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I. EXTRATERRITORIAL ASSERTION OF JURISDICTION: A "JURISDICTIONAL RULE OF REASON"

A. INTRODUCTION

The Ninth Circuit considered extraterritorial jurisdiction under antitrust legislation in *Timberlane Lumber Co. v. Bank of America.*[1] The traditional test for determining the existence of subject matter jurisdiction under the antitrust laws focused exclusively on the "effect" of the actions complained of upon the foreign commerce of the United States. The court rejected this test and, guiding itself by the field of conflict of laws, fashioned a new balancing test—a "jurisdictional rule of reason."[2]

Timberlane, an Oregon lumber company, alleged violations of the Sherman Antitrust Act by two competing Honduran lumber companies.[3] These companies were controlled by the Bank of

1. 549 F.2d 597 (9th Cir. Dec., 1976) (per Choy, J.); the other panel members were Browning, J. and Gray, J. sitting by designation).

2. This expression is derived from K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 10, 52, 50 (1969); Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order,* 32 TEMP. L. Q. 295, 304-06 (1959); Fortenberry, *Jurisdiction Over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire,* 32 OHIO ST. L. J. 519, 539-45 (1971); Simson, *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad,* 9 J. INT'L L. & ECON. 233, 244-48 (1974); Trautman, *Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation,* 22 OHIO ST. L.J. 586, 588 (1961); Zwarensteyn, *Foreign Reach of the American Antitrust Laws,* 3 AM. BUS. L.J. 163, 170-71 (1965); Comment, *International Law: The Act of State Doctrine as a Limitation Upon the Extraterritorial Application of United States Antitrust Laws,* 21 J. PUB. L. 151, 158-59 (1972); Note, *Extraterritorial Application of Federal Antitrust Laws: Delineating the Reach of Substantive Law Under the Sherman Act,* 20 VAND. L. REV. 1030, 1056 (1967); Comment, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach,* 70 YALE L. J. 259, 272-87 (1960).

3. The court summarized the facts as follows:

> The basic allegation of the Timberlane plaintiffs is that officials of the Bank of America and others located both in the United States and Honduras conspired to prevent Timberlane, through its Honduras subsidiaries, from selling lumber in Honduras and exporting it to the United States, thus maintaining control of the Honduran lumber export business in the hands of a few select individuals financed and controlled by the Bank. The intent and result of the conspiracy, they contend, was to interfere with the exportation to the United States, including

America and, according to Timberlane, attempted to monopolize Honduran lumber exports to the United States. The district court dismissed the action for lack of jurisdiction.[4] The court of appeals vacated the dismissal and remanded for reconsideration in light of the new test for extraterritorial jurisdiction.[5] Some features of the allegations admittedly may have called for a dismissal: foreign nationals were involved, many of the activities complained of took place in Honduras, and the most direct economic impact of those activities was probably on Honduras. Nevertheless, the *Timberlane* court held that a dismissal was inappropriate without a comprehensive analysis of the relative interests of Honduras and the United States, as well as an analysis of the potential conflict with the law or policy of the Honduran government.[6]

B. The Rejection of the "Effect Test"

The scope of American law in the antitrust field extends beyond the activities of American citizens within the United States territory.[7] In addition to interstate commerce, federal antitrust law also regulates foreign commerce between the United States and other nations. This may include acts by foreign nationals and officials of other governments as well as acts by Americans in other countries. Understandably, the assertion of federal antitrust law abroad generates serious concern in other countries and has an impact on their relations with the United States.[8]

> Puerto Rico, of Honduran lumber for sale or use there by the plaintiffs, thus directly and substantially affecting the foreign commerce of the United States. In addition to the antitrust action brought by Timberlane, its employees also brought three diversity suits for injuries received in the same course of events.

549 F.2d at 601.

4. *Id.* After the dismissal of the main action, the three tort suits were dismissed by the district court on the ground of forum non conveniens.

5. The dismissals of the tort suits were also vacated and remanded. The court reasoned that since the district court would be reconsidering the antitrust claim, it might "be convenient and more efficient for the same court to hear these suits." *Id.* at 616.

6. *Id.* at 615.

7. The scope of extraterritorial jurisdiction has been widely discussed by commentators. *See generally* K. Brewster, *supra* note 2; W. Fugate, Foreign Commerce and the Antitrust Laws (2d ed. 1973); Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 Antitrust L. J. 521 (1974).

8. Other countries have protested against what they consider excessive intrusions of American judicial authority into their domain. *See* A. Neale, The Antitrust Laws of the United States of America 365-72 (2d ed. 1970); Ass'n of the Bar of the City of New York, National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations 7-18 (1957); Zwarensteyn, *The Foreign Reach of the American Antitrust Laws*, *supra* note 2, at 165-69 (1965).

International law, as the *Timberlane* court noted, provides little guidance in determining when the incentive for foreign harmony takes precedence over the interests of the United States in asserting extraterritorial jurisdiction.[9] In the field of antitrust litigation, this delicate determination is left to the discretion of the federal courts. Consequently, in addition to the usual judicial considerations in this area, the courts must also take into account political factors typically left to the executive or legislative branches.

In applying the effect test, the district court dismissed for lack of subject matter jurisdiction because it found that the alleged violations had "no direct and substantial effect on United States foreign commerce."[10] Although using different terminology, this approach has been accepted by other courts and advocated by many commentators.[11] The test, in theory, focuses on the nature of the effect of the alleged violation and whether this effect is direct, substantial, and foreseeable. However, while professing to apply the effect test, courts have displayed a concern for other considerations. According to *Timberlane,* the "cases appear to turn, ultimately, on a reconciliation of American and foreign interests in regulating their respective economies and business affairs."[12] This is understandable since, on its face, the effect test considers only American interests and does not take into account those of other nations nor the relationship between the parties involved and this country.[13] So that other factors may be consid-

9. Miller, *Extraterritorial Effects of Trade Regulation,* 111 U. PA. L. REV. 1092, 1094 (1963). Similarly, the court in *Timberlane* pointed out that the Sherman Act itself provides little guidance. *See* 549 F.2d at 609.

10. 549 F.2d at 601.

11. *See, e.g.,* Thomsen v. Cayser, 243 U.S. 66, 88 (1916) ("the combination affected the foreign commerce of this country"); United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945) ("intended to affect imports and exports [and] . . . is shown actually to have had some effect upon them"); United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504, 592 (S.D.N.Y. 1951) ("a conspiracy . . . which affects American commerce"); United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949), *modified and aff'd,* 341 U.S. 593 (1951) ("a direct and influencing effect on trade"). *See also* 1 J. VON KALINOWSKI, ANTITRUST LAW AND TRADE REGULATION § 5.02(2), at 5-120 (1977).

Commentators have also proposed different standards. *See* J. VON KALINOWSKI, *supra* at 5-122 ("direct or substantial"); Rahl, *supra* note 7, at 523 ("in the course of foreign commerce, or . . . substantially affect[ing] either foreign or interstate commerce").

12. 549 F.2d at 611-12. *See* Note, *American Adjudication of Transnational Securities Fraud,* 89 HARV. L. REV. 553 (1976).

13. *See* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 362-72 (2d ed. 1970); Simson, *supra* note 2, at 241-44.

ered, courts have supplemented the effect test with the requirement that the effect on American foreign commerce be a substantial one.[14]

Even with the substantiality requirement, the court rejected the effect test for two reasons. First, the court found the test incomplete because it failed to articulate other factors which may be involved.[15] The court reasoned that

> this failure is costly . . . for it is more likely that [other elements] will be overlooked or slighted in interpreting past decisions and reaching new ones. Placing emphasis on the qualification that the effects be "substantial" is also risky, for the term has a meaning in the interstate antitrust context which does not encompass all the factors relevant to the foreign trade case.[16]

Second, whereas the substantiality requirement is essential in the area of interstate trade, the court found that the requirement might be inappropriate in the area of foreign commerce.[17] Issues of comity and fairness, which are essential to international trade, are not illuminated by adding the requirement of substantiality to the effect test.[18]

C. The New Test for Extraterritorial Jurisdiction

The court of appeals concluded that a tripartite analysis was appropriate in the field of extraterritorial jurisdiction. It must be determined: (1) whether the alleged violation had an effect,

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14. *See* United States v. Watchmakers of Switzerland Information Center, Inc., [1963] Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. Dec. 20, 1962), *order modified*, [1965] Trade Cas. (CCH) ¶ 70,352 (S.D.N.Y. Jan. 7, 1965); United States v. R.P. Oldham Co., 152 F. Supp. 818, 822 (N.D. Cal. 1957); United States v. General Electric Co., 82 F. Supp. 753, 891 (D.N.J. 1949), *decree enforced*, 115 F. Supp. 835 (D.N.J. 1953).

15. The court pointed out that "the effect on American commerce is not, by itself, sufficient information on which to base a decision that the United States is the nation primarily interested in the activity causing the effect." 549 F.2d at 611. It also quoted with approval the observation of former Attorney General Katzenbach that "anything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States." *Id.*, *quoting* Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087, 1150 (1956).

16. 549 F.2d at 612.

17. *Id.*

18. In the field of foreign commerce and extraterritoriality, these observations led the court of appeals to abandon the model of interstate commerce and recommend a different approach—that of conflict of laws. *See id.* at 613.

whether actual or intended, on the foreign commerce of the United States; (2) whether this effect was of a nature and magnitude so as to constitute a violation of the American antitrust laws; and (3) "whether the interests of, and links to, the United States — including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority."[19]

The first two steps of this analytical approach reflect the old effect test. The third step, which the court terms a "jurisdictional rule of reason," will allow the court to evaluate the foreign implications of an assertion of jurisdiction. *Timberlane* envisions that in applying the "jurisdictional rule of reason," a trial court should identify the potential degree of conflict that would occur if American authority were asserted. It should then balance this conflict with the interests of the United States to determine whether an exercise of extraterritorial jurisdiction is warranted.[20] According to the Ninth Circuit panel,

> the elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[21]

This new test possesses one main advantage over the previous test. Although it is not claimed to be exhaustive, it does succeed in isolating the most important factors which are to be evaluated and balanced. Furthermore, the new test solves the problems identified by the court in its criticisms of the effect test.[22]

It is unclear whether the court meant the tripartite analysis

19. *Id.* at 613.
20. *See id.* at 614-15.
21. *Id.* at 614 (footnotes omitted).
22. *See* text accompanying notes 14-18 *supra.*

to apply to areas other than antitrust. Although the phrasing of the second step seems to confine this approach to violations of American antitrust laws, the court also discussed issues of extra-territoriality in general, thereby suggesting that the new test might be useful or appropriate in other areas of foreign commerce.[23]

D. The Tripartite Test Applied to the Lanham Act

In *Wells Fargo & Co. v. Wells Fargo Express Co.*,[24] the Ninth Circuit considered with another case involving the issue of extra-territorial jurisdiction. Unlike *Timberlane,* the actions complained of took place in this country as well as abroad, and the defendant was a foreign corporation with a subsidiary in this country. Further, the jurisdictional question arose not in the context of antitrust law, but in that of trademark infringement and unfair competition under the Lanham Act.[25]

The district court permitted an amendment to the complaint to include the foreign corporation as a defendant, but a year later it ruled that the previous order had been improvidently granted for lack of both personal and subject matter jurisdiction. It held that foreign activities could be reached only if certain factors were present: "(1) Defendant's conduct must have had a substantial effect on United States commerce; (2) defendant must be a United States citizen . . . ; (3) there must be no conflict with trademark rights established under the foreign law."[26] The court of appeals reversed and remanded. Directing the court below to consider theories of "minimum contact" and "presence" as possible bases for in personam jurisdiction,[27] the Ninth Circuit panel ruled that the jurisdictional question should have been resolved

23. *See* 549 F.2d at 608-15.

24. 556 F.2d 406 (9th Cir. April, 1977) (per Choy, J.; the other panel members were Wright, J. and East, J. sitting by designation). Note that Judge Choy also authored the *Timberlane* opinion.

25. 15 U.S.C. §§ 1051-1127 (1970).

26. 358 F. Supp. 1065, 1077 (D. Nev. 1973).

27. In the dismissal by the district court, the foreign defendant was Wells Fargo Express Company, A.G. (A.G.), a Lichtenstein corporation. A.G. had an American subsidiary operating in Nevada, Wells Fargo Express Company (Express), over whom the district court asserted in personam jurisdiction. With regard to A.G., the court of appeals directed the district court on remand to examine theories related to "minimum contacts;" that is, did A.G., by itself or through Express acting as its agent, have sufficient minimum contacts with Nevada to be reached under that state's long-arm statute, at least as to causes of action arising from these contacts. The district court was also directed to examine theories concerning A.G.'s amenability to process for its foreign activities.

by means of the new test proposed in *Timberlane* because the Lanham Act, like the Sherman Antitrust Act, does not delineate the limits of its extraterritorial reach.[28]

On the basis of its extensive analysis of extraterritoriality in *Timberlane,* the circuit court emphatically rejected the requirement that the effect on United States foreign commerce must be a substantial one.[29] Further, although the factors mentioned by the district court were admittedly relevant to the jurisdictional issue, the court held that all these factors need not be present. Instead, "each factor is just one consideration to be balanced in the 'jurisdictional rule of reason' of comity and fairness."[30]

E. The Relationship of the Act of State Doctrine to the New Test

The new test appears to be closely related to the act of state doctrine which in its classic formulation states that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[31] The district court used this doctrine to support its dismissal of *Timberlane.* Apparently it viewed a decision by a Honduran court as an act by a foreign government and, as such, sufficient to trigger the application of the act of state doctrine to provide the defendant with immunity from American courts.[32] The court of appeals disagreed, stating that "the doc-

28. 556 F.2d at 427-29.

29. The court of appeals also held that "the extraterritorial coverage of the Lanham Act should be guaged not so much by the locus of the activity sought to be reached—as the district court below held—as by the nature of its effect on that commerce which Congress may regulate." *Id.* at 428 (citation omitted).

30. *Id.*

31. Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The doctrine was first applied in American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). Its leading modern statement appears in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). *See also* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972).

32. The *Timberlane* court rejected this application of the doctrine as erroneous because the act of state doctrine technically raises no jurisdictional issues; it can only be used as the basis of an objection for failure to state a claim under Federal Rule of Civil Procedure 12. The court of appeals thus reaffirmed Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd,* 461 F.2d 1261 (9th Cir.), *cert. denied,* 409 U.S. 950 (1972). Apart from this, even if the doctrine did apply in the present case, the court of appeals stated that the acts of the Honduran government were not sufficient to grant a dismissal. The range of conduct which might prevent review under the doctrine does not comprise all acts done under the aegis of a foreign government, but

trine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government."[33]

The primary concern of the act of state doctrine is the potential for judicial interference with the foreign relations of the United States, and this concern appears to have been incorporated into the new tripartite test. It certainly seems to be part of, if not identical with, the new test's third step: a determination of the potential degree of conflict if American authority is asserted.[34] However, the opinion in *Timberlane* implied that, for purposes of the tripartite test, the conflict requirement is to be interpreted less stringently than when it is interpreted in the context of the act of state doctrine. Thus, the same danger of conflict which the court found was insufficient to justify granting defendants immunity under the act of state doctrine, when combined with the other factors considered by the court in *Timberlane,* apparently became sufficiently significant to warrant reexamination of the jurisdictional question.

F. Conclusion

The *Timberlane* test for extraterritorial jurisdiction represents an important innovation, but the court of appeals acknowledged that it does not constitute a radical departure from pre-

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only those acts in which there is a potential interference with the foreign relations of the United States. The determinative factor in *Timberlane* was the absence of a potential for interference with the sovereignty of the foreign court or government policy. *See* 549 F.2d at 606-07.

33. 549 F.2d at 606. *Timberlane* recognized that the Supreme Court has held that the basis of the doctrine "was not compelled by the nature of sovereignty, by international law, or by the text of the Constitution . . . . Rather, it derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government." *Id.* at 605. After quoting from *Banco Nacional de Cuba v. Sabbatino, see* note 31 *supra, Timberlane* stated:

> We wish to avoid "passing on the validity" of foreign acts. Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action . . . . On the other hand, repeating the terms of *Sabbatino*, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

Id. at 607 (citations omitted). Thus, the factor that inhibits American courts from exercising jurisdiction is the "public interest" on the part of the foreign state in performing the act in question. "[A] court in the United States . . . will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests." *Id., quoting* Restatement (Second) of Foreign Relations Law of the United States § 41 (1965).

34. *See* text accompanying notes 18 & 19 *supra.*

vious decisions. The issue has been discussed at length by legal commentators, and the tripartite test has been articulated and recommended by at least one scholar.[35] The new test has one primary advantage: it eliminates the discrepancy between the restricted considerations expressed by the courts and the actual grounds upon which the courts have relied. The introduction of the new test is a commendable contribution which is likely to be utilized and adopted throughout the federal court system.

Silvano Miracchi

II. THE NINTH CIRCUIT CONTINUES TO REJECT PENDENT PARTY JURISDICTION

A. INTRODUCTION

In 1973, boxcars carrying bombs for the Department of the Navy exploded in a railway yard, causing damage to persons and property in the rural community of Roseville, California. Following this incident, the plaintiff in *Ayala v. United States*[1] brought suit against the United States under the Federal Tort Claims Act (FTCA).[2] Several plaintiffs sought to join Pullman, Inc., the boxcar manufacturer, as an additional defendant based on diversity jurisdiction.[3] Other plaintiffs, unable to meet the diversity requirements, requested that the district court assert pendent party jurisdiction so that they could prosecute their claims against

35. *See* K. BREWSTER, *supra* note 2. Perhaps, as the court stated, failure to adopt the new test resulted from two conflicting considerations. On the one hand, courts generally are not supposed to participate in political processes. The so-called "political question doctrine" is based primarily on the theories of separation of powers and judicial self-restraint. *See* C. WRIGHT, LAW OF FEDERAL COURTS 45 (2d ed. 1970). On the other hand, the repercussions in the field of foreign relations resulting from the federal courts' assertion of extraterritorial jurisdiction render political considerations inescapable. This conflict, together with the availability of the effect test which was both workable and uncontaminated by political overtones, may explain the longevity of the previous test. Perhaps the act of state doctrine also facilitated adherence to the status quo insofar as it permitted political consideration to be taken into account for the avowed purpose of minimizing political consequences of judicial assertion of extraterritorial jurisdiction. Regardless, it is clear that in this area, political considerations are both theoretically appropriate and practically unavoidable—at least in deciding whether jurisdiction should be granted or withheld, if not in determining the merits of the cases which result from assertion of extraterritorial jurisdiction.

1. 550 F.2d 1196 (9th Cir. May, 1977) (per Choy, J.; the other panel members were Wright and Kilkenny, JJ.), *cert. granted*, 98 S. Ct. 50 (1977) (No. 76-1610).

2. 28 U.S.C. §§ 2671-2680 (1970). *See id.* § 1346(b).

3. *Id.* § 1332 requires that the amount in controversy must exceed $10,000, and there must be complete diversity of citizenship between plaintiffs and defendants. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

Pullman.[4] Since pendent party jurisdiction is not recognized in the Ninth Circuit, the district court dismissed the claims of these plaintiffs.[5] The court of appeals affirmed.[6]

B. THE PENDENT PARTY JURISDICTION DOCTRINE

Federal jurisdiction over nonfederal claims has long been recognized;[7] however, it was not until 1966 that the Supreme Court clearly enunciated the test to be employed in determining whether such jurisdiction should be exercised. In *United Mine Workers v. Gibbs*,[8] Justice Brennan set forth a two part analytical approach. First, a court must determine whether it possesses the constitutional power to exercise jurisdiction.[9] This requires a finding that several elements are present. A state claim must: (1)

4. 550 F.2d at 1197. The plaintiffs asserted two independent theories in support of the court's exercise of pendent party jurisdiction. The first involved the joinder of the manufacturer as a pendent party defendant with each plaintiff's state claim appended to that plaintiff's FTCA claim. *Id.* at 1198. Under the second theory, the pendent parties involved were plaintiffs. Those plaintiffs who failed to meet diversity requirements would append their claims—and themselves—to the diversity actions of other plaintiffs who did meet the diversity requirements. *Id.*

5. *Id.* at 1198.

6. *Id.* Another Ninth Circuit panel reaffirmed the circuit's position in Blake v. Pallan, 554 F.2d 947 (9th Cir. May, 1977) (per Barnes, J.; the other panel members were Wallace, J., and Kelleher, D.J.). The *Blake* court, citing *Ayala*, stated:

> This circuit does not recognize pendent party jurisdiction having consistently held that there is no judicial power to entertain a non-federal claim by a pendent party who is unable to establish independent grounds of federal jurisdiction. . . .
>
> While reconsideration of this circuit's policy towards pendent party jurisdiction may be warranted, the present case does not suggest any strong reason for doing so.

Id. at 957.

7. Federal jurisdiction is of a limited nature, authorized by Congress, and ultimately derived from Article III of the Constitution. Federal jurisdiction, unlike state jurisdiction, can be exercised only if the party invoking it can demonstrate its constitutional or statutory basis. *See* McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1935); Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 7 (1799); *see also* W. BARRON & A. HOLTZOFF, FEDERAL PRACTCE & PROCEDURE § 20 (1960); C. WRIGHT, LAW OF FEDERAL COURTS 15 (2d ed. 1970). However, since legal disputes often contain a mixture of federal and state claims, pragmatic concerns have compelled federal courts to decide both in a single action. This extention of federal jurisdiction into areas otherwise left to state courts required some accompanying theoretical justification, and the federal courts responded by developing the doctrines of ancillary and pendent jurisdiction. For a discussion of the historical development of these two doctrines as perceived by Justice Rehnquist see Aldinger v. Howard, 427 U.S. 1, 7-9 (1976). *See also* Baker, *Towards a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759 (1971); Comment, *Pendent and Ancillary Jrisdiction: Toward a Synthesis of the Two Doctrines*, 22 U.C.L.A. L. REV. 1263 (1975).

8. 383 U.S. 715 (1966).

9. *Id.* at 725.

have a federal anchor—a "substantial" claim which "confer[s] subject matter jurisdiction on the [federal] court;"[10] (2) share with that anchor a "common nucleus of operative fact;"[11] and (3) be so related to the anchor that the two claims "would ordinarily be expected to [be litigated] . . . in one judicial proceeding. . . ."[12] Second, a court must balance factors relevant in each particular case to determine whether the exercise of pendent jurisdiction is advisable.[13] The factors to be considered are judicial economy, convenience and fairness to the litigants, and whether asserting jurisdiction would constitute a federal intrusion into the state judicial sphere.[14] If the benefits of the first two factors outweight the dangers of the third, pendent jurisdiction is warranted.[15]

It is a different, albeit related, question whether pendent jurisdiction should be extended to a party over whom a federal court would otherwise lack jurisdiction.[16] All but the Seventh and Ninth Circuits now recognize some form of pendent party jurisdiction.[17] The circuits recognizing pendent party jurisdiction have

10. *Id.* For a discussion of the substantiality requirement of the *Gibbs* test see *The Supreme Court, 1965 Term,* 80 HARV. L. REV. 91, 220-24 (1966).

11. 383 U.S. at 725.

12. *Id.*

13. The Court observed "that [the] power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Id.* at 726 (footnotes omitted).

14. *Id.*

15. *Id.* It should be pointed out that, because the two parts of the test are so interrelated, a court's determination that the constitutional power exists will simultaneously suggest that discretion be exercised in favor of pendent jurisdiction. First, the presence of a common nucleus of operative fact indicates that judicial economy would be served by disposing of all related claims in a single proceeding. Second, the ordinary expectation that all related claims would be litigated in one proceeding is predicated, at least in part, on the assumption that a single proceeding will promote convenience and fairness to the parties.

16. Aldinger v. Howard, 427 U.S. 1, 9 (1976).

17. At one point, the respective positions of the circuits were described as a "model of disarray." *See* Note, *Federal Pendent Party Jurisdiction and* United Mine Workers v. Gibbs—*Federal Question and Diversity Cases,* 61 VA. L. REV. 194, 206-08 (1976). The following circuits recognize pendent party jurisdiction in federal question cases: First (Bowers v. Moreno, 520 F.2d 843 (1st Cir. 1975)); Second (Leather's Best, Inc. v. S.S. Mormaclynz, 451 F.2d 800 (2d Cir. 1971)); Third (Curtis v. Everette, 489 F.2d 516 (3d Cir. 1973), *cert. denied,* 416 U.S. 995 (1974)); Fourth (Stone v. Stone, 405 F.2d 94 (4th Cir. 1968), *cert. denied,* 409 U.S. 1000 (1972)); Fifth (Florida E. Coast Ry. v. United States, 519 F.2d 1184 (5th Cir. 1975)); Sixth (Patrum v. City of Greensburg, 419 F.2d 1300 (6th Cir. 1969)); and Eighth (Schulman v. Huck Finn, Inc. 472 F.2d 864 (8th Cir. 1973)).

The following circuits recognize pendent party jurisdiction in diversity cases; Third (Nelson v. Keefer, 451 F.2d 289 (3rd Cir. 1971)); Fourth (Stone v. Stone, 405 F.2d 94 (4th Cir. 1968)); Sixth (Beauty Tuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1970));

found "no reason why the [*Gibbs*] principles should not . . . apply to pendent state-law claims involving the joinder of additional parties"[18] and have exercised jurisdiction where the *Gibbs* test was satisfied.[19]

C. The Current Position of the Ninth Circuit

Reasoning that *Gibbs* dealt with pendent claims and not pendent parties, the Ninth Circuit has not felt compelled to follow the lead of other circuits. In fact, it has consistently maintained that the requisite power to exercise pendent party jurisdiction does not exist.[20]

The Supreme Court recently had the opportunity to rule on the Ninth Circuit position in *Aldinger v. Howard.*[21] The Court concluded, however, that "it would be as unwise as it would be unnecessary to lay down any sweeping pronouncements upon the existence or exercise of such jurisdiction."[22] Instead, the Court affirmed the Ninth Circuit's denial of pendent party jurisdiction

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Eighth (Lynch v. Porter, 446 F.2d 225 (8th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972)); and Tenth (Neibuhr v. State Farm Mut. Auto Ins., 486 F.2d 618 (10 Cir. 1973)). *But see* Fortune, *Pendent Jurisdiction—The Problem of "Pendenting Parties,"* 34 U. Pitt. L. Rev. 1 (1973); Note, *supra* at 224-25.

These circuits base their acceptance of the doctrine on *Gibbs* and subsequent Supreme Court decisions in Aldinger v. Howard, 427 U.S. 1 (1976), and Moor v. County of Alameda, 411 U.S. 693 (1973), *discussed in* Sullivan, *Pendent Jurisdiction: The Impact of Hagans and Moor,* 7 Ind. L. Rev. 925, 944-46 (1973). However, these circuits generally assume the existence of the constitutional power to exercise pendent jurisdiction. They focus exclusively on the discretionary part of the *Gibbs* test. For example, in Bowers v. Moreno, 520 F.2d 843 (1st Cir. 1975), the First Circuit upheld the district court's assertion of pendent party jurisdiction. *Id.* at 847. After outlining the *Gibbs* test, the *Bowers* court analyzed the use of discretion without first ascertaining if the court had the power to exercise such jurisdiction. *See id.; see also* Chatzicharalambus v. Petit, 430 F. Supp. 1087 (E.D. La. 1977).

Only the Ninth and Seventh Circuits refuse to recognize pendent party jurisdiction in all cases. *See* Aldinger v. Howard, 513 F.2d 1257 (9th Cir. 1975), *aff'd on other grounds,* 427 U.S. 1 (1976); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974).

18. Aldinger v. Howard, 427 U.S. 1, 20 (1976) (per Brennan, J.) (dissenting).

19. *See* cases cited at note 17 *supra.*

20. In Williams v. United States, 405 F.2d 951 (9th Cir. 1969), the court affirmed the dismissal of a pendent party for lack of independent federal jurisdiction. *Id.* at 955. In Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969), the court rejected the doctrine of pendent jurisdiction as applied to parties, *id.* at 137, and cited as controlling precedent Kataoka v. May Dep't Stores Co., 115 F.2d 521 (9th Cir. 1940), a case that preceded *Gibbs* by 26 years. 407 F.2d at 138. For further discussion of these cases see note 35 *infra* and accompanying text.

21. 427 U.S. 1 (1976).

22. *Id.* at 18.

on the limited ground of the statute involved in that case.[23] Despite statutory language which authorizes a cause of action against a "person,"[24] the plaintiff to *Aldinger* sought to join a county as a pendent party defendant. The Court held that there was a clear congressional intent to exclude counties from the operation of the statute.[25]

In earlier Ninth Circuit decisions, the court did not employ the kind of careful statutory analysis undertaken by the Supreme Court in *Aldinger;* therefore, the appellants argued that the decisions should not be dispositive. The appellants maintained that when reviewing the applicable statute "analysis must isolate an express or implied legislative 'disinclination.' "[27] Mere congressional silence, they argued, is insufficient to preclude pendent party jurisdiction.[28]

The *Ayala* court responded that, even assuming an absence of congressional disinclination toward pendent party jurisdiction in the present circumstances, *Aldinger* raised a more fundamental obstacle to the doctrine's adoption—the constitutional question of whether pendent party jurisdiction falls within the limited scope of jurisdiction under Article III.[29] According to the *Ayala* court, "[t]he Supreme Court's affirmance in *Aldinger,* grounded as it was on a congressional disinclination to allowing pendent party jurisdiction, may thus be read as another avoidance of the

23. *Id.* at 16.

24. 42 U.S.C. § 1983 (1970) provides:

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

25. 427 U.S. at 16. The Court proceeded to narrow its holding even further:

> All that we hold is that where the asserted basis of federal jurisdiction over a municipal corporation is not diversity of citizenship, but is a claim of jurisdiction pendent to a suit brought against a municipal officer within § 1343, the refusal of Congress to authorize suits against municipal corporations under the cognate provisions of § 1983 is sufficient to defeat the asserted claim of pendent party jurisdiction.

Id. at 12.

26. 550 F.2d 1199.

27. *Id.*

28. *Id.*

29. *Id.*

ultimate question of constitutional power left unanswered by the Court. . . ."[30] However, the Supreme Court clearly implied that such power exists, at least with respect to an action brought under the FTCA, when it suggested in *Aldinger* that pendent party jurisdiction might be appropriate in such a case.[31] The *Ayala* court simply dismissed this suggestion as dictum and saw no reason to disturb its previous holdings until the Supreme Court confronted the "subtle and complex question with far-reaching implications."[32]

D. The Ninth Circuit Position Evaluated

The *Ayala* court premised its decision on circuit precedent, especially *Hymer v. Chai.*[33] The court stated that "it is clear that *Hymer's* rejection of pendent party theory was not based on a ferreted congressional disinclination, but rather rested on a more fundamental constitutional consideration."[34] However, *Hymer* was not based on a determination of the constitutional issue. Rather, the *Hymer* court declared that it was bound by circuit precedent which antedated *Gibbs* by twenty-six years.[35] In light

30. *Id.* at 1200 (footnote omitted).

31. The *Aldinger* Court stated:

> When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together.

427 U.S. at 18 (emphasis in original). The Court's choice of words here is unfortunate. While the Court is acutely aware of the *Gibbs* distinction between constitutional power and judicial discretion, its language seems to meld the two concepts. This will only serve to perpetuate the confusion concerning pendent party jurisdiction at the circuit court level. *See* note 17 *supra.*

32. 550 F.2d at 1200, *quoting* Moor v. County of Alameda, 411 U.S. 693, 715 (1973).

33. 407 F.2d 136 (9th Cir. 1969).

34. 550 F.2d at 1199-1200.

35. *Hymer* cited Kataoka v. May Dep't Stores Co., 115 F.2d 521 (9th Cir. 1940), as precedent for its denial of pendent party jurisdiction. However, *Kataoka* merely cited another Ninth Circuit case, Gavica v. Donaugh, 93 F.2d 173 (9th Cir. 1937), as authority for its refusal to exercise jurisdiction. *Gavica* similarly cited other cases rather than indepenently determining the issue. *See* Lion Bonding Co. v. Karatz, 262 U.S. 77, 85 (1923); Scott v. Frazier, 253 U.S. 243, 244 (1920); Pinel v. Pinel, 240 U.S. 594, 596 (1916); Rogers v. Hennepin County, 239 U.S. 621, 622 (1916); Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40 (1911); Wheless v. St. Louis, 180 U.S. 379, 382 (1901); Bateman v. Southern Ore. Co., 217 F. 933 (9th Cir. 1914). These cases may be distinguished from the situation in *Ayala* in that they considered the propriety of aggregating numerous parties' claims for purposes of satisfying the amount in controversy requirement, not for purposes of defeating a lack of complete diversity or subject matter jurisdiction, as the plaintiffs alleged here.

of the Supreme Court's apparent receptiveness to the doctrine, especially in suits involving the FTCA, *Ayala* provided the Ninth Circuit with an opportunity to scrutinize the constitutional underpinnings of its position.

If, as Justice Brennan and eight circuits have indicated,[36] the *Gibbs* reasoning applies to parties as well as claims, the *Ayala* court could have exercised pendent party jurisdiction over Pullman. First, a substantial federal claim was present. Second, the boxcar explosion provided a common nucleus of operative fact for the pendent claims to share with the anchor claims. Third, the pendent claims ordinarily would be expected to be litigated in one judicial proceeding with the anchor claims.

Had the *Ayala* court recognized its power to exercise pendent party jurisdiction, it should then have proceeded to determine whether the use of the power would have been appropriate. Since none of the factors to be considered raised any difficulty, assertion of jurisdiction would have been indicated.[37] First, the goal of judicial economy would have been furthered by trying together all the claims resulting from the explosion. Second, pendent jurisdiction would have promoted convenience and fairness to the litigants by avoiding the additional expenses and risk of inconsistent results entailed by separate litigation. Since there was exclusive federal jurisdiction over claims against the United States, only a federal court could try all the claims together.[38] Finally, the danger of federal intrusion into the state judicial sphere would have been minimal, since it would have been unlikely that exercising pendent jurisdiction would have introduced any new questions of state law not raised by the other claims already subject to diversity jurisdiction.

It may be argued, however, that under the theories advanced by the appellants in support of pendent party jurisdiction[39] defendants may be at a disadvantage because plaintiffs can engage in forum shopping. Nonetheless, as Justice Brennan stated in his dissent in *Aldinger,* possible litigant hardship "does not vitiate

36. *See* notes 17-18 *supra* and accompanying text.

37. It is interesting to note that the *Ayala* court acknolwedged that "[i]n the instant case, the district judge has ruled that, should this court approve pendent party jurisdiction, he would exercise his discretion in favor of it." 550 F.2d at 1200 n.6.

38. *See* note 31 *supra.*

39. *See* note 4 *supra.*

the *Gibbs* analysis or its application to the question of [the power] of pendent party jurisdiction."[40] Rather, unfairness to defendants will be prevented by judicial discretion.[41] The benefits to be derived from pendent party jurisdiction are lost by steadfastly retaining a policy which bars pendent party jurisdiction in all situations. A general recognition of the power of pendent party jurisdiction, tempered in each case by the application of the discretion is clearly preferable.

Silvano Miracchi

III. WRITS OF MANDAMUS AND THEIR APPLICABILITY TO CLASS CERTIFICATION ORDERS

A. INTRODUCTION

In several cases decided this term, Ninth Circuit panels ruled on the propriety of issuing writs of mandamus to vacate or modify class certification orders. The Ninth Circuit's aim in this line of cases was to meet "the challenge to the federal appellate courts . . . to formulate objective principles to guide the exercise of their [writ] power . . . . In the absence of guiding and limiting principles, appellate use of the peremptory writs could readily subvert the policies underlying the finality rule. . . ."[1] The

40. Aldinger v. Howard, 427 U.S. 1, 21 (1976) (dissenting opinion).

41. *See* note 13 *supra*. It should also be noted that, even if the decision to assert jurisdiction should later prove to be mistaken, it can be reversed at any subsequent stage of the proceedings. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966); Note, *UMW v. Gibbs and Pendent Party Jurisdiction,* 81 HARV. L. REV. 657, 658-60 (1967).

1. Bauman v. United States District Court, 557 F.2d 650, 653 (9th Cir. July, 1977) (per Wallace, J.; the other panel members were Goodwin and Hufstedler, JJ.). The "All Writs Statute," 28 U.S.C. § 1651(a) (1976) provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The statute descends, essentially unchanged, from section 14 of the Judiciary Act of 1789, 1 Stat. 81 (1789). For a discussion of the history of the Act *see* In re Josephson, 218 F.2d 174, 177-80 (1st Cir. 1954). The *Bauman* court stated:

> Unprincipled use of that power could also operate to undermine the mutual respect that generally and necessarily marks the relationship between federal trial and appellate courts. Further, without articulable and practically applicable guidelines to govern the issuance of extra-ordinary writs, appellate judges would continually be subject to the temptation to grant such relief merely because they are sympathetic with the purposes of the petitioners' underlying actions, or because they question the trial court's ability to direct the litigation efficiently or impartially.

557 F.2d at 653-54 (footnotes omitted).

cases, when considered collectively, establish the manner in which the Ninth Circuit will implement the recent Supreme Court case of *Kerr v. United States District Court,*[2] particularly as it applies to interlocutory orders of class certification.

B. Background

The Supreme Court has greatly increased the availability of writs of mandamus during the past twenty years. The traditional view of these writs was expressed in *Parr v. United States,*[3] where the Court held that proper exercise of the writ was limited to those cases in which an inferior court had exceeded or refused to exercise its jurisdiction or where appellate review would be frustrated.[4] The rationale for this limitation was the congressional policy against piecemeal litigation which underlies the final judgment rule.[5]

In 1957, the Supreme Court broadened the criteria for issuing writs of mandamus. While not disapproving *Parr, La Buy v. Howes Leather Co.*[6] established what has come to be known as the doctrine of supervisory mandamus: "'[W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force', mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked."[7] The Court insisted, however, that this remedy is so drastic that it should be resorted to only in extraordinary circumstances.[8]

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2. 426 U.S. 394 (1976).

3. 351 U.S. 513 (1956).

4. *Id.* at 520, 521. *See also* Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382-85 (1953); DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943); *Ex parte* Peru, 318 U.S. 578, 582-86 (1943); Maryland v. Soper, 270 U.S. 9, 29-30 (1926).

5. *See* 28 U.S.C. § 1291 (1976), which provides in pertinent part: "The courts of appeals shall have jurisdiction of appeals from all final decision of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

6. 352 U.S. 249 (1957). In *La Buy,* the petitioner judge had referred substantial issues of fact in two antitrust cases to a master pursuant to FED. R. CIV. P. 53(b). Both parties to the litigation appealed. These referrals, and the Seventh Circuit Court of Appeals issued writs of mandamus to vacate them. *Id.* at 254. The Supreme Court found that the referrals amounted to an abdication of judicial power and upheld the writs. *Id.* at 256.

In his dissenting opinion, Justice Brennan argued that *La Buy* was a case in which "the district [court had] erred in ruling on matters within [its] jurisdiction. The extraordinary writs do not reach to such cases. . . ." *Id.* at 260-61. He argued that the majority opinion allowed circumvention of final judgment rule.

7. *Id.* at 256.

8. *id.* at 258. *La Buy* was found to be such an exceptional case, insofar as the trial

In 1964 and 1967, the Court attempted further refinements of mandamus criteria in *Schlagenhauf v. Holder*[9] and *Will v. United States.*[10] In *Schlagenhauf,* the Court analyzed the propriety of writs of mandamus noting that the traditional use of the writ was to confine courts to the lawful exercise of their jurisdiction even though hardship might result from delay.[11] However, the Court acknowledged that the writ is properly issued whenever there is a clear abuse of discretion.[12] The Court gave little consideration to *La Buy's* extraordinary circumstances requirement, referring neither to the consequences of allowing the trial judge's order to stand nor to whether the error was a persistent one. However, it did add an important caveat: "The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.'"[13] *Will v. United States,*[14] in which the Court vacated a writ of mandamus, emphasized that in addition to meeting the extraordinary circumstances requirement, the petitioner must show the right to the writ is indisputable.[15]

In its most recent decision, *Kerr v. United States,*[16] the Su-

judge's order referring antitrust matters to a special master manifested a persistent disregard of instructions to the contrary by the Seventh Circuit Court of Appeals.

9. 379 U.S. 104 (1964). The respondent judge had ordered that the driver undergo nine examinations; the codefendants had only requested four. The court of appeals denied the petitioner's request for a writ of mandamus to vacate the order, and the Supreme Court "granted certiorari to review undecided questions concerning the validity and construction of Rule 35." *Id.* at 109.

10. 389 U.S. 90 (1967).

11. 379 U.S. at 109-110.

12. *Id.* at 110. The Court found that the trial judge lacked authority to order the examination. This fact was coupled with questions as to the validity of FED. R. CIV. P. 35. The questions presented included whether rule 35 violated the Constitution or the statutory enabling act, whether rule 35 permitted mental or physical examination of a defendant, and the meaning of certain critical terms contained in the rule. Therefore, the Court held that mandamus was an appropriate remedy. *Id.* at 111-12.

13. *Id.* at 112.

14. 389 U.S. 90 (1967). In *Will,* the petitioning judge indicated his intention to dismiss a criminal tax evasion indictment unless the government complied with his order for a list of names and addresses of persons to whom statements were made by the defendant. The government declined, claiming the judge had no authority under FED. R. CRIM. P. 7(f) to require production of a list of prosecution witnesses, and petitioned for a writ of mandamus. The court of appeals ordered that the request for information be vacated, and the Supreme Court reversed that order. *Id.* at 94-95.

15. 389 U.S. 96 (1967).

16. 426 U.S. 394 (1976). In a class action filed by state prisoners against various officials of the California Department of Corrections, the trial judge overruled objections of confidentiality and ordered the defendants to produce certain documents. The defendants' petitions for writs of mandamus were denied by the court of appeals because the

preme Court added two conditions to insure that the writ would only issue in extraordinary circumstances. First, the party seeking issuance of the writ can have no other means to attain the relief desired. Second, the right to the writ must be clear and indisputable.[17] However, the Court recognized that issuance of the writ was in large part committed to the discretion of the court to which the petition was addressed. Thus, refusal by an appellate court to exercise its power would not be held reversible error.[18] Although *Kerr's* deference to an appellate court's discretion does not deter improvident exercises of mandamus authority,[19] *Kerr* did provide a framework for fashioning guidelines for issuing the extraordinary writ.

C. *Green*: RULE 23(B)(1) CERTIFICATION ORDERS IN DAMAGE ACTIONS

Green v. Occidental Petroleum Corp.[20] was a securities fraud class action in which it was alleged that the defendants distorted reports of profits and income in press releases and reports to shareholders. The action was initiated when the Securities and Exchange Commission filed a complaint for injunctive relief.[21] Subsequently, a number of private civil actions were filed; several of these were consolidated in *Green*. The trial judge certified the litigants as a properly constituted class under rule 23(b)(1) and 23(b)(3).[22] The defendants unsuccessfully sought certification for

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assertion of privilege was insufficient. *Id.* at 399-400. The Supreme Court affirmed. *Id.* at 406.

17. *Id.* at 403.

18. *Id.*

19. *See* text accompanying notes 29-40 *infra.*

20. 541 F.2d 1335 (9th Cir. Aug., 1976) (per curiam) (the panel members were Duniway, JJ., Kilkenny, JJ. and Sneed, J., who filed a separate concurring opinion).

21. *Id.* at 1337.

22. FED. R. CIV. P. 23 provides in pertinent part:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to

an interlocutory appeal of the class order under 28 U.S.C. § 1292(b).[23] The defendants then petitioned the court of appeals for

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individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

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

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

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

The factors which distinguish rule 23(b)(1) certifications from their 23(b)(3) counterparts are that 23(b)(1) classes do not require the notice and opt-out procedures mandated by FED. R. CIV. P. 23(c)(2):

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

For an extensive analysis of this area of federal procedure *see Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976). *See also* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973); Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1973); Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123 (1974).

23. Certification was sought pursuant to 28 U.S.C. § 1292(b) (1976), which 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 there-

a writ of mandamus directing the trial judge to certify the class issue for appeal or, in the alternative, for a writ vacating the plaintiff's class certification. The defendant also filed a direct appeal.[24]

The court noted that it had no jurisdiction to entertain an appeal under 28 U.S.C. § 1291[25] because class certification is not viewed as a final order in the Ninth Circuit.[26] Further, jurisdiction was not appropriate under 28 U.S.C. § 1292(b)[27] where the trial judge refused to certify the class issue for interlocutory appeal.[28] The court explained that such certification requires that the trial judge believe that the appeal qualifies under the terms of section 1292(b). If, in the trial court's discretion, the matter is properly appealable, the appellate court is vested with authority to permit the appeal. The court of appeals cannot unilaterally assume an appeal without the concurrence of the trial court.[29] However, the

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> upon, in its discretion, permit an appeal to be taken from such order, . . . *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

24. 541 F.2d at 1339.

25. 28 U.S.C. § 1291 (1976).

26. 541 F.2d at 1338.

27. 28 U.S.C. § 1292(b) (1976).

28. 541 F.2d at 1338. This is a settled question in other circuits. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972); United States v. 687.30 Acres of Land, 451 F.2d 667 (8th Cir. 1971); D'Ippolito v. Cities Serv. Co., 374 F.2d 643, 649 (2d Cir. 1967).

29. 541 F.2d at 1338. In dismissing the defendants' direct appeal, the *Green* court followed Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976), another securities fraud class action. For an extensive discussion of *Blackie see* Note, *Appealability and Certification of Rule 10b-5 Class Actions*, 7 GOLDEN GATE U.L. REV. 258 (1976). The *Blackie* court held that class certification is not a final judgment. Neither does it fall within the collateral order or the death knell doctrine exceptions to the final judgment rule. 524 F.2d at 896-98. The collateral order exception allows immediate appeal if: (1) the class action order operates as a final determination of rights which can be separated from the basic cause of action; and (2) the collateral rights asserted would be irretrievably lost if review were deferred until final judgment was entered. This exception was adopted by the Supreme Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), in order to give the final judgment rule a "practical rather than a technical construction." *Id.* at 546.

The death knell doctrine provides that if the denial of class certification effectively terminates a suit, appeal may be taken before determining the case on its merits. The Second Circuit created this theory of interlocutory appeal in Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) *(Eisen I)*. The death knell doctrine was adopted by the Ninth Circuit in Falk v. Dempsey-Tegeler & Co., 472 F.2d 142 (9th Cir. 1972). However, the continued viability of the doctrine is in question. The Supreme Court recently heard oral argument on two cases in which the petitioners challenged the death knell doctrine as an "improper judicial revision of the plain language of

Green court issued a writ of mandamus compelling the trial court to vacate its rule 23(b)(1) class certification.[30] It distinguished certification under rule 23(b)(1) and 23(b)(3).[31] It noted that a writ of mandamus was not appropriate regarding the 23(b)(3) classification because the plaintiff's allegations and other materials before the trial judge were "sufficient to form a reasonable judgment on each [of the four] requirements [of 23(b)(3)]" and the trial judge made a diligent effort to determine the future course of the litigation. However, mandamus was appropriate to correct the district court's certification under rule 23(b)(1).[32] In so holding, the Ninth Circuit reaffirmed its disapproval of 23(b)(1) certification for class actions in which damages are sought.[33]

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§ 1291." 46 U.S.L.W. 3595 (U.S. Mar. 28, 1978) (oral argument on *Coopers & Lybrand v. Livesay*, No. 76-1836, and *Punta Gorda Isles, Inc. v. Livesay*, No. 76-1837).

The *Blackie* panel refused to adopt a third exception to the final judgment rule—the reverse death knell doctrine. The Second Circuit formulated this exception in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1007 n.1 (2d Cir. 1973) *(Eisen II)*. The doctrine was explicated in Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308, 1312 (2d Cir. 1974). The Second Circuit held that class certification could be appealed if: (1) reversal of class certification would likely terminate the plaintiff's action (hence the term reverse death knell—*see* Kohn v. Royall, Koegel & Wells, 496 F.2d 1094, 1098-99 (2d Cir. 1974)); (2) the order is separable from the merits; and (3) maintenance of the suit would have a coercive effect on the defendant. *See* Herbst, 495 F.2d at 1313. The Second Circuit has since limited the applicability of the test and attempted to merge it with the collateral order doctrine. *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). Due to the coercive effect of class action determination, this doctrine permits a defendant to appeal a grant of class certification if certain conditions are met. *See* Comment, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 548, 551 (1975); Note, *The Finality and Appealability of Interlocutory Orders—A Structural Reform Toward Redefinition*, 7 SUFFOLK U.L. REV. 1037, 1049 (1973).

The Ninth Circuit stated that this doctrine "impermissibly disregards the conditions placed on appealability." 524 F.2d at 896-97. A grant of class certification does not "threaten [a] defendant with any irreparable harm. . . . [A]ppeal after the litigation fully protects [a defendant] from a judgment for an improper class." *Id.* at 897. Thus, the Blackie panel did not consider increased litigation costs or the coercive impact of large-class, small-claim actions to inflict sufficient harm upon defendants to warrant an exception to the finality rule. *Id.* at 897-900.

30. 541 F.2d at 1341.

31. *Id.*

32. *Id.* at 1340.

33. This position was expressed in McDonnell Douglas Corp. v. United States District Court, 523 F.2d 1083 (9th Cir. 1975), wherein the district court certified all the next of kin as a class under rule 23(b)(1). The *McDonnell Douglas* court ordered the district court to vacate its certification, reasoning, *inter alia*, that neither of the subdivisions of rule 23(b)(1) "permit certification of a class whose members have independent tort claims arising out of the same occurrence and whose representatives assert only liability for damages." *Id.* at 1085. Multiple tort actions, stated the *McDonnell Douglas* court, do not create a risk of "incompatible standards of conduct for the part opposing the class" nor

From the standpoint of the proper issuance of writs of mandamus, the rule of *Green* would appear to be that plaintiff class certification orders under either rule 23(b)(1) or 23(b)(3) are subject to mandamus whenever they evidence a clear abuse of discretion. Thus, under rule 23(b)(3), class certification may be ordered vacated if the district court opinion fails to disclose a conscientious effort by the trial judge in evaluating the sufficiency of the complaint's allegations, in considering the type of proof necessary to establish the allegations, and in forecasting the future course of the litigation.[34] Since a rule 23(b)(1) class certification is improper in a suit for damages,[35] it would appear to give rise to an automatic writ of mandamus. However, *Green* was decided prior to the Supreme Court's decision in *Kerr*. While *Kerr*'s requirement of "clear and indisputable" right to the writ was later inter-

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do they "as a practical matter [dispose] of the interests of the other [class] members not parties to the adjudications or [impair] their ability to protect their interests." *Id.* at 1086. For the basis of this holding, *see* La Mar v. H. & B. Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973). FED. R. CIV. P. 23(b)(1)(A) authorizes class actions to eliminate the possibility of inconsistent adjudications which would impose incompatible standards of conduct on those opposing the class. In a class action for damages, stated the *La Mar* court, "the defendants . . . can continue the conduct of which the plaintiffs complain even if the plaintiffs are successful." *Id.* at 466. Rule 23(b)(1)(B) authorizes class actions where individual actions would be dispositive of the interests of other class members not parties. The *La Mar* court held that

> the success or failure of the plaintiffs in their individual [damage actions would] not inescapably alter the rights of others similarly situated. Their claims are left untouched by separate actions. Neither the *stare decisis* consequences of an individual action nor the possibility of false reliance upon the improper initiation of a class action can supply either the practical disposition of the rights of the class, or the substantial impairment of those rights. . . .

Id. at 467. The *McDonnell Douglas* court found that the extraordinary remedy of mandamus was properly invoked because

> [n]ot only is the district court's decision contrary to [our disapproval of class certification under 23(b)(1) in damage actions], it is also inconsistent with any tenable interpretation of Rule 23. We are also aware that the district court has reached an identical decision in a prior case. Repeated errors of this magnitude in applying the Federal Rules of Civil Procedure may be corrected by mandamus.

523 F.2d at 1087 (citations omitted). In Pan Am World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975), a companion case to *McDonnell Douglas*, the court of appeals issued a writ of mandamus to prevent the district court judge from notifying potential plaintiffs of the actions prior to class certification. *Id.* at 1081. It reasoned that "[n]otice from the court to potential plaintiffs not authorized explicitly by statute or rule is so extraordinary that review of such actions by mandamus will not frustrate the congressional policy permitting appeals only from final judgments." *Id.* at 1076.

34. 541 F.2d at 1341.

35. *Id.* at 1340.

preted by the Ninth Circuit to be equivalent to the "clear abuse of discretion" standard,[36] *Kerr* added another requirement which might appear to foreclose future issuance of writs of mandamus for erroneous class certifications: "the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires. . . ."[37] However, since *Kerr* did not displace the discretion which may be exercised by the court of appeals to which a petition for a writ if addressed,[38] it appears that the Ninth Circuit is free to exercise its supervisory power to order rule 23(b)(1) certifications vacated. In subsequent cases,[39] the Ninth Circuit has given clear indication that it will continue to adhere to *Green* in order to "remedy the collateral harm that will flow from the error."[40]

D. *Arthur Young:* Interpretation of Mandamus Requirements in Light of *Kerr*

In *Arthur Young & Co. v. United States District Court,*[41] another securities fraud class action, the defendants unsuccessfully petitioned for a writ of mandamus to vacate and strike all class allegations from the complaint.[42] Citing *Kerr,* the panel stated that mandaus was an extraordinary remedy, and the recent expansion of its scope would not admit of "frivolous and dilatory petitions under the guise of requests for 'supervision' or 'advice' from the Court of Appeals."[43] According to the *Arthur Young* court,

> [t]he Supreme Court has thus directed us to examine, on a petition for a writ of mandamus, the degree of certainty that there was error committed by the district court and the alternative procedural means available to either correct the error or remedy the collateral harm that will flow from the error. If we determine that the error, if any, is not

36. *See* text accompanying note 44 *infra.*

37. 426 U.S. at 403.

38. *Id.*

39. Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. July, 1977); Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686 (9th Cir. Mar., 1977).

40. 549 F.2d at 692 & n.8. *See also* Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. July, 1977), where the court declared that "[the defendant in Green] would have been prejudiced by erroneous notice and opt-out procedures." *Id.* at 655.

41. 549 F.2d 686 (9th Cir. Mar., 1977) (per Lucas, D.J., sitting by designation; the other panel members were Browning and Choy, JJ.), *cert. denied,* 434 U.S. 829 (1977).

42. *Id.* at 687-89.

43. *Id.* at 691 n.7.

> "clear and indisputable," or that there are alternative means available to correct the error or remedy the harm, the writ will not issue.[44]

The court in *Arthur Young* found no clear error in the district court's decision.[45] Therefore, it declined to "determine whether remedies alternative to mandamus exist or whether the gravity and nature of the harm compels us to exercise our discretion to issue the writ."[46] Thus, in its first ruling following the Supreme Court's opinion in *Kerr,* the Ninth Circuit did not have occasion to examine and rule on the condition which *Kerr* introduced—the availability of other means of review.

E. *Bauman:* Guidelines for Determining Availability of Mandamus

In *Bauman v. United States District Court,*[47] plaintiffs in a Title VII action petitioned the court of appeals to delete portions of a conditional class certification order under rule 23(b)(2).[48] The order directed the plaintiffs to notify all individuals who could be located through reasonable efforts that they could either opt out or make individual allegations of discrimination.[49] The trial court required this notice in order to assure that the prerequisites of a class action were met.[50] The petitioners contended that the notice provisions of the district court order were "so onerous and damaging to the class action" as to deny effectively the class certification and injunctive relief sought.[51] They claimed that class members would either opt out of fail to opt in[52] thus providng a reason to decertify that class on the ground that the members were not

44. *Id.* at 691-92. The court referred to its decision in *Green,* stating that "the 'clear and indisputable' error furnished the 'compelling circumstances' necessary for the issuance of the writ." *Id.* at 692 n.8.

45. *Id.* at 692-697.

46. *Id.* at 692.

47. 557 F.2d 650 (9th Cir. July, 1977) (per Wallace J.; the other panel members were Goodwin and Hufstedler, JJ.).

48. *Id.* at 652.

49. *Id.* at 652.

50. *Id.* at 652-53. The trial court acted pursuant to Fed. R. Civ. P. 23(d) (1970) which vests the trial court with a substantial degree of discretion in the management of a class action.

51. *Id.* at 656.

52. The petitioners contended that Union Oil had engaged in retaliatory practices and that the class members lacked "sophistication" regarding their rights. *Id.* The petitioners were apparently concerned that class member nonresponses would be understood by the trial court as indications of a desire to be excluded from the class. However, the court of appeals foreclosed this interpretation.

so numerous to qualify for a class action. As a result, the scope of injunctive relief would be diminished.[53] The petitioners argued, therefore, that the interlocutory order was immediately appealable.[54]

The *Bauman* panel refused to grant the writ.[55] In so doing, it developed guidelines which appear to implement the *Kerr* standards:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires.
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. . . .
> (3) The district court's order is clearly erroneous as a matter of law. . . .
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
> (5) The district court's order raises new and important problems, or issues of law of first impression.[56]

However, the court pointed out that these guidelines do not always lend themselves to clear-cut determinations and "rarely if ever will a case arise where all guidelines point in the same direction. . . . The considerations are cumulative and proper disposition will often require a balancing of conflicting indicators."[57]

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53. *Id.*

54. 28 U.S.C. § 1292(a)(1) provides in pertinent part:

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

In reference to the above statute, the *Bauman* court stated:

> [A]n order refusing to certify a Rule 23(b)(2) class seeking injunctive relief from violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, . . . is an appealable one under 28 U.S.C. § 1292(a)(1) because its *effect* is a "denial of the broad injunctive relief" which the plaintiffs sought on behalf of the class.

Id. at 656 n.6 (citation omitted), *citing* Price v. Lucky Stores, Inc., 501 F.2d 1177, 1179 (9th Cir. 1974).

55. 557 F.2d at 662.

56. *Id.* at 654-55. (citations omitted).

57. *Id.* at 655. The panel noted that generally more than one guideline was present

The panel applied the guidelines to the facts of *Bauman* and concluded that this was one of the rare cases where all five guidelines pointed in the direction requiring denial of mandamus.[58] First, the court declared that the mere possibility of a direct appeal may constitute "other adequate means" to obtain relief.[59] Second, any damage which petitioners might suffer by reason of a reduction of the class size could be corrected on appeal after final judgment.[60] Third, the trial judge's order was not clearly erroneous for several reasons. The order merely allowed members to respond; a response was not required. There was no indication that nonresponses would lead to exclusion from the class. And the responses would not be used as a basis for determining the size of the class.[61] Fourth, although the trial judge was subsequently reversed in two similar cases, at the time the *Bauman* order was issued he was not on notice of his error.[62] Moreover, since there was no controlling authority on the opt out provisions, "persistent disregard" was not present.[63] Fifth, the order did not raise issues of first impression because it only revealed an intention to permit opting out; thus review would be premature and unnecessary.[64]

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in cases where mandamus was granted. *Id.* at 655-56. *See id.* at 655, *citing* Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. Aug., 1976); Hartland v. Alaska Airlines, 544 F.2d 992 (9th Cir. 1976); Pan Am World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975); McDonnell Douglas v. United States Dist. Court, 523 F.2d 1083 (9th Cir. 1975).

58. 557 F.2d at 661-62.

59. *Id.* at 656.

60. *Id.* at 657. The *Bauman* court extended the holding in Catena v. Capitol Indus., Inc., 543 F.2d 77 (9th Cir. Oct., 1976), a case which held that, in a rule 23(b)(3) class action, a "damage award can be expanded to include those who had been denied recovery" by an erroneous opt-out order which reduces the size of a certified class. *Id.* at 78. The same equitable powers are available to adjust injunctive relief of the type sought in *Bauman* under rule 23(b)(2). 557 F.2d at 657. Alternatively, if the opt-out provisions led to the denial of class certification on numerosity grounds, the order could then be appealed under 28 U.S.C. § 1292(a)(1). In either case, postponing review of the district court's opt-out provisions did not pose irreparable harm to the petitioners. *Id.*

61. 557 F.2d at 660. The court of appeals determined that the petitioners' documentation as to numerosity, typicality, and commonality were clearly adequate for a rule 23(b)(2) certification. *Id.* at 658. As long as nonresponses were not used to measure numerosity, the trial court's notice order was nothing more than an attempt to gather additional information regarding compliance with the rule 23(a) requirement that class representation be fair and adequate. Such an attempt was precisely what is authorized under rule 23(d)(2) and thus could not be deemed an error. *Id.* at 660.

62. *Id.* at 660.

63. *Id.* at 660-61. *Compare* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249, 252-53 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1973), *and* Air Line Stewards & Stewardesses Ass'n v. American Airlines, Inc., 490 F.2d 636, 642 (7th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974), *with* Walker v. Styrex Indus., 21 Fed. Rules Serv. 2d 355 (M.D.N.C. Jan. 7, 1976), *and* Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465 (W.D. Pa. 1972).

64. 557 F.2d at 661.

F. *Sugar Antitrust:* OTHER MEANS OF RELIEF

The petitioners in *In re Sugar Antitrust Litigation*[65] sought a writ of mandamus to overturn the district court's class certification in an antitrust suit alleging price fixing in violation of section one of the Sherman Act.[66] The petitioners contended that, since the price-fixing claims "involve[d] a variety of geographic and product markets as well as different pricing and distributing structures,"[67] common questions of law or fact did not predominate.[68] They also contended that class members were not adequately represented because of conflicts within the class.[69]

The *Sugar Antitrust* opinion consists of a decision rendered before *Bauman.* The original decision, utilizing the *Arthur Young* test, concluded that the district court's order was not "clearly and indisputably" erroneous[70] nor was it incapable of correction by other procedures.[71] The court refused to grant a rehearing even though a recent Supreme Court case[72] cast serious doubt on the propriety of the certification.[73] The court reasoned that even if there was error, petitioners still had an alternative means of relief so that the extraordinary remedy of mandamus should be denied.[74] In addition, the court referred to the guidelines established in *Bauman* noting that the district court had not habitually misread rule 23 and the case did not present new issues of sufficient import to warrant review by mandamus.[75]

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65. 559 F.2d 481 (9th Cir. June, 1977) (before Goodwin and Hufstedler, JJ.).

66. 15 U.S.C. § 1 (Supp. III 1973).

67. 559 F.2d at 483.

68. *Id.* at 482-83.

69. *Id.* at 483.

70. *Id. See* Windham v. American Brands, Inc., 539 F.2d 1016, 1021 (4th Cir. 1976); *In re* Master Key Antitrust Litigation, 70 F.R.D. 23, 26 (D. Conn.), *appeal dismissed,* 528 F.2d 5 (2d Cir. 1975); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 492-94 (N.D. Ill. 1969); Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 457-58 (E.D. Pa. 1968); Siegel v.Chicken Delight, Inc., 271 F. Supp. 722, 726 (N.D. Cal. 1967); *see generally* J. VON KALINOWSKI, 14 ANTITRUST LAW AND TRADE REGULATION § 108.03[4], at 108-81 (1974).

71. 559 F.2d at 483-84.

72. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

73. 559 F.2d at 484. The district court had included indirect purchasers as members of the class seeking treble damages. *See* § 4 of the Clayton Act, 15 U.S.C. § 15 (1970). *Illinois Brick,* 97 S. Ct. 2061 (1977), held that only direct purchasers are entitled to seek treble damages. Thus, petitioners argued that the certification was clearly erroneous.

74. 559 F.2d at 484. The panel held that the petitioners could obtain adequate review after final judgment or, alternatively, submit a motion to modify the class certification order in light of *Illinois Brick. Id.*

75. *Id.*

G. Conclusion

After *Kerr,* the Ninth Circuit developed a specific set of guidelines for exercising its discretionary use of writs of mandamus. Unless an interlocutory order raises novel issues of substantial importance which require immediate resolution in order to relieve a petitioner of irreparable damage, the Ninth Circuit will evaluate petitions for writs of mandamus in much the same way as a court in equity considers requests for temporary restraining orders or preliminary injunctions.[76] That is, it will inquire into the certainty that the district court has committed an error that will absolutely prejudice the petitioner's interest if not immediately corrected. *Bauman* gives every indication that petitioners challenging class certification orders must discharge a heavy burden to obtain writs of mandamus.

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76. *See* D. Dobbs, Handbook on the Law of Remedies, 108-09 (1973).