St. John's Law Review

Volume 49
Number 2 *Volume 49, Winter 1975, Number 2*

Article 11

August 2012

Appellate Review of Interlocutory Orders (Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.)

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FEDERAL JURISDICTION AND PRACTICE

APPELLATE REVIEW OF INTERLOCUTORY ORDERS

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.

The determination of interlocutory orders by a federal district court may hinge upon the resolution of substantial legal issues which, while independent from the principal matters in controversy, affect important substantive rights.[1] As crucial to the conduct of the proceedings as these orders might be, litigants seeking immediate appellate relief from adverse intermediary decrees must first surmount the imposing barrier of the final judgment rule.[2] This rule, one of the dominant factors in modern federal appellate practice,[3] limits the jurisdiction of the courts of appeals to review of final decisions emanating from the district courts.[4] Despite its apparent clarity, the finality requirement has resulted in confusion, particularly with respect to the appealability

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1 *Cf.* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); Eisen v. Carlisle & Jacquelin, 370 F.2d 120, 120 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

2 28 U.S.C. § 1291 (1970). The final judgment rule first emerged in the Judiciary Act of 1789, which established the federal court system. Act of Sept. 24, 1789, ch. 20, §§ 21-25, 1 Stat. 73, 83-85. It provided that appeals could be had "from final decrees in a district court in causes of action of admiralty and maritime jurisdiction . . . to the next circuit court . . . ." 1 Stat. at 83. Furthermore, "final decrees and judgments in civil actions in a district court" were allowed to be "re-examined, and reversed or affirmed in a circuit court." *Id.* at 84. The difference between the two appeals procedures centered upon the monetary requirement of each action at the district level, the former being $300 and the latter only $50. This provision was carried forward when the courts of appeals were established. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1133.

3 DiBella v. United States, 369 U.S. 121, 126 (1962); 9 J. MOORE, FEDERAL PRACTICE ¶ 110.06, at 105 (2d ed. 1970) [hereinafter cited as MOORE].

The rule has not met with universal approval. It has been criticized for causing unnecessary and protracted litigation over the meaning of a "final" order. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 557 (1932). Secondly, its rigid application can result in irreparable injury. Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102 (1950). *See* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950) (Jackson, J.). Nevertheless, it does serve to minimize both the harassment, delays, and expense of piecemeal litigation. Catlin v. United States, 324 U.S. 229, 233-34 (1945); Cobbledick v. United States, 309 U.S. 323, 325 (1940). *See* Note, *The Finality and Appealability of Interlocutory Orders—A Structural Reform Toward Redefinition*, 7 SUFFOLK U.L. REV. 1037, 1039-40 (1973); Note, *Statutory Criteria for Review in the Federal Courts: The Proper Indicia of Appealability?*, 29 U. PITT. L. REV. 365 (1967).

4 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.

Appeals sought to be taken from the highest court of a state to the Supreme Court face the same requirements of finality. 28 U.S.C. § 1257 (1970). *See generally* Note, *The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts*, 73 YALE L.J. 515 (1964).

of a trial court's refusal to disqualify opposing counsel.[5] In *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,[6] the Second Circuit, sitting en banc, overturned prior circuit precedent[7] and held that orders denying disqualification, as well as those excluding counsel from further participation, are final decisions and therefore appealable.[8]

In *Silver Chrysler*, defendants' attorneys, Kelley, Drye, Warren, Clark, Carr & Ellis, moved to disqualify Hammond & Schreiber as counsel for the plaintiff.[9] Dale Schreiber, when associated with Kelley Drye, had represented Chrysler in other litigation.[10] Upon leaving Kelley Drye, Schreiber formed his own firm, specializing in the representation of automobile dealers in actions against manufacturers, including Chrysler.[11] In support of their motion, defendants argued that Schreiber may have possessed access to confidential information and that his further participation in the case would create an appearance of impropriety.[12] District Judge Jack B. Weinstein found to the contrary and denied the motion.[13] Subsequently, Chrysler Motors sought appellate review of the district court determination by direct appeal to the Second Circuit.[14] In addition, defendants petitioned for an extraor-

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5 *See* notes 35-41 and accompanying text *infra*.

6 496 F.2d 800 (2d Cir. 1974) (en banc).

7 *See* Fleischer v. Phillips, 264 F.2d 515, 517 (2d Cir. 1959). In Marco v. Dulles, 268 F.2d 192, 193 (2d Cir. 1959), the court, constrained by the principle of stare decisis, followed *Fleischer*.

8 496 F.2d at 805-06.

9 *Id.* at 801; Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 583 (E.D.N.Y. 1973).

10 496 F.2d at 801. The defendants alleged that, in addition to real estate and business matters, Schreiber had represented Chrysler in actions brought by Chrysler dealers. 370 F. Supp. at 584-85.

11 496 F.2d at 801.

12 *Id.*; 370 F. Supp. at 583.

13 370 F. Supp. at 591. The district court found that Schreiber had no actual knowledge of matters substantially related to the *Silver Chrysler* case. *Id.* at 585-86. Furthermore, the judge ruled that such knowledge should not be imputed to Schreiber merely because of his prior association with the defendants' law firm. Finally, the court concluded that no impropriety had been established. *Id.* at 587-89.

14 496 F.2d at 802. The defendants tried a number of tactics in order to present their case to the Second Circuit in a cognizable form. They first requested that the district court amend its order denying disqualification to include a certification pursuant to 28 U.S.C. § 1292(b) (1970). Under this section, the district court in a civil case can make an order appealable by including in that order a statement 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 . . . .

Id. If the order contains such a statement, the circuit court may, in its discretion, permit the appeal. *See* FED. R. APP. P. 5 (1970). However, the district court in *Silver Chrysler* declined to certify. 496 F.2d at 801-02.

The defendants then sought permission to appeal via § 1292(b), notwithstanding the absence of the certification. Although technically the district court must certify the

dinary writ, directing the district court to amend its original order to provide for disqualification.[15]

Generally, to be final, a decision must be "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[16] Inevitably, however, both Congress[17] and the courts[18] have engrafted exceptions onto the final judgment rule in

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question, there is authority for the proposition that the congressional policy behind § 1292(b) can be used to support the jurisdiction of a circuit court to hear an appeal if the issues presented are "fundamental to the further conduct of the case" and the case is one of at least "marginal" finality. Gillespie v. United States Steel Corp., 379 U.S. 148, 154 (1964); *see* 9 MOORE, *supra* note 3, ¶ 110.22[3], at 263. *See also* S. REP. No. 2434, 85th Cong., 2d Sess. 2-4 (1958). Nevertheless, the Second Circuit denied the defendants' motion. 496 F.2d at 802.

Thirdly, the defendants attempted to obtain a direct appeal by filing a notice of appeal. The plaintiffs, in turn, moved to dismiss the appeal for want of jurisdiction. *Id.* at 802. Finally, Chrysler Motors sought to present the case to the court by requesting a writ of mandamus. *See* note 15 and accompanying text *infra*. The court consolidated the petition for mandamus with the motion to dismiss the appeal. 496 F.2d at 802. In sum, the Second Circuit was inundated with paperwork as a result of the efforts of the tenacious putative appellants. *See* note 46 *infra*.

[15] 496 F.2d at 802. 28 U.S.C. § 1651(a) (1970) provides, in pertinent part, 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 . . . ."

A number of Supreme Court decisions indicate the difficulty a litigant will encounter when seeking mandamus as an alternative to appeal. *See, e.g.*, Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953) (party seeking relief must establish "clear and indisputable" right to issuance of the writ); *Ex parte* Fahey, 332 U.S. 258, 260 (1947) (writs are "reserved for really extraordinary causes"). *See also* Will v. United States, 389 U.S. 90, 98 n.6 (1967) (courts are to exercise caution in considering petitions for peremptory writs).

[16] Catlin v. United States, 324 U.S. 229, 233 (1945); *accord*, Gulf Ref. Co. v. United States, 269 U.S. 125, 136 (1925); Mower v. Fletcher, 114 U.S. 127, 128 (1885). It should be noted that an order can be final without being the last order in the case. Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964).

In deciding whether a particular order is a final order, the most important of the competing factors to be considered by the courts are the "inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Id.* at 152-53, *quoting* Dickinson v. Petroleum Conversion Corp., 383 U.S. 507, 511 (1950).

[17] Interlocutory appeals are permitted in bankruptcy proceedings, 11 U.S.C. § 47 (1970), in specified situations under 28 U.S.C. § 1292(a) (1970)—notably appeals from grants and denials of injunctive relief—and pursuant to the certification procedure outlined in 28 U.S.C. § 1292(b), *see* note 14 *supra*. *See also* 28 U.S.C. § 1651 (1970) (courts of appeals may issue writs in aid of their jurisdiction). *Cf.* FED. R. CIV. P. 54(b) (district court may direct entry of final judgment as to fewer than all claims or parties).

[18] The first significant judicial inroad on the federal policy against interlocutory appeals came in Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848). In *Forgay* the Supreme Court asserted its jurisdiction to review, under the finality rule, a decree from the circuit court which, if unreviewed, would have exposed the appellants to "irreparable injury." The order appealed from directed immediate transfer of title and possession of property from appellants to respondents and additionally remanded the case for an accounting.

Forgay set the stage for a line of decisions recognizing that an appeal would lie from orders directing the transfer of physical property, notwithstanding the fact that the orders also provided for an accounting and therefore were not technically final. *See, e.g.*, Radio Station WOW v. Johnson, 326 U.S. 120 (1945); Carondelet Canal and Navigation

order to alleviate the harshness of strict application.[19] Since the order in *Silver Chrysler* clearly was not final in the general sense of the term, an appeal could not be taken from it unless the order came within one of the exceptions.

The Second Circuit, in a unanimous en banc opinion authored by Judge Moore, found that the order was appealable under the exception announced by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[20] In *Cohen*, the Court exempted from the strictures of the rule a

> small class [of less than final orders] 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.[21]

In recognizing the order denying disqualification as being a member of this "small class" and thus finding it to be appealable, the *Silver Chrysler* court specifically overruled the Second Circuit precedent of *Fleischer v. Phillips*.[22] The court rejected the distinction drawn in *Fleischer* which permitted appeals to be taken from orders granting the motion to disqualify, but not from orders denying that motion.[23]

In reaching its conclusion, the court embarked upon an analysis of the precedents, with *Cohen* serving as the "cornerstone" of the discussion.[24] The Second Circuit viewed *Cohen* as having enunciated three "prerequisites" which an order must meet in order to be final.[25] Although Judge Moore failed to expressly set forth these factors, a reading of *Cohen* suggests that to be appealable an order must: (1) definitively

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Co. v. Louisiana, 233 U.S. 362 (1914); Thomson v. Dean, 74 U.S. (7 Wall.) 342 (1868). *See generally* 9 MOORE, *supra* note 3, ¶ 110.11, at 137-50.

19 Both courts and commentators agree that an unyielding adhesion to the confines of the rule can result in the denial of justice. *See* Gillespie v. United States Steel Corp., 379 U.S. 148, 153 (1964); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 563 (1932); Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102 (1950).

20 337 U.S. 541 (1949).

21 *Id.* at 546. The order appealed from denied a motion to require the plaintiff in a derivative shareholders' suit to post security for costs in accordance with the applicable state statute. *Id.* at 544-45.

22 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959), *noted in* 38 TEXAS L. REV. 792 (1960); *accord*, Marco v. Dulles, 268 F.2d 192 (2d Cir. 1959). *See also* Willheim v. Murchison, 312 F.2d 399 (2d Cir. 1963). Interestingly, Judge Moore, the author of the court's opinion in *Silver Chrysler*, dissented from both the *Fleischer* decision, 264 F.2d at 518, and that of *Marco*, 268 F.2d at 193.

23 496 F.2d at 805.

24 *See* 496 F.2d at 802.

25 *Id.* at 805; *see* 9 MOORE, *supra* note 3, ¶ 110.10, at 133.

resolve a claim of right collateral to the main cause of action; (2) be "too important to be denied review"; and (3) result in irreparable harm should review be postponed.[26]

The *Silver Chrysler* court noted that from the time *Cohen* was handed down in 1949 until *Fleischer* was decided in 1959, the Second Circuit had found orders both granting and denying disqualification of counsel to be appealable under *Cohen*.[27] The *Fleischer* court, however, though conceding the collateral nature of the claim, nevertheless held the order denying disqualification to be deficient in the second and third requirements of the *Cohen* rule.[28] Although the court did not

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26 *See* 337 U.S. at 546.

Decisions subsequent to *Cohen* have placed varying degrees of emphasis on each of the three requirements. For example, the Supreme Court initially stressed the element of irreparable harm. In Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684 (1950), the Court held that an order vacating an attachment of a ship was final. Justice Frankfurter noted 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.

Id. at 689. In subsequent cases, however, the Court demonstrated less concern for the irreparable harm rationale and instead focused upon the importance of the rights involved. *See* Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 301-02 (1966), *citing* Stock v. Boyle, 342 U.S. 1 (1951) (appeal permitted from order denying motion to reduce bail); Roberts v. United States Dist. Ct., 339 U.S. 844 (1950) (per curiam) (appeal permitted from order denying leave to appeal in forma pauperis).

An example of a finding that a putatively final order under *Cohen* was insufficiently collateral is the decision in DiBella v. United States, 369 U.S. 121 (1962). There, the Court overturned a Second Circuit determination, 284 F.2d 897 (2d Cir. 1960), that a pre-indictment motion to suppress evidence made under FED. R. CRIM. P. 44(e) was directly appealable under § 1291. The Second Circuit had taken the position that where the motion to suppress was made prior to indictment its denial was a final disposition of an independent claim and therefore appealable. 284 F.2d at 898. The Supreme Court expressly rejected this analysis and held

> that the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for the purposes of appealability.

369 U.S. at 131. Rather, the Court was persuaded that the determination was simply another step in the "federal prosecutorial system leading to a criminal trial." *Id.*

In recent years, the Supreme Court has been less circumspect in looking for the three prerequisites of *Cohen*. The Court has emphasized the language in *Cohen* which suggested that § 1291 be given a "practical rather than a technical construction." 337 U.S. at 546. The most notable example of this relaxation is Gillespie v. United States Steel Corp., 379 U.S. 148 (1964). There, the Court ruled that where the order is one of "marginal" finality the courts can hear the appeal if the order determines issues "fundamental to the further conduct of the case." *Id.* at 154.

It has also been suggested that review under the *Cohen* rule should be reserved for the resolution of issues of general importance beyond the interests of the parties involved. Donlon Indus., Inc. v. Forte, 402 F.2d 935, 937 (2d Cir. 1968).

27 496 F.2d at 802-03, *citing* Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., 239 F.2d 555 (2d Cir. 1956), wherein the Second Circuit stated: "[W]ith respect to appealability no distinction exists between orders granting disqualification and those refusing to do so." *Id.* at 556.

28 264 F.2d at 517. *See* text accompanying note 26 *supra*. The *Fleischer* decision was cited with approval in Marco v. Dulles, 268 F.2d 192 (2d Cir. 1959), wherein the Second

speak in terms of specific requirements, Judge Clark stated that the ordering of a disqualification seriously impedes the conduct of the action and impairs the attorney's reputation.[29] On the other hand, he concluded that the order denying disqualification has no permanent effect in that it merely permits the case to proceed.[30] Consequently, the denial was viewed as insufficient to warrant immediate appellate review.

In *Silver Chrysler*, the Second Circuit elected to "return to the wisdom" of its former position and rejected the *Fleischer* distinction as having "no sufficient basis."[31] In so holding, the court reevaluated the nature of the impact of a district court's erroneous denial of disqualification. It was felt that further participation by the plaintiff's counsel in contravention of an attorney's ethical responsibility[32] might well taint the entire trial and result in an irretrievable loss of rights.[33] Moreover, the court indicated that review after final judgment would be especially inadequate in this context.[34]

The Second Circuit's examination of the order in terms of its importance and potential for an irreparable loss of rights enjoys the support of at least four other circuits. The District of Columbia,[35]

Circuit indicated that immediate appeal of an order denying disqualification could be had only pursuant to certification under 28 U.S.C. § 1292(b) (1970). The Ninth Circuit, in Cord v. Smith, 338 F.2d 516 (9th Cir. 1964), agreed with this reasoning but nonetheless granted mandamus and reviewed the question. *See* text accompanying notes 39-40 *infra*.

29 264 F.2d at 517.

30 *Id.*

31 496 F.2d at 805.

32 *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4, which provides: "A lawyer should preserve the confidences and secrets of a client."

33 496 F.2d at 805. The court established the collateral nature of the order, one of the *Cohen* requirements, without serious discussion. 496 F.2d at 805.

34 *Id.* The court relied upon the Ninth Circuit's observation that

> [c]ontinued participation as an attorney, by one who is disqualified by conflict of interest from so doing, will bring about the very evil which the rule against his participation is designed to prevent, and a subsequent reversal based upon such participation cannot undo the damage that will have been done as a result of such participation.

Id. at 804, *quoting* Cord v. Smith, 338 F.2d 516, 521-22 (9th Cir. 1964). Judge Moore believed it "fatuous to suppose that review of the final judgment will provide adequate relief." 496 F.2d at 805.

35 In Yablonski v. United Mine Workers, 448 F.2d 1175 (D.C. Cir. 1971), a group of union members brought suit against the United Mine Workers of America (UMWA) and its officials, seeking both an accounting of union funds and the restitution of allegedly misappropriated funds. Plaintiffs moved in the district court for an order disqualifying the regular UMWA outside counsel. Plaintiffs supported this motion with claims that said counsel would be compensated from the UMWA treasury and that a conflict of interest existed between the officers and the union. 448 F.2d at 1177. The district court issued an order denying disqualification. The court of appeals considered the merits without disputing the appealability of the order. The district court's order was vacated and the case remanded.

Thereafter, outside counsel withdrew and was replaced by UMWA's general counsel. Plaintiffs again moved in the district court to disqualify and again were rebuffed. In lieu of seeking a direct appeal, plaintiffs petitioned the court of appeals for further relief,

Third,[36] and Fifth[37] Circuits have allowed direct appeals from orders denying disqualification. The Fourth Circuit intimated that it would

relying upon the court's prior opinion, which had declared that representation of the defendants by regular UMWA outside counsel was improper. Yablonski v. United Mine Workers, 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) [hereinafter *Yablonski II*]. Petitioners alleged that the denial of the second motion to disqualify failed to give full effect to the court of appeals' prior mandate. The court agreed and granted the petition.

While the court in *Yablonski II* was not faced with a direct appeal, it set forth its policy with respect to the appealability of orders denying disqualification of counsel. The court distinguished between disqualification orders based solely on ethical considerations and those based on impingement on a specific legislative policy, only the latter being appealable. *Id.* at 1038 n.9; *accord*, 9 MOORE, *supra* note 3, ¶ 110.13[10], at 190. In addition, in determining that it had the power under the circumstances to grant the peculiar relief sought in the nature of mandamus, the court indicated an acceptance of the reasoning of the Ninth (and now Second) Circuit with respect to the irreparable harm which an unreviewed erroneous decision would entail. 454 F.2d at 1039, *quoting* Cord v. Smith, 338 F.2d 516, 521-22 (9th Cir. 1964).

This rationale was particularly forceful in light of the facts in the case. The court cited the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 (1970), as favoring the "representation of a labor union by counsel free of possibly conflicting obligations to adverse parties." 454 F.2d at 1039. The court felt that representation of the union and its officials by the UMWA general counsel would be just as offensive to this legislative policy as would representation by the UMWA's regular outside counsel. The court was persuaded that an appeal after final judgment could not rectify the frustration of the legislative will that would result from the district court's order. It was concluded that the potential frustration of public policy would render the order denying disqualification not only directly appealable but also, on the facts presented, sufficient grounds for issuance of a special writ. *Id.* However, the court refrained from issuing a writ of mandamus in hope that the district court would be sufficiently impressed with its decision to rectify its own error. *Id.* at 1042.

[36] Greene v. Singer Co., Civil No. 71-1835 (3d Cir., Nov. 2, 1971). *Greene* involved an action based on unfair competition, antitrust violations, and patent infringement. Defendant, The Singer Company, moved in the district court for an order disqualifying one of plaintiff's attorneys from further participation in the case. This motion was supported with allegations that the attorney in question was previously employed as a patent attorney for a firm which had been acquired by the defendant, and that while in the employ of the acquired company he "represented [that] company in the matter which [was] the subject of [the instant] law suit." *Id.* at 2. Like *Silver Chrysler*, the *Greene* court expressed concern regarding the possibility of irreparable harm. Indeed, in recognizing the order as final and appealable under *Cohen*, the court conceded:

> To require appellant to await a final judgment on the merits before testing the legality of the order denying the disqualification may, for practical purposes, deny it the reality of appellate processes.

Id. at 3.

It should be noted, however, that the court added a caveat against excessive extrapolation from its decision, saying: "We do not hold that every ruling relating to conflict of interest by an attorney should activate the *Cohen* rule." *Id.* Apparently, it was the allegation that plaintiff's counsel had had a prior connection with the defendant, involving the subject matter of the ongoing litigation, which convinced the court to depart from its generally restrictive approach to the collateral order rule. *See, e.g.*, Hackett v. General Host Corp., 455 F.2d 618, 621 (3d Cir. 1972), *cert. denied*, 407 U.S. 925 (1973) (*Greene* cited as an exception to general policy).

[37] Tomlinson v. Florida Iron and Metal, Inc., 291 F.2d 333 (5th Cir. 1961). *Tomlinson* involved an action to recover taxes which were alleged to have been collected illegally. Tomlinson, District Director of Internal Revenue, moved in the district court for an order disqualifying plaintiff's counsel based on a federal statute, 5 U.S.C. § 99 (1958), *as amended*, 18 U.S.C. § 207 (1970). This section made it unlawful for a former government

treat an order denying disqualification as final.[38] On the other hand, the Ninth Circuit refuses to regard a denial as appealable.[39] Nonetheless, giving recognition to the loss of rights that a failure to review might entail, the Ninth Circuit would take cognizance of the order if presented with a petition for a special writ.[40] In the alternative, the court might, in its discretion, accept an appeal certified by the district court.[41]

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employee to act as counsel with respect to any claim against the United States which was pending while he was employed by the agency against which the claim was made.

In *Tomlinson*, the Fifth Circuit, like the District of Columbia Circuit (*see* note 35 *supra*), was concerned with the possible irreparable "frustration of a public policy." 291 F.2d at 334. Since plaintiff's counsel fell within the statutory prohibition, a refusal by the court to review the order denying his disqualification would have resulted in a direct contravention of an express legislative policy which could not "be avoided or mitigated by any appeal taken after trial." *Id.*

Significantly, however, in a later case in which disqualification was sought solely on ethical grounds, the Fifth Circuit found the underlying rationale of *Tomlinson* broad enough to support treatment of an order denying disqualification as final. Uniweld Prods., Inc. v. Union Carbide Corp., 385 F.2d 992, 994 (5th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

[38] United States v. Hankish, 462 F.2d 316, 318 (4th Cir. 1972) (per curiam). In this criminal prosecution, the government moved to disqualify defendant's counsel on the ground that he had previously represented an individual who was expected to be called as a material witness for the prosecution. The district court granted the motion, but defendant neglected to seek an appeal. Instead, the defendant made an application to the court of appeals seeking review of the district court's order. The Fourth Circuit indicated that if the defendant had sought a direct appeal of the order it would have treated the order as final and appealable under *Cohen*. Notwithstanding the fact that the court faced an order granting disqualification, it supported its conclusion by citing the Second Circuit's original position in Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc., 239 F.2d 555 (2d Cir. 1956), wherein orders denying as well as granting disqualification were treated as final under *Cohen*. 462 F.2d at 318. *See* note 27 *supra*.

In light of its determination that the order was previously appealable as final, the court concluded that it would not treat the defendant's application as a petition for a special writ, nor would it grant such a writ. Reliance was placed on the Supreme Court's pronouncement in Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30-32 (1943), wherein it was held that the special writ should not be used as a substitute for an appeal.

[39] Cord v. Smith, 338 F.2d 516, 521-22 (9th Cir. 1964).

[40] *Id.* at 521, *applying* 28 U.S.C. § 1651 (1970); *accord*, Chugach Elec. Ass'n v. United States Dist. Court, 370 F.2d 441 (9th Cir. 1966). Professor Moore supports this position, by stating:

> The view of the Second [referring to the *Fleischer* decision] and the Ninth Circuits seems clearly preferable. Questions of counsels' conflict of interest are almost invariably questions of fact best left to the trier of fact. In the unusual case in which the denial of a motion to disqualify presents a novel question of law, 28 U.S.C. § 1292(b) is available, as is, in a truly exceptional case, mandamus.

9 MOORE, *supra* note 3, ¶ 110.13[10], at 190.

The Tenth Circuit takes an equally restrictive approach. It refuses all review of a denial of disqualification except in extreme circumstances. *See* Waters v. Western Co. of N. America, 436 F.2d 1072 (10th Cir. 1971), wherein an appeal from an order denying disqualification certified and permitted under section 1292(b) was dismissed as improvidently granted.

[41] 338 F.2d at 521, *disscussing* 28 U.S.C. § 1292(b) (1970). *See* note 14 *supra*. The court also rejected the argument that a refusal to disqualify counsel should be treated as a denial of injunctive relief under 28 U.S.C. § 1292(a) (1970). *See* note 17 *supra*. The court concluded that the refusal was more in the nature of an exercise of "the supervisory power of the federal courts over attorneys appearing before them . . . ." 338 F.2d at 521.

Although representing a restrictive viewpoint, the Ninth Circuit's position finds support in the general policy against piecemeal litigation which underlies the final judgment rule.[42] Moreover, it evidences the reluctance of courts and commentators to add yet another class of appealable orders to the ever-increasing volume which the appellate courts are now being called upon to review.[43]

Despite this concern for the burden upon courts of appeals, the Second Circuit's position appears consonant with the Supreme Court's ruling in *Cohen*. Since an order denying disqualification of counsel satisfies the three requirements of *Cohen*,[44] courts should not attempt to avoid applying *Cohen* for the sake of limiting their case load.[45] Furthermore, the Ninth Circuit's approach results in a contorted review procedure, relegating such significant orders to a state of quasi-appealability and creating an inordinate amount of uncertainty.[46] Direct

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42 *See* Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); note 3 *supra*.

43 *See, e.g.*, Weight Watchers v. Weight Watchers Int'l, 455 F.2d 770, 773 (2d Cir. 1972) (Friendly, C. J.) ("*Cohen* must be kept within narrow bounds, lest the exception swallow the salutary 'final judgment rule' "); Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 317-20 (1966) (noting there are so many exceptions to *Cohen* that the rule may no longer be viable). *See also* 9 MOORE, *supra* note 3, ¶ 110.13[10], at 190.

There is a legitimate need to protect the docket of the courts of appeals. For example, in the seven-year period from 1966 to 1973 the number of filings in the eleven circuits increased 117.6%. Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 579 (1974). *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); Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949 (1964).

44 *See* text accompanying notes 26 & 31-34 *supra*.

45 Rejection of *Cohen* will not necessarily achieve the sought-after reduction of workload. *See* note 46 *infra*. The problems of calendar congestion would best be dealt with by structural and substantive reforms. *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, 567-68 (1969); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974); Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576 (1974). *See also Hearings on H.R. 7378 Before the Subcomm. on the Commission on Revision of Judicial Circuits of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971).

46 The alternatives of certification and mandamus are both productive of uncertainty. In order to obtain certification, the putative appellant must establish the applicability of § 1292(b) to the satisfaction of the district court. A refusal to certify would cut off the appeal in the formative stages. Moreover, even if certification is obtained, the appellate court has discretion to refuse to accept the case. *See* note 14 *supra*. A writ of mandamus is issued only in rare instances and an even greater burden must be satisfied by the party seeking relief. *See* note 15 *supra*. Questions will undoubtedly arise as to what situations are sufficiently exigent to justify the use of this extraordinary power.

The burden upon the judiciary is compounded by the fact that a diligent attorney, in order to protect his client, will attempt both approaches. This is precisely what occurred in *Silver Chrysler*. *See* note 14 *supra*. In *Silver Chrysler*, the court noted that the "procedural uncertainties" resulted in the court's having to consider a notice of appeal, a motion for permission to appeal and a petition for a special writ. In addition, the

appeal offers a uniform and expeditious[47] vehicle for consideration of orders deemed "too important to be denied review"[48] by an impressive number of circuit courts of appeals.[49]

Silver Chrysler represents an example of the Second Circuit's willingness to apply *Cohen* in a proper setting. The court's decision, however, is predicated on the substantial effect the denial of disqualification of counsel may have on the litigation. Thus, the case offers no indication that the Second Circuit is prepared to depart from its generally restrictive treatment of the collateral order rule.[50]

Edgar J. Royce

INTERLOCUTORY APPEAL OF CLASS ACTION DESIGNATION

Herbst v. International Telephone & Telegraph Corp.

Interlocutory appeals are not viewed favorably by most courts.[1] Fearing that piecemeal appeals would result in a waste of judicial energy, Congress early established the final judgment rule[2] and has con-

district court was requested to certify an appeal. Each of these attempts to perfect an appeal, with the exception of the notice of appeal, "included the same repetitious statements of fact and law and each required time-consuming considerations by the courts." 496 F.2d at 802. On balance, the disposition of these matters could result in a greater waste of time and expense than would result if the arguably appealable order were directly reviewed.

47 The interest in conservation and careful allocation of judicial resources underlying the final judgment rule can, in some cases, militate in favor of permitting a direct appeal. As the *Silver Chrysler* court noted:

> By holding such an order [denying disqualification] directly appealable, we eliminate the uncertainties (and the paperwork) attendant to resorting to § 1292(b) and/or § 1651. Since the ultimate objective is to bring before an appellate court an important question which, if unresolved, might well taint a trial, why should not this question be presented before judicial and attorney time may have been needlessly expended?

496 F.2d at 806.

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

49 *See* notes 35-38 and accompanying text *supra*.

50 *See, e.g.*, Weight Watchers v. Weight Watchers Int'l, 455 F.2d 770, 773 (2d Cir. 1972); West v. Zurhorst, 425 F.2d 919, 921 (2d Cir. 1970); Donlon Indus., Inc. v. Forte, 402 F.2d 935, 937 (2d Cir. 1968). *See also* I.B.M. Corp. v. United States, 480 F.2d 293 (2d Cir. 1973) (en banc), *petition for cert. filed sub nom.*, I.B.M. Corp. v. Edelstein, 42 U.S.L.W. 3033 (U.S. June 11, 1973).

Since the decision in *Silver Chrysler*, the Second Circuit has reaffirmed its position on the appealability of disqualification orders. General Motors Corp. v. City of N.Y., 501 F.2d 639, 644 (2d Cir. 1974).

1 Andrews v. United States, 373 U.S. 334, 340 (1963); Catlin v. United States, 324 U.S. 229, 233-34 (1945).

2 The concept of finality can be traced to the first Judiciary Act. Act of Sept. 24, 1789, ch. 20, §§ 21, 22, 25, 1 Stat. 73, 83-85. Congress has forbidden piecemeal appeals from a single controversy in the interests of judicial economy and efficiency. The underlying rationale is that appeals of interlocutory orders cause an unjustifiable and intolerable delay since such orders merge into the final judgment and will be ultimately