St. John's Law Review

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

Article 12

August 2012

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Thomas A. O'Rouke

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

tinued to limit the jurisdiction of the courts of appeals in most instances to "final decisions" of the district courts.[3] Nevertheless, in *Eisen v. Carlisle & Jacquelin (Eisen I)*,[4] the Second Circuit permitted the plaintiff to appeal from an order denying his lawsuit class action status because the denial would, in effect, terminate the action. Despite the unpopularity of its decision in *Eisen I*,[5] the Second Circuit subsequently announced by way of dictum in *Eisen v. Carlisle & Jacquelin (Eisen*

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reviewable. The Supreme Court has noted that the time and money consumed by appeals make them attractive as harassment measures, thereby obstructing valid claims. *See* Cobbledick v. United States, 309 U.S. 323, 324-25 (1940).

[3] The finality rule is embodied in 28 U.S.C. § 1291 (1970), which provides in pertinent part:

> 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.

Congress has provided a limited number of statutory exceptions to the requirements of finality. *See, e.g.*, 28 U.S.C. § 1292(a)(1) (immediate review available for interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions . . . ."). *See also* note 45 *infra*. In Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), the Supreme Court further excepted from the finality requirement those orders that determine claims collateral to and independent of the main cause of action and which are too important to be denied review. *See generally* Note, *The Finality and Appealability of Interlocutory Orders—A Structural Reform Toward Redefinition*, 7 SUFFOLK L. REV. 1037 (1973).

[4] 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). In *Eisen I*, the Second Circuit enunciated its celebrated "death knell" rule which permits a plaintiff who has been denied class action status to appeal if the district court's order would "for all practical purposes terminate the litigation." *Id.* at 121. Since Eisen's personal claim was for a mere $70, it was safe to conclude that the plaintiff would abandon the lawsuit. Subsequent to *Eisen I*, the Second Circuit has allowed appellate review where the would-be class representative's claim was as high as $1042. Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). *See also* Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971) (appeal sustained where individual claim was for $386). Where the individual's claim is considerably more substantial, review has been denied. *See, e.g.*, Shayne v. Madison Square Garden Corp., 491 F.2d 397 (2d Cir. 1974) (appeal dismissed where the individual claim was for $7482); Cacers v. International Air Transp. Ass'n, 422 F.2d 141 (2d Cir. 1970) (appeal dismissed where average claim was for $150,000).

[5] *See* King v. Kansas City S. Indus., Inc., 479 F.2d 1259 (7th Cir. 1973) (plaintiff sought to represent all former shareholders of specific mutual funds); Songy v. Coastal Chem. Corp., 469 F.2d 709 (5th Cir. 1972) (plaintiffs sought an injunction to prevent defendant's air and noise pollution); Gerstle v. Continental Airlines, Inc., 466 F.2d 1374 (10th Cir. 1972) (suit challenging "no-marriage" rule for airline stewardesses); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972) (consumer antitrust suit against bread distributors); Lamarche v. Sunbeam Television Corp., 446 F.2d 880 (5th Cir. 1971) (motions to proceed in forma pauperis and to maintain suit as class action denied).

A number of cases in which appeal has been denied can be reconciled with *Eisen I*, since the plaintiffs' claims were sufficiently substantial to suggest that the lawsuits would have continued without class action status. *See* Graci v. United States, 472 F.2d 124 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973) (plaintiff's claim under the Federal Tort Claims Act was for $78,000); Falk v. Dempsey Tegeler & Co., 472 F.2d 142 (9th Cir. 1972) (plaintiff sought $14,125 in a suit alleging securities fraud); Gosa v. Securities Inv. Co., 449 F.2d 1330 (5th Cir. 1971) (appeal dismissed where the suit was for $3,322.20 and denial would not terminate the action); Weingartner v. Union Oil Co., 431 F.2d 26 (9th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971) (plaintiffs' claim in private antitrust suit was for $353,700).

III),[6] that the same reasoning for allowing a plaintiff to appeal from a denial of class action status would mandate that a defendant be permitted to appeal where class action status has been granted.[7] The court in *Herbst v. International Telephone & Telegraph Corp.*[8] seized upon the guidelines suggested in *Eisen III* and allowed the defendant to appeal a district court order authorizing the plaintiff to proceed as representative of a class.[9]

Herbst had its genesis in the 1970 merger of International Telephone & Telegraph Corp. (ITT) and Hartford Fire Insurance Co. Mrs. Herbst, a Hartford stockholder, alleged that irregularities in ITT's handling of the proposed stock transfer jeopardized a favorable tax ruling previously received from the Internal Revenue Service.[10] She contended that if all the circumstances had been revealed to the stockholders, ITT would have been required to increase its offer for Hartford stock. Basing her action on various antifraud provisions of the Securities Exchange Act of 1934,[11] she sought either rescission or

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6 479 F.2d 1005 (2d Cir. 1973), *aff'd*, 417 U.S. 156 (1974).

7 *Id.* at 1007 n.1. In *Eisen III*, the court of appeals exercised jurisdiction which it purportedly retained following its decision in Eisen v. Carlisle & Jacquelin (*Eisen II*), 391 F.2d 555 (2d Cir. 1968). In *Eisen II*, the district court had been directed to conduct further hearings as to whether the action was maintainable as a class action. Upon remand, the district court found that a class action was proper, 52 F.R.D. 253, 261 (S.D.N.Y. 1971), and later ordered the defendants to pay 90% of the cost of notifying the class members, 54 F.R.D. 565, 567 (S.D.N.Y. 1972). Defendants appealed, relying upon the Second Circuit's retention of jurisdiction and the finality provision of 28 U.S.C. § 1291 (1970). The court of appeals held the action was not maintainable as a class action and dismissed the suit. 479 F.2d 1005, 1012 (2d Cir. 1973). The jurisdiction of the court of appeals to review the interlocutory order was ultimately upheld by the Supreme Court on the ground that the district court's order imposing the cost of notice on the defendants was an appealable "final decision" under § 1291. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172 (1974). However, the Supreme Court did not address itself to the issue of whether the defendants had a right to appeal from the district court's grant of class action status.

8 495 F.2d 1308 (2d Cir. 1974).

9 Judge Lumbard authored the opinion of the court. Judge Mulligan concurred, but with "grave doubt." *Id.* at 1325. Judge Danaher, of the District of Columbia Circuit, sitting by designation, concurred *dubitante*.

10 In 1969 ITT purchased approximately 1.7 million shares (about 8%) of the Hartford common stock and later entered into a proposed merger agreement. ITT sought a ruling from the Internal Revenue Service (IRS) that the merger would be a tax-free reorganization. As a condition for a favorable ruling, ITT was to dispose of the Hartford stock it had previously acquired. Herbst claimed that in an agreement entered into between ITT and Mediobanca BancadiCredito Finanziore-S.P.A. (Mediobanca), ITT did not properly divest itself of the Hartford holdings—that Mediobanca was merely holding the stock for a fee. The merger plans in 1969 did not materialize, however, because of the disapproval of the Insurance Commissioner of Connecticut. ITT modified the terms of its offer, and the Insurance Commissioner's approval was obtained. Since the tax consequences of the later plan were identical to those of the previous attempted merger, no supplemental IRS ruling was sought for either the proposed merger or the arrangement with Mediobanca. *Id.* at 1310-11. The initially favorable tax ruling was revoked by the IRS after the appellate arguments were heard in the case. *Id.* at 1310 n.2.

11 15 U.S.C. § 78a *et seq.* (1970). The Second Circuit did not delineate all the statu-

the difference between ITT's offer and what it might have been required to offer. Mrs. Herbst then petitioned the court for permission to represent, as a class, all Hartford stockholders pursuant to rule 23 of the Federal Rules of Civil Procedure.[12] It was the district court's consent that precipitated ITT's appeal.[13]

Although the *Herbst* opinion expressly adopts a three-part test proposed in *Eisen III*, it does not reveal how these requirements were satisfied by the facts before the court. Thus, it can only be presumed that the test was fulfilled. The first inquiry set forth in *Eisen III* is whether the granting of class action status is "fundamental to the further conduct of the case."[14] Since Mrs. Herbst held only 100 of the 22 million shares of Hartford common stock exchanged in the merger with ITT,[15] it is likely that a denial of class action status would have sounded the "death knell" of the action.[16] The second *Eisen III* requirement, presumably satisfied in *Herbst*, is the separability of questions of notice and manageability from the plaintiff's substantive claims.[17] The third element of the *Eisen III* test is the possibility that in defending the class action irreparable injury might befall the defendant.[18] In this

tory provisions relied upon by Mrs. Herbst in her complaint, but at least one of the grounds was that ITT had violated section 10(b), 15 U.S.C. § 78j(b), and rule 10b-5, promulgated by the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5. *See* 495 F.2d at 1310, 1313.

12 FED. R. CIV. P. 23(c)(1) requires the court to determine the feasibility of class action status as soon as possible after the initiation of the action. However, the determination is merely conditional, and it may be amended before a decision on the merits.

13 The defendant's appeal was predicated on 28 U.S.C. § 1291 (1970), which gives the courts of appeals jurisdiction of appeals from final decisions of the district courts.

14 479 F.2d 1005, 1007 n.1 (2d Cir. 1973).

15 495 F.2d at 1310.

16 *See* Eisen v. Carlisle & Jacquelin (Eisen I), 370 F.2d 119, 121 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

17 479 F.2d at 1007 n.1. The requirement of separability from the merits stems from the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), where the Court stated:

> We hold this [interlocutory] order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

Id. at 546-47.

18 479 F.2d at 1007 n.1. In *Eisen III*, Judge Medina commented:

> [T]he preliminary procedures, including . . . the huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim.

Id. at 1019.

The great power of the plaintiff class has been criticized in Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1 (1971). Professor Handler contends that if innocent defendants have no real alternative except settlement, it is a defacto deprivation of the constitutional right of a trial on the merits. Arguing that settlements remove the distinction between the innocent defendants and those whose actions have caused great hardship, he asserts that the size of the ransom paid for peace becomes the primary issue. He emphasizes that

regard, the *Herbst* opinion notes, generally, that enormous expenditures are incurred in defending massive class actions, and that, since potential damages often reach millions of dollars, defendants are inclined to settle, even where the claims are spurious.[19] Having resolved the jurisdictional issue in defendant's favor, it was concluded, however, that the district court did not err in authorizing a class action.[20]

In two subsequent decisions, *Kohn v. Royall, Koegel & Wells*[21] and *General Motors Corp. v. City of New York*,[22] the Second Circuit indicated that it did not view *Herbst* as signalling a policy of unqualified appealability of orders granting class action status. Chief Judge Kaufman, writing for the panels in both cases, applied the *Herbst* tripartite analysis to preclude interlocutory appeal. In *Kohn*, the plaintiff, a female law student, claimed that the law firm of Royall, Koegel & Wells discriminated against women in its hiring procedures.[23] Challenging the firm's employment practices and internal promotion procedures, Ms. Kohn sought both damages and injunctive relief to correct past discriminatory practices.[24] She subsequently moved to represent all women qualified for legal positions at Royall, Koegel & Wells, and upon the granting of the motion the defendant appealed. In *General Motors*, the City charged General Motors with antitrust violations in the alleged monopolization of the nationwide bus market. Immediately after the suit was initiated, the City successfully moved to represent similarly situated municipalities, an estimated 177 cities.[25] Here too, defendant immediately appealed the class action designation.[26]

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[a]ny device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail.

Id. at 9.

19 495 F.2d at 1312-13.

20 *Id.* at 1316.

21 496 F.2d 1094 (2d Cir. 1974).

22 501 F.2d 639 (2d Cir. 1974).

23 It was alleged that defendant had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Supp. II 1972). Kohn was interviewed at Columbia University for a summer position with Royall, Koegel & Wells. When an offer of employment was not forthcoming, she filed a complaint with the New York City Commission on Human Rights. Six months later, a similar complaint was filed with the Equal Employment Opportunity Commission (EEOC). She subsequently received permission to sue the law firm from EEOC. 496 F.2d at 109.

A discussion of the problems facing the parties in civil rights class actions is found in Comment, *Class Actions & Title VII of the Civil Rights Act of 1964: The Proper Class Representative and the Class Remedy*, 47 TUL. L. REV. 1005 (1973).

24 The court did not reach the question of the plaintiff's standing to challenge internal employment practices because such inquiry would touch on the ultimate merits of Kohn's claim. 496 F.2d at 1100.

25 City of New York v. General Motors Corp., 60 F.R.D. 393 (S.D.N.Y. 1973). The City originally sought to represent between 200 and 300 municipalities and ultimately submitted a list of 177 to Judge Carter.

26 A corollary question that was raised on appeal dealt with disqualification of the

In both *Kohn* and *General Motors*, the initial inquiry, whether the class status was "fundamental" to the continuation of the action, was answered negatively. It was found that Kohn could reasonably be expected to continue the action without the class designation.[27] The same was true of the City in light of its 12 million dollar claim.[28] Hence, a denial of the motion in both instances would not have terminated the action. Unlike the situation in *Herbst*, the defendants would probably have been compelled to stand and defend whether or not class action status was found improper.

Although the failure to comply with the threshold requirement was dispositive of the appeal, the *Kohn* and *General Motors* panels, nevertheless, inquired into the other two tests. In examining the arguments raised by Royall, Koegel & Wells, the court concluded that they were interwoven with the merits of Kohn's discrimination charge.[29] This would necessitate resolving portions of the merits on the interlocutory appeal before the district court had an opportunity to rule on them. A similar conclusion was reached in *General Motors* where the defendant contended that proof relating to economic power, competition, and behavior would vary for each class member.[30] The court construed this argument as an indication that these issues were critical to the City's claim and, thus, would arise later at the trial.[31] The third *Herbst* test—that the class action designation result in irreparable harm to the defendant—also failed in *Kohn* and *General Motors*. The *Kohn*

City's attorney. Twenty years prior to the City's suit, the United States had brought a similar action against General Motors. One of the Government attorneys was now representing the City, and General Motors sought his disqualification because of a conflict of interest. The Second Circuit agreed with the defendant:

> Where the overlap of issues is so plain, and the involvement while in Government employ so direct, the resulting appearance of impropriety must be avoided through disqualification.

501 F.2d at 652. *See* Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 660 (1957).

The jurisdiction of the court of appeals to hear interlocutory appeals on the question of attorney disqualification was decided by the Second Circuit in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc).

27 The defendant conceded on oral argument that class action status was not "'fundamental to the further conduct of the case.'" 496 F.2d at 1099. The court, in addition, noted that the Civil Rights Act of 1964 permits aggrieved plaintiffs to recover costs and reasonable attorney's fees, thus virtually insuring the availability of counsel willing to represent the plaintiff. 496 F.2d at 1100. *See* 42 U.S.C. § 2000e-5 (1970).

28 501 F.2d at 645.

29 FED. R. CIV. P. 23(a)(2) requires that, in order for a class action to be maintained, there must be questions of law or fact common to the class. *Id.* (a)(4) requires that the party seeking class action standing adequately represent the interests of the class. Royall, Koegel & Wells argued that neither of these requirements was met. The court determined that an examination of defendant's argument would necessitate an inquiry into Kohn's standing to sue and the merits of her allegations. 496 F.2d at 1100.

30 501 F.2d at 645.

31 *Id.*

court found that the increase in cost and time encountered in defending the class action was insignificant in comparison with that in *Herbst*.[32] In *General Motors*, it was determined that the alleged national monopoly would in any event lead to broad discovery proceedings, so the defendant would not incur significantly higher costs if the lawsuit were allowed to proceed as a class action.[33] Neither the *Kohn* nor the *General Motors* panel commented on the likelihood that the class action might pressure the defendants to settle.

The Second Circuit's decision in *Herbst* to review the class action designation is in direct conflict with the policies of at least two other circuits. In *Walsh v. City of Detroit*,[34] the Sixth Circuit dismissed an interlocutory appeal from a grant of class action status. Emphasis was placed on that portion of rule 23(c)(1) which gives the district court power and authority to reconsider its class action determination,[35] thereby rendering such an order not final and, thus, unappealable.[36] The Seventh Circuit reached a similar result in *Thill Securities Corp. v. New York Stock Exchange*.[37] The plaintiff in *Thill*, a licensed securities broker, brought an antitrust action against the New York Stock Exchange and successfully sought to represent all other securities dealers not affiliated with the Exchange.[38] In dismissing defendant's appeal, the Seventh Circuit indicated that the Exchange was unable to show a compelling reason for an early appeal beyond the normal disadvantages encountered by any litigant who must wait to appeal an adverse trial ruling.[39]

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32 496 F.2d at 1100.

33 501 F.2d at 646.

34 412 F.2d 226 (6th Cir. 1969).

35 FED. R. CIV. P. 23(c)(1) states, in relevant part: "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." The *Walsh* court rejected the application of Cohen v. Beneficial Indus. Corp., 337 U.S. 541 (1949), because in its opinion the "order was not collateral to and separable from the rights asserted in the main action." 412 F.2d at 227.

36 412 F.2d at 227. To support its conclusion the court cited Kowalski v. Holden, 276 F.2d 359 (6th Cir. 1960). In *Holden*, the Sixth Circuit ruled that interlocutory appeal of a collateral issue would be unavailable unless substantial rights would be lost as a result of delaying review until the litigation was terminated. 276 F.2d at 360. An analogy was made between an order granting class action standing and one granting separate trials. Both were considered nonappealable because they did not involve an extraordinary situation.

37 469 F.2d 14 (7th Cir. 1972). The *Thill* court preferred to permit interlocutory appeals only where irreparable harm would occur if the court waited until after a trial on the merits. *See* Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684 (1949).

38 469 F.2d at 17.

39 *Id.* On its facts, *Thill* would appear to be similar to *Kohn* and *General Motors* in that the threshold test of *Herbst* was not satisfied. Thill, in an earlier phase of the action, personally claimed actual damages of $7 million for which it sought the permitted

Substantial considerations support the Second Circuit's decision in *Herbst*. In conclusively determining at the outset the propriety of a class action designation, an interlocutory appeal may eliminate the possibility of unnecessary expenditures by both parties. Defendants will undoubtedly spend large sums in litigating class actions,[40] and plaintiffs must initially bear the cost of notice to "each class member who can be identified through reasonable effort."[41] Moreover, class actions can generate untold managerial difficulties for the district court. As pointed out in *Herbst*, rule 23(d) imposes broad supervisory responsibility upon the district court governing the conduct of the action.[42] Additionally, the immense proportions of a class action "naturally take up infinitely more of the court's time than most other civil actions."[43] Immediate review of the grant of class action status may thus avoid the expenditure of much judicial time and energy, which, ironically, is the *raison d'être* of the finality concept.[44] Until the *Herbst* innovation, a district court might successfully resolve the plethora of managerial complexities only to learn later that its efforts were rendered worthless by an appellate court's decision that class action status was improper.

Determining the appealability of an interlocutory order[45] requires

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treble damages of $21 million. Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264, 267 (7th Cir. 1970). Thus, it is likely that the plaintiff would have continued the action despite the absence of class action designation.

40 *See* notes 18-19 and accompanying text *supra*.

41 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974). *See* FED. R. CIV. P. 23(c)(2). Where the plaintiff's personal stake in the suit is but a nominal amount, this requirement can be devastating. In his dissent to the Second Circuit's denial of rehearing en banc in *Eisen III*, Judge Oakes calculated that the cost of mailing notices to the members of the class would be $218,750. 479 F.2d at 1022 n.4.

42 495 F.2d at 1313. Rule 23(d) authorizes the making of "appropriate orders" during the progress of the litigation. Subdivision 2 outlines the procedural matters which may prove the most troublesome to the court:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . . .

FED. R. CIV. P. 23(d)(2).

43 495 F.2d at 1313.

44 *See* note 2 and accompanying text *supra*.

45 The "final decision" rule embodied in 28 U.S.C. § 1291 (1970) is not, of course, the only vehicle for an interlocutory appeal. For example, section 1292(a)(1) provides for immediate review of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions . . . ." *Id.* § 1292(a)(1). Section 1292(b) may also be utilized in certain instances. Under § 1292(b), if the district judge believes that a nonappealable order under § 1291 or § 1292(a) involves a controlling question of law on which a substantial difference of opinion is likely and that an immediate appeal from this order would materially

a delicate balancing approach.[46] The difficulty which two appeals may present must be weighed against the injuries that may arise when interlocutory appeal is denied.[47] The *Herbst* court was satisfied that the potential savings of time and money by both litigants and federal courts may militate in favor of interlocutory appeal where the reversal of a class action designation could prove outcome-determinative of the plaintiff's desire or ability to proceed. As applied in *Kohn* and *General Motors*, the *Herbst* test proved to be an equally viable means of avoiding "piecemeal" appeal where prosecution of the action appeared inevitable in any event.[48] In view of the crucial role a denial or grant of

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advance the suit, he may permit an interlocutory appeal which can be accepted in the discretion of the court of appeals.

When it was first enacted there was some thought that courts might be too generous in certifying interlocutory appeals under § 1292(b). *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendment to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 n.131 (1967). However, § 1292(b) has not been liberally applied. In Milbert v. Bison Lab., 260 F.2d 431 (3d Cir. 1958), the court concluded that "the conditions precedent to the granting by the court of permission to appeal which are laid down by . . . section 1292(b) are to be strictly construed and applied." *Id.* at 435. *See also* Kraus v. Board of County Road Comm'rs, 364 F.2d 919 (6th Cir. 1966); United States Rubber Co. v. Wright, 359 F.2d 784 (9th Cir. 1966); Gottesman v. General Motors Corp., 268 F.2d 194 (2d Cir. 1959). This strict interpretation is based chiefly on the following passage taken from H.R. REP. No. 1667, 85th Cong. 2d Sess. (1958):

> Your committee adopts with approval the view that appeals under this legislation should only be used in exceptional cases where an immediate appeal may avoid protracted and expensive litigation and is not to be used or granted in ordinary litigation wherein the issues raised can otherwise be properly disposed of.

Id. at 1-2. *See also* S. REP. No. 2434, 84th Cong., 2d Sess. (1958). For a discussion of the ramifications of § 1292(b) appeals, see Note *Interlocutory Appeal From Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292, 1296-97 (1970). *See also* Note *Class Action Certification Orders: An Argument for the Defendant's Right to Appeal*, 42 GEO. WASH. L. REV. 621, 623-24 (1974).

In Johnson v. Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969), the Fifth Circuit granted appeal pursuant to a § 1292(b) certification in the case of an interlocutory order denying class action designation. The *Herbst* panel, on the other hand, felt that appeal of a grant of class action designation should be a matter of right, freeing the defendant from relying upon the discretion of the district judge under § 1292(b). 495 F.2d at 1313 n.9.

[46] As noted by Mr. Justice Powell in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974):

> While the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future. . . . The inquiry requires some evaluation of the competing considerations underlying all questions of finality—"the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by the delay on the other."

Id. at 170-71, *quoting* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

[47] In 1965 the American Bar Association Special Committee on Federal Rules of Procedure made the following observations:

> It may be desirable for the Judicial Conference of the United States to review the question of intermediate appeals generally. The current crowded appellate docket is, in our opinion, no justification for unduly restricting intermediate appeals where they may be useful in securing "the just, speedy and inexpensive determination" of an action.

American Bar Association Special Committee on Federal Rules of Procedure, Report of Aug. 1965, *reprinted in* 38 F.R.D. 95, 105 (1966).

[48] As with all tests, there is always the danger that strict application will not prove

class action standing can play in the outcome of a lawsuit, other circuits should make use of the *Herbst* approach in determining whether an interlocutory appeal of this issue is appropriate.

Thomas A. O'Rourke

FEDERAL INTERVENTION IN STATE CRIMINAL PROCEEDINGS

Salem Inn, Inc. v. Frank

The issuance of federal injunctive relief against the enforcement of allegedly unconstitutional state criminal statutes raises delicate questions of comity and federalism.[1] Accordingly, the Supreme Court in *Younger v. Harris*,[2] established the basic principle that, absent extraordinary circumstances,[3] federal courts should not interfere with pend-

satisfactory in meeting changing circumstances. Judge Mansfield, concurring in *General Motors*, aptly cautioned against inflexible utilization of the *Herbst* standard:

> While the "three pronged" test . . . sets forth relevant factors that should be considered in deciding whether a class action certification is appealable, not all of them strike me as mandatory conditions precedent to review. Moreover, I fear that too strict or mechanical an adherence to the test, coupled with the engrafting of excessively specific conditions on appealability, will lead to violation of the Supreme Court's direction that § 1291 be given a "practical rather than a technical construction."

501 F.2d at 656-57, *quoting* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

1 Spears, *The Supreme Court February Sextet: Younger v. Harris Revisited*, 26 BAYLOR L. REV. 1 (1974). For an in depth analysis of developments in this area, see Note, *Federal Relief Against Threatened State Prosecutions: The Implications of Younger, Lake Carriers and Roe*, 48 N.Y.U.L. REV. 965 (1973).

2 401 U.S. 37 (1971). The plaintiff was indicted for violation of the California Criminal Syndicalism Act. CAL. PENAL CODE §§ 11400-01 (West 1970). He brought an action in federal court to enjoin the prosecution, alleging that the Act was unconstitutional on its face and that he would suffer irreparable harm. A three-judge court, holding that the law was impermissibly vague and overbroad, enjoined further prosecution. *Id.* at 40. The Supreme Court reversed the lower court's determination, holding that in order to enjoin a pending state prosecution, the federal plaintiff must establish the existence of extraordinary circumstances. *Id.* at 54. In this instance, the plaintiff would be required to prove that his federally protected rights could not be vindicated by his defense in a single prosecution. *Id.* at 46.

Decided the same day as *Younger* were five companion cases which both extend and interpret the Court's holding. *See* Samuels v. Mackell, 401 U.S. 66, 73 (1971) (declaratory relief denied for failure to meet *Younger* requirements); Boyle v. Landry, 401 U.S. 77, 81 (1971) (no threat of great and immediate injury); Perez v. Ledesma, 401 U.S. 82, 84-85 (1971) (suppression of evidence would stifle good faith state prosecution); Dyson v. Stein, 401 U.S. 200, 203 (1971) (no irreparable injury); Byrne v. Karalexis, 401 U.S. 216, 220 (1971) (failure to show that federal rights would not be adequately protected by defense in state prosecution).

3 401 U.S. at 54. The most commonly cited extraordinary circumstances are bad faith or harassment on the part of the state prosecutors. However, these are not exclusive, and other unusual situations might develop which would mandate federal intervention.

In Dombrowski v. Pfister, 380 U.S. 479 (1965), the Court reversed the denial of injunctive relief to a plaintiff being prosecuted pursuant to a statute which on its face violated first amendment rights. *Id.* at 497. The Court emphasized the "chilling effects" that a prosecution would have upon the exercise of such rights, regardless of the probable out-