cross-examination, and the abilities of the jury in recognizing the same.

Since its effectiveness is so greatly outweighed not only by the undue burden it imposes on the honest litigant, but also by the unnecessarily complex problems it creates in litigation, Iowa's dead man statute should be abolished. The decedent's estate will be adequately protected where the trier of fact, in weighing the witness' credibility, takes into account along with all the other factors, the probability and extent to which his or her testimony might have been contradicted by the deceased, had he survived.

Vreni R. Glista

A FINAL TOLLING OF THE DEATH-KNELL: THE DOCTRINE, ITS DEMISE AND CURRENT ALTERNATIVE METHODS OF APPEAL OF CLASS CERTIFICATION ORDERS.

I. INTRODUCTION

Since major changes nearly fourteen years ago,[1] the class action mechanism of Federal Rule of Civil Procedure 23[2] has been widely used[3] in causes

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1. The text of the old rule, the new rule and the Advisory Committee's notes on the new rule are set out in *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 94-107 (1966). *See also* 3B J. MOORE, FEDERAL PRACTICE ¶¶ 23.09[1]-[8] (2d ed. 1978); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-400 (1967). *See generally Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).

2. FED. R. CIV. P. 23. The rule as amended provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. 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 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.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

concerning a range of interests, from the problems of the aged to zoning issues.[4] However, despite its apparent utility as a method of consolidating claims in "mass-joinder," the rule has not escaped villification.[5] But whether one applauds the class action mechanism as helpmate to consumer claims[6]

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(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.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (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; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

3. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1977 ANN. REP. 230-44. In his report, the Director of the Administrative Office reported a decrease in the filing of class suits of 10.9%; only 3,153 new filings were added to 5,982 pending class suits. *Id.* at 230. *See also* Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123 (1974).

4. *See* 1 H. NEWBERG, CLASS ACTIONS § 1000b (1977).

5. *See* Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1973).

6. *E.g.*, Williams v. Mumford, 511 F.2d 363, 371 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 828 (1976) (Robinson, J., for a rehearing en banc):

[T]he class action has provided access to the judicial process for those who need it most. It has been the refuge of the poor, the hope of the downtrodden, and the salvation of the many whom our social institutions all too frequently victimize, unwittingly or otherwise. Truly it is said that "[t]he class action is one of the few legal

or reviles it as a dangerous weapon in the war of strike suits, there should be little doubt that the recent abrupt end put to the "death-knell" doctrine by the Supreme Court of the United States[7] is yet another limitation[8] on the efficacy of rule 23.

This so-called death-knell doctrine, which originated in the Second Circuit,[9] was a method by which appeal could be taken from non-final orders of a federal district court. Not all the circuits accepted the doctrine,[10] and in the end, the Supreme Court revoked its tacit acceptance.[11] Where adopted, the doctrine found its primary use in enabling appeal of orders granting or denying class certification under rule 23(c)(1).[12]

This Note does not contain any commentary on the wisdom of the Court's decision to close the door opened by the Second Circuit. The Court acted in response to the clear mandate of the final judgment rule imposed by Congress.[13] The purpose of this Note is to provide a familiarity with the now defunct death-knell doctrine and to generally examine the remaining alternatives which may be pursued when one is faced with an adverse class certification order in federal court.

In part one, the reader is exposed to the development of the death-knell doctrine, from its probable progenitors through its reception in the federal courts to its certain death in *Coopers & Lybrand v. Livesay*.[14] Also reviewed

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remedies the small claimant has against those who command the status quo." *Id.* at 371.

7. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), and text accompanying notes 157-78 *infra*.

8. *Coopers* is not the first case in which the Supreme Court has restricted the use of rule 23. In Snyder v. Harris, 394 U.S. 332 (1969), the Court held that individual claims of class members could not be aggregated to meet the jurisdictional amount necessary under 28 U.S.C. § 1332(a) (1976). The effect of this decision is to close the federal court system to those potential class action plaintiffs who have individual claims of less than $10,000 and have no other basis for federal jurisdiction than diversity of citizenship or federal question, 28 U.S.C. § 1331 (1976). This is true regardless of the fact that class-wide damages may well be in the millions of dollars.

Again, in Zahn v. International Paper Co., 414 U.S. 291 (1973), the Court limited the application of rule 23. The named plaintiffs in *Zahn* had individual claims exceeding $10,000, but some of the other members of the class did not. *Id.* at 292. The Court held that as to the latter group, the class action could not continue. *Id.* at 301. *See generally,* Shuck and Cohen, *The Consumer Class Action: An Endangered Species,* 12 San Diego L. Rev. 39 (1974).

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

10. *See* text accompanying notes 100-16 *infra*.

11. *Cf.* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (Supreme Court accepts without comment, that Second Circuit properly heard appeal in *Eisen I*) *with* Coopers & Lybrand v. Livesay, 437 U.S. at 477 (fact that one might be induced to abandon claim when denied class status is insufficient to confer appealability).

12. *See* note 2 *supra*.

13. 28 U.S.C. § 1292 (1976), often called the "final judgment rule," 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."

14. 437 U.S. 463 (1978).

in this section is the late-blooming companion to the original doctrine, the *reverse* death-knell and its applications. Then, having examined the problem of appealability of class determination orders through this framework, the present alternatives to the now defunct doctrine are discussed in part two. The reader should consider how well each of these substitutes fills the needs which supplied the impetus for the burgeoning of the death-knell doctrine.

No discussion is included regarding the various state class action provisions.[15] Nevertheless, even though the topic of this Note is thus limited, it is hoped that through it one may glean some insight into the interplay of practicalities and formalities in the judiciary.

II. Genesis: From Eisen I to Coopers & Lybrand v. Livesay

A. *The Final Judgment Rule and Pre-Eisen I Formulae*

In the federal court system, by statutory mandate, appeal may be taken only from a final order.[16] Thus, in the usual case, before a circuit court of appeals may review the decision of a federal district court, there must be an order entered by the district court which ends the litigation on the merits and leaves nothing for the trial court to do but execute the judgment.[17] This limitation of finality has its roots in the common law[18] and has been part of the judicial code since 1789.[19]

Adherence to the final judgment rule has been strict, and for good reason. In general, application of the rule averts clogging of the appellate courts,[20] delay caused in the trial court by interlocutory appeal[21] and tension between the courts of appeals and the district courts.[22] But mostly, judicial regard for the rule stems from its beneficial impact in preventing piecemeal appeal of orders regarding component elements of a single case[23] which would restrict

15. *See, e.g.*, Cal. Civ. Proc. Code § 382 (West 1972); Conn. Gen. Stat. § 52-105 (1958); Iowa R. Civ. P. 42; N.Y. Civ. Prac. Law §§ 901-909 (McKinney 1976); 42 Pa. Cons. Stat. Ann. §§ 1701-16 (Purdon 1977). *See generally* 1 H. Newberg, *supra* note 4, at §§ 1200-90.

16. *See* 28 U.S.C. § 1291 (1976), *supra* note 13.

17. *See* Catlin v. United States, 324 U.S. 229, 233 (1945). *But see* Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964) (final decision is not necessarily the last order in a case).

18. *See* Frank, *Requiem for the Final Judgment Rule*, 45 Tex. L. Rev. 292 (1966).

19. *Id.* at 292.

20. *Id.* at 293.

21. Quite naturally, if every order of a district court were appealable, and trial proceedings were held in abeyance until an appellate ruling were handed down, even the most simple of trials would drag on at length. Perhaps it is for this reason that Congress added the proviso to the Interlocutory Appeals Act, 28 U.S.C. § 1292(b), which permits the trial proceeding to continue unless a stay is entered by the district judge or a judge of the Court of Appeals. *Cf.* Fed. R. Civ. P. 62 (stay provisions of Federal Rules relating to orders pending injunctions, motions for new trials, where the United States is a party, actions for accounting, etc. . . .).

22. *See, e.g.*, Parkinson v. April Industries, Inc., 520 F.2d 650, 654 (2d Cir. 1975) ("The line between helpful guidance and noxious interference is a narrow one, and one goal of the final judgment rule is that of maintaining the appropriate relationship between the respective courts.").

23. *See, e.g.*, Cobbledick v. United States, 309 U.S. 323, 325 (1940).

the perspective of the appellate courts.[24]

Although adherence to the rule has been strict, it has not been rigid. Early on, in the 1848 case of *Forgay v. Conrad*,[25] the Supreme Court held that an order which subjected a party to "irreparable injury" was final for purposes of review.[26] *Forgay* dealt with a transfer of title to plaintiff by the trial court and the post-transfer order of an accounting of profits received by defendant during his possession of a parcel of land.[27] The Court found the requisite finality, reasoning that review after the accounting might provide only illusory relief if the order transferring title were reversed since the plaintiff could by then have disposed of the property in issue.[28] The *Forgay* rationale was later distilled to apply in cases where the order for which review was sought carried "serious public consequences."[29] In two cases subsequent to *Forgay*, the Court found finality relying in part on the de facto dismissal of the appealing parties to whom the litigation was ended by virtue of the orders appealed.[30]

In *Cohen v. Beneficial Industrial Loan Corp.*,[31] the Court elaborated on the requirements for exception from the final judgment rule,[32] retaining the irreparable injury element of *Forgay* but without citation to that case.[33] The Court adopted a "practical" approach to finality,[34] noting three criteria necessary to justify appealability: first, the order must impose irreparable injury; second, it must not be tentative, informal, incomplete or inconclusive; and third, the order must not ultimately merge with the final decision.[35]

In *Cohen*, the order appealed from relieved minority shareholders in federal court from posting a bond required by state law in shareholder's derivative suits.[36] The Court held that the district court's order fell into "that

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24. *See* Frank, *supra* note 18, at 293.

25. 47 U.S. (6 How.) 201 (1848).

26. *Id.* at 204.

27. *Id.* at 202-03.

28. *Id.* at 204.

29. *See* Radio Station WOW v. Johnson, 326 U.S. 120, 124 (1945).

30. *See* Clark v. Williard, 292 U.S. 112, 117-18 (1934) (order setting aside execution on judgment was final as to parties seeking its enforcement); Gumbel v. Pitkin, 113 U.S. 545, 548 (1885) (order dismissing intervention was final where it effectively disposed of party's rights).

31. 337 U.S. 541 (1949).

32. *Id.* at 546-47.

33. *Id.* at 546.

34. *Id.*

35. *Id. But see* Chabot v. Nat'l Sec. and Research Corp., 290 F.2d 647, 658-59 (2d Cir. 1961) (order appealed from was not totally separate from merits, but appeal allowed on the basis of *Cohen* because otherwise the action would end).

Compare United States v. McDonald, 435 U.S. 850 (1978) (pre-trial order denying motion to dismiss an indictment because of an alleged violation of the sixth amendment right to a speedy trial was not appealable on *Cohen* grounds because the decision was not consummated) *with* Abney v. United States, 431 U.S. 651 (1977) (pre-trial order denying motion to dismiss an indictment on double jeopardy grounds was appealable under *Cohen* because the order disposed of the question completely).

36. 337 U.S. at 543-45.

small class [of orders] which finally determines 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"[37] to defer review until entry of judgment on the merits.[38] Thus, in *Cohen*, the Supreme Court adopted a flexible interpretation of the rule of finality, which it deemed to be required by practicality.[39]

Cohen has been scopiously employed to allow appeal of collateral orders.[40] Its wider applicability has superseded the usefulness of *Forgay*, which is clearly stricter than the *Cohen* collateral order rule.[41] Like *Cohen*, *Gillespie v. United States Steel Corp.*,[42] which supplied another exception to the finality rule, had its origins in the *Forgay* doctrine, but it too is less stringent in application.[43] In fact, *Gillespie* is quite liberal, in comparison with *Forgay*, in the Court's handling of the finality rule.

In *Gillespie*, a negligence action prosecuted under the Jones Act,[44] recovery was sought by both the mother and the siblings of the decedent.[45] The district court struck the claim of the siblings[46] but the court of appeals reversed.[47] The Supreme Court, per Mr. Justice Black, allowed the appeal.[48] After weighing the inconvenience of piecemeal review against the danger of denying justice by delay, the court concluded that sanctioning the appeal would reduce the eventual cost to the parties, avoid a possible injustice on the siblings and that under the circumstances, the court of appeals had been correct in deciding and not dismissing the petition.[49] The Court also grounded its holding on the fundamental importance of the district court's order to the further conduct of the case.[50]

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37. *Id.* at 546.

38. *Id. See* Frank, *supra* note 18, at 300-02.

39. *Id.* at 546-47.

40. *See, e.g.*, Comment, *Appealability of a Class Action Dismissal: The "Death Knell" Doctrine*, 39 U. CHI. L. REV. 403, 410 n.49 (1972) [hereinafter cited as CHICAGO COMMENT]. *See also* Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l Inc., 455 F.2d 770, 773 (2d Cir. 1972) (*Cohen* collateral order doctrine must be kept in bounds, lest the exception swallow the rule).

41. *See* CHICAGO COMMENT, *supra* note 40, at 410. *See also* Comment, *Federal Appellate Review of the Grant or Denial of Class Action Status*, 18 B.C. IND. & COM. L. REV. 101, 110 n.76 (1976) [hereinafter cited as BOSTON COMMENT].

42. 379 U.S. 148 (1964).

43. *Compare* Gillespie v. United States Steel Corp., 379 U.S. 148, 153 (1964) ("Moreover, delay . . . might work a great injustice on [petitioners]") *with* Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1885) ("If appellants . . . must wait . . . they will be subjected to irreparable injury.").

44. 46 U.S.C. § 688 (1976). The Jones Act permits an injured seaman, or in case of his death, his representative, to maintain an action at law for damages.

45. 379 U.S. at 149-50.

46. *Id.* at 150.

47. *Id.* at 152.

48. *Id.* at 154.

49. *Id.* at 151-53.

50. *Id.* at 154. *Compare* Sekaquaptewa v. MacDonald, 575 F.2d 239, 242 (9th Cir. 1978) (*Gillespie* test interpreted to inquire whether the order sought to be appealed was fundamental

Curiously, the Court noted that by hearing the appeal, the court of appeals implemented the very policy which motivated Congress to pass the Interlocutory Appeals Act.[51] Presumably, this meant that the court below had recognized, as had Congress, that some situations required movement away from a strict finality rule.[52]

Forgay, Cohen and *Gillespie* are all exceptions to the final judgment rule, but *Cohen* is most intimately tied to the death-knell doctrine. In fact, before evolving into a doctrine in its own right, the death-knell doctrine was closely wedded to the *Cohen* collateral order rule.

B. *Eisen v. Carlisle & Jacquelin—The Case, Application and Dissent*

1. *The Case*

In 1966, Martin Eisen filed a class action lawsuit pursuant to Federal Rule of Civil Procedure 23(b)(3)[53] in the Southern District of New York on behalf of himself and all other similarly situated purchasers and sellers of "odd-lots" on the New York Stock Exchange against Carlisle & Jacquelin and DeCoppet & Doremus, brokers on the exchange.[54] Eisen alleged that the brokers had conspired to monopolize odd-lot trading and to charge excessive fees[55] in violation of the Sherman Antitrust Act.[56] The district court dismissed the class action, but not Eisen's individual claim.[57]

The Second Circuit Court of Appeals, in *Eisen I,* held that the district court's order dismissing the class was appealable, because if not reviewed, the death-knell of the action would be sounded.[58] Relying on language in *Cohen* and *Gillespie,* Circuit Judge Kaufman concluded that "no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen."[59] He noted that practical finality demanded that an appeal be allowed since irreparable harm would be visited upon Eisen and others if the order was not reviewed because the action would come to an end.[60]

Later,[61] in *Eisen IV,*[62] the Supreme Court implicitly recognized the valid-

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to the further conduct of the case) *with* Wescott v. Impresas Armadoras, S.A., 564 F.2d 875, 880-81 (9th Cir. 1977) (*Gillespie* test interpreted to require inquiry whether the inconvenience of piecemeal review would be greater than the danger of delaying justice).

51. *Id.* at 154. *See* note 182 *infra.*

52. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978).

53. *See* note 2 *supra.*

54. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967). *See* 46 U. Colo. L. Rev. 243, 254-46 (1974).

55. 370 F.2d at 119-20.

56. 15 U.S.C. §§ 1-7 (1976).

57. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 152 (S.D.N.Y. 1966).

58. 370 F.2d at 121.

59. *Id.* at 120.

60. *Id.* at 120-21.

61. Plaintiff Eisen's claim did not fail for want of trying. In all, there were nine decisions handed down, the end result of which brought Eisen back to square one. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966), was first in the series: there the district court declined

ity of the death-knell doctrine when it reviewed the history of the *Eisen* litigation.[63] Although it viewed *Eisen I* as resting exclusively on *Cohen*, the court did not otherwise comment on the decision.[64] Coincidentally, with regard to the central issue[65] of *Eisen IV*, the Court again applied the *Cohen* collateral order rule to sustain appellate jurisdiction concerning an order of the district court directing rule 23(c)(2) notice.[66]

2. *Application*

Two years after its decision in *Eisen I* and six years before *Eisen IV*, the Second Circuit had occasion to reconsider the death-knell doctrine in *Green v. Wolf Corp.*,[67] an action brought under rule 10b-5[68] of the Securities and Exchange Commission.[69] In *Green*, Judge Kaufman, again writing for the court, made note of the fact that as in *Eisen I*, plaintiff Green was not likely to press an enormously complex and expensive action to recover less than $1,000.[70] The monetary impetus to continue suit was stressed once more when the court commented upon the suitability of the class action mechanism for this type of litigation, where the injury was widespread, but no one potential plaintiff had been damaged sufficiently to bring suit on his own behalf.[71] Thus, through repetition, the outlines of the death-knell doctrine began to form: the incentive to sue, measured by the amount of one's claim, grew in importance for the fledgling doctrine.

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to allow Eisen to prosecute his suit as a class action. In 370 F.2d 119 (2d Cir. 1966) (*Eisen I*), the Second Circuit permitted appeal from the district court's dismissal of the class action. In Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (*Eisen II*), the court remanded the cause to the district court for reconsideration of the certification issue. In 50 F.R.D. 471 (S.D.N.Y. 1970), 52 F.R.D. 253 (S.D.N.Y. 1971) and 54 F.R.D. 565 (S.D.N.Y. 1972) the district court attempted to deal with the problems of Eisen's class suit. The Second Circuit in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973) (*Eisen III*), disdained the district court's dealings, and agreed with the lower court's original holding in 41 F.R.D. 147 (S.D.N.Y. 1966); it denied a rehearing *en banc* in 479 F.2d 1020 (2d Cir. 1973). In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (*Eisen IV*), the Supreme Court affirmed 479 F.2d 1005 (2d Cir. 1973) and by implication 41 F.R.D. 147 (S.D.N.Y. 1966) but did not overturn 370 F.2d 119 (2d Cir. 1966), whereby springs this Note.

62. 417 U.S. 156 (1974).

63. *Id.* at 161-69.

64. *Id.* at 162.

65. Because the plaintiff class in the *Eisen* litigation was so large, substantial problems arose with regard to the notice to be sent to class members. Additionally, a question existed as to the mechanics of damage payments over so large a class. Both of these issues were at the heart of *Eisen IV;* the Supreme Court ruled against plaintiff on each. *See* 46 U. COLO. L. REV. 243, 251-87 (1974).

66. 417 U.S. at 171. *See* note 2 *supra.*

67. 406 F.2d 291 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969).

68. 17 C.F.R. § 240.10b-5 (1978).

69. 406 F.2d at 293.

70. *Id.* at 295 n.6.

71. *Id.* at 296.

Next, in *City of New York v. International Pipe & Ceramics Corp.*,[72] an antitrust suit against suppliers of piping to municipal and state governments, the Second Circuit refused to apply the death-knell.[73] The court found that the district court's order denying class status was not an appealable final judgment.[74] The point of departure from *Eisen I* and *Green* appeared to be the size of the plaintiff's claim. The court in *City of New York* held that plaintiffs had adequate resources to carry on the litigation, even though they had been divested of class action status.[75] Furthermore, in the court's view, the substantial amounts at stake almost assured that the plaintiffs would continue on.[76]

Curiously, these three decisions do not sharply define the crux of the death-knell test. In *Eisen I* and *Green* the impetus to continue suit, measured by the prayer for damages, appeared dispositive.[77] Yet, in *City of New York*, the representative plaintiff's "resources" were considered in deciding if the death-knell would sound for the action if class status was not conferred.[78]

Two years later, in *Korn v. Franchard Corp.*,[79] decided with *Milberg v. Western Pacific Railroad Co.*,[80] the Court of Appeals for the Second Circuit made clear that implementation of the death-knell, without which adverse orders under rule 23(c)(1)[81] were held not appealable as final orders,[82] depended chiefly on the incentive to continue suit without class action status, as measured by the alleged damages.[83] For example, the class representative in *Korn* had a total claim for $386;[84] in *Milberg* it was $8,500.[85] Milberg's claim, it was held, came too close to the federal jurisdictional minimum

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72. 410 F.2d 295 (2d Cir. 1969).

73. *Id.* at 299.

74. *Id.* Nor did the court find 28 U.S.C. § 1292(a)(1) applicable.

75. 410 F.2d at 299. *But cf.* CHICAGO COMMENT, *supra* note 40, at 414 n.72 (the assets of the plaintiff that might possibly be applied to aid in its suit should not be taken into account; the amount of the claim in the instant litigation is the appropriate factor).

76. 410 F.2d at 299. In dissent, Judge Hays reasoned that while the City of New York might continue the action, the death-knell should sound as to those plaintiffs who would not continue their suit in absence of class status. *Id.* at 300-01.

See also Caceres v. International Air Transport Ass'n, 422 F.2d 141 (2d Cir. 1970). In *Caceres*, the appeal from the district court's adverse class determination order was dismissed as a non-final order. *Id.* at 141. Once again, as in *City of New York*, the substantial amount of the average plaintiff's claim, here $150,000, had no small effect on the court's judgment. *Id.* at 144.

77. *See* Green v. Wolf Corp., 406 F.2d 291, 295 n.6 (2d Cir. 1968); Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966).

78. *See* City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 299 (2d Cir. 1969).

79. 443 F.2d 1301 (2d Cir. 1971).

80. *Id.*

81. *See* note 2 *supra*.

82. 443 F.2d at 1305.

83. *Id.* at 1306-07. *See also* note 77 and accompanying text *supra*.

84. 443 F.2d at 1306.

85. *Id.* at 1306-07. Mrs. Milberg's claim was aggregated with her husband's to reach the $8,500 amount because in the court's view, it would have been imprudent to treat the two as practically separate. *Id.*

dollar amount in diversity[86] and federal question[87] cases to apply the death-knell doctrine.[88] The $8,500 amount was considered adequate motivation to "keep a case alive"[89] without the benefit of rule 23.[90]

Equally important, the *Korn-Milberg* court demonstrated that it was reluctant to permit general appealability of adverse class determination orders.[91] The court relied on the policies behind the final judgment rule[92] in rejecting a broad rule of appealability in order to stem the onrushing tide of appeals.[93] Short of the death-knell, the court showed its willingness to let class determination orders stand until final judgment provided a route of appeal.[94]

Judge Friendly concurred with reservation.[95] He expressed his fears regarding the viability and legal justification for the death-knell doctrine.[96] Significantly, he was among the first to point to the inequality of the death-knell:[97] appeals had been allowed for class action plaintiffs, but as of *Korn*, not for defendants.[98] He was not the last to make this particular observation or to question the workability of the doctrine.[99]

Among the most articulate condemnations of the death-knell doctrine came in *Hackett v. General Host Co.*,[100] a 1977 case wherein the Third Circuit explicitly rejected the *Eisen I-Korn* development of the doctrine.[101] The plaintiff in *Hackett*, who had an individual claim of nine dollars, attempted to appeal from the district court's denial of her motion to represent a class of 1.5 million.[102] Relying on the availability of other routes of appeal[103] and

86. 28 U.S.C. § 1332 (1976) (the section allows, *inter alia*, citizens of different states to sue in federal court where the amount in controversy exceeds $10,000).

87. 28 U.S.C. § 1331 (1976) (this section gives the federal district courts original jurisdiction in causes where the amount in controversy exceeds $10,000 and the action arises under the Constitution or laws of the United States).

88. 443 F.2d at 1307.

89. *Id.*

90. *Id.*

91. *Id.* at 1305. *See* CHICAGO COMMENT, *supra* note 40, at 417-20.

92. *See* note 13 *supra*.

93. 443 F.2d at 1305.

94. *Id.* at 1306.

95. *Id.* at 1307.

96. *Id.*

97. *Id. See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).

98. *See* City of New York v. International Pipe and Ceramics Corp., 410 F.2d 295 (2d Cir. 1969); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

99. *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978); Hackett v. General Host Co., 455 F.2d 618 (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972). *See generally* 3B MOORE, *supra* note 1, at ¶ 23.97.

100. 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

101. *See also* Samuel v. University of Pittsburgh, 506 F.2d 355 (3d Cir. 1974) (*Cohen* collateral order rule would be similarly inappropriate for appeal of a class certification order).

102. 455 F.2d at 620.

103. *Id.* at 624.

noting the dangers inherent in the death-knell,[104] the court declined to employ the doctrine in the Third Circuit.[105]

The *Hackett* court also relied in part on one point raised in Judge Friendly's concurring opinion in *Korn*: the criticism that the death-knell operated only for *plaintiffs* refused class certifications.[106] Furthermore, the court made note of two additional functional defects in the death-knell doctrine. First, the death-knell had no application in cases where federal jurisdiction depended, in the first instance, on a statutorily mandated amount.[107] That is, if a named plaintiff had a claim in excess of $10,000, under *Milberg* the death-knell would not apply.[108] In addition, since aggregation of claims is not permitted under rule 23, thus requiring each would-be class member to satisfy the amount in controversy requirements,[109] attempted class actions resting on diversity or federal question jurisdiction could not survive the death-knell doctrine if each of the individual class members had less than the minimum claim.

Secondly, especially in civil rights class action litigation, the death-knell doctrine was viewed as unnecessary because of the beneficial effect of 28 U.S.C. § 1292(a)(1),[110] which permits appeal of an interlocutory order granting or denying injunctive relief. So, because of these two reasons and a conviction that public interest claims too small to draw the attention of competent attorneys were not worthy grist for the judicial mill,[111] the court dismissed plaintiff's appeal.

Following the Third Circuit's lead, the Court of Appeals for the Seventh Circuit disapproved of the death-knell doctrine in the *per curiam* opinion of *King v. Kansas City Southern Industries Inc.*.[112] Citing *Hackett* and *Gerstle v. Continental Airlines, Inc.*,[113] a Tenth Circuit case where the court, without mention of the death-knell doctrine, found that a rule 23(c)(1) order was not final and appealable,[114] the *King* court merely noted that a class designation order was not a final order under section 1291,[115] and declined to follow *Eisen I*.[116] However, not all the circuits gave the doctrine such cursory handling.

For example, in *Weingartner v. Union Oil Co.*,[117] the Ninth Circuit Court

104. *Id.* at 622-23, 626. *See* Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

105. 455 F.2d at 626.

106. *Id.* at 622.

107. *Id.*

108. *See* BOSTON COMMENT, *supra* note 41, at 117 n.145.

109. *See* Snyder v. Harris, 394 U.S. 332 (1969); note 8 *supra*.

110. 28 U.S.C. § 1291(a)(1) (1976). *See* note 180 *infra*.

111. 455 F.2d at 626.

112. 479 F.2d 1259 (7th Cir. 1973). *Accord*, Anschul v. Sitmar Cruises, Inc., 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976); Thill Sec. Corp. v. New York Stock Exch., 469 F.2d 14 (7th Cir. 1972).

113. 466 F.2d 1374 (10th Cir. 1972).

114. *Id.* at 1377.

115. *Accord*, Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

116. 479 F.2d at 1260.

117. 431 F.2d 26 (9th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

of Appeals impliedly adopted the death-knell when it dismissed an appeal from a class determination order, but only because the named plaintiff had an individual claim in excess of $350,000, by far adequate incentive to continue suit.[118] Similarly, in *Falk v. Demsey-Tegeler & Co.*,[119] the court noted the existence of the death-knell doctrine, but declined to apply it under the circumstances presented by that case, where the named party-plaintiff had a claim in his own right of $14,000.[120] Apparently, because of the amount of the claim, the *Falk* court assumed that the plaintiff would prosecute his case until final judgement, when review of the order denying class status would be appealable as of right.[121] Much later, in *Hooley v. San Francisco Real Estate Board*,[122] the Ninth Circuit refined this line by requiring as a condition to application of the death-knell doctrine that not only the *named* plaintiffs, but all the members of the purported class not have a claim justifying separate litigation.[123]

In the Fifth Circuit, the death-knell doctrine had been accepted. In *Gosa v. Securities Investment Co.*,[124] a securities fraud case, although the court was forced to dismiss an appeal from an adverse class determination order because of an underdeveloped record, it named several factors that would be determinative in sounding the death-knell.[125] In addition, the *Gosa* court put the burden of developing an adequate record upon the party seeking to invoke the death-knell.[126] *Graci v. United States*,[127] reaffirmed *Gosa* and added another requirement, true death, that is, extinguishment of the representative party's claim.[128] Presumably, extinguishment occurred where the representative party was unable to maintain the suit without class status, as in *Eisen I*.

So too, the Eighth Circuit accepted and the District of Columbia Circuit rejected the doctrine in *Hartman v. Scott*[129] and *Williams v. Mumford*,[130] respectively. In *Hartman*, the court found that in striking the class allegation, the district court had so contracted the requested relief that the litigation had effectively been terminated.[131] The court therefore allowed the appeal. In

118. *Id.* at 29.
119. 472 F.2d 142 (9th Cir. 1972).
120. *Id.* at 143 n.3.
121. *Id.* at 144.
122. 549 F.2d 643 (9th Cir. 1977).
123. *Id.* at 645.
124. 449 F.2d 1330 (5th Cir. 1971).
125. *Id.* at 1332. The court thought the following important: cost to final judgment; solvency of the named plaintiff, with regard to payment of court costs; the likelihood of a recovery which would include attorney's fees and the amount of the claims of the other class members. *Id.*
126. *Id. Accord,* Jelflo v. Hickok Mfg. Co., Inc., 531 F.2d 680 (2d Cir. 1976) (*per curiam*).
127. 472 F.2d 124 (5th Cir.), *cert. denied,* 412 U.S. 928 (1973).
128. *Id.* at 126. *Accord,* Share v. Air Properties G. Inc., 538 F.2d 279, 273 (9th Cir.), *cert. denied sub nom.*, Woodruff v. Air Share Properties G. Inc., 429 U.S. 923 (1976).
129. 488 F.2d 1215 (8th Cir. 1973).
130. 511 F.2d 363 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975).
131. 488 F.2d at 1219-20.

Williams, a suit alleging discrimination in employment practices,[132] the court noted that the possibility that plaintiff could obtain back pay, job reinstatement and attorney's fees[133] provided sufficient incentive for the plaintiff to continue the litigation without the benefit of class status.[134] Moreover, the court questioned whether the death-knell could ever apply to a case where attorney's fees were available to the prevailing party.[135] Despite the tacit disapproval and qualification in *Williams*, the doctrine continued to develop in other courts.

C. *The Reverse Death-Knell*

Perhaps spurred on by Judge Friendly's cautioning voice in *Korn*,[136] the Second Circuit developed what may be called the "reverse" death-knell doctrine.[137] Although it may have been slow in coming,[138] the reverse death-knell provided equality of treatment for defendants who were aggrieved because of a class determination adverse to them, but favorable to plaintiffs, the traditional beneficiaries of the doctrine.[139]

Judge Friendly's criticism of the death-knell's lack of mutuality gained support in *Eisen III*,[140] where Judge Medina noted that certain injury would be done to a defendant who was forced to defend a class action that should not have been certified.[141] In *Herbst v. International Telephone & Telegraph Corp.*,[142] the test for the reverse death-knell doctrine emerged. The defendant in *Herbst* challenged the certification of a class whose potential damages reached nearly $110 million.[143] Relying primarily on *Cohen*, the court assumed jurisdiction of the appeal under a three-part test, but sustained the class on the merits.[144]

In order to maintain an appeal, the *Herbst* court called for the defendant to demonstrate: (a) that the order would be fundamental to the further conduct of the case; (b) that it be separable from the merits; and (c) that irreparable harm flow to the defendant from the cost of litigating the action and the potential damages.[145] Because IT&T faced potential liability of $110 million, the court had little trouble concluding that the reverse death-knell

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132. 511 F.2d at 365.
133. *See* 42 U.S.C. §§ 2000e-5(g), 2000e-16(d) (1976).
134. 511 F.2d at 367.
135. *Id.* at 368.
136. Korn v. Franchard Corp., 443 F.2d 1301, 1307 (2d Cir. 1971) (Friendly, J., concurring).
137. *See* BOSTON COMMENT, *supra* note 39, at 119.
138. *See* Note, *Class Action Certification Orders: An Argument for the Defendant's Right to Appeal*, 42 GEO. WASH. L. REV. 621, 622 (1974).
139. *Id.*
140. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973).
141. *Id.* at 1007 n.1.
142. 495 F.2d 1308 (2d Cir. 1974).
143. *Id.* at 1312.
144. *Id.* at 1312-13, 1316.
145. *Id.* at 1312-13.

should apply.[146] A later case, *Kohn v. Royall, Koegel & Wells,*[147] examined these criteria more minutely. The first hurdle, fundamentality, said the court, demanded the same result as did the plaintiff-oriented death-knell: if the order were reversed on appeal, the litigation would practically be at an end.[148] In effect, this meant that if the order would not fit under the death-knell for a plaintiff, it would not for a defendant. If a plaintiff had incentive to continue suit without certification, the reverse death-knell would not operate.[149] Because the court found that *Kohn* could continue the suit without class status, it held that it could not properly hear the case and therefore, dismissed the appeal.[150]

The Second Circuit noted another compelling reason to permit defendant appeals of class certification orders in *Parkinson v. April Industries, Inc.*[151] In *Parkinson*, a rule 10b-5 action,[152] the court reviewed the practical consequences of deferring review of a certification order until final judgment. In the court's view, a reversal of an incorrect certification order after trial would be improbable because of a reluctance to upset class status after the time and efforts put into the complete litigation.[153]

Of course, not every circuit accepted the reverse death-knell.[154] But whatever prognosis might have been assigned to the future of the death-knell doctrine and the reverse death-knell doctrine in the wake of the Second Circuit's decisions in *Herbst* and *Parkinson,*[155] it became apparent that a change was imminent when the Supreme Court of the United States granted a writ of certiorari to the defendants in the Eighth Circuit case of *Coopers & Lybrand v. Livesay.*[156]

D. *Coopers & Lybrand v. Livesay: The End of the Line*

Cecil and Dorothy Livesay filed suit on behalf of themselves and others similarly situated, seeking damages for themselves in the amount of $2,650, which represented a loss sustained on an investment in Punta Gorda Isles, Inc.[157] Punta Gorda had issued a prospectus which had allegedly misstated earnings.[158] Coopers & Lybrand, an accounting firm, certified the prospec-

146. *Id.* at 1313.
147. 496 F.2d 1094 (2d Cir. 1974).
148. *Id.* at 1098.
149. *See* General Motors Corp. v. City of New York, 501 F.2d 639, 645 (2d Cir. 1974).
150. 496 F.2d at 1100-01.
151. 520 F.2d 650 (2d Cir. 1975).
152. 17 C.F.R. 240.10b-5 (1978).
153. 520 F.2d at 653, 654 n.3.
154. *See* Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975); *In re* Cessna Aircraft Distrib. Antitrust Litigation, 518 F.2d 213 (8th Cir.), *cert. denied,* 423 U.S. 947 (1975); Thill Sec. Corp. v. New York Stock Exch., 469 F.2d 14 (7th Cir. 1972); Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969).
155. *See* text accompanying notes 142-53 *supra.*
156. Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106 (8th Cir.), *cert. granted sub. nom,* Coopers & Lybrand v. Livesay, 434 U.S. 954 (1977).
157. 550 F.2d at 1107.
158. *Id.* at 1107.

tus.[159] Punta Gorda later wrote down its net income for each year reported in the prospectus by over $1 million. The Livesays sold the stock they had purchased in reliance on the falsified prospectus and sustained the loss mentioned.[161]

The district court first certified, and then, because plaintiffs delayed in prosecuting the case, decertified the cause as a class action, finding the plaintiffs to be inadequate representatives.[162] On appeal to the Eighth Circuit, plaintiffs sought reversal of the decertification order or in the alternative, a writ of mandamus.[163] Finding no support in the record for the district court's action, the Eighth Circuit reversed.[164]

Coopers & Lybrand petitioned for and was granted a writ of *certiorari* to the Supreme Court.[165] The court after argument unanimously reversed the Eighth Circuit,[166] holding the death-knell doctrine would not support federal appellate jurisdiction of certification orders because of their non-final character.[167] That a party might choose not to prosecute his claim because of an adverse rule 23(c)(1)[168] order would not constitute reason to consider such order final within the meaning of section 1291.[169]

The Court based its decision on several principles, not the least of which was an interpretation of the *Cohen* collateral order rule which excluded certification orders from its scope.[170] Essentially, since a certification order may be altered or amended at any time before final judgment, the Court found a rule 23(c)(1) order too tentative and too involved with the merits to be reviewable before final judgment.[171] In addition, the Court found the different methods of administering the death-knell[172] arbitrary and inconsistent with the Congressional decision to make finality the requisite of appeal.[173]

The Court also balked at what it perceived as the indiscriminate interlocutory review permitted by the death-knell doctrine.[174] Interlocutory appeal

159. *Id.* at 1107-08.

160. Coopers & Lybrand v. Livesay, 437 U.S. 463, 465 (1978).

161. *Id.*

162. 550 F.2d at 1109.

163. *Id.*

164. *Id.* at 1112-13.

165. Punta Gorda Isles and the Livesays entered into a settlement while appeal was pending; Coopers & Lybrand did not. 437 U.S. at 465 n.3.

166. 437 U.S. at 477.

167. *Id.* at 467.

168. *See* note 2 *supra*.

169. 437 U.S. at 477.

170. *Id.* at 469.

171. *Id.*

172. *Compare* Shayne v. Madison Square Garden Corp., 491 F.2d 397 (2d Cir. 1974) (motive to continue suit, measured by prayer, is the test for implementation of the death-knell) *and* Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971) (if plaintiff has incentive to continue litigation, appeal not allowed) *with* Hooley v. Red Carpet Corp., 549 F.2d 643 (9th Cir. 1977) (plaintiff must prove that no member of the class can continue) *and* Gosa v. Securities Investment Co., 449 F.2d 1330 (5th Cir. 1971) (plaintiff must demonstrate "true death").

173. 437 U.S. at 471-74.

174. *Id.* at 474.

is available in the federal court system,[175] the Court noted, but subject to restrictions imposed by Congress, and not judicial fiat.[176] Finally, the Court concluded that the plaintiff-directed doctrine did not sufficiently protect the defendant's position *vis-a-vis* class certification orders,[177] nor did it aid in the maintenance of a proper relationship between the federal appellate and trial court levels.[178]

Thus, the death-knell doctrine of *Eisen I* came to naught. And yet, the problem remains that potential class action plaintiffs and defendants will still be confronted in the course of rule 23 practice with adverse class determination orders, and have little immediate recourse available. What these parties can and apparently must do, to obtain review of these orders is limited; however, there are five afternatives available.

III. Post-Coopers & Lybrand: the Present Alternatives[179]

A. *Interlocutory Appeals.*

Of the remaining routes to the courts of appeals when seeking review of a rule 23(c)(1) order, the most reliable is that afforded by the Interlocutory Appeals Act (section 1292).[180] Within section 1292, sections (a)(1) and (b) are

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175. *See* 28 U.S.C. § 1292 (1976).

176. 437 U.S. at 474-75.

177. *Id.* at 476.

178. *Id. But see, e.g.*, Parkinson v. April Industries, Inc., 520 F.2d 650, 654 (2d Cir. 1975) (the death-knell relieves some burden on the district courts and allows the appellate court to supervise the developing law).

179. Not every possible means of appeal is discussed. Clearly, the Supreme Court's decision in *Coopers* has removed the *Cohen* collateral order route to review of certification decisions. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978). Nor will the *Gillespie* doctrine be of much aid in attempting appeal, in view of the Court's dictum in *Coopers* to the effect that *Gillespie* should be limited to its narrow factual situation. *Id.* at 477 n.30.

One case, General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974) hints at another route of appeal. In *General Motors*, the plaintiffs moved to acquire class status; their motion was granted. Defendants successfully moved to disqualify one of plaintiffs' attorneys. The death-knell doctrine was held inapplicable to defendants' attempted appeal, because the requirements of the *Herbst* test were not met. *Id.* at 645. However, since the court of appeals was hearing an appeal from the disqualification order via *Cohen*, the defendants requested that the court exercise its pendent jurisdiction to hear the appeal from the certification order. The court declined to do so, but did not mention whether it would have employed this method under different circumstances. *Id.* at 648. *See* 9 Moore, *supra* note 1, at ¶ 110.25[1].

180. 28 U.S.C. § 1292 (1976). The Act reads:

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

particularly relevant, but in differing degrees.[181] In general, the section exists as a legislative recognition of the problems that inhere in a final judgment rule.[182] In section 1292, Congress makes appeal available for non-final orders, but subject to careful restrictions.[183]

Under section 1292(a)(1), the courts of appeals have jurisdiction of appeals from district court orders granting, modifying or refusing injunctive relief.[184] On its face then, section (a)(1) has only limited utility; its primary application will be in cases where injunctive relief is the principal remedy sought.[185] By its terms, section (a)(1) does not apply to allow appeal from an adverse class determination order in an action for damages.

One example of how this section might apply to denials of class certifications appears in *Brunson v. Board of Trustees,*[186] a class action pursued under the old rule 23.[187] In *Brunson,* the district court struck all reference to the class of school children seeking vindication of their civil rights, except the named plaintiff.[188] The Fourth Circuit Court of Appeals assumed jurisdiction of the appeal from this dismissal because it viewed the order as a denial of requested injunctive relief; the named plaintiff could pursue an injunction on his own, but the scope of what he might obtain would be extremely limited in comparison with the requested relief of the dismissed class as a whole.[189] This reasoning gained a following in later cases,[190] but predictably, not every court subscribed to it.[191] In courts that did, restrictions were sometimes placed on free

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termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *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.

See generally Wright, *The Interlocutory Appeals Act of 1958,* 23 F.R.D. 199 (1959).

181. Sections 1292(a)(2), (3) and (4) apply to appeal of orders appointing receivers, admiraiity cases orders and orders in patent infringement cases.

182. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 471 (1978); Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955). As the Court said in *Coopers & Lybrand,* the Interlocutory Appeals Act mends a flaw in the final judgment rule; certain non-final orders require prompt review. 437 U.S. at 474.

183. *See* § 1292(b), *supra* note 180.

184. *Id.*

185. Section 1292(a)(1) might then have special significance for class suits maintained under FED. R. CIV. P. 23(b)(2); *see* note 2 *supra.*

186. 311 F.2d 107 (4th Cir. 1962), *cert. denied,* 373 U.S. 933 (1963).

187. *Id.* at 107; *see* note 1 *supra.*

188. *Id.* at 108.

189. *Id.*

190. *See* Johnson v. Nekoosa-Edwards Paper Co., 558 F.2d 841 (8th Cir. 1977), *cert. denied,* 434 U.S. 920 (1978); Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Price v. Lucky Stores Inc., 501 F.2d 1177 (9th Cir. 1974); Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972); Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2d Cir. 1971).

191. *See* New York Assoc. of Homes for the Aging v. Toia, 559 F.2d 876 (2d Cir. 1977); Weit v. Continental Illinois Nat'l Bank and Trust Co., 535 F.2d 1010 (7th Cir. 1976); Donaldson v. Pillsbury Co., 529 F.2d 979 (8th Cir. 1976); Williams v. Mumford, 511 F.2d 363 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975); Greenhouse v. Greco, 496 F.2d 213 (5th Cir. 1974); Sogny v. Coastal Chemical Corp., 469 F.2d 709 (5th Cir. 1972).

appealability. For instance, in *Jones v. Diamond,*[192] the court required that in order to invest an appellate court with jurisdiction under 1292(a)(1), the requested injunctive relief must be the heart of the remedy sought *and* the denial of class status must *de facto* preclude it.[193]

Section 1292(a)(1), therefore, has a scope too narrow to establish federal appellate jurisdiction for all rule 23(c)(1) orders. Paradoxically, section 1292(b) encompasses a much wider class of orders than 1292(a)(1), yet may be more circumscribed in application than that section.[194] The limitations of section 1292(b) are twofold: (1) before an interlocutory order may be appealed it must be certified by the district court as a controlling question of law, as to which there are good grounds for different interpretation, the resolution of which may hasten final judgment; (2) once certified, the appellate level has discretion to refuse the appeal[195] for a variety of reasons, including docket congestion.[196]

Use of section 1292(b) has been urged by court and commentator alike as a more suitable means of appeal of class certification,[197] but even the most cursory examination of the contingent benefit of appeal under section 1292(b) casts serious doubt on its usefulness. Before one satisfies the discretion of a court of appeals, one must meet three substantive tests at the district court level and secure that court's permission to appeal. It has been suggested that fulfilling these procedural requirements is no easy task.[198] For example, a district court may be unwilling to certify appeal on a question it recently decided or it might not view the certification order as involving a controlling question of law which may be fairly disputed and resolution of which may hasten final judgment.[199]

As regards a finding that an order involves a controlling question of law, one writer has suggested that in analyzing an issue to determine if it contains a controlling question, a judge should look to the piece of litigation as a whole and not the level of discretion involved.[200] The focus would be on whether or not the order might result in protracted suit; if it did, the policy which generated 1292(b) would favor allowing appeal.[201]

Parties to class actions have attempted to use section 1292(b) to appeal certification orders, but results have been inconsistent.[202] In several instances,

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192. 519 F.2d 1090 (5th Cir. 1975).

193. *Id.* at 1095-96.

194. *See* Note, *Interlocutory Appeals In the Federal Courts Under 28 U.S.C. § 1292(b),* 88 HARV. L. REV. 607 (1975) [hereinafter cited as HARVARD NOTE].

195. *See* note 180 *supra.*

196. *See* HARVARD NOTE, *supra* note 194, at 607.

197. *See* Parkinson v. April Industries, Inc., 520 F.2d 650, 660 (2d Cir. 1975) (Friendly, J., concurring); Kaplan, *supra* note 1, at 390 n.31; BOSTON COMMENT, *supra* note 41, at 129.

198. *See, e.g.,* Note, *Interlocutory Appeal From Orders Striking Class Action Allegations,* 70 COLUM. L. REV. 1292, 1296-97 (1970) [hereinafter cited as COLUMBIA NOTE].

199. *Id.* at 1296.

200. *See* BOSTON COMMENT, *supra* note 41, at 131.

201. *Id.* at 131-32. *See* Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.), *cert. denied,* 419 U.S. 885 (1974).

202. *Compare* Sussman v. Lincoln American Corp., 561 F.2d 86 (7th Cir. 1977) (§ 1292(b) appeal permitted); Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976) (class

parties have neglected to follow the 1292(b) procedure, focusing solely on the section 1291 route, via the death-knell doctrine.[203] In one case, after the court of appeals determined that the death-knell doctrine did not apply, it went on to say that, in retrospect, having heard arguments, it would not have exercised its discretion to accept a section 1292(b) appeal because the district court had acted properly.[204] However, since the discretion of the district court is somewhat defined by the substantive requirements of rule 23,[205] the courts of appeals would be correct in taking a close look at certification orders.[206]

In *Katz v. Carte Blanche Corp.*,[207] the Third Circuit gave ample consideration to the appropriateness of review of a certification order under section 1292(b). *Katz*, a suit filed under the Truth in Lending Act,[208] involved a section 1292(b) appeal from an order granting class status to plaintiff.[209] The Court of Appeals found the requirement of a difference of opinion no hurdle since it concluded there was no likelihood that the district court would certify an appeal where none existed.[210] Similarly, the court noted the district court's informed assessment as to whether appellate resolution would advance eventual termination presented no difficulty.[211] Only as to the requirement of a controlling question did the court indicate that an issue concerning the propriety of the section 1292(b) appeal might arise.[212] Yet ultimately, the court determined that demarcating which orders are appealable under section 1292(b) rests not upon a strict formula, but on considerations of the policy of 1292(b).[213]

Generally then, a party litigant may find his salvation from an adverse class determination order in section 1292(b). If not there, in the proper case section 1292(a)(1) may be the correct route. Yet what might be the result if section 1292(a)(1) is inapposite to a case, and the district court refuses to certify an appeal under section 1292(b)?

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action status denial appealed under § 1292(b)); Wilcox v. Commerce Bank, 474 F.2d 336 (10th Cir. 1973) (rule 23(c)(1) order appealed under § 1292(b)); Fisons Ltd. v. United States, 458 F.2d 1241 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972) (policy of § 1292(b) permits appeal from adverse class determination order) *and* Johnson v. Georgia Hwy. Express Inc., 417 F.2d 1122 (5th Cir. 1969) (§ 1292(b) appeal allowed from adverse rule 23(c)(1) order) *with* Donaldson v. Pillsbury Co., 529 F.2d 979 (8th Cir. 1976) (district court refused to certify appeal from adverse class certification order) *and In re* Master Key Antitrust Litigation, 528 F.2d 5 (2d Cir. 1975) (district court would not certify appeal of order certifying class).

203. *See* Domaco Venture Capitol Fund v. Teltronics Services, Inc., 551 F.2d 508 (2d Cir. 1977); Ott v. Speedwriting Publishing Co., 518 F.2d 1143 (7th Cir. 1975).

204. *See* Caceres v. Int'l Air Transport Ass'n, 422 F.2d 141, 144 (2d Cir. 1970).

205. *See* note 2 *supra*.

206. *See* Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); COLUMBIA NOTE *supra* note 198, at 1295.

207. 496 F.2d 747 (3rd Cir. 1974).

208. 15 U.S.C. §§ 1601-1681t (1976).

209. 496 F.2d at 751-52.

210. *Id.* at 754-55.

211. *Id.* at 755.

212. *Id.*

213. *Id.* at 755-56.

B. *Mandamus.*

As a means of forcing a district court to amend a certification order, one may seek a writ of mandamus.[214] For example, where the district court did not grant class status, the representative plaintiff would petition the court of appeals for a writ unequivocally directing the district court to certify the requested class.

The case law on the availability of this extraordinary remedy is curiously divided. One group holds that mandamus is an alternative method of review.[215] Another holds that mandamus is such an extraordinary remedy, such a potent judicial weapon, that it will be applied in only the most exceptional cases.[216]

Realistically, chances for getting a writ of mandamus are slim.[217] Whether sought to coerce the district court to certify a section 1292(b) appeal regarding the validity of a rule 23(c)(1) order[218] or to compel the court to vacate a certification order,[219] a petitioner for a writ must meet stringent standards. Review is confined by a demand that the party seeking mandamus have no other remedy[220] and have a clear right to issuance of the writ.[221] Its grant is discretionary.[222] The court to which the writ is directed must be guilty of indisputable error[223] or clear usurpation of power.[224]

The writ would not be available to contest the correspondence of a particular class to the rule 23(a) criteria,[225] but if a district court certified the class under a subsection of rule 23 that was clearly inapplicable, mandamus would lie.[226] And if a lower court certified a class action in direct disregard of a federal statute mandating other procedures for prosecuting a class suit, then mandamus would be the appropriate remedy.[227] But absent compelling circumstances such as those, petitions for mandamus will not serve as a replacement for the death-knell doctrine.

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214. 28 U.S.C. § 1651 (1976).

215. *See, e.g.*, Parkinson v. April Industries, Inc., 520 F.2d 650, 655 (2d Cir. 1975); Hackett v. Gen. Host Co., 455 F.2d 618, 624 (3d Cir. 1972).

216. *See, e.g., In re* Cessna Aircraft Antitrust Litigation, 518 F.2d 213, 215 (8th Cir. 1975); Weight Watchers of Phil., Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770, 775 (2d Cir. 1972).

217. *See* COLUMBIA NOTE, *supra* note 198, at 1296-97.

218. *See* note 2 *supra*.

219. *See, e.g.*, Arthur Young & Co. v. United States District Court, 549 F.2d 686, 688 (9th Cir. 1977).

220. *See* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

221. *See* Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953).

222. *See* Schlagenhauf v. Holder, 379 U.S. 104, 112 n.8 (1964).

223. *See* Arthur Young & Co. v. United States District Court, 549 F.2d at 692.

224. *See* Sperry Rand Corp. v. Carson, 554 F.2d 868, 872 (8th Cir. 1977).

225. *See* Interpace Corp. v. City of Phila., 438 F.2d 401, 404 (3d Cir. 1971).

226. Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976).

227. *See, e.g.*, Schmidt v. Fuller Brush Co., 527 F.2d 532, 534-35 (8th Cir. 1975) (where Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1976), mandated one procedure, mandamus would lie where district court had employed FED. R. CIV. P. 23).

C. *Intervention.*

One of the fears attendant upon denying an immediate appeal of a class certification has been that a plaintiff who continues without class status will not be the champion for the dismissed out class and consequently will not seek review of the denial of certification.[228] To avert this possible danger, the dismissed class, or more likely, a representative, may seek to intervene, either for trial, or an appeal.[229] Simply put, the representative would move to become a party to the action under Federal Rule 24; once accomplished, the dismissed out class members would be assured of having their interests protected.

Without proceeding to an exhaustive study of the procedures of intervention,[230] it might be appropriate to point out some problem areas that may confront a putative intervenor. First, unless one intervenes as of right,[231] and in class action cases, one probably will not, intervention is discretionary with the trial court[232] and not reviewable as a final judgment if denied.[233] Secondly, a party defendant may oppose intervention on appeal of potential class action plaintiffs on at least one convincing ground: that they did not prepare or defend against a class suit, and should not *sua sponte* be visited with liability of class proportion.[234]

There are cases in which intervention has been permitted to allow some individuals to join in the action,[235] and of course, there are cases where it has

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228. *See* CHICAGO COMMENT, *supra* note 40, at 418.

229. FED. R. CIV. P. 24 reads in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action; (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

See United Airlines v. McDonald, 432 U.S. 385 (1977).

230. *See generally* 3B MOORE, *supra* note 1, at ¶ 24.01.

231. *See* 3B MOORE, *supra* note 1, at ¶¶ 24.06-24.09-1[4].

232. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 75 (3d ed. 1976).

233. *See* 3B MOORE, *supra* note 1, at 24.15.

234. *Accord,* Note, *Class Actions in the Seventh Circuit: Appealability of an Interlocutory Order Denying Class Status,* 53 CHI.-KENT L. REV. 462, 473 (1976); CHICAGO COMMENT, *supra* note 40, at 419.

235. *See, e.g.,* United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

been refused because of the potential confusing effect on the trial.[236] Yet generally, intervention would appear as one alternative to keep a party in a suit where class certification had been denied. Notice though, that the benefits of rule 24 would only accrue to dismissed-out plaintiffs.[237] In addition, the number of intervenors would never approach the number of class plaintiffs there might have been if rule 23 status had been granted,[238] thereby thwarting the policy of rule 23 to avoid a multiplicity of actions.[239]

D. *Federal Rules 54(b) and 41(b)*

Two final methods to secure review of an adverse class determination order may be suggested, but given the paucity of citation to them, one is forced to assume that they are not preferred methods of appeal.[240] First, rule 54(b)[241] permits entry of final judgment as to less than all parties where multiple parties are involved, when the district court determines there is no just reason for delay.[242] Through this method, parties who are denied class status may seek entry of judgment under rule 54(b) and appeal the adverse certification order.[243]

In one case, *Monarch Asphalt Sales Co. v. Wilshire Oil Co.*,[244] a suit brought under the Clayton[245] and Robinson-Patman[246] Acts the district court had denied both the request for class certification and a request to intervene.[247] The court then entered rule 54(b) judgment against the intervenor

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236. *See, e.g.*, Lipsett v. United States, 359 F.2d 956 (2d Cir. 1966).

237. Certainly, it would be the ousted unnamed class plaintiffs that would seek to intervene; defendants confronted with an adverse certification order would be parties to a class action and therefore would not have to intervene.

238. Especially in a case such as *Eisen*, where the class numbered over one million members. *Contra*, Hackett v. Gen. Host Co., 455 F.2d 618, 624 (3d Cir. 1972).

239. *See* 3B Moore, *supra* note 1, at ¶ 23.02[1].

240. *See generally*, C. Wright & A. Miller, Federal Practice and Procedure §§ 2369-2373, 2653-2661 (1973).

241. Fed. R. Civ. P. 54 provides, in pertinent part:

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

242. *See* note 241 *supra*.

243. *See, e.g.*, Katz v. Carte Blanche Corp., 296 F.2d 747, 752 (3d Cir. 1974).

244. 511 F.2d 1073 (10th Cir. 1975).

245. 15 U.S.C. §§ 12, 13, 14-19, 20-27, 44 (1976).

246. 15 U.S.C. §§ 13, 13a, 13b, 21a (1976).

247. 511 F.2d at 1076.

hopefuls, and on appeal, the Tenth Circuit allowed the appellants to raise the issue of the correctness of the denial of class status.[248] While this liberal posture may not be accepted everywhere, the utility of 54(b) is apparent. One drawback, however, is that the 54(b) route requires the district court's approval[249] and where this is refused, no appeal may be taken unless mandamus is sought and awarded.[250]

Rule 41(b)[251] allows entry of judgment where a party, again usually a plaintiff, does not respond to the order denying certification and the opposing party moves for dismissal for failure to prosecute.[252] From this judgment plaintiff could appeal.

Two problems with this route have been suggested. First, the judgment entered is on the merits: by taking the rule 41(b) judgment, plaintiff is gambling everything on the appeal.[253] Secondly, the defendant, who must move for entry of judgment, may not so move, deferring consideration of the certification issue as to the named plaintiffs, and allowing the continued running of the statute of limitations against would-be class members.[254] Clearly, 41(b) does not fully replace the death-knell either.

IV. Conclusion

From *Eisen I* to *Coopers & Lybrand* was a comparatively short road. Twelve years of decisions had begun to hammer out a very much needed route of appeal for orders that may have deleterious effects upon plaintiff and defendant alike.

Whether right or wrong, *Coopers* imposes a serious procedural limitation on use of class actions. It would be a mistake to commit the effect of *Coopers*

248. *Id.* at 1077.

249. *See* note 241 *supra.*

250. *See* text accompanying notes 214-27 *supra.*

251. Fed. R. Civ. P. 41 provides in part that:

> . . . (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. . . .

252. *See* note 251 *supra.*

253. *See* Columbia Note, *supra* note 198, at 1298.

254. *Id.*

solely to consumer actions, those "frankenstein monsters"[255] of federal litigation. No matter what the underlying cause of action may be, the certification order poses the threat of extinguishing a valid claim or fortifying a dubious one.

Certainly no judicial time is saved. If a potential class is denied class status, groups of claimants may splinter off and bring what action they may under state and federal rules of joinder. If class status is granted in a case where it should not have been, the trial, which probably will be lengthy,[256] stands to clog the district court unnecessarily, not to mention impose enormous costs on the rule 23 defendants.

The alternative routes to appeal class certification do not seem adequate to the task. Although the death-knell doctrine may not have been strictly proper under the final judgment rule, it undoubtedly filled a need. Success comes from answering needs; perhaps Congress, which has the necessary tools, will see fit to meet the demand occasioned by the Supreme Court's decision in *Coopers* with appropriate legislation.

James Patrick Tallon

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255. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C.J., dissenting).

256. *See* Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1139 (1974).

THE LEGAL LIABILITY OF MEDICAL PEER REVIEW PARTICIPANTS FOR REVOCATION OF HOSPITAL STAFF PRIVILEGES

I. INTRODUCTION

In recent years, medical peer review committees have increasingly become a topic of medical, as well as legal, discussion.[1] The phenomenon may be partially attributed to recently enacted federal legislation which requires a nationwide network of physician groups to review the quality of medical care received by certain protected groups of patients.[2] Additionally, an increasing number of state legislatures have enacted statutes which provide members of medical peer review committees with at least some degree of immunity from civil liability for their actions as committee members.[3] This legislative trend reflects a widespread belief that the medical profession is best qualified to police its own activities. As one court has stated: "The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance."[4] However, the growing attention being given to matters of medical peer review is perhaps best evidenced by the increasing amount of litigation involving the correctness of review committee decisions suspending physician's hospital staff priveleges.

As members of a medical peer review committee, physicians review the practices and procedures of other staff physicians, particularly those whose medical competency has been placed in question by complaints from patients or other medical personnel. The procedural mechanisms of the review process are generally included in the hospital by-laws, which also delineate the procedural safeguards provided the physician being investigated. The typical hospital by-laws include the due process guarantees of notice, the right to an impartial hearing, and appellate review.[5] The hospital's governing body, upon the recommendation of the peer review committee, makes the final decision regarding the physician's staff privileges.[6]

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1. *See, e.g.*, Southwick, *Hospital Medical Staff Priviliges*, 18 DEPAUL L. REV. 655 (1969); Note, *Selection of Hospital Staff Members*, 40 CIN. L. REV. 797 (1971); Note, *Physician-Hospital Conflict: The Hospital Staff Privileges Controversy in New York*, 60 CORNELL L. REV. 1075 (1975); Note, *Judicial Review of Private Hospital Activities*, 75 MICH. L. REV. 445 (1976) [hereinafter cited as MICH. Note; Note, *Application of the Antitrust Laws to Anticompetitive Activities by Physicians*, 30 RUTGERS L. REV. 991 (1977); Comment, *Hospital Medical Privileges: Recent Developments in Procedural Due Process Requirements*, 12 WILLAMETTE L. J. 137 (1975) [hereinafter cited as WILLAMETTE Comment].

2. *See* A. GOSFIELD, PRSO'S: THE LAW AND THE HEALTH CONSUMER 1 (1975). The enacted legislation is found at 42 U.S.C. §§ 1320c to 1320c-22 (1976).

3. *See* note 11 *infra*.

4. Sosa v. Board of Managers, 437 F.2d 173, 177 (5th Cir. 1971).

5. *See, e.g.*, the medical staff by-laws contained in the appendix to the court's decision in Campbell v. St. Mary's Hosp., 252 N.W.2d 581, 587-90 (Minn. 1977).

6. *Id.* at 589.