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Appealability of Class Certification Denials After Roper and Geraghty: The Flexible Character of the Case or Cotroversy Requirement

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NOTE

APPEALABILITY OF CLASS CERTIFICATION DENIALS AFTER *ROPER* AND *GERAGHTY*: THE FLEXIBLE CHARACTER OF THE CASE OR CONTROVERSY REQUIREMENT

INTRODUCTION

Under the Federal Rules of Civil Procedure, before a class suit may proceed, the trial judge must "certify" the class as such.[1] The

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[1] Under FED. R. CIV. P. 23(c), the trial judge is required to consider the certification of a class "as soon as practicable" after the filing of suit. Although such consideration is generally prompted by a plaintiff's motion for class certification, *see, e.g.*, Peritz v. Liberty Loan Corp., 523 F.2d 349, 354-55 (7th Cir. 1975); United States v. School Bd. of City of Suffolk, 418 F. Supp. 639, 645-47 (E.D. Va. 1976), some courts have held that certification may be made without a motion by the plaintiff, *see* Senter v. General Motors Corp., 532 F.2d 511, 520-21 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); Rodriguez v. East Tex. Motor Freight Sys., Inc., 505 F.2d 40, 50 (5th Cir. 1974), *vacated and remanded on other grounds*, 431 U.S. 395 (1977). The plaintiff's failure to move for class certification, however, has been held by some courts to be evidence of his inadequacy as a class representative. *See, e.g.*, Nance v. Union Carbide Corp. Consumer Prods. Div., 540 F.2d 718, 722-25 (4th Cir. 1976), *cert. denied*, 431 U.S. 953 (1977); Forrester v. Vermilye, 78 F.R.D. 68, 70 (E.D. Tenn. 1978); Buckner v. Cameron Iron Works, Inc., 25 Fed. R. Serv. 2d 649, 650-51 (S.D. Tex. 1978); Beasely v. Kroehler Mfg. Co., 22 Fed. R. Serv. 2d 909, 910-11 (N.D. Tex. 1976).

In considering whether to certify a class, the district court must look to see if the particular suit satisfies the requirements of rule 23(a), *see* notes 23-25 and accompanying text *infra*, and if the class fits within one of the categories described in rule 23(b). *See, e.g.*, Miller v. Mackey Int'l, Inc., 452 F.2d 424, 427-29 (5th Cir. 1971); Hyatt v. United Aircraft Corp., Sikorsky Aircraft Div., 50 F.R.D. 242, 245-47 (D. Conn. 1970). Although the district court generally is not required to make findings regarding its decision as to certification, it may do so if there are substantive controversies regarding the certification. *See* Interpace Corp. v. City of Philadelphia, 438 F.2d 401, 404 (3d Cir. 1971). Recognized to be discretionary in nature, *see* Berman v. New Hampshire Jockey Club., Inc., 292 F. Supp. 993, 999-1000 (D. N.H. 1968), *rev'd on other grounds sub nom.*, Berman v. Narragansett Racing Ass'n, Inc., 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970); Baxter v. Savannah Sugar Ref. Corp., 46 F.R.D. 56, 59 (S.D. Ga. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 458 (E.D. Pa. 1968), the determination of class certification may be reversed or amended during the course of the litigation, *see, e.g.*, Lamphere v. Brown Univ., 553 F.2d 714, 718-19 (1st Cir. 1977); Guerine v. J & W Inv., Inc., 544 F.2d 863, 864-65 (5th Cir. 1977); Gerstly v. Continental Airlines, Inc., 466 F.2d 1374, 1375-78 (10th Cir. 1972);

effect of the certification, the Supreme Court has noted, is to imbue the class with "a legal status separate from the interests" asserted by the named plaintiffs.[2] Where class certification is denied, however, the maintenance of the action as a class suit—frequently the only economically feasible means of seeking redress—depends on the availability of an effective right of appeal. The existence of such right of appeal generally requires the satisfaction of two conditions. The first, imposed by statute, as a general rule mandates that the appeal be taken only from a "final decision."[3] At one time this requirement was liberally construed, thus permitting appeals from certification rulings which had the practical economic effect of terminating the litigation, notwithstanding that such rulings generally were not final in the literal sense.[4] The Supreme Court, however, rejected this attempt to circumvent the finality requirement in *Coopers & Lybrand v. Livesay*,[5] holding that no interlocutory appeal lies as of right from an adverse certification ruling.[6]

The second condition to obtaining appellate review of a certification denial, one of constitutional dimension, is that the party pursuing the appeal must possess a personal stake in the outcome

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Sley v. Jamaica Water & Utils. Inc., 77 F.R.D. 391, 394 (E.D. Pa. 1977).

[2] Sosna v. Iowa, 419 U.S. 393, 399 (1975). *See* Kremens v. Bartley, 431 U.S. 119, 129-30 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 752-57 (1976).

[3] 28 U.S.C. § 1291 (1976) states in pertinent part: "The courts of appeals shall have jurisdiction of appeals from all final decisions." The Supreme Court has interpreted the statute to mean that finality is a prerequisite to appellate review in the absence of a statutory or common-law exception. *See* Andrews v. United States, 373 U.S. 334, 340 (1963); Cobbledick v. United States, 309 U.S 323, 324 (1940). The policy underlying finality is to "avoid the mischief of economic waste and of delayed justice," Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945), as well as "prevent[ing] the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is in practical consequence, but a single controversy." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974). Some commentators, however, have suggested that a more flexible approach to appealability than that provided by the current judicial interpretation of finality is needed. *See* Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975); Note, *Proposals for Interlocutory Appeals*, 58 YALE L.J. 1186 (1949). For a discussion of some of the more important exceptions to finality, *see* notes 35-83 and accompanying text *infra*.

[4] In Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), the Supreme Court stated that the finality requirement should be given "a practical rather than a technical construction." *Id.* at 152. Relying on this statement, the Second Circuit, in Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), held that when the denial of the class suit sounded the "death knell" of the suit, it was in practical terms a final order and was appealable as of right under 28 U.S.C. § 1291. 370 F.2d at 121. *See* notes 35-51 and accompanying text *infra*.

[5] 437 U.S. 463 (1978).

[6] *Id.* at 477. *See* notes 52-61 and accompanying text *infra*.

of the litigation.[7] The effect of this requirement on the continuation of a class action *once certified* has been the subject of several Supreme Court decisions in recent years.[8] Indeed, the Court has noted that once certified, the interest of the class is sufficient to justify the continuation of the action, notwithstanding that the named plaintiff—the putative class representative—has individually lost the stake in the outcome requisite to satisfy the case or controversy requirement.[9] Moreover, the Court has also suggested that when the named plaintiff's individual claim has become moot before the trial court has ruled on the motion to certify, which motion it subsequently grants, the certification may be found to relate back to the filing of the complaint so as to establish the existence of the case or controversy necessary to continue the action.[10] Until

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[7] The personal stake requirement necessary to establish standing derives from article III of the United States Constitution which limits the jurisdiction of the federal courts to "cases" and "controversies." U.S. CONST. art. III, § 2. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498-502 (1975); North Carolina v. Rice, 404 U.S. 244, 246 (1971); Powell v. McCormack, 395 U.S. 486, 496 n.7 (1969); United States v. Raines, 362 U.S. 17, 20-21 (1960). The case or controversy requirement limits the jurisdiction of the federal courts to suits brought "in an adversary context and in a form capable of judicial resolution." Flast v. Cohen, 392 U.S. 83, 101 (1968). Since the extent of the case or controversy requirement is not readily definable, *see* Poe v. Ullman, 367 U.S. 497, 509 (Frankfurter, J., concurring), the Supreme Court has had great flexibility in defining the limits of justiciability in each particular case. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-8 (1978). In interpreting such limits, however, the courts are precluded by article III from considering non-adversarial matters, such as advisory opinions. *See* Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945). The restriction on advisory opinions is designed to maintain the separation of powers, since advisory functions are duties restricted to the executive and legislative branches. *See* United States v. Fruehauf, 365 U.S. 146, 147 (1961); Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n.2 (1792). In meeting the adversarial requirement, the plaintiff must possess a personal stake in the controversy. Flast v. Cohen, 392 U.S. 83, 101 (1968); Baker v. Carr, 369 U.S. 186 (1962). In *Baker*, the Supreme Court noted that the personal stake requirement was designed "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination. . . ." *Id.* at 204. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 731 (1972). Whether the requisite personal stake exists is a frequently litigated issue in public interest suits. *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-500 (1963); Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

[8] *See* Kremens v. Bartley, 431 U.S. 119 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Gerstein v. Pugh, 420 U.S. 103 (1975); Sosna v. Iowa, 419 U.S. 393 (1975); Richardson v. Ramirez, 418 U.S. 24 (1974); Roe v. Wade, 410 U.S. 113 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972).

[9] Sosna v. Iowa, 419 U.S. at 393, 402 (1975). *See* note 132 *infra*. *See generally* Champlin, *Personal Stake and Justiciability: Application to the Moot Class Action*, 27 KAN. L. REV. 85 (1978); Kane, *Standing, Mootness and Federal Rule 23—Balancing Perspectives*, 26 BUFFALO L. REV. 83 (1976); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573 (1974).

[10] Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975). *See* note 132 and accompanying text

recently, however, a conflict existed among the circuits on the issue of whether the mootness of the named plaintiff's individual claim subsequent to the denial of certification would preclude him from seeking review of the certification ruling.[11] In the companion cases, *Deposit Guaranty National Bank v. Roper*[12] and *United States Parole Commission v. Geraghty*,[13] however, the Supreme Court resolved the controversy holding that at least in certain instances, the mootness in whole or in part of the putative class representative's claim did not deprive him of the personal stake in the outcome of the litigation requisite to appealing the certification ruling.[14]

In light of the recent developments both in the interpretation of finality and the effect of the mootness of the named plaintiff's individual claim, this Note will explore the current availability of an effective right of appeal for would-be class representatives who have been denied class certification in federal court. First, the development of the class action, the requirement of certification, and the right of appeal from certification determinations will be traced.[15] Then, after identifying certain problems that have arisen

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infra.

[11] The federal courts of appeals have differed as to the viability of the putative class suit when the named plaintiff's individual claim expires prior to certification. Some courts had held that once the named plaintiff's claim was rendered moot, then the putative class suit must be dismissed for lack of a live case or controversy. *See* Vun Cannon v. Breed, 565 F.2d 1096, 1098-1101 (9th Cir. 1977); Winokur v. Bell Fed. Sav. & Loan Ass'n, 560 F.2d 271, 276-77 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334, 1336-37 (9th Cir. 1976) (per curiam); Boyd v. Justices of Special Term, 546 F.2d 526, 527 (2d Cir. 1976); Napier v. Gertrude, 542 F.2d 825, 826-28 (10th Cir. 1976), *cert. denied*, 429 U.S. 1049 (1977). Other courts, however, have allowed class suits to continue notwithstanding the mootness of the plaintiff's claim. *See* Susman v. Lincoln American Corp., 587 F.2d 866, 868-71 (7th Cir. 1978), *cert. denied*, 445 U.S. 940 (1980); Roper v. Consurve, 578 F.2d 1106 (5th Cir. 1978), *aff'd sub nom.* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980); *cf.* Armour v. City of Anniston, 597 F.2d 46, 48-49 (5th Cir. 1979), *vacated*, 445 U.S. 940 (1980); Camper v. Calumet Petrochemicals, Inc., 584 F.2d 70, 71-72 (5th Cir. 1978) (per curiam) (where named plaintiff's claim found meritless, class suit dismissed unless plaintiff has "nexus" with putative class). *But cf.* Goodman v. Schlesinger, 584 F.2d 1325 (4th Cir. 1978) (dismissal of named plaintiff's claim on the merits held not to require dismissal of class claim until after reasonable time for intervention by proper plaintiff has passed).

[12] 445 U.S. 326 (1980).

[13] 445 U.S. 388 (1980).

[14] United States Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 (1980). *See* notes 94-136 and accompanying text *infra*.

[15] *See* notes 19-34 and accompanying text *infra*.

regarding the appealability of a denial of class certification,[16] an analysis will be made of recent cases which have relaxed the article III case or controversy requirements thereby facilitating the appeal of some certification rulings.[17] Finally, this Note will suggest that although these most recent decisions have ameliorated some of the problems involved in appealing certification rulings, they nevertheless have not secured for the aggrieved putative class representative a meaningful right of appeal from adverse certification determinations.[18]

DEVELOPMENT OF THE CLASS ACTION AND THE CERTIFICATION PROCEDURE

The class suit device, which originated in order to circumvent the stringency of common-law joinder requirements,[19] allows suit to be brought by a representative who asserts not only his own claim, but also the rights of the class as a whole.[20] Thus, the class suit makes possible the avoidance of much of the cost, effort, and time that would have been required to litigate each claim individually.[21] Although the class action first was promulgated by the courts of equity,[22] representative suit today generally is authorized

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[16] *See* notes 35-92 and accompanying text *infra.*

[17] *See* notes 93-136 and accompanying text *infra.*

[18] *See* notes 137-150 and accompanying text *infra.*

[19] F. JAMES & G. HAZARD, CIVIL PROCEDURE 500 (1977); *see* Note, *Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 928-29 (1958). *See generally* 1 H. NEWBERG, CLASS ACTIONS § 1004 (1977).

[20] The class representative is, in effect, a "private attorney general," litigating on behalf of an aggrieved class. *See* Associated Indus. v. Ickes, 134 F.2d 694, 700-05 (2d Cir. 1943). As such, the class suit has been called "a cross between administrative action and private litigation." Dolgow v. Anderson, 43 F.R.D. 472, 481 (E.D.N.Y. 1968); *see* Homburger, *Private Suits in the Public Interest in the United States of America,* 23 BUFFALO L. REV. 343, 375-79 (1974); Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684, 717 (1941).

[21] *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 266 (1972); Amalgamated Workers Union v. Hess Oil Virgin Islands Corp., 478 F.2d 540, 543 (3d Cir. 1973); Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948). *See generally* H. NEWBERG, *supra* note 19, § 1000a; 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1758 (1972); Note, *Collateral Attack on the Binding Effect of Class Action Judgments,* 87 HARV. L. REV. 589, 589 (1974).

[22] *See* System Fed'n. No. 91 v. Reed, 180 F.2d 991, 995 (6th Cir. 1950). The class action originated in the English Court of Chancery, where the bill of peace was used to permit suit by an individual on behalf of an entire group. *See* Z. CHAFEE, CASES ON EQUITABLE REMEDIES 200-13 (1938); W. WALSH, EQUITY § 118, at 553-60 (1930); 7 C. WRIGHT & A. MILLER, *supra* note 21, § 1751 at 504. *See generally* Langdell, *A Brief Survey of Equity Jurisdiction (VII): Creditor's Bills,* 5 HARV. L. REV. 101, 109, 128 (1891).

by statute. For federal cases, rule 23 of the Federal Rules of Civil Procedure is controlling.[23] Originally adopted in 1938[24] and sub-

[23] Rule 23 of the Federal Rules of Civil Procedure states in pertinent part:

(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 specific 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

stantially revised in 1966,[25] rule 23 sets forth the prerequisites to

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

FED. R. CIV. P. 23(a), (b), (c). This rule, which allows wide discretion to the trial judges in permitting class suits, was intended to promote availability of class actions. *See Amendments to Rules of Civil Procedure*, 39 F.R.D. 69, 100, 102, 104 (1966). Thus, rule 23 is to be given a liberal, rather than restrictive interpretation. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968); Escott v. Barchris Construction Corp., 340 F.2d 731, 733 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1966); *accord*, Alameda Oil Co. v. Ideal Basic Indus., Inc., 326 F. Supp. 98, 102 (D. Colo. 1971).

[24] As originally enacted, rule 23 came under scholarly attack. *See* Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, *supra* note 20, at 684 (1941); Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905 (1962). *But see* Van Dercreek, *The "Is" and "Ought" of Class Actions Under Federal Rule 23*, 48 IOWA L. REV. 273 (1963). One source of criticism was the failure of the rule to address the binding effect of a class action judgment on the absent members. *See* Moore & Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 556 (1938) (advisory committee on the federal rules believed that matter of binding effect was substantive and, hence, not a proper subject for treatment in procedural rules). At the root of this criticism was the adoption by the 1938 rule of a tripartite classification. Under this classification, rule 23 required that all class actions be categorized into one of three categories. *See* 7 C. WRIGHT & A. MILLER, *supra* note 21, § 1752. These classifications came to be known as the "true," "hybrid," and "spurious" class suits. *Id.* Proper categorization was very important to the class action litigant since many courts came to determine the question of the binding effect of the class judgment on the basis of which category of class suit was involved. *See* F. JAMES & G. HAZARD, *supra* note 19, at 503; *see* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, *supra* note 21, at 591-92. Another criticism of the 1938 rule was its failure to provide adequate assurance of procedural fairness. *See* Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 937-38 (1958); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 COLUM. L. REV. 818, 822-33 (1946).

[25] In amending rule 23 in 1966, the Supreme Court attempted to remedy difficulties that existed with the 1938 rule, *see* note 24 *supra*, by taking a more practical approach in outlining the requirements for a class action. *See* Wright, *Recent Changes in the Federal Rules of Procedure*, 42 F.R.D. 552, 563-67 (1966); Note, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendments*, 52 MINN. L. REV. 509, 509-10 (1967). *But see* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 334 (1973) (notice requirement is best left to discretion of the district court). In addition to abolishing the tripartite categorization of the 1938 rule, *see* note 24 *supra*, the 1966 amendments added sections (c)(2) and (d) to rule 23. Rule 23(c)(2) requires that in an action for damages, once the class is certified, notice be sent to all potential class members and if the members do not want to be considered part of the class, then they can ask to be excluded from the class. FED. R. CIV. P. 23(c)(2). Rule 23(d) provides the district court with flexibility to conduct the class suit by permitting the court to "make appropriate orders." FED. R. CIV. P. 23(d). This section was added to encourage the judiciary to take a more active role to ensure that the absent class was properly represented. *See generally* Newberg,

maintenance of a class suit[26] and the procedure to be used by the trial court to determine whether the purported class will be certified.[27] Before the trial court will certify the class, the plaintiff must demonstrate that all of the requirements of rule 23 are met.[28] Thus, in carrying this burden of proof, the would-be class representative must show among other things that joinder of all members of the class is impracticable because of the class size, that the case presents questions of law or fact which are common to the class, and that he will adequately and fairly represent the absent class members.[29] Once the class is certified, the separate legal status which it acquires[30] triggers significant procedural consequences.[31]

Significantly, denial by the trial court of certification means only that the plaintiff may not bring suit as a representative; he may continue, of course, with his individual cause of action. Nevertheless, it has been recognized that the decision whether a claim may proceed as a class action may also be determinative of the

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Orders in the Conduct of Class Actions: A Consideration of Subdivision (d), 10 B.C. IND. & COM. L. REV. 577 (1969).

[26] FED. R. CIV. P. 23(a), (b).

[27] FED. R. CIV. P. 23(c)(1). *See* 7A C. WRIGHT & A. MILLER, *supra* note 21, at § 1785. In a suit for damages, the determination of class certification should be made prior to adjudication of the merits, Peritz v. Liberty Loan Corp., 523 F.2d 349, 353-54 (7th Cir. 1975), but this determination may be made subsequent to adjudication of the merits upon waiver by the class opponent, Katz v. Carte Blanche Corp., 496 F.2d 747, 762 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974). In class suits for injunctive or declaratory relief, the class determination may be made subject to the court's decision on the merits. *See* Roberts v. American Airlines, Inc., 526 F.2d 757 (7th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

[28] Strict compliance with the requirements of rule 23 is required in order to maintain a class suit. The failure to satisfy even one of the requisites is grounds for dismissal. *See, e.g.*, Doctor v. Seaboard Coast Line R.R., 540 F.2d 699, 708-09 (4th Cir. 1976); Burns v. United States Postal Serv., 380 F. Supp. 623, 629-30 (S.D.N.Y. 1974); Bennett v. United States, 266 F. Supp. 627, 629 (W.D. Okla. 1965).

[29] FED. R. CIV. P. 23(a); *see* Smith v. Baltimore & O.R.R., 473 F. Supp. 572, 580-82 (D. Md. 1979).

[30] *See* Sosna v. Iowa, 419 U.S. 393 (1975).

[31] The date of certification marks the time when all class members must be given notice of the institution of the suit, and invests an unnamed class member with the right to "enter an appearance through his counsel," and to "opt out" of the class suit. FED. R. CIV. P. 23(c)(2). In addition, once the class is certified, any class judgment, whether or not favorable, will be binding upon all the members of the class. *See In re* Four Seasons Sec. Laws Litigation, 525 F.2d 500, 502-04 (10th Cir. 1975); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 411-13 (2d Cir. 1975); Brown v. Housing Auth., 471 F.2d 63, 69 (7th Cir. 1972); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969); *Amendments to Rules of Civil Procedure*, 39 F.R.D. 69, 99 (1966).

ultimate substantive outcome of the case.[32] For example, in some instances denial of class certification, in effect, may terminate the plaintiff's claim because it is impracticable for him to proceed individually.[33] In addition, litigation strategy and settlement possibilities may depend on the certification determination.[34] Thus, an effective right of appeal from adverse class certification decisions is of significant consequence to an aggrieved class-action plaintiff.

APPEALABILITY OF CLASS ACTION CERTIFICATION DETERMINATIONS

The Rise and Fall of the Death Knell Doctrine

Section 1291 of Title 28 of the United States Code limits to "final decisions" the district court determinations from which an appeal may be taken as of right,[35] in the absence of a specific statutory grant to the contrary.[36] The primary purpose of the restric-

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[32] *See* Cullen v. New York Civil Serv. Comm'n, 566 F.2d 846, 848 (2d Cir. 1977); Jones v. Diamond, 519 F.2d 1090, 1095-97 (5th Cir. 1975); Handwerger v. Ginsberg, 519 F.2d 1339, 1341 (2d Cir. 1975); Green v. Wolf Corp., 406 F.2d 291, 297-98 (2d Cir.), *cert. denied*, 395 U.S. 977 (1968). Recognizing that the class certification ruling could be determinative of the outcome of the case, the Second Circuit promulgated the death knell doctrine, which permitted interlocutory appeal of class certification denials. Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). *See* notes 35-51 and accompanying text *infra*.

[33] The denial of class certification may make it economically prohibitive for the named plaintiff to proceed individually since the cost of litigation may exceed the recovery on his individual claim. Indeed, in Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), the Second Circuit noted, "We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for [the named plaintiff]." *Id.* at 120-21. *See* Ott v. Speedwriting Publishing Co., 518 F.2d 1143, 1148 (6th Cir. 1975); Graci v. United States, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973). Where a class is certified, however, the potential class recovery will exceed the litigation costs and hence make the named plaintiff's pursuit of the litigation more feasible. *See* Escott v. Barchris Constr. Corp., 340 F.2d 731, 733 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); Weeks v. Bareco Oil Co., 125 F.2d 84, 88-90 (7th Cir. 1941). *See generally* Kalven & Rosenfield, *supra* note 20.

[34] *See* Jimenez v. Weinberger, 523 F.2d 689, 698 (7th Cir. 1975), *cert. denied*, 417 U.S. 912 (1976); Comment, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 549, 574-78 (1975); *cf.* Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292, 1293-94 (1970) (denial of class certification forces named plaintiff into a weaker bargaining position with the defendant).

[35] 28 U.S.C. § 1291 (1976); *see* Johnson v. Combs, 471 F.2d 84, 87 (5th Cir.), *cert. denied*, 413 U.S. 922 (1973); Donovan v. Hayden, Stone, Inc., 434 F.2d 619, 620 (6th Cir. 1970) (per curiam); note 3 and accompanying text *supra*.

[36] Examples of federal statutes that permit interlocutory appeal as of right include: 18 U.S.C. §§ 1404, 3731 (1976) (interlocutory appeals by the government from pretrial orders suppressing evidence); 18 U.S.C. § 3147 (1976) (interlocutory appeals by criminal defendants from denial of preconviction release orders); 18 U.S.C. § 2518(10)(b) (1976) (interlocu-

tion is to prevent the waste associated with fragmented appellate review by disallowing appeal of any determination that is "tentative, informal or incomplete."[37] Although the concept of finality defies precise definition,[38] generally a final order may be categorized as one which "fully and finally" determines the action.[39] Since an order denying class certification is procedural in nature[40] and does not determine the merits of the controversy,[41] it is con-

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tory appeal by government from order denying or suppressing wire or oral communications monitoring); 28 U.S.C. § 1292(a)(2) (1976) (interlocutory appeal of orders involving receiverships); 28 U.S.C. § 1292(a)(3) (interlocutory appeal of orders determining rights and liabilities of parties in admiralty cases); 28 U.S.C. § 1292(a)(4) (appeal of judgment in patent infringement cases which are final except for accounting). Implicit in such statutes is a legislative balancing of the interests served by finality against the potential harm resulting from delaying review until final judgment. *See* 16 WRIGHT, MILLER, COOPER & GRESSMAN, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3920, at 6-7 (1977). *See generally* Redish, *supra* note 3; Comment, *Collateral Orders And Extraordinary Writs as Exceptions to the Finality Rule*, 51 NW. U.L. REV. 746 (1957).

[37] Fleischer v. Phillips, 264 F.2d 515, 517 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959). *See* United States v. Nixon, 418 U.S. 683, 690 (1974); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170-72 (1974); Markham v. Holt, 369 F.2d 940, 942 (5th Cir. 1966); Paliaga v. Luckenbach S.S. Co., 301 F.2d 403, 406-07 (2d Cir. 1962). Additional justification for the rule can be found, however, in a desire to avoid judicial backlog in the federal appellate courts, *see* Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 293 (1966), in the prevention of the delay that might be caused by allowing nonfinal orders to be appealed, *see* Note, *A Final Tolling of the Death-Knell: The Doctrine, Its Demise and Current Alternative Methods of Appeal of Class Certification Orders*, 28 DRAKE L. REV. 668, 671 & n.21 (1979), and the avoidance of unnecessary tension between the district courts and the courts of appeals, *see id.* at 671 & n.22 (citing Parkinson v. April Indus., Inc., 520 F.2d 650, 654 (2d Cir. 1975)).

[38] As the Supreme Court has stated, "No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974). *See* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950); McGourkey v. Toledo & O. Cent. Ry., 146 U.S. 536 (1892). Professor Wright points out, however, that "[t]he saving grace of the imprecise rule of finality is that in almost all situations it is entirely clear, either from the nature of the order or from a crystallized body of decisions, that a particular order is or is not final." C. WRIGHT, FEDERAL COURTS § 101, at 305. *See* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 354 (1961). *See also* Will v. United States, 389 U.S. 90, 108 (1967) (Black, J., concurring); Redish, *supra* note 3, at 90. *See also* Freeman v. Califano, 574 F.2d 264, 266-67 (5th Cir. 1978); United States v. 243.22 Acres of Land, 129 F.2d 678, 680 (2d Cir. 1942), *cert. denied*, 317 U.S. 698 (1943).

[39] Beebe v. Russell, 60 U.S. (19 How.) 283, 284 (1866). *See* Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62, 68 (1948); Gospel Army v. Los Angeles, 331 U.S. 543, 546 (1947); Catlin v. United States, 324 U.S. 229, 233 (1945). *See generally* 9 J. MOORE, FEDERAL PRACTICE ¶ 110.06, at 106 (1980).

[40] *See* Dorfman v. First Boston Corp., 62 F.R.D. 466, 472-73 (E.D. Pa. 1974); *In re* Penn Central Securities Litigation, 347 F. Supp. 1327, 1343-44 (E.D. Pa. 1972), *modified*, 357 F. Supp. 869 (E.D. Pa. 1973), *aff'd*, 494 F.2d 528 (3d Cir. 1974). *See generally* Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307 (1973).

[41] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974); Miller v. Mackey Int'l,

cededly nonfinal[42] and seemingly subject to the general proscription of interlocutory appeals.[43] Nevertheless, not long after the revision of federal class action procedures in 1966, an exception to the final-judgment rule of section 1291, the death knell doctrine, was fashioned by the judiciary in an attempt to balance the competing interests underlying the general federal prohibition against interlocutory appeals and the policies which gave rise to the establishment of class actions. The doctrine was promulgated in the seminal case of *Eisen v. Carlisle & Jacquelin*,[44] wherein the Court of Appeals for the Second Circuit was presented with the question of whether a party could appeal as of right a district court order which dismissed his class action, but allowed him to proceed with his individual claim.[45] Weighing the conflicting interests of "the in-

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Inc., 452 F.2d 424, 427 (5th Cir. 1971).

[42] Coopers & Lybrand v. Livesay, 437 U.S. 463, 471 (1978); *accord*, Williams v. City of New Orleans, 565 F.2d 874, 874-75 (5th Cir. 1978) (per curiam); West v. Capitol Fed. Sav. & Loan Ass'n, 558 F.2d 977, 981 (10th Cir. 1977); Schlick v. Penn-Dixie Cement Corp., 551 F.2d 531, 532-33 (2d Cir. 1977); Domaco Venture Capital Fund v. Teltronics Servs., Inc., 551 F.2d 508, 509 (2d Cir. 1977) (per curiam); Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1338 (9th Cir. 1976) (per curiam); King v. Kansas City S. Indus., Inc., 479 F.2d 1259, 1260 (7th Cir. 1973); Hackett v. General Host Corp., 455 F.2d 618, 621 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969).

[43] It is the general rule that before an aggrieved party may appeal from a decision of a federal trial court, there must have been entered an order which brought an end to the litigation on the merits, leaving "nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945); *see* Kappelmann v. Delta Air Lines, Inc., 539 F.2d 165, 167-68 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977). The federal courts have held that a class certification determination generally is not a decision on the merits and that even if class certification is denied, the named plaintiff may still proceed with the litigation of his individual claim. *See* Lamphere v. Brown Univ., 553 F.2d 714, 718 (1st Cir. 1977); General Motors Corp. v. City of New York, 501 F.2d 639, 645 (2d Cir. 1974); Siebert v. Northern Dev. Co., 494 F.2d 510, 511 (5th Cir. 1974).

[44] 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

[45] 370 F.2d at 119. The named plaintiff in *Eisen* brought an action in federal district court alleging that the defendants, "odd lots" dealers on the New York Stock Exchange, had violated the Sherman Act. *Id.* at 119-20. Eisen, whose individual claim was for seventy dollars, sought to bring the suit on behalf of a class of similarly situated "odd-lot purchasers and sellers on the Exchange." *Id.* at 120. On motion by the defendants, the district court denied class certification and dismissed the class suit on the grounds that the named plaintiff could not fairly and adequately represent the class and that common class issues were absent. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 150-52 (S.D.N.Y. 1966), *rev'd on other grounds*, 391 F.2d 555 (2d Cir. 1968). Eisen, however, was permitted to continue with his individual claim. 370 F.2d at 120.

The Second Circuit acknowledged that in general only final orders may be appealed, *id.*; *see* 28 U.S.C. § 1291; notes 3, 36 and accompanying text *supra*, but noted that there were exceptions and limitations to this rule. 370 F.2d at 120. In this regard, the court cited 28 U.S.C. § 1292 (1976), wherein the legislature had enumerated several types of nonfinal orders from which appeal may be had. 370 F.2d at 120. The court also observed that the

convenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other," the Second Circuit ruled that, on the facts presented, the balance tipped in favor of granting immediate appeal,[46] since a denial of immediate review would "for all practical purposes terminate the litigation."[47] Thus, the court held: "where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed."[48]

The exception to the general rule against interlocutory appeal promulgated in *Eisen*, commonly called the "death knell" doctrine,[49] found acceptance among a number of circuits.[50] Since it allowed immediate appeal of orders denying class certification, the doctrine was a very attractive tool to aggrieved plaintiffs and not

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concept of finality under section 1291 had been distinguished from "the last order possible to be made," thus allowing appeals from class certification denials where there seemed to be little chance of the suit continuing. 370 F.2d at 120 (quoting Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964)).

[46] 370 F.2d at 120. In reaching its decision, the Second Circuit purported to apply the "collateral order" doctrine. *Id.*; *see* notes 74-77 and accompanying text *infra*. It appears, however, that in construing the requirement of finality practically rather than technically, the court went beyond the scope of that doctrine.

[47] 370 F.2d at 121.

[48] *Id.*

[49] *See* Note, *A Final Tolling of the Death Knell: The Doctrine, Its Demise and Current Alternative Methods of Appeal of Class Certification Orders*, 28 DRAKE L. REV. 668, 670, 674-680 (1979); Note, *Civil Procedure—Appealability of Interlocutory Orders Denying Class Certification—The Supreme Court Sounds the Death Knell for the Death Knell Doctrine, the Collateral Order Doctrine, and Appeals Based on 28 U.S.C. § 1292(a)(1)*, 27 U. KAN. L. REV. 529, 532-33 (1979); Case Comment, *Immediate Appealability of Orders Denying Class Certification:* Coopers & Lybrand v. Livesay *and* Gardner v. Westinghouse Broadcasting Co., 40 OHIO ST. L.J. 441, 445-47 (1979); 49 MISS. L.J. 973, 978-81 (1978).

[50] *See* Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106, 1112 (8th Cir. 1977), *rev'd sub nom.* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Share v. Air Properties Inc., 538 F.2d 279, 281-83 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976); Ott v. Speedwriting Publishing Co., 518 F.2d 1143, 1146-48 (6th Cir. 1975); Hartmann v. Scott, 488 F.2d 1215, 1223 (8th Cir. 1973); Gosa v. Securities Inv. Co., 449 F.2d 1330, 1332 (5th Cir. 1971); Korn v. Franchard Corp., 443 F.2d 1301, 1304-06 (2d Cir. 1971). Not all circuits embraced the death knell concept, however. Several courts of appeals held that the class certification determination was reviewable only after final judgment. *See* Williams v. Mumford, 511 F.2d 363, 369-71 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); King v. Kansas City S. Indus., Inc., 479 F.2d 1259, 1260 (7th Cir. 1973); Hackett v. General Host Corp., 455 F.2d 618, 621 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

Interestingly, at a later stage of the *Eisen* litigation, the Supreme Court reviewed the history of the case without comment, causing some to believe that it ultimately would endorse the death knell doctrine. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161-69 (1974); Note, *A Final Tolling of the Death-Knell: The Doctrine, Its Demise and Current Alternative Methods of Appeal of Class Certification Orders*, 28 DRAKE L. REV. 668, 674-75 (1979). *But see* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

surprisingly was frequently employed in class-action litigation.[51] The decisions in which it was applied evinced judicial awareness of the significance and necessity of a meaningful right of appeal from an order denying certification of the class. The doctrine, however, was not long lived. In 1978, the Supreme Court in *Coopers & Lybrand v. Livesay*[52] sounded the death knell of the death knell doctrine.

In *Livesay*, suit was brought alleging a violation of the federal securities laws.[53] The named plaintiffs, who claimed that they had purchased securities in reliance on a defective prospectus, sought to represent a class of purchasers of the securities.[54] The district court at first certified, but later decertified the class.[55] On the plaintiff's appeal of this decision,[56] the Eighth Circuit, applying the death knell doctrine, held that it had jurisdiction to hear the appeal.[57] The United States Supreme Court, however, unanimously reversed the court of appeals decision, expressly rejecting the death knell doctrine.[58]

Delivering the opinion of the Court, Justice Stevens expressed disapproval of a judicially engrafted exception to the finality requirement under which "appealability turns on the court's percep-

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[51] *E.g.*, Share v. Air Properties, Inc., 538 F.2d 279 (9th Cir.), *cert. denied*, 429 U.S. 923 (1976); Hartman v. Scott, 488 F.2d 1215 (8th Cir. 1973); Graci v. United States, 472 F.2d 124 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973). Subsequent to *Eisen*, the Second Circuit developed the "reverse death knell" doctrine, which in certain instances permitted a defendant to appeal a district court order granting class certification. *See* Herbst v. International Tel. & Tel. Co., 495 F.2d 1308, 1312-13 (2d Cir. 1974).

[52] 437 U.S. 463 (1978), *rev'g* Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106 (8th Cir. 1977).

[53] 437 U.S. at 465-66.

[54] *Id.* at 465. The plaintiffs claimed that they had incurred a loss of $2,650 on their investment in the securities of Punta Gorda Isles, Inc. Coopers & Lybrand was the accounting firm that had certified the financial statements in the allegedly defective prospectus and thus, was named as a defendant. *Id.*

[55] *Id.* at 466.

[56] The plaintiffs did not continue to a final judgment on their individual claim. Nor did they seek a discretionary appeal pursuant to 28 U.S.C. § 1292(b) (1976). Rather, they sought to appeal immediately as of right. 437 U.S. at 466.

[57] 550 F.2d 1106, 1112 (8th Cir. 1977).

[58] 437 U.S. at 476-77. Prior to reaching the death knell issue, the Court initially determined that a class certification ruling was nonfinal since it did not constitute "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.'" *Id.* at 467 (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). Moreover, at the outset, the Court found that an order granting or denying class certification did not fall within the collateral order doctrine. *Id.* at 468-69; *see* notes 74-77 and accompanying text *infra*.

tion of th[e] impact [of a certification decision] in the individual case."[59] It is not proper, the Court reasoned, for the judiciary to be required to base appealability on its perception of whether a "plaintiff has adequate incentive to continue" with his individual claim.[60] Additionally, the Court found that it could not approve of the death knell doctrine, since it "authorize[d] *indiscriminate* interlocutory review of decisions made by the trial judge," and thus, would defeat the statutorily established scheme allowing a limited right of appeal from interlocutory orders.[61]

Remaining Methods of Interlocutory Appeal

Both the reasoning and the result of the *Livesay* decision have been strongly criticized.[62] It has been suggested, for example, that the decision effectively leaves remediless the wide range of plaintiffs for whom the denial of class certification is, for all practical purposes, final judgment.[63] Indeed, although there remain several methods of interlocutory appeal other than the death knell doctrine, each of these alternatives has failed to provide adequate assurance of a meaningful right of appeal for aggrieved class-action

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[59] 437 U.S. at 470-71. The Court, although admitting that the class action is to some extent a "special kind of litigation," found that the absence of special provisions regarding appealability in the Federal Rules of Civil Procedure indicated that "[t]he appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation." *Id.* at 470.

[60] *Id.* at 471. In the course of rejecting the death knell rule on the grounds that it required the trial judge to subjectively assess the prospects of the plaintiff continuing the action in his individual capacity, the Court stated that it is the function of the legislature and not the judiciary to permit appeal based on the size of the named plaintiff's claim. *Id.* at 472. In noting that finality is the prerequisite to appealability, the Court held that basing finality on the plaintiff's monetary claim, absent legislative enactment, is "arbitrary," for such a consideration does not examine the other factors influencing the named plaintiff to proceed on his own behalf. *Id.* The Court listed factors such as the plaintiff's "subjective willingness" to continue suit, the intervention of other parties, and the possibility of reversal of the certification denial upon appeal after final judgment. *Id.* at 470-71 n.15.

[61] *Id.* at 474 (emphasis in original). In particular, the Court posited that to permit interlocutory appeal as of right would be to circumvent the restrictions of 28 U.S.C. § 1292(b) (1976), which authorizes discretionary appeal from nonfinal orders only in exceptional circumstances. 437 U.S. at 474-75. The Court termed this possibility of circumventing the procedures of section 1292(b) "[p]erhaps the principal vice of the 'death knell' doctrine." *Id.* at 474.

[62] *See* Cohen, *"Not Dead But Only Sleeping": The Rejection of the Death Knell Doctrine and the Survival of Class Actions Denied Certification*, 59 B.U.L. REV. 257, 265-66, 269, 273, 279-81 (1979); Note, *A Final Tolling of the Death Knell: The Doctrine, Its Demise and Current Alternative Methods of Appeal of Class Certification Orders*, 28 DRAKE L. REV. 668, 683 (1979); Case Comment, *supra* note 49, at 441-43.

[63] *See* Cohen, *supra* note 62, at 267-73; Case Comment, *supra* note 49, at 464-73.

plaintiffs.

1. Statutory Appeal As of Right From Certain Nonfinal Orders

Section 1292(a) of Title 28 of the United States Code enumerates specific interlocutory orders from which appeal may be had as of right.[64] This statutory list of exceptions to the rule of finality is based on the policy of granting an aggrieved party a right of appeal where such a right is necessary to challenge effectively the order and where the order is of serious, and perhaps irreparable consequence.[65] Class action certification determinations, however, are not among the particularized orders named in section 1292(a).[66]

2. Discretionary Appeal

Section 1292(b) provides for the discretionary appeal of interlocutory orders.[67] Before appeal is permitted under this section,

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[64] 28 U.S.C. § 1292(a) (1976); *see* notes 65-66 *infra*.

[65] Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955). *See generally* C. WRIGHT, FEDERAL COURTS § 102 (3d ed. 1976).

[66] Although orders granting or denying class status are not specifically mentioned in section 1292, 28 U.S.C. § 1292 (1976), a split among the circuits has developed as to whether a class certification denial in an action seeking injunctive relief would be immediately appealable under section 1292(a)(1) as an order refusing an injunction. *Compare* Williams v. Wallace Silversmiths, Inc., 566 F.2d 364, 365 (2d Cir. 1977) *and* Williams v. Mumford, 511 F.2d 363, 366 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975) (denial of class certification is not an order refusing an injunction within the meaning of § 1292(a)(1)) *with* Smith v. Merchants & Farmers Bank, 574 F.2d 982, 983 (8th Cir. 1978) *and* Jones v. Diamond, 519 F.2d 1090, 1096-97 (5th Cir. 1975) *and* Price v. Lucky Stores, Inc., 501 F.2d 1177, 1179 (9th Cir. 1974) *and* Yaffe v. Powers, 454 F.2d 1362, 1364-66 (1st Cir. 1972) *and* Brunson v. Board of Trustees, 311 F.2d 107, 108-09 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963) (denial of certification is appealable under § 1292(a)(1)). The Supreme Court's recent decision in Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978), however, indicates that there is no right to an immediate appeal under § 1292(a)(1) from an order denying class certification in an action seeking injunctive relief. In *Gardner*, the Supreme Court held that on the facts presented, interlocutory appeal from such an order was not warranted, since the order was fully reviewable both before and after judgment and, therefore, did not pose a threat of irreparable injury necessary to obtain interlocutory review under the statute. *Id.* at 480-82. *See generally* Case Comment, *supra* note 49; Comment, *Civil Procedure—Interlocutory Appeal of Negative Class Action Determination Denied Under 28 U.S.C. § 1292(a)(1)*—Gardner v. Westinghouse Broadcasting Co., 31 RUTGERS L. REV. 106 (1977). Notably in *Gardner*, a companion case to *Livesay*, the Court did not indicate the basis for obtaining review of a certification denial *prior* to final judgment. Presumably, the Court was alluding to the possibility of obtaining discretionary interlocutory review under section 1292. *See generally* Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 336 n.8 (1980). Generally, however, plaintiffs seeking immediate review of a class certification ruling under this section have not been successful. *See* notes 71-73 and accompanying text *infra*.

[67] 28 U.S.C. § 1292(b) states:

however, both the district court and the appellate court must agree that review is warranted.[68] The statute requires initially that the district court judge certify that the case "involves a controlling question of law" and that "immediate appeal from the order may materially advance the ultimate termination of the litigation."[69] Only then, upon proper application by the aggrieved party, may the court of appeals in its discretion permit the appeal.[70] Although

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> 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: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (1976). *See generally* Note, *Interlocutory Appeals in the Federal Courts Under U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975). By expediting review of orders that in all likelihood would be appealed after final judgment, section 1292(b) "not only save[s] protracted litigation, but with its built-in safeguards, prevent[s] numerous and groundless appeals to . . . appellate courts." H.R. REP. No. 1667, 85th Cong., 2d Sess. 1, 2 (1958).

[68] 28 U.S.C. § 1292(b) (1976). Though the district court may certify an order for interlocutory appeal, the appellate court is not bound to certify the appeal. *See* Katz v. Carte Blanche, 496 F.2d 747, 754 (3d Cir.), *cert. denied*, 419 U.S 885 (1974); Johnson v. Alldredge, 488 F.2d 820, 822-23 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974); Gialde v. Time, Inc., 480 F.2d 1295, 1300 (8th Cir. 1973).

[69] 28 U.S.C. § 1292(b) (1976). The first requirement of the statute is that there must be a controlling question of law. *See* Katz v. Carte Blanche, 496 F.2d 747, 755 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); United States Rubber Co. v. Wright, 359 F.2d 784, 784-85 (9th Cir. 1966) (per curiam); SCM Corp. v. Xerox Corp., 474 F. Supp. 589, 592-94 (D. Conn. 1979). The courts have held, however, that the requirement is not satisfied if the order merely involves a procedural matter that can be accommodated by the judgment. *See* City of Burbank v. General Elec. Co., 329 F.2d 825, 828-29 (9th Cir. 1964); Gottesman v. General Motors Corp., 268 F.2d 194, 196 (2d Cir. 1959); Kroch v. Texas Co., 167 F. Supp. 947, 949 (S.D.N.Y. 1958). Furthermore, there must also be a substantial difference of opinion as to the legal issue involved. *See* Fallon v. United States, 405 F. Supp. 1320, 1322-23 (D. Mont. 1976); *In re* Midwest Milk Monopolization Litigation, 380 F. Supp. 880, 888 (D. Mo. 1974). Finally, the order under review must result in a material advancement of the litigation. *See* United States for Use and Benefit of Joseph Marion Bldg. Corp. v. Dember Constr. Corp., 600 F.2d 11, 11-12 (4th Cir. 1979) (per curiam); Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240, 1246, *rehearing denied*, 504 F.2d 760 (5th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); Hodgson v. United States Slicing Mach. Co., 370 F.2d 565, 567 (3d Cir. 1967). This requirement merely reflects the policy that interlocutory appeal should not delay the litigation. *See* Atlantic City Elec. Co. v. General Elec. Co., 337 F.2d 844, 845 (2d Cir. 1964) (per curiam); *In re* Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975); First Delaware Valley Citizens Television, Inc. v. CBS, Inc., 398 F. Supp. 917, 924-25 (E.D. Pa. 1975).

[70] 28 U.S.C. § 1292(b) (1976). *See* FED. R. APP. P. 5.

at first blush section 1292(b) appears to offer promise to a class action plaintiff who has been denied certification by the trial court, the policies underlying the statute and the prerequisites to appellate review contained therein render it largely ineffective in such context.[71] Indeed, courts generally have been reluctant to construe a class certification determination as involving a controlling question of law[72] or to find that immediate review of such determination would hasten the conclusion of the litigation.[73]

3. Collateral Order Doctrine

The collateral order doctrine is a judicially promulgated device by which a party may have an immediate right of appeal from cer-

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[71] The judiciary's limited utilization of section 1292(b) reflects the legislative intent that certified interlocutory appeals should be restricted to exceptional cases so as not to permit appeal in the ordinary case which would result in congesting the appellate dockets and unduly lengthening the litigation process. *See* Spinetti v. Atlantic Richfield Co., 552 F.2d 927, 929-30 (Temp. Emer. Ct. App. 1977); Fisons Limited v. United States, 458 F.2d 1241, 1248 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972); McNulty v. Borden, Inc., 474 F. Supp. 1111, 1120-21 (E.D. Pa. 1979). *See also* S. REP. No. 2434, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 5256-57, 5260-63.

[72] Since a certification ruling made within the rule 23 guidelines is deemed discretionary and procedural, utilization of section 1292(b) as a basis for interlocutory appeal of certification denials cannot be consistently relied upon. *See* Link v. Mercedes-Benz of North America, Inc., 550 F.2d 860, 862-63 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977); Arth Main Street Drugs v. Beer Distributors of Indiana, Inc., 26 Fed. R. Serv. 2d 91, 92 (N.D. Ind. 1978). *But see* Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 336 n.8 (1980) ("In some cases [a § 1292(b)] appeal would promise substantial savings of time and resources or for other reasons should be viewed hospitably."); Katz v. Carte Blanche Corp., 496 F.2d 747, 755-56 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974) (section 1292(b) should be liberally construed and in some cases may be applicable to review of class certification denials).

[73] *See* Gelman v. Westinghouse Elec. Corp., 556 F.2d 699, 702 (3d Cir. 1977); Lamphere v. Brown Univ., 553 F.2d 714, 718-19 (1st Cir. 1977); *In re* Folding Carton Antitrust Litigation, 75 F.R.D. 727, 738-39 (N.D. Ill. 1977). One reason for the judiciary's reluctance to permit certified interlocutory appeal of class status determinations is that such a ruling may be revised or vacated by the district court during the course of the litigation. *See* Link v. Mercedes-Benz of North America, Inc., 550 F.2d 860, 862-63 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977). In certain instances, the Second Circuit has refused to review class rulings brought under section 1292(b). *See* Shelter Realty Corp. v. Allied Maintenance Corp., 574 F.2d 656, 659-61 (2d Cir. 1978). It appears that only in exceptional cases will the courts permit interlocutory review of the certification denial. *See* Sullivan v. Pacific Indem. Co., 566 F.2d 444, 445-46 (3d Cir. 1977); Katz v. Carte Blanche, 496 F.2d 747, 756 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974); Caceres v. International Air Transport Assoc., 422 F.2d 141, 142-44 (2d Cir. 1970). *See generally* Note, *A Final Tolling of the Death-Knell: The Doctrine, Its Demise and Current Alternative Methods of Appeal of Class Certification Orders*, *supra* note 37, at 685-86 (1979); Note, *Immediate Appealability of Orders Denying Class Certification:* Coopers & Lybrand v. Livesay *and* Gardner v. Westinghouse Broadcasting Co., *supra* note 49, at 467 (1979).

tain district court orders that are not final in the traditional sense, yet are sufficiently final to satisfy the congressional intent of section 1291. In order to be appealable under this exception to the rule of finality, the order in question "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[74] In the case that first recognized the doctrine, for example, immediate appeal was allowed from a district court order denying application of a state statute requiring a deposit of security for costs in a federal diversity suit on the grounds that such determination, distinct from the merits of the controversy, would escape effective review if appeal was forestalled pending final judgment.[75] Although no doubt it can be argued by analogy that an adverse certification decision, because it frequently results in the termination of the litigation, may escape review if a right to immediate appeal is not recognized, it is settled that in such context the collateral order doctrine may not be employed to circumvent the statutory prohibition of interlocutory appeals. Indeed, the Supreme Court in *Livesay*, in addition to rejecting the death knell doctrine, itself an outgrowth of the collateral order doctrine,[76] made it clear that an order denying class certification is not an order separable from and collateral to

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[74] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

[75] In Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 546, the wellspring of the collateral order doctrine, a shareholder derivative suit based on diversity jurisdiction was brought alleging a conspiracy of "mismanagement and fraud" by officers of the corporation. *Id.* at 543-44. The suit was brought in New Jersey, where a state statute was in force requiring the plaintiff in a shareholder derivative suit to post a $125,000 bond and be liable for the defendant's litigation costs, if the plaintiff lost. *Id.* at 544-45. After the district court held that the statute was inapplicable to federal actions, the defendant sought interlocutory review. 7 F.R.D. 352, 356 (D.N.J. 1947). The Court of Appeals for the Third Circuit, after initially finding the order immediately appealable, 170 F.2d 44, 49-50 (3d Cir. 1948), reversed on the merits, *id.* at 58. The Supreme Court granted certiorari and as a preliminary matter to its review of the merits, determined that the order was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Id.* at 546-47. Thus, noting that the statute should be given a "practical rather than a technical construction," the Court held that such an order was immediately reviewable under 28 U.S.C. § 1291. *Id. See generally* Cobbledick v. United States, 309 U.S. 323, 328 (1940); United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926).

[76] The collateral order doctrine provided the impetus for the federal courts to recognize the interlocutory appealability of certain class action orders which conceivably could jeopardize the adjudication of the suit if immediate appealability were denied. *See* Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); notes 44-48 and accompanying text *supra*.

rights asserted in the action within the meaning of this exception.[77]

4. Mandamus

Section 1651(a) of Title 28 permits a federal court to issue "all writs necessary or appropriate in aid of [its] jurisdiction and agreeable to the usages and principles of law."[78] Under this statute it is possible for a court of appeals to issue a writ of mandamus directing the trial court to change its ruling.[79] Petition for the writ may be made despite any allegation of the nonfinality of the order.[80]

The probability of obtaining a writ of mandamus to overturn an adverse certification ruling, however, appears slight. Since the writ is intended to be used only in exceptional circumstances,[81] it

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[77] 437 U.S. at 468-69. In determining that the collateral order doctrine was inapplicable to class certification denials, the *Livesay* Court noted that the certification ruling was "inherently tentative," since rule 23(c)(1) permits the trial court to "alter or amend" the class status prior to adjudication of the merits. *Id.* at 469 & n.11. Thus, the class ruling does not conclusively determine the issue. Secondly, the Court pointed out that the ruling on certification may involve consideration of the merits, since the court may look at such factors as typicality of claims or defenses, the ability of the named plaintiff to fairly and adequately represent the class, and the commonality of law or fact questions. *Id.* These considerations thus preclude the certification ruling from meeting the collateral order doctrine's requirement that the order be completely separate from the merits. *Id.* Finally, the Court noted that since the certification ruling may be effectively reviewed by either the named plaintiff or intervening class members after final judgment, the *Cohen* requirement that the order be effectively unreviewable after final judgment is not met either. *Id.* at 469.

[78] 28 U.S.C. § 1651(a) (1976).

[79] Nixon v. Sirica, 487 F.2d 700, 706-07 (D.C. Cir. 1973); Grace Lines, Inc. v. Motley, 439 F.2d 1028, 1031 (2d Cir. 1971). The purpose of the mandamus writ, when utilized by an appellate court in reviewing a district court's ruling, is to ensure that the district court has not overextended the bounds of its legitimate discretionary power. *See* Kerr v. United States District Court for the Northern District of California, 426 U.S. 394, 402-03 (1976); Will v. United States, 389 U.S. 90, 95-98 (1967); Hospes v. Burmite Division of Whittaker Corp., 420 F. Supp. 806, 809 (S.D. Miss. 1976).

[80] Though "the power to issue [a writ of mandamus] is discretionary and it is sparingly exercised," Parr v. United States, 351 U.S. 513, 520 (1956); State Farm Mut. Auto Ins. Co. v. Scholes, 601 F.2d 1151, 1154 (10th Cir. 1979); *In re* Halkin, 598 F.2d 176, 197-200 (D.C. Cir. 1979), the courts, in some instances, have permitted the writ of mandamus to be used as a basis for interlocutory appeal. *See* United States v. Mellon Bank, N.A., 545 F.2d 869, 872 (3d Cir. 1976); American Fidelity Fire Ins. Co. v. United States District Court for the Northern District of California, 538 F.2d 1371, 1373-76 (9th Cir. 1976); Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 508-17 (1969); Comment, 52 CALIF. L. REV. 1036 (1964). *See generally* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

[81] *See In re* Cessna Aircraft Distrib. Antitrust Litigation, 518 F.2d 213, 215 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975); Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 775 (2d Cir. 1972). As the Supreme Court stated, "[w]e are unwill-

has been held that the writ should be granted only "when there is a usurpation of judicial power or a clear abuse of discretion."[82] Since such a showing rarely is possible in the class action context, the writ of mandamus appears to be yet another ineffective method by which a class-action plaintiff may seek to obtain an immediate appeal from an order denying class certification.[83]

THE PROBLEM OF FINAL JUDGMENT APPEAL

In its opinion in *Livesay*, the Supreme Court seemed unconcerned that the result of its decision would be to preclude an aggrieved party from obtaining immediate appeal of class certification determinations. Rather, the Court expressed confidence that such determinations would obtain "effective review after final judgment."[84] In a line of cases following the *Livesay* case, however, it became increasingly apparent that appeal after final judgment frequently did not provide "effective review" of the lower court order.[85] In particular, the would-be class representative would not be allowed to serve as representative of the class where his individual cause of action became moot subsequent to the denial of class certification.[86] This mootness generally occurred in one of three ways. First, after a denial of class certification by the district court and adjudication of the named plaintiff's individual claim, it became

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ing to utilize [writs of mandamus] as substitutes for appeals . . . [a]s extraordinary remedies, they are reserved for really extraordinary cases." *Ex parte* Fahey, 332 U.S. 258, 260 (1947). Though some courts have felt that the writ should be liberally applied, *see* Parkinson v. April Indus., Inc., 520 F.2d 650, 655 n.5 (2d Cir. 1975); Hackett v. General Host Corp., 455 F.2d 618, 624 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972), there has not been a consistent trend with respect to this matter by the courts. *Compare In re* Attorney General of United States, 596 F.2d 58, 62-65 (2d Cir. 1979); Citibank, N.A. v. Fullam, 580 F.2d 82, 86-87 (3d Cir. 1978); Prop-Jets, Inc. v. Chandler, 575 F.2d 1322, 1324 (10th Cir. 1978); Banc Ohio Corp. v. Fox, 516 F.2d 29, 32-33 (6th Cir. 1975) *with* Whitlock's Estate v. Commissioner of Internal Revenue, 547 F.2d 506, 510 (10th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977); Drew v. Lawrimore, 380 F.2d 479, 483 (4th Cir. 1967); Schillinger v. United States Dep't of Justice, 259 F. Supp. 29, 29 (M.D. Pa. 1966).

[82] Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964).

[83] *See* Bauman v. United States District Court, 557 F.2d 650, 653-62 (9th Cir. 1977); Sperry Rand Corp. v. Larson, 554 F.2d 868, 873-75 (8th Cir. 1977); Arthur Young & Co. v. United States District Court, 549 F.2d 686, 697-98 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977).

[84] 437 U.S. at 469.

[85] *See* notes 91-92 and accompanying text *infra*.

[86] *See generally* Note, Satterwhite v. City of Greenville *and Breathing New Life into the Headless Title VII Class Action*, 32 STAN. L. REV. 743 (1980); Comment, *The Headless Class Action: The Effect of a Named Plaintiff's Pre-Certification Loss of a Personal Stake*, 39 MD. L. REV. 121 (1979).

apparent that the putative class representative's cause of action was without merit.[87] Alternatively, a named plaintiff's individual claim could be mooted because of a judgment in his favor.[88] Finally, the named plaintiff's claim could become moot due to some occurrence distinct from the adjudicatory process.[89]

The problem posed by the mootness of the named plaintiff's claim prior to appeal of the certification denial has not been uniformly handled by the federal judiciary. In some instances, courts have found that the plaintiff could proceed with his appeal from a district court denial of class certification notwithstanding the intervening mootness of his individual claim.[90] The majority of courts, however, have found that such mootness prevents the putative class-action plaintiff from appealing an adverse certification determination, either for lack of an article III case or controversy[91]

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[87] *See* Armour v. City of Anniston, 597 F.2d 46, 48-49 (5th Cir. 1979), *vacated*, 445 U.S. 940 (1980); Goodman v. Schlesinger, 584 F.2d 1325, 1332-33 (4th Cir. 1978); Shipp v. Tennessee Dep't of Employment Security, 581 F.2d 1167, 1171-72 (6th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979); Satterwhite v. City of Greenville, 578 F.2d 987, 992-96 (5th Cir. 1978) (en banc), *vacated*, 445 U.S. 940 (1980); Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 276-77 (10th Cir. 1977); Moss v. Lane Co., 471 F.2d 853, 854-56 (4th Cir. 1973); Note, Satterwhite v. City of Greenville *and Breathing New Life into the Headless Title VII Class Action*, *supra* note 86, at 743; Comment, Goodman v. Schlesinger *and the Headless Class Action*, 60 B.U.L. REV. 348, 348-61 (1980).

[88] *See* McLaughlin v. Hoffman, 547 F.2d 918, 919 (5th Cir. 1977); Nelson v. United Credit Plan, Inc., 77 F.R.D. 54, 56-58 (E.D. La. 1978).

[89] *E.g.*, Geraghty v. United States Parole Comm'n, 579 F.2d 238, 244-46 (3d Cir. 1978), *vacated*, 445 U.S. 388 (1980) (prisoner's challenge of federal parole guidelines mooted by release from prison); Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334, 1336 (9th Cir. 1977) (employee's challenge of workmen's compensation plan mooted by administrative award of relief sought); Napier v. Gertrude, 542 F.2d 825, 826 (10th Cir. 1976), *cert. denied*, 429 U.S. 1049 (1977) (institutionalized juvenile's challenge of state juvenile detention statute mooted by her release from custody); Allen v. Likins, 517 F.2d 532, 533-35 (8th Cir. 1975) (prisoner's challenge of state statute making prisoner's children dependents of the state mooted after her release). In some putative class suits, the defendants have attempted to avert litigation on the merits by tendering payment of the named plaintiff's claim or voluntarily ceasing the alleged wrongful conduct. *See* Susman v. Lincoln American Corp., 587 F.2d 866, 868-69 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980); Roper v. Consurve, Inc., 578 F.2d 1106, 1110-11 (5th Cir. 1978), *aff'd sub nom.* Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980); Banks v. Multi-Family Management, Inc., 554 F.2d 127, 128-29 (4th Cir. 1977); Bradley v. Housing Authority, 512 F.2d 626, 627-29 (8th Cir. 1975) (per curiam); Stokes v. Bonin, 366 F. Supp. 485, 487-88 (E.D. La. 1973).

[90] *See, e.g.*, Jones v. Diamond, 519 F.2d 1090, 1097-98 (5th Cir. 1975); Conover v. Montemuro, 477 F.2d 1073, 1081-82 (3d Cir. 1973); Rivera v. Freeman, 469 F.2d 1159, 1163 (9th Cir. 1972); Frost v. Weinberger, 375 F. Supp. 1312, 1318-19 (E.D.N.Y. 1974), *rev'd on other grounds*, 515 F.2d 57 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976).

[91] *See, e.g.*, Allen v. Likins, 517 F.2d 532, 534-35 (8th Cir. 1975) (per curiam); Bradley v. Housing Auth., 512 F.2d 626, 628-29 (8th Cir. 1975) (per curiam); Locke v. Board of Pub. Instruction, 499 F.2d 359, 366 (5th Cir. 1974); McCleary v. Realty Indus., Inc., 405 F. Supp.

or because the plaintiff was deemed no longer a suitable class representative under rule 23.[92] Whatever the grounds for decision, these cases seriously limited the availability of a meaningful right of appeal from district court orders denying class certification.

Roper AND *Geraghty*: THE SUPREME COURT ADDRESSES THE PROBLEM OF THE MOOTNESS OF THE NAMED PLAINTIFFS' CLAIM AFTER CERTIFICATION DENIAL

Recently, in two companion cases, *Deposit Guaranty National Bank v. Roper*[93] and *United States Parole Commission v. Geraghty*,[94] the Supreme Court addressed for the first time the issue of whether the mootness of the named plaintiffs' individual claim subsequent to the denial of class status would deprive them of the standing requisite to challenge that ruling. An examination of these cases as well as their significance in more fully securing a meaningful right of appeal for the putative class-action plaintiff from adverse certification determinations follows.

Deposit Guaranty National Bank v. Roper: *Named Plaintiffs Held to Have Retained Personal Stake in Controversy Despite Satisfaction of Individual Claims*

The plaintiffs in *Roper* brought an action alleging that they were charged usurious rates on their credit accounts with the defendant.[95] In addition to their individual claims, the plaintiffs sought to assert, in a representative capacity by way of class action, the claims of 90,000 similarly situated credit-card holders.[96] The district court, however, denied the motion to certify the

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128, 130 (E.D. Va. 1975); Huemann v. Board of Education, 320 F. Supp. 623, 624-25 (S.D.N.Y. 1970).

[92] *See, e.g.*, Armour v. City of Anniston, 597 F.2d 46 (5th Cir. 1979), *vacated*, 445 U.S. 940 (1980); Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978), *vacated*, 445 U.S. 940 (1980); *cf.* East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (in attempting to pursue class remedy "careful attention to the requirements of Rule 23 remains indispensable").

[93] 445 U.S. 326 (1980).

[94] 445 U.S. 388 (1980).

[95] 445 U.S. at 327-28. The plaintiffs premised their claim on sections 5197 and 5198 of the National Bank Act, 12 U.S.C. §§ 85, 86 (1976) (amended 1979), alleging that the interest charges on the credit accounts sometimes exceeded the maximum interest rate permitted by law. *Id.* at 328-29.

[96] 445 U.S. at 328.

class.[97] After the plaintiffs' unsuccessful attempt to obtain interlocutory review pursuant to section 1292(b),[98] the defendant tendered as settlement the maximum amount that each named plaintiff could have recovered.[99] Although the plaintiffs did not accept the offer, the district court entered judgment in their favor based on the defendant's tender of payment.[100]

Subsequently, the *Roper* plaintiffs again appealed the denial of class certification.[101] Notwithstanding the defendant's contention that the case was mooted by the district court's entry of judgment for the plaintiffs, the Fifth Circuit Court of Appeals reversed the denial of certification.[102] The Supreme Court subsequently granted certiorari to consider whether the tender or entry of judgment rendered the plaintiffs' claims moot, thus precluding them from seeking review of the certification ruling.[103] Affirming the Fifth Circuit, the Court held that the plaintiffs had a continuing individual interest in the litigation that was sufficient to permit the appeal of the adverse class certification determination.[104]

The *Roper* majority recognized that, as a general rule, federal appellate practice precludes a party from appealing a judgment in his favor that fully satisfies his claim on the merits.[105] The Court

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[97] *Id.* at 329. The district court based its denial of class certification on the finding that the requirements of FED. R. CIV. P. 23(b)(3) were not met because the plaintiffs failed to establish that questions of law and fact common to class members predominated, and that the class suit was not shown to be a "superior method" of adjudicating the claims. *Id.* at 329 & n.2.

[98] Although the district court certified the case for appeal pursuant to 28 U.S.C. § 1292(b) (1976), the Court of Appeals for the Fifth Circuit declined to hear the appeal. 445 U.S. at 329.

[99] 445 U.S. at 329. The amounts tendered to the two named plaintiffs totaled $1312.96, including court costs and interest at the statutory rate. *Id.*

[100] *Id.* at 329-30.

[101] *Id.* at 330.

[102] Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978), *aff'd*, 445 U.S. 326 (1980). In concluding that the named plaintiff's individual claim was not moot, the Fifth Circuit relied on the Supreme Court's decision in United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). 578 F.2d at 1110. In *McDonald*, the Court allowed an unnamed member of the putative class to intervene after the named plaintiff, who had since recovered a judgment on her individual claim, chose not to pursue an appeal from the district court's denial of class certification. 432 U.S. at 393-96.

[103] *See* 440 U.S. 945 (1979).

[104] 445 U.S. at 327.

[105] *Id.* at 333 (citing Public Service Comm'n v. Brashear Freight Lines, Inc., 306 U.S. 204, 206 (1939) (per curiam); New York Tel. Co. v. Maltbie, 291 U.S. 645, 645 (1934); Corning v. Troy Iron & Nail Factory, 56 U.S. (15 How.) 451, 464-66 (1854); 9 J. MOORE, FEDERAL PRACTICE ¶ 203.06 (2d ed. 1976)).

carefully pointed out, however, that this rule does not derive from the jurisdictional limitations of article III, but rather is a self-imposed restraint on the exercise of judicial power. The Court reasoned, therefore, that "[i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III."[106] Applying this rule to the case before it, the majority found that an adverse class certification ruling is by nature collateral to the merits of the controversy[107] and that the requisite personal stake in the controversy was satisfied by the named plaintiffs' "desire to shift part of the costs of litigation" to the putative class members who—if the class were certified and the action successful—ultimately would share in the recovery.[108] Thus, the Court held that the denial of class certification was appealable by the plaintiffs notwithstanding their success on the merits of their individual claims.[109] Indeed, the Court reinforced this conclusion, noting that an important consideration in its refusal to allow interlocutory appeal as of right from adverse class certification rulings was the existence of a meaningful right of appeal after final judgment.[110] Moreover, the majority concluded, to hold otherwise would be to sanction the practice of "buying off" the plaintiffs' in-

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[106] 445 U.S. at 334. It is important to note that the suggestion by the *Roper* Court that certain collateral determinations may be appealable although a party has prevailed on the merits is not prima facie inconsistent with the conclusion of the Court in *Livesay* that a certification determination does not fall within the collateral order exception to the finality rule, *see generally* notes 76-77 and accompanying text *supra*. The distinction, of course, is that the *Roper* Court was addressing the constitutional case or controversy aspect of appealability, whereas the Court in *Livesay* was examining the statutorily imposed finality requirement. *See generally* notes 59-61 and accompanying text *supra*.

[107] 445 U.S. at 334. The Court cited its decision in Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939) as an example of a previous instance where it had "perceived the distinction between the definitive mootness of a case or controversy, which ousts the jurisdiction of the federal courts and requires dismissal of the case, and a judgment in favor of a party at an intermediate stage of litigation, which does not in all cases terminate the right to appeal." 445 U.S. at 335 (footnote omitted).

[108] *Id.* at 336-37. Although it is fundamental in this country that adverse litigants bear their own attorney's fees, non-litigants who will share in a recovery obtained through the efforts of a litigant can be compelled to contribute to the costs of suit under an equitable device known as the common fund doctrine. Boeing Co. v. Van Gemert, 444 U.S. 472, 481-82 (1980); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 125-26 (1885); Trustees v. Greenough, 105 U.S. 527, 532-37 (1882).

[109] 445 U.S. at 340.

[110] *Id.* at 337-38 (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)); *see* notes 52-61 and accompanying text *supra*.

dividual claims in order to prevent appeal of the lower court's certification ruling.[111]

Notably, the decision in *Roper* appears to be a logical extension of prior Supreme Court decisions. The Court has recognized, for example, that a defendant in a suit for injunctive relief ordinarily will not be able to moot the plaintiff's cause of action by voluntary cessation of the allegedly wrongful conduct.[112] In such cases it has been reasoned that remedial conduct will not create an article III obstacle to continuance of an action since absent an adjudication on the merits a "defendant is free to return to his old ways," and, furthermore, there is a public interest in resolving the legality of the questionable practice.[113] Similar considerations, it is submitted, support the decision in *Roper*.

Although the *Roper* Court confined its holding to the narrow facts before it,[114] thus apparently limiting its applicability only to class actions for monetary relief where the defendants have attempted by their own act to render the plaintiff's claim moot, the decision nevertheless represents a significant step by the Court toward ensuring the existence of a meaningful right of appeal from a denial of class certification. Through a liberal interpretation of the

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[111] 445 U.S. at 339. In a strong dissent, Justice Powell disagreed with the majority's application of settled article III principles. *Id.* at 346 (Powell, J., dissenting). In particular, the dissent rejected the majority's conclusion that the named plaintiffs were possessed of the requisite personal stake by their desire to shift part of the litigation costs to members of the putative class. *Id.* at 351 (Powell, J., dissenting). Such a personal stake, Justice Powell observed, was "conspicuously vague" where, in a case such as this, the named plaintiffs' counsel were retained on a contingent fee basis. *Id.* (Powell, J., dissenting). Thus, he concluded that the desire to shift fees was entirely speculative and "wholly irrelevant to the existence of a present controversy" in the absence of an explanation of how the named plaintiffs' "obligation to pay 25% of their recovery to counsel could be reduced if a class is certified and its members become similarly obligated to pay 25% of their recovery." *Id.* (Powell, J., dissenting).

[112] United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953); *accord*, County of Los Angeles v. Davis, 440 U.S. 625, 631-33 (1979); Dunagin v. City of Oxford, 489 F. Supp. 763, 767-68 (N.D. Miss. 1980). *See generally* L. TRIBE, *supra* note 7, at 66-67; *see, e.g.*, Quincy Oil, Inc. v. Federal Energy Administration, 620 F.2d 890, 894-95 (Temp. Emer. Ct. App. 1980); Central Soya Co. v. Consolidated Rail Corp., 614 F.2d 684, 687 n.6 (7th Cir. 1980); Cramer v. Virginia Commonwealth Univ., 486 F. Supp. 187, 192 (E.D. Va. 1980).

[113] United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). *See also* Atlantic Richfield Co. v. Oil, Chemical and Atomic Workers Int'l Union, 447 F.2d 945, 947 (7th Cir. 1971). The *W.T. Grant* Court noted, however, that voluntary cessation may cause mootness where there is a "reasonable expectation" that the wrong will not reoccur. 345 U.S. at 633; *see* United States v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968); United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945).

[114] *See* 445 U.S. at 332-33.

case or controversy requirement of article III, the Supreme Court has held for the first time that an aggrieved party may appeal an adverse certification determination notwithstanding the expiration of his individual claim—the constitutional requisites being satisfied by the plaintiffs' economic interest in distributing the costs of the litigation among the putative class.[115] Significantly by not discussing the basis or merits of the *Roper* plaintiffs' attorneys' fee claim, the Court has suggested that even the mere allegation of a desire to shift fees will be sufficient to satisfy the continuing stake requirement of article III.[116]

United States Parole Commission v. Geraghty: *Named Plaintiff Held Proper Party to Appeal Certification Denial Notwithstanding Intervening Mootness of Individual Claim*

John M. Geraghty, a prisoner in a federal penitentiary, brought an action challenging the validity of federal parole release guidelines.[117] Prior to trial, Geraghty sought to have certified a class of plaintiffs composed of "all federal prisoners who are or who will become eligible for release on parole."[118] The district court denied the certification motion and granted the defendant's summary judgment request.[119] While his appeal from these rulings was pending in the Third Circuit Court of Appeals, the plaintiff was released from prison.[120] The defendants then moved to dismiss Geraghty's appeal as moot.[121] The Third Circuit, finding that the claim was not moot, entertained the plaintiff's appeal from the adverse certification determination and reversed the district court

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[115] *Id.* at 340.

[116] *See* note 111 and accompanying text *supra.*

[117] 445 U.S. at 390 (1980). Geraghty had been convicted of "conspiracy to commit extortion . . . and of making false material declarations to a grand jury." *Id.* at 391-92. After two unsuccessful applications for parole, he brought an action alleging that United States Parole Board Release Guidelines, 28 C.F.R. § 2.20 (1979), were violative of the United States Constitution and the Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-4218 (1976). 445 U.S. at 393.

[118] 445 U.S. at 393.

[119] *Id.* The district court, which regarded Geraghty's suit as a petition for a writ of habeas corpus, found certification "neither necessary nor appropriate." *Id.* Moreover, reaching the merits of the case, the district court upheld the guidelines as valid. *Id.* at 393-94.

[120] *Id.* at 394. The plaintiff's release was mandatory, since he had served his full sentence less time for which he had earned "good time" credits. *Id.*

[121] Geraghty v. United States Parole Comm'n, 579 F.2d 238, 244 (3d Cir. 1978), *vacated and remanded*, 445 U.S. 388 (1980).

ruling.[122] The Supreme Court granted certiorari to consider whether a certification denial could properly be appealed notwithstanding that the individual claim of the named plaintiff had become moot, and ultimately held that such review would not contravene article III.[123]

Writing for the Court, Justice Blackmun acknowledged the importance of the existence of a meaningful right of final judgment appeal.[124] As it had done in *Roper*, the Court found that a live controversy existed as to the plaintiff's desire to achieve class certification notwithstanding that Geraghty's individual claim had become moot.[125] Indeed, the majority noted, the class suit presents two legal controversies—the issue on the merits and the named

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[122] 579 F.2d at 252-54. Addressing the threshold question of whether the plaintiff could appeal the denial of certification, the Third Circuit reasoned that since expiration of Geraghty's individual claim would not have rendered the controversy moot if a class had been certified at the trial level before his release, "an erroneous denial of a class certification should not lead to an opposite result." *See* 445 U.S. at 394. Thus, the court of appeals held that subsequent certification of such a class would relate back to the time of the district court denial, thereby preserving jurisdiction. *Id.*

[123] 445 U.S. at 390, 407.

[124] *Id.* at 400.

[125] *Id.* at 404. In support of its conclusion that the case was not moot, the Court surveyed other cases in which it had occasion to consider the "personal stake" requirement of article III in the class action context. *Id.* at 397-401. First the Court observed that in Sosna v. Iowa, 419 U.S. 393 (1975), it had held that once a class had been certified, the suit will continue notwithstanding the subsequent mootness of the named plaintiff's individual claim, *id.* at 400. 445 U.S. at 397. Thus, the *Sosna* decision made clear "that an Art. III case or controversy 'may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.' " 445 U.S. at 397-98 (quoting Sosna v. Iowa, 419 U.S. at 402 (footnote omitted)). Second, citing Gerstein v. Pugh, 420 U.S. 103 (1975), the Court stated that the timing of the certification should not be crucial. 445 U.S. at 398. In *Gerstein*, the Court permitted an appeal on the merits in a class action challenging a state's pretrial detention procedures notwithstanding that the detention had ended prior to a final adjudication on the merits. Noting that the nature of the detention was such that it could end before an adjudication on the merits, or before any named plaintiff could obtain class certification, the Court held that the appeal was not moot under the "capable of repetition, yet evading review" exception to the finality doctrine. 420 U.S. at 110 n.11. Thus under this exception, it is possible for a class action to continue despite the fact that the named plaintiff's claim became moot prior to certification.

Finally, the majority cited United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), where the Court held that a putative class member could intervene after the named plaintiff's personal claim became moot, by virtue of a judgment on the merits. 432 U.S. at 393-95; *see* 445 U.S. at 400. Concluding that these cases and the Court's decision earlier that day in *Roper* demonstrated the flexible character of the article III mootness doctrine, 445 U.S. at 400, the Court determined that Geraghty retained a sufficient personal stake in class certification to appeal an adverse certification determination notwithstanding the mootness of his individual claim on the merits. *Id.* at 407.

plaintiff's right to represent the class. Since the certification denial remained a "concrete, sharply presented issue," the Court held that the case or controversy requirement of article III was satisfied.[126]

Although the Supreme Court decision in *Geraghty* yielded the same result achieved in *Roper*—the named plaintiff was allowed to appeal the denial of class certification notwithstanding that his individual claim subsequently became moot—the *Geraghty* holding appears far more pervasive than *Roper*. Notably, the majority opinion in *Geraghty* spoke in much broader terms than had been used in *Roper*. Rather than insisting on the importance of the facts before it, the Court seemingly established a general right of appeal from adverse class certification denials despite any allegations of the mootness of an individual's personal claim.[127] In addition, the *Geraghty* decision extended the flexible reading of article III to suits for equitable relief as well as for damages.[128] More importantly, however, the Court declined to limit its earlier decision to instances where mootness resulted from affirmative action on the part of the defendant. In *Geraghty*, the Supreme Court found no difference between mootness caused by "expiration" of the individual claim and a favorable judgment-induced mootness, ruling that "Geraghty's 'personal stake' in the outcome of the litigation is, in a practical sense, no different than that of the putative class representative in *Roper*."[129] The Court's express refusal to distinguish between the continuing interests of the named plaintiffs in *Roper* and *Geraghty* is perhaps the most significant aspect of the decision. In *Roper*, the Court found a continuing individual interest satisfying the article III case or controversy requirement in the named plaintiff's desire to shift attorney's fees to the other mem-

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[126] 445 U.S. at 403-04. As in *Roper*, Justice Powell authored a lengthy dissenting opinion. *Id.* at 409-424 (Powell, J., dissenting); *see* note 113 *supra*. Analyzing prior decisions, the dissent challenged the correctness of both the majority decision that the article III personal stake requirement be applied flexibly, 445 U.S. at 409-19 (Powell, J., dissenting), and the Court's specific holding that Geraghty satisfied that requirement, *id.* at 419-24 (Powell, J., dissenting).

[127] In *Roper*, the Court suggested that mootness was avoided because the continuing economic interest possessed by the plaintiffs—the desire to shift attorney's fees—kept alive the controversy on the merits. 445 U.S. at 332-33. In *Geraghty*, on the other hand, the Court stated that the plaintiff's interest in the merits was distinct and separable from his interest in obtaining class certification, and that the mootness of the claim did not deprive him of the personal stake requisite to appealing the denial of certification. 445 U.S. at 402.

[128] *See* 445 U.S. at 393.

[129] *Id.* at 401.

bers of the class.[130] A similar economic interest, however, was not present in *Geraghty*. Rather, in the latter case, the Court analogized the would-be representative's interest to a "private attorney general's" interest in achieving class certification.[131]

Previously, the Court had suggested that where the named plaintiff's claim expired prior to certification, resort to the fiction of relation back might be one way in which to find the personal stake requisite to pursuing class certification.[132] The employment of this fiction, the Court had cautioned, was appropriate only where the issue was capable of repetition but evading review.[133] Al-

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[130] *Id.* at 336.

[131] *Id.* at 403.

[132] In Sosna v. Iowa, 419 U.S. 393 (1975), the Court held that where the plaintiff's individual claim became moot subsequent to certification, the class claim could be continued provided that the named plaintiff's claim was viable at the time the complaint was filed and at the time of certification, and also that at every stage thereafter a live controversy existed between a member of the class and a named defendant. *Id.* at 402. With respect to the requirement that the named plaintiff possess a viable claim at the time of certification, however, the Court qualified its statement in a footnote stating:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Id. at n.11.

[133] *Id.* at 402 n.11. The possibility that the validity of the Parole Release Guidelines might evade review was not present in *Geraghty* since the plaintiff's attorney candidly conceded that were the Court to declare the case moot, he would simply reinstitute a similar action on behalf of other parties whose interests would outlast the litigation. 445 U.S. at 414 n.7 (Powell, J., dissenting).

The potential that an issue might recur and yet evade review, which the *Sosna* Court indicated might justify a fictional relation back of the grant of certification, has been employed frequently by the Court to determine whether the continued prosecution of a certified class action was precluded by the intervening mootness of the named plaintiff's cause of action. In *Sosna*, the Court held that where the issue was capable of repetition, yet evading review with respect to any member of the certified class, a justiciable controversy was presented, and thereby justified the continued prosecution of the action notwithstanding the expiration of the putative class representative's claim. *Id.* at 401-02. Subsequently, in Board of School Commissioners of Indianapolis v. Jacobs, 420 U.S. 128 (1975) (per curiam), the Court appeared to elevate the "capable of repetition, yet evading review" element to the status of an article III requirement to continuation where the claims of the named plaintiff had become moot. Indeed, the *Jacobs* Court stated:

> The case is therefore moot unless it was duly certified as a class action pursuant to Fed. Rule Civ. Proc. 23, a controversy still exists between petitioners and the present members of the class, *and the issue in controversy is such that it is capable of repetition yet evading review.*

Id. at 129 (emphasis added). In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), however, the Court retreated from the position seemingly espoused in *Jacobs*, stating that

though noting the existence of this fiction, however, the *Geraghty* Court did not invoke such reasoning.[134] Rather, it based its finding on the plaintiff's continuing interest in obtaining class certification.[135] The wellspring of this interest, however, is nowhere discussed. Indeed, on close inspection, it appears that the Court acknowledged the existence of a right to obtain class certification which survives the expiration of the individual claim that originally served as the predicate under rule 23 for the institution of the class action.[136] The practical import of such a rule, at least with respect to certification appeals, is to render virtually indefeasible a valid article III interest present at the inception of the action and to allow a named plaintiff to bootstrap his way into an appeal of the certification denial.

CLASS-CERTIFICATION APPEALS AFTER *Roper* AND *Geraghty*

Although the Court has apparently made the relation back fiction absolutely applicable for the purpose of satisfying the case or controversy requirement,[137] it should not be presumed that the liberalization of the constitutional standard will facilitate the appeal of class certification rulings in all cases. For parties aggrieved by such rulings, the conjunctive requisite to appealability—final-

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neither *Sosna* nor *Jacobs* held or even intimated that where the named plaintiff's claim had become moot, the existence of an issue capable of repetition yet evading review was the absolute prerequisite to the continuation of the class suit. *Id.* at 754. More recently, the Court has reiterated that position, noting that the "capable of repetition yet evading review" element "was one factor to be considered in evaluating the adequacy of the adversary relationship in this Court." Kremens v. Bartley, 431 U.S. 119, 133 (1977).

[134] *See* 445 U.S. at 398-405.

[135] *Id.* at 402-04.

[136] It is beyond dispute that the statutory prerequisites to certification contained in rule 23(a) require that the substantive issues presented and the claims and defenses to be raised by the named plaintiff "typify" those of the absent class members. Indeed, rule 23(a)(2) imposes the requirement that common questions of law or fact exist, and subsection (a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(2), (3). It is submitted that it is theoretically unsound to suggest that, wholly apart from any substantive claim giving rise to such commonality and in the absence of the exceptional circumstances found in *Sosna, see* note 132 *supra*, a party possesses the right *to seek to qualify a class* to pursue a remedy to which he is no longer entitled. Moreover, Justice Powell observed in his dissent in *Geraghty* that by granting standing to a party who concededly has no substantive interest in the controversy, the decision portended a relaxation of the Court's previously strict stance regarding privately litigated "public actions." *See* 445 U.S. at 421-22 (Powell, J., dissenting). *See generally* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974).

[137] *See* note 9 and accompanying text *supra*.

ity—remains a difficult hurdle to surmount.[138]

At least with respect to the typical consumer class action, one result of the relaxation of the article III barrier to appealability is sure to be the refusal of the putative class defendant to settle with the named plaintiffs after certification has been denied. Clearly, in *Roper*, it was just such an attempt to satisfy the claims of the putative class action representative, under the guise of a nuisance settlement, which when judicially enforced gave rise to the plaintiffs' right to appeal the certification ruling. In the absence of the defendant's tender—the very act which mooted the plaintiffs' individual claims—there is no doubt after *Livesay* that the plaintiffs would have been precluded from appealing the certification denial as of right for want of a final judgment.[139] By holding, however, that an attempted "buy out" of the named plaintiffs will not deprive them of the standing to contest the validity of a class certification denial[140] and, moreover, will provide the finality requisite to such appeal, the Court as a practical matter has reversed the operation of the *in terrorem* effect of a class-action judgment.[141] Where previously it appeared to be in the defendant's interest to attempt to satisfy the individual claim of the named plaintiff so as to deprive him of the capacity[142] as well as the incentive to appeal a

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[138] *See* note 3 and accompanying text *supra*. Notably, the Court in *Roper* gave some indication that attempts to obtain review of certification denials pursuant to section 1292(b) should be viewed more favorably. *See* 445 U.S. at 336 n.8.

[139] *See* notes 59-61 and accompanying text *supra*.

[140] 445 U.S. at 339-40.

[141] The grant of class certification, which raises the specter of ruinous liability, often operates to coerce the defendants into settlement notwithstanding their probability of success on the merits. *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). In this context, Professor Handler has called the class suit a "form of legalized blackmail." Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971). The Second Circuit, recognizing that "these cases are settled even though the validity of the plaintiff's claims are doubtful," devised a reverse death knell doctrine, permitting class-action defendants to appeal as of right the grant of class certification. Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308, 1312-13 (2d Cir. 1974).

[142] Where the named plaintiff's claim has become moot by virtue of the defendant's tender of payment or cessation of wrongful conduct prior to certification, some courts have refused appellate review of the class certification denial. *See* Banks v. Multi-Family Mgmt., Inc., 554 F.2d 127, 128-29 (4th Cir. 1977); Bradley v. Housing Auth., 512 F.2d 626, 627-29 (8th Cir. 1975). In *Bradley*, for instance, although the Eighth Circuit noted that prior to certification "the defendants deliberately mooted the issue as to the named plaintiffs or intervenors to avoid judicial review," the court still dismissed the suit on mootness grounds. *Id.* at 628-29. Indeed, since the Supreme Court had stated that "it is only a 'properly certi-

class certification denial, after *Roper* a class defendant's best tactical posture apparently is to do nothing, thereby forcing the named plaintiff to litigate his individual claim on the merits in order to obtain a final judgment from which appeal of the certification ruling is possible.[143] Indeed, class action defendants now have everything to lose and nothing to gain by attempting to reach an accord with the named plaintiffs subsequent to the denial of class status.

Clearly, however, not all putative class representatives will be unable to satisfy the finality requirement.[144] By not discussing the issue, however, *Geraghty* implicitly suggests that where a nonjudicial occurrence is the cause of the mootness of the plaintiff's individual claim, the resulting dismissal will constitute the requisite final judgment from which the certification appeal may be taken.[145] In such instance, of course, the relaxation of the strictures of arti-

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fied' class that may succeed to the adversary position of a named representative whose claim becomes moot," Kremens v. Bartley, 431 U.S. 119, 132-33 (1977); *see* Vun Cannon v. Breed, 565 F.2d 1096, 1098-1101 (9th Cir. 1977); Winokur v. Bell Fed. Sav. & Loan Ass'n, 560 F.2d 271, 276-77 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978), prior to *Roper* and *Geraghty*, a class-action defendant had a tenable expectation that by mooting the named plaintiffs' claims he could prevent them from obtaining class certification and thus possibly avoid class suit.

[143] *See generally* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

[144] The entry of judgment in favor of the putative class adversary will generally satisfy the *Livesay* finality requirement for purposes of appellate review of the certification denial. *See, e.g.*, Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 274-75 (10th Cir. 1977); Long v. Sapp, 502 F.2d 34, 36, 42-43 (5th Cir. 1974); Moss v. Lane Co., 471 F.2d 853, 854-55 (4th Cir. 1973).

[145] Nowhere in the *Geraghty* opinion is the finality requirement of 28 U.S.C. § 1291 (1976) even mentioned. In contrast, where the dismissal is the result of the plaintiff's actions, such as a failure to prosecute, the courts have refused to permit appeal of the certification denial, holding that such a dismissal is an attempt by the plaintiff to circumvent the policy of 28 U.S.C. § 1291 (1976). In Huey v. Teledyne, 608 F.2d 1234 (9th Cir. 1979), for example, the plaintiff made no appearance at trial after the district court denied his motion for class certification. The district court dismissed the case for want of prosecution and, thereafter, the plaintiff appealed the denial of class certification under section 1291. *Id.* at 1236. Citing to *Livesay*, the Ninth Circuit stated that "[j]ust as the policy against piecemeal appeals precludes the appeal of an order denying class certification—even where that may sound the 'death knell' of an action—so it precludes review of that order from a proper dismissal for failure to prosecute which results from that order." *Id.* at 1239. The court further noted that when the plaintiff fails to prosecute the suit after the denial of class certification, "that ruling does not merge in the final judgment for purposes of appellate review." *Id.* at 1240. *See also* Marshall v. Sielaff, 492 F.2d 917, 918 (3d Cir. 1974). Recently, in Bowe v. First of Denver Mortgage Investors, 613 F.2d 798 (10th Cir.), *cert. denied*, 100 S. Ct. 2989 (1980), the Tenth Circuit reaffirmed *Huey*, noting that "[t]he Supreme Court's decision in [*Livesay*] was a positive one which does not tolerate creation of a loophole by the simple device of allowing the claim of a class representative to be dismissed for lack of prosecution." 613 F.2d at 801.

cle III wrought by the Supreme Court is of profound significance to the named plaintiff. Certainly where finality does not constitute a significant impediment to appealability, and where the plaintiff has at least a facially tenable individual claim at the time the action was commenced, the decision in *Geraghty* will permit him to seek appellate review of the certification ruling notwithstanding the status of his individual claim at the time finality is established.

A more difficult problem, however, is presented by a situation in which finality is clearly not an obstacle to appealability—where prior to certification the plaintiff's claim is mooted by an adverse judgment on the merits.[146] While neither *Roper* nor *Geraghty* addressed this situation, it would appear that the virtual emasculation of the case or controversy requirement would apply without regard to the cause of the mootness of the plaintiff's claim and hence would not, of itself, preclude appealability. As the Supreme Court has noted, however, the disposition of the mootness issue does not end the inquiry, but rather shifts its focus to whether the putative class representative satisfies the stringent requirements of rule 23.[147] In this regard, it is settled that the determination of

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[146] The effect upon a putative class suit where the named plaintiff's individual claim is deemed meritless has not been resolved uniformly by the federal courts. The Fifth Circuit, for instance, has held that in such circumstances the suit will be dismissed unless the named plaintiff had a sufficient nexus with the class so as to satisfy rule 23(a)(3). *See* Armour v. City of Anniston, 597 F.2d 46, 48-50 (5th Cir. 1979), *vacated*, 445 U.S. 940 (1980); Camper v. Calumet Petrochemicals Inc., 584 F.2d 70, 71-72 (5th Cir. 1978); Satterwhite v. City of Greenville, 578 F.2d 987, 990-91 (5th Cir. 1978) (en banc), *vacated*, 445 U.S. 940 (1980). The necessity that the plaintiff have a "nexus" with the putative class was derived from East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977), where the Supreme Court stated that "[t]he mere fact that a complaint alleges [wrongful conduct] does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that [conduct]." *Id.* at 405-06. The Fourth Circuit and some lower courts, however, have permitted class suits to continue, notwithstanding a determination that the plaintiff's claim lacked merit. *See* Goodman v. Schlesinger, 584 F.2d 1325, 1332-33 (4th Cir. 1978); Cox v. Babcock & Wilcox Co., 471 F.2d 13, 16 (4th Cir. 1972); La Reau v. Manson, 383 F. Supp. 214, 218-19 (D. Conn. 1974); Taylor v. Springmeier Shipping Co., 15 Fed. R. Serv. 2d 1233, 1234 (W.D. Tenn. 1971). In *Goodman*, for example, the court deemed the named plaintiff's claim meritless, but in light of evidence that a class controversy might exist, remanded the suit to the district court in order to permit a putative class member to intervene and argue the certification issue. 584 F.2d at 1331-33. *See generally* Comment, *The Headless Class Action: The Effect of a Named Plaintiff's Pre-Certification Loss of A Personal Stake, supra* note 86, at 151-63; Note, Satterwhite v. City of Greenvile *and Breathing New Life into the Headless Title VII Class Action*, 32 STAN. L. REV. 743 (1980). Notably, the Supreme Court has vacated *Armour* and *Satterwhite* for further consideration by the Court of Appeals. Satterwhite v. City of Greenville, 445 U.S. 940 (1980); Armour v. City of Anniston, 445 U.S. 940 (1980).

[147] *See* United States Parole Comm'n v. Geraghty, 445 U.S. at 405-07 (citing Sosna v.

whether the named plaintiff may adequately represent the class where class status is not granted at the outset of the litigation "is appropriately made on the full record, including the facts developed at the trial of the plaintiff's individual claims."[148] It is submitted that where the adjudication that the would-be representative's claims were meritless reflects his lack of nexus to the injured class and not the validity of the cause of action shared by the class, the adverse individual judgment militates against allowing the putative class representative to contest the denial of certification.[149] On the other hand, the expiration of the plaintiff's individual claim for reasons other than an adverse determination on the merits, for example a nonjudicial occurrence, seemingly should not indicate—at least for the purpose of appealing the certification denial—the undesirability of his continued representation of the class.[150]

Iowa, 419 U.S. at 403).

[148] East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 406 n.12 (1977). In focusing on the requirement of fair and adequate representation, *Rodriguez* recognized that in some civil cases a named plaintiff may represent the putative class notwithstanding the lack of merit in his individual claim. *Id.*

Proper representation is a crucial element to the class action, and the courts have stressed that the representative's interests must coalesce with those of the absent class members. *See* Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459, 463-64 (10th Cir. 1974); Schy v. Susquehanna Corp., 419 F.2d 1112, 1116-17 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970). As one court has stated, "[b]ecause members of the class are bound—even though they may not actually be aware of the proceedings—by the judgment in a Rule 23 action unless they affirmatively exercise their option to be excluded, the requirement of adequate representation must be stringently applied." Alameda Oil Co. v. Ideal Basic Indus., Inc., 326 F. Supp. 98, 103 (D. Colo. 1971). *See* Hansberry v. Lee, 311 U.S. 32, 44-45 (1940); Comment, *The Class Representative: The Problem of the Absent Plaintiffs*, 68 NW. U.L. REV. 1133 (1974).

[149] Rule 23(a)'s requirement that the class representative have an interest common with the class does not appear to be met when the named plaintiff's claim is rendered meritless and there is no nexus between the plaintiff and the class. *See* Shipp v. Tenn. Dep't of Employment Security, 581 F.2d 1167, 1172 (6th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979); Satterwhite v. City of Greenville, 578 F.2d 987, 992 (5th Cir. 1978) (en banc), *vacated*, 445 U.S. 940 (1980); Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973); Moss v. Lane Co., 471 F.2d 853, 855-56 (4th Cir. 1973). Furthermore, the ability of the named plaintiff to represent the putative class is critical to appellate review, for in its absence the court "need not reach the issue whether the plaintiff has the requisite standing to sue." Satterwhite v. City of Greenville, 578 F.2d 987, 991 (5th Cir. 1978) (en banc), *vacated*, 445 U.S. 940 (1980).

[150] Where the named plaintiff's claim has expired for reasons other than an adjudication on the merits, it appears that the named plaintiff has a sufficient typicality of interest with the putative class so as to be capable of appealing the certification denial. *See* United States Parole Comm'n v. Geraghty, 445 U.S. at 404-07; Sosna v. Iowa, 419 U.S. at 402-03; McGill v. Parsons, 532 F.2d 484, 488-89 (5th Cir. 1976); Conover v. Montemuro, 477 F.2d 1073, 1081-82 (3d Cir. 1973); Rivera v. Freeman, 469 F.2d 1159, 1163 (9th Cir. 1972).

CONCLUSION

Despite its coercive potential, the class action frequently constitutes the only viable means to redress injuries which, although suffered by a large number of persons, when measured individually against the time, effort, and expense of the litigation would prove economically insubstantial. In large part because the in terrorem effect of a class judgment often induces a defendant to settle the action, even where he might reasonably expect to prevail on the merits, judicial aversion to the class suit is often manifest. Indeed, one notable example of this has been the strict application of the final decision rule of section 1291, mandated by the Supreme Court in *Livesay*, to prevent interlocutory review of class certification denials. Nevertheless, because finality continues to present a formidable obstacle to the maintenance of class suits, recent Supreme Court decisions allowing appeal of certification rulings by parties whose individual claims have become moot evince a judicial unwillingness to erect further barriers to the maintenance of class suits. While these decisions, by focusing on the constitutional aspect of appealability, have left *Livesay* unaffected, they nonetheless appear to indicate that *Livesay* is the high watermark of the pro-class defendant decisional law and, indeed, may portend an eventual retreat from that decision. Until such time, however, the finality requirement continues to be a pervasive impediment to appellate review. *Roper* and *Geraghty*, therefore, can be expected to advance only marginally the realization of a meaningful right of review for parties aggrieved by an adverse class certification ruling.

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