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Martin J. Kane

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FEDERAL PRACTICE AND PROCEDURE—REMOVAL JURISDICTION—DIVERSITY CASE REMOVED TO FEDERAL COURT UNDER SECTION 1441 NEED NOT BE REMANDED TO A STATE COURT DESPITE A PRIOR DETERMINATION IN A PARALLEL CASE THAT THE SAME CLAIM COULD NOT SATISFY THE AMOUNT IN CONTROVERSY REQUIREMENT OF SECTION 1332.

Albright v. R.J. Reynolds Tobacco Co. (1976)

In 1965, plaintiff commenced three actions against the R.J. Reynolds Tobacco Company, claiming that the company's products caused him to develop lung cancer and related diseases.[1] Two of the actions, one in tort and the other in assumpsit, were initiated in the Pennsylvania state courts by filing praecipes for writs of summons.[2] Subsequently, plaintiff instituted a third action, based on identical claims, in the United States District Court for the Western District of Pennsylvania, alleging diversity of citizenship and demanding relief in excess of the jurisdictional minimum of $10,000.[3] The district court dismissed because, *inter alia*, it found as a matter of law that the evidence could not support a claim in excess of the jurisdictional

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1. Albright v. R.J. Reynolds Tobacco Co., 531 F.2d 132 (3d Cir.) *cert. denied*, 426 U.S. 907 (1976). Although Mr. Albright died in 1965 the suits were carried on by substituted plaintiffs. *Id.* at 133. This litigation can be traced back to 1962 when plaintiff brought suit against the city of Pittsburgh for injuries received when his automobile struck an excavation maintained by the city. Plaintiff alleged various traumatic injuries, including contusions, shock, and lung cancer. Albright v. R.J. Reynolds Tobacco Co., 350 F. Supp. 341, 343 (W.D. Pa. 1972). Although the actions in this case are separate, the claims for relief are based upon the same carcinoma of the lung. *Id.* at 344.

2. 531 F.2d at 133. The actions were commenced pursuant to PA. R. CIV. P. 1007, which states: "An action may be commenced by filing with the prothonotary
(1) a praecipe for a writ of summons,
(2) a complaint, or
(3) an agreement for an amicable action.
Id. At the time this action was commenced, Pennsylvania practice did not permit the joinder of claims in tort and assumpsit. PA. R. CIV. P. 1020 (1947) (amended in 1971 to permit such joinder); *see* 1 GOODRICH-AMRAM, STANDARD PENNSYLVANIA PRACTICE §1020(a)(1) (2d ed. 1962).

3. 531 F.2d at 134. Plaintiff alleged jurisdiction based upon the general diversity statute, which states in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
> (1) citizens of different States;
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. §1332 (1970).

amount.[4] The United States Court of Appeals for the Third Circuit affirmed the dismissal on the jurisdictional ground.[5]

In 1974, after the statute of limitations had run on each of his claims, plaintiff had the writs reissued, again alleging damages in excess of $10,000.[6] Defendant subsequently removed the proceedings to the United States District Court for the Western District of Pennsylvania.[7] Several days later, after filing complaints in the state court reducing his prayer for relief to $3,000,[8] plaintiff moved for remand to the state court, asserting that the federal court lacked subject matter jurisdiction because the same court had previously determined that the jurisdictional minimum was not in controversy, and because the subsequently filed complaint demanded less than $10,000.[9] Defendant opposed the motion to remand and moved for summary judgment asserting, *inter alia,* that the statute of limitations had run.[10]

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4. 350 F. Supp. at 353. In addition, the court found that summary judgment should be granted on the ground that the action was barred by the settlement of the prior action against a joint tortfeasor. *Id.* at 352–53. The settlement was with the city of Pittsburgh, and stemmed from the injuries plaintiff received from the traffic mishap. *Id.*; *see* note 1 *supra.*

5. Albright v. R.J. Reynolds Tobacco Co., 485 F.2d 678 (3d Cir.), *as modified,* Civ. No. 72–2105 (3d Cir. Nov. 23, 1973), *cert. denied,* 416 U.S. 951 (1974).

6. 531 F.2d at 134. Under Pennsylvania practice, in order to keep an action "alive," the plaintiff must have a summons served on the defendant within 30 days or have his original praecipes reissued within the period of the applicable statute of limitations. PA. R. CIV. P. 1009; *see* Yefco v. Ochs, 437 Pa. 233, 263 A.2d 416 (1970). The statutes of limitations on the tort and assumpsit claims are two and four years respectively. PA. STAT. ANN. tit. 12, § 34 (Purdon 1953); PA. STAT. ANN. tit 12A, § 2–725 (Purdon 1954). Plaintiff had the writs reissued initially in 1967. Therefore, he had until 1969 to reissue the writ in trespass and until 1971 to reissue the writ in assumpsit. However, he took no further action until 1974. 531 F.2d at 137.

One may wonder why the plaintiff persisted when the statutes of limitations had so clearly expired. From the dismissal of the initial litigation from federal court, plaintiff was convinced that the judge was biased against him. *Id.* at 140 n.7 (Hunter, J., dissenting). Pursuant to rule 35(E) of the Rules for the Western District of Pennsylvania, Judge Gerald Weber was assigned to the removed suit as well as the original one. *Id.* at 136 n.7. Plaintiff sought a writ of mandamus to remove Judge Weber, which was denied first by the Third Circuit, Civ. No. 74–2084 (3d Cir. Oct. 31, 1974), and then by the Supreme Court, Civ. No. 74–723 (U.S. Jan. 27, 1975). 531 F.2d at 140 n.7 (Hunter, J., dissenting).

7. 531 F.2d at 134. Defendant removed pursuant to section 1441 of the Judicial Code, which states:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
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> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441 (1970).

8. 531 F.2d at 134.

9. *Id.*

10. *Id.*; *see* note 6 *supra.*

The district court denied plaintiff's motion to remand and dismissed the claim as barred by the statute of limitations.[11] On appeal, the United States Court of Appeals for the Third Circuit affirmed,[12] *holding* that the prior determination of lack of jurisdiction due to insufficient amount in controversy did not preclude the exercise of jurisdiction upon a subsequent and admittedly identical action removed from state court. *Albright v. R.J. Reynolds Tobacco Co.*, 531 F.2d 132 (3d Cir.), *cert. denied*, 426 U.S. 907 (1976).

The Constitution of the United States does not specifically provide for the removal of suits from state to federal courts.[13] Removal is a congressionally created right, originally promulgated in the Judiciary Act of 1789[14] and currently found in section 1441 of the Judicial Code.[15] In general, as with all grants of federal jurisdiction, the courts have strictly construed the removal statutes to effectuate the congressional goal of limiting the caseload of the federal courts.[16] Accordingly, the party invoking federal jurisdiction must allege its existence in his pleadings and, if challenged, must support his allegations by competent proof.[17] In the removal context, this burden is placed on the defendant — the party invoking the district court's jurisdiction.[18]

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11. 531 F.2d at 134.

12. Judge Aldisert wrote the court's opinion, in which Judge Garth joined. Judge Hunter dissented.

13. 1A MOORE'S FEDERAL PRACTICE ¶ 0.156[1], at 13 (2d ed. 1974) [hereinafter cited as MOORE]. Article III of the Constitution states that federal jurisdiction shall extend to certain enumerated cases. U.S. CONST. art. III, § 2. This does not imply that cases over which Congress can give the inferior federal courts jurisdiction must be commenced in those courts. Following this line of reasoning, Congress granted removal jurisdiction to the federal district courts. MOORE, *supra*, ¶ 0.156[1], at 13. The constitutionality of Congress' exercise of authority in granting removal jurisdiction has been undisputed for some time. *See* Gaines v. Fuentes, 92 U.S. 10 (1876).

14. Ch. 20, § 12, 1 Stat. 73 (1789).

15. 28 U.S.C. § 1441 (1970). For the text of the general removal statute, *see* note 3 *supra*. For a discussion of some of the specialized removal statutes not applicable to the present case, *see* 1A MOORE, *supra* note 13, ¶ 0.155.

16. 1A MOORE, *supra* note 13, ¶ 0.157[1.–3], at 32. The principle of strict interpretation of removal statutes has been well settled since Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941), in which the Supreme Court observed, after an historical review of removal authority: "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." *Id.* at 108. The current removal statute was similarly construed in American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951), in which the Supreme Court stated: "The Congress, in the revision [of 1948], carried out its purpose to abridge the right of removal." *Id.* at 10.

17. In McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936), the Supreme Court held that the party invoking federal jurisdiction "must allege in his pleading the facts essential to show jurisdiction. . . . If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." *Id.* at 189. More recently, it was held that "the burden of proving all jurisdictional facts rests upon the plaintiff or the person asserting that the court has jurisdiction." Birmingham Post Co. v. Brown, 217 F.2d 127, 130 (5th Cir. 1954); *see* 1 MOORE, *supra* note 13, ¶ 0.60 [4] , at 609.

18. Greenshields v. Warren Petroleum, 248 F.2d 61 (10th Cir.), *cert. denied*, 355 U.S. 907 (1957); United Founders Life Ins. Co. v. Blackhawk Holding Corp., 341 F. Supp. 483 (E.D. Wis. 1972); Douglas v. Park City Assocs., 331 F. Supp. 823 (E.D. Pa. 1971).

With certain statutory exceptions, removal jurisdiction is based on the original jurisdiction of the federal district court.[19] Thus, when removal is based upon the diversity jurisdiction of the court, the amount in controversy must exceed $10,000 in conformity with the general diversity statute.[20] As with original jurisdiction, the existence of removal jurisdiction may be examined at any time, at trial or on appeal, upon motion of a litigant or by the court sua sponte.[21] Indeed, in the removal context the court has a duty to examine the evidence beyond the pleadings to determine if jurisdiction existed at the time of removal.[22]

In addition, the Supreme Court has made it clear that principles of res judicata apply to jurisdictional determinations.[23] For example, in *Baldwin v. Iowa Traveling Men's Association*,[24] the Supreme Court applied the doctrine of res judicata to a determination of personal jurisdiction, reasoning that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."[25]

It has also been established that once removal jurisdiction has attached, a plaintiff cannot oust a court of jurisdiction by amending the complaint to

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19. *See* Boston & Mont. Consol. Copper & Silver Mining Co. v. Montana Ore Purchasing Co., 188 U.S. 632 (1903). It must be pointed out that there are two major differences between removal jurisdiction and original jurisdiction. Section 1441(b) does not permit the defendant to remove to his resident state, and section 1441(c) permits the removal of claims not within original federal jurisdiction if they are joined and removed with claims that are within federal jurisdiction. 28 U.S.C. § 1441(b), (c) (1970). For other exceptions of less relative importance to this note, *see generally* 1A MOORE, *supra* note 13, ¶ 0.157[5], at 100.

20. 1A MOORE, *supra* note 13, ¶ 0.157[6], at 103; *see* note 3 *supra*.

21. Mansfield, C. & L. Mich. Ry. v. Swan, 111 U.S. 379 (1883). In this case, the Supreme Court raised the issue of lack of removal jurisdiction on an appeal from a judgment on the merits. *Id.* at 382.

In addition, the question of lack of jurisdictional amount may be raised by a party for the first time on appeal. 1A MOORE, *supra* note 13, ¶ 0.90[1], at 826. Kelly v. Hartford Accident & Indem. Co., 294 F.2d 400, 409 (5th Cir. 1961), *cert. denied*, 368 U.S. 989 (1962); 1A MOORE, *supra* note 13, ¶ 0.157[6], at 109. If neither party raises the question, both the district and appellate courts may note the infirmity sua sponte. Colorado Life Co. v. Steele, 95 F.2d 535, 536 (8th Cir. 1938).

22. Section 1447(c) of the Judicial Code provides:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1447(c) (1970).

23. *See* American Sur. Co. v. Baldwin, 287 U.S. 156 (1932). In *American Surety*, the Supreme Court held that a state court's determination that subject matter jurisdiction existed bars an examination of that issue in a federal action brought to enjoin enforcement of the state court judgment. *Id.* at 166.

24. 283 U.S. 522 (1931). In *Baldwin*, a suit was initiated in one federal court to enforce a judgment rendered in another federal court. The Supreme Court held that the defendant could not assert the defense of lack of personal jurisdiction in the later suit after having fully litigated the issue in the action on the merits. *Id.* at 525.

25. *Id.*

demand less than the jurisdictional minimum.[26] The courts have reasoned that Congress did not intend to subject the defendant's statutory right of removal to the discretion of the plaintiff.[27]

These principles are far more easily stated than applied, however, especially in a complicated factual situation like that which confronted the Third Circuit in *Albright*. Judge Aldisert began the majority's analysis by attempting to explain the apparent inconsistency of a court finding a claim insufficient to meet the jurisdictional amount when originally brought, yet later finding an identical claim sufficient.[28] Pointing to the fact that the former claim was brought originally in federal court and the latter removed from state court, the majority found that different standards apply for determining the amount in controversy depending upon the forum in which the case originated.[29] The court reasoned that when unliquidated damages are involved in a case originating in federal court, a plaintiff's potentially frivolous claim cannot be decisive in establishing jurisdiction.[30] To explain why the determination of the amount in controversy is less difficult in removed actions, the court quoted the United States Supreme Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*:[31]

> A different situation is presented in the case of a suit instituted in a state court and thence removed. There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end. For if such were the purpose suit would not have been instituted in the first instance in the state but in the federal court. It is highly unlikely that the parties would pursue this roundabout and troublesome method to get into the federal court by removal when by the same device the suit could be instituted in that court. Moreover, the status of the case as disclosed by the plaintiff's complaint is controlling in the case of removal, since

26. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938); Kanouse v. Martin, 56 U.S. 198 (1854); 1A MOORE, *supra* note 13, ¶ 0.168[4–1], at 522. In general, once removal jurisdiction has attached, it cannot be defeated by subsequent events. Kirby v. American Soda Fountain Co., 194 U.S. 141 (1909) (plaintiff's withdrawal of his claim did not oust the district court of jurisdiction over a counterclaim after removal was perfected); Phelp v. Oaks, 117 U.S. 236 (1886) (intervention of parties not essential to an adjudication on the merits); Morgan's Heirs v. Morgan, 15 U.S. 290 (1817) (changes in citizenship); First Nat'l Bank of Chicago v. Ettinger, 465 F.2d 343 (7th Cir. 1972) (a party attempted to defeat removal by changing his position during the trial and aligning himself with the opposition); Brown v. Eastern States Corp., 181 F.2d 26 (4th Cir. 1950) (plaintiff deleted the federal question in his complaint); Division 25, Order of Railway Conductors v. Gorman, 133 F.2d 273 (8th Cir. 1943) (addition of third party defendants); Alexander v. Lancaster, 330 F. Supp. 341 (W.D. La. 1971) (joinder of an additional party after removal).

27. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938), the United States Supreme Court In St. Paul Mercury stated: "If the plaintiff could no matter how *bona fide* his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice." *Id.* at 294. For a discussion of *St. Paul Mercury Indemnity, see* 51 HARV. L. REV. 1108 (1938).

28. 531 F.2d at 134.

29. *Id., citing* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938).

30. 531 F.2d at 134, *citing* C. WRIGHT, FEDERAL COURTS § 33, at 111 (2d ed. 1970).

31. 303 U.S. 283 (1938). For a discussion of *St. Paul Mercury Indemnity, see* note 48 *infra*.

> the defendant must file his petition before the time for answer or forever lose his right to remove. Of course, if, upon the face of the complaint, it is obvious that the suit cannot involve the necessary amount, removal will be futile and remand will follow.[32]

Finding this analysis controlling, the court concluded not only that the plaintiff could not oust the court of jurisdiction by reducing his claim for relief, but that in the removal context, jurisdiction can be defeated only by defects appearing on the face of the complaint.[33]

In reaching this conclusion, the Third Circuit rejected the plaintiff's argument that the district court should have taken judicial notice of its previous determination of the lack of the jurisdictional amount.[34] Judge Aldisert reasoned that the calculation of the amount in controversy is an imprecise process of estimation based on the available evidence as well as on the procedural posture of the case.[35] As imprecise as this process is, he found that *St. Paul Mercury Indemnity* indicated that different, simpler standards were applicable in a removed case in light of the small risk of a frivolously large claim and the need for certainty to allow the defendant to promptly decide whether to remove.[36] Concluding that different standards may lead to different results, the court refused to announce an unprincipled exception to *St. Paul Mercury Indemnity* despite the apparent anomaly produced in *Albright*.[37]

Furthermore, the court was not moved by the equities of the plaintiff's case.[38] Examining the merits, Judge Aldisert suggested that since the action was so clearly barred by the statute of limitations, "the only real question is whether the claim will be dismissed as time-barred by the federal court or state court."[39] Therefore, based upon notions of judicial comity and efficiency, the court saw no purpose in remanding to state court.[40]

In his dissenting opinion, Judge Hunter agreed with the majority that, in general, the face of the initial pleading controls the jurisdictional determination.[41] He argued, however, that the majority was misinterpreting the language of *St. Paul Mercury Indemnity* in order to support its conclusion that "the jurisdictional requirement is foreclosed if the original

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32. 531 F.2d at 135, *quoting* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290–92 (1938).

33. 531 F.2d at 135.

34. *Id.* at 136.

35. *Id.*

36. *Id.*

37. *Id.* In explaining its refusal, the Third Circuit emphasized that the plaintiff had suggested no workable formulation for such an exception, nor any principle upon which to base it. *Id.*

38. *Id.* at 136.

39. *Id.*

40. *Id.* at 136–37. The court also considered plaintiff's assertion that the district court's decision violated due process in depriving him of his right to trial in a state court. Noting that any statute of limitations deprives a tardy litigant of any right to trial that he might have had, the court agreed with the district court's observation that "the substantive law of statutes of limitations does not infringe upon the requirements of due process." *Id.* at 137.

41. *Id.* at 138.

documents are not insufficient on their face."[42] In Judge Hunter's view, this initial evaluation should not prevent the court from considering subsequent developments in the record either on its own initiative or upon a motion to remand by the plaintiff.[43] Such an approach was required, the dissent emphasized, in order to give effect to the unambiguous command of section 1447(c) of the Judicial Code that the court dismiss the action if the lack of jurisdiction becomes apparent at any time before final judgment.[44]

The dissent further argued that strong policy considerations militate against the majority's position.[45] Judge Hunter asserted that in his opinion the majority had judicially created an unwarranted exception to the principle that removal jurisdiction is coextensive with original jurisdiction.[46] Moreover, this position offered a "back door" into federal court when the front door was denied, by encouraging litigants to collude in filing a complaint in state court and removing it to federal court, knowing that the actual amount in controversy was certainly less than that stated in the complaint.[47]

As the dissent noted, although the language relied upon by the court may seem clear and controlling, such language arguably lies outside of the holding of *St. Paul Mercury Indemnity*.[48] It was not necessary for the Court in that case to establish different standards.[49] The Supreme Court's statement that the status of the case was to be determined by recourse to the plaintiff's initial pleading was a major premise for the holding that the plaintiff could not alter that status by amending the complaint.[50] It need not follow that such status cannot be challenged by recourse to extrinsic evidence showing that jurisdiction never existed.

Furthermore, the meaning ascribed to *St. Paul Mercury Indemnity* by the *Albright* majority is not otherwise logically compelling. First, by implying that there is a presumption in cases removed to federal court that

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42. *Id.*
43. *Id.*
44. *Id.*, *citing* 28 U.S.C. § 1447(c) (1970); *see* note 22 *supra.*
45. 531 F.2d at 139.
46. *Id.*
47. *Id.*
48. 531 F.2d at 139. In *St. Paul Mercury Indemnity* the plaintiff brought suit in Indiana state court and the suit was subsequently removed to the United States District Court for the Southern District of Indiana. Although plaintiff thereafter filed several amended complaints claiming more than the jurisdictional minimum, he attached a list of specific damages which totalled only $1,380.89 — a sum less than the jurisdictional amount. The plaintiff was awarded $1,162.98 pursuant to a jury's verdict. The United States Supreme Court found that the court had jurisdiction when the petition was perfected and that jurisdiction was not ousted by the attachment of the itemized list of damages. 303 U.S. at 292. In an attempt to discover the extent of the holding of *St. Paul Mercury Indemnity*, the *Albright* court ventured a definition of dicta: "[A]n *obiter dictum* is a 'statement of law in the opinion which could not logically be a major premise of the selected facts of the decision.'" 531 F.2d at 136 n.6, *quoting* R. CROSS, PRECEDENT IN ENGLISH LAW 80 (2d ed. 1968). The court did point out that "what is or is not dictum may, like beauty, be in the eye of the beholder. . . ." 351 F.2d at 136 n.6.
49. For the relevant quotation from *St. Paul Mercury Indemnity, see* text accompanying note 32 *supra.*
50. *See* 303 U.S. 290–92.

jurisdiction exists, the *Albright* decision may permit litigants to obtain federal jurisdiction through tacit collusion.[51] A plaintiff need only demand a sum in excess of $10,000 in state court and thereafter the parties would have the benefit, upon removal, of a presumption that the jurisdictional amount is in controversy. Thus, even though the court discounted this phenomenon as improbable, it would seem that the congressional and judicial goal of limiting diversity jurisdiction could be rather easily thwarted.[52]

Second, the *Albright* decision would seem to render meaningless section 1447(c) which requires that the trial court remand the action if it appears that jurisdiction is lacking.[53] A fortiori, such a congressional mandate necessarily contemplates that the court go beyond the pleadings in determining whether or not jurisdiction existed at the time of removal.[54]

Third, the *Albright* court has seemingly encroached upon the province of Congress. The general removal statute provides that any civil action within the original jurisdiction of the federal district court may be removed from a state court "[e]xcept as expressly provided by act of Congress."[55] Nonetheless, by establishing different standards for determining the amount in controversy, the Third Circuit has judicially created an exception to the principle that removal jurisdiction is "keyed" to the original jurisdiction of the federal district court.

Fourth, the holding appears to create an exception to the principle that the party invoking federal jurisdiction bears the burden of proving its existence.[56] Although traditionally the defendant had borne this burden in the removal context,[57] *Albright* seemingly gives rise to a presumption that the jurisdictional minimum is in controversy if it is alleged on the face of the complaint.[58] It is submitted that the court should have afforded greater deference to the long-established tradition that jurisdiction must be proved when challenged.

Even if there should be different standards for determining jurisdiction upon removal, the prior determination of lack of jurisdiction in this case should have compelled a different result due to the fact that jurisdictional determinations are generally given res judicata effect as to the precise issue ruled upon.[59] In *Baldwin v. Iowa Traveling Men's Association,*[60] the United States Supreme Court held that the policy considerations which supported

51. Although the court in *St. Paul Mercury Indemnity* discounted this possibility, 303 U.S. at 291, it is nonetheless possible that litigants who prefer federal court will attempt to take advantage of the "back door." *See* text accompanying note 45 *supra.*

52. *See* note 16 *supra.*

53. For the text of § 1447(c), *see* note 22 *supra.*

54. Section 1447(c) mandates that the jurisdictional amount be assessed as of the time the petition for removal is filed. However, in making such determination, the court is not limited to the pleadings. For example, in Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971), the Third Circuit affirmed a dismissal for lack of jurisdiction based upon information adduced during pretrial proceedings.

55. 28 U.S.C. 1441(a) (1970); *see* note 19 and accompanying text *supra.*

56. *See* notes 17 & 18 and accompanying text *supra.*

57. *See* note 17 *supra.*

58. 531 F.2d at 135.

59. *See* notes 23 & 25 and accompanying test *supra.*

60. *See* Baldwin v. Iowa Traveling Men's Ass'n, 283 U.S. 522 (1931); *see* text accompanying notes 22–24 *supra.*

the application of res judicata in other contexts, support its application to jurisdictional determinations.[61] Although in *Albright* the party who lost the previous decision was the one asserting its finality, the policy of encouraging reliance on judicial decrees nonetheless supports the application of res judicata to that previous determination. The district court which initially dismissed the action did so because it found "to a legal certainty" that the claims could not involve $10,000.[62] Given the admitted identity of claims in *Albright,* it would seem that such a determination should not be disturbed, regardless of the standard of review.

In determining whether different standards can be justified, one must balance the underlying policy considerations of such a holding with the conflicting rationale of res judicata.[63] The *Albright* court's policy arguments appear insufficient to justify putting aside such traditional underpinnings of res judicata as permitting parties to rely on judicial determinations and discouraging the wasting of judicial resources in repetitious litigation.[64] Finally, it is submitted that the doctrine of res judicata provides the workable formulation sought by the *Albright* court to deal with cases like the one at bar, *i.e.,* that a jurisdictional decision stands res judicata as to the precise factual issue determined.

Paradoxically, the underlying basis of the *Albright* decision may actually have been the court's notion of judicial economy.[65] The court rationalized that the only real question presented was which court, state or federal, would eventually dismiss the action.[66] Nonetheless, such an approach seems to ignore the basic concept of subject matter jurisdiction, since a court does not have the power to examine the merits if jurisdiction is not present.[67] Although the unusual factual situation in *Albright* will rarely arise, the issue of the standards applicable to original and removed actions will be relevant whenever unliquidated damages are involved. It is submitted, however, that the impact of *Albright* on the law of federal jurisdiction will not be great due to the questionable authority on which the holding in *Albright* is based and the strong policy considerations which have prompted courts to construe jurisdictional statutes strictly. Meanwhile, at least in the Third Circuit, collusive litigants may be able to confer jurisdiction on the federal district courts through removal in situations in which original jurisdiction would not have been found.

Robert E. Welsh, Jr.

61. 283 U.S. at 526.

62. 350 F. Supp. at 353; *see* note 4 *supra.*

63. The *Albright* court put forth two policy arguments in support of its position. First, there is little danger of a frivolously large claim in a removed action. 351 F.2d at 136. Second, there is a need for certainty to allow the defendant to decide promptly whether to remove or not. *Id.*

64. *See* text accompanying notes 24 & 25 *supra.*

65. 531 F.2d at 136; *see* notes 38 & 39 and accompanying text *supra.*

66. 531 F.2d at 136.

67. Metcalf v. Watertown, 128 U.S. 586 (1888). In *Metcalf,* the United States Supreme Court held that a court had no power to examine the timeliness of an action when jurisdiction was not present. *Metcalf* was cited with approval in Phillips Petroleum Co. v. Texaco Inc., 415 U.S. 125 (1974).

FEDERAL CIVIL PROCEDURE — FED. R. CIV. P. 13 — A STATE ATTORNEY GENERAL IS AN OPPOSING PARTY UNDER RULE 13 FOR THE PURPOSE OF FILING A COUNTERCLAIM SEEKING ENFORCEMENT OF A STATE STATUTE EVEN THOUGH HE HAS PURPORTEDLY BEEN SUED IN HIS PRIVATE CAPACITY UNDER THE DOCTRINE OF *Ex Parte Young*.

Aldens, Inc. v. Packel (1975)

In 1974 Aldens, Inc. (Aldens), an Illinois corporation doing mail order business in Pennsylvania, brought a declaratory judgment action in the United States District Court for the Middle District of Pennsylvania, claiming that the Pennsylvania Goods and Services Installment Act (Act)[1] was unconstitutional.[2] The suit was brought against the state attorney general in his private capacity under the doctrine of *Ex parte Young*.[3] The attorney general filed a counterclaim pursuant to rule 13 of the Federal

1. PA. STAT. ANN. tit. 69, §§ 1101–2303 (Purdon 1966). Section 1103 of the Act provides:

> For the purposes of this act a retail installment contract, contract, retail installment account, installment account, or revolving account is made in Pennsylvania and, therefore, subject to the provisions of this act if either the seller offers or agrees in Pennsylvania to sell to a resident buyer of Pennsylvania or if such resident Pennsylvania buyer accepts or makes an offer in Pennsylvania to buy, regardless of the situs of the contract as specified therein.
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> Any solicitation or communication to sell, verbal or written, originating outside the Commonwealth of Pennsylvania but forwarded to and received in Pennsylvania by a resident buyer of Pennsylvania shall be construed as an offer or agreement to sell in Pennsylvania.
>
> Any solicitation or communication to buy, verbal or written, originating within the Commonwealth of Pennsylvania from a resident buyer of Pennsylvania, but forwarded to and received by a retail seller outside the Commonwealth of Pennsylvania shall be construed as an acceptance or offer to buy in Pennsylvania.

Id. § 1103. Also pertinent to Aldens' situation were sections 1301–1404, which set forth the required form and terms of all contracts subject to the Act, *Id.* §§ 1301–1404, and section 1501, which set forth the maximum service charge rates allowed under the Act. *Id.* § 1501.

2. Aldens, Inc. v. Packel, 379 F. Supp. 521 (M.D. Pa. 1974). Aldens maintained that enforcement of the Act against it would violate due process requirements, create an undue burden on interstate commerce, and infringe upon its rights to use the United States mails. *Id.* at 529–31.

3. 209 U.S. 123 (1908). In *Ex parte Young*, Edward Young, the Minnesota attorney general, was held in contempt for refusing to obey a federal district court injunction restraining the enforcement of a Minnesota statute which controlled the railroad rates of the Northern and Pacific Railway Company, an Illinois corporation. *Id.* at 126. On appeal to the United States Supreme Court, Young maintained that suing him in federal court as a representative of the state violated the state's sovereign immunity which had been reaffirmed by the eleventh amendment. *Id.* at 137. The railroad argued, however, that acceptance of Young's position would dilute the fourteenth amendment's guarantee of due process in that the railroad company would be denied access to a federal forum in which to challenge the constitutionality of state legislation until it had purposely violated the statute, thereby risking significant damage and gambling that its argument against the statute would be upheld. *Id.* at 163–65.

Carefully balancing the importance of state sovereign immunity in the federal system against the fourteenth amendment's guarantee of due process, the Supreme Court held that when an individual state officer responsible for enforcing the state law threatens to enforce a state statute which violates the Federal Constitution, he

Rules of Civil Procedure,[4] seeking a declaratory judgment that the Act was constitutional and an injunction enforcing the Act against Aldens.[5] Although finding the Act constitutional,[6] the district court refused to grant relief on the counterclaim for three reasons: 1) the attorney general was not an opposing party for purposes of rule 13;[7] 2) the counterclaim for declaratory relief was moot;[8] and 3) the counterclaim for an injunction was not permissible because such relief could not be obtained in the Pennsylvania state courts.[9]

On appeal by both parties, the Third Circuit[10] affirmed both the Act's constitutionality[11] and the dismissal of the attorney general's specific

may be enjoined by a federal court from taking such action. *Id.* at 155–56. The Court implied that the action was one against an official in his private capacity — that the officer was a private constitutional tortfeasor, even though he had not yet done anything to damage the party seeking relief and there had been no actual damage or trespass. *Id.* at 167.

Ex parte Young is presently invoked to permit a federal suit attacking the constitutionality of state legislation to be brought against a state official in his private capacity so as to alleviate the plaintiff's problem of having to overcome the state's sovereign immunity in a suit directly against the state. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 933–34 (2d ed. 1973).

4. 379 F. Supp. at 31. Rule 13 provides in pertinent part that "a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against *any opposing party*." FED. R. CIV. P. 13(a) (emphasis added).

5. 379 F. Supp. at 531.

6. *Id.* Concerning the burden on interstate commerce contention of Aldens, the district court concluded that "the national interest in the free flow of interstate commerce does not outweigh the interest of Pennsylvania in protecting its consumers from unreasonable service charge rates on installment credit accounts." *Id.* at 530. The court found that Aldens' $15,000,000 in annual sales to Pennsylvania customers constituted sufficient minimum contact to satisfy due process requirements for the enforcement of the Act against it and that the statute's indirect effect upon mailed contracts was not an interference with the United States mail. *Id.* at 531.

7. *Id.* at 532. The court found that the state was the proper party to bring the action. *Id.*; *see* notes 39–41 and accompanying text *infra*.

8. The request for declaratory judgment on the constitutionality of the statute in the counterclaim was dismissed as being redundant and moot because it merely duplicated the factual and legal issues in the complaint. 379 F. Supp. at 532.

9. *Id.* Noting that the Act sets forth specific statutory penalties, the district court refused to grant the attorney general's request for an injunction because there was no specific provision for such equitable relief contained in the statute. *Id.*; *see* PA. STAT. ANN. tit. 69, §§ 2201, 2204 (Purdon 1966). The district court relied upon the holding in Commonwealth v. Glen Alden Corp., 418 Pa. 57, 210 A.2d 256 (1965), in which the Supreme Court of Pennsylvania refused to grant the commonwealth an injunction against antipollution law violators because the applicable statute provided a specific statutory procedure for enforcement. The district court in *Aldens* interpreted this refusal to mean that without an express provision for equitable relief under the statute, such relief cannot be granted. 379 F. Supp. at 531.

10. Aldens, Inc. v. Packel, 524 F.2d 38 (3d Cir. 1975). The appeal was heard by Chief Judge Seitz and Circuit Judges Aldisert and Gibbons. Judge Gibbons wrote the opinion.

11. *Id.* at 42–50. In response to Aldens' contention that enforcing the Act against it violated due process because its only contact with the state was through the use of the mails, the Third Circuit stated that the question would be decided by determining whether Pennsylvania had the requisite sufficient minimum interest in Aldens' transactions with its residents. *Id.* at 41–42. Relying upon its interpretation of the holding in McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957), that the due process clause requires a rather low threshold of state interest to justify an exercise of the state's sovereign decisional authority with respect to any given transaction, and noting that

counterclaims.[12] However, the Third Circuit did not agree that rule 13 provided a basis for the counterclaim's dismissal, *holding* that a state attorney general is an opposing party for the purposes of filing a counterclaim for enforcement of a state statute, even when sued under the doctrine of *Ex parte Young. Aldens, Inc. v. Packel,* 524 F.2d 38 (3d Cir. 1975), *cert. denied,* 425 U.S. 943 (1976).

Aldens was obtaining $750,000 more in interest charges annually than a Pennsylvania seller could lawfully obtain in identical transactions, the court decided that the commonwealth had sufficient interest in the interest rates its citizens paid to foreign corporations to overcome Aldens' due process argument. 524 F.2d at 43.

Regarding Aldens' argument that as an Illinois corporation, its contracts were controlled by Illinois law, to which Pennsylvania had to give full faith and credit, the court purported to implement a balancing test weighing Pennsylvania's interest in protecting its consumers from exorbitant interest rates against Illinois' interest in its own contract laws. *Id.* at 44. While noting that Illinois' maximum rate on credit charges was somewhat higher than Pennsylvania's, the court emphasized that Illinois had expressed no state policy that its businesses should be able to obtain that maximum rate in every transaction. *Id.* The Third Circuit therefore held that the full faith and credit clause would not prevent the application of Pennsylvania law in this case because the interest rate limitations in the Act, though more stringent than those of Illinois, did not conflict with any Illinois policy. *Id.* at 44–45.

In addressing Aldens' contention that enforcement of the Act against it imposed an undue burden on interstate commerce in excess of the value of the interest which Pennsylvania had in consumer protection and that this burden was magnified by the lack of uniformity among the states regarding both credit rates and contract requirements, the Third Circuit noted that the Pennsylvania statute was neither an attempt to impose an extraterritorial tax nor a denial of access to a state court, both of which would have required a greater state interest. *Id.* at 48–50, *distinguishing* Allenburg Cotton Co. v. Pittman, 419 U.S. 20 (1974), *and* National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). Rather, it was merely an attempt by Pennsylvania to afford uniform protection to its citizens with respect to consumer credit interest rates. Moreover, the court considered Congress' express grant to the states of the power to regulate interest rates to be a mandate to the states to further their individual interests in protecting their citizens. 524 F.2d at 49–50. The court concluded that although the Act did burden interstate commerce and although this burden was increased by the lack of uniformity in interest rate regulation among the states, such a burden was not sufficient basis upon which to invalidate the Act. *Id.* at 50. According to the court, Pennsylvania had sufficient interest in protecting its consumers to outweigh the burden, and any determination concerning the propriety of such laws could properly be made only by Congress, which had expressly left rate regulation to the discretion of the states. *Id.* at 48–49.

Thus, the fact that Aldens might face the burden of having a different contract form with different credit rates and terms for its transactions in each state apparently did not trouble the court. Rate regulation and contract requirements, according to the court, were matters of local concern, and the lack of uniformity did not prevent this exercise of local authority. *Id.* at 49. In other words, as a cost of doing business in 50 states, Aldens would have to conform to the regulations of each state, even to the extent of having different contract forms and terms for each state.

It seems clear that mail order corporations wishing to transact business in Pennsylvania will have to conform to both the credit rate and contract provisions of the Act. If this decision is followed by other courts, these businesses will be faced with the burdensome task of conforming with the unique statutory requirements of each state in which they do business. Such compliance could involve drafting different contract forms for each individual state or using a uniform contract containing the strictest provisions required by any single state for use in every state. Whether or not *Aldens* portends a national trend, one thing is clear: mail order corporations will find that the privilege of transacting business with Pennsylvania consumers has become significantly more burdensome.

12. 524 F.2d at 51–52. The Third Circuit agreed with the district court that the counterclaim for declaratory judgment on the Act's constitutionality should be

Since the promulgation of the Federal Rules of Civil Procedure in 1937, decisions determining who qualifies as an opposing party under rule 13 have been hopelessly at odds.[13] Generally, a counterclaim against a plaintiff as an individual is not permitted when he has sued in a representative capacity.[14] Nor can an individual defendant counterclaim as a representative.[15] This rule, previously followed in cases involving trustees,[16] assignees,[17] class actions,[18]

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dismissed as redundant and moot because of the complete identity of factual and legal issues between the complaint and the counterclaim. *Id.* at 52. *See generally* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1406 (1971).

Although the request for an injunction was not considered moot, the court noted that, as a permissive counterclaim, it required an independent basis of federal jurisdiction. 524 F.2d at 52. Finding no federal question jurisdiction because the claim arose under state law and no diversity jurisdiction because the state could not be considered a party for diversity purposes, the court noted that the claim could be supported only by pendent jurisdiction, which is a matter of discretion. *Id.*, *citing* UMW v. Gibbs, 383 U.S. 715, 724–27 (1966). In exercising its discretion, the court dismissed the counterclaim because of the uncertainty under state law of the availability of injunctive relief under the Act. 524 F.2d at 52. The dismissal allowed the attorney general to bring the claim in state court free of the res judicata effect of a federal decision on a state law issue. *Id.*

13. *See generally* 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 398 (C. Wright ed. 1969); 3 MOORE'S FEDERAL PRACTICE ¶ 13.06 (2d ed. 1974) (hereinafter cited as MOORE'S).

14. First Nat'l Bank v. Johnson County Nat'l Bank & Trust Co., 331 F.2d 325, 327–28 (10th Cir. 1964) (intervening party defendant in interpleader suit denied leave to file counterclaim against disinterested stakeholder plaintiffs); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485 (S.D.N.Y. 1973) (nonrepresentative class members in rule 23 class action are not opposing parties under rule 13); United States v. Timber Access Indus. Co., 54 F.R.D. 36, 39–40 (D. Ore. 1971) (in an action by the United States as a trustee, counterclaim against the United States in its individual capacity is not a claim against an opposing party under rule 13); Tryforos v. Icarian Dev. Co., 49 F.R.D. 1, 3 (N.D. Ill. 1970) (counterclaims against plaintiff trustees in their individual capacities not permitted when trustees had brought suit as representatives); United States *ex rel.* TVA v. Lacy, 116 F. Supp. 15, 21 (N.D. Ala. 1953), *rev'd on other grounds*, 216 F.2d 223 (5th Cir. 1954) (the United States suing on relation and for use of TVA could not be counterclaimed against in its individual capacity); Chambers v. Cameron, 29 F. Supp. 742, 744 (N.D. Ill. 1939) (in action by plaintiffs as trustees, a counterclaim against them as individuals will not lie). *But cf.* Scott v. United States, 354 F.2d 292, 300–01 (Ct. Cl. 1965) (in an action by a partnership, the United States could set off against an individual partner pursuant to statutory authority); Abraham v. Selig, 20 F. Supp. 52, 53 (S.D.N.Y. 1939) (in an action upon a partnership claim, counterclaim against individual partner allowed in the interest of judicial economy to avoid a multiplicity of suits).

15. Durham v. Bunn, 85 F. Supp. 530, 531 (E.D. Pa. 1949) (city tax collector sued as individual for injuries to plaintiff could not bring representative counterclaim for unpaid taxes on behalf of city).

16. *See* United States v. Timber Access Indus. Co., 54 F.R.D. 36, 39–40 (D. Ore. 1971); Tryforos v. Icarian Dev. Co., 49 F.R.D. 1, 3 (N.D. Ill. 1970); Chambers v. Cameron, 29 F. Supp. 742, 744 (N.D. Ill. 1939).

17. *See* Mesker Bros. Iron Co. v. Donata Corp., 401 F.2d 275, 279 (4th Cir. 1968). *See generally* 3 MOORE'S, *supra* note 13, at ¶ 13.06.

18. *See* Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485, 489–90 (S.D.N.Y. 1973) (nonrepresentative class members are not parties for purposes of rule 13). *But cf.* Klinzing v. Shakey's, Inc. 49 F.R.D. 32, 35 (E.D. Wis. 1970) (counterclaim may be brought against representative class members as individuals and nonrepresentative class members are parties for purposes of rule 13). *See generally* 3 MOORE'S, *supra* note 13, at ¶ 13.06.

stockholder derivative actions,[19] and qui tam actions,[20] has been based primarily on three considerations: sovereign immunity where applicable,[21] the convenience and expediency policies of the Federal Rules,[22] and the degree and type of interest of the various parties in the counterclaim.[23] Some decisions may also have been influenced by unexpressed concern with the possibility that the counterclaim might be compulsory and therefore potentially barred from being brought in a subsequent action by principles of res judicata.[24]

In implementing the convenience and expediency policy of the Federal Rules, courts have focused upon such factors as the number of parties affected by the counterclaim,[25] the relationship of these parties,[26] and the possibility of delay or prejudice involved in permitting the claim,[27] with heavy emphasis placed upon the promotion of swift adjudication.[28] In other

19. *See* Cravatts v. Klozo Fastener Corp., 15 F.R.D. 12, 13 (S.D.N.Y. 1953). *See generally* Higgins v. Shenango Pottery Co., 12 F.R.D. 510 (W.D. Pa. 1951), *followed in* Purcell v. Keane, 430 F.2d 1182 (3d Cir. 1970).

20. *See* United States *ex rel.* Rodriguez v. Weekly Publications, Inc., 74 F. Supp. 763, 768 (S.D.N.Y. 1947), *aff'd on other grounds,* 144 F.2d 186 (2d Cir. 1944). The court's strict interpretation of "opposing party" in *Rodriguez* seems to have been influenced by a concern that the allowance of a counterclaim against the informer by the informed-upon defendant in a qui tam informant action could inhibit, if not prevent, future use of informants. 3 MOORE'S, *supra* note 13, at ¶ 13.06.

21. *See* United States v. Timber Access Indus. Co., 54 F.R.D. 36, 39–40 (D. Ore. 1971); United States *ex rel.* TVA v. Lacey, 116 F. Supp. 15, 21 (N.D. Ala. 1953); 3 MOORE'S, *supra* note 13, at ¶ 13.06. *See also* FED. R. CIV. P. 13(d), which provides in pertinent part: "[T]hese rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof."

22. *See* Abraham v. Selig, 29 F. Supp. 52, 53 (S.D.N.Y. 1939). Rule 1 of the Federal Rules of Civil Procedure provides that the rules shall "be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

23. *See* Durham v. Bunn, 85 F. Supp. 530, 531, (E.D. Pa. 1949); note 15 *supra.*

24. *See* 3 MOORE'S, *supra* note 13, ¶ 13.06[1]. The author suggests:

> Some confusion arises in analysis because the operative words "opposing party" produce two sets of results. The first result is to allow the raising of both compulsory and permissive claims in the initial law suit. The second result is to bar subsequent compulsory claims not raised in the first litigation. The first result gives rise to liberal interpretation since the rules favor bringing in all related claims. The second result gives rise to narrow construction since the penalty of total bar is considered harsh.

Id. For an example of the implementation of a narrow construction to avoid res judicata in a state action, *see* Campbell v. Ashler, 320 Mass. 475, 70 N.E.2d 302 (1946), *criticized in* 15 U. CHI. L. REV. 446 (1946). *See generally* 1A W. BARRON & A. HOLTZOFF, *supra* note 13, § 398, at 662–64.

25. *See* Berger v. Reynolds Metals Co., 39 F.R.D. 313, 315 (E.D. Pa. 1966) (general rule against allowance does not apply to closely held corporation with only three shareholders).

26. *See* Burg v. Horn, 37 F.R.D. 562, 563 (E.D.N.Y. 1965), *aff'd on other grounds,* 380 F.2d 897 (2d Cir. 1967) (derivative form of action did not prevent counterclaim in the case of a closely held corporation where the substance of the action was to determine the rights of the individual parties against one another).

27. *See* Berger v. Reynolds Metals Co., 39 F.R.D. 313, 315 (E.D. Pa. 1966); note 25 *supra.*

28. Berger v. Reynolds Metals Co., 39 F.R.D. 313, 315 (E.D. Pa. 1966). The expediency policy has been succinctly articulated:

> [I]t should not be forgotten that the purpose of Rule 13 is the avoidance of a multiplicity of suits and the adjudication of all causes of action between the same

decisions, expediency has seemingly received less consideration[29] than has a determination of whether the parties in their representative capacities had demonstrated a sufficient interest in the proposed counterclaim to warrant its inclusion in the main action.[30] Because "sufficient interest" was defined rather narrowly in these decisions, the typical result was a dismissal of the claim.[31]

Although there have been innumerable cases in the rule 13 context involving governmental immunity,[32] it seems that none has decided the specific issue of whether an *Ex parte Young* defendant is an opposing party for purposes of counterclaiming under rule 13.[33] The only case that came close to deciding this issue was *Dunham v. Crosby,*[34] in which a school teacher brought an action against the school board members in their individual capacities for wrongful dismissal, and the defendants counterclaimed for salary paid to the plaintiff.[35] Although stating that it did not seem proper to allow defendant individuals to counterclaim in their representative capacity as school board members, the *Dunham* court refused to dismiss the claim.[36] Instead, the court remanded directing the district court to consider the counterclaim since its resolution was so closely

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parties at one time. . . . To say that a plaintiff bringing a stockholder's derivative suit is not an opposing party under the circumstances of this case, where he is one of three major and only stockholders, is to place form over substance and to undermine and thwart the salient purpose of Rule 13. . . . In reaching this interpretation, the court believes it is following not only the spirit and letter of Rule 13, but also the spirit and letter of Rule 1 which provides that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."

Id.; *see* Abraham v. Selig, 29 F. Supp. 52, 53 (S.D.N.Y. 1939). *But cf.* Tryforos v. Icarian Dev. Co., 49 F.R.D. 1, 3 (N.D. Ill. 1970) (permissive counterclaim dismissed on expediency grounds to avoid the interjection of complex and immaterial issues into the lawsuit).

29. This is not to say that expediency and convenience were ignored. The interest test is not mutually exclusive of the expediency test. In Scott v. United States, 354 F.2d 292 (Ct. Cl. 1965), the court not only allowed the counterclaim on interest grounds, but also considered the expediency basis of the rules in rendering its decision:

> The controlling philosophy is that, so far as fairness and convenience permit, the various parties should be allowed and encouraged to resolve all their pending disputes within the bounds of one litigation. To say that an individual partner-plaintiff can veto the maintenance of an individual counterclaim against him, even though convenience and fairness would be served by allowing it, goes counter to this basic premise and affords partners a technical, artificial device for proliferating litigation and possibly escaping valid demands against them.

Id. at 300 (footnote omitted).

30. *See* Durham v. Bunn, 85 F. Supp. 530, 531 (E.D. Pa. 1949); note 15 *supra.*

31. Durham v. Bunn, 85 F. Supp. 530, 531 (E.D. Pa. 1949). *Contra,* Scott v. United States, 354 F.2d 292, 300–01, (Ct. Cl. 1965); Burg v. Horn, 37 F.R.D. 562, 563 (E.D.N.Y. 1965), *aff'd on other grounds,* 380 F.2d 897 (2d Cir. 1967).

32. *See* note 21 and accompanying text *supra.*

33. Aldens, Inc. v. Packel, 524 F.2d 38, 50 (3d Cir. 1975).

34. 435 F.2d 1177 (1st Cir. 1970), *overruled on other grounds,* Roper v. Lucey, 488 F.2d 748, 751 n.3 (1st Cir. 1973).

35. 435 F.2d at 1181.

36. *Id.*

connected with that of the original claim.[37] The court also suggested that the individual defendants move to intervene in their representative capacity as the school board, thereby making the board a party and waiving immunity for purposes of the counterclaim.[38]

The district court in *Aldens* dismissed the counterclaim,[39] determining that the state, not the attorney general, was the real party in interest under rule 17[40] and the proper opposing party for purposes of rule 13.[41] While the district court's approach reflected that of past cases involving fiduciaries and representatives determined upon real party in interest grounds,[42] its resolution of the instant issue extended the *Ex parte Young* private capacity fiction into a rule 17 analysis of the rule 13 issue.[43]

Declaring that past cases involving fiduciaries and representatives presented a "remote analogy,"[44] the Third Circuit rejected the district court's approach[45] and refused to allow the *Ex parte Young* private capacity fiction to influence unduly a rule 13 decision.[46] Appreciating the judicial economy policy underlying rule 13,[47] the court proceeded to discuss and dismiss the

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37. *Id.* The court reasoned:
[W]e assume that the question to be resolved at trial on remand is closely related to the counterclaim. For example, if the court should find that the appellant was improperly dismissed and that the Superintendent would have otherwise signed the crucial affidavit, that finding would probably determine the question whether appellant was teaching illegally. Thus, adjudicating these issues at one time would be consistent with the approach to judicial economy underlying the Federal Rules of Civil Procedure.
Id.

38. *Id.* Federal Rule of Civil Procedure 24(b) provides:
Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action . . . . (2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the right of the original parties.
FED. R. CIV. P. 24(b).

39. 379 F. Supp. at 532.

40. *Id.* Rule 17(a) provides that "every action shall be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a).

41. 379 F. Supp. at 531–32. The court stated:
The counterclaim seeking a declaration that the Act is constitutional and for an injunction against Aldens' further noncompliance with the Act belongs to the Commonwealth, not to the Attorney General. . . . Thus under F. R. CIV. P. 13, it would appear that Aldens and Defendant Packel are not opposing parties for the purposes of this counterclaim. A similar analysis leads the court to conclude that Defendant Packel is not the real party in interest in regards to the counterclaim as required by F. R. CIV. P. 17.
Id. The court also dismissed the specific counterclaims. *Id.* at 532; *see* note 7 *supra.*

42. *See* note 23 and accompanying text *supra.*

43. *See* note 61 and accompanying text *infra.*

44. 524 F.2d at 50 n.18.

45. *Id.*

46. *Id.* at 51.

47. *Id.* As the court explained, the opposing party issue "should be resolved consistently with the fundamental policy underlying Rule 13; that is, the expeditious

apparently conflicting dictum in *Dunham*,[48] accenting a distinction in the relief requested.[49] While ostensibly a distinction without a difference, the court's focus demonstrated a concern that the relief requested in *Dunham* could have complicated the litigation. Dunham's suggestion that the individual defendants intervene in their representative capacity[50] was not discussed, probably because the court, *sub silentio*, found intervention a mere matter of form which could have needlessly delayed a decision on the substantive issue in *Aldens*.

The Third Circuit recognized the inherent anomaly present in *Ex parte Young* proceedings in that the attorney general is not considered to be the state for purposes of eleventh amendment immunity but is considered to be acting on behalf of the state for purposes of the state action requirement of the fourteenth amendment.[51] In answering the question as to which fiction should prevail,[52] the court determined that the private capacity fiction must yield to the fourteenth amendment state action reality in a rule 13 situation.[53] The court considered the attorney general to be acting on the state's behalf in both the main claim and the counterclaim,[54] thereby sidestepping the private capacity fiction as it tended to obfuscate the opposing party issue. Moreover, subordinating the private capacity fiction seemed to better implement the expediency policy fundamental to rule 13.[55] Thus, the court concluded that allowing the attorney general to assert the counterclaim seemed entirely appropriate, especially in the instant case where the claim was for declaratory or injunctive relief.[56]

The Third Circuit's resolution of the opposing party issue in *Aldens* seems to have been based upon an implicit recognition that an *Ex parte Young* proceeding differs significantly from the usual representative or fiduciary case. In *Ex parte Young*, the Supreme Court created a fiction whereby an action could be brought against the state indirectly by suing a state official in federal court.[57] This was a departure from previous decisions wherein the Court had allowed an action only when the official, as an individual, was personally responsible for some injury to the plaintiff and

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resolution of all controversies growing out of the same transaction or occurrence or between the same parties in a single suit." *Id.*

48. 435 F.2d 1177 (1st Cir. 1970), *overruled on other grounds*, Roper v. Lucey, 488 F.2d 748, 751 n.3 (1st Cir. 1973); *see* notes 34–38 and accompanying text *supra*.

49. 524 F.2d at 51. Whereas the relief requested in *Aldens* was for declaratory judgment and an injunction, *Dunham* involved money damages.

50. *See* note 38 and accompanying text *supra*.

51. 524 F.2d at 50; *see* note 3 *supra*.

52. 524 F.2d at 50.

53. *Id.* at 50–51.

54. *Id.* at 51.

55. *Id.* The court stated that: "This policy seems to us to point toward a reliance on the fourteenth amendment fiction rather than the sovereign immunity fiction of *Ex parte Young*, and to the treatment of the Attorney General or other Ex parte Young defendant as an opposing party for purposes of the rule." *Id.*; *see* notes 3 & 47 *supra*.

56. 524 F.2d at 51. The court also suggested that even a counterclaim for money might be appropriate if practical difficulties could be overcome. *Id.* at n.20.

57. *See* note 3 *supra*.

had attempted to invoke sovereign immunity to avoid jurisdiction.[58] Thus, since *Ex parte Young*, the plaintiff need not demonstrate any personal claim against the official,[59] for while the official is the named party, the state is the real party in interest. By contrast, in the usual representative or fiduciary case, there has been an attempt to introduce a different real party in interest with the filing of the counterclaim.[60] Thus, it is submitted that there should be two determinations of real party in interest, one for the main claim and one for the counterclaim. If both determinations identify the same party, the counterclaim should be allowed; otherwise it should be dismissed.

The district court apparently determined that the private capacity fiction somehow made the attorney general the real party in interest in Aldens' claim.[61] While the Third Circuit made no direct assertion to the contrary, the court, in disregarding the private capacity fiction, apparently recognized that there was no real party in interest problem in the instant case. For despite the fact that the attorney general was the named party, the state was clearly the real party in interest in both Aldens' claim and the proposed counterclaims.

By disregarding the fictional aspect of the proceeding, the real party in interest argument became untenable and the court was then able to deal with the rule 13 issue on rule 13 grounds. With the real party in interest argument dismissed, Aldens was unable to demonstrate convincingly that allowing the counterclaim would either prejudice its own claim or complicate or prolong the litigation. It is submitted that the court's resolution was thus proper, because rule 13's policy of allowing counterclaims in the interest of judicial economy should be overcome only by real issues such as prejudice, not confusing fictions.

Although the counterclaims in *Aldens* were ultimately dismissed,[62] the instant decision is significant in that, in future *Ex parte Young* proceedings, the named state official will be considered an opposing party for purposes of counterclaiming under rule 13 — at least in the Third Circuit. As a result, in

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58. *See, e.g., In re* Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); Cunningham v. Macon & B.R.R., 109 U.S. 446 (1883). In *Ayers*, the Court noted that the "action has been sustained only in those instances where the act complained of . . . constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character." 123 U.S. at 502. Justice Harlan, in his dissenting opinion in *Ex parte Young*, described the difference as follows:

> There is a distinction . . . drawn between a suit in which the State is the real party in interest, although not technically a party on the record, and one in which "an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under orders of the government. . . ." [T]he defendant "is not sued as, or *because he is*, the officer of government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer."

209 U.S. at 184, (Harlan, J., dissenting), *quoting* Cunningham v. Macon & B.R.R., 109 U.S. 446, 452 (1883) (emphasis supplied by the Court).

59. For example, according to the *Ex parte Young* Court, it seemed to make no difference whether the official was guilty of an actual trespass. *See* 209 U.S. at 167.

60. *See, e.g.*, Durham v. Bunn, 85 F. Supp. 530 (E.D. Pa. 1949); *see* notes 23, 40 & 41 *supra*.

61. *See* note 41 *supra*.

62. *See* note 12 *supra*.

an *Ex parte Young* proceeding, the state official's counterclaim for injunctive or declaratory relief should be allowed.[63] Moreover, with the burden upon the party attacking the counterclaim to show that allowance would cause prejudice or prolong the litigation, counterclaims for penalties or damages may also be allowed.[64] Thus the state, through the state official, should be able to litigate all issues in a single action, resulting in corresponding savings in time and resources.

Of more general importance is the recognition that while the fictional aspect of the proceeding may be necessary for the parties' entrance into court, this fiction will be subordinated if it hinders the implementation of the Federal Rules of Civil Procedure. With this recognition the Third Circuit has reemphasized the expediency policy underlying the Federal Rules and reaffirmed one of the broad tenents of this policy, namely, that requirements of form not hinder expeditious substantive determinations.[65]

Robert E. Heideck

FEDERAL CIVIL PROCEDURE — FED. R. CIV. P. 54(b) — CERTIFICATION OF JUDGMENT AS FINAL UNDER RULE 54(b) HELD ABUSE OF DISTRICT COURT'S DISCRETION UNLESS ACCOMPANIED BY ENUMERATION OF FACTORS UPON WHICH IT RELIED.

Allis–Chalmers Corp. v. Philadelphia Electric Co. (1975)

Respondent Allis–Chalmers Corporation, a manufacturer of electrical equipment, filed suit in the United States District Court for the Eastern District of Pennsylvania against Philadelphia Electric Company (PECO), asserting the indebtedness of PECO to Allis–Chalmers in the amount of $497,000.[1] This amount represented 1) the balance allegedly due on three of

63. While such counterclaims should be allowed in *Ex parte Young* proceedings, the determination that an injunctive counterclaim is both permissive and a state issue recognizes that it is a matter for the court's discretion. *See* note 12 *supra*. However, it would seem that that discretionary decision should be tempered with a consideration of the judicial economy policy of rule 13.

64. *See* note 56 *supra*.

65. The status of the more common representative action situations which involve rule 17 real party in interest problems probably remain unchanged by the instant decision. While the Third Circuit gave strong emphasis to judicial economy and expediency in allowing the counterclaim in Aldens, *see* note 47 *supra*, there was no corresponding problem with rule 17 real party in interest once the court disregarded the *Ex parte Young* fiction. In the usual representative action case, however, the real party in interest determination is a more valid concern. *See* notes 15, 19 & 23 *supra*. Thus, while *Aldens* makes it clear that fictions will not prevent the implementation of rule 13, it is doubtful that a true rule 17 problem will be as easily overcome. At the very least, however, the Third Circuit has emphasized that judicial economy will be recognized as a factor in future decisions and it appears certain that future determinations will not be based solely upon rule 17 considerations.

1. Allis-Chalmers Corp. v. Philadelphia Elec. Co., 64 F.R.D. 135–37 (E.D. Pa. 1974).

eight power transformers sold and delivered to PECO in 1972, and 2) the cost of repair services performed at PECO's Muddy-Run Generating Station in 1973.[2] Although admitting the amount of the indebtedness,[3] PECO counterclaimed in tort and contract for $519,000 compensatory and $500,000 punitive damages, alleging that a fire at PECO's Callowhill Sub-Station in 1972 was caused by defective circuit breakers manufactured and sold to PECO by Allis-Chalmers.[4] Allis-Chalmers moved for summary judgment under Federal Rule of Civil Procedure 56[5] on both of its claims.[6] The district court granted Allis-Chalmers' motion, certified the summary judgment as final under Federal Rule of Civil Procedure 54(b),[7] and denied PECO's motion to stay execution of the judgment under Federal Rule of Civil Procedure 62(h).[8]

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2. *Id.* at 135, 137.

3. *Id.* In its answer, PECO admitted ordering and receiving the eight transformers from Allis-Chalmers. *Id.* PECO also admitted its nonpayment of the balance due on three of the transformers, asserting in defense a demand for an adequate testing period before payment. *Id.* The court rejected this defense, however. *Id.* at 140.

4. *Id.* at 137. Allis-Chalmers submitted to the district court the affidavit of one of its employees to support its allegation that the equipment allegedly involved in the Callowhill fire was completely unrelated to the equipment and services which formed the basis of Allis-Chalmers' two principal claims. Relying upon this affidavit, the court defined the counterclaim as permissive. *Id.*

5. Rule 56 provides in pertinent part:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

. . . .

(c) Motion and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(a), (c).

6. 64 F.R.D. at 135; *see* note 2 and accompanying text *supra.*

7. Federal Rule of Civil Procedure 54(b) provides:

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

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

8. 64 F.R.D. at 140. Federal Rule of Civil Procedure 62(h) provides:

When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

FED. R. CIV. P. 62(h).

PECO appealed to the United States Court of Appeals for the Third Circuit[9] on the district court's disposition of the summary judgment and rule 62(h) issues.[10] The Third Circuit dismissed the appeal and remanded the case to the district court, *holding* that the district court's certification under rule 54(b) was an abuse of discretion, since the court failed to articulate the factors upon which it relied in granting certification. *Allis–Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975).

Historically, piecemeal appeals in the federal courts have been disfavored. Originally, appeal could be taken only from a final judgment disposing of all claims of one plaintiff against one defendant.[11] As the complexity of federal litigation expanded due to the liberalization of the Federal Rules of Civil Procedure dealing with the joinder of parties and claims and the consolidation of actions,[12] a reevaluation of the traditional application of the finality rule became necessary.[13] Rule 54(b), originally promulgated in 1937 in response to this necessity, allowed but did not compel a court, when presented with multiple claims in a single action, to adjudicate any individual claim as final provided all "the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence" which formed the basis of that claim had already been decided by the court.[14] While rule 54(b) was not intended to dilute the traditional

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9. The case was heard by Judges Aldisert, Gibbons and Garth. Judge Garth wrote the opinion, with Judge Gibbons dissenting.

10. Allis-Chalmers Corp. v. Phildelphia Elec. Co., 521 F.2d 360, 361 (3d Cir. 1975); *see* notes 7 & 8 and accompanying text *supra*.

11. This doctrine is fully applicable at the present time. *See* 28 U.S.C. § 1291 (1970); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 357 (1961). However, there are exceptions in a few defined situations, such as appeal from certain interlocutory orders. *See* 28 U.S.C. § 1292 (1970).

Traditionally, appeal was permitted after a judgment disposing of the entire action, which usually consisted of a single plaintiff suing a single defendant. *See* Collins v. Miller, 252 U.S. 364 (1920); Holcombe v. McKusick, 61 U.S. (20 How.) 552 (1857); United States v. Girault, 52 U.S. (11 How.) 21 (1850); Metcalfe's Case, 77 Eng. Rep. 1193 (K.B. 1615). In an action involving multiple parties where joint liability was alleged, appeal could be taken only after judgment as to all parties was entered. *See* Hohorst v. Hamburg-American Packet Co., 148 U.S. 262 (1893). As the complexity of litigation increased, courts allowed appeal to be taken in given situations notwithstanding the fact that some part of the litigation was as yet unadjudicated. *See* Republic of China v. American Express Co., 190 F.2d 334, 335–36 (2d Cir. 1951) (judgment upon separate claim in multiple party action held appealable).

12. *See, e.g.*, FED. R. CIV. P. 13, 14, 18, 20, 24, 42(a). *See generally* MOORE'S FEDERAL PRACTICE ¶ 54.27(2), at 325 (2d ed. 1976).

13. *See, e.g.*, Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 432 (1956).

14. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: *Civil* § 2653 (1972). As originally promulgated in 1937, rule 54(b) provided as follows:

> Judgment at Various Stages. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

FED. R. CIV. P. 54(b) (1937).

doctrine of finality,[15] it did restructure this concept by eliminating the requirement that all the claims between two parties be fully adjudicated, requiring instead final adjudication of all claims arising out of the same "transaction or occurrence."[16] In so doing, the promulgators of the rule attempted to strike a balance between the recognized disadvantages of piecemeal or duplicative appeals and the equally obvious injustice which might result from delayed review of separable parts of an action.[17]

The 1948 amendment[18] to rule 54(b) permitted a trial court to certify for appeal one or more but fewer than all the claims in a multiple-claim action upon an express direction of final judgment as to those claims and an express determination that there was no just reason for delaying an

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15. After extended consideration, the Advisory Committee on the Federal Rules of Civil Procedure

> concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite workable rule. This is afforded by amended rule 54(b). It re-establishes an ancient policy with clarity and precision.

Advisory Committee Report on Rules for Civil Procedure, 5 F.R.D. 433, 473 (1946). *See also* Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445 (1956); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) (Frankfurter and Harlan, J.J., concurring in *Sears,* dissenting in *Cold Metal*); Aetna Ins. Co. v. Newton, 398 F.2d 729 (3d Cir. 1968); RePass v. Vreeland, 357 F.2d 801, 805 (3d Cir. 1966); Panichella v. Pennsylvania R.R., 252 F.2d 452 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960).

16. FED. R. CIV. P. 54(b) (1937). *See* C. WRIGHT & A. MILLER, *supra* note 14, at § 2653.

In Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956), the Supreme Court expressed the opinion that the liberal joinder provisions of the Federal Rules of Civil Procedure did not affect the finality rule, but did create a new need for a relaxation of the definition of a "judicial unit" for purposes of appealability. *Id.* at 432. *See also* 6 MOORE'S FEDERAL PRACTICE ¶ 54.43(3), at 914–16 (2d ed. 1976).

17. *See* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950); Aetna Ins. Co. v. Newton, 398 F.2d 729 (3d Cir. 1968); RePass v. Vreeland, 357 F.2d 801 (3d Cir. 1966); C. WRIGHT & A. MILLER, *supra* note 14, at § 2654.

Prior to the 1948 amendment to rule 54(b), certification was permitted only on a claim transactionally distinct from the balance of the litigation. *See* Baltimore & O. R.R. v. United Fuel Gas Co., 154 F.2d 545 (4th Cir. 1946) (order dismissing cross-claims or third party claims arising from the same transaction as principal claim held not "final"). *But see* Timberlake v. Day & Zimmerman, Inc., 49 F. Supp. 28 (S.D. Iowa 1943) (order completely adjudicating interest of three of the multiple parties in the controversy held "final").

There were two tests or definitions of finality under 54(b) prior to 1948. The "pragmatic test" required that the claim sought to be certified as final arose out of a factually distinct transaction. *See* Reeves v. Beardall, 316 U.S. 283 (1942). The "cause of action test" looked to whether the claim was based on a separate legal theory. *See* Zarati S.S. Co. v. Park Bridge Corp., 154 F.2d 377 (2d Cir. 1946); Note, *Separate Review of Claims in Multiple Claims Suits: Appellate Jurisdiction Under Amended Federal Rule 54(b),* 62 YALE L. REV. 263, 265 (1952).

18. The 1937 rule, although clear on its face, proved ineffective due to the extreme difficulty in determining when a claim or set of claims based upon the same transaction in a multiple claim action had in fact been fully adjudicated. *See* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956). In *Sears,* the Supreme Court stated:

> [Under the original rule, it] was soon found to be inherently difficult to determine by any automatic standard of unity which of several multiple claims were sufficiently separable from others to qualify for this relaxation of the unitary principle in favor of their appealability. The result was that the jurisdictional time for taking an appeal from a final decision on less than all of the claims in a multiple claims action in some instances expired earlier than was foreseen by the

appeal.[19] Furthermore, the amended rule deleted the "transaction or occurrence" language of the former version,[20] allowing instead appeals of one or more but fewer than all "claim(s) for relief" in an action.[21] Following the enactment of the 1948 amendment, the circuit courts disagreed on the status of the "transaction test" as the determining factor in 54(b) certification for appeals of separate "claims for relief" in multiple-claim litigation.[22] In two companion cases, *Sears, Roebuck & Co. v. Mackey*[23] and *Cold Metal Process Co. v. United Engineering & Foundry Co.*,[24] the United States Supreme Court partially resolved this question by holding that the "transaction test" no longer controlled. Instead, "the relationship of the adjudicated claims to the unadjudicated claims [was to be] one of the factors

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losing party. It thus became prudent to take immediate appeals in all cases of doubtful appealability and the volume of appellate proceedings was undesirably increased.

Id. at 434. *See also* Libbey-Owens-Ford Glass Co. v. Sylvania Indus. Corp., 154 F.2d 814 (2d Cir. 1946), *cert. denied*, 328 U.S. 859 (1946); Leonard v. Socony-Vacuum Oil Co., 130 F.2d 535 (7th Cir. 1942); Atwater v. North Am. Coal Corp., 111 F.2d 125 (2d Cir. 1940).

The amendment to rule 54(b) attempted to remedy this situation. *See* note 19 and accompanying text *infra*.

19. Although rule 54(b) was subsequently amended in 1961, the 1948 version was substantially similar to that currently in force. The text of the 1948 version was as follows:

Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

FED. R. CIV. P. 54(b). For the present version of the rule, *see* note 7 *supra*. The 1961 amendments making rule 54(b) applicable to multiple-party actions resulted from the advisory committee's observation that the danger of hardship through delay of appeal was as real with regard to multiple-party as with multiple-claim actions. C. WRIGHT & A. MILLER, *supra* note 14 § 2653, *citing* Advisory Committee Report on Rules for Civil Procedure, 5 F.R.D. 433, 473 (1946); 6 MOORE'S FEDERAL PRACTICE ¶ 54.43(5), at 951-53 (2d ed. 1976).

20. For the text of the original version of rule 54(b), *see* note 14 *supra*. For a discussion of the rule's "transaction or occurrence" language, *see* note 18 and accompanying text *supra*.

21. FED. R. CIV. P. 54(b) (1948).

22. *See, e.g.*, Bendix Aviation Corp. v. Glass, 195 F.2d 267 (3d Cir. 1952) (appeal accepted from final adjudication of principal claim even though a compulsory counterclaim remained unadjudicated); Flegenheimer v. General Mills, 191 F.2d 237 (2d Cir. 1951) (prior "transaction" test held applicable and the appeal brought by an intervenor on a final dismissal of his claim against the same goods in dispute in the principal claim was dismissed). For a further discussion of *Bendix*, *see* Annot., 38 A.L.R.2d 356 (1954).

23. 351 U.S. 427 (1956). In *Sears*, the Supreme Court affirmed the district court's certification for appeal of a judgment on two of four counts, even though the counts presented only slightly different legal theories of relief and were factually related to the nonappealable counts. *Id.* at 430–32.

24. 351 U.S. 445 (1956). In *Cold Metal*, the Court affirmed the district court's certification of a judgment on one claim for relief despite the fact that a clearly compulsory counterclaim remained unadjudicated. *Id.* at 452.

which the District Court [could] consider in the exercise of its discretion."[25] However, after deemphasizing the separateness and transaction tests, the Supreme Court failed to provide a realistic alternative, leaving the district courts without well-defined standards by which to judge motions for 54(b) certification.[26]

Since *Sears* and *Cold Metal,* many district courts have continued to view the interrelationship of the adjudicated and unadjudicated claims as the decisive factor.[27] Others have remained in a quandry as to what other factors are to be balanced against the traditional hostility to piecemeal appeals.[28] Several courts have agreed, however, that the party moving for 54(b) certification must make a strong showing of necessity for the trial court to exercise its discretion in the movant's favor and allow an

25. *Id.*

26. *See* Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445 (1956); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) (Frankfurter & Harlan, J.J., concurring in *Sears,* dissenting in *Cold Metal).* Justices Frankfurter and Harlan, in their joint dissenting opinion to *Cold Metal,* questioned the wisdom of the majority's holding, pointing specifically to the rejection of the "transaction and distinctness" tests. *Id.* at 439. The two justices viewed the majority's interpretation of amended rule 54(b) as a perversion of the doctrine of finality codified in section 1291 of the Judicial Code, 28 U.S.C. §1291 (1970). 351 U.S. at 440. In conclusion, the dissenters predicted that the doctrine of finality, and consequently the application of rule 54(b), would become totally dependent upon the interpretation of each individual district judge. 351 U.S. at 439, 444 (Frankfurter & Harlan, J.J., dissenting).

27. *See, e.g.,* Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66 (2d Cir. 1973) (since claims for principal and for prejudgment interest depend on same operative facts they cannot be separately adjudicated); Aetna Ins. Co. v. Newton, 398 F.2d 729 (3d Cir. 1968) (order certifying one of multiple claims was improper, as it contained no express determination that there was no just reason for delay); RePass v. Vreeland, 357 F.2d 801, 805 (3d Cir. 1966) (dictum) (claim for costs of prosecuting worthless action held merely an element of damages, and not a certifiable, separate claim); Gaetano Marzotto & Figli, S.P.A. v. G.A. Vedovi & Co., 28 F.R.D. 320 (S.D.N.Y. 1961) (54(b) certification denied because record did not indicate whether principal claim and counterclaim arose from same selling agreement or were sufficiently separate). *See also Note, Appealability in the Federal Courts,* 75 HARV. L. REV. 351, 360 (1961).

28. Left without any definitive standards, the district courts have continued to consider a variety of factors in deciding a motion for 54(b) certification. One of these is the pre-1946 standard: the relationship between the adjudicated and unadjudicated claims. *See, e.g.,* American Security Co. v. Shatterproof Glass Corp., 268 F.2d 769, 774 n.11 (3d Cir. 1959), *cert. denied,* 361 U.S. 902 (1960). Other factors held to be decisive regarding 54(b) certification are: 1) the presence of issues still unresolved by the district court which are relevant to the claim currently being appealed in the circuit court (*see* Campbell v. Westmoreland Farm, Inc., 403 F.2d 939 (2d Cir. 1968); *Zangardi v. Tobriner,* 330 F.2d 224 (D.C. Cir. 1964)); 2) the possibility that review may be mooted by further developments in the district court (*see* Thompson v. Trent Maritime Co., 343 F.2d 200 (3d Cir. 1965)); 3) the effect of immediate appeal on conduct, length, and expense of trial in district court (*see* Gas-A-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102, 1105 (10th Cir. 1973); Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958) *cert. denied,* 361 U.S. 932 (1960); Combined Bronx Amusements, Inc. v. Warner Bros. Pictures, Inc., 132 F. Supp. 921, 922 (S.D.N.Y. 1955)); 4) the presence of a counterclaim or the possibility of a resultant set-off against the judgment on the adjudicated claim (*see* Schroeter v. Ralph Wilson Plastics, Inc., 49 F.R.D. 323, 326 (S.D.N.Y. 1969); Morand Bros. Beverage Co. v. National Distillers & Chem. Corp., 25 F.R.D. 27 (N.D. Ill. 1959)).

Another standard which is being increasingly applied in an attempt to define the analytical process to be employed in deciding on the appropriateness of a 54(b) certificate was suggested in Rieser v. Baltimore & O.R.R., 224 F.2d 198 (2d Cir. 1955), *cert. denied,* 350 U.S. 1006 (1956). In *Rieser,* the Second Circuit stated that claims in a

interlocutory appeal.[29] In this regard, the Third Circuit in *Panichella v. Pennsylvania R.R.*[30] held that the trial judge should grant certification only "'in the infrequent harsh case' as an instrument for the administration of justice."[31] In addition, the Second Circuit has held that a district court must delineate the factors considered in the determination that a claim was appealable under rule 54(b).[32]

It was within this historical context that the Third Circuit rendered its decision on the propriety of the 54(b) order granted by the district court on Allis-Chalmers' claims. In its threshold discussion, the court focused its analysis on the rule 54(b) certification, stating that this issue bore upon the very jurisdiction of the court to review the district court's decision on the merits.[33] Noting that the Supreme Court had placed 54(b) certification within the district court's discretion in the first instance,[34] the *Allis-Chalmers* court emphasized that careful review of the exercise of discretion was clearly in

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multiple claim action may be separately and finally adjudicated if the factual bases for recovery state a number of different claims which could have been separately enforced. 224 F.2d at 199. For a discussion of the cogency of this standard of decision, *see* United States v. Kocher, 468 F.2d 503 (2d Cir. 1972) *cert. denied,* 411 U.S. 931 (1973); Campbell v. Westmoreland Farm, Inc., 403 F.2d 939 (3d Cir. 1968); Curtis Publishing Co. v. Church, Rickards & Co., 58 F.R.D. 594 (E.D. Pa. 1973).

29. *See* Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 942 (2d Cir. 1968); Liquilux Gas Servs., Inc. v. Tropical Gas Co., 48 F.R.D. 330, 332 (D.P.R. 1969). *See also* Gaetano Marzotto & Figli, S.P.A. v. G.A. Vedovi & Co., 28 F.R.D. 320 (S.D.N.Y. 1961).

30. 252 F.2d 452 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960). In *Panichella,* suit was brought by a railroad employee against the railroad for damages resulting from a sidewalk accident. 252 F.2d at 453-54. Although plaintiff released the abutting owner and all other persons, the defendant filed a third party claim against the abutting owner as a joint tortfeasor. *Id.* at 454. The District Court for the Western District of Pennsylvania held that the release barred the railroad employee's claim against the abutting owner, and granted summary judgment to the abutting owner on the third party claim, and certified the summary judgment as final under rule 54(b). Panichella v. Pennsylvania R.R., 150 F. Supp. 79 (W.D. Pa. 1957). The Third Circuit dismissed the appeal, holding that the 54(b) certification was an abuse of discretion, reviewable by the circuit court. 252 F.2d at 455. The court stated that since the resolution of the third party claim was completely dependent upon the principal claim, the appeal would be mooted if Panichella did not recover against the railroad. *Id.* Furthermore, the court noted that the appeal would delay the trial on the principal claim and would not completely resolve the issue of the effect of the release as between the principal parties. *Id.* at 454-55, *citing* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956).

31. 252 F.2d at 455, *quoting* Advisory Committee Report on Rules for Civil Procedure, 5 F.R.D. 433, 474 (1946). For the relevant text of this report, *see* note 15 *supra.*

32. *See* Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286 (2d Cir. 1974) (district courts should include statement of reasons supporting their certification under rule 54(b)); Schwartz v. Compagnie Generale Transatlantique, 405 F.2d 270, 275 (2d Cir. 1968) (trial court instructed to state the most important considerations supporting its certification).

33. 521 F.2d at 362.

34. *Id., citing* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437-38 (1956). In *Sears* the Court not only restructured the standards to be followed in determining whether a claim for relief was sufficiently distinct to warrant a separate, final adjudication (*see* notes 11 & 17 and accompanying text *supra*), but also spoke to the issue of the reviewability by the circuit courts of the district court's decision on 54(b) certification. 351 U.S. at 437. The *Sears* Court stated:

> The timing of such a release [for appeal] is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be

order.[35] Judge Garth began the Third Circuit's analysis by recapitulating the policy behind rule 54(b) as enunciated by the Supreme Court in *Sears*.[36] Judge Garth noted that the *Sears* Court had described the rule not as a relaxation of the traditional standard of finality,[37] but rather as a recognition of the need for immediate appealability from adjudications of less than all claims in a multiple claim action.[38] Referring to the Third Circuit's specific articulation in *Panichella,* the court in the principal case also emphasized that rule 54(b) certification should be granted only in the "infrequent harsh case."[39]

From this discussion of policy, the court turned to the issues of whether the district court in Allis-Chalmers should have articulated the factors it considered in granting the 54(b) certification.[40] The court noted the desirability of providing the reviewing court with a meaningful basis for review[41] as well as informing litigants of the reasons for the court's action.[42] Furthermore, the court cited two recent Second Circuit cases[43] indicating that the district court should submit a statement of reasons for certification in cases " 'where the justification for the certification is not apparent.' "[44]

The majority believed that the diversity of factors which might influence a district court's 54(b) certification decision presented a particularly compelling justification for requiring a statement of reasons supporting this decision.[45] Summarily listing some of the factors on which district courts in the past had relied,[46] the Third Circuit outlined a three-step

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familiar with the case and any justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals. *Id. See also* Gold Seal Co. v. Weeks, 209 F.2d 802, 810–11 (D.C. Cir. 1954); Note, *Appealability in the Federal Courts,* 75 HARV. L. REV. 351, 362–63 (1961); 32 AM. JUR. 2d *Federal Practice and Procedure* § 347 (1967).

35. 521 F.2d at 362–63.

36. *Id., discussing* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956).

37. *See* note 16 *supra.*

38. 521 F.2d at 362–63, *discussing* Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 432 (1956). Thus, according to *Allis-Chalmers,* the rule represents a pragmatic device to be utilized in balancing the undesirability of piecemeal appeals against the need for timing review with an eye to the needs of the parties. 521 F.2d at 363, *citing* Aetna Ins. Co. v. Newton, 398 F.2d 729, 734 (3d Cir. 1968), RePass v. Vreeland, 357 F.2d 801, 804 (3d Cir. 1966), *and* Panichella v. Pennsylvania R.R., 252 F.2d 452, 454 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960).

39. 521 F.2d at 363, *quoting* Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960); *see* note 30 *supra.*

40. 521 F.2d at 364.

41. *Id., quoting* Protective Comm. v. Anderson, 390 U.S. 414, 434 (1968).

42. 521 F.2d at 364.

43. *Id., citing* Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286 (2d Cir. 1974), *and* Schwartz v. Compagnie Generale Transatlantique, 405 F.2d 270, 275 (2d Cir. 1968).

44. 521 F.2d at 364, *quoting* Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286 (2d Cir. 1974).

45. 521 F.2d at 365.

46. *Id.* at 364. The factors specifically listed by the majority included: 1) the relationship between the adjudicated and unadjudicated claims; 2) the possibility that the need for review would be mooted in the future; 3) the danger of duplicative appeals of identical issues; 4) the presence of a claim or counterclaim possibly resulting in a set-off against the judgment sought to be made final; and 5) delay, economic solvency, trial time, and expense. *Id.*

procedure for rule 54(b) certifications.[47] First, the party seeking final certification must sustain the heavy burden of proving that this was the "infrequent harsh case" described in *Panichella*.[48] Second, the district court must balance the factors relevant to this issue.[49] Finally, in order to facilitate review, the court must articulate its reasons for granting certification.[50]

The court then applied this test to the case at bar.[51] Judge Garth explained that although the district court had expressed its reasons for granting summary judgment on Allis-Chalmers' claims, its reasoning on that issue was not applicable to and did not compel a grant of 54(b) certification.[52] Furthermore, the court stated that the mere fact that PECO's counterclaim was factually unrelated to Allis-Chalmers' principal claims was only one factor for the district court to consider.[53] Because of the district court's summary analysis of the certification issue, the reviewing court was unable to answer several factual questions raised in the appeal which in its view required consideration before 54(b) certification could be granted.[54] Specifically, the court believed that a possible set-off of Allis-Chalmers' claim by PECO's counterclaim[55] weighed heavily against 54(b) certification.[56] Furthermore, the court stated that Allis-Chalmers had not fulfilled the first step in the court's three-part certification procedure,[57] which

47. *Id.* at 365.

48. *Id.*, *citing* Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied*, 361 U.S. 932 (1960).

49. 521 F.2d at 365.

50. *Id.*

51. *See id.* at 365–66.

52. *Id.* at 365. The court explained that the "essential inquiry" with regard to summary judgment is whether material facts are disputed. *Id.* On the other hand, in determining the appropriateness of a 54(b) certification, the "essential inquiry" involves a balancing of factors to determine whether a grant of final judgment will serve "the interests of sound judicial administration and public policy." *Id.*

53. *Id.*, *citing* Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445 (1956).

54. *Id.* at 365–66. In applying some of the considerations relevant to 54(b) certification to the principal case, the court was unable to form conclusions as to the following aspects of the case: 1) whether Allis-Chalmers or PECO might be prejudiced by postponement of the execution of its judgment due to the other party's financial instability; 2) the legal or factual substantiality of PECO's counterclaim; 3) the reasons, if any, which convinced the district court to exercise its discretion; 4) the reasons, if any, for not allowing all claims to be fully adjudicated before appeal so that any recovery on PECO's counterclaim might be set off against the judgment in Allis-Chalmers' favor. *Id.* In isolating these questions, Judge Garth implied that the district court's memorandum and order in this case was not one which fulfilled the requirements of and policy supporting rule 54(b), since the answers to these questions were indispensable to a certification determination. *Id.*

55. For the discussion of these facts, *see* notes 1–4 *supra*. 521 F.2d at 366. In its brief discussion of the effect of a possible set-off against the judgment rendered on Allis-Chalmers' principal claims, the court referred to TPO, Inc. v. Federal Deposit Ins. Co., 487 F.2d 131 (3d Cir. 1973), in which the Third Circuit had found that the possibility of a set-off weighed heavily against the grant of *summary judgment*. *Id.* at 134. The Allis-Chalmers court did recognize, however, that *TPO* was a case involving a compulsory counterclaim, whereas PECO's counterclaim was clearly permissive. 521 F.2d at 366.

56. *See* text accompanying notes 48 & 49 *supra*.

57. 521 F.2d at 366.

required the moving party to make a strong showing that this was the "infrequent harsh case" in which the district court should exercise its discretion.[58]

Judge Gibbons, in his dissenting opinion, argued that the majority's decision to remand was unwarranted in light of the clear ripeness for appeal of Allis-Chalmers' favorable judgment.[59] In Judge Gibbons' view, the use of rule 54(b) was particularly appropriate in the permissive counterclaim situation.[60] In addition, he questioned the power of the circuit court to refuse a 54(b) certified appeal, especially when the grounds for appeal urged by the parties did not focus upon improper certification.[61] After a lengthy discussion of the factors which the majority considered in deciding to remand the case,[62] Judge Gibbons concluded that certification was proper, and that Allis-Chalmers would suffer definable hardship through the delaying of its appeal.[63]

In light of the fact that neither party raised the rule 54(b) issue on appeal, the Third Circuit's decision to dismiss the appeal and remand for an articulation of the district court's reasons for granting certification is surprising. Since the court did not involve itself in an analysis of the merits of these particular claims with regard to their ripeness for immediate appeal,[64] *Allis-Chalmers* probably should be read solely as a procedural

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58. *Id.* at 367 (Gibbons, J., dissenting).

59. *Id.* at 369–70.

60. The parties' most urgent grounds for appeal centered upon the summary judgment issue and on the refusal of the district court to stay enforcement of the judgment on Allis-Chalmers' claims under Federal Rule of Civil Procedure 62(h). 521 F.2d at 367, 373 (Gibbons, J., dissenting).

61. *Id.* at 367. Judge Gibbons presented a thorough analysis of the merits of the case at bar with reference to 54(b) certification for appeal. *Id.* He regarded the case as one which did not contravene the two major policies of rule 54(b) certification: 1) avoidance of appellate adjudications which may later become unnecessary, and 2) avoidance of fragmentation in adjudication of related issues. *Id.* at 370.

In replying to the factors and questions listed by the majority, Judge Gibbons stressed that Allis-Chalmers' claims and PECO's counterclaim were neither factually nor legally related, so that there was no overlap of issues and no possibility that the appeal might be mooted by the district court's determination of the remaining issues. *Id.* at 371. Further, the presence of a set-off, in Judge Gibbons' opinion, was relevant only to the summary judgment issue and not to certification. *Id.*

The dissent attempted to answer all of the questions which the majority had listed as having been ignored by the district court's brief certification order. *Id.* at 372. Judge Gibbons concluded that there was no reason to delay final certification of Allis-Chalmers' claims in view of: the undisputed nature of PECO's debt; Allis-Chalmers' right to collect and utilize the money it was owed; and the time-consuming nature of a full consideration of all the factors which the majority had mentioned as bearing on the 54(b) issue. 521 F.2d at 367; *see* note 66 *supra.*

62. *Id.* at 371–72.

63. *See* note 43 and accompanying text *supra.*

64. Nor was the court's analysis of potential certification factors offered in support of a holding that Allis-Chalmers' claims were not ripe for appeal. The court did not so hold. 521 F.2d at 363. The majority emphasized that "notwithstanding the stridency of the dissent, our holding is not that this was an improper case for Rule 54(b) certification." *Id.* at 367 n.16. The court clearly indicated that its consideration of the factors weighing for and against certification in the case at bar was not exhaustive, characterizing them as being for purposes of illustration only. *Id.* at 364 n.6.

decision, emanating from what the court concluded should be the logical consequence of the policy controlling the implementation of rule 54(b).[65] It did not attempt to usurp the district court's function of deciding the certification issue.[66] Rather, the court's analysis emphasized the ambiguity surrounding the standards of decision for rule 54(b) certifications and pointed out the valid questions raised by the particular set of facts in the principal case. The majority's explicit order to the district courts evidently resulted from its belief that the justification for the certificate in the principal case was not apparent from the district court's order,[67] and from its superseding concern with both the need for definite standards of decision in line with the *Panichella* policy[68] and with the possibility of an abuse of discretion.[69]

The three-step procedure outlined by the *Allis-Chalmers* court for rule 54(b) certification is consistent with both the *Panichella* policy[70] and the traditional emphasis on the requirement of finality.[71] However, given the fact that one of the primary reasons for the doctrine proscribing any appeal

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65. *See id.* at 363–64.

66. *Id.* at 367 n.16. The majority stated: "We express no opinion on the dissent's analysis of the factors to be considered by the district court because, in the view we take, that is a proper function for the district court." *Id.*

67. *Id.* at 364–65, *citing* Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286 (2d Cir. 1974).

68. 521 F.2d at 365, *quoting* Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960).

69. 521 F.2d at 362; *see* text accompanying note 34 *supra.* This concern was also expressed in *Panichella,* in which the Third Circuit had suggested that careful review of the 54(b) certification might be necessary to prevent overuse of the procedure. *Id.* at 454–55. For a discussion of *Panichella, see* note 30 and accompanying text *supra.*

Notwithstanding the power of the circuit court to review the district court's certification, the district court's firsthand knowledge of the case weighs heavily in favor of the circuit court's respecting the district court's decision. 6 MOORE'S FEDERAL PRACTICE ¶ 54.04(3.–10), at 164 (2d ed. 1976).

Other considerations, such as the avoidance of duplicative review of the same issue, have led courts to require that the party moving for 54(b) certification clearly demonstrate the necessity therefor and indicate the exigencies of the particular case which warrant an exercise of the district court's discretion. For a discussion of these cases, *see* note 28 *supra.* The Third Circuit, in District 65, Distributive Processing & Office Workers Union v. McKague, 216 F.2d 153 (3d Cir. 1954), went so far as to advise lower courts that if suits such as that at bar which present no major issue or guiding principle are to be cut up and brought piecemeal before appellate tribunals Rule 54(b) will not fulfill its function and continued disregard of the spirit of the Rule must inevitably lead to its modification or repeal. *Id.* at 156. The *Allis-Chalmers* court's requirement that the moving party present a substantial showing of need as a precondition to 54(b) certification appears to make just such a "modification" of the rule. *See* notes 48 & 49 and accompanying text *supra.*

70. *See* note 40 and accompanying text *supra.*

71. The traditional doctrine of finality is codified today at 28 U.S.C. § 1291 (1970).

Although there had been some disagreement as to the circuit court's role in reviewing certifications under rule 54(b) (*see generally* 38 A.L.R.2d 377, 386–90 (1954)) it is now clear that such review is not only within the court's purview, but it is indeed the circuit court's duty to consider the threshold question of the propriety of the certification sua sponte, since it is a matter which goes to the court's jurisdiction. United Bonding Ins. Co. v. Stein, 410 F.2d 483, 485 n.1 (3d Cir. 1969); Aetna Ins. Co. v. Newton, 398 F.2d 729 (3d Cir. 1968).

It has been suggested that such review is necessary not only to control the certification process and preserve the policy behind the rule, but also because

for less than a final judgment is the conservation of judicial time,[72] it seems somewhat incongrous to require what the dissent appropriately calls a "trial within a trial" on the final certification itself.[73] Furthermore, in demanding that such a "trial within a trial" be conducted by the district court and recorded in detail in the certification order, the majority may be suggesting that the circuit court's review be equally as detailed. In so doing, the majority may, in effect, be usurping the district court's power to decide the certification question.[74] Although this may be a desirable limitation upon the district court's broad discretion, it is seemingly inconsistent with the Supreme Court's holding in *Sears* that the district court was to be the primary forum for the 54(b) certification issue.[75]

The impact of *Allis-Chalmers* on the 54(b) certification process remains to be determined. On the one hand, the case may be regarded as requiring the implementation of a procedure which will contribute to the establishment of more definite standards to guide district courts in evaluating the propriety of a certification.[76] If the trial court is required to submit a written opinion in support of its certification, the circuit court will be able to examine the factors considered in greater detail and this may facilitate its review of the district court's decision. Gradually, the Third Circuit may be able to construct a meaningful set of guidelines for the district courts, isolating the most important considerations and defining the phrase "abuse of discretion"[77] as it applies to 54(b) certification.

On the other hand, the court's holding appears to extend the *Panichella* rule[78] and may further limit use of rule 54(b) as a means of avoiding hardship, even in cases where such hardship is a clear possibility. This is especially true since, as the dissent emphasized,[79] the certification of Allis-

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certification affects other matters, such as res judicata and the accrual of interest, which are normally dependent upon finality. *See* 6 MOORE'S FEDERAL PRACTICE ¶ 54.28(1), at 364 (2d ed. 1976).

72. Note, *Appealability in the Federal Courts,* 75 HARV. L. REV. 351 (1961).

73. 521 F.2d at 373 (Gibbons, J., dissenting).

74. For the Supreme Court's statement on the district court's discretion, *see* note 34 and accompanying text *supra.*

The *Allis-Chalmers* court may be understood as impliedly requiring that the reviewing court undertake a consideration of the certification issue which would all but equal the thoroughness of the district court's analysis. This conclusion seems to be mandated by the court's insistence that the district court enter into a detailed analysis of the many factors affecting the particular certification decision, including the financial condition of the parties and the general economic climate. To provide meaningful review, the circuit court might be compelled to perform an analysis of the same broad scope. 521 F.2d at 373 (Gibbons, J., dissenting). This in turn, pragmatically, could make the reviewing court the true arbiter of the issue, for instead of merely surveying the certification to detect a blatant abuse of discretion, the reviewing court would carefully reconsider all of the reasons proffered by the district court.

75. 351 U.S. at 435–36.

76. For a discussion of the factors which courts presently take into account, *see* note 29 and accompanying text *supra.*

77. *See* Sears, Roebuck & Co. Mackey, 351 U.S. 427, 437 (1956); *see* text accompanying note 34 *supra.*

78. Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960). For the text of rule 54(b), *see* note 7 *supra.*

79. *See* note 61 and accompanying text *supra.*

Chalmers' claims seemed quite justified on the face of the record before the circuit court. Furthermore, the holding may require the Third Circuit to engage in a substantially more time-consuming review of every future 54(b) certification before it accepts such an appeal.[80]

Although the Third Circuit in *Allis-Chalmers* asserted that it was attempting merely to clarify the criteria for rule 54(b) certification decisions and to provide for an effective means of detecting an abuse of discretion, it seems likely that the opinion may be interpreted somewhat differently by the district courts. The lower courts may find it difficult to ignore the implications of the more cumbersome three-step certification procedure[81] established by the Third Circuit and the repeated reminder that rule 54(b) is to be employed "only in the infrequent harsh case."[82] For this reason, *Allis-Chalmers* may be read as advocating a severe limitation on the use of 54(b) certifications by the district courts and as shifting the actual discretion in the certification decisions to the Third Circuit.

Joanne R. Alfano

FEDERAL JURISDICTION — APPEALABILITY — ORDER STAYING FEDERAL GRAND JURY PROCEEDINGS PENDING OUTCOME OF RELATED STATE ACTION THAT IN PRACTICAL EFFECT DISMISSED THE GRAND JURY IS APPEALABLE AS A FINAL DECISION WITHIN THE MEANING OF SECTION 1291 OF THE JUDICIAL CODE.

In re Grand Jury Proceedings (1975)

On March 27, 1973, the Commonwealth of Pennsylvania and Allegheny County instituted a civil contempt action against United States Steel Corporation (U.S. Steel) for the latter's failure to comply with a previously entered consent decree setting air pollution limitations at its Clairton,

80. Perhaps more significantly, if future defendants who are considering filing a permissive counterclaim interpret the principal case as narrowing the application of rule 54(b) beyond the limits established by *Panichella,* these litigants may decide against bringing their claim as a permissive counterclaim. The reason is that if they do bring the counterclaim, it is conceivable that a district court would refuse to certify a judgment on the principal claim, citing *Allis-Chalmers* as precedent. If the defendant was the losing party in the judgment on the principal claim, his own permissive counterclaim could bar his obtaining a timely review, and he would be better advised to file his claim in a separate action. This result clearly contravenes the policy behind the more liberalized joinder provisions of the Federal Rules of Civil Procedure — especially rule 13, Fed. R. Civ. P. 13. Ironically, rule 54(b) was originally promulgated to accommodate the increased complexity of litigation resulting from these same joinder provisions. For a discussion of the history of rule 54(b), *see* note 18 and accompanying text *supra.*

81. *See* text accompanying notes 40–55 *supra.*

82. 521 F.2d at 363, *quoting* Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied,* 361 U.S. 932 (1960).

Pennsylvania coke works.[1] While that action was pending, the United States empanelled a grand jury[2] to investigate possible criminal violations of the Clean Air Act[3] by U.S. Steel at its Clairton works.[4] Pursuant to U.S. Steel's motion, however, the United States District Court for the Western District of Pennsylvania ordered a stay of the federal grand jury proceedings pending the outcome of the state contempt action.[5] On appeal,[6] the United States

1. Commonwealth v. United States Steel Corp., Civ. No. 1550 (Pa. C.P. Allegheny County Mar. 27, 1973). On September 25, 1972, a consent decree was entered in an action brought by the commonwealth and the county against U.S. Steel in the Court of Common Pleas of Allegheny County. *See* Commonwealth v. United States Steel Corp., 15 Pa. Cmwlth. Ct. 184, 325 A.2d 324, 326 (1974). The decree, which modified earlier limitations on the emission of particulate matter and sulfur oxides from the coke ovens, resulted from civil injunctive proceedings brought by the commonwealth and county to halt violations of air pollution regulations. *Id.* The standards in the decree were approved by the United States on March 22, 1973, as a revision of Pennsylvania's Clean Air Act Implementation Plan. 40 C.F.R. § 52.2036(a) (1975). They thus became federally enforceable under section 113 of the Clean Air Act, 42 U.S.C. § 1857c–8 (1970) (amended 1974).

On May 23, 1973, as a result of U.S. Steel's allegations that the consent decree was technologically impossible to comply with, the Court of Common Pleas of Allegheny County ordered a committee of technical experts to examine the feasibility of compliance with the consent decree standards and to report its findings to the court. Commonwealth v. United States Steel Corp., Civ. No. 1550 (Pa. C.P. Allegheny County May 23, 1973). On appeal, the commonwealth court reversed on the ground that the lower court could not order the procedure sua sponte and remanded the action for further proceedings. Commonwealth v. United States Steel Corp., 15 Pa. Cmwlth. Ct. 184, 325 A.2d 324 (1974). The proceedings in the lower court culminated with the entering of another consent decree between the parties. Commonwealth v. United States Steel Corp., Civ. No. 1550 (Pa. C.P. Allegheny County Dec. 6, 1976).

2. Pursuant to section 113 of the Clean Air Act, 42 U.S.C. § 1857c–8 (1970) (amended 1974), the United States, on November 8, 1973, notified U.S. Steel of its failure to comply with the emission limitations and compliance schedules contained in the Pennsylvania Clean Air Act Implementation Plan as modified by the 1972 consent decree. *In re* Grand Jury Proceedings, 525 F.2d 151, 153 (3d Cir. 1975). Subsequently, on October 22, 1974, a federal grand jury was empanelled for an 18-month term to investigate the possible criminal violations of the Clean Air Act by U.S. Steel. *Id.* at 153.

3. 42 U.S.C. §§ 1857–1857e (1970) (amended 1974).

4. Section 113 of the Clean Air Act provides for federal enforcement of a state implementation plan adopted pursuant to the Act if a violation continues 30 days after the violator was notified of his noncompliance by the administrator of the Federal Environmental Protection Agency. 42 U.S.C. § 1857c–8(a)(1) (1970) (amended 1974). The complementary nature of federal and state regulation of air pollution has been extensively reviewed by the Third Circuit. *See, e.g.,* Duquesne Light Co. v. Environmental Protection Agency, 522 F.2d 1186 (3d Cir. 1975); Duquesne Light Co. v. Environmental Protection Agency, 481 F.2d 1, 3–4 (3d Cir. 1973).

5. Commonwealth v. United States Steel Corp., Misc. No. 6132 (E.D. Pa. Mar. 6, 1975). U.S. Steel asserted that the "pending state proceedings were a bar to simultaneous federal enforcement of the coke oven door emission standards." *Id.* The district court agreed, concluding that it was not the intent of Congress that state implementation plans incorporating federal regulations would authorize enforcement proceedings against polluters by both federal and state authorities. *Id.*; *see* note 44 and accompanying text *infra*. U.S. Steel also asserted other grounds not applicable here in support of its motion. *In re* Grand Jury Proceedings, 525 F.2d 151, 154 (3d Cir. 1975).

6. A petition for mandamus was consolidated with the appeal. 525 F.2d at 154; *see* notes 19 & 29 *infra*.

Court of Appeals for the Third Circuit[7] vacated the stay order, *holding* that an indefinite stay of grand jury proceedings pending the outcome of related state proceedings amounting to a dismissal of the grand jury is appealable as a final decision within the meaning of section 1291 of the Judicial Code.[8] *In re Grand Jury Proceedings,* 525 F.2d 151 (3rd Cir. 1975).

It is generally conceded that when a judicial system affords a right to appellate review it must ensure both that appeal does not come too late to be of any value and that the system promotes the efficient disposition of judicial business.[9] In most jurisdictions, this balance is struck by a general rule allowing appeals only from final judgments.[10] The purpose of this rule, which has been followed in the federal courts since the enactment of the Judiciary Act of 1789,[11] is to "combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results,"[12] thereby avoiding the potential harassment and delay of successive appeals within one case.[13] Although the Supreme Court has characterized a final decision as "one which ends the litigation . . . and leaves nothing for the court to do but execute the judgment,"[14] it has emphasized that a "practical rather than a technical construction" must be

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7. The case was heard by Circuit Judges Van Dusen, Adams, and Hunter. Judge Hunter wrote the opinion.

8. 28 U.S.C. § 1291 (1970). Section 1291 states in pertinent part: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." *Id.*

9. *See* Note, *Appealability in the Federal Courts,* 75 HARV. L. REV. 351 (1961).

10. *Id.* at 351 & n.20. In a few state jurisdictions, statutes provide that appeals can be taken from most interlocutory rulings of the court. *See, e.g.,* N.Y. CIV. PRAC. LAW & R. § 5701. *See also* note 19 *infra.*

11. Ch. 20, § 21, 1 Stat. 83 (1789) (current version at 28 U.S.C. § 1291 (1970)). For the text of section 1291, *see* note 8 *supra.*

12. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); *see* note 16 and text accompanying notes 15 & 16 *infra.* The Supreme Court has observed that "[t]he foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up in fragments.' " Catlin v. United States, 324 U.S. 229, 233-34 (1945), *quoting* Luxton v. North River Bridge Co., 147 U.S. 337, 341 (1893).

13. The Supreme Court has explained the history and purpose of the rule as follows:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed.

Cobbledick v. United States, 309 U.S. 323, 324-25 (1940) (citations omitted). *See also* Note, *supra* note 9, at 352, which analyzes the rationale of the finality rule.

14. 324 U.S. at 233, *citing* St. Louis, I.M. & S.R.R. v. Southern Express Co., 108 U.S. 24, 28-29 (1883). One commentator has observed, however, that "[a]lthough there have been numerous attempts to formulate an all-encompassing definition of finality, there have been just as many declarations that no single definition will suffice." Note, *supra* note 9, at 353.

given to the rule.[15] Thus, the Court has, in appropriate cases, allowed immediate appeal of nonfinal orders where the practical result of denying review would have been to foreclose a litigant's opportunity to obtain reversal before sustaining irreparable injury.[16]

Generally, courts have held that an order staying an action pending the outcome of related proceedings in another court cannot be reviewed on appeal[17] — usually on the ground that such orders are merely interlocutory,[18] rather than final.[19] The leading case in the Third Circuit supporting

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

16. In Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848), the Supreme Court granted an appeal from an order directing an immediate transfer of certain property to an assignee in bankruptcy, who presumably would have sold it for the benefit of creditors. The Court reasoned that the appellants would be subject to irreparable injury if immediate review were not granted, because their property would have been sold long before a final judgment was tendered in the principal litigation. *Id.* at 204. For an application of the *Forgay* rule, *see* Radio Station WOW v. Johnson, 326 U.S. 120 (1945).

In Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), the Supreme Court allowed an immediate appeal from an order denying defendant's motion to require plaintiff to give security under a state statute because the order was collateral to the principal litigation and would not affect or be affected by a decision on the merits. Although the order did not terminate the action, the Court reasoned that review of the order could not await final judgment because "[w]hen that time comes the . . . order and rights conferred . . . will have been lost, probably irreparably." *Id.* at 546; *see* Stack v. Boyle, 342 U.S. 1 (1951) (denial of motion to reduce bail appealable under *Cohen*); Roberts v. United States Court, 339 U.S. 844 (1950) (order refusing a plaintiff leave to proceed in forma pauperis appealable under *Cohen*).

It has also been determined by the Supreme Court that the courts of appeals have authority to answer questions concerning the propriety of immediate review when an order considered marginally final has been rendered and review of that order is considered "fundamental to the further conduct of a case." Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); *see* 9 MOORE'S FEDERAL PRACTICE ¶ 110.12, at 150 (2d ed. 1975) [hereinafter cited as MOORE].

Congress has long recognized the need for exceptions to the finality rule. *See, e.g.,* 28 U.S.C. § 1292(a)(1)–(4) (1970) (permitting appeals from interlocutory orders concerning injunctions, receiverships, admiralty, and patent infringement); *Id.* § 1292(b) (permitting certification of controlling questions of law as to which there may be substantial ground for difference of opinion). *See also* Federal Rule of Civil Procedure 54(b) which provides in pertinent part:

> When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

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

17. *See* Jackson Brewing Co. v. Clarke, 303 F.2d 844 (5th Cir.), *cert. denied,* 371 U.S. 891 (1962); International Nickel Co. v. Martin J. Barry, Inc., 204 F.2d 583 (4th Cir. 1953); Mottolese v. Preston, 172 F.2d 308 (2d Cir. 1949).

18. International Nickel Co. v. Martin J. Barry, Inc., 204 F.2d 583, 585 (4th Cir. 1953). An interlocutory order has been defined as an order issued between the commencement and ending of a suit deciding a point or matter but not finally deciding the whole controversy. *See, e.g.,* Engel Sheet Metal Equip., Inc. v. Shewman, 301 S.W.2d 856, 860 (Mo. App. 1957).

19. Some orders staying proceedings pending the outcome of a related action have been held appealable under state statutes authorizing appeals other than from final decisions. *See, e.g.,* San Bernardino Valley Mun. Water Dist. v. Gage Canal Co., 226 Cal. App. 2d 206, 37 Cal. Rptr. 856 (1964). A few courts have allowed an appeal of such stay orders under section 1292(a)(1) of the Judicial Code, 28 U.S.C. § 1292(a)(1) (1970), which authorizes appeals from interlocutory orders "granting, continuing, modifying,

this proposition is *Arny v. Philadelphia Transportation Co.*,[20] in which the court refused to review a district court's order staying federal court proceedings pending the outcome of a wrongful death action in a state court based upon the same facts. Although the plaintiff argued that since the outcome of the state court litigation would in all probability render the federal action res judicata, the stay was tantamount to a dismissal of the federal suit, the Third Circuit refused to consider the order final for purposes of review,[21] stating:

> We cannot say that the order appealed from surely will result in the case becoming *res judicata* by reason of an adjudication of the case or cases now pending in the Court of Common Pleas . . . . To treat the order appealed from as the equivalent of a dismissal would compel this court to speculate on the possible or probable course of the litigations in the Pennsylvania State tribunal. This we should not do.[22]

However, other courts confronted with factual situations requiring immediate review of stay orders have, under exceptional circumstances, ruled that the order amounted to a final decision within the meaning of section 1291.[23]

The policy of refusing to review orders issued or denied during the course of grand jury proceedings is especially strong and is usually based upon an assumption that the grand jury proceedings would be forced to halt until review could be completed.[24] It is clear, however, that immediate review of such orders can be obtained where necessary to ensure that all opportunities for review will not be lost.[25]

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refusing or dissolving injunctions." *E.g.*, Glen Oaks Util., Inc. v. Houston, 280 F.2d 330 (5th Cir. 1960); *see* note 28 and accompanying text *infra*.

Section 1292(b) of the Judicial Code, 28 U.S.C. 1292(b), which permits a court of appeals discretion in accepting an otherwise unappealable order when included in the order is the district judge's written opinion that the 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, has been applied to permit an appeal from an order staying an action due to the pendency of another action. *See, e.g.*, Lear Siegler, Inc. v. Adkins, 330 F.2d 595 (9th Cir. 1964).

The propriety of an order staying an action until the termination of the merits of a related action in another court may also be challenged by a petition for a writ of mandamus. McClellan v. Carland, 217 U.S. 268, 280 (1910); *see* Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949); note 29 and accompanying text *infra*.

20. 266 F.2d 869 (3d Cir. 1959).

21. *Id.* at 870.

22. *Id.*

23. *See* McSurely v. McClellan, 426 F.2d 664 (D.C. Cir. 1970) (order simultaneously denying a stay of criminal contempt proceedings and granting stay of civil injunctive suit until criminal proceedings were concluded was immediately appealable as final where rights to be declared in civil suit were needed in criminal proceedings); Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967) (district court's stay of stockholder derivation action until resolution of related state action amounted to a dismissal and was therefore final). For further discussion of *Amdur*, *see* note 33 *infra*.

24. *See* United States v. Ryan, 402 U.S. 530, 533 (1971) (order denying motion to quash grand jury subpoena duces tecum requiring the production of records not final); Cobbledick v. United States, 309 U.S. 323, 325–26 (1940) (order denying motion to quash subpoena directing witness to appear before a grand jury not final). For a further discussion of *Ryan* and *Cobbledick*, *see* note 36 *infra*.

25. *See* Burdeau v. McDowell, 256 U.S. 465 (1921); Perlman v. United States, 247 U.S. 7 (1918). In *Burdeau*, the Supreme Court agreed to review an order directing the

The first issue facing the Third Circuit in the instant case, therefore, was whether the court had jurisdiction to review the district court's order.[26] The United States urged three bases for jurisdiction:[27] 1) that the order was final and therefore appealable under section 1291; 2) that the stay was an interlocutory order granting an injunction, and was therefore appealable under section 1292(a) of the Judicial Code;[28] and 3) that the stay order was entitled to review by mandamus and was therefore appealable under section 1651(a) of the Judicial Code.[29]

Determining that it had jurisdiction under section 1291, the court did not reach the other two asserted bases of jurisdiction proceeding instead to enumerate the reasons why it considered the order in the instant case to be

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Government to deliver to the petitioner certain papers belonging to him and restraining the evidentiary use of information obtained from the papers in grand jury proceedings. 256 U.S. at 471. In *Perlman*, the Court reversed a lower court holding and accepted review of an order denying Perlman's petition to prohibit the evidentiary use of exhibits owned by him before a grand jury, rejecting the Government's contention that the order was nonfinal. The Court reasoned that to have held otherwise would have rendered Perlman "powerless to avert the mischief of the order," since the documents were already in the court's possession, thereby eliminating the possibility of review by resistance to the order and submission to an adjudication of contempt. 247 U.S. at 13. It is generally recognized that *Burdeau* and *Perlman* are exceptions to the general rule espoused in United States v. Ryan, 402 U.S. 530, 533 (1970), and Cobbledick v. United States, 309 U.S. 323, 328–29 & n.6 (1940). *See* note 24 *supra*.

The traditional method for obtaining immediate review of allegedly nonfinal orders is by resisting the order and submitting to an adjudication of contempt. United States v. Ryan, 402 U.S. at 533. In *Ryan*, the Court stated that the respondent did not have to comply with the subpoena duces tecum, adding:

> We have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resisting to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.

402 U.S. at 532–33.

26. 525 F.2d at 154.

27. *Id.*

28. 28 U.S.C. § 1292(a)(1) (1970). Section 1292(a)(1) provides in pertinent part: "The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing, or dissolving injunctions . . . ." *Id.* An order staying or refusing to stay proceedings is appealable under section 1292(a)(1) of the Judicial Code if: 1) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law, and 2) the stay was sought to permit the prior determination of some equitable defense or counterclaim. This theory is generally known as the *Enelow-Ettelson* rule. Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942); *see* Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935). Courts have generally declined to extend this rule to orders respecting stays pending the outcome of other litigation. *See* Day v. Pennsylvania R.R., 243 F.2d 485, 487 (3d Cir. 1957); MOORE, *supra* note 16, ¶ 110.20 [4.–2], at 51.

29. 28 U.S.C. § 1651(a) (1970). Section 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* The Third Circuit noted that even if the district court's order was not appealable as a final decision, petitioners would be entitled to review by mandamus. 525 F.2d at 155. *See generally* Texaco v. Borda, 383 F.2d 607 (3d Cir. 1967); United States v. United States Dist. Ct., 238 F.2d 713 (4th Cir. 1956), *cert. denied*, 352 U.S. 931 (1957). *See* MOORE, *supra* note 16, ¶ 110.20 [4.–2], at 240; Note, *supra* note 9, at 375.

final.[30] Noting that the Supreme Court had "counselled that 'the requirement of finality is to be given a practical rather than a technical construction,'"[31] and that a "'pragmatic approach'"[32] to finality is essential, the Third Circuit concluded that the district court's order was final because it amounted to a dismissal of the grand jury proceedings.[33] In support of this conclusion, Judge Hunter observed that the state court action had already consumed more than two years and was likely to continue beyond the grand jury's term.[34] Therefore, he reasoned that the grand jury's investigation into U.S. Steel's possible criminal violations of the Clean Air Act was "effectively precluded by the district court's stay."[35]

The court then proceeded to dispose of appellee's contentions that certain Supreme Court decisions, in which orders granting or denying motions to quash subpoenas or suppress evidence before grand juries were found not to be final,[36] required the Third Circuit to conclude that the district court's order was not appealable.[37] After examining the policy behind these decisions — avoiding the disruption of grand jury proceedings[38] — the

30. 525 F.2d at 154–55.

31. *Id.* at 155, *quoting* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); *see* note 16 and accompanying text *supra.*

32. 525 F.2d at 155, *quoting* Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962).

33. 525 F.2d at 155, *citing* Amdur v. Lizars, 372 F.2d 103, 105–06 (4th Cir. 1967). In *Amdur,* an order staying a stockholders derivative action brought in a federal court for as long as a prior, related state court action remained outstanding was held to be final. The Fourth Circuit reasoned that, in effect, the order amounted to a "*dismissal* of the proceedings," because the plaintiff had no intention of posting security, as was required to continue the federal court action. 372 F.2d at 106 & n.3 (emphasis supplied by the court). The *Amdur* court emphasized, however, that orders staying proceedings pending the termination of related proceedings in courts were not usually appealable. *Id.* at 105–06.

34. 525 F.2d at 155. As of the date of this note, the grand jury's term has expired and the state court proceedings culminated with the entrance of another consent decree. *See* Commonwealth v. United States Steel Corp., Civ. No. 1550 (Pa. C.P. Allegheny County Dec. 6, 1976).

35. 525 F.2d at 155; *see* notes 1–5 and accompanying text *supra.*

36. 525 F.2d at 155–56. Appellee relied upon United States v. Ryan, 402 U.S. 530 (1971), DiBella v. United States, 369 U.S. 121 (1962), and Cobbledick v. United States, 309 U.S. 323 (1940). In *Cobbledick* and *Ryan,* the Supreme Court held that orders denying motions to quash subpoenas duces tecum directing witnesses to appear and produce documents before a United States grand jury were not appealable as final decisions. The Court emphasized that review of the orders would interfere with the progress of the grand jury proceedings and thereby violate the policy of "expedition in the administration of the criminal law." United States v. Ryan, 402 U.S. at 533; *see* Cobbledick v. United States, 309 U.S. at 325, 327–28. In both cases, the Court also noted that the moving parties were capable of obtaining review at once by refusing to comply with the order and facing contempt charges which were reviewable. 402 U.S. at 533; 309 U.S. at 323. In *DiBella,* the Supreme Court held that a ruling on a preindictment motion to suppress the use in a federal criminal trial of evidence allegedly procured through an unreasonable search and seizure was not final for purposes of review. Again, the Court emphasized the importance of avoiding disruption of a criminal trial. 369 U.S. at 126.

37. 525 F.2d at 155.

38. *Id.* at 156. The court reasoned: "If an immediate appeal could be taken from every court order concerning matters before a grand jury, years would pass before any grand jury could complete its investigation. Indeed the grand jury's term might expire

Third Circuit concluded that the decisions did not control the instant case.[39] The court explained:

> Permitting appeal in this instance does not involve this Court in the sort of minitrials that the Supreme Court has sought to avoid. Unlike [the cases concerning] particular orders to individual witnesses pertaining to specific evidence, the district court's stay . . . goes to the entire grand jury proceeding; it affects all witnesses and all evidence. To deny appeal of this order would only encourage the "leaden-footed" administration of justice, for the lower court's order has caused the entire federal proceedings to grind to a halt.[40]

Having established this basis for jurisdiction, the Third Circuit addressed the merits of the stay order.[41] Noting that broad investigative powers are essential to enable a grand jury to carry out its law enforcement functions,[42] the court concluded that the order "constituted an unwarranted encroachment" upon the historical authority of the grand jury.[43] The court therefore vacated the stay.[44]

The Third Circuit's decision to treat the stay order as final for purposes of section 1291 appears to be in consonance with the Supreme Court's direction that courts use a practical approach when applying the finality

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before the appeals could run their course." *Id.*; *see* text accompanying notes 45–47 *infra*.

39. 525 F.2d at 156.

40. *Id.* The court also noted that the government could not follow the traditional avenue to immediate appellate review, namely resistance to the order and submission to a possible adjudication of contempt. *Id.* at n.20; *see* note 25 *supra*.

41. 525 F.2d at 156.

42. *Id.* at 157. The court observed that "[t]he investigative function of the grand jury is at the foundation of effective law enforcement in the United States and accordance of broad powers to the grand jury in the conduct of its investigations is essential to the proper execution of its functions." *Id.* at 157 & n.22, *citing*, *e.g.*, United States v. Calandra, 414 U.S. 338, 343–45 (1974), Blair v. United States, 250 U.S. 273, 282 (1919), *and* Hale v. Henkel, 201 U.S. 43, 52, 65 (1906).

43. 525 F.2d at 157.

44. *Id.* at 156–58. The Third Circuit reasoned that the district court had granted the stay because it erroneously believed that the grand jury was limited in its investigation to violations by United States Steel of the emission limitations incorporated into the Pennsylvania Clean Air Act Implementation Plan. *Id.* at 157; *see* note 5 and accompanying text *supra*. Thus, in the district court's opinion, simultaneous enforcement of these limitations by both the state and federal governments would be contrary to provisions of the Clean Air Act. Commonwealth v. United States Steel Corp., Misc. No. 6132 (E.D. Pa. Mar. 6, 1956). In discussing the district court's error, Judge Hunter explained:

> All investigation by the grand jury was halted even before it could be started. At that nascent stage of the grand jury's inquiry, the lower court could not possibly predict whether indictments would issue, or, if issued, against whom and for what violations . . . . Thus, reliance on the Clean Air Act as the basis for the issuance of the stay was unfounded, without regard to the validity of the court's conclusion on dual enforcement.

Id. (citations and footnote omitted). Although the Third Circuit was not required to review the district court's conclusions on dualistic enforcement of state implementation plans under the Clean Air Act, the court did take the liberty of suggesting two cases which might provide guidance in the area. *Id.* at 157 n.25, *citing* Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975), *and* Duquesne Light Co. v. Environmental Protection Agency, 522 F.2d 1186, 1188–89 (3d Cir. 1975).

rule,[45] since denial of review of the contested order in the instant case would, in practical effect, have halted the grand jury proceedings entirely.[46] In addition, the Third Circuit may have provided some useful guidance to the lower courts by its rather clear enunciation of the factors it considered in reaching its conclusion: 1) permitting appeal would not involve the court in the sort of "minitrials" that are to be avoided; 2) the order affected the entire grand jury proceedings and all witnesses (not just one); and 3) denying review would have encouraged the "leaden-footed administration of justice."[47] It would seem that these guidelines are sufficiently definite to enable courts to apply the final judgment rule with some degree of certainty in an analogous situation.

However, considering the need for specific guidelines in the area of finality,[48] it is puzzling that the Third Circuit did not distinguish or even discuss its oft-cited opinion in *Arny v. Philadelphia Transportation Co.*,[49] since the instant case required the court to engage in almost the same type of speculation as to the progress of litigation in a Pennsylvania state court which it pointedly said it "should not do" in *Arny*.[50] While the cases are distinguishable on their facts in that the instant case involved a stay of grand jury proceedings while *Arny* involved a stay of a federal district court proceeding, the contention in both cases was that the stay amounted to a dismissal because of the expected progress (or lack of progress) of a related state court action.[51]

The Third Circuit's failure to distinguish *Arny* presents a problem in that a court comparing the two opinions is left with little guidance as to when, or even if, it should speculate on the outcome of litigation pending in a different court when determining whether an order affecting related litigation is final. However, within two months after *In re Grand Jury Proceedings* was decided, the Third Circuit seemed to clarify the scope of its holding by indicating that a deciding factor in making the stay appealable in the instant case was the finite duration of the grand jury's term.[52] In *Cotler v. Inter-County Orthopedic Association*,[53] the appellant urged that an indefinite stay of stockholder derivation proceedings had the practical effect of a dismissal and should, based on the instant case, be treated as final.[54]

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45. *See, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). For a discussion of *Cohen*, *see* note 16 *supra*.

46. 525 F.2d at 155; *see* text accompanying notes 30–35 *supra*.

47. 525 F.2d at 156. Since, in fact, the order amounted to a dismissal of the grand jury proceedings, the United States would have been forced to convene a new grand jury at a later date if it wished to pursue the issue. *Id.*

48. *See* Note, *supra* note 9, at 352–53.

49. 266 F.2d 869 (3d Cir. 1959); *see* text accompanying notes 20–22 *supra*.

50. 266 F.2d at 870; *see* text accompanying notes 20–22 *supra*.

51. *Compare In re* Grand Jury Proceedings, 525 F.2d 151, 155 (3d Cir. 1975), *with* Arny v. Philadelphia Transp. Co., 226 F.2d 869, 870 (3d Cir. 1959). Another potentially important distinction is that the *Arny* court refused to speculate on the merits of the state litigation, while in the instant case the Third Circuit merely speculated on the length of the state litigation.

52. *See* Cotler v. Inter-County Orthopedic Ass'n, 526 F.2d 537 (3d Cir. 1975).

53. *Id.*

54. *Id.* at 540.

The Third Circuit, however, distinguished *In re Grand Jury Proceedings*, observing that in there the grand jury's term was limited and would, in all likelihood, have expired before the state action to which the district court deferred could be concluded, while in *Cotler*, regardless of the duration of the state suit, the district court eventually had to consider the claim over which it had exclusive jurisdiction.[55] The *Cotler* court therefore concluded that the stay involved was not final.[56]

Notwithstanding the potential problems of comparing the instant case with *Arny*,[57] it is submitted that the Third Circuit's determination that an order which would have amounted to a dismissal of grand jury proceedings was final for purposes of review under section 1291 is consistent with the Supreme Court's teaching that the finality rule is to be given a "practical rather than a technical construction."[58] Further, by drawing a distinct line between the appealability of an order staying a grand jury when the order would amount to a dismissal and the nonappealability of orders granting or denying motions to quash subpoenas or suppress evidence before grand juries, the court may have provided a much needed guideline for the lower courts.[59]

Edward J. Charlton

55. *Id.* In *Cotler*, the Third Circuit noted that its treatment concerning stay orders had not "been unwavering." *Id.* However, the court attempted to distinguish its holding *In re Grand Jury Proceedings* and stated that that case did not diminish "the precedential value" of *Arny*. *Id.*; *see* notes 20–22 *supra*. This would seem to indicate that the holding of *Arny* — a stay of a federal action pending the outcome of similar state litigation between the same parties is not a final order — is the general rule, and the Third Circuit would specifically limit *In re Grand Jury Proceedings* to its facts.

56. 526 F.2d at 540. The Third Circuit reversed the lower court's stay, however, on the grounds that it deprived the plaintiff of a federal forum in which to litigate an issue over which the federal courts had exclusive jurisdiction. *Id.* at 541–42. The court concluded that the district court had no power to issue such a stay and that mandamus was a proper remedy for this abuse of power. *Id.* at 542.

57. *See* notes 49–51 and accompanying text *supra*.

58. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); notes 14–16 *supra*.

59. *See* notes 24 & 36 *supra*. *Compare In re* Grand Jury Proceedings, 525 F.2d 151, 155–56 (3d Cir. 1975), *with* Cobbledick v. United States, 309 U.S. 323, 327–28 (1940).

CIVIL PROCEDURE — RULE 23 CLASS ACTIONS — 1) NOMINAL PLAINTIFF WHO LACKS STANDING AGAINST A DEFENDANT ON ONE OF SEVERAL CLAIMS MAY REPRESENT A CLASS OF PLAINTIFFS WHO DO HAVE STANDING PROVIDED REMAINING CLAIMS OF THE NOMINAL PLAINTIFF SATISFY "TYPICALITY" REQUIREMENT OF RULE 23(a)(3); 2) TIMELY COMMENCEMENT OF CLASS ACTION TOLLS THE STATUTE OF LIMITATIONS FOR ALL MEMBERS OF THE CLASS EVEN THOUGH THE NOMINAL PLAINTIFF IS SUBSEQUENTLY DETERMINED TO BE AN INAPPROPRIATE REPRESENTATIVE OF THE CLASS.

COMMERCIAL LAW — INTEREST CHARGES — "PREVIOUS BALANCE" METHOD FOR COMPUTING INTEREST CHARGES ON CREDIT CARD ACCOUNTS VIOLATES SECTIONS 904 AND 905 OF THE PENNSYLVANIA GOODS AND SERVICES INSTALLMENT SALES ACT.

Haas v. Pittsburgh National Bank (1975)

Plaintiff Haas instituted a class action in the United States District Court for the Western District of Pennsylvania in November 1972[1] seeking to recover statutory damages under the National Bank Act against defendants Pittsburgh National Bank, Mellon Bank, and Equibank for alleged unlawful practices in connection with defendants' operation of BankAmericard and Master Charge credit plans.[2] Specifically, Haas alleged that the three banks had violated Pennsylvania law[3] by charging usurious interest rates of 1¼% per month,[4] by using the "previous balance" method of

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1. Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083, 1086 (3d Cir. 1975).

2. *Id.* at 1086. The plaintiffs sought monetary damages of twice the amount of interest received by the three defendant banks. *Id.*

3. 526 F.2d at 1086. The National Bank Act makes relevant Pennsylvania law applicable to national banks. The Act provides in pertinent part: "Any association may take, receive, reserve and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory or District where the bank is located. . . ." 12 U.S.C. § 85 (1970).

4. 526 F.2d at 1086. The plaintiffs had contended that the applicable statutory authority governing institutions such as banks was the Pennsylvania Banking Code of 1965 (Banking Code), PA. STAT. ANN. tit. 7, §§ 101-2202 (Purdon 1967 & Supp. 1976), which limits the permissible interest rate to 1% per month. Haas v. Pittsburgh Nat'l Bank, 381 F. Supp. 801, 806 (W.D. Pa. 1974).

computing the outstanding balance of accounts,[5] and by compounding interest charges.[6]

On August 6, 1973, the district court defined the class as those holders of credit cards issued by the three banks who, during the limitations period of two years prior to the filing of the complaint, "were charged by such defendants a finance charge in connection with the purchase of goods or services."[7] Six months later the district court decided that Haas, who held credit cards issued by Pittsburgh National Bank and Mellon Bank only, could not represent cardholders of Equibank.[8] Upon court order, the

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5. 526 F.2d at 1086. Under the "previous balance" method, service charges are computed on the balance outstanding on the first day of the billing cycle. *Id.* at 1090. The Third Circuit offered the following example as an aid in understanding the use of the "previous balance" method:

> Assume that a cardholder's billing date is the thirtieth of each month and that on March 30 the balance in the cardholder's account is zero. If the cardholder purchases $100 worth of merchandise on April 25, that purchase will appear on the cardholder's April 30 statement but will not be included in the balance on which the service charge for the month of April is calculated. The April service charge will be one and one-quarter percent of zero, or zero. The five days' use of the $100 is called the "free ride" since no service charge is imposed. If the purchase had been made on April 5, the "free ride" would have been for 25 days.
>
> In the example, the balance outstanding on April 30 is $100. This balance is also the balance on the first day of the May billing cycle and, therefore, is the balance on which the May service charge will be imposed unless the balance is fully discharged before the end of the May billing cycle. Thus, if the cardholder pays $75 on account on May 5 and no other transactions occur during May, the service charge for the May billing cycle will be one and one-quarter percent of $100, the previous balance, or $1.25. The service charge for May is computed in this manner even though $100 was outstanding during only five days and the cardholder had the use of only $25 during the rest of the May billing cycle. The actual rate of service charge for May thus is much higher than the nominal rate of one and one-quarter percent specified in the Sales Act.

Id.

6. *Id.* at 1088. The plaintiffs alleged that the banks' practice of computing service charges on the total balance rather than the outstanding balance of the customer's delinquent accounts amounted to an unlawful compounding of interest. *Id.* at 1094. The *Haas* court, found that Pennsylvania disfavors the compounding of interest and permits its use only when there is either statutory authorization or a specific provision in a contract allowing it. *Id., citing* Acker v. Provident Nat'l Bank, 512 F.2d 729 (3d Cir. 1975) (*see* note 15 *infra*). Since the *Acker* court had determined that the Pennsylvania Goods and Services Installment Sales Act, PA. STAT. ANN. tit. 69, §§ 1101–2203 (Purdon Supp. 1976), did not provide such express authorization, 512 F.2d at 739, the *Haas* court concluded that the cardholder agreements also did not provide for interest compounding, and found that the banks' practice was unlawful. 526 F.2d at 1095.

7. 526 F.2d at 1095.

8. *Id.* at 1086. The district court's original certification of the class occurred before both the Supreme Court's decision in O'Shea v. Littleton, 414 U.S. 448 (1974), and the Ninth Circuit's decision in La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973).

In *O'Shea*, the Supreme Court held that if none of the named plaintiffs in a class action could meet article III's case or controversy requirement, none of the plaintiffs could seek relief on behalf of the class. 414 U.S. at 494.

In *La Mar*, the plaintiff instituted a class action on behalf of an estimated 33,000 customers of defendant pawnbrokers, alleging that the defendants had violated various provisions of the Truth-in-Lending Act. 489 F.2d at 462. Although the defendant class consisted of all pawn brokers licensed to do business under Oregon law, the named plaintiff had conducted business with only one of the defendant

complaint was amended on February 19, 1974 to include plaintiff Mitchell, who did hold a credit card issued by Equibank.[9] Thereafter, the district court granted the defendants' motion for summary judgment finding that, under the Pennsylvania Goods and Services Installment Sales Act (Installment Sales Act),[10] the banks were permitted both to use the "previous balance" method and to impose the 1¼% monthly service charge.[11] In addition, after finding that the amendment to the complaint adding plaintiff Mitchell did not relate back to the original filing date, and that Equibank had discontinued its use of the "previous balance" method more than two years before the amendment was filed, the district court granted summary judgment in favor of Equibank on the "previous balance" issue on the ground that plaintiffs' action was barred by the statute of limitations.[12]

The plaintiffs appealed all claims.[13] In light of the Third Circuit's decision in *Acker v. Provident National Bank*[14] that a 1¼% monthly interest rate on revolving credit accounts is lawful with regard to *consumer* transactions conducted by banks,[15] plaintiffs modified their claim of usurious interest, asserting that the banks' charges were excessive on

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pawnbrokers. *Id.* The district court ruled that the plaintiff was a proper class representative. *Id.* On appeal, the Ninth Circuit held that a plaintiff having a cause of action against only a single defendant cannot institute a class action on behalf of all those injured by a group of defendants who have engaged in similar wrongdoings. *Id.* The Ninth Circuit based its holding on the determination that the plaintiff failed to meet the third and fourth prerequisites of subsection (a) of rule 23 of the Federal Rules of Civil Procedure. *Id.* at 465. The court reasoned that the third prerequisite — that the claims of the representative be typical of those of the class — cannot be satisfied when the nominal plaintiff never had any type of claim against some of the defendants. *Id.* Similarly, the court concluded that the fourth prerequisite — that the representative party fairly and adequately protect the interests of the class — could not be fulfilled, notwithstanding the fact that the plaintiff's attorney had excellent qualifications. *Id.* at 466. The court concluded that such a determination was necessary to conform with the Advisory Committee's Note on rule 23 and to "reduce the incidence of proceedings in which the trial judge and the representative plaintiff's counsel become a part-time regulatory agency." *Id.*

In light of these two decisions the district court reconsidered its original ruling and determined that its certification order as to Equibank had been improper. 526 F.2d at 1095.

9. 526 F.2d at 1086. The district court then granted certification. 381 F. Supp. at 807.

10. PA. STAT. ANN. tit. 69, §§ 1101-2303 (Purdon Supp. 1976).

11. 526 F.2d at 1086. The district court concluded that the credit card plans operated by the bank which involved the purchasing of consumer goods were controlled by the Installment Sales Act, which in turn permitted a maximum yearly service charge of 15%. 381 F. Supp. at 806-07.

12. 381 F. Supp. at 807-08.

13. 526 F.2d at 1086.

14. 512 F.2d 729 (3d Cir. 1975).

15. In *Acker*, the Third Circuit held that the Pennsylvania Banking Code, which permits a maximum of 1% monthly interest on installment loans, did not apply to banks operating revolving credit card plans, which the court found were not "loans" but "credit sales" governed by the Sales Act. *Id.* at 734-35. Additionally, the court found that banks came within the definition of "financing agency" as contained in the Sales Act and thus were permitted to charge a maximum of 1¼% monthly interest on the "consumer" transactions regulated by that act. *Id.* at 736-37.

commercial transactions.[16] The defendants, however, contended on appeal that the nominal plaintiffs lacked standing to challenge the interest rate imposed upon commercial transactions because they had participated only in consumer transactions.[17] The United States Court of Appeals for the Third Circuit,[18] while not reaching a decision regarding the legality of the 1¼% monthly interest charge on commercial transactions, reversed the district court's judgment on all other counts, *holding* 1) the lack of personal standing by the nominal plaintiff on any one claim does not warrant dismissal of the claim when the class itself has standing and the nominal plaintiff has satisfied the requirements of Federal Rule of Civil Procedure 23; 2) the "previous balance" method for computing interest charges on credit card accounts is proscribed by Pennsylvania law; and 3) the commencement of a class action by nominal plaintiff who is later determined not to be a proper representative of the class tolls the statute of limitations as to all asserted members of the class. *Haas v. Pittsburgh National Bank*, 526 F.2d 1083 (3d Cir. 1975).

Focusing upon the requirements of rule 23(a)(3) and (4)[19] as the test for determining whether the nominal plaintiff was a proper representative of the class, the Third Circuit found that although Haas did not engage in a commercial transaction, she could represent the class because her claims against the Mellon Bank, on which she had standing, were closely related to those claims of the class of commercial credit card holders that she represented.[20] The court thus distinguished *La Mar v. H & B Novelty & Loan Co.*,[21] in which the Ninth Circuit had held that a nominal plaintiff was not a proper representative of a class alleging numerous claims against

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16. 526 F.2d at 1086. Plaintiffs alleged that *commercial* credit transactions were regulated by the Banking Act's 1% monthly limit and not by the Sales Act's 1¼% maximum. 526 F.2d at 1087.

17. 526 F.2d at 1086.

18. The case was heard by Judges Kalodner, Van Dusen, and Rosenn. Judge Rosenn wrote the majority opinion to which Judge Van Dusen dissented in part in a separate opinion.

19. Rule 23(a) of the Federal Rules of Civil Procedure, which sets out the prerequisites for the maintenance of a class action, provides:

> 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.

FED. R. CIV. P. 23(a).

20. 526 F.2d at 1088–89. The Third Circuit determined that Hass' two claims against the Mellon bank, namely, the previous balance claim and the compounding claim, were sufficiently related to the commercial transaction issue so that Haas could be a proper representative under rule 23. *Id.* at 1089. The court based its opinion upon the fact that all three of the claims involved identical revolving accounts under an identical cardholder agreement with the Mellon Bank and the fact that the damages sought under the National Bank Act for all three claims were basically the same. *Id.* Furthermore, the court reasoned that if it found that the service charge was illegal under any or all three of the plaintiff's claims, recovery would be the same. *Id.*

21. 489 F.2d 461 (9th Cir. 1973). For a discussion of *La Mar*, *see* note 8 *supra*.

several banks if the nominal plaintiff had a claim against only one of the defendants.[22] The Third Circuit's conclusion seems to have been based upon the fact that in *La Mar* the nominal plaintiff did not have standing against all the defendants, while in *Haas* the nominal plaintiff merely lacked standing on one of several claims against a single defendant. The Third Circuit further pointed out that, unlike *La Mar,* the remaining claims on which nominal plaintiff Haas did have standing against Equibank were "typical" of the class within the meaning of rule 23(a)(3).[23]

In a related rule 23 issue concerning the tolling of the statute of limitations, the Third Circuit relied upon the Supreme Court's ruling in *American Pipe & Construction Co. v. Utah,*[24] and decided that rule 23's

22. 489 F.2d at 462.

23. 526 F.2d at 1089. Recognizing that the actual determination of standing was generally for the trial court, the Third Circuit, after strongly suggesting that Haas could represent the class of commercial credit cardholders, remanded this question to the district court. *Id.; see* Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 245 (3d Cir. 1975), *cert. denied,* 421 U.S. 1011 (1976); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969).

On remand the district court will have to determine whether Haas meets the requirements of rule 23(a)(3) and (4) in deciding whether she can represent the class. 526 F.2d at 1089.

24. 414 U.S. 538 (1974). In *American Pipe,* the State of Utah instituted a Sherman Act treble-damage class action suit against a number of businesses for allegedly conspiring to set prices in the sale of concrete and steel pipe. *Id.* at 541. The suit, commenced by the State on behalf of the public bodies and agencies of Utah who purchased pipe from the defendants, was brought 11 days prior to the running of the statute of limitations. *Id.* The district court ruled that the action could not be maintained as a class action because the numerosity requirement of rule 23(a)(1) that "the class be so numerous that joinder of all members is impracticable" was not satisfied. Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 21 (C.D. Cal. 1969). After certification was denied, members of the purported class filed motions to intervene under rule 24 of the Federal Rules of Civil Procedure. The district court denied these motions, finding that the limitations period had run and had not been tolled by the institution of the class action. Utah v. American Pipe & Constr. Co., 50 F.R.D. 99, 108 (C.D. Cal. 1970). The United States Court of Appeals for the Ninth Circuit reversed, finding that the statute of limitations was tolled at the time of the filing of the class action. Utah v. American Pipe & Constr. Co., 473 F.2d 580, 584 (9th Cir. 1973). The United States Supreme Court affirmed, holding that when class status has been denied solely because of the failure to meet the numerosity requirement of rule 23(a)(1), the statute of limitations is tolled for all purported members of the class upon the commencement of the original class action. 414 U.S. at 552–53. Stating that class actions were designed to avoid the unnecessary filing of repetitious papers and motions, the Court reasoned that a contrary ruling would "deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Id.* at 550–53. The Court was concerned that potential class members would be induced to file individual motions to join or intervene as parties in order to protect their claims from a time bar in the event that a class action was later denied certification. *Id.* at 553. The Court emphasized that, where the certification by the court rests upon such subtle factors as the experience of the judge with the situation or the current status of the court's docket, such situations would breed needless duplication of motions if the statute of limitations were not tolled since the members of the class would be unsure of the certification ruling and be induced to file individually. *Id.* at 554.

Focusing its attention upon the policies underlying the statute of limitations, the Court declared that statutory limitations periods were designed to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories faded, and witnesses disappeared."

policy of promoting "efficiency and economy of litigation" required that the statute of limitations be tolled for the entire class against Equibank at the time Haas filed her original complaint.[25] Like the Supreme Court in *American Pipe*, the Third Circuit feared that if the statute of limitations were not tolled for all the members of the class upon the filing of the original complaint, individual class members would file protective motion to intervene or join as parties to avoid being barred by the statute should the class later lose its certification for some unforeseen reason.[26] In the Third Circuit's view, it was precisely this type of wasteful and repetitious litigation that rule 23 was designed to avoid.[27]

Regarding the interest charge issue, the *Haas* court noted that section 904 of the Installment Sales Act,[28] the substantive usury provision, did not in itself indicate a legislative intent to outlaw the "previous balance" method of computing interst charges on installment payment plans.[29] Nevertheless, the court read section 904 in light of section 905's requirement that statements sent to the debtor include the "total balance 'at the end of

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414 U.S. at 554, *quoting* Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348–49 (1944). Finding that these policies were satisfied in *American Pipe* because the commencement of the suit put the defendant on notice of both the claims brought against him and of the number and "generic identities" of the potential plaintiffs, the Court concluded that its ruling was not inconsistent with the purposes of the statute of limitations. 414 U.S. at 554.

25. 526 F.2d at 1097, *quoting* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).

26. 526 F.2d at 1097.

27. *Id.; see* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551 (1974).

28. Section 904 provides:

> [T]he seller or holder of a retail installment account may charge, receive and collect the service charge authorized by this act. The service charge shall not exceed the following rates computed on the outstanding balances from month to month:
>
> (a) On the outstanding balance, one and one-quarter percent (1¼%) per month.
>
> (b) A minimum service charge of seventy cents (70¢) per month may be made for each month if the service charge so computed is less than that amount; such minimum service charge may be imposed for a minimum period of six months.
>
> (c) The service charge may be computed on a schedule of fixed amounts if as so computed it is applied to all amounts of outstanding balances equal to the fixed amount minus a differential of not more than five dollars ($5), provided that it is also applied to all amounts of outstanding balances equal to the fixed amounts plus at least the same differential.

PA. STAT. ANN. tit. 69, § 1904 (Purdon Supp. 1976).

29. 526 F.2d at 1091. The court did not believe that the language in section 904 requiring that service charges not exceed specified rates "on outstanding balances computed from month to month" mandated that the balance be computed at the end of the monthly billing cycle. *Id.* at 1091–92.

the monthly period,' "[30] concluding that such language was inconsistent with the use of the previous balance method.[31]

While the *Haas* court's ruling concerning the illegality of the "previous balance" method appears consistent with the language and legislative history of sections 904 and 905 of the Sales Act,[32] the decision presents somewhat of a problem for banking institutions. Since the Third Circuit determined that a ruling on the legality of the banks' imposition of more than 1% monthly interest on commercial credit transactions would be premature,[33] Pennsylvania banks face uncertainty in dealing with their commercial accounts. If the commercial purchases are subsequently held not to be within the scope of the Installment Sales Act, then presumably the banks must charge a lower rate of interest on those accounts. Additionally, the use of the "previous balance" method may be held permissible with regard to commercial accounts. Until such determinations are made by the court or the legislature, banks will be forced to establish a system for classifying credit sales transactions as either consumer or commercial or, in order to avoid a violation of the Banking Code, charge the lower rate of 1% per month on all credit transactions.[34] Neither alternative appears attractive

30. *Id.* at 1092. Section 905, the disclosure section of the Sales Act, provides:
The seller or holder of a retail installment account shall promptly provide the buyer with a statement as of the end of each monthly period (which need not be a calendar month) setting forth the following:
a) The balance due to the seller or holder from the buyer at the beginning of the monthly period.
b) The dollar amount of each purchase by the buyer during the monthly period and, (unless a sales slip or memorandum of each purchase has previously been furnished the buyer or is attached to the statement) the purchase or posting date, a brief description and the cash price of each purchase.
c) The payments made by the buyer to the seller or holder and any other credits to the buyer during the monthly period.
d) The amount of the service charge, and the following statement: The service charge herein contained does not exceed the equivalent of fifteen percent (15%) simple interest per annum on the unpaid balance except that a minimum service charge of seventy cents (70¢) per month may be made.
e) The total balance in the account at the end of the monthly period.
f) A legend to the effect that the buyer may at any time pay his total balance.
The items need not be stated in the sequence or order set forth above; additional items may be included to explain the computations made in determining the amount to be paid by the buyer.
PA. STAT. ANN. tit. 69, § 1905 (Purdon Supp. 1976).

31. 526 F.2d at 1092; *see* note 5 *supra*. The Third Circuit stated that sections 904 and 905 must be read together because the legislative intent was for the explanatory statement to the credit card holder required by section 905 to disclose the impact of section 904. 526 F.2d at 1097.
It should ne noted that the district court, although finding that the use of the "previous balance" method was not in violation of Pensylvania law, considered its use "a devious means for taking unfair advantage of a customer relatioship by working to squeeze every possible penny out of the finance charge." 381 F. Supp. at 809.

32. *See* 526 F.2d at 1091–94.

33. *Id.* at 1089. The Third Circuit, noting that it had remanded the question of the nominal plaintiffs' ability to represent the class of commercial cardholders, declined to rule on the merits of the commercial transaction issue. *Id.* The court believed that such a complex issue should be decided upon "a more complete record and with the benefit of a district court's analysis." *Id.* at 1090.

34. *See* 49 TEMP. L.Q. 476, 485 (1976).

in light of the cost and administrative problems of classifying the extensive number of credit sales[35] and the obvious loss of revenue to the banks if they are forced to lower their interest rates.

In addition to the impact of the decision upon the commercial community, *Haas* presents an intriguing view of the procedural questions concerning the requirement of standing in class actions and the tolling of the statute of limitations.

The *Haas* court, in distinguishing *La Mar*,[36] and finding that although the nominal plaintiff, a consumer credit card holder, who lacked personal standing to challenge the service charge rate imposed upon commercial accounts, could nevertheless be found to be a proper representative of the class under rule 23(a) and could therefore maintain the class suit, appears to have created a middle ground in addressing the problem of standing in class actions.

The Third Circuit's acknowledgment of the traditional notion that the nominal plaintiff in a class action have standing at the time of the commencement of the action[37] seemingly rejects the view that the class itself and not the nominal plaintiff should be analyzed in determining the issue of standing.[38] However, in focusing upon the nominal plaintiff, the Third Circuit did not require the same type of standing as it would in a case that was not a class action. Thus, while the *Haas* court recognized that the nominal plaintiff could not raise the commercial transaction issue as an

35. It is estimated that in 1973, consumer charge account credit in the United States equalled $147,437 million. *See* WORLD ALMANAC & BOOK OF FACTS 81 (1975). *See also* Caplovitz, *Consumer Credit in the Affluent Society*, 33 LAW & CONTEMP. PROB. 641, 642 (1968). Consumer credit extended by commercial banks constituted 46% of all outstanding installment credit in 1975. *See* 1 FED. RES. BULL., A-5 (Feb. 1976).

36. *See* notes 21-23 and accompanying text *supra*.

37. *See* 526 F.2d at 1095. The court stated: "We believe that, where no nominal plaintiff has standing on any issue against one of multiple defendants, a suit for damages may not be maintained as a class action against that defendant." *Id.*

In Sosna v. Iowa, 419 U.S. 393 (1975), the Supreme Court stated that "a named plaintiff in a class action must show that the threat of injury in a case such as this is 'real and immediate,' not 'conjectural or hypothetical.'" *Id.* at 403, *quoting* O'Shea v. Littleton, 414 U.S. 488, 494 (1974); *see* Golden v. Zwickler, 394 U.S. 103, 109-10 (1969). The *Sosna* Court continued: "A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." 419 U.S. at 403, *citing* Rosario v. Rockefeller, 410 U.S. 752 (1973), Hall v. Beals, 396 U.S. 45 (1969), and Baily v. Patterson, 369 U.S. 31 (1962). The Supreme Court has also declared that "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." O'Shea v. Littleton, 414 U.S. 488, 494 (1974), *citing* Indiana Employment Div. v. Burney, 409 U.S. 540 (1973), and Baily v. Patterson, 369 U.S. 31, 32-33 (1962).

38. *See Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1463-71 (1976). In a related matter it has been submitted that recent Supreme Court decisions have suggested that the class itself should be the focus of the case or controversy requirement in class action cases. *Id.* at 1464. In Sosna v. Iowa, 419 U.S. 393 (1975), the Court refused to dismiss a class suit dispite the fact that the nominal plaintiff's claim had become moot. The Court limited its decision to those cases where the issues presented are "capable of repetition, yet evading review." 419 U.S. at 401. In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), however, the Court focused solely upon the fact that class' claims against the defendant still existed in ruling that the action was not mooted by the satisfaction of the nominal plaintiff's claim, thus

individual, it would allow her to bring the claim in a proper class action.[39] While agreeing with *La Mar* that the typicality prerequisite of rule 23(a)(3) is not fulfilled when the nominal plaintiff has no claims against a defendant, the Third Circuit determined that it is met where the nominal plaintiff has a cause of action against the defendant and it is typical of the claims of the class.

It is submitted that the Third Circuit's expansion of the Supreme Court's rather narrow holding in *American Pipe*[40] that the statute of limitations will be tolled for all class members upon the initial filing of the class action even though it is subsequently denied certification for failing to meet the numerosity requirement of rule 23(a)(1), was justifiable in light of the importance that both courts placed upon the policies of rule 23 and the statute of limitations.[41] It would appear that the *Haas* situation, in which class action status was originally granted but subsequently denied for failure to meet the standing requirement, is realistically indistinguishable from *American Pipe* insofar as both courts feared the effect which not tolling the statute of limitations would have upon the practical policies of rule 23.[42] Indeed, it is arguable that this first basis for the *American Pipe* holding can be found in almost every case where class action status could be denied, for if the limitations period is not tolled, rule 23's goals of economy and efficiency of litigation could be frustrated by the apprehensive filing of protective motions by individual class members. Thus, the multiplicity of activity which the rule was created to avoid would appear in all cases except those in which the class action was somehow assured certification.

It is significant, however, that the judicial economy was not the sole factor considered in *American Pipe*; the Supreme Court also focused upon the policies underlying the statute of limitations in reaching its decision.[43] The Court found that the statute's dual purposes of ensuring fairness to the defendant through timely notice and of barring a plaintiff who has "slept on his rights" were satisfied even though the statute was tolled by the filing of an action which was later denied class action status because it had failed to meet the numerosity requirement of rule 23(a)(1).[44] The Court determined

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abandoning the requirement that the issue be "capable of repetition yet evading review." *Id.* at 753–57.

In analyzing the effect of these two cases it has been submitted that they have not diminished the relevance of the case or controversy requirement in class actions but rather have redirected the courts' analysis away from the representative party's relationship with the defendant toward a direct examination in considering whether there exists a controversy between the class and the defendant. *Developments in the Law — Class Actions, supra* at 1466.

39. 526 F.2d at 1088. The Third Circuit stated: "Even though Haas herself does not have standing to challenge the service charge rate imposed on commercial transactions by Mellon Bank, summary judgment is inappropriate if Haas may represent a class of plaintiffs who do have standing." *Id.*

40. For a discussion of *American Pipe*, *see* note 24 *supra*.

41. *See* 526 F.2d at 1096–97, *discussing* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).

42. *See* 414 U.S. at 553; 526 F.2d at 1097.

43. 414 U.S. at 554–56; *see* note 24 *supra*.

44. 414 U.S. at 554–55. For the text of rule 23(a), *see* note 19 *supra*.

that in such a case the original filing of the class action put the defendant on notice of both the substantive claims against him and the "number and generic identities" of the plaintiffs.[45] Thus, while these policy considerations outlined by the *American Pipe* Court may limit the tolling of the statute in some instances where class action status is later denied, they were satisfied in *Haas* since the defendant was not in any way unjustly surprised by the maintenance of the action.

It is important to consider, however, whether under the *Haas* rational there exists any limitations upon the tolling doctrine. As discussed previously, the economy and efficiency policy considerations of rule 23 would seem to favor tolling in all situations. The second factor considered by the court — the statute of limitations policy of ensuring fair and timely notice to defendants, would arguably not serve as a bar to tolling where the original class action was not certified due to a failure to meet the prerequisites of rule 23(a)(1), (3), and (4).[46] In each of those situations the defendant is put on notice of the substantive claims against him and of the identity of the plaintiffs, thus satisfying the policy underlying the limitations period. However the same may not be said when class action status is denied for failure to meet the 23(a)(2)[47] requirement of commonality of questions of fact, since the defendant may not have a clear understanding of the true claims of the class. Thus, the second consideration of the *Haas* court may act as a limitation upon its broad tolling doctrine. Additionally, both *American Pipe* and *Haas* involved situations where "the district court's ruling on maintenance of a class action is difficult to predict,"[48] thus a prerequisite to the inplementation of the tolling doctrine may be that the class action have a reasonable change of certification. This limitation would serve to bar frivolous class actions from the tolling doctrine. This bar would not frustrate rule 23's policy of judicial efficiency since in these situations the certification will be denied and the absent members of the class would have to file intervening motions if they wished to maintain their cause of action.

The Third Circuit's decision in *Haas* will have a significant impact in the consumer protection area. In finding that the bank's method of computing interest charges on credit card accounts was proscribed by Pennsylvania law, the court displayed its willingness to consider the strong policy of protecting consumers in interpreting relevant statutes. Additionally, the court's favorable rulings concerning the maintenance of class actions and the tolling of the statute of limitations will aid consumer groups, which have found this type of litigation invaluable in their efforts to protect consumer interests.

Thomas J. McGarrigle.

45. 414 U.S. at 555.
46. For the pertinent text of rule 23, *see* note 19 *supra.*
47. For the text of rule 23(a)(2), *see* note 19 *supra.*
48. 526 F.2d at 1083.

FEDERAL RULES OF CIVIL PROCEDURE — PLEADING — PLAINTIFF IN CIVIL RIGHTS ACTION IS REQUIRED TO PLEAD SPECIFIC FACTS DESPITE NOTICE PLEADING PHILOSOPHY OF FEDERAL RULES.

Rotolo v. Borough of Charleroi (1976)

Upon his termination from the position of building inspector,[1] Salvadore Rotolo instituted two actions in the United States District Court for the Western District of Pennsylvania[2] under section 1983 of the Civil Rights Act[3] against his employer, the Borough of Charleroi, Pennsylvania (Borough) and several Borough councilmen,[4] alleging that his termination had resulted from the exercise of his first amendment rights.[5] The district court determined that suit could not be maintained against the Borough under section 1983, since the municipality was not a "person" as defined under that statute.[6] In addition, finding that the complaints did not recite any specific facts surrounding the termination of plaintiff's employment, the district court granted defendants' motion to dismiss both complaints for their failure to state claims upon which relief could be granted.[7] On appeal, the United States Court of Appeals for the Third Circuit agreed with the

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1. Rotolo v. Borough of Charleroi, 532 F.2d 920, 921 (3d Cir. 1976) (per curiam).

2. Rotolo v. Borough of Charleroi, Nos. 72–775, 72–776 (W.D. Pa., Mar. 1, 1973).

3. 532 F.2d at 921. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970). Jurisdiction was founded upon 28 U.S.C. § 1343 (1970). 532 F.2d at 921 n.1.

4. 532 F.2d at 921. The first complaint, seeking in excess of $25,000 in damages, named as defendants the Borough of Charleroi and the four councilmen who had voted to terminate Rotolo's employment with the Borough. *Id.* The second complaint, wherein three other councilmen were named as additional defendants, sought to enjoin the defendants from filling the vacancy caused by plaintiff's termination and requested reinstatement with back pay, and an unspecified amount of damages. *Id.* at 923 (Gibbons, J., concurring and dissenting).

5. *Id.* at 921–22. The pertinent allegations of Rotolo's complaint were:

> Prior to August 23, 1972, the Plaintiff was employed in the capacity of Building Inspector for the Defendant, Borough of Charleroi.
>
> . . . On or about August 23, 1972, the Defendants, Peter Celaschi, Theodore Breuer, Fred P. McLuckie and Armand Balsano, voted to terminate the Plaintiff's employment with the Defendant, Borough of Charleroi, because the Plaintiff had exercised his First Amendment privileges under the Constitution of the United States.
>
> . . . That the aforesaid action on the part of the Defendants was a denial of the Plaintiff's First Amendment rights to freedom of speech and freedom of expression.

Id.

6. Rotolo v. Borough of Charleroi, Nos. 72–775 & 72–776 (W.D. Pa., Mar. 1, 1973). In dismissing the complaint against the Borough, the district court relied upon Monroe v. Pape, 365 U.S. 167 (1961), wherein the Supreme Court had held that a "municipality" was not a person for purposes of section 1983. *Id.*

7. Rotolo v. Borough of Charleroi, Nos. 72–775, 72–776 (W.D. Pa., Mar. 1, 1973). The district court did not grant leave to amend either complaint. *Id.*

district court's findings,[8] but vacated the judgment and remanded to the district court in order to permit the plaintiff to amend his complaints,[9] *holding* that fact pleading is required for all civil rights cases brought in the Third Circuit. *Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976) (per curiam).

The standard of pleading required under the Federal Rules of Civil Procedure was described by the Supreme Court of the United States in *Conley v. Gibson*:[10]

> In appraising the sufficiency of the complaint we follow . . . the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[11]

The *Conley* Court explained that a plaintiff was required to make only "a short and plain statement of the claim"[12] sufficient to give fair notice to the defendant of the substance of the claim and the grounds upon which it rests.[13]

In the instant case, the court began its analysis by noting that in a 1967 case, *Negrich v. Hohn*,[14] the Third Circuit had adopted a stricter standard of pleading for civil rights cases.[15] The present court acknowledged that in *Haines v. Kerner*,[16] which was decided after *Negrich*, the Supreme Court of the United States apparently applied a notice pleading standard to a

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8. 532 F.2d at 923. The case was heard by Chief Judge Seitz and Judges Gibbons and Rosenn. Judge Gibbons filed a separate opinion, concurring in part and dissenting in part.

9. *Id.* Rotolo was allowed to amend his complaint under the liberal amendment provisions of Federal Rule of Civil Procedure 15(a). Although the Third Circuit agreed with the district court as to the unavailability of section 1983 with regard to the complaint against the Borough, plaintiff was allowed under 28 U.S.C. § 1653 (1970), to amend that portion of his complaint in order to come within the jurisdiction of 28 U.S.C. § 1331 (1970). 532 F.2d at 922.

10. 355 U.S. 41 (1957). In explaining this pleading standard, the *Conley* Court was interpreting rule 8 of the Federal Rules of Civil Procedure. *Id.* at 47–48, *construing* FED. R. CIV. P. 8.

11. 355 U.S. at 45–46 (footnote omitted).

12. *Id.* at 47, *citing* FED. R. CIV. P. 8(a)(2).

13. 355 U.S. at 47.

14. 379 F.2d 213 (3d Cir. 1967).

15. 532 F.2d at 922, *citing* Negrich v. Hohn, 379 F.2d 213 (3d Cir. 1967). The *Rotolo* court also quoted from Kauffman v. Moss, 420 F.2d 1270, 1275–76 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970), in which the court expressed concern over possible vexatious litigation against public officials:

> A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants — public officials, policemen and citizens alike, considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.

532 F.2d at 922, *quoting* 420 F.2d at 1275–76.

16. 404 U.S. 519 (1972) (per curiam).

prisoner's pro se civil rights complaint.[17] However, the *Rotolo* court concluded that *Haines* and *Negrich* were "harmonized" in *Gray v. Creamer,*[18] in which the Third Circuit had "suggested" that the *Negrich* requirement of specificity would apply to those civil rights actions " 'which contain[ed] only vague and conclusory allegations,' "[19] while the liberal *Haines* standard would apply to those civil rights complaints containing "specific allegations of unconstitutional conduct."[20] Finding the allegations in Rotolo's complaint to be "vague and conclusory"[21] in that Rotolo failed to indicate the manner in which he had exercised his first amendment privilege,[22] the instant court stated that the *Negrich* standard should be applied to the complaint so that the plaintiff, if he chose to amend, would be required to allege facts with specificity.[23]

Judge Gibbons filed a separate opinion in which he concurred with the majority's decision to vacate the judgment dismissing the complaints but dissented from its holding that fact pleading is required in a civil rights suit.[24] Judge Gibbons asserted that the majority had gone beyond any prior holding in requiring fact pleading in the instant case;[25] that its reading of previous Third Circuit cases was strained, if not misleading;[26] and that Rotolo had met the pleading requirements under *Conley.*[27] Judge Gibbons argued that the majority was requiring the plaintiff to plead his evidence,[28]

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17. *Id.* The plaintiff in *Haines,* a prisoner who filed a pro se complaint, charged that the governor of Illinois and other state officers and prison officials had deprived him of his civil rights. 404 U.S. at 519. The Supreme Court held:

> [A]llegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the *pro se* complaint, *which we hold to less stringent standards than formal pleadings drafted by lawyers,* it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

404 U.S. at 520–21, *quoting* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (emphasis added).

18. 532 F.2d at 922, *citing* Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972). In *Gray,* a civil rights action by a prisoner represented by counsel, the Third Circuit reversed a district court order granting dismissal of plaintiff's complaint for failure to state a claim upon which relief could be granted, noting that the complaint should be viewed in the light most favorable to the plaintiff and that the motion to dismiss should be subjected to a strict standard. 465 F.2d at 181.

19. 532 F.2d at 922, *citing* Gray v. Creamer, 465 F.2d 179, 182 n.2 (3d Cir. 1972).

20. *Id.*; *see* notes 45–53 and accompanying text *infra.*

21. 532 F.2d at 923.

22. *Id.* at 923; *see* notes 32–36 and accompanying text *infra.*

23. 532 F.2d at 923.

24. *Id.* at 927 (Gibbons, J., concurring and dissenting).

25. *Id.*

26. *Id.* Judge Gibbons stated that *Negrich* could be distinguished since it involved a pro se complaint, thus requiring application for relief under 28 U.S.C. § 1915(d) (1970). 532 F.2d at 926. Under this section, Judge Gibbons noted, courts are given greater discretion to impose a stricter pleading standard on pro se complaints. *Id.*

27. 532 F.2d at 924, *citing* Conley v. Gibson, 355 U.S. 41, 71–78 (1957). For a discussion of *Conley, see* notes 10–13 and accompanying text *supra.* Judge Gibbons stated that Rotolo's complaint had given defendants adequate notice as to both the specific action complained of and the legal basis for relief. 532 F.2d at 924.

28. 532 F.2d at 924–25 (Gibbons, J., concurring and dissenting).

and that its holding appeared to be based upon an inner hostility toward civil rights actions.[29]

It is submitted that the *Rotolo* court's reliance upon *Negrich* as justification for its departure from the *Conley* notice pleading standard is open to question. In *Negrich,* the complaint charged that the defendants — state, county and prison officials — had deprived the plaintiff of his civil rights.[30] However, as recognized by Judge Gibbons in his dissenting opinion in the instant case, the complaint in *Negrich* had failed to allege how, when, or where the defendants had violated Negrich's civil rights.[31] Thus, since the *Negrich* complaint arguably did not meet even the *Conley* notice pleading standard,[32] it is difficult to determine whether the *Negrich* court did in fact impose a stricter standard of pleading than that required under *Conley.* In contrast, the complaint in *Rotolo* identified the time, place, and nature of the defendants' acts,[33] and thus met the notice pleading standard of *Conley.* Nevertheless, the *Rotolo* court found the complaint to be "vague and conclusory,"[34] since Rotolo had failed to allege the *manner* in which he had exercised his first amendment privileges.[35] However, as Judge Gibbons noted in his opinion, the content of Rotolo's utterance would appear to be an *evidentiary* matter, discoverable under the Federal Rules of Civil Procedure, but not a matter required to be pleaded as part of his claim for relief.[36]

Assuming arguendo that *Negrich* did impose a stricter pleading standard, it follows that since *Negrich* was actually a pro se case, since a pro se complaint was subject to the motion to dismiss[37] the Supreme Court in *Haines* appears to have overruled the imposition of a stricter standard to pro se civil rights complaints — unless the "harmonization" of *Negrich* with *Haines* in *Gray v. Creamer* is valid.[38] Upon analysis, this "harmonization,"

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29. *Id.* at 927.

30. 379 F.2d at 214. The plaintiff in *Negrich* was allowed to proceed *in forma pauperis,* although counsel was later appointed for him. *Id.* at 214, 215 n.4. However, the pro se complaint was the one dismissed by the *Negrich* court. *Id.* at 215 n.4; *see* notes 57–59 and accompanying text *infra.*

31. 532 F.2d at 925 (Gibbons, J., concurring and dissenting). In dismissing the *Negrich* complaint, the Third Circuit stated:

> The complaint is insufficient because it is broad and conclusory. Its insufficiency lies in its failure to state facts in support of its conclusions. The charges of beating and cruel and unusual punishment are made against the defendants generally and not against any particular defendant. It is apparent that all defendants could not have inflicted the beatings at the time and places indicated.

379 F.2d at 215 (footnotes omitted).

32. *See* notes 10–13 and accompanying text *supra.*

33. For the text of Rotolo's allegations, *see* note 5 *supra.*

34. 532 F.2d at 923.

35. *Id.* The court reasoned that it could not determine whether Rotolo's conduct was "the sort afforded protection under the first amendment . . . ." *Id.*

36. *Id.* at 924–25 (Gibbons, J., concurring and dissenting).

37. *See* note 30 *supra.*

38. This "harmonization" would result in the application of the *Haines* standard to a complaint where "specific allegations of unconstitutional conduct" were made, while the *Negrich* standard would apply to complaints which "contain only vague and conclusory allegations." Gray v. Creamer, 465 F.2d 179, 182 n.2 (3d Cir. 1972).

fails to accommodate adequately the *Haines* holding.[39] Under the *Gray* "harmonization," a complaint setting forth vague allegations would require — yet fail to withstand — the application of the stricter pleading standard, while a specific complaint, which would satisfy a stricter pleading standard, would be subject to the less stringent notice pleading standard. This amounts to a strict pleading standard in all cases and renders the "harmonization" illusory. Consequently, since the "harmonization" is invalid, it is submitted that the standard should be the one applied to pro se civil rights complaints.

The *Rotolo* court also cited *Kauffman v. Moss,*[40] as an instance wherein it applied the more stringent standard set forth in *Negrich.*[41] *Kauffman,* like *Negrich,* was a pro se civil rights action in which a prisoner alleged that a county district attorney and three law enforcement officers had conspired to deprive the plaintiff of his civil rights.[42] The *Kauffman* court granted defendants' motion to dismiss, finding the allegations in the complaint to be "broad and conclusory" and insufficient to meet the *Negrich* standard,[43] which was termed an exception to the "general rule of 'notice pleading.' "[44] However, unlike *Negrich,* the complaint in *Kauffman* asserted a cause of action based upon civil conspiracy;[45] thus, under even the notice pleading standard, the plaintiff was required to plead an *overt act* in order to make out his cause of action.[46] Therefore, it would appear that regardless of whether or not a strict standard of pleading was recognized for civil rights cases in *Negrich,*[47] it was necessary for the *Kauffman* plaintiff to plead more specific facts in order to make out his cause of action.

It is further submitted that the *Rotolo* court overlooked two recent Third Circuit decisions — *United States ex rel. Tyrrell v. Speaker*[48] and *Thomas v. Brierly*[49] — both of which were decided after *Gray v. Creamer*'s "harmonization" of the *Negrich* approach with *Haines.*[50] In *Tyrrell* and *Thomas,* each

39. For a discussion of *Haines, see* note 17 and accompanying text *supra.* Cases following *Gray* have failed to mention this "harmonization" of *Negrich* and *Haines. See* notes 48–56 and accompanying text *infra.*

40. 420 F.2d 1270 (3d Cir.), *cert. denied,* 400 U.S. 846 (1970). For a discussion of *Kauffman, see* note 15 *supra.*

41. 532 F.2d at 922, *citing* Kauffman v. Moss, 420 F.2d 1270, 1275–76 (3d Cir.), *cert. denied,* 400 U.S. 846 (1970).

42. 420 F.2d at 1272.

43. *Id.* at 1275–76.

44. *Id.* at 1276 n.15.

45. *Id.* at 1272.

46. *See, e.g.,* Hoffman v. Halden, 268 F.2d 280, 295 (9th Cir. 1959) (in civil conspiracy the damage is caused by the overt acts and not the conspiracy); Weise v. Reisner, 318 F. Supp. 580, 583 (E.D. Wis. 1970) (the cause of action is not the conspiracy itself but rather the overt acts resulting from the conspiracy).

47. *See* notes 30–32 and accompanying text *supra.*

48. 471 F.2d 1197 (3d Cir.), *cert. denied,* 411 U.S. 921 (1973).

49. 481 F.2d 660 (3d Cir. 1973) (per curiam).

50. *See* notes 18–20 and accompanying text *supra.* It is interesting to note that what the *Rotolo* court described as *Gray v. Creamer*'s "harmonization" was undertaken in a footnote to the *Gray* court's decision. The substance of the so-called "harmonization" was contained in the following language:

> Although we have observed that actions under the civil rights statutes are to be "liberally construed by reviewing courts," . . . we have continued to affirm the

involving civil rights actions against public officials,[51] a notice pleading standard was applied to the plaintiffs' civil rights complaints.[52] Furthermore, in neither case did the Third Circuit mention *Gray*'s supposed "harmonization" of *Negrich* with *Haines*; in *Tyrrell, Gray* was even cited as authority for the proposition that a motion to dismiss a civil rights complaint was subject to a strict standard,[53] while in *Thomas,* the Third Circuit did not refer to *Gray,* and, moreover, cited *Haines* and *Tyrrell* for the authority that the plaintiff's allegations must be liberally construed.[54] Admittedly, these cases are factually distinguishable from the instant case in that they involved pro se prisoner complaints,[55] while the *Rotolo* action was instituted by a nonprisoner plaintiff who was represented by counsel.[56] However, *Negrich,* which served as the foundation for the *Rotolo* court's opinion,[57] was in essence a pro se case — although, in *Negrich,* counsel was appointed for the plaintiff-prisoner *after* he filed a complaint,[58] it was the pro se complaint which was subjected to the motion to dismiss.[59] Thus, since the *Rotolo* court drew its authority from a pro se case, the issue of whether a plaintiff is pro se or represented by counsel would not appear to be the distinguishing factor in determining the pleading standard. Nevertheless, other courts may very well draw such a distinction and use *Rotolo* as authority for the application of a fact pleading standard to plaintiffs' civil rights complaints which are drawn by counsel, while using *Tyrrell* and *Thomas* as authority for the imposition of a notice pleading standard to pro se complaints. This result would be particularly absurd in light of the fact that *Rotolo*'s holding was based on *Negrich,* a pro se case.

In the case of the represented plaintiff there would appear to be no authority for departing from the *Conley* notice pleading standard.[60] Since *Negrich,* upon which the *Rotolo* court relied, has in effect been overruled by *Haines,*[61] it is inadequate authority for imposing the stricter standard in *Rotolo.* As Judge Gibbons pointed out in his separate opinion, the only rationale for distinguishing the civil rights complaints from non-civil rights

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> dismissal of actions which contain only vague and conclusory allegations. . . . There is no reason to believe that this procedure is inconsistent with the Court's holding in Haines v. Kerner, . . . since in that case the prisoner made specific allegations of unconstitutional conduct.

465 F.2d at 182 n.2, *quoting* United States *ex rel.* Birnbaum v. Dolan, 452 F.2d 1078, 1079 (3d Cir. 1971) (citations omitted).

51. In *Tyrrell,* the plaintiff named as defendants the Pennsylvania State Attorney General and various prison officials. 471 F.2d at 1198–99. The plaintiff in *Thomas* named prison officials as the defendants. 481 F.2d at 661.

52. United States *ex rel.* Tyrrell v. Speaker, 471 F.2d at 1201; Thomas v. Brierly, 481 F.2d at 661.

53. 471 F.2d at 1200–01.

54. 481 F.2d at 661.

55. *See* United States *ex rel.* Tyrrell v. Speaker, 471 F.2d at 1201; Thomas v. Brierly, 481 F.2d at 661.

56. 532 F.2d at 921.

57. *See* notes 14, 15 & 21–23 and accompanying text *supra.*

58. *See* note 30 *supra.*

59. *Id.*

60. *See* notes 10–13 and accompanying text *supra.*

61. *See* notes 36–38 and accompanying text *supra.*

actions would seem to be judicial hostility to civil rights actions.[62] In fact, as a policy justification to buttress its imposition of the fact pleading standard in the instant case, the *Rotolo* court viewed that standard as a means to "weed out frivolous and insubstantial cases"[63] from the large number of actions brought under the Civil Rights Acts.[64] However, with the liberal discovery afforded under the Federal Rules of Civil Procedure and the availability of summary judgment, all of which are aimed at defining the facts and issues,[65] this fact pleading standard would not appear to be needed. Moreover, in applying this stringent pleading standard, the *Rotolo* court placed more emphasis upon an artfully drawn complaint than upon the merits of the plaintiff's claim, which is precisely what the notice pleading standard was adopted to avoid.[66]

In conclusion, it is difficult to predict whether future decisions will require fact pleading in all civil rights actions or only in those actions where the plaintiff is represented by an attorney. If such a standard is applied, it is possible that cases without merit may be disposed of early in the judicial process, thus providing some relief for the already overcrowded court dockets.[67] However, in doing so, the application of such a stringent pleading standard will undermine the liberal pleading philosophy of the Federal Rules of Civil Procedure.[68]

Jerome P. Gilligan

62. 532 F.2d at 927 (Gibbons, J., concurring and dissenting); *see* note 28 and accompanying text *supra*.

63. 532 F.2d at 922, *citing* Kauffman v. Moss, 420 F.2d 1270, 1276 n.15 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); *see* note 15 *supra*. *Kauffman* quoted approvingly from Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968). The complaint in *Valley* was grounded in civil conspiracy, which, as previously discussed, is held to a different pleading standard. *See* notes 45–47 and accompanying test *supra*.

64. 532 F.2d at 922, *citing* Kauffman v. Moss, 420 F.2d 1270, 1276 n.15 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); *see* note 15 *supra*. *Kauffman* quoted approvingly from Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968).

65. Conley v. Gibson, 355 U.S. 41, 47–48 (1957).

66. *Id.* at 48.

67. However, since there is such a liberal amendment of pleading standard under rule 15(a) of the Federal Rules of Civil Procedure, dockets may not in actuality be relieved of the backlog of cases but may possibly be tied up longer as suits are prolonged, thus adding to, rather than decreasing the congested conditions of court dockets.

68. Conley v. Gibson, 355 U.S. 41, 48 (1957); 2A MOORE'S FEDERAL PRACTICE ¶ 8.13, at 1692–1713 (2d ed. 1975).

FEDERAL CIVIL PROCEDURE — INTERLOCUTORY APPEALS — DENIAL OF PRELIMINARY STAY OF ARBITRATION NOT APPEALABLE UNDER SECTION 1292(a)(1) AS AN INTRODUCTORY ORDER REFUSING AN INJUNCTION.

Stateside Machinery Co. v. Alperin (1975)

In September 1973, Stateside Machinery Company (Stateside), a British corporation, contracted with Joel Alperin to purchase all foreign rights to the Triple A Trouser Manufacturing Company Bad Loop Detector.[1] The contract provided for binding arbitration of disputes.[2] As a result, when Stateside determined that the defendant has misrepresented the performance of the bad loop detector and consequently stopped payment on its check, Alperin filed a demand for arbitration.[3] On November 4, 1974, Stateside brought suit in the United States District Court for the Middle District of Pennsylvania for rescission of the sales contract and damages.[4] The defendant moved to stay the court proceedings pending arbitration and Stateside responded by filing a cross-motion requesting a preliminary injunction staying the arbitration proceeding.[5] The district court refused to rule on defendant's motion[6] but did issue an order denying Stateside the requested injunction.[7]

Stateside argued that it should be allowed to appeal the district court's refusal to rule on defendant's motion to stay the court proceedings,

1. Stateside Mach. Co. v. Alperin, 526 F.2d 480, 481 (3d Cir. 1975). A bad loop detector is designed to discover faulty belt loops before they are sewn onto trousers. *Id.* at 481 n.1.

2. The pertinent provision in the contract read: "This agreement here will be considered binding notwithstanding other agreements and in case of any unresolved issues will be subject to binding arbitration by the American Board of Arbitration." *Id.* at 481.

3. *Id.* Alperin also obtained a judgment in England requiring Stateside to honor its check. According to the Third Circuit, fraudulent inducement is not a defense to an action on a check under British law. *Id.*

4. *Id.* In its amended complaint, Stateside sought recission of the contract, recovery of payments made to Alperin, and consequential and punitive damages. *Id.* at 484.

5. *Id.* at 481. Stateside contended that fraudulent inducement nullified the contract, including the arbitration clause. *Id.* at 482. Alperin argued that the issue of fraudulent inducement was a matter for arbitration. *Id.* In support of this contention, Alperin relied upon Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), wherein a buyer sued for recission of a contract of sale on grounds of fraudulent misrepresentation by the seller. The majority in *Prima Paint* held that in ruling upon an application for a stay of arbitration under section 3 of the United States Arbitration Act of 1925, 9 U.S.C. § 3 (1970), a federal court may not consider a general claim of fraud in the inducement of the contract but should confine itself to the "issues relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404. A strong dissent by Justice Black, concurred in by Justices Douglas and Stewart, cited the United States Arbitration Act of 1925, which allows a judge to order arbitration of a dispute unless grounds exist for revocation of the contract. 388 U.S. at 412 (Black, J., dissenting), *citing* 9 U.S.C. §§ 2–3 (1970). The dissenting Justices contended that fraud in the inducement voided the entire contract including the arbitration clause. 388 U.S. at 412. *See also* Merritt-Chapman & Scott Corp. v. Penna. Tpk. Comm'n, 387 F.2d 768 (3d Cir. 1967).

6. 526 F.2d at 481. The district court expressly retained jurisdiction over defendant's motion. *Id.* at 482 n.2.

7. *Id.* at 481.

contending that the refusal plus the implied permission for the arbitration hearing to continue constituted an appealable constructive order which, in effect, granted defendant's motion.[8] The Third Circuit dismissed the appeal after determining that there had not been a constructive order since, by failing to rule, the district court had taken no action which prevented Stateside from continuing its lawsuit.[9] Stateside also sought review of the denial of its motion to stay the arbitration proceeding under section 1292(a)(1) of the Judicial Code.[10] The Third Circuit[11] also dismissed this appeal, *holding* that an order preliminarily denying a stay of arbitration is not appealable under section 1292(a)(1) as an interlocutory order refusing an injunction. *Stateside Machinery Co. v. Alperin*, 526 F.2d 480 (3d Cir. 1975).

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8. *Id.* at 484. The "constructive order" theory, which derived from a number of cases in the Fifth Circuit and, later, in the Second, holds that a district court's failure to rule on a motion for injunctive relief was appealable under section 1292(a)(1) of the Judicial Code, 28 U.S.C. § 1292(a)(1) (1970). A "constructive order" is recognized when a failure to rule results in a continuation of the conduct against which the injunction had been sought, in effect, leaving the appealing party to endure the harm as if the court had ruled against him. *See, e.g.*, Weiss v. Duberstein, 445 F.2d 1297 (2d Cir. 1971); United States v. Lynd, 301 F.2d 815 (5th Cir.) *cert. denied*, 371 U.S. 893 (1962). In *Lynd*, the district court's failure to rule on a motion for a temporary injunction against discriminatory voting registration practices was held appealable as an interlocutory order refusing an injunction. The "order" was reversed in view of the Government's clear showing of violations. 301 F.2d at 823. *But see* NAACP v. Thompson, 321 F.2d 199 (5th Cir. 1963), in which the Fifth Circuit emphasized that every failure to grant relief was not to be construed as the refusal of an injunction, particularly when the aggrieved party's rights had not been established beyond question. *Id.* at 202.

9. 526 F.2d at 484. In addition, the Third Circuit stated that even if the action taken by the district court had resulted in a constructive grant of Alperin's motion to stay the district court action, that order would not be appealable under the *Enelow-Ettelson* rule. *Id.* For a discussion of the *Enelow-Ettelson* rule, *see* note 42 *infra*.

It should be noted that arbitration, which had been scheduled to begin on December 11, 1974, was presumably concluded at the time the Third Circuit heard this appeal. Apparently, however, the results were not yet known. 526 F.2d at 482.

10. 28 U.S.C. § 1292(a)(1) (1970). The statute reads as follows:

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, except where a direct review may be had in the Supreme Court.

Id.

In the alternative, Stateside petitioned for a writ of mandamus. 526 F.2d at 485. This petition was summarily denied by the court on the ground that the action taken by the district court was within its jurisdiction and did not constitute an abuse of discretion. *Id.* Mandamus is available only to remedy a clear abuse of discretion by the lower court. *See, e.g.*, Rodgers v. United States Steel Corp., 508 F.2d 152, 161 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975). In Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962), the Second Circuit did issue a writ of mandamus to a district court ordering it to vacate an unappealable order granting a stay of arbitration. That case, however, involved an "exceptional circumstance." 297 F.2d at 86, *citing* La Buy v. Howes Leather Co., 352 U.S. 249, 260 (1957). The appellant's right to arbitration had already been conclusively litigated by the Court of Appeals for the First Circuit and such litigation, according to the Second Circuit, should not be repeated. 297 F.2d at 87.

11. The case was heard by Judges Gibbons, Biggs, and Weis. Judge Gibbons wrote the opinion.

The general principle applied in federal courts is that appeal lies only from a final judgment.[12] The purpose of the rule is to promote judicial economy by discouraging interlocutory appeals.[13] To alleviate possible harshness under this rule, Congress and the courts have developed a small number of exceptions,[14] one of which, embodied in section 1292(a)(1), provides for appellate jurisdiction over interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions."[15] As applied to orders which stay proceedings in one forum pending adjudication in another, section 1292(a)(1) has been interpreted narrowly by the Supreme Court in *Baltimore Contractors, Inc. v. Bodinger,*[16] as allowing appeals only from those interlocutory orders which entail "serious, perhaps irreparable consequences."[17]

Although the federal circuit courts have diligently attempted to apply the *Baltimore Contractors* standard in determining the appealability of orders which grant or deny stays of arbitration pending court proceedings,

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12. *See generally* Note, *Appealability in the Federal Courts,* 75 HARV. L. REV. 351 (1961). A final decision is deemed to be "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945).

The Third Circuit in *Stateside* summarily dismissed the possibility that a denial of a stay of arbitration would be appealable as a final order. 526 F.2d at 482. The Third Circuit has indicated in other cases its dislike for any attempt to circumvent the final order requirement. *See, e.g.,* Judge Gibbons' discussion of the "death knell" doctrine in Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537, 540 (3d Cir. 1975). *See also* Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied* 407, U.S. 925 (1972).

13. Cobbledick v. United States, 309 U.S. 323, 325-26 (1940); Taylor v. Board of Educ., 288 F.2d 600, 605 (2d Cir.), *cert. denied,* 368 U.S. 940 (1961). For a useful summary of the various rationales for the rule of finality, *see* Note, *supra* note 12, at 351–52.

14. For example, an exception has been judicially created for orders finally disposing of separable, collateral rights. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949). An exception has also been made for the immediate resolution of issues fundamental to the further conduct of the case. Gillespie v. United States Steel Corp., 379 U.S. 148, 154 (1964). The First Circuit has found both of these exceptions inapplicable to orders denying a stay of arbitration. New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183, 185 (1st Cir. 1972). *See generally* Note, *Appellate Review of Stay Orders in Federal Courts,* 72 COLUM. L. REV. 518, 526–28 (1972).

15. 28 U.S.C. § 1292(a)(1) (1970). For the text of this section, *see* note 10 *supra.*

16. 348 U.S. 176 (1955).

17. *Id.* at 181. *Baltimore Contractors* involved an action for an accounting of profits in a joint construction venture in which the district court had denied a motion for a stay of proceedings pending arbitration. The Supreme Court determined that the order was not a refusal of an injunction, appealable under section 1292(a)(1), but was merely a ruling on the order of litigation. *Id.* at 184.

The Third Circuit noted in *Stateside* the "anomalous" situation that results from adherence to the principle of finality in this situation. 526 F.2d at 483. In a suit brought to compel or enjoin arbitration, a judgment directing the parties to or away from arbitration is usually appealable as a final judgment, whereas such an order occurring in an action instituted on other grounds is appealable, if at all, as a section 1292(a)(1) interlocutory injunction. For example, in Goodall-Sanford, Inc. v. United Textile Workers, Local 1802, 353 U.S. 550 (1957), a suit by a union against an employer for the purpose of compelling arbitration, the order directing the parties to arbitration, was held appealable as a final order under section 1291. The Court distinguished the situation from that in *Baltimore Contractors* on the basis that there

they have reached far from consistent results. In *Lummus v. Commonwealth Oil Refining Co.*,[18] the Second Circuit held that an interlocutory order either granting or denying a stay of arbitration is not an appealable injunction.[19] The *Lummus* court reasoned that since the expense and delay which resulted from an unjust order *granting* a stay of arbitration did not satisfy this "serious, perhaps irreparable consequences"[20] criterion, such an order was not appealable.[21] The Second Circuit clarified its position in *Greater Continental Corp. v. Schechter*,[22] holding that an interlocutory order *denying* a stay of arbitration was also not appealable . In its opinion, the court emphasized the benefits of arbitration and the likelihood that irreparable harm would result from an order denying a stay of arbitration since arbitration awards are not self-executing.[23]

The Ninth and Sixth Circuits have reached positions contrary to that of the Second Circuit. In *A & E Plastik Pak Co. v. Monsanto Co.*,[24] the Ninth Circuit reversed a denial of a licensee's motion for a temporary injunction against arbitration on the ground that the dispute involved matters of public

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arbitration was a step in the judicial process and not the full relief sought. *Id.* at 551. *But see* John Thompson Beacon Windows v. Ferro, Inc., 232 F.2d 366 (D.C. Cir. 1956), where, in a suit to compel arbitration, the district court's refusal to do so was held not appealable. The court explained that "[t]he suit was not for injunctive relief in the traditional sense, nor even for specific performance strictly speaking. It was for a unique statutory remedy." *Id.* at 369.

18. 297 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962).

19. 297 F.2d at 86. Concerning a related issue, the United States Court of Appeals for the District of Columbia Circuit determined that orders refusing to compel arbitration and a concommitant stay of court proceedings were not appealable injunctions. The motion to enforce arbitration "was not for injunctive relief, in the traditional sense, . . . [but] for a unique statutory remedy." 232 F.2d 366, 369 (D.C. Cir. 1956).

20. 297 F.2d at 85–86, *quoting* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955).

21. 297 F.2d at 86. *Lummus* had a long and complicated history of litigation. Contractor Lummus had demanded arbitration of a dispute pursuant to a contract. *Id.* at 82. Defendant Commonwealth Oil Refining Co. (Commonwealth), alleging fraudulent misrepresentation, responded by suing Lummus in Puerto Rico and moving for a stay of arbitration. *Id.* Lummus, in a New York state court, moved to compel arbitration, whereupon Commonwealth removed its suit to federal district court and obtained, in Puerto Rico, an order enjoining the New York proceedings. *Id.* at 83. That order was appealed in the First Circuit and vacated. Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915 (1st Cir.), *cert. denied*, 364 U.S. 911 (1960). Commonwealth then obtained in the New York proceeding an order to stay arbitration. 297 F.2d at 84. The Second Circuit refused to take jurisdiction over Lummus' appeal of the order under section 1292(a)(1) but granted his petition for mandamus. *Id.* at 86; *see* note 8 *supra*. *Lummus* is apparently the only Second Circuit case where the appeal involved a *grant* of a stay of arbitration.

22. 422 F.2d 1100 (2d Cir. 1970).

23. The Second Circuit stated:

> The reason for the different approach to stays of arbitration as compared to stays of other court proceedings is twofold: (1) appealability of a denial to stay arbitration would further delay the arbitration proceedings and thereby eliminate one of the primary purposes of arbitration, i.e., the speed of the proceedings; (2) arbitration differs from another court proceeding in the essential respect that arbitration would not produce an enforceable result without further judicial action.

Id. at 1102–03 (citations omitted).

24. 396 F.2d 710 (9th Cir. 1968).

concern not appropriate for resolution by arbitration.[25] In the Ninth Circuit's view, for the purposes of section 1292(a)(1), an order denying a stay of arbitration constituted "the classic form of injunction,"[26] rather than "an exercise by a court of its inherent power to control its own proceedings."[27]

A recent Sixth Circuit decision, *Buffler v. Electronic Computer Programming Institute, Inc.*,[28] after considering the positions of both the Second and the Ninth Circuits, held that an order granting a preliminary injunction against arbitration was appealable under section 1292(a)(1).[29] The court admitted that an order *denying* a stay of arbitration might not result in "serious, irreparable consequences"[30] but determined that an order *granting* a stay of arbitration resulted in the irreparable loss to one party of contractually agreed upon rights.[31]

Finally, the First Circuit has held that an order denying an injunction against arbitration is not appealable under section 1292(a)(1),[32] whereas the grant of such an order is appealable.[33] The First Circuit has justified its conclusion in light of the *Baltimore Contractors* limitation on section 1292(a)(1).[34] Since submitting a dispute to arbitration does not bar subsequent judicial review,[35] a refusal to enjoin arbitration will not cause any party to lose irretrievably any substantive right.[36] In the First Circuit's view, a decision to stay arbitration, however, "may well be an injunction in the 'classic sense,' "[37]

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25. *Id.* at 716.

26. *Id.* at 713.

27. *Id.* The court explained:

> Here the [district] court was asked (and declined) affirmatively to interfere with proceedings in another forum; to exercise its equity powers to halt action of its litigants outside of its own court proceedings — the classic form of injunction. That arbitration is not a mere extension of court proceedings but involves a separate tribunal seems clear from Bernhardt v. Polygraph Co. of America, 350 U.S. 198 (1956).

396 F.2d at 713.

28. 466 F.2d 694 (6th Cir. 1972).

29. *Id.* at 699. In a suit for damages, recission, and alleged antitrust violations, the district court had granted plaintiff's motion to stay arbitration on the grounds that questions of law remained for the court and that arbitration would cause plaintiff irreparable financial harm. *Id.* at 696. This order was vacated on appeal as an interlocutory order granting an injunction. *Id.*

30. *Id.*, *quoting* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955).

31. 466 F.2d at 696. The Sixth Circuit stated that the Second Circuit's rationale concerning the nonappealability of an order denying a stay of arbitration might be valid if "the prospect of allowing the parties to go through a possibly needless arbitration is viewed as not a serious consequence." *Id.* at 698.

32. New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183, 185–87 (1st Cir. 1972).

33. Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915, 917 (1st Cir.), *cert. denied*, 364 U.S. 911 (1960).

34. 456 F.2d at 186–87.

35. A district court may vacate an arbitration award when, *inter alia*, the award was obtained by fraud or "undue means" or when the arbitrators have exceeded their powers. 9 U.S.C. §§ 10–11 (1970).

36. New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183, 185 (1st Cir. 1972).

37. *Id.* at 186, *quoting* A & E Plastic Pak Co. v. Monsanto Co., 396 F.2d 710, 713 (9th Cir. 1968).

since at least one party could be deprived of his contractual right to a quicker and more efficient settlement.[38]

In *Stateside*, the Third Circuit adopted the reasoning of the Second Circuit in *Lummus* and *Greater Continental*.[39] The Third Circuit concluded that a district court's refusal to stay arbitration was not an injunction having "serious, perhaps irreparable consequences"[40] since arbitration awards require judicial enforcement and an improper award would presumably be vacated.[41] The Third Circuit, therefore, held an interlocutory order denying a stay of arbitration unappealable under section 1292(a)(1).[42]

As might be expected in an area where there are conflicting opinions among the circuits, the court's approach is not without problems. The *Stateside* court's facile assumption that any improper arbitration award would not be enforced by a court of law lends only arguable support to the court's conclusion that there are no "irreparable consequences" when a stay of arbitration is denied. Although the United States Arbitration Act of 1925

38. 456 F.2d at 186. The First Circuit's position appears less than satisfactory when viewed in light of the plain language of section 1292(a)(1), which purports to establish the same criteria for appeal whether the order is granted or denied. For the text of section 1292(a)(1), *see* note 10 *supra*.

39. *See* notes 20–23 and accompanying text *supra*.

40. 526 F.2d at 482, *quoting* Baltimore Contractors, Inc v. Bodinger, 348 U.S. 176, 181 (1955).

41. 526 F.2d at 484; *see* note 35 and accompanying text *supra*.

42. 526 F.2d at 484. The court also rejected the plaintiff's "constructive order" theory. *Id.; see* note 8 and text accompanying notes 8 & 9 *supra*. Interestingly, after enunciating its holdings in *Stateside*, the Third Circuit devoted a considerable portion of its opinion to dicta as to what it would have done if it had determined that the district court's refusal to rule upon defendant's motion for a stay of the court proceedings had constituted a constructive grant of defendant's motion. 526 F.2d at 484–85; *see* note 8 *supra*. The court announced that it would have relied upon the so-called *Enelow-Ettelson* rule, which provides, in general, that an order granting or denying the stay of a legal claim pending the prior hearing by a court of equity of an equitable defense or counterclaim is an interlocutory injunction appealable under section 1292(a)(1). 526 F.2d at 484–85; *see* Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942); Enelow v. New York Life Ins., 293 U.S. 379 (1935). An interlocutory order in an equitable action, however, is not an appealable injunction, but a decision by the judge as to the manner in which he will try the proceeding. *See* City of Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949). The *Enelow-Ettelson* rule has been criticized in the Third Circuit and elsewhere as an anachronism in a legal system where law and equity are merged. *See, e.g.*, Stateside Mach. Co. v. Alperin, 526 F.2d 480, 483 n.9 (3d Cir. 1975) ("artificial"); New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183, 189 (1st Cir. 1972) ("medieval if not Byzantine"). However, the Third Circuit indicated that because of the *Enelow-Ettelson* rule, even if the district judge had ruled upon Alperin's motion to stay Stateside's equitable suit for recission, such an order would not have been appealable as a 1292(a)(1) interlocutory injunction. 526 F.2d at 484–85.

Assuming the necessity of operating within the *Enelow-Ettelson* framework, the logic of the above dicta seems unassailable. The real problem lies with the *Enelow-Ettelson* doctrine itself, which has become increasingly unwieldy in the present legal context. The Supreme Court has eliminated the law-equity distinction in some areas as, for example, to allow jury trials in traditionally equitable actions. *See, e.g.*, Ross v. Bernhard, 396 U.S. 531 (1970); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). Yet a persistent, albeit reluctant, reliance on *Enelow-Ettelson* continues. At least one commentator has suggested that the benefits of an efficient appellate system should be sufficient reason to abandon an "approach for which there is so little rational support." Note, *supra* note 12, at 375. *See generally* Note, *Appealability of Stay Orders in the Federal Courts*, 47 MINN. L. REV. 1099, 1105–07 (1963).

provides for judicial review and enforcement of awards,[43] courts in the Third Circuit and elsewhere have not lightly upset arbitration awards once the arbitrator's jurisdiction is established.[44] This seems consistent with a realization that it is difficult to reconcile a policy which implicitly encourages judicial review of arbitration awards with the benefits of speed and efficiency that should accompany the use of arbitration.

Additionally, there is the problem of statutory interpretation since section 1292(a)(1) makes no distinction between orders granting and orders denying injunctions.[45] If the statute is read literally and the holding in *Stateside* extended by implication to make orders *granting* a stay of arbitration unappealable, the Third Circuit would be faced with the problem discussed in *Buffler*:[46] the grant of a stay of arbitration may well involve "serious, perhaps irreparable consequences"[47] for the party who has been denied his contractual right to arbitration of disputes. In view of the Third Circuit's express reliance upon the *Baltimore Contractors* interpretation of section 1292(a)(1)[48] and the court's evident sympathy for a party who has sought to assure himself of a certain contractual right,[49] it would not be surprising if the Third Circuit, despite *Stateside,* allowed appeal of an order granting a stay of arbitration. This would place the court squarely in the "hybrid" position taken by the First Circuit,[50] which distinguishes between orders granting and orders denying stays of arbitration although the language of section 1292(a)(1) makes no such distinction.

As a possible alternative to this confusion, the United States Court of Appeals for the District of Columbia in *Travel Consultants, Inc. v. Travel Management Corp.*[51] has proposed the use of section 1292(b)[52] in connection

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43. 9 U.S.C. §§ 10–11 (1970).

44. Once a court has decided that the issue in dispute is within the jurisdiction of the arbitrators (*see* discussion of Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), in note 5 *supra*), even erroneous findings of fact or misrepresentations of law generally will not cause a court to overturn the award. *See, e.g.,* Kirchner v. West Co., 247 F. Supp. 550 (E.D. Pa.), *aff'd,* 353 F.2d 537 (3d Cir. 1965), *cert. denied,* 383 U.S. 945 (1966); Orion Shipping & Trading Co. v. Eastern States Petroleum Corp., 206 F. Supp. 777 (S.D.N.Y. 1962), *aff'd,* 312 F.2d 299 (2d Cir.), *cert. denied,* 373 U.S. 949 (1963).

45. For the text of section 1292(a)(1), *see* note 10 *supra.*

46. *See* notes 28-31 and accompanying text *supra.*

47. 348 U.S. at 181.

48. *See* 526 F.2d at 482.

49. *See id.* at 483-84. The opinion states that "[a]ny duty to arbitrate is necessarily contractual in origin. Thus we are dealing with a situation in which the party resisting arbitration appears prima facie to have agreed to the procedure at least in certain circumstances." *Id.*

50. *See* notes 33–38 and accompanying text *supra.*

51. 367 F.2d 334 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 912 (1967).

52. 28 U.S.C. § 1292(b) (1970). The statute provides as follows:

> 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 an 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.

Id.

with the appeal of any stay order. By its terms, section 1292(b) applies only when an interlocutory appeal by right under section 1292(a)(1)[53] is not available. Thus 1292(b) would permit the appeal of an order staying arbitration only if such an order was not considered to be a section 1292(a)(1) "injunction."[54] However, this proposed solution seems less than satisfactory. Section 1292(b) is discretionary, and obviously its use could and would produce results every bit as inconsistent as those now reached by the circuit courts' varying interpretation of Section 1292(a)(1).

What is obviously needed is consistency. Litigants do not benefit when courts are placed in the position, occupied by the Third Circuit in *Stateside*, of choosing between two alternatives, each of which is supported by ample precedent. The benefit to be gained from one established rule governing the appealability of orders denying or granting stay of arbitration outweighs any arguments advanced for or against allowing such appeals. Unfortunately, the circuits will continue to be divided upon the appealability of such orders unless and until the Supreme Courts provides guidance.

Emma Brown

FEDERAL JURISDICTION — SECTION 1332(c) — INTERSTATE AUTHORITIES AND MULTISTATE CORPORATIONS — 1958 ENACTMENT OF SECTION 1332(c) REQUIRES THAT FOR DIVERSITY PURPOSES, A CORPORATION SHOULD BE DEEMED A CITIZEN OF EVERY STATE IN WHICH IT IS INCORPORATED.

Yancoskie v. Delaware River Port Authority (1975)

Francis J. Yancoskie fell to his death while helping to construct a bridge which would span the Delaware River and connect Pennsylvania and New Jersey.[1] The deceased's widow, a Pennsylvania resident, filed suit in the United States District Court for the District of New Jersey against her husband's employer, the Delaware River Port Authority (Authority),

53. For the text of this section, *see* note 10 *supra*.

54. 367 F.2d at 338. Obviously, such an order would also have to involve "a controlling question of law as to which there is a substantial ground for difference of opinion," the immediate appeal and resolution of which would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (1970). For arguments that orders granting or denying stays of arbitration meet the criteria of section 1292(b), *see* Note, *supra* note 12, at 378–82 (1961); Comment, *Arbitration or Litigation*, 1973 U. ILL. L.F. 349; Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 357 (1959). *See generally* Note, *Interlocutory Appeals in the Federal Courts Under 28* U.S.C. § 1292(b), 88 HARV. L. REV. 607 (1975).

1. Yancoskie v. Delaware River Port Auth., 528 F.2d 722, 723 (3d Cir. 1975). Yancoskie was killed when an electric shock caused him to fall from the bridge. Yancoskie v. Delaware River Port Auth., 385 F. Supp. 1170, 1171 (D.N.J. 1975).

asserting a claim for damages "under any and all wrongful death and survival actions."[2] The Authority, which was created by an interstate compact agreement between New Jersey and Pennsylvania[3] pursuant to the compact clause of the United States Constitution,[4] moved to dismiss the complaint, claiming that there was no basis for federal jurisdiction.[5] The district court denied the motion which had been argued solely on the diversity jurisdiction theory,[6] on the ground that federal question jurisdiction existed because construction of the interstate compact was a question of federal law.[7] On appeal,[8] the Third Circuit[9] reversed and remanded to the district court for dismissal, *holding* 1) that no federal question jurisdiction existed since interpretation of the compact which established the Authority was not an element of the plaintiff's claim,[10] and 2) that even if it were assumed that the defendant, for purposes of diversity jurisdiction, was incorporated under the laws of both Pennsylvania and New Jersey, no diversity existed because plaintiff was also a Pennsylvania citizen and

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2. 528 F.2d at 723–24. Plaintiff filed suit as administratrix of decedent's estate both in her own right and on behalf of her minor son. *Id.* at 724.

3. Act of June 14, 1932, ch. 258, 47 Stat. 308, *as amended by* Act of July 17, 1952, ch. 921, 66 Stat. 738.

4. U.S. CONST. art. I, § 10. The compact clause provides: "No State shall, without the Consent of Congress . . . , enter into any Agreement or Compact with another State, or with a foreign Power. . . ." *Id.*

5. 528 F.2d at 724. The Authority advanced two arguments to support this motion. First, it contended that it could not be a citizen for purposes of diversity since it was the alter ego of the Commonwealth of Pennsylvania, and it is well settled that neither a state nor its alter ego is a citizen for purposes of diversity. *Id.* at 726; *see* Moor v. County of Alameda, 411 U.S. 693, 717 (1973). Second, the Authority argued that it was incorporated in both New Jersey and Pennsylvania and, thus, even if it were found to be a citizen for purposes of diversity, diversity would not exist because the plaintiff was also a citizen of Pennsylvania. 528 F.2d at 724 n.1.

The Authority additionally contended that even if jurisdiction were proper, the plaintiff could not obtain any relief because the Authority was entitled to sovereign immunity under Pennsylvania law. 385 F. Supp. at 1172. The Authority did not attempt to claim sovereign immunity under New Jersey law because of a recently enacted statute which permitted suits against the state. *Id.* at 1174, *citing* N.J. STAT. ANN. § 59:1–1 (West 1972).

Since the Authority could claim sovereign immunity only in Pennsylvania and not in New Jersey, the district court held that in light of the powers granted to the Authority "[t]o sue and be sued," Act of June 14, 1932, ch. 258, 47 Stat. 308, 310, it was unlikely that Congress intended to set up this inequality between the compact's member states. *Id.* In light of this inconsistency the district court held that the Authority could not claim Pennsylvania's sovereign immunity. 385 F. Supp. at 1174.

6. 528 F.2d at 724 n.1.

7. 385 F. Supp. at 1172. The district court opinion did not specify upon what statute jurisdiction was based, although it was presumably either section 1331, 28 U.S.C. § 1331 (1970), or section 1337, 28 U.S.C. § 1337 (1970). *See* note 24 *infra.*

8. Pursuant to section 1292(b), 28 U.S.C. § 1292(b) (1970) the district court certified the jurisdictional issue as " 'a, controlling question of law as to which there is substantial ground for difference of opinion' " and as to which " 'an immediate appeal may materially advance the ultimate termination of the litigation.' " 528 F.2d at 724, *quoting* 28 U.S.C. § 1292(b) (1970).

9. The case was heard by Chief Judge Seitz and Circuit Judges Van Dusen and Rosenn. Judge Van Dusen wrote the court's opinion.

10. 528 F.2d at 724–25. Since plaintiff's claim was based upon state tort law, no issue of federal law would arise *until* the defendant asserted sovereign immunity, at which time the interpretation of the interstate compact, a federal question, would become critical to the rights of the parties. *See* note 28 *infra.*

under section 1332(c) a corporation is a citizen of every state in which it is incorporated. *Yancoskie v. Delaware River Port Authority*, 528 F.2d 722 (3d Cir. 1975).

Section 1331(a) of the Judicial Code provides in pertinent part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . *arises under* the Constitution, laws or treaties of the United States."[11] In 1908, the United States Supreme Court shaped the meaning of the "arising under" requirement in *Louisville & Nashville R.R. v. Mottley*,[12] which held that a suit arises under the law of the United States when the plaintiff's cause of action is based upon those laws. The Court emphasized that "[i]t is not enough that the plaintiff allege some anticipated defense" which raises an issue of federal law.[13] Thus, in *Mottley* the Court held that there was no federal jurisdiction to hear a suit brought on a contract even though the defense that federal law invalidated the contract would certainly arise.[14]

The other primary means of access to federal court requires an allegation of diversity of citizenship. Section 1332(a) of the Judicial Code provides that "[t]he district courts shall have original jurisdiction in all civil actions where the matter in controversy . . . is between citizens of different states. . . ."[15] The diversity of citizenship requirement has long been held to mean *complete diversity*[16] — that is, no single plaintiff and no single defendant may be citizens of the same state. This requirement often caused confusion when a party suing or being sued by a multistate corporation was a citizen of one of the states in which its opponent was incorporated. In an attempt to deal with this confusion, the courts developed the "forum

11. 28 U.S.C. § 1331(a) (1970) (emphasis added). The "arising under" requirement exists in both the constitutional, U.S. CONST. art III, § 2, and the statutory context, 28 U.S.C. §§ 1331(a), 1337 (1970). In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court broadly interpreted the constitutional "arising under" requirement to mean that the judicial power of the United States is coextensive with the legislative and executive powers. *Id.* at 823. Subsequent cases which have considered the "arising under" requirement in the statutory context, however, have rendered stricter interpretations. Mr. Justice Holmes, writing for the Court in American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916), stated that "[a] suit arises under the law that creates the cause of action." *Id.* at 260. The strict interpretation of the statutory "arising under" requirement was relaxed somewhat in Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), which held that federal jurisdiction exists if a federal issue is an integral element of a state cause of action. *Id.* at 199-202.

The Supreme Court made a further effort to clarify the "arising under" requirement in Gully v. First Nat'l Bank, 299 U.S. 109 (1936), which held that to invoke federal question jurisdiction the federal issue must be 1) essential to the plaintiff's cause of action, 2) disclosed on the face of the complaint and not raised as an answer to an anticipated defense, and 3) substantial, not frivolous. *Id.* at 112-13.

12. 211 U.S. 149 (1908).

13. *Id.* at 152.

14. *Id.*

15. 28 U.S.C. § 1332(a) (1970).

16. The complete diversity requirement was first enunciated by Chief Justice Marshall in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). The courts have continued to follow *Strawbridge* and have repeatedly affirmed the requirement. *See* American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951); Soderstrom v. Kungsholm Baking Co., 189 F.2d 1008, 1013-14 (7th Cir. 1951).

doctrine."[17] The basic tenet of the doctrine was that "if suit was brought by or against a corporation in one of its states of incorporation, for diversity purposes the company would be treated as if it were only a citizen of the forum state."[18] Thus, under the forum doctrine, if a Pennsylvania resident brought suit in the United States District Court for the District of New Jersey against a corporation incorporated in both New Jersey and Pennsylvania, the complete diversity requirement would be met since the defendant corporation would be considered a citizen only of New Jersey, the forum state.

Doubt was cast upon the validity of the doctrine in 1958, however, when Congress amended the general diversity statute to include a specific section dealing with the citizenship of corporations. Section 1332(c) now provides that "a corporation shall be deemed a citizen of *any* State by which it has been incorporated and of the State where it has its principal place of business. . . ."[19] While the Supreme Court has not considered the forum doctrine since the 1958 amendment, several district courts have focused upon its continued viability. In *Hudak v. Port Authority Trans-Hudson Corp.*,[20] decided shortly after the amendment, the United States District Court for the Southern District of New York held that the 1958 amendment did not overrule the forum doctrine. The court found that it had subject matter jurisdiction over a suit brought by a New Jersey plaintiff against the defendant, a product of an interstate compact, treated for diversity purposes as though it were incorporated in both New York and New Jersey.[21] Recently, the United States District Court for the District of New Jersey chose to follow *Hudak* in a case presenting an identical jurisdiction issue.[22]

To reach the diversity issue in *Yancoskie,* the Third Circuit first had to dispose of the plaintiff's allegation that federal question jurisdiction existed. The court found it unnecessary to decide if the construction of an interstate compact presented a federal question because, even if it did, it was merely an anticipated defense to the plaintiff's cause of action.[23] Quoting *Mottley,* the

17. The forum doctrine originated in Railway Co. v. Whitton's Adm'r, 80 U.S. (13 Wall.) 270 (1871). In *Whitton,* an Illinois plaintiff brought suit in a Wisconsin federal district court against a corporation incorporated under the laws of Illinois and Wisconsin. *Id.* at 283. Despite the complete diversity requirement, the Court held that there was diversity jurisdiction since "[i]n Wisconsin the laws of Illinois have no operation. . . . It is not *there* a corporation or a citizen of any other state. Being there sued it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere." *Id.* (emphasis by the court).

18. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3626, at 808 (1975) [hereinafter cited as WRIGHT].

19. 28 U.S.C. § 1332(c) (1970) (emphasis added).

20. 238 F. Supp. 790 (S.D.N.Y. 1965).

21. *Id.* at 791–92.

22. Kozikowski v. Delaware River Port Auth., 397 F. Supp. 1115 (D.N.J. 1975).

23. 528 F.2d at 724–25. The district court had relied upon Petty v. Tennessee-Missouri Comm'n, 359 U.S. 275 (1959), which held that the construction of an interstate compact is a federal question. *Id.* at 278. However, the existence of a federal question does not, in and of itself, satisfy the jurisdictional "arising under" requirement. *See* note 11 and accompanying text *supra.* In addition, there is a possibility that the district court's reliance upon *Petty* may have been misplaced in any event. Jurisdiction in that case was based upon section 33 of the Jones Act, 46 U.S.C. § 688 (1970), and the determination that the construction of an interstate

court held that federal question jurisdiction could not be invoked merely by alleging an anticipated defense that raised a federal issue.[24]

Although the district court had not reached the diversity issue,[25] the Third Circuit was required to consider it because of their decision that federal question jurisdiction was not present. Relying upon the language of the compact which referred to the Authority as "a body corporate and politic . . . which shall constitute the public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey,"[26] and a Supreme Court case[27] which referred to a similar entity as a "bi-state corporation,"[28] the court determined that for purposes of diversity jurisdiction the Authority was a corporation incorporated in both New Jersey and

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compact was a federal question was relevant only with regard to which law would apply to the merits and not to the jurisdictional issue. 359 U.S. at 279–80.

24. 528 F.2d at 725. The plaintiff further argued that jurisdiction could be based upon section 1337, 28 U.S.C. § 1337 (1970), which provides that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against monopolies." *Id.* The plaintiff argued that since the Authority was engaged in interstate commerce by building a bridge connecting two states, any suit involving the Authority would necessarily involve issues which should be decided by a federal court. However, the commerce statute contains an "arising under" requirement which is interpreted identically to the one in the federal question statute. *See* Peyton v. Railway Express Agency, 316 U.S. 350 (1941); Springfield Television, Inc. v. City of Springfield, 428 F.2d 1375 (8th Cir. 1970). The *Yancoskie* court thus held that since the plaintiff's complaint did not raise a question of interstate commerce which was essential to her cause of action, federal jurisdiction on that basis was improper. 528 F.2d at 726. Finally, the plaintiff argued that because the construction of the bridge could be undertaken only with federal approval, jurisdiction should be determined as if the federal government were building the bridge. *Id.* In that situation jurisdiction would exist under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (1970). The court also found this contention to be without merit. 528 F.2d at 726.

25. 528 F.2d at 726–27. The Authority contended that it was an alter ego of the Commonwealth of Pennsylvania and therefore not a citizen of any state for purposes of diversity. *Id.* at 726. Alternatively the Authority argued that because it was a citizen of both Pennsylvania and New Jersey, diversity could not exist between itself and a Pennsylvania plaintiff. *Id.* at 727.

26. Act of June 14, 1932, ch. 258, Art. I, 47 Stat. 309.

27. Petty v. Tennessee-Missouri Comm'n, 359 U.S. 275 (1959).

28. *Id.* at 279. The *Yancoskie* court found it unnecessary to resolve the Authority's claim that, since it was an alter ego of the state, it was not a citizen of any state for diversity purposes. *See* note 25 *supra.* The court found that even assuming the Authority was not the alter ego of the state, it was a citizen of *both* Pennsylvania and New Jersey, thus defeating diversity jurisdiction. 528 F.2d at 727. It is submitted that had the *Yancoskie* court reached this claim, Petty v. Tennessee-Missouri Comm'n, 359 U.S. 275 (1959), while not conclusive, would have supported the Authority's contention. In that case, the Court "assume[d] *arguendo* that [the] suit must be considered as one against the States since [the] bi-state corporation [was] a joint or common agency of Tennessee and Missouri." *Id.* at 279 (emphasis by the court). It should be noted, however, that the Supreme Court's assumption about the character of the commission in *Petty* arose in the context of an eleventh amendment state immunity issue, and it does not necessarily follow that, even if the commission was the alter ego of the state for those purposes, that it would also be so for purposes of diversity jurisdiction. On the other hand, to support its claim that it was an alter ego of the state, the Authority relied upon Appeal of Lillian Anderson, 408 Pa. 179, 182 A.2d 514 (1962). In that case, the Supreme Court of Pennsylvania held that the Delaware River Port Authority was not a mere public corporation, but rather an agency of the Commonwealth carrying out an executive function, and that it was thus entitled to claim the Commonwealth's sovereign immunity. *Id.* at 182, 182 A.2d at 515.

Pennsylvania.[29] From this position, the court summarily held that, since the plaintiff was a Pennsylvania citizen and the defendant was incorporated in both Pennsylvania and New Jersey, there could be no diversity.[30] It was only in a footnote that the court alluded to the forum doctrine as casting doubt upon the diversity issue in this case.[31] In the same footnote the court went on to "hold that [section 1332(c)] means that a multi-state corporation is deemed a citizen of *every* state in which it has been incorporated,"[32] thereby overruling the forum doctrine by implication.

While the Court's recognition that federal question jurisdiction cannot be based upon an anticipated defense is in accordance with established principles of federal jurisdiction,[33] its conclusion that the forum doctrine did not survive the enactment of section 1332(c) arises in the midst of unsettled law. Perhaps the greatest criticism which can be leveled against the *Yancoskie* court is not that it overruled the forum doctrine, but that it did so by implication without even superficial consideration of the meaning of the 1958 amendment. *Lang v. Colonial Pipeline Co.*,[34] which the *Yancoskie* court cited to support its conclusion that the forum doctrine is no longer viable, is inapposite.[35] The *Lang* case involved the joinder of a Pennsylvania corporation, incorporated *only* in Pennsylvania, as a defendant to a suit brought in the Eastern District of Pennsylvania by a Pennsylvania plaintiff.[36] The opposing parties agreed that if the Pennsylvania corporation were joined, diversity jurisdiction could not exist.[37] The true issue in *Lang* was whether joinder could be avoided by piercing the veil of the Pennsylvania corporation, which was a wholly owned subsidiary of the Delaware corporation already a party to the suit. It was in this context that the *Lang* court noted that 1332(c) mandates that a corporation is a citizen of every state wherein it is incorporated.[38] *Lang* did not present a situation comparable to the instant case, and only by the broadest interpretation can it be read as lending support to the *Yancoskie* holding.

Anderson relied upon Rader v. Pennsylvania Turnpike Comm'n, 407 Pa. 609, 182 A.2d 199 (1962), which held that the Pennsylvania Turnpike Commission possessed the same immunity from suit as did the Commonwealth. *Id.* at 621, 182 A.2d at 205. However, *Rader* has been overruled by Specter v. Commonwealth, 462 Pa. 474, 341 A.2d 481 (1975). *Specter* held that in order for a governmental entity to claim the sovereign immunity of the Commonwealth, it must be part of the "Commonwealth" as that term is defined in the Pennsylvania Constitution. *Id.* at 478, 341 A.2d at 483; *see* PA. CONST. art. I, § 11. Since this determination is made by construing the legislative acts creating the governmental entity, it is doubtful that the defendant in *Yancoskie* could have successfully claimed Pennsylvania's immunity in light of the "sue and be sued" clause of the Compact. *See also* Ayala v. Philadelphia Bd. of Educ., 453 Pa. 584, 305 A.2d 877 (1973).

29. 528 F.2d at 727.
30. *Id.*
31. *Id.* at 727 n.17.
32. *Id.* (emphasis added).
33. *See* note 11 and accompanying text *supra.*
34. 266 F. Supp. 552 (E.D. Pa.), *aff'd*, 383 F.2d 986 (3d Cir. 1967).
35. At least one commentator, however, has cited *Lang* as overruling the forum doctrine. 13 WRIGHT, *supra* note 18, § 3626, at 817 n.30.
36. 266 F. Supp. at 553–54.
37. *Id.* at 553.
38. *Id.* at 558.

While *Lang* is inapposite, the jurisdictionally relevant facts in *Kozikowski v. Delaware River Port Authority*,[39] decided only six months prior to *Yancoskie*, are identical to those of the instant case. In *Kozikowski*, a Pennsylvania citizen brought suit against the Authority in the United States District Court for the District of New Jersey, and the district court, following *Hudak*, held that diversity jurisdiction existed.[40] In discussing the 1958 amendment and its relation to the forum doctrine, the *Kozikowski* court quoting *Hudak*. emphasized:

> "There was no consideration by Congress of the multiple incorporation problem; the sole interest of Congress was in preventing a corporation sued in the state of its principal place of business from removing to the federal court on the ground, valid before the 1958 amendment, that it was incorporated in another state. It may also be noted that the 1958 amendment uses the phrase 'any State' as opposed to 'every State'; had Congress used 'every state' the meaning would be clear but 'any State' is equivocal to say the least. . . . [A]bsent any evidence of an intent by Congress to change preexisting law, there seems no reason for a District Court to put aside that law so clearly established."[41]

The position quietly taken by the *Yancoskie* court, however, is not without support. Most commentators agree that the 1958 amendment should be interpreted as an end to the forum doctrine[42] since the congressional purpose was to decrease the rapidly multiplying federal caseload.[43] The Third Circuit's decision to overrule the forum doctrine is in accord with this congressional policy. Furthermore, while the *Hudak* court correctly pointed out that Congress was primarily concerned with the problem of preventing a corporation sued in its principal place of business from removing to federal court,[44] the ambiguity noted in *Hudak*, created by the use of the phrase "any

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39. 397 F. Supp. 1115 (D.N.J. 1975).

40. *Id.* at 1118–19. Having found that diversity jurisdiction existed, the *Kozikowski* court was not required to determine whether federal question jurisdiction existed also. *Id.* at 1119.

41. *Id.*, *quoting* Hudak v. Port Authority Trans-Hudson Corp., 238 F. Supp. at 792 (citations omitted).

42. 1A MOORE'S FEDERAL PRACTICE ¶ 0.161 [3.–2], at 228–30 (2d ed. 1974); 13 WRIGHT, *supra* note 18, § 3626, at 818–20; 72 HARV L. REV. 391, 395 (1958). *But see* 48 IOWA L. REV. 410 (1963).

43. S. REP. NO. 1830, 85th Cong., 2d Sess. 1–5 (1958), *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3099–102. The legislative history shows that Congress placed cosiderable emphasis upon preventing a corporation from invoking diversity jurisdiction by incorporating in more than one state. *Id.*; *see* WRIGHT, *supra* note 18, § 3624, at n.14.

44. 238 F. Supp. at 792; *see* S. REP. NO. 1830, 85th Cong., 2d Sess. 4 (1958), *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3101–02. The Senate report states:

> It is now established doctrine that a corporation, for the purposes of jurisdiction, is deemed a citizen of the State in which it is incorporated. It is by virtue of this rule . . . that so-called out-of-State corporations may sue and be sued under the diversity jurisdiction where it is suing or being sued by a citizen of a State other than the State of its incorporation.
>
> This fiction of stamping a corporation a citizen of the State of its incorporation has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation

State" as opposed to "every State,"[45] should be analyzed in light of the overriding purpose of the amendment — to limit the diversity jurisdiction of federal district courts.[46] With this in mind, it is submitted that the restrictive reading of section 1332(c) adopted by the *Yancoskie* court will do more to further the intended legislative ends.[47]

Furthermore, as one commentator has noted, the underlying concept of "the forum doctrine that a corporation has no legal existence beyond the bounds of the sovereignty by which it was created has been rejected."[48] Since the underlying rationale has disappeared, it is fitting that the Third Circuit took the opportunity to rid itself of a doctrine which no longer has support in theory or policy.

Thus, by means of a footnote to the *Yancoskie* opinion, the Third Circuit has implicitly overruled the forum doctrine. This ruling effectively proscribes diversity suits against bodies created by interstate compacts from being brought in federal court when the plaintiff is a citizen of one of the compact's member states.[49] It should be understood that the holding has implications beyond the context of suits involving interstate authorities. Thus, diversity jurisdiction will no longer permit a plaintiff who is a citizen

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into the Federal courts simply because it has obtained a corporate charter from another State.

Id. (citations omitted). Since the underlying purpose of diversity jurisdiction is to protect out-of-state litigants from the bias of local tribunals, such jurisdiction should not extend to entities which are essentially local in character and thus not subject to such bias. *Id.*

45. 238 F. Supp. at 792.

46. S. REP. NO. 1830, 85th Cong., 2d Sess. 3 (1958), *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3100–01. The Senate report, which expressed great concern over the tremendous increase in the federal caseload, stated:

> Most of the increase has occurred in the diversity of citizenship cases, which have increased from 7,286 in 1941 to 20,524 in 1956. A large portion of this caseload involves corporations.
>
> . . . .
>
> In adopting this legislation, the committee feels that it will . . . ease the workload of our Federal courts by reducing the number of cases involving corporations which come into Federal district courts on the fictional premise that a diversity of citizenship exists.

Id. See also note 47 *infra.*

47. A further argument can be based upon the legislative history of section 1332(c), which suggests that the amendment was, in fact, intended to overrule the forum doctrine. The language of the amendment was altered a number of times prior to its enactment. An earlier version stated: "[A] corporation shall be deemed a citizen of the State of its original creation." S. REP. NO. 1830, 85th Cong., 2d Sess. 30, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 3099, 3133. One commentator analyzed the successive changes in the language of section 1332(c) as follows:

> Under the earlier drafts of the amendment it appears that a corporation incorporated in more than one state would have been deemed a citizen of only one of its states of incorporation. Thus, there is a strong basis for the argument that the final version of the amendment rejects this result and requires that a corporation be treated as a citizen of every state by which it has been incorporated.

13 WRIGHT, *supra* note 18, § 3626, at 819.

48. 13 WRIGHT, *supra* note 18, § 3626, at 820; *see* note 17 *supra.*

49. In circuits which still uphold the forum doctrine there remains the barrier to diversity jurisdiction left unshaken by the Third Circuit. An interstate authority may still claim that it is an alter ego of the state and thus not a citizen of any state for the purposes of diversity jurisdiction. *See* note 30 *supra.*

of state *A* to bring suit against a corporation incorporated in state *A*, regardless of how many other states it is incorporated in and regardless of where the suit is brought. The holding has thus severely limited the litigant's choice of forum when suing a multistate corporation. Furthermore, it would appear that the Third Circuit is the first court of appeals to hold that section 1332(c) has put the forum doctrine to rest. Despite the court's failure to elaborate upon this issue, its holding, especially in light of the support and reasoning of the commentators,[50] will undoubtedly influence other circuits where this issue has not been resolved. If this approach is adopted by the other circuits, it could have a significant effect in furthering the legislative intention to decrease the caseload in the federal courts through the enactment of section 1332(c).

Martin J. Kane

50. *See* notes 42, 47 & 48 *supra*. *See also* note 44 *supra*.