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FEDERAL PRACTICE & PROCEDURE

INTRODUCTION

During the survey period, the Ninth Circuit Court of Appeals considered a wide variety of procedural and jurisdictional issues in the course of dealing with the evergrowing number of civil cases appearing on its docket. However, only a limited number of these decisions involved issues sufficiently consequential to be discussed in this survey.

The Ninth Circuit resolved important questions involving standing under section 812 of the Fair Housing Act,[1] Guam's elimination of appellate jurisdiction of its federal district court,[2] the scope of Federal Rule of Appellate Procedure 4(a),[3] and numerous factual situations involving the appealability of class certification orders and maintenance of class actions.[4]

I. OVERVIEW

A. STANDING UNDER SECTION 812 OF THE FAIR HOUSING ACT OF 1968.

In *TOPIC v. Circle Realty Co.*,[5] a community volunteer organization brought an action against a number of real estate brokers alleging that the brokers "steered"[6] minority customers to hous-

1. *See* TOPIC v. Circle Realty Co., 532 F.2d 1273 (9th Cir. Mar., 1976) (per Kennedy, J.), *cert. denied*, 45 U.S.L.W. 3253 (U.S. Oct. 4, 1976).

2. *See* Agana Bay Dev. Co. v. Supreme Court of Guam, 529 F.2d 952 (9th Cir. Jan., 1976) (per Carter, J.), *overruled in* People v. Olsen, 540 F.2d 1011 (9th Cir. Aug., 1976) (en banc), *cert. granted*, 45 U.S.L.W. 3359 (U.S. Nov. 16, 1976) (No. 76-439).

3. *See* Salazar v. San Francisco Bay Area Rapid Transit Dist., 538 F.2d 269 (9th Cir. July, 1976) (per Kilkenny, J.), *cert. denied*, 45 U.S.L.W. 3342 (U.S. Nov. 8, 1976). *See also* Karstetter v. Cardwell, 526 F.2d 1144 (9th Cir. Dec., 1975) (per Koelsch, J.).

4. *See* Seay v. McDonnell Douglas Corp., 533 F.2d 1126 (9th Cir. Mar., 1976) (per Zirpoli, D.J.); Little v. First Cal. Co., 532 F.2d 1302 (9th Cir. Mar., 1976) (per Sneed, J.); Williams v. Sinclair, 529 F.2d 1383 (9th Cir. Dec., 1975) (per Voorhees, D.J.), *cert. denied*, 96 S. Ct. 2651 (1976); Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. Nov., 1975) (per Koelsch, J.); Inmates of San Diego County Jail v. Duffy, 528 F.2d 954 (9th Cir. Dec., 1975) (per curiam); Blackie v. Barrack, 524 F.2d 891 (9th Cir. Sept., 1975) (per Koelsch, J.), *cert. denied*, 45 U.S.L.W. 3241 (U.S. Oct. 5, 1976).

5. 532 F.2d 1273 (9th Cir. Mar., 1976) (per Kennedy, J.), *cert. denied*, 45 U.S.L.W. 3253 (U.S. Oct. 4, 1976). The district court's opinion is reported at 377 F. Supp. 111 (C.D. Cal. 1974).

6. Steering was defined in the complaints as the practice of "directing non-white home seekers to housing in designated minority residential areas, and directing white home seekers to housing in designated white residential areas." 532 F.2d at 1274.

ing in designated minority residential areas. While the plaintiffs themselves were not home-buyers subjected to any such racial steering, they nevertheless claimed that they were injured by the defendants in that they were "deprived of the important social and professional benefits of living in an integrated community [and suffered] embarrassment and economic damage in their social and professional activities from being stigmatized as residents of either white or black ghettoes."[7] The district court denied the defendants' motion to dismiss on the ground that plaintiffs lacked standing to sue; instead, it certified the order for interlocutory appeal under 28 U.S.C. section 1292(b).[8] The Ninth Circuit Court of Appeals held that the jurisdictional section relied upon by the plaintiffs, section 812 of the Fair Housing Act of 1968 (FHA),[9] did not authorize lawsuits to vindicate the rights of third parties.[10]

The court compared the injury suffered by the plaintiffs in this case to that suffered in *Trafficante v. Metropolitan Life Insurance Co.*,[11] where the Supreme Court held that section 810 of the FHA conferred standing to tenants of a large apartment complex to challenge their landlord's alleged discrimination in renting apartments.[12] The Ninth Circuit felt that the two cases were distinguishable on two bases. First, in *TOPIC* the plaintiffs were not residents of a single apartment complex as in *Trafficante*, but were simply members of a large metropolitan community. The court reasoned that the role played by the defendants in impeding the integration of the plaintiffs' community might be so attenuated as to negate the existence of any injury-in-fact attributable to the ac-

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7. *Id.* at 1274.

8. 28 U.S.C. § 1292(b) (1970) provides:

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

9. FHA § 812, 42 U.S.C. § 3612(a) (1970), provides in pertinent part: "The rights granted by sections 803, 804, 805, and 806 [42 U.S.C. sections 3603 through 3606] may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction."

10. 532 F.2d at 1275.

11. 409 U.S. 205 (1972).

12. *Id.* at 212.

tions of the defendants.[13] Nevertheless, the court stated that it need not reach this constitutional issue because of the second factor which distinguished *TOPIC* from *Trafficante*. The court held that the language of section 812 of the FHA, upon which the district court had based its jurisdiction, did not authorize suits to vindicate the rights of third parties, as did section 810 which was involved in *Trafficante*. According to the court, section 812 provided access to the courts only to those persons who are granted rights by the Act—*i.e.*, to those who are the direct objects of the practices which the Act makes unlawful. Therefore, only direct victims of racial steering have a cause of action under section 812; thus, the plaintiffs in *TOPIC* failed to state a claim upon which relief could be granted.[14]

TOPIC viewed administrative procedures as the proper vehicle for pursuing the plaintiffs' claims. The court stated that this conclusion was consistent with the statutory design of the FHA, and that resolution of the plaintiffs' claims at the agency level would be a superior remedy to judicial resolution of the issues. While this issue was one of first impression in the Ninth Circuit, the result is consistent with the only other appellate court decision on point.[15] It appears that the *TOPIC* court correctly applied existing Supreme Court precedent by concluding that the injury to plaintiffs did not create a cause of action under section 812.

13. 532 F.2d at 1275. In support of this view, the *TOPIC* court cited Warth v. Seldin, 422 U.S. 490 (1975). Therein, the plaintiffs—nonprofit organizations, taxpayers and low income residents of the Rochester, New York, metropolitan area—brought an action against the town of Penfield (an incorporated municipality adjacent to Rochester) and its governing bodies, claiming that Penfield's zoning ordinances excluded persons of low and moderate income from living in the town. The Supreme Court stated that the fact that some plaintiffs shared "attributes common" to persons who were allegedly excluded wrongfully was not sufficient in itself to require the conclusion that plaintiffs themselves were injured. *Id.* at 502. The *Warth* Court noted that the plaintiffs had to demonstrate that absent the defendant's conduct, there was a substantial probability that they would have been able to live in the town from which they were excluded.

14. 532 F.2d at 1275-76. The court distinguished between the purposes behind the two sections: Section 810 contemplates resolution of problems by means of the slower, less adversarial context of administrative reconciliation and mediation rather than by the judicial system, which is the chief forum for relief under section 812. The latter section gives preferential access to the judicial system to those persons who are the primary victims of illegal discrimination. To treat both sections as extending to the same class of plaintiffs would destroy the statutory scheme, since the procedural aspects of section 810 could always be circumvented. In support of this conclusion the court cited Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Act of 1964 and 1968*, 82 HARV. L. REV. 834, 857 (1969), which distinguished between the two sections for the same reasons as those relied upon by the court in *TOPIC*.

15. *See* Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974). The plaintiffs in

B. The Vietnamese Orphan "Babylift" Case

In *Nguyen Da Yen v. Kissinger*,[16] a class action[17] was brought against the Immigration and Naturalization Service (INS), seeking to reunite children, who allegedly were brought to this country improperly from Vietnam, with their parents. The court described the action as "a unique lawsuit, responsive to a highly unusual operation—the Vietnamese Orphan 'Babylift.' "[18] At an early stage of this complex action, the plaintiffs moved for a preliminary injunction requiring that the defendants (1) determine each child's adoptive status; (2) identify and locate each child's parents if they were living; and (3) disclose all information obtained to the plaintiffs. The district court conducted a series of hearings and ordered that investigations into each child's adoptive status be conducted, and also provided for the random[19] discovery of investigative files held by the INS. Upon cross appeals from the preliminary injunctive order,[20] the Ninth Circuit held that: (1) the administrative discretion of the INS, which was not subject to judicial review,[21] did not extend to acts which allegedly violate constitutional rights, so that the district court

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Acevedo, members of low-income minority groups and two organizations that represented members of these groups, alleged that the defendant violated the FHA as a result of its abandonment of plans to build low-income family housing at a certain site. The court held that the plaintiffs lacked standing to sue since they neither suffered an injury-in-fact nor sought to protect an interest arguably within the zone of interests to be protected by the law in question. *Id.* at 1083. The court stated that plaintiffs did not show any harm caused by defendant's conduct "which would differentiate them sufficiently from the general public to constitute an 'injury in fact.' " *Id.*

16. 528 F.2d 1194 (9th Cir. Nov., 1975) (per Koelsch, J.).

17. Three named plaintiffs, represented by a guardian ad litem appointed by the court, were children who apparently had living parents in Vietnam. The plaintiffs sought to represent 2700 children who allegedly had been brought to this country improperly. According to the court,

> [t]he documentation accompanying some of the children is insufficient on its face to establish the child's status as an orphan, abandoned, or irrevocably released child, the validity of the private agency's custody of such a child under Vietnamese child custody law, or the child's eligibility for admission under 8 U.S.C. §§ 1101(b)(1)(F) and 1151(b).

Id. at 1197.

18. *Id.* at 1196-97.

19. One out of three investigative files were to be provided by the INS for ex parte in camera inspection. The district court would then make a sampling of such files available to the plaintiffs. *Id.* at 1204-05.

20. On appeal, plaintiffs claimed that the district court's order improperly restricted access to the children's records. For the Ninth Circuit's response see text accompanying note 33 *infra*.

21. Actions by administrative agencies which are not an abuse of discretion are not reviewable in the courts. *See* 5 U.S.C. § 706(2)(A) (1970) (Administrative Procedure Act).

could compel the disclosure of information pertinent to its investigation of alleged constitutional violations, if proper jurisdiction existed;[22] (2) such jurisdiction did exist under the court's habeas corpus power;[23] and (3) random disclosure of INS records improperly restricted the plaintiffs' access to the children's files.[24]

At the outset, the Ninth Circuit considered and rejected the argument of the INS that the conduct of the administrative investigation was committed to unreviewable agency discretion. The defendants, according to the court, misconstrued the complaint, which merely alleged that the exercise of the agency's discretionary power resulted in a continuing deprivation of the plaintiffs' constitutional rights; the complaint was not seeking a discretionary exercise of this power for the plaintiffs' benefit, as the defendants had believed.[25] The court stated that "nothing in the [Ad-

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22. 528 F.2d at 1199-1200.

23. *Id.* at 1200-04. The court also rejected 28 U.S.C. sections 1343(3) and 1331, and 8 U.S.C. section 1101, as alternative jurisdictional bases. 28 U.S.C. section 1343(3) is the jurisdictional basis for 42 U.S.C. section 1983, which requires action under color of state law. Such action was not alleged in *Nguyen Da Yen*.

28 U.S.C. section 1331 requires that the matter in controversy must exceed the sum or value of $10,000. The plaintiffs here failed to claim such injury, but the court stated that the complaint could be amended to allege the requisite injury. In addition, the court noted that the question of whether an intangible right of the sort at issue in *Nguyen Da Yen* can be valued to confer section 1331 jurisdiction was unresolved in the Ninth Circuit. *Id.* at 1201 n.10. However, from the authority cited by Judge Koelsch in *Nguyen Da Yen*, it may be inferred that at least he would approve such valuation if the issue was properly presented to the court. *See, e.g.*, Hague v. CIO, 307 U.S. 496 (1939); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974); Hartigh v. Latin, 485 F.2d 1068 (D.C. Cir. 1973).

The court also stated that 8 U.S.C. section 1101, a part of the Immigration and Naturalization Act, was not jurisdictional in nature. Noting that other circuits were in conflict on the issue as to whether the Administrative Procedure Act (APA) provides an independent jurisdictional basis for review of these provisions, *Nguyen Da Yen* found that the Ninth Circuit's most recent view was that the APA did not confer the necessary jurisdiction on the district court. The court declined to decide the issue here, however, since it was not necessary to the resolution of the case. 528 F.2d at 1201. Note, however, that a subsequent Ninth Circuit decision, Wiren v. Eide, 542 F.2d 757 (9th Cir. June, 1976) (per Koelsch, J.), held that the APA did act as an independent jurisdictional basis for review.

24. 528 F.2d at 1204-05.

25. The plaintiffs argued

> that the defendants' cooperation in the removal of a child from Vietnam without proper custody of it having been obtained (including by totally voluntary parental releases), and its continued, allegedly involuntary, detention in this country in custody other than that of its natural parent, is a violation of the child's fundamental human rights and of its Fifth Amendment right to liberty and due process.

Id. at 1197.

ministrative Procedure Act] purports to sanction the violation of constitutional rights committed under the guise of the exercise of discretion, or prevents a court from inquiring into and remedying the deprivation."[26] Moreover, the court noted that the plaintiffs were not seeking a review of the administrative investigations conducted by the INS, but instead were only seeking facts relevant to their own claims. The court stated that the district court could properly compel disclosure of the agency's findings, and that the INS had no discretion to refuse to produce the required information.

On its own initiative,[27] the court examined the jurisdiction of the district court. After dismissing the possibility that 28 U.S.C. sections 1343(3) and 1331 and 8 U.S.C. section 1101[28] provided proper jurisdictional grounds, the court held that the lower court did have jurisdiction to enter its order under its habeas corpus power,[29] since the "in custody" jurisdictional prerequisite was satisfied.[30] Although the class action aspect of this habeas corpus proceeding was unusual, the Ninth Circuit admitted that it was within the discretion of the district court to allow the maintenance of a class action.[31] By treating the complaint as a class application for a writ of habeas corpus, the district court had the power under the All Writs Act[32] to require the INS to develop the preliminary

26. *Id.* at 1199.

27. *Nguyen Da Yen* noted: "We turn next to an issue which the parties have not discussed, but which even at a casual glance it is apparent we must confront—the jurisdiction of the district court." *Id.* at 1200.

28. The court's reasoning is discussed at note 23 *supra*.

29. 528 F.2d at 1202-04.

30. 28 U.S.C. § 2241(c) (1970) provides in pertinent part:

> The writ of habeas corpus shall not extend to a prisoner unless—
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> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

According to *Nguyen Da Yen*, where children are involved, if the custody is illegal, the child is deemed presumptively detained even if s/he has voluntarily submitted to the restraints.

31. 528 F.2d at 1203. The district court was given wide discretion to decide if the application would be treated as a class action in litigating the merits or if individual applications would have to be filed for each child whose status was questionable. *Id.* at 1204 n.18.

32. 28 U.S.C. § 1651 (1970).

information as to the identification, location and circumstances of potential habeas corpus applicants, since the agency had access to these crucial facts. However, the court noted that the district court's habeas corpus jurisdiction was limited to those children presently detained within its territorial jurisdiction, or to those who were in its jurisdiction when the application was filed and subsequently removed. Consequently, new applications would have to be filed in the jurisdictions where each child was located.

Finally, *Nguyen Da Yen* agreed with the plaintiffs' contention that random access to INS files, which the district court's order authorized, improperly restricted their access to the children's records. Noting that the INS was an adverse party to the case, the court stated that the plaintiffs needed access to each child's file—and not simply random files—in order to determine whether a child was potentially a member of the illegally detained class. The Ninth Circuit noted that while such records were confidential, they were not privileged, so that a court could take appropriate protective measures to guard against disclosure or abuse of the information received.[33]

The *Nguyen Da Yen* court refused to decide whether (1) the intangible right in question in the case could be valued to confer section 1331 jurisdiction; and (2) the Administrative Procedure Act independently confers jurisdiction on the district courts. It was unnecessary for the court to reach the merits of these questions since, as previously noted, it found another basis for the district court's jurisdiction. However, these are important questions which, in all probability, the Ninth Circuit will soon be forced to confront; their discussion in *Nguyen Da Yen* provides some insight into their probable resolution.[34]

C. Mail Censorship and Pretrial Detainees

In *Inmates of San Diego County Jail v. Duffy*,[35] the inmates of a county jail brought a class action seeking both injunctive relief

33. The court stated:

> [W]hile the district court should not and need not proceed *ex parte*, it may, of course, screen out information not necessary to plaintiffs' purposes, regulate the timing of disclosure, and otherwise surround plaintiffs' access to the records with appropriate protective orders to guard against disclosure or abuse of the information.

528 F.2d at 1205.

34. *See* note 23 *supra*.

35. 528 F.2d 954 (9th Cir. Dec., 1975) (per curiam).

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and damages. They challenged alleged infringements of their first amendment rights as a result of unlawful censorship of their mail and denial of access to reading materials. The district court denied motions for preliminary and injunctive relief, as well as for certification of the case as a class action, and the plaintiffs appealed. The Ninth Circuit held that: (1) the claims of pretrial detainees were not to be judged by the same first amendment standards applicable to convicted prisoners;[36] (2) the district court order denying the plaintiffs' motion for class action certification was a final and appealable order;[37] and (3) the district court erred in denying a motion to sever claims for declaratory and injunctive relief for trial prior to claims for monetary damages.[38]

The *Duffy* court indicated that the district court incorrectly applied the rationale of *Procunier v. Martinez*[39] by failing to recognize the different status of the prisoner involved in that case. In *Procunier*, the plaintiffs were convicted prisoners who had been sentenced, whereas in the instant case, the plaintiffs were merely short-term pretrial criminal detainees. The court stated that this distinction entitled the plaintiffs in *Duffy* to the application of a different standard than that employed in *Procunier*.[40] Next, finding that the order denying the motion for certification of the cause as a class action was a final appealable order within the provisions of 28 U.S.C. section 1292(a)(1),[41] the court held that

36. *Id.* at 956.

37. *Id.*

38. *Id.* at 957.

39. 416 U.S. 396 (1974).

40. In *Procunier*, the Supreme Court stated that some infringements upon the first amendment rights of prisoners were justified if (1) they furthered one or more of the substantial governmental interests of security, order and the rehabilitation of inmates; (2) they were no greater than necessary to further the legitimate governmental interests involved; and (3) they were accompanied by minimum procedural sefeguards against arbitrariness or error. *Id.* at 413-14.

The *Duffy* court did not enunciate the appropriate standard to be applied, but it did approvingly cite several cases which indicated that pretrial criminal detainees maintain all the rights of ordinary citizens, except the right to come and go as they please. This would seem to indicate that the court would strike down any intrusion upon the first amendment rights of such detainees. *See* Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Dillard v. Pitchess, 399 F. Supp. 1225 (C.D. Cal. 1975); Payne v. Whitmore, 325 F. Supp. 1191 (N.D. Cal. 1971). For further discussion of the mail censorship issue see *Ninth Circuit Survey-Constitutional Law*, 6 GOLDEN GATE U.L. REV. 437, 439 (1976).

41. The court relied upon Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975), in reaching this conclusion. Therein, the Fifth Circuit court noted that "class actions are the only practicable judicial mechanism for the cleansing reformation and purification of these penal institutions." *Id.* at 1097. *Jones* added that "where the injunction is the primary purpose of the suit, the [denial of the motion for class action certification] is appealable under section 1292(a)(1) as an order refusing an injunction." *Id.*

the ultimate certification could relate back to the time of the filing of the complaint.[42] *Duffy* reasoned that due to the nature of the confinement involved,[43] the recurring release of individual detainees from custody might make each of the originally named plaintiffs' claims for injunctive relief moot well before the district court could reasonably be expected to rule on a class action certification motion. This would forever forestall adjudication of the claims of the detainee plaintiffs.[44] Finally, the court held that the lower court erred, as a matter of law, in denying the motion for severance of the claim for injunctive relief and in viewing the cause predominantly as one for money damages.[45] *Duffy* found that "[t]he motion for severance conclusively established that phase of the cause as predominantly for injunctive relief."[46]

The *Duffy* decision reaffirmed the Ninth Circuit's position that class actions brought by pretrial detainees, which challenge conditions of their confinement, belong to the narrow class of cases in which termination of the class representatives' claims does not moot the claims of unnamed class members. In this respect, the circuit's approach is consistent with the stance of the Supreme Court[47] and that of earlier Ninth Circuit decisions on this issue.[48]

D. Mootness and Summary Judgment

In *Seay v. McDonnell Douglas Corp.*,[49] nonunion employees brought an action challenging the purposes for which the defend-

42. 528 F.2d at 956.

43. The overall average length of confinement was only 7.65 days. *Id.*

44. *Id.* The court cited as other examples of the application of this "relation back" principle Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1974), and Frost v. Weinberger, 375 F. Supp. 1312, 1318-19 (E.D.N.Y. 1974), *rev'd on other grounds*, 515 F.2d 57 (2d Cir. 1975).

45. 528 F.2d at 957.

46. *Id.*

47. *See* Gerstein v. Pugh, 420 U.S. 103 (1975). *Gerstein* involved a class action brought by prisoners against county judicial and prosecutorial officials, claiming a constitutional right existed for a judicial hearing on the issue of probable cause for pretrial detention and requesting declaratory and injunctive relief. The court held that since pretrial detention is temporary in nature, it therefore would be most unlikely that any given individual could have his or her constitutional claim decided on appeal before release or conviction. Consequently, *Gerstein* found the case was a suitable exception to the mootness rule. *Id.* at 110 n.11.

48. *See, e.g.*, Workman v. Mitchell, 502 F.2d 1201 (9th Cir. 1974).

49. 533 F.2d 1126 (9th Cir. Mar., 1976) (per Zirpoli, D.J.). Earlier, the Ninth Circuit had reversed the district court's order dismissing the suit on the ground that its jurisdiction had been preempted by the National Labor Relations Act. Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970). Upon remand, the district court entered summary judgment against the plaintiffs due to the fact that the defendant union had

ant union used agency fees paid by these employees pursuant to a collective bargaining agreement.[50] The action was dismissed by the district court, but on appeal, the Ninth Circuit held that: (1) even though the defendant had ceased its allegedly wrongful conduct after the litigation had begun, the case was not moot;[51] (2) despite the development of an intra-union remedy, the district court erred in granting summary judgment in favor of the union;[52] and (3) the district court did not abuse its discretion in denying the plaintiffs' motions to amend, for class action certification and for joinder.[53]

First, *Seay* stated that where a defendant voluntarily ceases its allegedly wrongful conduct after the onset of litigation, as did the union here, a court is not necessarily deprived of its power to act. An action is only moot, noted the court, if it is absolutely clear that the wrongful conduct complained of will not recur. The *Seay* court indicated that there were no assurances given by the defendant union that it would not reinstitute its allegedly wrongful acts after termination of the lawsuit; hence, the court did not find the action moot. Second, although the district court found that the intra-union remedy was a fair, reasonable and adequate procedure,[54] *Seay* held that it erred in granting summary judgment for the defendant since the plaintiffs had raised several genuine factual objections to the procedure.[55] Finally, the court dealt with the plaintiffs' contention that the district court had abused its discretion with respect to the plaintiffs' motion to certify the class or to join additional parties. At the time the motion to certify the case as a class action was filed, only one other person

voluntarily adopted a procedure whereby plaintiffs were entitled to a rebate, which the court felt was a fair, reasonable and adequate remedy on its face. The district court's opinion is reported at 371 F. Supp. 754 (C.D. Cal. 1973).

50. In International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), the Supreme Court held that unions may not use dues or agency fees to finance political activities if members or fee-payers object to the use of those funds for such purposes. The plaintiffs contended that the defendant union was utilizing agency fees to finance political activities over the plaintiffs' objection. 533 F.2d at 1128.

51. 533 F.2d at 1130.

52. *Id.* at 1130-32.

53. *Id.* at 1132.

54. 371 F. Supp. at 763.

55. The plaintiffs questioned whether the union would administer the plan fairly and honestly. In addition, they argued that by shifting the burden of proof from the defendant to the plaintiffs, the union remedy deprived them of an important procedural right to which they would be entitled if a judicial remedy were utilized under Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963). *Brotherhood* held that a union should bear the burden of proof in establishing the amount of a plaintiff's fees which it is entitled to retain. *Id.* at 122.

had been suggested by the plaintiffs to be part of the class they were seeking to represent.[56] The district court found that the number of potential plaintiffs was not so great as to make joinder impractical and consequently denied the motion to certify. A full year later, plaintiffs moved to join forty-six employees as additional party plaintiffs, but the trial court denied this motion as being untimely. Four months after the joinder motion, plaintiffs moved to amend their complaint to include several other causes of action,[57] but the district court also denied this motion. The Ninth Circuit panel in *Seay* concluded that since these denials were within the discretion of the trial court and the plaintiffs failed to show that the court abused its discretion, the trial court had not erred in denying these motions.

The *Seay* decision expressly rejected the result reached by the Tenth Circuit in *Reid v. UAW, District 1093*[58] regarding the propriety of granting a motion for summary judgment. The *Reid* court indicated that the plaintiffs' claim that the intra-union remedy might be unfairly applied only amounted to conjecture and speculation, and, as a result, was not sufficient to raise a genuine issue of material fact. Therefore, summary judgment in *Reid* was upheld. However, *Seay* indicated that such objections do raise genuine issues of fact which obligate the trial court to hold a hearing on the disputed factual questions.

E. Guam's Elimination of Appellate Jurisdiction in the District Court

In *Agana Bay Development Co. v. Supreme Court of Guam,*[59] the Ninth Circuit held that the territory of Guam could eliminate

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56. The class the plaintiffs sought to represent consisted of those who had formally objected to the union's use of their fees for political purposes.

57. The plaintiffs questioned whether the union could use agency fees to finance organizing expenses, the union strike fund, death benefits for union members and the union newspaper.

58. 479 F.2d 517 (10th Cir. 1973). As in *Seay*, nonunion member plaintiffs in *Reid* brought an action against a union for declaratory judgment, injunctive relief and damages, alleging over the plaintiffs' objections that the defendant had wrongfully spent agency fees for political purposes. The plaintiffs were compelled to pay these fees under a collective bargaining agreement. The trial court had granted summary judgment for the defendant, which was affirmed on appeal.

59. 529 F.2d 952 (9th Cir. Jan., 1976) (per Carter, J.). Agana Bay Development Co., the appellee in an action which had been appealed to the Supreme Court of Guam, sought a writ of prohibition from the district court directing the Guam Supreme Court to cease all appellate proceedings in the case. The district court issued a peremptory writ of prohibition pursuant to 28 U.S.C. section 1651, which the Guam Supreme Court then appealed to the Ninth Circuit.

the appellate jurisdiction of the Federal District Court of Guam by transferring that jurisdiction to a court created by the territorial legislature.[60] Seven months later, in *People v. Olsen*,[61] the Ninth Circuit, sitting en banc, reversed *Agana Bay* in a per curiam opinion.

In 1974, the Guam Legislature created the Supreme Court of Guam, which purportedly had exclusive appellate jurisdiction over appeals from the principal local court.[62] These appeals were formerly taken to an appellate division of the District Court of Guam. As an unincorporated territory of the United States, Guam is subject to the plenary authority of Congress to provide for its governmental structure under article IV, section 3, of the United States Constitution. *Agana Bay* examined the Organic Act of Guam, passed by Congress under authority of this constitutional provision,[63] in order to determine if Congress had authorized Guam to undertake such a reorganization and, in effect, to divest the district court of its appellate jurisdiction regarding local, nonfederal cases.

Interpreting section 22 of the Organic Act,[64] the *Agana Bay* court stated that the Guam Legislature had been given the power to create more than just inferior courts. Consequently, although the Guam Legislature had given the district court appellate juris-

60. 529 F.2d at 953.

61. 540 F.2d 1011 (9th Cir. Aug., 1976) (en banc), *cert. granted*, 45 U.S.L.W. 3359 (U.S. Nov. 16, 1976) (No. 76-439). The appellant in *Olsen* had been convicted of criminal charges in the superior court of Guam. He then appealed to the district court of Guam, which dismissed the appeal on the authority of *Agana Bay*.

62. Guam Court Reorganization Act, Guam Pub. L. No. 12-85 (Jan. 16, 1974).

63. 48 U.S.C. §§ 1421-1428 (1970). For a thorough discussion of the legislative history of the judicial system established by the Organic Act of Guam see Corn v. Guam Coral Co., 318 F.2d 622 (9th Cir. 1963).

64. 48 U.S.C. § 1424 (1970), which provides in pertinent part:

> There is created a court of record to be designated the "District Court of Guam", and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or hereafter be established by the laws of Guam. The District Court of Guam shall have the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States, regardless of the sum or value of the matter in controversy, shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam.

diction for twenty-three years, the *Agana Bay* court observed that it was not compelled to do so. In addition, the Ninth Circuit noted that the Organic Act authorized Guam to create its own court system to deal with intraterritorial matters. Therefore, Guam could, as it did, determine the district court's appellate jurisdiction over local, nonfederal issues and could create appellate courts of its own.[65]

Judge Kennedy, dissenting in *Agana Bay*, would have upheld the order of the district court disallowing the transfer of appellate jurisdiction to the locally created court.[66] Considering the Organic Act in the context of the whole territorial system established by Congress, Judge Kennedy stated that Congress would have expressly provided for the transfer if it had intended to give Guam the power to do so. He disagreed with the majority's contention that the power to determine the appellate jurisdiction of the district court necessarily included the power to abolish it and stated that the Guam Legislature had the power only to decide which cases were serious enough to be appealable. Judge Kennedy noted that there was evidence that Congress had intended the judicial system of Guam to be similar to that of other territories, but by permitting the transfer of appellate jurisdiction to occur here, appellate review by federal courts would be precluded—a situation inconsistent with the judicial schemes of other territories.[67] In Judge Kennedy's view, the legislative history of the Organic Act supported this conclusion.[68]

65. The court compared the powers given to Guam with those delegated to other territories of the United States and concluded that those given to Guam were unique and broader than those of the other territories. From this, it concluded that Congress did not intend to prevent the Guam legislature's actions here. 529 F.2d at 957-58.

66. *Id.* at 959.

67. Judge Kennedy stated that since review by federal courts was provided for in the former territories of Alaska and Hawaii, and in the Virgin Islands and Puerto Rico, it could be concluded that Congress did not intend to deny federal courts review of the decisions of the Superior Court of Guam.

68. Judge Kennedy found that

> [t]here is no evidence in the legislative history of the Organic Act of 1950 that Congress intended section 22(a) to give the territorial lesiglature the option of creating a local supreme court having the power of ultimate review. Earlier versions of the Organic Act included provisions for a congressionally-created supreme court for Guam; these were eliminated in favor of a federal district court . . . . The apparent reason for eliminating the provision for a local supreme court was to avoid duplicative judicial machinery, rather than to allow local authorities to put certain controversies beyond review by the federal court system.

529 F.2d at 961.

The analysis of Judge Kennedy's dissent in *Agana Bay* was expressly adopted by the Ninth Circuit sitting en banc in *Olsen*, where a divided court held that the provisions of Guam's Court Reorganization Act transferring the appellate jurisdiction of the district court to a territorial court were not authorized by the Organic Act.[69] The court placed special emphasis on the fact that the transfer denied review of substantial federal questions by federal district courts under existing statutes. *Olsen* stated that its decision should not be construed as criticism of Guam's objective of increasing its autonomy, but that a transfer of appellate jurisdiction, such as the one attempted here, could only be accomplished when authorized by Congress.

Despite the *Olsen* decision, it remains unclear whether the Guam Legislature will be permitted to transfer the appellate jurisdiction of a federal district court to a locally created court. Certiorari has been granted by the Supreme Court in the *Olsen* case, so it appears that the issues raised by Guam's transfer of appellate jurisdiction will soon be resolved.[70]

II. APPEALABILITY AND CERTIFICATION OF RULE 10b-5 CLASS ACTIONS

A. INTRODUCTION

During recent years, class actions have frequently been relied upon as a technique for the resolution of mass claims of various types.[1] A great volume of legal literature has been written discussing the utility and function of the class action;[2] nevertheless, much uncertainty still surrounds Federal Rule of Civil Procedure (Fed. R. Civ. P.) 23(b)(3).[3] In *Blackie v. Barrack*,[4] a panel of the Ninth Circuit considered two procedural issues in the class action area about which uncertainty still exists.

69. Four of the eleven justices hearing the case dissented for the reasons relied upon by the majority in *Agana Bay*.

70. *See* note 61 *supra*.

1. *See* COMMITTEE ON COMMERCE, UNITED STATES SENATE, 93D CONG., 2D SESS., CLASS ACTION STUDY (Comm. Print 1974) [hereinafter cited as *Class Action Study*].

2. For example, in 16 INDEX TO LEGAL PERIODICALS (1970-1973), under the heading *Actions and Defenses*, approximately 50% of the more than 150 titles included dealt with some aspect of class actions.

3. *See, e.g.*, Note, *Class Action Certification Orders: An Argument for the Defendant's Right to Appeal*, 42 GEO. WASH. L. REV. 621, 634 (1974) [hereinafter cited as *Right to Appeal*].

4. 524 F.2d 891 (9th Cir. Sept., 1975) (per Koelsch, J.), *cert. denied*, 45 U.S.L.W. 3249

First, the court was called upon to determine whether an order conditionally certifying a class is a final order under 28 U.S.C. section 1291.[5] The Ninth Circuit had not previously dealt with the matter, and the position of other circuits remains unclear.[6] Second, the court was required to define the common questions and predominance of common questions requirements of Fed. R. Civ. P. 23[7] in the context of securities fraud allegations.[8]

The plaintiffs in *Blackie*, stockholders in Ampex Corporation, alleged that the defendants misrepresented the financial condition of Ampex Corporation in annual reports, press releases and Security and Exchange Commission filings for a period of two years. After the district court in *Blackie* conditionally certified the class, it denied the defendants' motion to reconsider its order. Several of the defendants filed direct appeals under 28 U.S.C. section 1291, while other defendants obtained the permission of the district court to file interlocutory appeals under 28 U.S.C. section 1292(b).[9] On appeal, the Ninth Circuit held that the certification order was nonappealable and dismissed the direct appeals.

(U.S. Oct. 5, 1976). The securities law aspects of *Blackie* are extensively discussed in the Securities section of the Survey, *infra* at p. 373 *et seq*.

5. 28 U.S.C. § 1291 (1970) provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

6. *See* text accompanying notes 34-47 *infra*.

7. The relevant parts of FED. R. CIV. P. 23 can be found at notes 72 & 73 *infra*.

8. A third issue, whether the interlocutory appeals brought under 28 U.S.C. § 1292(b) (1970) should be dismissed on the ground that their prosecution was dilatory, was only briefly discussed by the court. *Blackie* held that while the "prosecution of these appeals has not been a model of diligence," it would not dismiss the appeals since there was evidence that the plaintiffs may have agreed to some of the delays. 524 F.2d at 900. Section 1292(b) is set forth at note 9 *infra*.

9. 28 U.S.C. § 1292(b) (1970) provides in pertinent part:

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

The court granted permission to only two defendants to seek interlocutory review since they were the only ones to move for reconsideration of the certification order prior to the filing of their notices of appeal.

In addition, the court denied the plaintiffs' motion to dismiss the section 1292(b) appeals, but held that their suit could properly be maintained as a class action under rule 23.[10]

B. Appealability of Class Action Certification Orders

The Final Judgment Rule

The Ninth Circuit initially considered the issue of whether a district court's certification of a class action was appealable as a matter of right under section 1291. This section incorporates what is commonly known as the "final judgment" rule, which enables appellate courts to hear appeals from final, rather than from interlocutory, decisions of the district courts[11] unless the order falls into one of the recognized exceptions to the rule.[12] A final decision is traditionally defined as one which ends the litigation on the merits and leaves nothing for a court but execution of the judgment.[13] Several reasons have been advanced in support of the well-established judicial reluctance to hear interlocutory appeals; two of the most common are the promotion of judicial economy[14] and the preservation of the appropriate relationship between, and the respective functions of, appellate and trial courts.[15]

The finality rule has often been criticized.[16] The root of much of the dissatisfaction with the rule lies in the fact that its strict

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10. 524 F.2d at 895.

11. For further discussion of the final judgment rule in this context see *Right to Appeal*, *supra* note 3, at 625-26.

12. Besides the judicially-created exceptions discussed in the text, several statutory exceptions do exist. *E.g.*, the order could be viewed as an injunction and thus would be appealable under 28 U.S.C. § 1292(a)(1) (1970), or the court of appeals could review the order under its mandamus power, *id.* § 1651(a). Furthermore, the order could be appealed from under *id.* § 1292(b), the text of which may be found at note 9 *supra*.

13. *See* Catlin v. United States, 324 U.S. 229, 233 (1945).

14. *See id.* at 233-34; Cobbledick v. United States, 309 U.S. 323 (1940). Courts have found justification for this historical prohibition against piecemeal disposition of a case in the belief that interlocutory appeals add to the already intolerable delays in contemporary litigation, and also present a party with a delaying tactic which may be used for possible harassment of his or her opponent. By combining, in one appeal, all stages of a case which might effectively be reviewed, the absolute number of appeals is limited. *See generally* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969); Note, *The Finality and Appealability of Interlocutory Orders—a Structural Reform Toward Redefinition*, 7 SUFFOLK U.L. REV. 1037 (1973) [hereinafter cited as *Interlocutory Orders*].

15. Parkinson v. April Indus. Inc., 520 F.2d 650, 652 (2d Cir. 1975). Additional justifications for the rule, such as the enhancement of the likelihood of sound review, are discussed in *Parkinson*.

16. For a critical discussion of the finality rule see Redish, *The Pragmatic Approach to*

application and subsequent denial of immediate review may result in irreparable harm to a party's rights, compel an unnecessary (and expensive) trial or subject the parties to gross abuse of discretion at the trial court level.[17] In response to these difficulties, judicial and statutory exceptions to the rule have been developed.

Collateral Order Doctrine

One such exception is the collateral order doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.*[18] Under this narrow exception to the finality rule, interlocutory orders are treated as final, and hence appealable, if three elements are present: (1) the order must finally determine rights separable from, and collateral to, the merits of the main claim; (2) the order must affect a party's constitutional right to proceed in that forum; and (3) the deferral of appeal must be inadequate, in that the right asserted would be irreparably lost if immediate appeal were not permitted.[19] If these factors are present, the interlocutory order would fall into

> that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[20]

Subsequent Supreme Court decisions have broadened the rule enunciated in *Cohen*. In *Swift & Co. v. Compania Columbiana del Caribe*,[21] the Court minimized the constitutional aspects of the *Cohen* opinion while emphasizing the collateral nature of the order at issue.[22] Similarly, in *Gillespie v. United States Steel*

Appealability in the Federal Courts, 75 COLUM. L. REV. 89 (1975); *Interlocutory Orders*, *supra* note 14, at 1041.

17. *See* Hackett v. General Host Corp., 455 F.2d 618, 628 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); *Interlocutory Orders*, *supra* note 14, at 1041.

18. 337 U.S. 541 (1949). In *Cohen* the defendants, in a shareholders derivative suit, appealed from a district court order which relieved the plaintiffs of their statutory duty to post a bond as security for the defendants' costs.

19. *Id.* at 546.

20. *Id.*

21. 339 U.S. 684 (1950).

22. *Id.* at 688-89. The Court stated that

> [a]ppellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible [and that the finality rule] should not be con-

Corp.,[23] the Supreme Court called for a practical, rather than technical, construction of the finality rule in order to avoid the undesirable consequences of a rigid application of the rule. To accomplish this result, the Court required that the inconvenience and costs of piecemeal review be balanced against the danger of a denial of justice as a consequence of delay.[24]

Death Knell Doctrine

The Second Circuit has been primarily responsible for the development of the "death knell" doctrine, which is closely related to the collateral order rule. In *Eisen v. Carlisle & Jacquelin*,[25] the Second Circuit held that the district court's order denying plaintiff's class allegations, but permitting the plaintiff to proceed with his individual claim, was a final order. Therefore, the *Eisen* court found that it could properly review the order before final judgment was rendered. The court stated that the order in question would effectively terminate the suit, since the plaintiff's individual claim was for only seventy dollars, and "no lawyer of competence is going to undertake this complex and costly case to recover"[26] such a miniscule amount. Consequently, review of the class certification order would not be possible unless immediate appeal were permitted.

Despite the collateral nature of the order involved, the *Eisen* court primarily relied upon the *Gillespie* balancing of interests rationale and concluded that where "the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed."[27] While the court in *Eisen* premised its decision on the balancing test of *Gillespie* and, to a more limited ex-

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> strued so as to deny effective review of a claim fairly severable from the context of a larger litigious process.

Id. at 689. The Court did not discuss the party's constitutional right to proceed in the forum.

23. 379 U.S. 148 (1964).

24. *Id.* at 153. *See also* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950), which also engaged in this type of balancing.

25. 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). In *Eisen*, the plaintiff, who sued on the behalf of a class consisting of as many as 3,750,000 persons, alleged that the defendants had conspired to monopolize odd lot trading and had charged excessive fees in violation of the Sherman Act, 15 U.S.C. §§ 1-2 (1970).

26. 370 F.2d at 120.

27. *Id.* Later decisions of the Second Circuit have further refined the *Eisen* doctrine. Now, application of the *Eisen* rule has been restricted to clear death knell situations, unlike the Second Circuit's earlier practice of applying the rule to less clear-cut cases. *See* City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969). In Weingartner v. Union Oil Co., 431 F.2d 26 (9th Cir. 1970), *cert. denied*, 400

tent, the collateral order doctrine of *Cohen*, it has been suggested that the Second Circuit was really construing the finality rule far more practically than either *Cohen* or *Gillespie* and, in effect, created a new exception to the general rule.[28]

Despite the fact that some confusion surrounds the question of whether the death knell exception comes within the *Cohen* collateral order doctrine,[29] a majority of the circuits have accepted the doctrine as a valid exception to the finality rule.[30] The trend has been, as the Second Circuit has advocated, to give a practical construction to the finality rule. One court has commented that

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U.S. 1000 (1971), the Ninth Circuit recognized this fact. As a result, courts now place primary emphasis on whether a plaintiff has sufficient funds to proceed if the class is not certified. *See Interlocutory Orders, supra* note 14, at 1049. They reason that as the amount of a plaintiff's claim increases, so does the incentive to proceed with the litigation individually, with the result that denial of class certification does not sound the death knell of the action. Note, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 548, 551 (1975) [hereinafter cited as *Class Action Determinations*]. The Second Circuit has held that a plaintiff with a $386 claim could appeal an order denying class certification, while a plaintiff with a $8,500 claim could not appeal a similar order. *See* the consolidated cases of Korn v. Franchard Corp. and Milberg v. Western Pac. Ry., 443 F.2d 1301 (2d Cir. 1971).

28. *See Class Action Determinations, supra* note 27, at 550.

29. *See Interlocutory Orders, supra* note 14, at 1048-49. *Compare* Williams v. Mumford, 511 F.2d 363 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975), *and* King v. Kansas City S. Indus., Inc., 479 F.2d 1259 (7th Cir. 1973) (discussing the two exceptions separately), *with* Blackie v. Barrack, 524 F.2d 891 (9th Cir. Sept., 1975), *and* Eisen v. Carlisle & Jacquelin, 370 F.2d 119 ((2d Cir. 1966) (treating the two exceptions together). It should be noted that in the latter opinions some language appears which indicates that the courts believe there is some distinction between the two doctrines. For example, the *Blackie* court spoke of the *Cohen* doctrine as a "narrower exception" than the death knell doctrine. 524 F.2d at 898. However, this is probably the result of careless use of language rather than a conscious differentiation between the two concepts.

Nevertheless, in the recent case of Share v. Air Properties G. Inc., 538 F.2d 279 (9th Cir. July, 1976) (per Sneed, J.), a Ninth Circuit panel did distinguish between the death knell doctrine and the collateral order exception. The court stated:

> The collateral order doctrine provides appellate jurisdiction with respect to asserted rights which do not constitute an ingredient of the basic cause of action and which will be lost forever if the disposition of the trial court is not reviewed on appeal prior to the adjudication of the basic cause. The death knell doctrine, on the other hand, is concerned with the survival of the basic cause of action, not merely a right collateral thereto, and is grounded on the notion that a sentence of death should not be passed on a cause of action by only one judge.

Id. at 282.

30. *See, e.g.*, Williams v. Mumford, 511 F.2d 363 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); Hartmann v. Scott, 488 F.2d 1215 (8th Cir. 1973); Falk v. Dempsey-Tegeler & Co., 472 F.2d 142 (9th Cir. 1972); Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). The Fifth and Sixth Circuits have also accepted the doctrine, but place the burden on a plaintiff of proving the extent of his finan-

"[e]ffective death should be understood to comprehend any extended state of suspended animation."[31] The Ninth Circuit, following the majority view, has adopted the death knell doctrine.[32] However, both the Third and Seventh Circuits have expressly rejected the doctrine.[33]

Reverse Death Knell

Relying upon many of the same considerations which were cited in support of the death knell doctrine, the Second Circuit has developed a corollary rule known as the "reverse death knell" doctrine. In *Herbst v. International Telephone & Telegraph Corp.*,[34] a tripartite test was enunciated to determine if an order which granted class certification was appropriate for immediate review. The *Herbst* court focused on whether (1) the class action determination was fundamental to further conduct of the case;[35] (2) review of that order was separable from review of the merits of the

cial resources, the anticipated costs of litigation and the potential amount of claims of other class members before a court will determine if the denial of class action certification will sound the death knell of the action. *See* Ott v. Speedwriting Publishing Co., 518 F.2d 1143 (6th Cir. 1975); Graci v. United States, 472 F.2d 124 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973). *Graci* has been misinterpreted by one recognized authority as rejecting the death knell doctrine. *See Developments In the Law—Class Actions*, 89 HARV. L. REV. 1318, 1438 n.234 (1976) [hereinafter cited as *Developments*].

31. Hines v. D'Artois, 531 F.2d 726, 730 (5th Cir. 1976). It has been argued that the death knell doctrine is too restrictive and that there should be no limitations placed on a plaintiff's right to appeal immediately from orders striking class action allegations from the complaint. *See* Note, *Interlocutory Appeal From Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292 (1970).

32. *See* Share v. Air Properties G. Inc., 538 F.2d 279 (9th Cir. July, 1976) (per Sneed, J.); Falk v. Dempsey-Tegeler & Co., 472 F.2d 142 (9th Cir. 1972); Weingartner v. Union Oil Co., 431 F.2d 26 (9th Cir. 1970), *cert. denied* 400 U.S. 1000 (1971). *Falk* has been inaccurately viewed as rejecting the death knell doctrine in *Developments*, *supra* note 30, at 1438 n.234.

33. *See* King v. Kansas City S. Indus. Inc., 479 F.2d 1259 (7th Cir. 1973); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972). In *Hackett*, the court relied upon (1) the availability of alternative methods of appeal; (2) the traditional policy against interlocutory appeals; and (3) the Sherman Act Provision for attorney's fees for successful plaintiffs and found that a denial of class certification was a nonappealable order. *Hackett* also disapproved of class actions brought by small claimants on behalf of huge classes, especially where public enforcement remedies were available, because it believed that judicial time would be better spent on other matters. *Hackett*'s rationale has been criticized as unsound. *See* Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299 (1973); *Class Action Determinations*, *supra* note 27, at 553-55.

34. 495 F.2d 1308 (2d Cir. 1974). In *Herbst*, the plaintiff, an owner of 100 shares of stock in Hartford Fire Insurance Company at the time it merged with the defendant, alleged that the merger violated various provisions of the Securities Act of 1933 and the Securities and Exchange Act of 1934. She sought to represent herself and 16,000 other class members in a class action, which the district court proceeded to certify.

35. This has been interpreted to mean that if the order were reversed, the claims of

case; and (3) the order would cause irreparable harm to the defendant, in terms of time and money that would be spent in defending a large class action.[36] The court held that where a district court has conditionally certified a class action, the defendant may be permitted to appeal the ruling prior to a final judgment on the merits.[37] The *Herbst* court relied upon several assumptions in reaching this conclusion. First, the court noted that the defendant in a class action would normally expend a large amount of time and money in defending the action because of the enormous potential liability involved. Second, *Herbst* recognized that for this very reason, the defendant is often eoerced into settling a class action regardless of the merits of the plaintiffs' claims. Finally, the court stated that both parties often have to spend much time and money in their efforts to define the class and to notify its members. Therefore, for reasons of judicial economy and in order to avoid irreparable harm to litigants, the court indicated that immediate appeal of class certification orders was desirable.

The Second Circuit has recently retreated from the broad language of *Herbst*, although it still recognizes that extraordinary circumstances occasionally present issues in class action litigation which require prompt appellate review.[38] Recent Second Circuit opinions have emphasized the policies underlying the final judgment rule,[39] with the result that immediate appeal is allowed only in exceptional cases, and not where a defendant merely challenges a ruling of the district court that the requirements of rule 23(b)(3) have been satisfied.[40] While the Second Circuit may have originally intended to create a distinct exception to the finality rule,[41] the more recent decisions of the circuit indicate that it is

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the named class representatives would be so insignificant that the litigation would not be continued—literally, the reverse death knell situation. Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974).

36. This tripartite test was also applied in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *rev'd on other grounds*, 417 U.S. 156 (1974). For further definition of this test see Parkinson v. April Indus. Inc., 520 F.2d 650 (2d Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974).

37. 495 F.2d at 1312-13.

38. *See* Parkinson v. April Indus., Inc., 520 F.2d 650 (2d Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974), Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974).

39. *See, e.g.*, Parkinson v. April Indus., Inc., 520 F.2d 650, 658 (2d Cir. 1975).

40. *See Second Circuit Review–Civil Procedure, 1974-1975 Term*, 42 BROOKLYN L. REV. 765 (1976) [hereinafter cited as *Second Circuit Review*].

41. Indeed, this is how some courts have interpreted the *Eisen* case. *See, e.g.*, Williams v. Mumford, 511 F.2d 363 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); King v.

now applying the *Cohen* doctrine to determine the appealability of class action certification orders.[42] The tripartite test currently employed by the Second Circuit essentially focuses upon the same considerations as the collateral order doctrine—the irreparability of the harm to one of the parties, the separability of the issue from the merits and the relevance of class certification to further con duct of the case.[43]

The Supreme Court has had the opportunity to consider the reverse death knell issue, but has neither ruled on its propriety nor established procedural guidelines for its application.[44] Those courts of appeals which have confronted the issue approve of the Second Circuit's tripartite test, yet disagree with the Second Circuit's original position that class certification orders are appealable in situations similar to *Herbst*.[45] These courts appear to be adopting the most recent Second Circuit position on the appealability of class action orders,[46] but confusion still exists over the

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Kansas City S. Indus., Inc., 479 F.2d 1259 (7th Cir. 1973); *Class Action Determinations*, *supra* note 27, at 548.

42. *See, e.g.*, General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974).

43. *See* text accompanying notes 18-24 *supra*.

44. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Following the Second Circuit's reversal of the denial of class certification in Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), wherein the death knell doctrine was first enunciated, the district court certified the action as proper for class treatment and also imposed on the defendants 90% of the costs of providing notice to the class members. On appeal, the Supreme Court focused upon the notice-costs provision of the order and neglected its class certification aspects. The Court stated that the imposition of notice-costs on the defendants involved a collateral matter unrelated to the merits of the case. Allocation of these costs, noted the Court, was a final disposition of a claimed right which was not an essential part of the cause of action, and hence did not require consideration with any appeal of the district court's final judgment in the case. The Court therefore upheld immediate appellate review of the district court's order under 28 U.S.C. section 1291. 417 U.S. at 169-72. For a discussion of *Eisen* see Note, *Managing the Large Class Action:* Eisen v. Carlisle & Jacquelin, 87 HARV. L. REV. 426 (1973).

45. *See* Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir. 1976); Hellerstein v. Mr. Steak, Inc., 531 F.2d 470 (10th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3234 (U.S. Oct. 4, 1976); Bennett v. Behring Corp., 525 F.2d 1292 (5th Cir.), *cert. denied*, 96 S. Ct. 2175 (1976); Seiffer v. Topsy's Int'l, Inc., 520 F.2d 795 (10th Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *In re* Cessna Aircraft Distrib. Antitrust Litigation, 518 F.2d 213 (8th Cir. 1975), *cert. denied*, 423 U.S. 947 (1976); Thill Secur. Corp. v. New York Stock Exch., 469 F.2d 14 (7th Cir. 1972); Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969).

46. For example, the Tenth Circuit, in Seiffer v. Topsy's Int'l, Inc., 520 F.2d 795 (10th Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976), expressly approved of the Second Circuit's tripartite test, but found that the test did not permit immediate appeal in that particular situation. However, the court did not suggest any situation where a certification order would be appealable, which may indicate that the Tenth Circuit would not allow appeal regardless of the circumstances.

relationship of the reverse death knell doctrine to the *Cohen* collateral order exception.[47]

C. The *Blackie* Decision

The issue of the appealability of orders which grant class certification, presented in *Blackie*, was one of first impression in the Ninth Circuit. The court agreed that the final decision requirement of section 1291 should be construed practically since, at times, the delay of an appeal may result in the irreparable loss of some of a litigant's rights. Although recognizing that the Ninth Circuit had previously adopted the death knell doctrine, *Blackie* refused to follow the reverse death knell doctrine of the Second Circuit.[48] *Blackie* stated: "The Second Circuit's rule impermissibly disregards the conditions placed on appealability by *Cohen*."[49] According to the court, the *Cohen* test, not the reverse death knell doctrine, should be employed to determine whether a class certification order should be immediately appealable. While the Ninth Circuit recognized that *Cohen* is an exception to the finality rule, the court concluded that it should be strictly construed:

> [T]he *Cohen* rule is an effort to prevent the inevitable injustices to litigants which result from application of a prophylactic rule which operates "on balance," but only in those limited situations where it can be accomplished with a minimum intrusion on the statutory policy.[50]

Blackie found that a class certification order did not satisfy the *Cohen* exception to the finality rule for several reasons. First, since Fed. R. Civ. P. 23(c)(1)[51] provides that class certification orders are conditional and subject to amendment as new facts become known, *Blackie* held that the finality condition of *Cohen* was not

47. In the cases cited in note 45 *supra*, the courts differ as to whether the reverse death knell doctrine of the Second Circuit is separate from the *Cohen* exception. But, as indicated in note 29 *supra*, it is unclear if this differentiation is intentional.

48. 524 F.2d at 896-97. The *Blackie* court noted that even if it applied the reverse death knell doctrine, it doubted whether the class certification order involved would be appealable. *Id.* at 896 n.8. *Blackie* stated that the first two criteria of the reverse death knell doctrine—the separability of the order from the merits of the case and the order's effect on the future conduct of the litigation—probably would not be satisfied in the fact situation before it.

49. 524 F.2d at 896-97 (footnote omitted).

50. *Id.* at 897.

51. Fed. R. Civ. P. 23(c)(1) provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order

met. Second, *Blackie* indicated that the class issue was not separable from the merits in many cases, including the one before it, because review of a class certification order might include examination of the same facts and law as a review of the merits would entail.[52] Finally, the court stated that the defendant in *Blackie* was not threatened with any irreparable harm cognizable under *Cohen*. The court disagreed with the Second Circuit's view that the requisite degree of injury existed in the "increased, and generally irrecoverable, costs of defending the class action."[53] *Blackie* noted that these costs were no more than those resulting from a deferral of review of orders denying motions to dismiss or for summary judgment which must be borne by litigants due to

> the legislative judgment that a final decision rule will most benefit all litigants, statutorily foreclosing reliance on litigation costs as a justification for departure from the final decision rule.[54]

The court stated that the Second Circuit approach was based on three policy considerations which were insufficient to justify a departure from the traditional interpretation of *Cohen*. The first policy consideration was that total litigation costs would be decreased by allowing immediate appeal since an improperly certified class would be recognized at an early stage of litigation. The Ninth Circuit disagreed with this belief, claiming that it would be true only in rare situations[55] and that the benefits of immediate appeal must be weighed against the loss of time and money

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> whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

52. The court stated:

> The common questions, typicality, conflicts and adequacy of representation, Fed. R. Civ. P. 23(a), and predominance tests, Fed. R. Civ. P. 23(b)(3), are determinations (unlike, for example, the notice question involved in *Eisen IV* [417 U.S. 156 (1974)], which may require review of the same facts and the same law presented by review of the merits.

524 F.2d at 897 (footnote omitted).

53. *Id.*

54. *Id.* at 898 (footnotes omitted).

55. According to the court,

> the Second Circuit's rule saves time and money only when the appellate court determines the particular class certification order is appealable, when the order would not have been otherwise appealable under the narrower *Cohen* exception, when the district judge would have refused to certify a § 1292(b) appeal, where the district judge would not later de-

which would result from appeals where the order is affirmed or held not appealable. According to the court, a resolution of these competing interests is a proper matter for the legislature, but not for the judiciary. Moreover, since certification is within the discretion of the trial court, *Blackie* suggested few cases would be reversed upon appeal, so that a rule of appealability would be worthwhile in only a relatively small number of cases.

The second policy consideration which was rejected by the Ninth Circuit was that parity of treatment required that defendants be allowed to appeal orders granting class certification since, under the death knell doctrine, plaintiffs could appeal orders denying class certification. The *Blackie* court stated that the plaintiff and the defendant were differently situated in terms of the finality of a class order—an order denying certification terminates the lawsuit for a plaintiff, while a class certification order does not terminate the action for a defendant. Consequently, *Blackie* rejected any parity of treatment for parties so differently situated.

The third and final policy consideration relied on by the Second Circuit was that

> a class certification order in a large-class, small-claim class action threatens such ruinous liability that the defendant inevitably must settle even frivolous claims, thereby effectively precluding review of the crucial class certification order unless interlocutory review is allowed.[56]

The *Blackie* court viewed this consideration as undermining the policy upon which rule 23 is based, namely to allow integration of numerous small claims into one powerful action. Consequently, *Blackie* indicated that only Congress, not the courts, could act to remedy the settlement pressures attendant to class action litigation.

Irreparable Harm Defined

The most important difference between *Blackie* and the Second Circuit position, as expressed in *Herbst*, is the courts' determination of the type of irreparable harm needed to satisfy the

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> certify the class, and where, on the merits, the order is reversed.

Id.

56. *Id.*

Cohen test.[57] The Ninth Circuit has adopted the position that although application of the final judgment rule often increases the time and costs of litigation, defendants must bear these additional costs because of the legislative judgment that the finality rule will ultimately be beneficial to most litigants. The *Blackie* court analogized the reverse death knell situation to cases where review of denials of motions to dismiss or for summary judgment is deferred. In such cases, appeals are not permitted until after final judgment on the merits.[58] This analysis, however, ignores the *in terrorem* settlement effect of even dubious claims in large-member, small-claim class actions produced by the threatening effect of a potentially large monetary judgment against the defendant. If one accepts the existence of this type of inherent economic coercion, it is reasonable to conclude, as did the Second Circuit, that the *Cohen* requisite injury is present. However, the Ninth Circuit refused to recognize this *in terrorem* effect of class actions.[59]

Much evidence has been accumulated indicating that defendants do in fact settle class actions to avoid the potential liability involved.[60] According to many commentators, this coercive

57. In *Blackie* and in most other decisions dealing with the appealability of class certification orders, little discussion is devoted to whether the class certification issue is separable from the merits. *See, e.g.*, Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir. 1976); Bennett v. Behring Corp., 525 F.2d 1202 (5th Cir), *cert. denied*, 96 S. Ct. 2175 (1976). This implies that the separability requirement may not be a determinative factor, but merely a collateral issue dependent upon the findings made on the other two *Cohen* factors. The result is that a finding on the separability issue is always consistent with the findings on the other two. In other words, if a court found that its decision on the motion to certify would affect the further conduct of the case and that irreparable harm would occur, the third requirement of separability would also be found with a subsequent conclusion that the certification order would be appealable. In such cases where inseparability of the issues has been relied upon by a court in denying review, threat of irreparable harm has not been found. *See, e.g.*, General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974).

58. *See* Conney v. Erickson, 317 F.2d 247 (7th Cir. 1963); Ford Motor Co. v. Busam Motor Sales, Inc., 185 F.2d 531 (6th Cir. 1950); *Right to Appeal*, *supra* note 3, at 629-30.

59. *See* text accompanying note 56 *supra*.

60. The *Blackie* court primarily relied upon a congressional study which concluded that the class action was not a particularly effective vehicle for coercing settlements. *See Class Action Study*, *supra* note 1, at 9-10. The committee study indicated that while class actions which are terminated at the preliminary motions stage do not exert much economic pressure on defendants, this is not the case where class certification is granted. A national study of 79 class actions revealed that 39 plaintiffs recovered some measure of damages. In those cases where plaintiffs did recover, the amount recovered was more than $100,000 in 81% of the cases, more than $1,000,000 in 38%, and more than $5,000,000 in 13% of the actions. Thus, the damages recovered in 41% of all class actions studied amounted to more than $100,000. However, the court did not apply this

effect is very real and quite significant.[61] The result, in a significant percentage of cases, is that once class certification has occurred, the litigation will be settled and there will consequently be no chance to reconsider the certification order.[62] A similar result will follow where there is a denial of class certification and the death knell doctrine, followed by the Ninth Circuit, is applied. In this case, if immediate appeal were not permitted, economic pressure would often act to compel the plaintiff to end the litigation. The only significant distinction between the death knell doctrine and the reverse death knell doctrine lies in which party may be forced to terminate the action if the class is upheld or found to be improperly certified. *Blackie* failed to recognize the fact that a class certification order is critical to the further conduct of many rule 23(b)(3) class actions, regardless of whether the order is granted or denied. If a court has adopted the death knell doctrine, as the Ninth Circuit has done, it should also allow immediate appeal in the reverse death situation. This result is required by the fact that defendants, like plaintiffs, may be economically coerced into terminating the action, and not for reasons of parity of treatment or decreasing litigation costs.

The Rationale of Rule 23(b)(3)

The Ninth Circuit suggested that the purpose underlying rule 23(b)(3) was "to put small claimants in an economically feasible

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evidence to the facts of *Blackie*. Instead, the court utilized the evidence of the committee report that was relevant only to class actions that were not certified. Furthermore, *Blackie* criticized other studies of class actions which recognized their *in terrorem* effect and characterized them as highly inconclusive and lacking in empirical evidence. 524 F.2d at 899 n.15. However, there is no evidence which indicates that these studies are supported by less empirical data than the *Class Action Study*. *See, e.g.*, AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATION OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1973); Pollock, *Class Actions Reconsidered: Theory and Practice Under Amended Rule 23*, 28 BUS. LAW. 741 (1973); Simon, *Class Actions–Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1973); Rosenfeld, *The Impact of Class Actions on Corporate and Securities Law*, 1972 DUKE L.J. 1167; Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 5-12 (1971).

61. The pressure to settle may decrease as the suit progresses:

> At the outset of the litigation, the plaintiff class can rely upon the defendant's interest in avoiding both the full consequences of an adverse judgment and the rapidly mounting expenses of litigation to provide an incentive for quick agreement. After a time, though, the defendant's deeper pocket may enable it to win a favorable settlement through a war of attrition, by simply outlasting the plaintiffs.

Developments, *supra* note 30, at 1379 (footnotes omitted).

62. *See, e.g.*, articles cited in note 60 *supra*.

litigating posture."[63] While some commentators support this position,[64] others argue that the utility of the class action lies in its achievement of uniformity of decision and judicial economy.[65] Recent Supreme Court decisions suggest that the Court takes the latter position.[66] If this is indeed true, then the immediate appeal of class certification orders would seem to be mandated for two reasons: (1) to avoid the time and expense of a class action trial whenever the class was improperly certified; and (2) to provide the courts of appeals with one of their few opportunities to develop standards for the application of rule 23(b)(3), since few large class actions proceed to a judgment on the merits. Therefore, both judicial economy and uniformity of decision would be served by allowing immediate appeal of certification orders.[67]

However, if the purpose of rule 23(b)(3) is to encourage a large number of small-claim parties to pursue a lawsuit which would be otherwise impossible to litigate on an individual basis, then the *Blackie* court's result is consistent with this purpose. Refusing a defendant the right of appeal early in such a suit will assist the plaintiffs by avoiding an early threat to the existence of their lawsuit. In addition, economic pressure is exerted on the defendant to settle the action prior to trial in order to avoid a

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63. 524 F.2d at 899.

64. *See* Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501 (1969); Kalven & Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941). Proponents of this viewpoint often argue that unless rule 23(b)(3) is available to the consumer, no satisfactory private remedy will exist to redress consumer fraud.

65. *See, e.g.*, FED. R. CIV. P. 23, Advisory Comm. Note. Note that these two views of the function of rule 23 are certainly not incompatible, and perhaps the better view is that the rule should serve both of these functions simultaneously. However, in the past, courts have not discussed the two functions together, but have focused upon either one or the other. *Compare* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968), *with* Snyder v. Harris, 394 U.S. 332 (1969), *and* Zahn v. International Paper Co., 414 U.S. 291 (1973). *See* note 66 *infra* for a discussion of *Snyder* and *Zahn*.

66. *See* Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969). In *Snyder*, the Court held that aggregation of the class members' claims in order to meet the jurisdictional amount was impermissible since it might prevent important questions from being decided and undermine the effectiveness of rule 23. 394 U.S. at 336. Prior to *Zahn*, it was felt that if only the named representatives' claims satisfied the jurisdictional amount, they could represent a class whose members' claims did not each satisfy the requirement. But in *Zahn*, the Court went even further and held that the claims of all class nembers must meet the jurisdictional amount unless, of course, the action was brought under a statute which had no such jurisdictional prerequisite. 414 U.S. at 292-302.

67. The economy that would be achieved is the avoidance of a trial on the merits whenever the class is certified improperly. The *Blackie* court would argue that this is

potentially large monetary judgment.[68] A denial of immediate appeal will thus encourage this type of class action, as *Blackie* clearly recognized.

A Resolution of Competing Interests

In light of the discussion above, the result reached in *Herbst*, allowing immediate appeal of a class certification order, appears to be the preferable one. Contrary to the contention of the Ninth Circuit, irreparable harm does often result from the denial of immediate review, especially in large-member, small-claim class actions. This fact alone gives support to the reverse death knell doctrine of *Herbst*. In addition, allowing immediate appeal of certification orders would be consistent with Supreme Court decisions stressing the importance of judicial economy and uniformity of decision. *Blackie* strictly applied the final judgment rule and thus demonstrated the need for a flexible exception to the rule so that defendants may avoid unnecessary injury. However, subsequent Ninth Circuit decisions have reaffirmed the *Blackie* result,[69] as have the courts of appeals of other circuits.[70]

D. COMMON QUESTIONS OF LAW AND PREDOMINANCE OF COMMON QUESTIONS REQUIREMENTS

The *Blackie* court did consider the merits of the appeals of those defendants who appealed under 28 U.S.C. section 1292(b).[71] The Ninth Circuit determined whether the district court's order certifying the class was proper under the standards

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inaccurate for the reasons stated in note 55 *supra*. It is suggested that the *Blackie* court unduly minimized the situations when immediate appeal would result in judicial economies since the alternative avenues of appeal relied on in *Blackie* too often would be unavailable.

68. *See* notes 60-62 *supra* and accompanying text.

69. *See* Share v. Air Properties G., Inc., 538 F.2d 279, 282 n.3 (9th Cir. July, 1976) (per Sneed, J.); Little v. First Cal. Co., 532 F.2d 1302, 1303 (9th Cir. Mar., 1976) (per Sneed, J.). Citing *Blackie*, the *Little* court dismissed, at oral argument, an appeal under section 1291 from a class certification order. The court stated that a grant of class action status does not fall within the collateral order exception to the final judgment rule.

70. *See* Hellerstein v. Mr. Steak, Inc., 531 F.2d 470 (10th Cir.), *cert. denied*, 45 U.S.L.W. 3234 (U.S. Oct. 4, 1976); Bennett v. Behring Corp., 525 F.2d 1202 (5th Cir.), *cert. denied*, 96 S. Ct. 2175 (1976). The Supreme Court denied the defendants' petition for certiorari in *Blackie*. *See* note 4 *supra*. In several similar cases, petitions for certiorari have also been denied. *See* Bennett v. Behring Corp., *supra*; Seiffer v. Topsy's Int'l, Inc., 520 F.2d 795 (10th Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *In re* Cessna Aircraft Distrib. Antitrust Litigation, 518 F.2d 213 (8th Cir. 1975), *cert. denied*, 423 U.S. 947 (1976).

71. For the text of section 1292(b) see note 9 *supra*.

set forth in rules 23(a)[72] and 23(b)(3)[73] of the Federal Rules of Civil Procedure.

The Requirements of Rule 23

Fed. R. Civ. P. 23(a) contains several prerequisites necessary to the maintenance of a class action. These prerequisites attempt to balance the value of permitting individual actions against the judicial economies that can be achieved by a class action.[74] Rule 23(a)(2) requires that there must be questions of law or fact common to the members of a class. Although the requirement is technically not satisfied when the substantive law to be applied to each class member's claim is not identical, courts are usually willing to find that it has been met.[75] It has been suggested that the requirement may be superfluous when a rule 23(b)(3) class action is brought, since the rule 23(a)(2) requirement is necessarily satisfied if the 23(b)(3) class action is properly certified.[76]

For a class action to be certified under rule 23(b)(3), a court must make a specific finding that common questions of law or fact predominate over issues only affecting individual members of the class.[77] While it is clear that the commonality requirements of rule 23(b)(3) are stricter than those of rule 23(a)(2), no definitive guidelines for the application of the rule have yet been estab-

72. FED. R. CIV. P. 23(a) provides:

> 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 impractical, (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.

73. FED. R. CIV. P. 23(b) provides in part:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

74. *See* Professional Adjusting Sys. of America, Inc. v. General Adjustment Bureau, Inc., 64 F.R.D. 35 (S.D.N.Y. 1974); Cohn v. District of Columbia Nat'l Bank, 59 F.R.D. 84 (D.D.C. 1972).

75. *See, e.g.*, Lewis v. Bogin, 337 F. Supp. 331 (S.D.N.Y. 1972). *See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1763 (1969).

76. C. WRIGHT & A. MILLER, *supra* note 75, § 1763.

77. Rule 23(b)(3) also requires that the court find that a class action is superior to other available methods of adjudicating the claim if a class action is to be properly

lished.[78] However, the courts are generally agreed that all members of the class need not be identically situated in every respect, but there simply must be questions of law or fact common to all class members.[79] Furthermore, the common questions need not be dispositive of the entire action; if one or more of the central question is common to the class members and can be said to predominate, a class action may be maintained even if other important questions must be tried separately.[80] The purpose of this requirement is to determine if the individual questions involved are so overwhelming as to destroy the utility of the class action. If this is not found to be the case, courts will generally certify the class action.[81] In the area of securities fraud, it is well-established that the rule 23 (b)(3) requirement can be satisfied notwithstanding the fact that individual questions of misrepresentation, reliance, compliance with the statute of limitations or damages still exist within the class.[82] To avoid the problems these individual questions pose, a court may first conduct a single trial to

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maintained. However, this issue was not discussed in the *Blackie* decision, so it can be assumed that this requirement was satisfied.

78. Harrigan v. United States, 63 F.R.D. 402 (E.D. Pa. 1974). *Compare* Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967), wherein the court focused on the "ultimate issue" of the suit, which each member would have to prove, and found that a "common nucleus of operative facts" predominated over individual issues, *id.* at 726, *with* School Dist. of Philadelphia v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967), wherein the court focused on the various factual issues likely to arise in proving the allegations and, after finding that these issues would be varied and complex, held that individual issues predominated over any issue of law or fact common to the class.

79. *See, e.g.*, Partain v. First Nat'l Bank, 59 F.R.D. 56 (M.D. Ala. 1973); Hoffman v. Charnita, Inc., 58 F.R.D. 86 (M.D. Pa. 1973); Cohen v. District of Columbia Nat'l Bank, 59 F.R.D. 84 (D.D.C. 1972).

80. *See* Partain v. First Nat'l Bank, 59 F.R.D. 56 (M.D. Ala. 1973), where the court allowed the class action to proceed despite the fact that damages to each class member would differ and consequently would have to be determined separately. *See also* Green v. Wolf, 406 F.2d 291 (2d Cir. 1968); American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 94 (D. Md. 1974); Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99 (E.D.N.Y. 1973).

81. *See* Partain v. First Nat'l Bank, 59 F.R.D. 56 (M.D. Ala. 1973).

82. *See, e.g.*, Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308 (2d Cir. 1974); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); Aboudi v. Daroff, 65 F.R.D. 388 (S.D.N.Y. 1974). If the plaintiffs in a securities fraud action allege that the defendant issued a series of reports containing misleading information, the plaintiffs need not demonstrate that each of them relied on identical misrepresentations in order to maintain a class action. Instead, the plaintiffs must only show that the defendant's misrepresentations were part of a common scheme to manipulate the price of a security. *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972); *In re* U.S. Financial Sec. Litigation, 64 F.R.D. 443 (S.D. Cal. 1974).

Similarly, where each member of the potential class has suffered a different amount of damage, which must be proved separately, the class still may be certified. In such a case, alternative damage allocation schemes may be employed. One such alter-

determine the defendant's liability in such cases and, if liability is found, may then conduct separate trials to resolve the individual questions involved.[83]

The Blackie *Analysis of the Commonality Issue*

Before addressing the question of commonality, *Blackie* discussed the appropriate procedure which district courts must follow to certify a class action. It is clear, the court stated, that the district court may not certify an improper class action on the basis of a speculative possibility that it later may meet the requirements of rule 23. However, neither the possibility that the plaintiffs will be unable to prove their allegations nor the possibility that the decision to certify will prove incorrect are adequate reasons for declining to certify a class which apparently satisfies the requirements of the rule.[84] However, since a preliminary inquiry into the merits of a potential class action has been held to be improper by the Supreme Court,[85] a trial court must engage in some type of speculation as to the nature of the claim presented.

The *Blackie* court divided its evaluation of the merits of the district court's certification order into three issues. First, *Blackie*

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native scheme is fluid class recovery, whereby the total amount of damage incurred by the class as a whole is initially adjudicated in a single proceeding. This amount is placed into a separate fund which members of the class may claim in proportion to their losses. Any unclaimed portion of the fund is utilized to benefit the class in some specified manner. *See* West Virginia v. Chas. Pfizer Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971); Malina, *Fluid Class Recovery As A Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. REV. 477 (1972).

83. *See, e.g.*, Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

84. The court cited *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974), in support of this assertion. In *Hotel Tel. Charges*, the Ninth Circuit stated that conditional certification of a class was not a device to be used by the trial court to avoid determining whether the requirements of rule 23 had been satisfied. Rather,

> [t]he purpose of conditional certification is to preserve the Court's power to revoke certification in those cases wherein the magnitude or complexity of the litigation may eventually reveal problems not theretofore apparent.

Id. at 90.

85. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). In *Eisen*, the Supreme Court noted that such preliminary inquiries were authorized by neither the language nor the history of rule 23.

> Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefit of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained.

Id. at 177-78.

inquired as to whether there were common questions of law or fact sufficient to satisfy rule 23(a)(2). Despite the fact that the alleged misrepresentations made by the defendants were contained in a number of different documents released at various times during Ampex's operation,[86] the claims of those who purchased Ampex securities throughout the period of the alleged misrepresentations were found to present common issues of law or fact. The *Blackie* court stated that "[t]he overwhelming weight of authority holds that repeated misrepresentations of the sort alleged here satisfy the 'common question' requirement."[87] Moreover, the court added that past

> courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit.[88]

The court noted that while the degree of similarity which must exist between different misrepresentations in order to fall within the outer limits of the "common course of conduct" requirement was unclear, the requirement was clearly satisfied when a series of financial reports uniformly misrepresent a particular item in a financial statement.

The second issue discussed by the court was whether these common questions of law or fact predominated over the individual questions involved in *Blackie*, as required by Fed. R. Civ. P. 23(b)(3). The court stated that although damages are invariably an

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86. According to the plaintiff's complaint, the value of Ampex stock was artificially inflated because

> the annual reports of Ampex for fiscal years 1970 and 1971, various interim reports, press releases and other documents (a) overstated earnings, (b) overstated the value of inventories and other assets, (c) buried expensive items and other costs incurred for research and development in inventory, (d) misrepresented the companies' current ratio, (e) failed to establish adequate reserves for receivables, (f) failed to write off certain assets, (g) failed to account for the proposed discontinuation of certain product lines, (h) misrepresented Ampex's prospect for future earnings.

524 F.2d at 902.

87. *Id.*

88. *Id. Blackie* also noted that the availability of class actions to redress misrepresentation frauds is often upheld in large part because of the deterrent effect class actions play in accomplishing the objectives of the securities laws. *Id.* at 903.

individual question, that fact alone will not defeat a class action. The court found that if liability were established, computation of damages would "be virtually a mechanical task."[89] Similarly, individual questions of reliance were found not to impose an impediment to maintaining a class action, since "subjective reliance [was] not a distinct element of 10b-5 claims of the type involved in [*Blackie*]."[90]

Blackie last considered the question of whether potential conflicts among the class members relating to proof of damages suffered would preclude class certification.[91] The court found that any such conflicts that might develop would be substantially outweighed by the class members' common interests. *Blackie* stated that conflicts among class members could be avoided by the adoption of a rescissory measure of damages or by awarding consequential damages in place of out-of-pocket damages.[92] Furthermore, the court noted that the class could be divided into subclasses pursuant to rule 23(c)(4)[93] in order to minimize class conflicts.

The court also rejected the defendants' assertion that any divergence of interest among class members violates due process.[94] In order to give res judicata effect to a judgment against an entire class, a court must find that the interests of all class mem-

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89. *Id.* at 905.

90. *Id.*

91. According to the court, it was possible that some class members would desire to maximize the inflation in value of Ampex stock as a result of misrepresentation at a certain date, while other members would want to minimize such inflation in value on the same date.

> For example, [the defendants] posit that a purchaser early in the class period who later sells will desire to maximize the deflation due to an intervening corrective disclosure in order to maximize his out of pocket damages, but in so doing will conflict with his purchaser, who is interested in maximizing the inflation in the price he pays.

Id. at 908.

92. *Id.* at 909. For a comprehensive discussion of the methods by which courts calculate these damages see Note, *The Measure of Damages in Rule 10b-5 Cases Involving Actively Traded Securities*, 26 STAN. L. REV. 371 (1974).

93. FED. R. CIV. P. 23(c)(4) provides in pertinent part: "[A] class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

94. Hansberry v. Lee, 311 U.S. 32 (1940), relied on by the defendants, noted that those class members who are actually present in class litigation may have interests diametrically opposed to those who are absent on the central issue involved in the action. The Court in *Hansberry* stated that due process is violated only where the procedure adopted does not fairly ensure that the interests of absent class members, who are to be bound by the judgment, will be protected.

bers, even those not actually present in the lawsuit, were adequately protected by the class representatives. The Ninth Circuit found that the interests of the class members involved in *Blackie* would be adequately protected in light of the fact that there were numerous named representatives, each with substantial personal stakes in the outcome of the action.[95] Consequently, the court held that no violation of due process would occur and that the class representatives would fairly represent the class.[96]

Evaluation of the Blackie *Analysis*

The position adopted by the *Blackie* court is consistent with its view of the purpose of the rule 23(b)(3) class action, *i.e.*, to aid the small claimant.[97] The guidelines established by the court in dealing with rule 23(a)(2) and 23(b)(3) indicate that it has adopted a liberal approach in determining precisely what questions of law or fact will satisfy the rule's requirements. The result will be to encourage small-claim plaintiffs to seek judicial relief more frequently.

The Ninth Circuit's determination of the propriety of the district court's class certification order is consistent with the positions taken by other circuits on this issue.[98] Nevertheless, the *Blackie* decision is still significant since there has been little appellate court definition of the proper application of rule 23.[99] As a result of this dearth of appellate guidelines, district courts have been forced to develop ad hoc standards by which they have judged the merits of any request for class certification. In order to maintain uniformity of decision, it is important that specific guidelines be developed for class certification. The *Blackie* decision

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95. A class member may avoid the res judicata effect of a judgment in a class action by notifying the court that he or she does not wish to be bound by the decision. *See* FED. R. CIV. P. 23(c)(3), which provides in part that "[t]he judgment in an action maintained as a class action under subdivision (b)(3) . . . shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion . . . ."

96. 524 F.2d at 911. Subsequent Ninth Circuit decisions have reflected a similar willingness to find rule 23 requirements met in securities fraud cases. *See* Little v. First Cal. Co., 532 F.2d 1302 (9th Cir. Mar., 1976) (per Sneed, J.); Williams v. Sinclair, 529 F.2d 1383 (9th Cir. Dec., 1975) (per Voorhees, D.J.). In *Williams*, for example, the court held that the presence of individual issues such as damages or reliance, did not necessarily defeat class action certification, and cited *Blackie* in support of its decision. *Id.* at 1388.

97. *See* text accompanying notes 63-68 *supra*.

98. *See* text accompanying notes 74-83 *supra*.

99. *See* note 78 *supra* and accompanying text.

is a step in this direction, although the court might have been more specific as to the standards a trial judge must utilize.

E. CONCLUSION

The Ninth Circuit decision in *Blackie* resolved two important issues confronting the courts in class action litigation. First, *Blackie* rigidly applied the final judgment rule to reach its decision that an order granting class certification was not appealable. Second, the Ninth Circuit liberally construed the class action requirements of rule 23(b)(3) in finding that the plaintiffs' class in *Blackie* could be certified.

The *Blackie* holding is clearly beneficial to plaintiffs who attempt to bring class action suits. However, it is hoped that the court will soon recognize the irreparable harm which may befall defendants denied an immediate appeal of a class certification order, and will act to adopt the reverse death knell doctrine. Until that time, the coercive effect of potentially enormous monetary judgments against defendants may act to produce injustice which could easily be avoided by recognition of the defendant's right to immediate appeal.

Sean P. Barry

III. EXTENSIONS OF THE TIME TO FILE NOTICE OF APPEAL

A. INTRODUCTION

In *Salazar v. San Francisco Bay Area Rapid Transit District*,[1] a panel of the Ninth Circuit,[2] relying on a cryptic sentence in a previous Ninth Circuit opinion,[3] defined the scope of those provi-

1. 538 F.2d 269 (9th Cir. July, 1976) (per Kilkenny, J.), *cert. denied*, 45 U.S.L.W. 3342 (U.S. Nov. 9, 1976). In this opinion, Judge Kilkenny withdrew his prior opinion in the same case, No. 75-2561 (9th Cir., Apr. 22, 1976).

2. The *Salazar* panel was comprised of circuit Judges Kilkenny and Trask, and district Judge Carr, sitting by designation. Judge Carr became seriously ill just prior to argument, but was present on December 10, 1975, when the case was submitted. However, his illness prevented his participation in the decision. Judge Carr died March 13, 1976. Judge Kilkenny filed his first opinion on April 22, 1976, which he withdrew in favor of his second opinion on July 1, 1976.

3. Karstetter v. Cardwell, 526 F.2d 1144 (9th Cir. Dec., 1975) (per Koelsch, J.), *aff'g* 399 F. Supp. 1298 (D. Ariz. 1975). Without analysis, the *Karstetter* panel disposed of a jurisdictional issue similar to that involved in *Salazar* by stating: "Having considered the State's contentions regarding the timeliness of the appeal, we conclude it is properly before us; we deny the motion to dismiss and turn to the merits." 526 F.2d at 1144.

sions of Federal Rule of Appellate Procedure (Fed. R. App. P.) 4(a)[4] which enable a party to obtain an extension of the time normally prescribed for filing a notice of appeal.[5] In civil cases to which the United States is not a party, rule 4(a) prescribes a time limit of thirty days, following entry of final judgment, in which to file notice of appeal. Ordinarily, failure to file within this period (the standard period) will forfeit a party's right of appeal and divest the courts of jurisdiction.[6] However, upon a showing of excusable neglect,[7] rule 4(a) vests some discretion in the district

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4. The Federal Rules of Appellate Procedure are codified as an appendix to Title 28, United States Code. The Rules were adopted December 4, 1967, and became effective July 1, 1968. FED. R. APP. P. 4(a) was derived without change of substance from former Fed. R. Civ. P. 73(a) (1968) read in conjunction with FED. R. CIV. P. 6(b). Rule 73(a) was abrogated when the Federal Rules of Appellate Procedure were adopted. FED. R. APP. P. 4(a) reads in pertinent part:

> In a civil case [to which the United States is not a party] in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of judgment . . . .
>
> . . . .
>
> Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

5. The procedure for filing the notice of appeal, its content and the required service of the notice of appeal are prescribed in FED. R. APP. P. 3(a), (c), (d) respectively. Rule 3(a) states that an appeal "shall be taken by filing a notice of appeal" with the clerk of the district court within the time prescribed by rule 4. The rule requires nothing other than this simple filing to "take" the appeal. But, failure to timely file the notice of appeal threatens the "validity" of the appeal. Rule 3(d) provides that the clerk shall serve notice of the filing to each party other than the appellant by mailing to such party a copy of the notice of appeal, stamped with the date on which it was filed. The rule further provides that if the appeal is from a criminal conviction, the clerk shall also mail a copy to the defendant-appellant.

6. *See* United States v. Robinson, 361 U.S. 220, 224 (1960) (timely filing of the notice of appeal is "mandatory and jurisdictional"); Casalduc v. Diaz, 117 F.2d 915, 916-17 (1st Cir.), *cert. denied*, 314 U.S. 639 (1941) (attempted filing of notice of appeal after business hours on last day of standard period by slipping notice under door to clerk's office held untimely). For a full discussion of the jurisdictional nature of the notice of appeal see notes 24-29 *infra* and accompanying text.

7. Prior to 1966, the only excusable neglect recognized was failure to learn of the entry of judgment. 9 MOORE'S FEDERAL PRACTICE ¶ 204.13[1], at 967 (2d ed. 1975) [hereinafter cited as MOORE'S]. The 1966 amendment to Fed. R. Civ. P. 73(a) expanded the scope of the neglect provision. The Advisory Committee continued to believe that no reason other than failure to learn of the entry of judgment should *ordinarily* excuse a party's neglect to file notice of appeal within the standard period. However, it also be-

court to grant an extension of the time to take an appeal.[8] This extension period may not exceed thirty additional days.

Before expiration of the standard period, rule 4(a) imposes no procedural requirements on a party seeking an extension. The party may obtain such an extension by informal request which the court may grant ex parte.[9] After expiration of the standard period, the rule forbids an ex parte grant of an extension[10] by requiring that the party file a formal motion for extension and serve notice of motion and hearing on all adverse parties.[11] At the hearing, any adverse party may contest the showing of excusable neglect. In either event, the party must file a notice of appeal within the extension period or forfeit the right of appeal.[12]

B. The Ninth Circuit Position

In *Salazar*, a pro se civil plaintiff, Rose Salazar, failed to file a notice of appeal within the standard period, but did file such notice within the prescribed extension period. She did not file a

lieved that the district court should have authority to grant an extension in any unanticipated extraordinary cases where injustice would otherwise result. 9 Moore's, *supra* at 968-69. The existence of excusable neglect was not contested by the *Salazar* panel and therefore is not discussed in this Note. For a discussion of what circumstances have been held to constitute excusable neglect see *id.* at 969-974.

8. The phrase "take an appeal" is used synonomously with the phrase "file a notice of appeal." *See, e.g.*, Fed. R. App. P. 3(a); Fed. R. Civ. P. 73(a), Advisory Comm. Note to 1948 amendment, *reprinted in* 9 Moore's, *supra* note 7, ¶ 203.25[2], at 781.

9. Rule 4(a) impliedly sanctions this result by permitting a request for extension either within or beyond the standard period but attaching the motion and notice requirement only to requests made beyond the standard period. *See* North Umberland Mining Co. v. Standard Accident Ins. Co., 193 F.2d 951, 952 (9th Cir. 1952); Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275, 276-77 (3d Cir. 1962), *overruled on other grounds*, Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084, 1087 (3d Cir. 1972).

10. This prohibition of an ex parte grant of extension after expiration of the standard period arose out of case law first developed in the Ninth Circuit. *See* North Umberland Mining Co. v. Standard Accident Ins. Co., 193 F.2d 951 (9th Cir. 1952). The Tenth and Third Circuits followed suit. *See* Cohen v. Plateau Natural Gas Co., 303 F.2d 273 (10th Cir. 1962); Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275 (3d Cir. 1962), *overruled on other grounds*, Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084, 1087 (3d Cir. 1972). Rule 4(a) merely codifies the results reached in these cases. *See* Fed. R. App. P. 4(a), Advisory Comm. Note; note 38 *infra* and accompanying text.

11. The companion requirements of formal motion for extension and of notice of motion and hearing to adverse parties shall hereafter be referred to as the "motion and notice" requirement or simply the "motion" requirement. The requirement that a "request" for extension be made by formal motion automatically ensures notice to other parties under the provisions of Fed. R. Civ. P. 5(a), (b), 6(d), 7(b)(1). Presumably, Fed. R. App. P. 4(a) expressly mentions notice of the motion because it requires only "such notice as the [district] court shall deem appropriate," thus vesting the district court with power to approve notice other than that prescribed in Fed. R. Civ. P. 5(b).

12. For a discussion of the filing constraints on a notice of appeal see the text accompanying notes 15-16 *infra*.

motion for extension until after expiration of the extension period.[13] The district court found that her delay, both in filing the notice of appeal and in filing the motion for extension, resulted from economic hardship which constituted excusable neglect. It held, however, that expiration of the extension period deprived it of jurisdiction to entertain the motion for extension.[14]

In an earlier decision, *Karstetter v. Cardwell*,[15] a different district court within the Ninth Circuit had held that expiration of the extension period did not deprive it of jurisdiction to hear and grant a motion for extension, and thereupon approved, nunc pro tunc,[16] a notice of appeal filed beyond the standard period.[17] Since the notice of appeal in *Karstetter* was filed within the extension period, and since that late filing was found to be due to excusable neglect, the court validated the late filing. On appeal, a Ninth Circuit panel denied without discussion the appellee's motion to dismiss the appeal as untimely and turned to the merits.[18] Thus, *Karstetter* established precedent in the Ninth Circuit for the view that no timeliness provisions attach to the motion for extension and that only the filing of the notice of appeal itself is jurisdictional in nature. Analogous results had been reached in eight other circuits.[19]

Unaware of the *Karstetter* result, the *Salazar* panel originally confronted the question of whether to adopt the practice followed in other circuits, but refused and adopted a stricter interpretation

13. The notice of appeal was filed 44 days prior to the end of the extension period. The motion for extension was filed 41 days later. 538 F.2d at 269.

14. *Id.* at 270.

15. 399 F. Supp. 1298 (D. Ariz. 1975), *aff'd*, 526 F.2d 1144 (9th Cir. Dec., 1975) (per Koelsch, J.).

16.
> A *nunc pro tunc* entry in practice is an entry made now of something which was actually previously done, to have effect as of the former date. Its office is not to supply omitted action by the court, but to supply an omission in the record of action really had, but omitted through inadvertence or mistake.

Perkins v. Hayward, 132 Ind. 95, 101, 31 N.E. 670, 672 (1892) (citations omitted). For an extensive discussion of the nunc pro tunc entry of judgments and decrees see A. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS 51-70 (1879).

17. 399 F. Supp. at 1300.

18. *See* note 3 *supra*.

19. In the First Circuit, when a motion for extension was filed within the extension period but the notice of appeal was filed beyond the period, the motion was regarded as a notice of appeal and the district court was not required to grant the motion within the extension period. *See* Pasquale v. Finch, 418 F.2d 627, 629 (1st Cir. 1969). The First Circuit has not definitively stated its attitude toward a motion filed beyond the extension period. In the Second Circuit, when both notice of appeal and motion for extension were filed within the extension period, the appellee's contention that the district court

of rule 4(a).[20] Upon reconsideration, in light of *Karstetter*, the panel withdrew its earlier opinion[21] and accepted the *Karstetter* holding "[w]ith great reluctance. . . ."[22]

C. Timeliness And The Notice of Appeal

Rule 4(a) expressly states that the notice of appeal "shall be filed" within the standard period following entry of judgment

had to decide the motion within the extension period was rejected. *See* C-Thru Prods. Inc. v. Uniflex, Inc., 397 F.2d 952, 954-955 (2d Cir. 1968). In a later case, when notice of appeal was filed within the extension period but no motion was filed, the Second Circuit held that nothing in rule 4(a) precluded the district court from making a nunc pro tunc excusable neglect determination. *See* Stirling v. Chemical Bank, 511 F.2d 1030, 1032 (2d Cir. 1975). In the Third Circuit, a district court may at any time consider a motion to validate a notice of appeal filed within the extension period. *See* Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084, 1087 (3d Cir. 1972), which expressly overruled Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275 (3d Cir. 1962), in so far as it held otherwise. In the Fourth Circuit, when a notice of appeal was mailed within the standard period but filed within the extension period, and no motion was ever filed, the court remanded to the district court for a nunc pro tunc excusable neglect determination. *See* Evans v. Jones, 366 F.2d 772, 773 (4th Cir. 1966). In the Fifth Circuit, when a defendant's attorney withdrew just prior to expiration of the standard period and pro se notice of appeal was received within the extension period, the court remanded for a nunc pro tunc excusable neglect determination. *See* Tuley v. Heyd, 492 F.2d 788, 789 (5th Cir. 1974); Cramer v. Wise, 494 F.2d 1185, 1186 (5th Cir. 1974). The Sixth Circuit reached the same result, on similar facts, as did the Fourth Circuit in *Evans*. *See* Reed v. Michigan, 398 F.2d 800, 801 (6th Cir. 1968). The Tenth Circuit imposes no limit on the district court's power to grant a motion for extension, so long as the hearing is noticed to adverse parties. *See* Way v. Gaffney, 434 F.2d 996, 997 (10th Cir. 1970). In the District of Columbia Circuit, when a district court denied without a hearing a pro se plaintiff's request to appeal in forma pauperis, filed within the extension period, the circuit court treated the request both as a notice of appeal and a motion for extension and remanded for a nunc pro tunc excusable neglect determination. *See* Alley v. Dodge Hotel, 501 F.2d 880, 886 (D.C. Cir. 1974). This result was presaged by an earlier dictum to the effect that even if a notice of appeal were filed within the extension period, but the motion was filed beyond that extension period, the notice might be held timely. *See* Conway v. Pennsylvania Greyhound Lines, 243 F.2d 39, 41 (D.C. Cir. 1957).

The Eighth Circuit, on considering whether to remand for a nunc pro tunc excusable neglect determination, assumed arguendo that it possessed such discretionary power, but declined to exercise it since the record revealed that the appellant's neglect was not excusable. *See* Merrill Lynch, Pierce, Fenner, and Smith, Inc. v. Kurtenbach, 525 F.2d 1179, 1183 (8th Cir. 1975) (on petition for rehearing). The *Salazar* panel erroneously cited *Merrill Lynch* as supporting its original position in the withdrawn opinion. 538 F.2d at 270.

20. Reflecting the panel's concern for the finality of judgments and desire to avoid protracted litigation, the first *Salazar* opinion held that rule 4(a) required: (1) that the appealing party actually file a notice of appeal within the extension period; (2) that the party file a motion for extension within the extension period; and (3) that the district court grant the extension within the extension period. Under this decision, now withdrawn (*see* text accompanying note 21 *infra*), expiration of the extension period prior to completion of any one of these three requirements would have divested the district court of jurisdiction to proceed further.

21. 538 F.2d at 270.

22. *Id.* at 270-71. The *Salazar* court vacated the district court judgment and remanded

and that, upon a showing of excusable neglect, this standard time for filing may be extended for a period not to exceed thirty days. Thus, rule 4(a) prescribes a finite time to file a notice of appeal; at a maximum, it will be the full extension period abutted to the full standard period.

Rule 4(a) does not address the jurisdictional nature of the filing requirement. However, Fed. R. App. P. 3(a) clearly implies that an appeal taken beyond the time prescribed by rule 4(a) will be invalid.[23] Furthermore, in *United States v. Robinson*,[24] the Supreme Court firmly established the jurisdictional nature of the notice of appeal.[25] In *Robinson*, the defendant failed to file a notice of appeal within the standard period then prescribed. The rules under which *Robinson* was decided expressly prohibited any extension of the standard period.[26] The *Robinson* Court held that to recognize a notice of appeal filed beyond the standard period was actually to extend the standard period,[27] and therefore, the district court had no jurisdiction to recognize such a notice of appeal.[28] Applying *Robinson* to the current rules, which allow an extension period but expressly limit its length, one may conclude that a district court has no jurisdiction to allow the filing of a notice of appeal beyond the extension period.

Several policy considerations combine to effect this result. The standard period is prescribed in order to provide an ascer-

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for further proceedings. *Id.* at 271. Since the district court has already found the existence of excusable neglect, its only remaining task is to enter an order extending the time to file the notice of appeal. The appellant Salazar will then be back before the Ninth Circuit for a decision on the merits.

23. FED. R. APP. P. 3(a) provides in pertinent part: "[F]ailure of an appellant to take any step *other* than timely filing of a notice of appeal does not affect the validity of the appeal . . . ." (emphasis added).

24. 361 U.S. 220 (1960).

25. *Id.* at 224.

26. *Robinson* was decided under the then-existing Fed. R. Crim. P. 37(a)(2) and 45(b). Rule 37(a)(2) has since been abrogated by FED. R. APP. P. 4(b). Rule 45(b) is still in force. From the legislative history of these rules, the Court discerned that Congress had considered vesting the district courts with a limited discretion to extend the time to take an appeal from a criminal conviction, but had expressly abandoned the notion. 361 U.S. at 227-29. Therefore, rule 37(a)(2) prescribed the standard period within which to take a criminal appeal but contained no provision for an extension. *Id.* at 222 & n.3. The Court further noted that rule 45(b), governing "enlargements" of the time limits prescribed in the various other rules, contained an express prohibition of any enlargement of the time to take a criminal appeal. *Id.* at 223.

27. 361 U.S. at 224.

28. In *Robinson*, the court of appeals had held that the district court had authority to permit a notice of appeal to be filed beyond the standard period, if it determined the delay was due to excusable neglect. *Id.* at 223. The Supreme Court held that the plain

tainable date beyond which inaction by a disaffected party becomes tacit acquiescence in the judgment,[29] thereby protecting all other parties in their reliance on such inaction. The standard period also serves to expedite appeals and discourage dilatory tactics by a disaffected party.[30] To effectively serve these policies, the standard period is precisely delimited, and its expiration will *ordinarily* forfeit the right to appeal. However, in cases involving extraordinary circumstances, an uncompromising, inflexible forfeiture scheme may work an injustice. Flexibility and a willingness to balance all interests have proved the better posture.[31] Therefore, rule 4(a) provides that if a party's neglect to take an appeal within the standard period is legally excusable, the party is entitled to an extension period. But, to effectively serve the controlling policies, the extension period is also definitely limited.[32] Its expiration, combined with continued failure to file a notice of appeal, should and will irretrievably forfeit the right to appeal.

D. Timeliness And The Motion For Extension

The language of rule 4(a) provides neither express nor implied authority for any timeliness constraints on the motion for

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words, judicial interpretation and history of the rules opposed this conclusion. *Id.* at 229.

29. *See, e.g.*, Files v. City of Rockford, 440 F.2d 811, 814 (7th Cir. 1971).

30. United States v. Robinson, 361 U.S. 220, 226-27 (1960).

31. Even after noting the jurisdictional nature of the notice of appeal and stating that compliance with the timeliness provisions of rule 4 is therefore of utmost importance, the Advisory Committee Note to Fed. R. App. P. 3 continues:

> But . . . decisions under the [predecessor] civil and criminal rules which *dispense with literal compliance in cases in which it cannot fairly be exacted* should control interpretation of these rules.

Fed. R. App. P. 3, Advisory Comm. Note (emphasis added). The illustrative cases cited by the Committee all involve appeals from criminal convictions. But an illustrative list is not ordinarily regarded as exclusive and nothing in the Committee's language suggests it intended to confine this liberal attitude to the criminal context. Since the extension provision was first implemented with respect to civil appeals, the Committee must surely have been aware of decisions interpreting former Fed. R. Civ. P. 73(a), which dispensed with literal compliance to avoid injustice. *See* Evans v. Jones, 366 F.2d 772 (4th Cir. 1966) (on appellee's motion to dismiss appeal filed beyond standard period but within extension period, court remanded for excusable neglect determination and order granting extension nunc pro tunc); Conway v. Pennsylvania Greyhound Lines, 243 F.2d 39 (D.C. Cir. 1957) (if motion is filed beyond extension period, appeal might still be held timely) (dictum); Crump v. Hill, 104 F.2d 36 (5th Cir. 1939) (appellant's substitute notice of appeal accepted since a failure to "formalistically" comply with the rule would not be allowed to defeat substantial appellate rights).

32. In United States v. Robinson, 361 U.S. 220 (1960), the Court noted that Congress had expressly denied to the district court the power to extend the time to file a notice of appeal in a criminal case. The *Robinson* Court also speculated that if the power ever were given to the district courts, it must surely be subject to some definite time limita-

extension as opposed to the notice of appeal.[33] It states that an extension may be requested and granted *either within or beyond* the standard period, but if beyond, "it shall be [requested] by motion with such notice as the court shall deem appropriate."[34] This language does not limit how far beyond the standard period the request may be made.

The Advisory Committee Note to rule 4(a) is authority for no other result. It states that the purpose of the motion requirement is to codify, in the Federal Rules of Appellate Procedure, the result reached under former Federal Rules of Civil Procedure (Fed. R. Civ. P.) 73(a)[35] and 6(b).[36] That result was merely to

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tion. Otherwise many appeals would be indefinitely delayed, producing unnecessary and intolerable uncertainty and confusion. *Id.* at 230. Rule 4(a) embodies this concern expressed by the Court by strictly limiting the extension period to thirty additional days.

33. For a seemingly contrary interpretation see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach, 525 F.2d 1179, 1182 (8th Cir. 1975). *But see* the court's subsequent order on petition for rehearing, *id.* at 1183, discussed in note 19 *supra*, which appears to implicitly reserve the question.

34. FED. R. APP. P. 4(a).

35. Former Fed. R. Civ. P. 73(a) was the rule governing appeals from the district courts to the circuit courts. It provided that: (1) the notice of appeal was jurisdictional in nature; (2) the time to file the notice of appeal was thirty days from entry of judgment; (3) the district court could extend the time to file by at most thirty additional days; and (4) to qualify for an extension, a party would have to show excusable neglect. 9 MOORE'S, *supra* note 7, ¶ 203.21, at 761.

The Advisory Committee's purpose in expressly limiting the extension period to at most an additional thirty days is especially important. Prior to the 1946 amendment to the Federal Rules of Civil Procedure, the district courts sat for a calendar term, much as the Supreme Court currently sits for a term. Finality of judgments was assured by the doctrine that upon expiration of a term, the district court lost jurisdiction to disturb its final judgments entered at that term. But prior to the term's end, the court retained plenary power over such judgments. Concurrently, the time to take an appeal was prescribed by statute which recognized no extension power. Under these circumstances, the Supreme Court developed a rule that if a party failed to file a notice of appeal within the standard period because of excusable neglect, the district court could vacate the judgment and reenter it so that the appeal period ran anew from the reentry. Hill v. Hawes, 320 U.S. 520 (1944). Relief was thereby granted a deserving party, but ultimate finality was still secure since the expiration of the term at which the judgment was entered would divest the court of jurisdiction to vacate the judgment.

The 1946 amendment to the rules abolished the term doctrine. Thereafter, the *Hill* doctrine threatened the finality of judgments since the district court never lost jurisdiction over its judgments. Therefore, the 1948 amendment to rule 73(a) provided for the relief granted in *Hill* by expressly recognizing an extension power, but prevented the threatened lack of finality by expressly limiting the extension period to thirty additional days. This amendment deprived the district court of jurisdiction to allow the filing of a notice of appeal beyond the extension period. This was the Advisory Committee's express intent; it was the only purpose recognized for the extension limit. Fed. R. Civ. P. 73(a), Advisory Comm. Note to 1948 amendment, *reprinted in* 9 MOORE'S, *supra* note 7, ¶ 203.25[2], at 781-82.

36. FED. R. CIV. P. 6(b) was (and is) a broad rule of general application stating the procedures required to obtain an extension of the time limits specified in the various

forbid an ex parte extension order after expiration of the standard period.[37] No Advisory Committee commentary to rule 4(a) or its predecessor, Fed. R. Civ. P. 73(a), indicates an alternative pur-

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other Federal Rules of Civil Procedure. It provided that: (1) before expiration of a time limit otherwise prescribed, the district court could, for "cause shown," extend the time limit by ex parte order; (2) after expiration of such a limit, the district court could, for "excusable neglect," extend the limit, but only upon motion and notice thereof; and (3) the district court could extend the time to take an appeal only to the extent and under the conditions prescribed in rule 73(a). 2 MOORE'S, *supra* note 7, ¶ 6.01[5], at 1425, ¶ 6.01[19], at 1432.

The purpose and practical effect of the motion and notice requirement are especially important. From its inception, rule 6(b) imposed two standards to qualify for an extension of a prescribed time limit. Prior to expiration of the limit, the standard was "cause shown;" after expiration, it was "excusable neglect." The rule attached the motion and notice requirement only after expiration of the time limit. Although the Advisory Committee never expressly stated its reason for imposing the motion requirement only after expiration of the limit, the obvious inference is that the requirement, with its attendant adversary proceedings, was intended to ensure that the higher standard of excusable neglect would be met. The Advisory Committee did address the practical effect of this additional requirement. It stated that rule 6(b) gave the district court wide discretion to extend time limits *"or revive them after they have expired."* Fed. R. Civ. P. 6(b), Advisory Comm. Note to 1946 amendment, *reprinted in* 2 MOORE'S, *supra* note 7, ¶ 6.01[6], at 1426 (emphasis added). Furthermore, the rule

> itself contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under Rule 6(b).

Id. Obviously, the motion and notice requirement itself was intended to work no reduction of the time in which the district court might allow an appeal. Any limitation on that time would have to be found in Fed. R. Civ. P. 73(a).

37. The Committee did not state the result explicitly, but rather, cited decisions in three circuits: North Umberland Mining Co. v. Standard Accident Ins. Co., 193 F.2d 951 (9th Cir. 1952); Cohen v. Plateau Natural Gas Co., 303 F.2d 273 (10th Cir. 1962); and Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275 (3d Cir. 1962), *overruled on other grounds*, Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084, 1087 (3d Cir. 1972).

In *North Umberland*, after expiration of the standard period, the appellant filed an affidavit with the district court claiming excusable neglect. Accepting the affidavit at face value, the district court entered an ex parte order extending the time to file notice of appeal. But, in the circuit court, the appellee adduced substantial evidence effectively controverting the appellant's claim of excusable neglect. The *North Umberland* court noted this evidence and stated that rule 6(b) forbade an ex parte extension after expiration of the standard period. It dismissed the appeal, but not before remarking that the case was an excellent example of "the wisdom of empowering the [district] court to act . . . only after notice and opportunity given the opposite party to be heard." 193 F.2d at 952. Thus, the *North Umberland* panel was preoccupied with protecting the excusable neglect standard from such a dilution as to render it an automatic avenue of escape from a would-be appellant's mere carelessness or laxity.

In a per curiam opinion, the *Cohen* court reached the same result on virtually identical facts. The court noted that the existence of excusable neglect was extremely doubtful, and, in any event, the district court's ex parte extension order was void. 303 F.2d at 274. Citing *North Umberland*, *Cohen* dismissed the appeal.

The facts in *Plant Economy* were more complicated. The appellant, claiming excusable neglect, filed a motion for extension within the extension period. The district court entered an ex parte order extending the time to file notice of appeal and sent notice of

pose.[38] All that is required to serve this single purpose is a formal motion with the attendant opportunity for any adverse party to be heard. No timeliness constraints should attach to the motion since its timing is immaterial to its purpose. Therefore, a district court should not be deprived of jurisdiction to hear the motion because it is untimely.[39]

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the order to the appellee. The appellant then filed notice of appeal on the penultimate day of the extension period. After expiration of the extension period, the appellee moved the district court to dismiss the appeal on the ground that its ex parte order was invalid. The district court attempted to remedy its error by hearing counsel for both parties argue the excusable neglect issue. The court again found excusable neglect. It instructed the appellant to submit an order that the appeal should be allowed. The appellant never complied with this instruction, and *Plant Economy* was appealed with no written order granting an extension, other than the original ex parte order. The court of appeals, citing *North Umberland*, noted that the ex parte order was void. 308 F.2d at 276. It avoided the excusable neglect issue by holding that "since no effective action was taken in the court below to extend the appeal period," it would dismiss the appeal. *Id.* at 278. But, in dictum, the court went on to state that, in any event, the district court could not have entered a valid order after its second hearing, because expiration of the extension period had deprived it of jurisdiction to proceed further. *Id.*

The question thus raised is whether the Advisory Committee cited *Plant Economy* simply as an additional example of an invalid ex parte extension order, or as explicit authority for the more extensive proposition that expiration of the extension period terminated the district court's jurisdiction to hear a motion for extension even though the notice of appeal had actually been filed within the extension period. The Committee has never addressed this precise question. The available evidence suggests the decision was used as authority for the former purpose, not the latter. When citing *North Umberland, Cohen* and *Plant Economy* for the first time, the Committee stated that it intended to continue the

> decisional law based upon the provision of Rule 6(b): if a request for an extension is made before expiration of the [standard period], it may be granted without motion or notice; if the request is made after expiration of the [standard period], it may be granted only upon motion and notice.

Fed. R. Civ. P. 73(a), Advisory Comm. Note to 1966 amendment, *reprinted in* 9 MOORE'S, *supra* note 7, ¶ 203.25[3], at 782-83. Evidently, the Committee was concerned only with imposing the motion requirement, and not with its resultant effect. Considering that the dictum in *Plant Economy* contravened the Committee's own prior interpretation of the requirement's effect, *see* note 36 *supra*, the very absence of a comment suggests that the Committee intended its use of the case to merely support the ex parte prohibition and nothing more. This inference is further strengthened by observing that the Federal Rules of Appellate Procedure were amended in 1970, 1971 and 1972, and by observing that, as of the 1972 amendments, the *Plant Economy* dictum was flatly opposed by decisions in five circuits and by dictum in another. *See* authorities cited in note 19 *supra*. The Committee would have rejected such decisions if it had intended to adopt the *Plant Economy* dictum in 1966. It should also be noted that one month prior to adoption of the 1972 amendments, the Third Circuit itself expressly overruled the *Plant Economy* dictum. *See* Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084, 1087 (3d Cir. 1972). One can only conclude that the Advisory Committee cited *Plant Economy* for its support of *North Umberland's* prohibition of an ex parte extension after expiration of the standard period and for nothing more.

38. *See* the discussion in notes 35-37 *supra*.

39. To impose a rigid timeliness constraint on the motion for extension, where no

E. Conclusion

Imposition of a timeliness constraint upon the motion requirement would achieve little. If a party were to file a notice of appeal within the extension period but filed no motion for extension, or unduly delayed in filing the motion, the adverse party could always move the district court to dismiss the appeal. Upon that motion, if the appealing party failed to show excusable neglect, the appeal would be dismissed. Even if the party successfully established excusable neglect, the district court would have discretion[40] to grant the extension. In exercising that discretion, it could legitimately consider any undue delay in filing, or failure to file, the motion for extension.[41] Therefore, the only gain achieved by a timeliness constraint on the motion would be to routinely relieve an appellee of any burden to initiate this excusable neglect hearing, a burden the appellee will bear only in those few cases where the appellant fails to file, or unduly delays in filing, a motion for extension. To achieve this small gain would require strict compliance with artificial timeliness constraints in precisely those cases where such compliance could not fairly be exacted.[42] Thus, the *Karstetter* result, reluctantly followed in *Salazar*, is correct, not because it conforms to the practice of the majority of circuits, but because it conforms to logic and policy.

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such arbitrary constraint is required to serve the motion's purpose, would be to adapt the motion requirement to a different purpose. That purpose, implied in the *Salazar* panel's withdrawn opinion, would be to avoid an increase in the "burdens of an already overloaded federal judiciary" by dispersing a cloud of doubt which the panel feared would otherwise hover over the finality of judgments.

40. Fed. R. App. P. 4(a) provides that "[u]pon a showing of excusable neglect, the district court *may* extend the time" to take an appeal. (emphasis added).

41. The twin requirements in rule 4(a) that, after expiration of the standard period, an extension may be requested only by formal motion and may be granted only upon a showing of excusable neglect are derived from the provisions of Fed. R. Civ. P. 6(b). *See* Fed. R. App. P. 4(a), Advisory Comm. Note; 9 Moore's, *supra* note 7, ¶ 204.01[2], at 904; note 36 *supra*. A grant of extension under rule 6(b) has uniformly been interpreted as discretionary, even when excusable neglect is adequately shown. Negligence, bad faith or abuse of the extension privilege are sufficient grounds for denying the privilege. *See* 2 Moore's, *supra* note 7, ¶ 6.08, at 1500.70. Thus, if a party's delay in filing the motion for extension is unrelated to or unjustified by the circumstances originally comprising excusable neglect, or is otherwise unduly prejudicial to the appellee, the district court may deny the extension. *See, e.g.*, Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084, 1087 (3d Cir. 1972).

42. An Advisory Committee Note to the Appellate Rules seems to mandate a policy of liberal construction in cases where injustice would otherwise result. *See* Fed. R. App. P. 3, Advisory Comm. Note, discussed in note 31 *supra*. Furthermore, an earlier Supreme Court policy statement presaged the same result. "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Sanders v. United States, 373 U.S. 1, 8 (1963).