Immediate Appealability of Orders Denying Class Certification: *Coopers & Lybrand v. Livesay* and *Gardner v. Westinghouse Broadcasting Co.*

When the United States Supreme Court handed down its recent decisions in *Coopers & Lybrand v. Livesay*[1] and its companion case, *Gardner v. Westinghouse Broadcasting Co.*,[2] Court followers immediately styled *Coopers & Lybrand* "the death knell of the death knell." Witticisms aside, however, the commentators were unanimous in their opinion of the cases—*Coopers & Lybrand*, in tandem with *Gardner*, had dealt a formidable blow to the maintenance of class actions, particularly "consumer" class actions,[3] in the federal courts.[4]

The major impact of *Coopers & Lybrand* was the destruction of the death knell doctrine,[5] and "the death knell of the death knell" is certainly apropos. But *Coopers & Lybrand* and *Gardner* did much more than this. Taken together, the two cases have effectively foreclosed every available avenue of nondiscretionary[6] interlocutory[7] appeal from an order deciding

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1. 437 U.S. 463 (1978).

2. 437 U.S. 478 (1978).

3. The term "consumer class action" was coined to describe a class suit by a large number of individuals who each have a relatively small claim. Since they are particularly useful to remedy illegal overcharges, broken warranties, and deceptive trade practices—problems that frequently plague the consumer—consumer class actions are often the backbone of a suit against a large manufacturer or distributor. *See* Kirkpatrick, *Consumer Class Litigation*, 50 ORE. L. REV. 21 (1970). Economic recovery is only one facet of consumer class actions, however, since they also have a "subtantial therapeutic value." Dolgow v. Anderson, 43 F.R.D. 472, 485 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2nd Cir. 1971).

Consumer class actions depend upon the possibility of spreading the cost of litigation over the amount recovered by the entire group. Since each litigant bears only a fraction of the legal fees and expenses, his otherwise worthless claim becomes large enough to merit attention. *See* Kirkpatrick, *supra*; Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B. L. REV. 407 (1969). Because the action's viability depends on spreading the cost of litigation over a number of claims, however, denial of class status is almost always fatal. *See* text accompanying notes 11-12 *infra*.

4. The scope of this Case Comment does not include state doctrines of interlocutory review of class certification orders, although several states have decided this issue. The cases fall into three groups. One group has flatly forbidden an immediate appeal under any circumstances. *See, e.g.*, Taylor v. Major Fin. Co., 289 Ala. 458, 268 So. 2d 738 (1972); Levine v. Empire Sav. & Loan Assoc., 34 Colo. App. 235, 527 P.2d 910 (1974), *aff'd*, 536 P.2d 1134 (1975); Ross v. Amrep Corp., 42 N.Y.2d 856, 397 N.Y.S.2d 631, 366 N.E.2d 291 (1977) (*mem.*). A second group of cases has permitted immediate appeals, relying on the particular wording of the forum's jurisdictional statute. *See, e.g.*, Reader v. Magma-Superior Copper Co., 108 Ariz. 186, 494 P.2d 708 (1972); Rogelstad v. Farmers Union Grain Terminal Assoc., 224 N.W.2d 544 (N.D. 1974); Roemisch v. Mut. of Omaha Ins. Co., 39 Ohio St. 2d 119, 314 N.E.2d 386 (1974). The final group of cases has allowed appeals under state laws similar to the federal statute (28 U.S.C.§ 1291). *See, e.g.*, Daar v. Yellow Cab Co., 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967); Bell v. Beneficial Consumer Discount Co., 465 Pa. 225, 348 A.2d 734 (1975). None of the states, however, has adopted a death knell rationale as the basis for an appeal. *See, e.g.*, Bell v. Beneficial Consumer Discount Co., 465 Pa. at 233, 348 A.2d at 738 (specifically rejecting death knell).

5. For an explanation of the death knell doctrine, see text accompanying notes 21-32 *infra*.

6. Appeals in the federal courts fall into two basic categories. Those under 28 U.S.C. §§ 1291 and 1292(a) (1976) may be taken as a matter of right. *See* text accompanying notes 14-15 *infra*. On the other hand, appeals under 28 U.S.C. § 1292(b) (1976) and FED. R. CIV. P. 54(b) require the discretionary approval of either the district court judge, or district and appellate court judges. *See* text accompanying

whether an action may be maintained as a class action.[8] Since the viability of a suit often depends on whether it will continue as a class action, these

notes 16-17 *infra*. The first type are often referred to as nondiscretionary appeals and the second as discretionary appeals.

7. Much of the discussion of class action appeals is couched in terms of finality. These appeals, like any appeal from any order entered before final judgment, are nonetheless interlocutory. The reader should not be confused by this unfortunate overlap in terminology.

It is also important to distinguish between immediate appealability and ultimate reviewability. It has never been disputed that class certification orders are appealable after entry of final judgment. The issue in *Coopers & Lybrand* and *Gardner* was whether these orders may be appealed immediately, that is, without awaiting the ultimate disposition of the action on the merits.

8. FED. R. CIV. P. 23 governs class actions. It provides:

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and

two decisions may not only inter the death knell doctrine, but may cause the stillbirth of many future law suits as well.[9]

Despite the importance of these cases, the Court's analysis may best be characterized as lackluster. The *Coopers & Lybrand* opinion is marked by formalism and excessive concern for statutory wording. Its consideration of the policy behind the rules—and today one must concede that the Supreme Court is a policymaking body[10]—is cursory at best. The *Gardner* opinion is similarly insubstantial. If the Supreme Court intended to put class action appeals in their grave, one would have at least expected a decent burial. The Court, however, barely bothered to write an obituary.

This Case Comment will examine *Coopers & Lybrand* and *Gardner*, paying special attention to these shortcomings. Part I will sketch the background against which the cases were decided. Part II will present the Court's views and analyze them in terms of precedent and policy. Finally, Part III, in an effort to round out the Court's reasoning, will critically evaluate important arguments that were not considered by the Court.

I. BACKGROUND: COURT OF APPEALS JURISDICTION IN CLASS ACTIONS BEFORE *Coopers & Lybrand* AND *Gardner*

A. *The Need for Immediate Appeals from Class Certification Orders*

Both *Coopers & Lybrand* and *Gardner* have their roots in the class litigant's desire to take an immediate appeal from an adverse class certification ruling. The district court's decision on this question will

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each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. (As amended Feb. 28, 1966, effective July 1, 1966.)

9. *See* text accompanying notes 11-12 *infra*.

10. Commentators disagree whether the Court should have a policymaking role. *Compare* L. LEVY, AGAINST THE LAW 25-36 (1974) *and* A. BICKEL, THE LEAST DANGEROUS BRANCH 1-33 (1977) *with* R. BERGER, GOVERNMENT BY THE JUDICIARY 300-11, 351-62 (1977). There can be little doubt, however, that the Court has assumed such a role. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

frequently bear upon whether the case will be settled,[11] what strategy the parties will use, and whether the plaintiff will continue or be forced to drop his suit.[12] Thus, it is essential, from the standpoint of the losing party, that the ruling be appealed immediately. Even when the class determination is not pivotal, however, class suits present such a monumental advantage (or burden, depending upon one's point of view) that the parties would normally like to have appellate review of the certification question before the case proceeds on the merits. Defendants are likely to take an appeal in an effort to avoid the tremendous cost and complexity that invariably accompanies class action litigation.[13] Only after a final determination of the issue on appeal will the parties be able to proceed intelligently.

B. *Statutory Basis for Appeals*

It is not always possible to satisfy a litigant's desire for an immediate appeal. Federal appellate jurisdiction is a child of statute, and Congress has not been generous in enacting provisions that permit interlocutory appeals. A decision is immediately appealable as a matter of right only if it is a "final decision" within the meaning of 28 U.S.C. § 1291[14] or if it falls within the narrowly defined class of orders in 28 U.S.C. § 1292(a)[15] from which Congress has specifically permitted an interlocutory appeal. If these criteria cannot be satisfied, an interlocutory appeal can be pursued only with approval of the district court judge—if jurisdiction is based on Rule

11. Because of the enormous potential liability, defendants often choose to settle a case as soon as it is certified as a class action. *See* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE 15-17 (1972). *Compare* Herbst v. Int'l Tel. and Tel. Corp., 495 F.2d 1308, 1313 (2d Cir. 1974) *with* Rosenfeld, *The Impact of Class Actions on Corporate and Securities Law*, 1972 DUKE L. J. 1167, 1190 *and* Note, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 549, 577-78 (1975). As a result, several commentators have criticized class actions as a "form of legalized blackmail." Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 9 (1971). *See also* Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 388-89 (1973).

12. *See generally* Note, *Interlocutory Appeal From Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292 (1970); Note, *supra* note 11. The courts have recognized this fact as well. *See, e.g.*, Jiminez v. Weinberger, 523 F.2d 689 (7th Cir.), *rev'd on other grounds*, 417 U.S. 628 (1975).

13. *See*, Share v. Air Properties G., Inc., 538 F.2d 279, 283 (9th Cir.), *cert. denied sub nom.* Woodruff v. Air Properties G., Inc., 429 U.S. 923 (1976).

14. 28 U.S.C. § 1291 (1976) provides: "The courts of appeals shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States . . . except where a direct review may be had in the Supreme Court (emphasis added)."

15. 28 U.S.C. § 1292 (a) (1976) provides:

The courts of appeals shall have jurisdiction of appeals from:

(1.) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2.) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3.) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4.) Judgments in civil actions for patent infringement which are final except for accounting.

54(b) of the Federal Rules of Civil Procedure[16]—or the district and appellate court judges—if jurisdiction is invoked under 28 U.S.C. § 1292(b).[17] Moreover, since approval is discretionary, a party must usually rely on section 1291 or section 1292(a) if he is to be certain of securing an appeal.[18]

C. *Judicial Interpretations of 28 United States Code sections 1291 and 1292(a)*

1. *The* Cohen *Rule*

Since strict application of the jurisdictional standards often produced inequitable results, the appellate courts developed a number of exceptions in which an immediate appeal could be taken from a district court ruling under sections 1291 and 1292(a). Originally, the collateral order doctrine provided the basis for all such appeals. This rule, articulated by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*,[19] permitted an interlocutory appeal from "that small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[20] Orders that satisfied these requirements were appealable under 28 U.S.C. § 1291 since they were final orders. Conceptually, therefore, *Cohen* was simply an interpretation of section 1291.

2. *The Death Knell Doctrine*

Although the collateral order doctrine has been the underlying theory on which a number of appeals were based, it was never used extensively as

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16. Under FED. R. CIV. P. 54(b) a trial court "may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment." If the court complies with these requirements, the order falls within the ambit of "final decisions" and is appealable under § 1291. 9 MOORE'S FEDERAL PRACTICE ¶ 110.09, at 129 (2d ed. 1975)[hereinafter cited as MOORE'S]. The fact that Rule 54(b) certification is discretionary creates a major obstacle to class litigants, however. *See* text accompanying notes 188-194 *infra*.

17. 28 U.S.C. § 1292(b) (1976) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

18. It is not entirely accurate to say that discretionary certification is the only alternative to an appeal of right under §§ 1291 and 1292(a). A party may always seek review of an order by way of mandamus or similar writ under 28 U.S.C. § 1651 (1976). The availability of mandamus is extremely limited, however, and its practical usefulness is questionable. *See* text accompanying notes 201-05 *infra*.

19. 337 U.S. 541 (1949).

20. *Id.* at 546.

a source of appellate jurisdiction for class action appeals.[21] Instead, litigants chose to rely on other theories, principally the injunction provision of section 1292(a), which met with limited success.[22] It was not until the courts developed the death knell rule, a variation on the collateral order doctrine, that class action appeals were successfully taken. In recent years, it has been this doctrine on which appeals from class certification orders have relied.[23]

The death knell rule was originally enunciated by the Second Circuit in *Eisen v. Carlisle & Jacquelin (Eisen I)*.[24] Judge Kaufman,[25] writing for the court, recognized that the final decision language of section 1291 did not limit appealable decisions to the last order that could possibly be made in a case. He noted that the Supreme Court had issued a mandate "that the requirement of finality be given a 'practical rather than a technical construction.' "[26] Judge Kaufman went on to say that denying plaintiff right to appeal the trial court's denial of certification would, for all practical purposes, end the litigation since no lawyer of competence would undertake such a costly and complex case to recover the plaintiff's individual claim.[27] Dismissal of the class action sounded "the death knell" of the lawsuit and was, therefore, a "final" order within the meaning of section 1291.[28]

While Judge Kaufman purported to apply the collateral order doctrine, a more careful analysis of the opinion indicates that *Eisen I* actually established a new basis upon which class action appeals could be taken.[29] Subsequent cases recognized and refined this distinction.[30] By the time *Coopers & Lybrand* came before the Supreme Court, therefore, the death knell rule was well enough established to provide an immediate

21. The term "class action appeals" is a shorthand expression for immediate appeals from class certification orders.

22. *See, e.g.*, All Am. Airways v. Elderd, 209 F.2d 247 (2d Cir. 1954).

23. *See, e.g.*, *In re* Piper Aircraft Dist. Sys. Antitrust Litigation, 551 F.2d 213 (8th Cir. 1977); Caceres v. International Air Transp. Assoc., 422 F.2d 141 (2d Cir. 1970); City of New York v. Int'l Pipe & Ceramic Co., 410 F. 2d 295 (2d Cir. 1969).

24. 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

25. The death knell doctrine was developed primarily in the Second Circuit, with Judge Kaufman spearheading the effort. *See, e.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Eisen I*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

26. 370 F.2d at 120 (citing Gillespie v. United States Steel Corp., 379 U.S. 148 (1964)).

27. *Id.*

28. *Id.* at 121.

29. *Id.* at 120. Judge Kaufman stated that the issue in *Eisen I* was whether the trial court's order dismissing the class action came within the *Cohen* rule. The rest of his opinion, however, ignored *Cohen* and independently assessed whether the lower court's order was "final" as that term is used in § 1291.

30. *See, e.g.*, Share v. Air Properties G., Inc., 538 F.2d 279, 281 (9th Cir. 1976), *cert. denied sub nom.* Woodruff v. Air Properties G., Inc., 429 U.S. 923 (1976) ("It is our view that the collateral order doctrine and the death knell rule represent two distinct but compatible tests for appealability."); Siebert v. Great N. Dev. Co., 494 F.2d 510, 511 (5th Cir. 1974); King v. Kansas City S. Indus., Inc., 479 F.2d 1259, 1260 (7th Cir. 1973) (recognizing autonomy of death knell rule but refusing to adopt it). *But see* Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); City of New York v. Int'l Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969) (two cases which muddle the distinction).

appeal from an order denying (but not granting[31]) class certification if the individual plaintiff's claim was so small that he could not continue the action by himself.[32]

3. *Appeals Under Section 1292(a)(1)*

Some cases, particularly those in which nonmonetary relief was sought, did not fit into this scheme,[33] and many class litigants were forced to seek another source of appellate jurisdiction. In an effort to fill this void, the courts developed another exception to the traditional jurisdictional requirements. Unlike the death knell rule, however, this exception was based on 28 U.S.C. § 1292(a)(1).

Section 1292(a)(1) has always permitted interlocutory appeals from orders that deny an injunction.[34] It was a relatively simple matter for the courts to expand the scope of this statute to provide a basis for appeal from a class certification ruling entered in an action in which an injunction was sought. The reasoning, simply stated, was that the district court's order limited the scope of any future relief to such an extent that it had the effect of "denying" an injunction.

This rationale was first employed by the Fourth Circuit in *Brunson v. Board of Trustees*.[35] Brunson had filed a class action against the Clarendon County, South Carolina school system alleging racial discrimination and praying for injunctive relief. The district court dismissed the class action,[36]

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31. Appeals from orders granting class action status are an entirely different matter. Most courts have recognized that these orders are not appealable since, unlike a certification denial, there is a substantial chance that the district court will later reverse itself. *See Appealability of Class Action Determinations, supra* note 11, at 557-61; General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974). The Second Circuit, however, has allowed appeals from orders certifying a class under its "three pronged" test. *See* Herbst v. Int'l Tel. and Tel. Corp., 495 F.2d 1308, 1313 (2d Cir. 1974). *See also* Shelter Realty Corp. v. Allied Maint. Corp., 574 F.2d 656 (2d Cir. 1978). In light of recent decisions, however, it would seem that the Second Circuit is no longer willing to follow this approach. *See Shelter Realty Corp., supra*; Parkinson v. April Indus., Inc., 520 F.2d 650 (2d Cir. 1975); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974).

32. Korn v. Franchard Corp., 443 F. 2d 1301 (2d Cir. 1971). The death knell doctrine was not, however, a universally accepted rule in every circuit. *Compare* Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106 (8th Cir. 1977), *rev'd sub nom.* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Share v. Air Properties G., Inc., 538 F.2d 279 (9th Cir. 1976), *cert. denied sub nom.* Woodruff v. Air Properties G., Inc., 429 U.S. 923 (1976); Ott v. Speedwriting Co., 518 F.2d 1143 (6th Cir. 1975); *and* Gosa v. Securities Inv. Co., 449 F.2d 1330 (5th Cir. 1971) (adopting the death knell doctrine) *with* King v. Kansas City S. Indus., Inc., 479 F.2d 1259 (7th Cir. 1973) *and* Hackett v. Gen. Host Corp., 455 F.2d 618 (3d Cir.) (en banc), *cert. denied*, 407 U.S. 925 (1972) (refusing to adopt the death knell doctrine).

33. Because the death knell rule focused on the amount of the individual's claim, it did not lend itself to cases that sought, for example, injunctive relief. In most lawsuits, the plaintiff seeks *X* dollars and it will cost him *Y* dollars to recover it. While there may be a certain intrinsic value in vindicating one's rights, a simple cost-benefit comparison will usually indicate whether a class representative will continue the action by himself. On the other hand, the "worth" of an injunction may be an unmeasureable quality that depends upon the personal values of those seeking it. Consequently, it is impossible to determine objectively whether the individual plaintiff will persist if class action status is denied.

34. *See* note 15 *supra*. Section 1292(a) (1) was added by Act of Mar. 3, 1911, Pub. L. No. 475, § 129, 36 Stat. 1134 (codified at 28 U.S.C. § 1292 (a)(1) (1976)).

35. 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963).

36. Brunson v. Board of Trustees, 30 F.R.D. 369 (E.D.S.C. 1962). Prior to the amendment of

and an immediate appeal was taken from the ruling. The Fourth Circuit agreed with plaintiff that an appeal need not await disposition of the individual claim. It noted that the trial court's decision limited the scope of any possible injunction to an order requiring the admission of a particular plaintiff to the school of his choice,[37] and went on to hold that the lower court had denied "the *broad injunctive relief* which the plaintiffs sought."[38] The order consequently "denied" an injunction and was appealable under section 1292(a)(1).

Several other circuits eventually adopted the *Brunson* analysis.[39] In most circuits, therefore, disappointed class litigants were able to secure immediate review of the district court's adverse order under either section 1291 or section 1292(a)(1). Many cases were reversed on appeal; in others the lower court's decision stood. Regardless of the outcome, however, potential class representatives were consoled by the certainty of a final result. It was this certainty that the Supreme Court upset in *Coopers & Lybrand* and *Gardner*.

II. THE FACTS OF THE CASES AND THE COURT'S ANALYSIS

A. Coopers & Lybrand v. Livesay

The *Coopers &Lybrand* case presented a scenario that has become increasingly familiar during the last twenty years. In 1972 respondents purchased five thousand dollars worth of debentures and one hundred shares of stock in Punta Gorda Isles, Inc., a Florida land development company, relying upon a registration statement and prospectus that had been certified by the national accounting firm of Coopers & Lybrand.[40] Shortly thereafter, Punta Gorda restated its earnings for 1971 and 1972 by reducing net income for each year by one million dollars.[41] As a result, the value of Punta Gorda securities declined sharply, and respondents liquidated their holdings, sustaining a $2650 loss.[42]

FED. R. CIV. P. 23 in 1966 it was common for a court to "dismiss" the class. In some cases the court treated the class and the representative plaintiff as two separate entities, *see, e.g.*, All Am. Airways v. Elderd, 209 F.2d 247 (2d Cir. 1954), while in others it dismissed the entire complaint and granted leave for the individual to file an amended complaint without class allegations, *see, e.g.*, Oppenheimer v. F. J. Young & Co., 144 F.2d 387 (2d Cir. 1944). Regardless of the language used, however, the result seemed equivalent to a refusal to certify under the present Rule 23.

37. 311 F.2d at 108.

38. *Id.* (emphasis added).

39. Smith v. Merchants & Farmers Bank, 574 F.2d 982 (8th Cir. 1978); Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Price v. Lucky Stores, Inc., 501 F.2d 1177 (9th Cir. 1974); Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972). *Contra*, Williams v. Wallace Silversmiths, Inc., 566 F.2d 364 (2d Cir. 1977); Williams v. Mumford, 511 F.2d 363 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975) (refusing to allow an interlocutory appeal).

40. Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106, 1108 (8th Cir. 1977), *rev'd sub nom.* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

41. 437 U.S. at 465.

42. *Id.*

On July 27, 1973, respondents brought suit against Punta Gorda, its officers and directors, and Coopers & Lybrand in the United States District Court for the Eastern District of Missouri, seeking to represent themselves and approximately eighteen hundred other persons who had purchased securities pursuant to the 1972 offering.[43] The complaint alleged various violations of the federal securities laws and prayed for monetary damages.[44] The district court refused to rule on plaintiff's motion to certify as a class action and entered a stay of all discovery except discovery relating to the class determination.[45] Plaintiffs finally sought a writ of mandamus, requesting that the district court be ordered to lift its stay on discovery.[46] Although the court of appeals refused, it did "suggest" that the lower court proceed.[47] The district court thereupon certified the suit as a class action, only to decertify it again a few months later.[48] An immediate appeal was taken to the Court of Appeals for the Eighth Circuit, which upheld jurisdiction based upon the death knell doctrine and reversed the district court's order decertifying the class.[49]

The Supreme Court granted Coopers & Lybrand's petition for certiorari [50] and reversed the Court of Appeals with directions to dismiss the appeal for the lack of jurisdiction. The Court, citing *Catlin v. United States*,[51] noted that "[f]ederal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' "[52] It went on to hold that "[a]n order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim" and that "[s]uch an order is appealable . . . only if it comes within an appropriate exception to the final judgment rule."[53] In the final analysis, the Court decided that neither *Cohen* nor the death knell doctrine, the two exceptions on which respondents had relied, provided such an exception.[54]

From the standpoint of precedent, it is difficult to say that the Court's analysis was plainly incorrect. There is no authoritative definition of finality, and a good argument can be made to support the result reached in

43. 550 F.2d at 1108.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 1108-09.

49. *Id.* at 1113. That the Livesays did not request certification under § 1292(b) or Rule 54(b) is not surprising, given the trial judge's erratic behavior.

50. 434 U.S. 954 (1977). The Court granted certiorari to resolve the conflict among the circuits. *See* note 32 *supra.*

51. 324 U.S. 229 (1945).

52. 437 U.S. at 467.

53. *Id.*

54. *Id.*

Coopers & Lybrand. On the other hand, as the following discussion will show, there is ample support for the opposite conclusion.

1. Cohen: *Situational Jurisdiction*

The Court began its consideration of *Coopers & Lybrand* by analyzing the applicability of the collateral order doctrine.[55] As was previously noted, the Supreme Court held in *Cohen v. Beneficial Industrial Loan Corp.* that 28 U.S.C. § 1291 gives the federal courts of appeals jurisdiction over appeals from collateral orders.[56] The language of *Cohen* was relatively clear and permitted an immediate appeal only if certain requirements were met: (1) the decision could not be tentative, informal, or incomplete; (2) the question presented by the appeal had to be too important to await a decision on the merits; (3) it was necessary that effective review be in doubt if an appeal was delayed until entry of a more conventional final order; and (4) the decision had to be separate from the merits.[57] If these prerequisites are construed narrowly—and the Court's cursory treatment of this area would tend to indicate that it read *Cohen* literally—the Court was undoubtedly correct when it decided that *Coopers & Lybrand* did not fit within the collateral order doctrine. But the courts, including the Supreme Court, had never interpreted *Cohen* literally. From the beginning they engaged in a process of erosion that greatly expanded the number of cases that could be brought within the framework of the collateral order doctrine.[58] Consequently, the Court's conclusion that "the collateral order doctrine is not applicable to the kind of order involved in this case"[59] is a dubious and unexplained restriction of the *Cohen* rule.

Until *Coopers & Lybrand* there was little to indicate that the courts would carefully scrutinize a case to make certain that it satisfied each requirement of the collateral order doctrine. The emphasis had always been on the "practical rather than . . . technical construction" language of *Cohen*,[60] and a given situation was typically analyzed by balancing the various criteria against one another.[61] For example, an appeal did not need to be entirely separate from the merits if the appellant would be seriously injured by delaying review or if review at a later time would be wholly inadequate.[62] Frequently, "the combination of injury with a significant

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55. The Court's cursory analysis of the collateral order doctrine amounted to little more than an assertion that the prerequisites of *Cohen* were not met. 437 U.S. at 469.

56. 337 U.S. 541 (1949). *See* text accompanying notes 19-20 *supra.*

57. 337 U.S. at 546. *See also* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911, at 468 (1976) [hereinafter cited as WRIGHT, MILLER & COOPER].

58. *See* 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3911, at 470-72.

59. 437 U.S. at 469.

60. 337 U.S. at 546.

61. *See, e.g.*, Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

62. *See, e.g.*, McSurely v. McClellan, 521 F.2d 1024, 1032 (D.C. Cir. 1975):
The plaintiffs . . . argue that the defendants' assertion (that they will be irreparably harmed

question of law" was, without more, enough to justify an appeal.[63] As a result, the courts allowed many appeals when theoretical imperfections were outweighed by the importance of immediate review.

In addition, the individual requirements of *Cohen* had never been subjected to a narrow construction. The first requirement forbids an appeal from any order that is "tentative, informal, or incomplete."[64] Conceivably, this language could have excluded from consideration many district court decisions, such as class certification orders, that are subject to modification or correction at a later time. It has not. Instead, the courts have seized upon other language in the *Cohen* opinion to temper the bluntness of the passage:

> Appeal gives the upper court a power of review, not of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.[65]

The distinction between intervention and review is important. An appellate court sits only to correct errors; it is the trial court's responsibility to adjudicate the claims of the parties to a lawsuit.[66] Once the trial court has reached a decision on a particular question, however, appellate review does not present a danger of interference by the upper court because the trial judge's deliberations can no longer be colored by the appellate court's decision. Consequently, the test of *Cohen* has not been whether the lower court would have no further opportunity to change its ruling, but whether, as a practical matter, its consideration of the matter was closed. As one author has put it: "It is enough that no further consideration is contemplated."[67]

The impact of this analysis on orders that deny class certification is debatable. Class certification rulings are, of course, open to modification or amendment at any time[68] and a narrow construction of the finality requirement would unquestionably preclude immediate appeal. Nevertheless, since this criterion has been more broadly interpreted, it is at least

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by delaying review) begs a question which requires a plenary trial . . . .

We find the arguments of defendants to be the more persuasive . . . . [T]he question of appealability does not turn on the correctness of an appellant's claim (at least so long as it is not frivolous). Rather, the issue is whether his right to appellate review of that claim—whether ultimately successful or not—will be effectively lost if jurisdiction is denied.

See also Weingartner v. Union Oil Co. of Calif., 431 F.2d 26, 29 (9th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971). ("The *Cohen* approach rests upon either of two underpinnings: the 'collateral order' rule . . . or the likelihood of 'irreparable harm' to a party if immediate review is not allowed . . . ."); Convey Oil Co. v. Continental Oil Co., 340 F.2d 993, 995-97 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965). *See generally* 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3911, at 483-85.

63. 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3911, at 493-94.

64. 337 U.S. at 546.

65. *Id.*

66. *See* text accompanying notes 179-80 *infra*.

67. 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3911, at 470.

68. FED. R. CIV. P. 23(c)(1).

arguable that class action denials are sufficiently determinative—as a practical matter—to attain the requisite degree of finality. While a trial judge may be willing (and perhaps waiting) to decertify a class at the first opportunity, there is nothing to indicate that after an initial denial, the same judge will be ready to grant class action status at a later point in the proceedings. Indeed, such a course of action runs directly contrary to the established policy of speedy resolution of the class certification question,[69] and presents serious due process problems.[70] In most cases it would seem that once a court refuses to certify a class, "no further consideration is contemplated." Orders denying class certification could, therefore, satisfy the requirement that the trial court's decision not be tentative, informal, or incomplete.

The collateral order doctrine also requires the presentation of a "serious and unsettled question."[71] Here again, however, the requirement has been read quite broadly. Some courts of appeals, relying on the controversial nature of the question of law presented in *Cohen*,[72] have interpreted the word "unsettled" as restricting the collateral order doctrine to cases that present a substantial issue of law.[73] Other courts, however, have sustained jurisdiction over appeals that had no significant impact outside the case before them,[74] and a substantial number of courts have "tactfully ignored" the requirement, reasoning that the Supreme Court's language merely interjected a degree of discretion into the process.[75] It would certainly seem, therefore, that a decision as important as a class certification ruling would qualify as a "serious and unsettled question," frequently because it does involve a novel question of law, but equally as often because it can make the difference between a multimillion-dollar lawsuit and no suit at all.

The third prerequisite for application of the collateral order doctrine is that there must be a substantial risk of loss if the district court's decision is not reviewed immediately. This requirement is firmly rooted in the language of *Cohen*:

> The purpose [of section 1291] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final

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69. *Id.*

70. *See* text accompanying notes 212-25 *infra*.

71. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949).

72. The question presented in *Cohen* was whether a federal court, having jurisdiction because of diversity of citizenship, was bound to apply a state statute that made the plaintiff-stockholder liable for the corporation's expenses in an unsuccessful stockholder's derivative action and required plaintiff to post security for the expenses if the corporation so demanded. 337 U.S. at 543-45. Since the statute was obviously designed to deter stockholder suits, this question produced a great deal of controversy. *See* 9 MOORE'S, *supra* note 16, at ¶ 110.10.

73. *See* Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l Inc., 455 F.2d 770, 773 (2d Cir. 1972). *See also* United Auto Workers v. Nat'l Caucus of Labor Comms., 525 F.2d 323, 325 (2d Cir. 1975); Int'l Bus. Mach. Corp. v. United States, 480 F.2d 293, 298 (2d Cir. 1973), *cert. denied*, 416 U.S. 980 (1974); Donlon Indus. Inc. v. Forte, 402 F.2d 935, 937 (2d Cir. 1968).

74. *See, e.g.*, *In re* Cessna Distrib'ship Antitrust Litigation, 532 F.2d 64, 67 (8th Cir. 1976).

75. 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3911, at 472.

> judgment results. But this order of the District Court did not make any steps toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.[76]

It is not difficult to elicit the underlying concern which prompted this comment. The Supreme Court was obviously troubled by the possibility that *Cohen* might be used to sanction piecemeal appeals, thereby creating the potential for waste of judicial resources.[77] The "risk of important loss" requirement is a warning against misapplication of the doctrine. As a result, the interpretation of this requirement has been clear: a decision is appealable under the collateral order doctrine only if it will not merge in a final judgment, making review at a later time ineffective.[78]

Given this analysis, the Court's assertion that *Coopers & Lybrand* does not satisfy the third requirement of *Cohen* lacks credibility. As the Second Circuit pointed out in *Eisen I*, "[t]he alternatives [upon denial of class certification] are to appeal now or to end the lawsuit for all practical purposes."[79] And, even if the court's order does not end the lawsuit, it will at least end the class action.

The Court's invocation of *United Air Lines v. McDonald*[80] does not alter this conclusion. While *McDonald* does permit review of a class certification ruling after entry of final judgment, it does not provide an *effective* means of review. In *McDonald*, the Court decided only that a putative class member could intervene after judgment was entered for the purpose of appealing the district court's denial of class certification.[81] It did not reach the issue of what would happen upon reversal of the lower court's ruling—a question for which there is no readily discernible answer.[82] It is possible that certification after entry of judgment in the original action would require de novo consideration of the case vis-à-vis the class members.[83] At any rate, it is doubtful if the new litigants could try their action solely on the issue of damages.[84] Even if a class certification denial is reversed, the class members will have lost the opportunity presented by the initial action.[85] Consequently, it is unquestionable that, in the absence of an immediate appeal, a ruling denying certification will cause irreparable injury.

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76. 337 U.S. at 546.

77. *See* text accompanying notes 177-78 *infra*.

78. *See* Swift & Co. v. Compania Columbiana Del Caribe, 339 U.S. 684, 689 (1950); Greene v. Singer Co., 509 F.2d 750, 751 (3d Cir. 1971).

79. 370 F.2d at 120.

80. 432 U.S. 385 (1977).

81. *Id.* at 391-96.

82. *See* text accompanying notes 214-25 *infra*.

83. *Id.*

84. *Id.*

85. In effect, the class members will be commencing a new suit. *Id.*

Finally, the collateral order doctrine permits an immediate appeal only if the lower court's decision resolves an issue separate from the merits. The purpose of this requirement is unmistakable. Repeated consideration of a case on appeal entails a waste of judicial resources since the appellate court must continually reacquaint itself with the facts. If the alleged discrepancies are combined in a single appeal, however, the higher court need only review the case once, saving both time and expense.[86] As Justice Powell pointed out in *Eisen IV* "[r]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy."[87]

But Justice Powell also recognized that "[t]he inquiry requires some evaluation of the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' "[88] In construing *Cohen*, the courts have taken this notion to heart. As a result, the requirement that the lower court's decision be separate from the merits has been extensively eroded, and the necessity of considering the merits has not been a bar to immediate appellate review in many cases in which the result of delay would have been a serious loss to the appellant.[89] Similarly, courts have undertaken a review of the merits before entry of final judgment when the only alternative was to leave the party with no means of securing effective review.[90] Although *Cohen* requires severability from the merits in theory, the courts are often willing to ignore the requirement in practice.

The relevance of this development to the *Coopers & Lybrand* case is clear. Most class certification orders, as the Court noted, do involve some consideration of the merits.[91] This entanglement, however, is minor in relation to the consequences of denying an appeal—namely, inadequacy of review and the probability that a serious loss will be inflicted on the class members. There is no valid distinction between orders that deny class certification and other orders, such as those disapproving a proposed class action settlement,[92] over which the appellate courts have asserted jurisdiction. Consequently, the Court's conclusion that a class determination is not appealable since it "generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action' "[93] stands on shaky grounds.

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86. 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3911, at 470-71.

87. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).

88. *Id.* at 171 (citing Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)). *See generally* 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3907, at 433-35.

89. *See* 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3911, at 486-94.

90. *Id.*

91. 98 S. Ct. at 2458.

92. Norman v. McKee, 431 F.2d 769, 772-74 (9th Cir. 1970), *cert. denied sub nom.* 151 Corp. v. Meyers, 401 U.S. 912 (1971).

93. 437 U.S. at 469.

It would seem, therefore, that *Coopers & Lybrand* could have been brought within the scope of the collateral order doctrine. The Court's failure to do so is suspect. Its conclusion is even more questionable in light of other decisions handed down by the Supreme Court in recent years, particularly *Abney v. United States*.[94] In *Abney* a district court was prepared to try the petitioners a second time on charges of extortion despite their objections that a retrial would violate the fifth amendment prohibition against double jeopardy.[95] Rather than suffer through a second trial, petitioners filed an immediate appeal from the court's pretrial order denying their motion to dismiss the indictment.[96] The court of appeals affirmed in summary fashion,[97] and the Supreme Court granted certiorari.[98]

While the Court had little trouble disposing of petitioners' substantive arguments,[99] it did consider the appealability issue at some length. The final conclusion was that the district court's order fell within the *Cohen* rule and was consequently a final appealable order under section 1291.[100] This result is wholly inconsistent with the Court's strict interpretation of the rule in *Coopers & Lybrand*. Although the order appealed from in *Abney* differs significantly from a class certification ruling, both are subject to the same analysis for the purpose of determining finality.[101] Unless the district court's decision met each of the collateral order requirements, therefore, *Abney* was not immediately appealable.

But *Abney* did not satisfy the requirements of *Cohen*, at least not as the Court has construed them in *Coopers & Lybrand*, and therein lies the difficulty. It is impossible to decide the issue of double jeopardy without some examination of the merits, not only in the case at bar but in prior proceedings as well. This evaluation is no less probing than the class certification inquiry to determine whether there are common questions of law and fact.[102] Consequently, pretrial orders rejecting a claim of double jeopardy are immediately appealable only if the Court is willing to accept a broad construction of the collateral order requirements—that is, only if it is willing to undertake some review of the merits on the justification that

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94. 431 U.S. 651 (1977).

95. *Id.* at 653-55.

96. *Id.* at 655.

97. Appeal of Abney, 530 F.2d 963 (3d Cir. 1976).

98. 426 U.S. 934 (1976).

99. 431 U.S. at 663-65.

100. *Id.* at 662.

101. As the Court noted in *Abney*, civil and criminal appeals are both subject to the same jurisdictional requirements. *Id.* at 656.

102. FED. R. CIV. P. 23(b). In either case the district judge will at least have to look through the pleadings. The court is more likely to be drawn into the merits by a motion to dismiss based on double jeopardy grounds, however, since the judge must then decide if the issues to be litigated in the case before him are the same as those in the prior prosecution. By comparison, the court need only evaluate the common interests of the class members in making a decision under Rule 23.

appellant would suffer serious, irreparable injury by delaying appeal.[103] The contention that *Abney* was appealable because the potential injury, a deprivation of constitutional rights, was far more serious than in *Coopers & Lybrand* only strengthens this argument since it recognizes that in a given case the Court will decide finality by applying an ad hoc balancing test.

The Court was clearly willing to accept this balancing approach in *Abney*; why, then, did it balk in *Coopers & Lybrand*? The only plausible answer is that the two cases are irreconcilable. It is inconsistent to apply one standard in the *Abney* case and another in *Coopers & Lybrand.* As in the past, the Court has once again construed the collateral order doctrine to fit its needs.[104]

2. *The Death Knell Doctrine*

Since the death knell doctrine was originally a spinoff of the collateral order doctrine,[105] many of the criticisms discussed in connection with the Court's treatment of the *Cohen* case apply with equal force to its rejection of the death knell rule. Death knell, however, was also a viable theory in its own right and an independent source of appellate jurisdiction.[106] Its justification entails considerations that go beyond those that support the collateral order rule. The *Coopers & Lybrand* Court dealt with some, but by no means all, of these considerations in its opinion.

The death knell doctrine stood on slightly different theoretical grounds than *Cohen* and the collateral order doctrine. *Cohen* and its progeny were based on the theory that an order can be final even though it is not the last decision rendered in a case.[107] On the other hand, *Eisen I*, the decision that originally laid down the death knell doctrine, was premised upon the idea that an order denying class certification is a final order since, for all practical purposes, it is the last decision that will be made.[108]

The proposition than an immediate appeal should lie from an order that is the functional equivalent of a final decision generally meets with little resistance.[109] It is an entirely different matter, however, to forge this sentiment into a workable principle of law. The problem of feasibility frequently troubled the courts when they confronted the death knell doctrine,[110] and it was obviously the Court's main concern in *Coopers & Lybrand.* As the opinion pointed out: "[A]llowing an immediate appeal

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103. Cases similar to *Abney* make this even clearer. *See* Turner v. Arkansas, 407 U.S. 366 (1972); Colombo v. New York, 405 U.S. 9 (1972); Harris v. Washington, 404 U.S. 55 (1971).

104. Professor Moore views the collateral order doctrine itself as a makeweight developed to meet the exigencies of the moment. 9 MOORE'S, *supra* note 16, ¶ 110.10, at 130.

105. *See* text accompanying notes 21-22 *supra.*

106. *See* notes 29-30 *supra.*

107. *See* text accompanying notes 19-20 *supra.*

108. *See* text accompanying notes 23-28 *supra.*

109. *See, e.g.*, 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3912, at 501.

110. *Id.* at 503-04.

from . . . [orders that deny class certification] may enhance the quality of justice afforded a few litigants. But this incremental benefit is outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice."[111]

The Court's distaste for the death knell doctrine was centered around what it considered to be two major shortcomings. First, it found class action rulings indistinguishable from other rulings that had the practical effect of terminating the action, and feared that appellate dockets would be swamped if the Court endorsed death knell:

> The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation. Thus, if the "death knell" doctrine has merit, it would apply equally to many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a "death knell" for the entire class.[112]

Second, the Court disliked the factfinding role that the courts had been drawn into by the death knell rule: "The potential waste of judicial resources is plain. The District Court must take evidence, entertain argument and make findings; and the court of appeals must review that record and those findings simply to determine whether a discretionary class determination is subject to appellate review."[113]

While these criticisms have some weight, they are not entirely valid. The Court's first argument—the class certification orders are indistinguishable from other orders—is to a certain extent true. The Court refused, however, to acknowledge the broader scope of the death knell doctrine. Past cases identify three major categories of death knell orders, only one of which deals with class actions.[114] A second group of cases had adopted a death knell analysis for "orders that purport to leave matters open, but that operate in combination with surrounding facts to make it impossible to pursue the case further,"[115] for example an order quashing service of process on a nonresident defendant when there is no alternative means of obtaining service.[116] Still another line of cases has applied the death knell doctrine to "denials of temporary relief that seem likely to forestall the possibility of any effective permanent relief."[117] These cases typically deal with the denial of temporary restraining orders when the party's real concern is immediate rather than long-term relief.[118]

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111. 437 U.S. at 473.

112. *Id.* at 470.

113. *Id.* at 473.

114. *See* 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3912, at 501.

115. *Id.*

116. *See, e.g.*, United States v. Berkowitz, 328 F.2d 358 (3d Cir.), *cert. denied*, 379 U.S. 821 (1964). The appeal in *Berkowitz* was actually from an order refusing to transfer the case, but the difference is immaterial.

117. *See* 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3912, at 501.

118. *See* United States v. Wood, 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962).

Consequently, it is difficult to understand how the adoption of class action death knell would have led to a proliferation of appeals. There was already a substantial application of a death knell-type analysis outside the class action area at the time *Coopers & Lybrand* came before the Court. The acceptance of the death knell doctrine as a basis for class action appeals would not, therefore, have resulted in an expansion of appellate jurisdiction beyond existing limits.

There is language in *Coopers & Lybrand* indicating that the Court considered class certification orders to be distinguishable from other orders to which a death knell analysis had been applied in the past on the basis that class action denials have only a "tactical economic significance."[119] This distinction recognizes that nothing prevents the named plaintiff from going forward with his claim in the face of the district court's denial of class certification except his own decision that he is unwilling to spend more than his possible recovery. By comparison, a plaintiff who has seen the court quash service on a nonresident defendant could not, as a practical matter, proceed in that forum even though he would like to. Any distinction based on these grounds, however, is tenuous and fails to recognize the underlying character of class actions. Unlike unfavorable decisions on discovery, venue, or summary judgment—the examples cited by the Court[120]—the denial of class action status will almost always result in dismissal of the action. There is an underlying assumption, at least in cases to which the death knell doctrine would apply, that the parties will not proceed at all if they cannot proceed as a group.[121] It is illogical to lump class action orders in with all others simply because their impact is the result of economic rather than legal impossibility. The denial of class action status will end the action just as surely as if the court had quashed service on a nonresident.

An even greater drawback of the death knell doctrine, in the Court's eyes, was the necessity of deciding when a certification denial had the practical effect of terminating the action. The Court found this task to be an intolerable imposition that was bound to cripple the appellate system if left unchecked. This criticism of death knell, however, was unduly pessimistic and failed to take account of the rule's positive attributes.

More basically, the Court was concerned that the death knell doctrine was simply unworkable. It pointed out that the courts of appeals had developed two tests for determining appealability, one that entailed a comparison of the named plaintiff's claim with a preselected jurisdictional amount and a second that required a thorough study of the impact of the district court's order.[122] The first of these was condemned as arbitrary and

119. 437 U.S. at 470.

120. *Id.*

121. *See* text accompanying notes 11-12 *supra.*

122. 437 U.S. at 471-72.

"a legislative, not a judicial function"; the second as having "a serious debilitating effect on the administration of justice."[123] These criticisms are unwarranted, however, in light of the refinements to the death knell doctrine that had been made by the Fifth Circuit.

Eisen I was a straightforward instance of a lawsuit that would not survive absent class action status. It was obvious without further investigation that Mr. Eisen was not going to continue his "complex and costly case to recover $70."[124] Consequently, Judge Kaufman could "safely assume" that the lower court's order had effectively terminated the action.[125] As more and more cases were appealed under the death knell doctrine, however, it became impossible to make this assumption with such confidence.[126] Later cases in the Second Circuit—where nearly all the early death knell appeals were taken—were much closer, and the appellate court could only estimate the impact of the trial court's order on the basis of the information before it.[127]

The Fifth Circuit was dissatisfied with this procedure, particularly in marginal cases, in which the Second Circuit's approach tended to favor dismissal.[128] Consequently, in *Gosa v. Securities Investment Co.*[129] it laid down a new rule that was designed to develop the necessary information:

> In the instant case, plaintiff's individual claim is $3,322.20. Thus it is not a case . . . in which we should clearly accept jurisdiction under the 'death knell' theory, or . . . in which we should clearly deny jurisdiction. Each case of this type depends on its own facts. The position of the case before us now, which falls in the financial middle ground, is doubly confounding because what is wholly a fact issue is presented to an appellate court without the benefit of any fact development on the very issues which would control death knell finality. We would have to engage in rank speculation if we were to undertake the determination of such matters . . . . In short, aside from knowing the dollar amount claimed, we have nothing on which to base our necessarily ad hoc determination.
>
> If the plaintiff wishes to assert that what was otherwise a purely interlocutory ruling was effectively converted by the practical circumstances of the matter to an extinction of the very right to litigate, the plaintiff had the burden of developing these facts before the trial forum, which could afford an opportunity for adversary rebuttal and could enter findings and conclusions on this issue. Such a post-ruling hearing eliminates the procedural deficiency of requiring this Court to speculate without the benefit of relevant record facts or a decision on the real issues presented.[130]

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123. *Id.* at 472-73.

124. 370 F.2d at 120.

125. *Id.*

126. *See, e.g.*, Shayne v. Madison Square Garden, 491 F.2d 397 (2d Cir. 1974); Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971).

127. *See, e.g.*, Shayne v. Madison Square Garden, 491 F.2d 397 (2d Cir. 1974).

128. Both *Shayne, id.*, and Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971), were dismissed by the court of appeals.

129. 449 F.2d 1330 (5th Cir. 1971).

130. *Id.* at 1332-33 (footnotes omitted).

After *Gosa*, then, the plaintiff-appellant was responsible for establishing facts in the trial court from which the appellate court could determine that the action would not continue absent class certification.

The Fifth Circuit made two important refinements of this rule in *Graci v. United States.*[131] First, the court decided that the determination whether continuation of the lawsuit was infeasible was ultimately an issue for the court of appeals.[132] The district court's sole function was to take testimony and hear argument, and then render findings on "the size of the individual plaintiff's claim, the extent of his financial resources, and the probable expense of prosecuting the lawsuit to completion . . . ."[133] Second, it indicated that *Eisen I* and other cases decided by the Second Circuit could be explained in terms of judicial notice: "An individual claim may be so small that the unfeasibility [*sic*] of litigation by the individual plaintiff is clear without any further showing . . . ."[134]

Taken together, *Gosa* and *Graci* alleviate the Supreme Court's concern that the death knell doctrine is too difficult to administer. The two cases provide a clear, easily applied method for determining when a party can continue. It is unnecessary for the appellate court to closely investigate the facts since they have already been laid out by the trial judge. Nor is the district court saddled with a heavy burden, since most of the information it needs—for example, the size of the claim, the litigant's net worth, and the approximate cost of litigation—is readily available and could probably be submitted on paper without an elaborate evidentiary hearing.[135]

It is difficult to explain the Court's concern in light of the *Gosa/Graci* rule. The two cases clearly provide a workable rule for determining the feasibility of continued litigation. The list of horribles that the Court envisioned[136] is hardly likely to materialize. In short, the death knell rule would have entailed neither a "potential waste of judicial resources" nor "a serious debilitating effect on the administration of justice."[137]

Other, less weighty objections that the Court raised also fail to justify abandonment of the death knell doctrine. For example, the Court criticized the rule on the ground that it benefits only plaintiffs, leaving

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131. 472 F.2d 124 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973).

132. *Id.* at 126. Before *Graci* there was some question on this point since the court had merely instructed the lower court to "enter findings and conclusions on the issue." Gosa v. Sec. Inv. Co., 449 F.2d 1330, 1332-33 (5th Cir. 1971).

133. 472 F.2d at 126.

134. *Id.* (citing *Eisen I*, 370 F.2d 119 (2d Cir. 1966)).

135. A trial judge who is intent on preventing a class action might effectively deny appeal by distorting his findings of fact. There is nothing to indicate, however, that district judges are so intent on avoiding appellate review that they are willing to intentionally subvert the judicial process. Moreover, the rule relegates district judges to a relatively mechanical task that easily lends itself to review. The court wisely refrained from allocating to the trial court the ultimate determination whether the action would continue. Such an allocation would have given the district judge a great deal of unreviewable power.

136. 437 U.S. at 472-76.

137. *Id.* at 473.

defendants who suffer the misfortune of having an action certified against them with no choice but to proceed on the merits.[138] The mere fact that a defendant may not take an immediate appeal should not, however, preclude plaintiffs as well. A rule of jurisdiction that is grounded in statutory language and supported by sound reasoning should be adopted regardless of whether it confers a benefit on one party but not the other. "[T]he achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of [law]."[139]

The Court's criticism that "indiscriminate" (that is, nondiscretionary) interlocutory appeal should not be allowed[140] also falls short of the mark. The congressional decision to make appeals under 28 U.S.C. § 1292(b)[141] a matter of discretion was unquestionably sound and serves to protect the judicial process from unnecessary and unwarranted appeals. It does not follow, however, that all interlocutory appeals should be subjected to the screening procedure imposed by that statute. As the Supreme Court has recognized repeatedly, some orders, although entered before final judgment, have sufficient indicia of finality that immediate appeals from them will not upset the administration of justice. Class certification orders should be included in this select group. Section 1292(b) was enacted to permit immediate appeals from nonfinal orders when unusual circumstances mandated prompt review; it should not be used to deny review of other orders that, because of their posture in the litigation, are final.[142]

Finally, the Court argued that the death knell doctrine was unacceptable because it thrust the appellate courts indiscriminately into the trial process.[143] This is undoubtedly true: all interlocutory appeals share this feature. But the Court, by isolating this single element of the complex policy considerations that relate to recognition of prejudgment final orders,[144] has thus taken a narrow, one-sided view of the problem, a view that hardly supports the result reached in *Coopers & Lybrand.*

B. Gardner v. Westinghouse Broadcasting Co.

The facts of *Gardner* were typical of many civil rights actions. After being denied a job as a radio station talk show "host" at a Westinghouse owned station, petitioner, a woman, filed a class action suit alleging that the company discriminated against female job applicants on the basis of

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138. *Id.* at 476.

139. Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir. 1950).

140. 437 U.S. at 474.

141. *See* text of 28 U.S.C. § 1292(b) at note 17 *supra.*

142. Professor Wright has suggested that § 1292(b) *cannot* be used as a basis for appealing orders that are appealable as a matter of right. *See* A. Wright, *The Interlocutory Appeals Act of 1958,* 23 F.R.D. 199, 203 (1959). The *Coopers & Lybrand* Court's readiness to shuffle orders back and forth between these two categories thus presents conceptual difficulties.

143. 437 U.S. at 476.

144. *See* text accompanying notes 172-82 *infra.*

sex.[145] She sought to represent a class made up of respondent's "past, present, and future employees; unsuccessful female applicants; females deterred by respondent's reputation from applying for employment; and females who will not in the future be considered by respondent on account of their sex."[146] Her complaint prayed for injunctive relief for the entire class.[147]

Plaintiff moved for class certification pursuant to Rule 23(b), but the district court denied the motion on the grounds that her claim was not typical of the class and that the group of claims did not present common questions of law or fact.[148] The Third Circuit dismissed her appeal for lack of jurisdiction[149] and the Supreme Court granted certiorari.[150]

One might have expected the Court to reverse this typical civil rights class suit using the rationale developed by the Fourth Circuit in *Brunson v. Board of Trustees.*[151] In *Brunson*, as was previously noted, the Fourth Circuit permitted an appeal from an order denying class certification under 28 U.S.C. § 1292(a)(1) on the theory that the district court's decision "denied the broad injunctive relief that plaintiffs were seeking in the action."[152] The Supreme Court relied instead on *General Electric Co. v. Marvel Rare Metals Co.*[153] and *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*[154] in holding that orders denying class action certification did not come within the scope of section 1292(a)(1).

Although the Court had never specifically placed its imprimatur on the *Brunson* approach, several cases—including *Marvel* itself— tended to indicate that it had endorsed the basic theory on which *Brunson* and its progeny were premised. In *Marvel* the Court applied a rationale similar to that of *Brunson* in holding that the dismissal of a counterclaim that sought injunctive relief was the denial of an injunction within the meaning of section 1292(a)(1).[155] Normally an order dismissing a counterclaim is not immediately appealable since plaintiff's claim is still pending.[156] The Court's decision, therefore, was significant for two reasons. First, it acknowledged that an order "deny[ing] to [a party] *the protection* of the injunction prayed"[157] was immediately appealable. Second, it established

145. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 479 (1978).

146. *Id.*

147. *Id.*

148. *Id.* at 479-80.

149. 559 F.2d 209 (3d Cir. 1977).

150. 434 U.S. 984 (1977).

151. 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963).

152. Brunson v. Board of Trustees of School District No. 1, 30 F.R.D. 369 (E.D.S.C. 1962). *See* text accompanying notes 34-38 *supra.*

153. 287 U.S. 430 (1932).

154. 385 U.S. 23 (1966).

155. 287 U.S. at 433.

156. 6 WRIGHT, MILLER & COOPER, *supra* note 57, § 1408.

157. 287 U.S. at 433 (emphasis added).

that a decision need not be stamped "injunction denied" in order to fall within the ambit of section 1292(a)(1).

Other cases supported a practical application of the statute. In *Enelow v. New York Life Insurance Co.*,[158] for example, the Court permitted an immediate appeal from an order staying the trial of an equitable defense—an otherwise nonappealable decision[159]—on the ground that it was, for all practical purposes, an order granting an injunction. As the *Enelow* Court noted:

> It is thus apparent that when an order or decree is made . . . requiring, or refusing to require, than an equitable defense shall first be tried, the court, exercising what is essentially an equitable jurisdiction, in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose. Such a decree was made in the instant case, and therefore, although interlocutory, it was appealable to the Circuit Court of Appeals under [section 1292(a)(1)].[160]

Other decisions of the Court reached the same conclusion.[161] It is apparent, therefore, that the word "injunction" in section 1292(a)(1), like the term "final" in section 1291, was to be given a broad definition. As long as the order had the practical effect of denying an injunction, it was appealable immediately as a matter of right.

The Court did not agree that *Gardner* was controlled by these cases. Instead, it compared the case to *Switzerland Cheese*,[162] an earlier decision that had limited the scope of section 1292(a)(1). In that case the district court denied plaintiff's motion for summary judgment and an immediate appeal was taken under section 1292(a)(1).[163] Even though plaintiff was seeking an injunction in the underlying action, the court of appeals dismissed the appeal.[164] The Supreme Court affirmed, finding section 1292(a)(1) inapplicable under the facts of the case.[165] *Switzerland Cheese* is, however, easily distinguishable. Unlike *Gardner* or *Brunson*, *Switzerland Cheese* did "not settle or even tentatively decide anything about the merits of the claim."[166] While an order sustaining plaintiff's

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158. 293 U.S. 379 (1935).

159. *See* 16 WRIGHT, MILLER & COOPER, *supra* note 57, § 3923, at 48.

160. 293 U.S. at 383.

161. *See, e.g.*, Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942). *Cf.* Baltimore Contractors v. Bodinger, 348 U.S. 176 (1955) (holding that a stay order was "a step in controlling the litigation before the trial court, not the refusal of an interlocutory injunction." *Id.* at 185.).

The *Gardner* Court attempted to distinguish *Enelow* and *Ettleson* on the ground that they involved equitable rather than legal claims. 437 U.S. at 481 n.8. This distinction is untenable. *See* Baltimore Contractors v. Bodinger, 348 U.S. at 185-86 (Black, J., dissenting). Moreover, the relief sought in *Gardner* was the traditional equitable remedy of injunction.

162. 385 U.S. 23 (1966).

163. *Id.* at 23-24.

164. 351 F.2d 552 (1st Cir. 1965).

165. 385 U.S. at 24-25.

166. *Id.* at 25.

motion would have granted an injunction, the court's order denying that motion did nothing more than decide "that the case should go to trial."[167] The district court's order denying summary judgment did not, therefore, preclude the issuance of an injunctive or narrow the scope of any future injunctive relief. Under these circumstances, section 1292(a)(1) was clearly inapplicable.

The truth of the matter is that the Court could easily have fit the *Coopers & Lybrand* and *Gardner* cases within one of the recognized exceptions to the finality rule. Why, then, did it not? One reason may have been the nature of class actions. Despite the Court's disclaimer,[168] the burgeoning number of class suits and their characterization by some as a vexatious type of litigation[169] may well have had some impact on the final outcome. Another explanation is the Court's continuing concern for maintaining the integrity of the finality rule. Since *Cohen*, the courts have been struggling to keep the exception from swallowing up the rule.[170]

The Court's critical stance in *Coopers & Lybrand* and *Gardner* is not surprising. Nevertheless, the foregoing explanation provokes a more fundamental question: If the Court meant to take a stance on finality, were these the proper cases in which to do it? This question is the subject of Part III.

III. WHAT THE COURT FORGOT: THE "MINOR DETAILS" OF FINALITY

The most glaring defect of *Coopers & Lybrand* and *Gardner* is not what the Court said but what it failed to say.[171] Both opinions were marked by total failure to acknowledge the policy arguments that favored appealability of class certification orders and complete disregard for possible adverse effects of the holdings. Since class action appealability was not a clear-cut question, these issues should have figured prominently in the decisions.

The finality rule delicately balances two countervailing forces. On one side is the policy against "piecemeal" appeals.[172] On the other is a recognition that any continuation of proceedings in the trial court beyond an order that is ultimately reversed entails a waste of judicial resources and a hardship upon the parties.[173] The general rule that "[a] 'final decision' . . . is one which ends the litigation on the merits and leaves nothing . . . to do but to execute the judgment"[174] has been adopted on

167. *Id.*

168. 437 U.S. at 470.

169. For a good discussion of whether class actions are really as detrimental as some commentators would suggest, *see* Simon, *supra* note 11.

170. 9 MOORE'S, *supra* note 16, ¶ 110.10, at 134.

171. *See* text following note 9 *supra.*

172. *See generally* 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3907.

173. *Id.*

174. Catlin v. United States, 324 U.S. 229, 233 (1945).

the theory that immediate review of every order would result in greater waste than would allowing the lower court proceedings to continue.[175] This assumption, however, is not indisputable,[176] and the question of finality frequently turns on more subtle distinctions.

Three major considerations militate against a broad interpretation of finality. First, as the Court recognized in *Coopers & Lybrand*, there is a deep concern for judicial economy and optimum utilization of scarce judicial resources.[177] Postponing review furthers these goals by increasing the possibility that the action will follow a course that makes the appeal unnecessary. The parties might, for example, settle the dispute out of court, an alternative that is almost always preferred over litigation.[178] Similarly, the challenged ruling may become insignificant either because the party against whom it was decided ultimately emerges victorious or because in the context of the trial court's final decision it emerges as nonprejudicial error. Moreover, by consolidating review into a single proceeding, the appellate court is spared the arduous and time consuming task of refamiliarizing itself with the case.

A second consideration that weighs against immediate review of trial court decisions is the nature of the relationship between the appellate and trial courts.[179] As the Supreme Court pointed out in *Cohen*, appellate review gives the higher court a power of review, not intervention.[180] The primary responsibility for conducting the proceedings rests solely on the trial court. Delaying review increases the respect given the trial court's rulings and vests the trial judge with sufficient authority to adequately perform his supervisory function. It also adds to the continuity of the action and the efficiency with which cases are decided.

Finally, interlocutory appeals are a potent weapon in the arsenal of a party who is bent on delaying the action or harassing his opponent into submission.[181] An economically disadvantaged litigant may feel especially burdened by the prospects of protracted litigation. While every litigant must, as a practical matter, expect some cost and inconvenience, court proceedings should not be unnecessarily taxing.

Given these considerations, one might wonder why interlocutory appeals are permitted at all. A rule that allowed appeals only after entry of final judgment would allay all these concerns and would have the added

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175. 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3907, at 429.

176. As the Second Circuit explained many years ago, " 'Final' is not a clear one-purpose word; it is slithery, tricky . . . there is, still, too little finality about 'finality.' " United States v. 243.22 Acres of Land, 129 F.2d 678, 680 (2d Cir. 1942), *cert. denied sub nom.* Lambert v. United States, 317 U.S. 698 (1943). *See also* Gillespie v. U. S. Steel Corp., 379 U.S. 148 (1964).

177. *See generally* 15 WRIGHT, MILLER and COOPER, *supra* note 57, § 3907, at 430-32.

178. There has been a great deal of controversy on this point with respect to class actions. *See* note 11 *supra*. When class certification is denied, however, the question of "legalized blackmail" does not arise. *Id.*

179. *See* 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3907, at 430.

180. 337 U.S. at 546.

181. *See* 15 WRIGHT, MILLER & COOPER, *supra* note 57, § 3907, at 432.

advantage of definiteness and clarity. It would not, however, provide the utopia that the Court and some commentators have envisioned.

A rigid definition of finality entails a number of undesirable consequences. For one thing, an interlocutory decision may dispose of parties or claims, thus making it possible to hear an immediate appeal without contravening any of the policies that demand strict enforcement of finality.[182] In such cases it would work a great hardship on the parties to make them await final judgment solely for the sake of procedural niceties.

Unappealable interlocutory orders also present the potential for needless waste of time and money since, in many cases, an appellate court's only remedy is to reverse and remand for further proceedings. For example, an erroneous ruling on a discovery motion can be corrected only by reversing the ruling and giving the party an opportunity to retry his case with the benefit of the new information. The original trial, which may have gone on for weeks and cost the parties several thousands of dollars, will have been for naught. Moreover, there is always the possibility that the trial judge will make an error during the retrial, and the case will once again be reversed and remanded.

The most pressing consideration in favor of a broadly defined finality rule, however, is the impact that unreviewed orders can have on the merits of a party's case. Because of the posture of a case, failure to secure immediate review may mean that it will be impossible, as a practical matter, to ever appeal the court's ruling. Similarly, the delay inherent in awaiting a final judgment may effectively deny the relief that the action seeks, especially when temporary relief is sought pending final disposition of the controversy.

The relationship between these considerations and the collateral order and death knell doctrine is more than coincidental. For many years the Court had tended to focus on the potential injury that would result from delaying review, rather than the disadvantages of immediate appeals.[183] The Court has now ignored that trend and refused to consider the tremendous adverse effects that *Coopers & Lybrand* and *Gardner* are likely to have on class action litigants. This blindness is the gravamen of the decisions. Had there been a satisfactory alternative available to disappointed class representatives, the result in either case might have been acceptable. Since there is none, *Coopers & Lybrand* and *Gardner* can only be viewed as an unduly restrictive interpretation of a statutory scheme that was meant to have a "practical rather than . . . technical construction."[184] This is not to say that every interlocutory order should be appealable merely because it adversely affects one of the parties. But when the statutory language is ambiguous, the possibility of serious, irreparable injury should clearly tip the balance in favor of appealability.

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182. *Id.* at 433.

183. *See* text accompanying notes 60-63 *supra.*

184. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).

As a result of *Coopers & Lybrand* and *Gardner*, a potential class representative has only three courses of action once the district court has denied certification: he may seek interlocutory review by way of a discretionary appeal; he may continue his individual claim with the intention of appealing the certification ruling upon entry of final judgment; or he may abandon the class action (and possibly his individual claim as well). All three of these options, however, leave the litigant in an unsatisfactory position. He would, of course, prefer to appeal immediately, but the practical difficulties of securing discretionary review make this alternative infeasible. On the other hand, delaying an appeal until entry of final judgment may well leave him with no appeal at all. The final and most likely option, dropping the action entirely, is equally unpalatable. There is, consequently, a genuine possibility of "serious and irreparable injury" to the individual plaintiff and the class members as the result of the Court's decisions.

The practical infeasibility of discretionary review requires little explanation. Because of its limited scope of availability and the necessity of obtaining court approval, experienced trial attorneys are seldom confident of securing an appeal under either 28 U.S.C. § 1292(b) or Civil Rule 54(b), particularly with respect to class certification orders. Under section 1292(b), for example, the district judge cannot certify an appeal absent a finding that his order (1) "involves a controlling question of law" (2) over "which there is substantial ground for difference of opinion," and (3) that an immediate appeal would "materially advance the ultimate termination of the litigation."[185] Although *Katz v. Carte Blanche Corp.*,[186] a Third Circuit decision, would suggest that class certification rulings satisfy these criteria, the answer is not clear at all. Every certification ruling does not involve a controlling question of law nor does it turn on an issue on which there is a split of authority. Moreover, it could hardly be argued that the reversal of a lower court's denial of class action status would materially advance the termination of the litigation. *Katz* brushed over these "technicalities" by emphasizing judicial efficiency and the avoidance of hardship to litigants.[187] It is possible, however, that other courts will take a more restrictive view of the requirements—particularly in light of the Court's disposition toward nonappealability in *Coopers & Lybrand* and *Gardner*.

Civil Rule 54(b)[188] presents a similar problem. Under that provision, a district judge cannot certify an appeal from his order unless it adjudicates an entire claim(s) or enters judgment as to one or more parties.[189] The rule explicitly provides that an order is nonappealable unless one of these two criteria is satisfied.[190] This creates a theoretical dilemma. Class members

185. The full text of § 1292(b) is set out at note 17 *supra*.

186. 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

187. *Id.* at 754-56.

188. Rule 54(b) is set out at note 16 *supra*.

189. FED. R. CIV. P. 54(b).

190. *Id.*

are not technically "parties" to the litigation until it has been certified as a class action.[191] How, then, can an order denying certification decide anything, let alone enter judgment, with respect to "one or more parties?" Moreover, an expansive reading of Rule 54(b) with respect to class certification decisions could lead to abuses of the rule in other areas, notably denial of intervention under Rule 24.[192] While one circuit has endorsed class action appeals under Rule 54(b), [193] it is uncertain whether the Supreme Court would agree.[194]

Even if these requirements are satisfied, the class representative must clear a second, far higher hurdle. Certification under either section 1292(b) or Rule 54(b) is a matter of discretion,[195] and district judges are unlikely to exercise their discretion to allow an appeal, especially in class action situations.[196] A district judge may, for example, erroneously decide that the order does not satisfy the prerequisites of section 1292(b) or Rule 54(b). This belief, although mistaken, is virtually unassailable; the litigant must show abuse of discretion, a very difficult burden to meet.[197] A judge might also, in the exercise of his "sound discretion," decide that the costs of the interruption and delay exceed the benefits of immediate review. Moreover, an appeal under section 1292(b) requires the approval of the court of appeals as well as the district court,[198] and appellate judges may deny an appeal for any reason, however frivolous.[199] Finally, one cannot ignore "the possibility that an obdurate judge might thwart review"[200] simply because he objects to an appeal. As a practical matter, therefore, it is unlikely that a potential class representative will be able to secure discretionary review of a class certification order.

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191. *See* Note, *supra* note 11, at 372-73. *Compare* Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970) (holding that, pending a decision on the certification question, class members should be treated as if they were parties for the purposes of settlement and dismissal).

192. At the present time, orders denying intervention are not immediately appealable. *See* 7A WRIGHT, MILLER & COOPER, *supra* note 57, § 1923, at 626. *Compare* 3B MOORE'S, *supra* note 16, ¶24.15, at 24-561.

193. Samuel v. Univ. of Pittsburgh, 506 F.2d 355, 361 (3d Cir. 1974); Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); Hackett v. Gen. Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972). None of these cases, however, involved an appeal under Rule 54(b).

194. Moreover, since Rule 54(b) permits an appeal only by one who has had his claim adjudicated, this analysis assumes that a class member will be willing to step forward and pursue an appeal.

195. Both § 1292(b) and Rule 54(b) provide that a judge *may* allow an appeal. *See* notes 16-17 *supra*.

196. *See* American Bar Association, *Report of Special Commission on Federal Rules of Procedure*, 38 F.R.D. 95, 104 (1965).

197. An otherwise nonappealable discretionary ruling may be challenged only be mandamus. In ruling on a petition for mandamus, an appellate court looks only to see that the lower court did not step outside the sphere of its discretionary power. *See* note 206 *infra*.

198. *See* note 17 *supra*.

199. S. REP. NO. 2434, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 5255, 5257.

200. Parkinson v. April Indus., Inc., 520 F.2d 650, 660 (2d Cir. 1975) (Friendly, J., concurring).

A disappointed class litigant could, of course, seek "review" by way of mandamus or a similar writ under 28 U.S.C. § 1651, the "All-Writs Act."[201] Mandamus, however, is an "extraordinary remedy"[202] and its practical usefulness is questionable. The appellate court does not review the lower court's order for error but only to make certain that the lower court has not stepped outside its sphere of discretionary power.[203] Unless the error was blatant—almost malicious—the trial judge's ruling will be upheld. Furthermore, a court of appeals often exercises its discretionary power to refuse a writ.[204] Thus, even in this day of "supervisory" and "advisory" mandamus,[205] it is doubtful that the extraordinary writ presents a class litigant with an alternative means of obtaining interlocutory review.

Some commentators have suggested that a plaintiff may secure the equivalent of an interlocutory appeal by refusing to plead further after the district court has denied class certification.[206] In that event, the action will eventually be dismissed with prejudice,[207] and plaintiff may take an appeal from the resulting entry of final judgment. This is a drastic method of obtaining review, since the dismissal acts as an adjudication on the merits,[208] and can be justified only when the plaintiff's claim is so small that he would, in any event, be forced to dismiss the action—in other words, in a "death knell" situation.

Moreover, in recent years some courts have begun to look through this subterfuge and have refused to review the class certification order,[209] limiting their consideration to whether the district court abused its discretion by dismissing the action, given the result of the certification ruling.[210] As the Third Circuit said in dismissing one such appeal:

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201. 28 U.S.C. § 1651 (1976) provides in pertinent part: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law . . . ."

202. Roberts v. United States Dist. Ct. for the N. Dist. of Calif., 339 U.S. 844 (1950); *Ex parte* Fahey, 332 U.S. 258 (1947).

203. Will v. United States, 389 U.S. 90, 95 (1967). *See also* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

204. Kerr v. United States Dist. Ct. for the N. Dist. of Calif., 426 U.S. 394, 403 (1976); Hayakawa v. Brown, 415 U.S. 1304, 1305 (1974).

205. The Supreme Court has shown an interest in mandamus as a means of "advising" lower courts on novel questions of law and correcting recurring errors (*i.e.*, "supervising"). *See* Schlagenhauf v. Holder, 379 U.S. 104 (1964); La Buy v. Howes Leather Co., 352 U.S. 249 (1957). Since this doctrine is still undeveloped, however, supervisory or advisory mandamus does not present a reliable basis for securing appellate review.

206. *See, e.g.*, Note, *supra* note 12, at 1297-98; Note, *supra* note 11, at 574.

207. Dismissal may be entered on the court's own motion or pursuant to a motion by the opponent under FED. R. CIV. P. 41. In either case, a dismissal is with prejudice. *Id.*

208. Because the plaintiff takes an "all or nothing" chance that the appellate court will reverse the certification order, one commentator has called this process "federal rules roulette." Note, *supra* note 12, at 1298.

209. Sullivan v. Pacific Indem. Co., 566 F.2d 444 (3d Cir. 1977). *See also* Marshall v. Sielaff, 492 F.2d 917 (3d Cir. 1974). *Cf.* Oppenheimer v. F.J. Young & Co., 144 F.2d 387 (2d Cir. 1944) (allowing an appeal of the class certification question after a dismissal for failure to plead further).

210. Sullivan v. Pacific Indem. Co., 566 F.2d 444, 445 (3d Cir. 1977); Marshall v. Sielaff, 492 F.2d 917, 918-19 (3d Cir. 1974).

> This procedure appears to be an attempt to circumvent this court's well-established policy disallowing interlocutory appeals relating to class determination absent special circumstances. In adhering to this policy we reiterate our disapproval of indirect attempts to accomplish that which cannot be done directly. . . . Since appellants do not contend that the order of dismissal was in error, . . . the only issue that appellants would have us decide is the correctness of the refusal of class certification by the district judge.
>
> We view appellant's strategy as an attempt to avoid this court's firm position against interlocutory appeals of class certification determinations. . . . We accordingly dismiss the appeal for lack of an appealable order.[211]

Even if a plaintiff is willing to accept its drawbacks, therefore, it would appear that this procedure does not present a satisfactory opportunity for review.

This leaves a class litigant with only one other choice short of abandoning the class action—pursuing his individual claim and appealing after final judgment is entered. If the class plaintiff is unsuccessful on his individual claim, this method of securing review does not present a problem; the plaintiff will most likely appeal the judgment and the class certification ruling. Of course, in the meantime the parties and the trial court will have wasted a substantial amount of time, effort, and money.

On the other hand, the possibility of review is diminished considerably if the individual plaintiff succeeds on the merits. It is highly uncertain what will happen if the appellate court reverses the class certification decision after a plaintiff has prevailed on the merits. Quite possibly the plaintiff will lose the benefit of his judgment,

> [f]or . . . the appellate court . . . may conclude at the same time that it would be improper merely to order that notice pursuant to rule [*sic*] 23(c)(2) be sent to the members of the class without a new trial, since such disposition of the appeal would permit members of the class to make their decisions whether to join in the action at a time when they already know its outcome—a form of "one-way" intervention that the 1966 amendments were designed to prevent . . . or . . . that such a disposition would be unfair to the defendant since it would result in a judgment against him significantly larger in amount than the liability against which he litigated his defense at the trial.[212]

There is a good chance, therefore, that the named plaintiff will choose not to seek review of the certification order, especially if he has an economically significant claim and originally brought the class action only to defray the cost of litigation. The class members would consequently be left without a "champion."[213]

It is also likely that the members of an uncertified class would not be able to rely on the judgment for its preclusive effect. Ordinarily a final

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211. Sullivan v. Pacific Indem. Co., 566 F.2d 444, 445-46 (3d Cir. 1977).

212. Note, *supra* note 12, at 1294. *See also* Note, *supra* note 11, at 574-76.

213. Note, *supra* note 12.

judgment serves to prevent relitigation of the issues decided in the action in which it was entered. It is possible, however, that a court might refuse to give a judgment in favor of the named plaintiff binding effect in later actions by the "class" members. There are several reasons for this. First, the necessity of deciding who is and who is not a member of the class would present grave practical difficulties. Identifying the class members is frequently the most difficult aspect of class litigation, and the possibility of repeating this process in ten thousand individual actions, if there were ten thousand members in a potential class, might lead a court toward other alternatives.

Second, the 1966 amendments to federal Rule 23 were intended to put an end to "one-way intervention" in class actions.[214] Prior to the amendments, a class litigant in a "spurious" class action was bound by an adverse judgment on the merits only if he chose to join in the action.[215] A few courts permitted class members to join after a decision on the merits, thereby leaving open the possibility that an individual could take advantage of a favorable judgment without being bound by one against him.[216] This practice has much the same effect as the offensive use of collateral estoppel by an absent class member under the present Rule 23. It is therefore unlikely, in light of the policy behind the 1966 amendments, that a class member could rely on the named plaintiff's action as a binding determination of the issues.

Last, the courts have been cautious in applying collateral estoppel in this area, as illustrated by the treatment that has been afforded "test cases." On various occasions the parties to a class action have advocated litigation of a test case by the named plaintiff and the defendant as an alternative to the normal Rule 23 procedure.[217] The theory behind this proposal is that collateral estoppel would bind the defendant in the event of a judgment for the plaintiff, while the defendant would have the advantage of stare decisis if the judgement were in his favor.[218] Clearly, this procedure places the defendant in a less favorable position than if the action were to proceed under Rule 23, but such is the nature of collateral estoppel. Moreover,

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214. The Advisory Committee's report noted:

> Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening *before* the determination of liability, courts have held or intimated that class members might be permitted to intervene *after* a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision . . . . Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Advisory Committee's Note to Proposed Amendments to Rule 23, 39 F.R.D. 69, 105-06 (1966) (emphasis in original).

215. *See id.* at 105. A spurious class was the equivalent of a class certified under subsection (b)(3) of the present Rule.

216. *Id.*

217. *See, e.g.*, Katz v. Carte Blanche Corp., 496 F.2d 747, 758-62 (4th Cir. 1974).

218. *Id.* at 759.

advocates of the "test case" pointed out that the resulting savings in time and expense, particularly the elimination of notice costs, more than compensated for this shortcoming.[219]

The Fourth Circuit considered the use of test cases in *Katz v. Carte Blanche Corp.*[220] In a very persuasive opinion the court noted that past Supreme Court decisions had left open the possible application of collateral estoppel,[221] and that the public at large did not derive any substantial benefit from class actions that would favor their use over the alternative procedure.[222] The court was nonetheless reluctant to endorse a broad application of collateral estoppel, holding that a test case could be used only if the defendant agreed to be bound by the result—and then only if a normal Rule 23 proceeding would create an extraordinary hardship.[223]

In light of this lukewarm reception, it is doubtful if the test case or collateral estoppel presents much of an alternative.[224] A class member could, of course, still intervene for the purpose of appealing the certification order after entry of final judgment in the named plaintiff's action.[225] Without the benefit of collateral estoppel, however, an individual would really be doing little more than commencing a new action. Moreover, this method of review assumes that there will be a class member who is willing to intervene.

It is clear, therefore, that *Coopers & Lybrand* and *Gardner* leave no effective means of securing the review of a district court's class certification denial. As a result, many small claims—claims that do not warrant the expense of individual litigation—will never be adjudicated.

Some would say that these claims should not be litigated. In the succinct, if somewhat abrupt, words of the Third Circuit in *Hackett v. General Host Corp.*:[226]

> If in some cases . . . the individual claim often will be so small that neither

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219. *Id.*

220. *Id.*

221. *Id.* at 759 (citing Blonder-Tongue Labs. v. Univ. Foundation, 402 U.S. 313 (1971)).

222. *Id.* at 762.

223. *Id.*

224. The impact of the Supreme Court's recent decision in *Parklane Hosiery Co. v. Shore*, 99 S. Ct. 645 (1979), on class actions is an open question. In *Parklane* the Court removed the long-standing bar on the use of collateral estoppel by plaintiffs who are neither parties nor in privity with a party to the earlier judgment that is to be given preclusive effect. Clearly this holding could have a bearing in cases like *Katz*, especially since the plaintiffs in *Parklane* were suing on behalf of a class. *Id.* at 648. On the other hand, *Parklane* did little more than legitimate a position that the lower federal courts had taken all along; *see, e.g.*, Poster Exchange, Inc. v. Nat'l Screen Serv. Corp., 517 F.2d 117 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); Rachall v. Hill, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev., E.D.Wash. 1962), *aff'd sub nom.* United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964). It is doubtful that the courts will look upon collateral estoppel or the test case doctrine any more favorably today than they did when *Katz* was decided. A continued adherence to *Katz* is particularly likely because *Parklane* gives the lower courts broad discretionary power to determine when collateral estoppel should be applied. 99 S. Ct. at 651.

225. *See* United Air Lines v. McDonald, 432 U.S. 385 (1977).

226. 455 F.2d at 626.

> private nor public lawyers think it should be litigated, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere.

But contrast the position taken by Judge Robinson of the District of Columbia Circuit:

> It is hardly necessary in this age to argue the worth of the class action in our ever-expanding system of jurisprudence. Over the years it has promoted the convenience of courts and parties infinitely, reduced the expense of lawsuits incalculably, and . . . contributed immeasurably to efficient judicial administration. It has, too, made its mark on the development of the law. The reports are dotted with landmark cases which without benefit of representative litigation would never have seen the light of day.
>
> Even more profoundly, the class action has provided access to the judicial process for those who need it most. It has been the refuge of the poor, the hope of the downtrodden, and the salvation of the many whom our social institutions all too frequently victimize, unwittingly or otherwise. Truly it is said that "[t]he class action is one of the few legal remedies the small claimant has against those who command the status quo."
>
> In sum, as two leading authorities have aptly observed, "[i]t now is apparent that the increasing complexity and urbanization of modern American society has tremendously magnified the importance of the class action as a procedural device for resolving disputes affecting numerous people." And since class litigation could be chilled by nonappealability of denials of certifications save in narrowly limited circumstances, it is highly important to ascertain whether [those orders should be nonappealable].[227]

CONCLUSION

Any assessment of *Coopers & Lybrand* and *Gardner* must ultimately turn on the analyst's perception of the role of the American judicial system and, in particular, of class actions. As this writer has indicated, *Coopers & Lybrand* and *Gardner* effectively denied small litigants the opportunity to vindicate their rights. If one is willing to accept the result, the Supreme Court arguably decided both cases correctly. On the other hand, those who are offended by the thought that an individual may have a cause of action but no remedy will find the decisions hard to justify.

Searching inquiry has produced no consensus concerning the social and legal value of class actions. In particular, no one has satisfactorily resolved the question whether denial of class certification should be immediately appealable. One could scarcely expect that the Court would have provided the solution in *Coopers & Lybrand* and *Gardner*. It is nevertheless unfortunate that the Supreme Court, when squarely presented with a problem of this importance, refused to acknowledge that there even was an issue.

Michael K. Ording

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227. Williams v. Mumford, 511 F.2d 363, 371 (D.C.Cir.) (Robinson, J., dissenting), *cert. denied*, 423 U.S. 828 (1975).