Chapter 20: Civil Procedure

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§20.1. Trustee process: Constitutional and procedural developments. Trustee process is a form of attachment which has no basis in common law but is entirely a creation of the legislature. Attachment by this method has had a long history in the Commonwealth where there has been a statute governing the subject since at least 1708.1 The current statute permits certain enumerated personal actions to be commenced by summoning a third party who is in possession of goods, effects or credits of the defendant to be "trustee" of such property for the benefit of the plaintiff.2 Historically, and in accord with the terms of applicable statutes, this attachment may be effected prior to any judicial determination regarding the defendant's liability and prior to any notice and opportunity for a hearing. Although the plaintiff, in many cases, is required to file a bond in the appropriate court before making the attachment,3 the defendant need not be notified of the attachment until after it is made.4

Although there is considerable case law interpreting the language used in the trustee process statutes and its jurisdictional basis, there is a dearth of authority dealing with their constitutionality. Despite long hallowed use, a three judge federal court in Schneider v. Margossian5 held that certain sections of the trustee process statute violate the due process clause of the Fourteenth Amendment and enjoined further enforcement of the statute to the extent that defendants in civil actions are denied

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2 G.L., c. 246, §§1, 20.
3 Id. at §1. No bond need be filed in cases where there is a statement in the writ that the action is based on a judgment, a contract for personal service, a contract for goods sold and delivered, money due under a contract in writing, tort for operation of an unregistered motor vehicle, as well as where the alleged damages are under one thousand dollars or where the action is commenced by the Attorney General. Id.
4 G.L., c. 22, §17.
6 The scope of the original memorandum and order was clarified by a supplemental memorandum. Id. at 745.
notice and hearing prior to attachment. The court relied on several recent opinions of the Supreme Court of the United States as precedent for what it conceded would have been bold action only a few years earlier.

In *Sniadach v. Family Finance Corp.*, the plaintiff challenged a Wisconsin pre-judgment garnishment procedure which permitted a creditor to freeze the wages of his alleged debtor without notice and prior hearing and without a showing of special need. The Supreme Court held that this procedure violated the fundamental principles of procedural due process. In the more recent case of *Fuentes v. Shevin*, the Supreme Court struck down the replevin statutes of Florida and Pennsylvania in a context which did not involve the importance of wages to the poor. The statutes were held to deprive persons of property without due process of law since the defendants' chattels were taken without any prior opportunity to be heard. *Fuentes* thus extended the *Sniadach* rule to all property whose use by the owner is curtailed without prior notice and opportunity to be heard. The Court in *Fuentes* carefully indicated that certain attachments without hearing could be permitted. Examples include situations where attachment is necessary to create quasi in rem jurisdiction, to guard against a bank failure or to protect the public against dangerous products. However, in the absence of an important governmental or general public interest, a defendant must be afforded an opportunity to contest at least the probable validity of an underlying claim before the claim can subject his property to attachment.

Applying *Sniadach* and *Fuentes*, the court in *Schneider* held that Massachusetts trustee process provisions were unconstitutional on their face. The court carefully limited some of the potential effects of this holding. One of the defendants in the case urged that relief based on a determination that trustee process was unconstitutional should only be applied prospectively. To rule otherwise, it was argued, would cast doubt on the validity of all civil actions then pending in Massachusetts that were commenced by trustee process. In response the court expressly ruled that, except for the case at bar, its decision was to have no effect on actions begun prior to the effective date of the decree. Such actions begun before the effective date of the decree are valid, and the state courts may order trustees to pay over to plaintiffs the amounts held on such attachments.

The *Schneider* decision issued on September 21, 1972 raised many additional questions which were not answered in the opinion. The At-

8 The Massachusetts trustee process statute authorizes garnishment of wages in an action brought on a judgment with permission of the court after notice. G.L., c. 246, §24.
10 Id. at 96-97.
11 349 F. Supp. at 745.
12 Id.
torney General by letter dated October 10, 1972 suggested to Judge Garrity (the author of the Schneider opinion) that the original decision had created considerable procedural confusion. Pending clarification, the Attorney General advised sheriffs in the Commonwealth that trustee writs dated after September 21, 1972 were not to be served (although constables were not so notified). He also advised various courts that actions commenced by trustee writs dated prior to September 22, 1972 are not proscribed by the court’s opinion. The Attorney General’s letter also took the position that Chapter 246, the trustee process statute, had been struck down in its entirety but expressed concern that this interpretation might not be consistent with the intention of the court. Schneider provoked considerable discussion among attorneys. Did the decision invalidate trustee process only when used in connection with a pre-judgment cause of action without notice and without an opportunity to be heard? Was the right to utilize trustee process preserved in an action on a judgment?

The three judge court responded to both the Attorney General’s request for clarification and a letter from plaintiff’s counsel concerning certain class action aspects of the case by issuing a supplemental memorandum. The original suit was brought in the form of a class action but in the original opinion the court did not address the question of certification. In its supplemental memorandum the court stated that it has impliedly denied plaintiff’s request for class action certification when it denied retroactive effect to its decree even though the requirements of Rule 23 of the Federal Rules of Civil Procedure may have been met. Since retroactive relief was inappropriate no purpose would be served by certifying the plaintiff’s class. The original suit had also purported to establish the clerks of court of the Commonwealth as a class of defendants. The court also refused to certify that class.

In direct response to the questions posed by the Attorney General, the court expressly ruled that Chapter 246 was not struck down in its entirety and that it does have continued vitality in cases where there is notice and an opportunity for hearing. As an illustration, the court expressly referred to G.L., c. 246, §32, §8, which permits attachments of wages where an attaching creditor has already obtained a judgment. In order to obtain such attachment the creditor is required by paragraph 8 to apply to a judge upon ten days written detailed notice to the defendant. The court must then endorse permission for attachment on the writ before it may be served.

The illustration used by the court only deals with one of the many questions raised by its decision. Another question is whether trustee process is valid in an action brought upon a judgement. If a writ shows on its face that it is an action upon a judgment, existing provisions permit

13 Id.
14 Id.
15 Id. at 746.
trustee process to be used without the filing of a bond. Commencement of actions on a judgment by trustee process have been quite common. The Attorney General’s position that Chapter 246 had been struck down in its entirety jeopardized this practice and created considerable turmoil at the bar. The turmoil increased when Chief Judge Flaschner of the district court distributed a bulletin indicating that trustee process was invalid in all respects.

The practice of commencing suits by attaching a defendant’s bank account has been particularly common when suit is brought on an out-of-state judgment. In the original Schneider opinion the court did not suggest even by dictum whether such process might be used to commence an action on a judgment. However, the court expressly relied on the language in Fuentes which stated that a defendant should have the opportunity to contest the probable validity of the claim underlying the action. It may be argued that the need of a hearing before attachment on a judgment is not as great in these cases, since the validity of the claim underlying the action would presumably have been adjudicated. On the other hand such adjudication may not appear on the face of a judgment; and in fact the judgment may have been obtained by default. In the case of default judgments a defendant should have the opportunity to contest issues such as jurisdiction, particularly if an out-of-state judgment is involved, since the judgment sued upon requires jurisdiction to be valid. The illustration of a valid trustee process does not resolve the issue. G.L., c. 246, §32, ¶8 provides for attachment in an action on a judgment after the defendant has been given notice and a hearing. However, not only has the underlying claim been adjudicated, but even though the action is on a judgment, the defendant is given an opportunity to contest the attachment.

The Commercial Law League requested a hearing before Judge Flaschner on the issues raised by Schneider and its supplemental opinion and urged clarification of the judge’s bulletin. At a meeting with Judge Flaschner, the League sought acknowledgment of the continued constitutionality of the Massachusetts wage attachment procedures and a determination (a) that Chapter 246 is applicable to actions commenced on a judgment or (b) that the issue is not presently resolved by judicial determination. The League also requested promulgation of a rule providing for a “prior opportunity to be heard” in Chapter 246 situations as well as matters under Chapter 223, Sections 44(a) and 48. In addi-

16 G.L., c. 246, §1.
17 Bulletin No. 5-72 dated October 18, 1972.
19 The court also stated that “[o]bviously §32, ¶8 as it provides for trustee process based upon claims which have already been adjudicated, is unaffected by the decision in this case.” (Emphasis added). Id. at 746. Thus the court argued that all trustee process in actions on a judgment are valid under Schneider.
20 G.L., c. 246, §32, ¶8.
tion, the League submitted that the constitutionality of real estate attachments presently challenged in a case pending in the District Court for Massachusetts should be presumed until otherwise determined.21

Another practice subject to question is the issuance of “special precepts” which are attachments issued after commencement of suit upon motion to the court. Statutory authority for such action is contained in Chapter 223. The Schneider opinion was expressly limited to actions under Chapter 246. Chapter 223 specifically refers to attachments by trustee process.22 Nevertheless the rationale of Schneider was based upon the failure to give a defendant an opportunity to be heard. Although a special precept is issued only by a judge upon motion, it may be issued ex parte without notice to a defendant and without opportunity to be heard. Ex parte hearings on special precepts have not usually involved extensive inquiry into the probable validity of the underlying claims although a showing of need is usually required. The face of the special precept would not necessarily indicate that the defendant has been given notice and an opportunity to be heard. A potential trustee served with such a writ may feel himself caught between exposure for failure to freeze the account and concern that the writ was unconstitutionally issued. In such instances counsel for those named trustees have prepared motions for instructions from the court issuing the precept. To avoid unnecessary uncertainty a judge issuing special precepts could endorse on the precept a legend indicating that the precept was issued after notice and an opportunity had been afforded the defendant to be heard.

Some attorneys have even questioned whether the powers of a court sitting as a court of equity may be affected by the Schneider decision. Courts of equity have traditionally granted injunctive relief prior to the final disposition of a case to preserve the status quo which may sometimes require freezing the property of an alleged debtor. Preliminary injunctions are traditionally decreed only after notice and an opportunity to be heard upon findings by a court that the plaintiff has shown immediate and irreparable harm outweighing harm caused the defendant by the proposed restraint and a probability of prevailing on the merits.23 Temporary restraining orders may be issued ex parte without notice on affidavit or verified complaint, but are effective for only ten days, usually pending the outcome of a hearing on a preliminary injunction.24

Schneider has thus highlighted many problems which are not yet resolved. In early 1973, the Commercial Law League requested promulgation of clarifying rules by the Supreme Judicial Court implementing its earlier suggestions to Judge Flaschner. The Massachusetts Bar Associa-

22 G.L., c. 223, §16.
23 See Gallison v. Downing, 244 Mass. 33, 38, 138 N.E. 315, 318 (1923).
tion has drafted a somewhat different proposed court rule dealing with procedures for pre-attachment hearings. A subcommittee of the Civil Procedure Committee of the Boston Bar Association has recommended a rule prohibiting attachment without notice and an opportunity to be heard unless the court makes findings similar to those required to issue a preliminary injunction. Bills proposing various approaches have been filed in the legislature. Schneider and the proposed rules or legislation which may follow it will have an important impact on real estate attachments, motor vehicle attachments, remedies under Article 9 of the Uniform Commercial Code, the validity of replevin, enforcement of judgments and garnishment procedure generally. Other pre-judgment remedies such as lis pendens, arrest on mesne process, the special possessory liens of attorneys, mechanics, innkeepers and even bills to reach and apply may be affected.

In view of the present uncertainty, lawyers should exercise extreme caution to remain abreast of current developments by case, rule and statute in the area as a whole. Problems of immediate concern which appear limited in scope may be affected by developments in another related but not identical area.

§20.2. The Massachusetts Appeals Court. August 16, 1972 marked the effective date of legislation creating a new appellate court which functions immediately below the Supreme Judicial Court. On the same day, the Governor appointed all six justices of the new court. Two days later the first cases were received for filing by the Clerk of the Appeals Court. The court held its first hearing during the week of November 13, 1972, and by the year’s end had issued its first written opinions. As reported by John E. Powers, Clerk of the Appeals Court, “Never in the judicial history of the United States has such a court been established, located and functioning as a court within five weeks of its existence.”

The creation of the appeals court adds an entirely new dimension to Massachusetts practice. It limits the right of appeal to the Supreme Judicial Court but provides a quicker and, in some respects, more ac-

§20.2. 1 Acts of 1972, c. 740, §1, adding G.L., c. 211A.
3 Id. at 6.
4 See G.L., c. 211A, §11. The Governor’s Council raised a question about the constitutionality of this aspect of the legislation which it feared might impair the ability of a litigant to appeal to the Supreme Court of the United States. The Attorney General found no constitutional infirmity: “[T]he fact that the Supreme Judicial Court has exercised its discretion by refusing further review in such a case in no way affects the right of the litigants to seek further review in the Supreme Court of the United States. Title 28, Section 1257, of the United States Code provides: ‘Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court....’ Under this provision, if the jurisdiction of the Supreme Judicial Court is properly invoked and it declines to review the judgment of the Appeals Court,
cessible forum for appellate review. The mechanics of the new appeals court procedure should, therefore, be closely scrutinized by the practitioner.

With the single exception of convictions for first degree murder which result in a sentence of death or life imprisonment, the appeals court has concurrent appellate jurisdiction with the Supreme Judicial Court over determinations made in the superior court, land court, and probate court. The review of all cases falling within the concurrent jurisdiction of the Supreme Judicial Court and the appeals court “shall be in the first instance by the Appeals Court” unless two justices of the Supreme Judicial Court issue an order for direct review or unless a majority of the justices of the appeals court certifies that direct review by the Supreme Judicial Court is in the public interest. Should two justices of the Supreme Judicial Court wish to hear a particular case that would otherwise go to the appeals court, they must find:

that the questions to be decided are (1) questions of first impression or novel questions of law which should be submitted for final determination to the supreme judicial court; (2) questions of law concerning the Constitution of the commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the commonwealth; (3) questions of such public

the Appeals Court is then the highest court in which a decision could be had. A party would then be free to appeal that decision to the United States Supreme Court.” (Emphasis added) Op. Att'y Gen. (September 13, 1972), citing Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Rock, 279 U.S. 410 (1929); Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922). Compare Mr. Justice Black's opinion in Griffin v. Illinois, 351 U.S. 12 (1956), where he said, “[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.” Id. at 18.

Presently the mean time period between the filing of an appeal and the notice of hearing is 66.48 days for criminal appeals and 75.75 days for civil appeals. Thereafter it has taken approximately 45 days for a decision in a criminal appeal to be rendered by the court and 40 days for the decision in a civil appeal. Clerk's Report, at 4. Note that Appeals Court Rule 1:12 provides that, “A case shall not be argued sooner than the fifty-sixth day after ... entry except by order of the court or a justice.”

Typical of the legislature's concern with simplified procedures is the requirement that briefs need not be printed but may be reproduced by xerography. Acts of 1972, c. 740, §1, adding G.L., c. 211A, §13.

Id., adding G.L., c. 211A, §10. Appellate review of decisions in the district courts remains by way of the appellate divisions of the district courts and thence directly to the Supreme Judicial Court. G.L., c. 231, §§108 and 109. Appeal from decisions of the Appellate Tax Board is also directly to the Supreme Judicial Court. G.L., c. 58A, §13. The Chairman of the Massachusetts Senate Judiciary Committee has filed legislation to further expand the jurisdiction of the appeals court to encompass review of decisions of the Housing Court of the City of Boston, Mass. Senate Bill 10 (1973).

G.L., c. 211A, §10(A) and (B).
interest that justice requires a final determination by the supreme judicial court.  

The Supreme Judicial Court has promulgated detailed rules for dealing with applications for direct appellate review.  

The appeals court normally sits in panels of three justices although the Chief Justice may order a panel of four or more justices to sit on a particular matter. After the decision by one of its panels a majority of the justices of the court may review and revise that decision. Yet, since there are six justices on the appeals court, a unanimous decision by any three-judge panel would appear to be conclusive upon rehearing even if the other three justices strongly disagreed.  

Once the appeals court has rendered its decision upon a matter within its jurisdiction, “[t]here shall be no further appellate review by the supreme judicial court” unless  

(a) . . . a majority of the justices of the appeals court deciding the case, or of the appeals court as a whole, certifies that the public interest or the interest of justice makes desirable further appellate review, or (b) where leave to obtain further appellate review or late review is specifically authorized by three justices of the supreme judicial court for substantial reasons affecting the public interest or the interest of justice.  

9 G.L., c. 211A, §10 (A). It would appear from the language that the three enumerated findings are to be dealt with in the alternative and that a positive finding on one of the three can form the basis for direct review. Note also that in order for a question under the United States Constitution to form a basis for direct review by the Supreme Judicial Court it must have first been raised in “a court of the commonwealth.” Query whether this language permits raising for the first time on the request for direct review a constitutional question which has not been raised in the trial court but has been addressed by “a court of the commonwealth”?  

10 S.J.C. Rule 4:04(6). The form of application is detailed in S.J.C. Rule 4:04(2) which provides: “The application for direct appellate review shall contain, in the following order: (a) a request for direct appellate review; (b) a statement of the prior proceedings in the case; (c) a short statement of facts relevant to the appeal; (d) a statement of the issues of law raised by the appeal and a brief argument thereon (covering not more than ten pages), including appropriate authorities, in support of the applicant’s position on such issues; and (e) a statement of reasons why there should be direct appellate review. A copy of the record on appeal as previously filed in the Appeals Court shall be attached to or properly identified and filed with the application.” The new rules have been published in 16 Boston Bar J. 29 (Nov. 1972).  

11 G.L., c. 211A, §3.  

12 G.L., c. 211A, §11.  

13 Further, there could be no review of the decision by the full appeals court at all unless one of the judges on the original panel desired it, since without the concurrence of one of the judges on the original panel the other three could never command a majority.  

14 G.L., c. 211A, §11. Since the affirmative action of only two justices of the Supreme Judicial Court is needed to assure appellate review by that court before hearing by the appeals court but three justices must act to insure further review
The power vested in the justices of the appeals court to certify "that the public interest or the interest of justice makes desirable a further appellate review"\(^{15}\) has some very interesting procedural ramifications. Assume, for instance, that the probate court has found for the plaintiff in a bitterly contested case turning on a recondite question under the rule against perpetuities. Suppose further that the question is not particularly novel but that prior decisions of the Supreme Judicial Court could be read as indicating a contrary result. Since the question is not one of first impression, does not arise under either the Constitution of the Commonwealth or the United States and is not of particular public interest, direct review by the Supreme Judicial Court would not be warranted. On appeal, the case would thus be heard by a panel of three justices of the appeals court. Assume further that that panel, affirms the judgment for the plaintiff in a two-to-one decision. The dissenter in the original panel, outraged at what he considers a miscarriage of justice, may convince his brethren who did not sit on the case that further review is warranted. After such review, the full appeals court bench could find for the defendant, voting four-to-two. The majority of the original panel having now become the dissenters, it lies within their power, since they were "a majority of the justices of the Appeals Court deciding the case" in the first instance, to certify that "the interest of justice makes desirable a further appellate review."\(^{16}\) The whole case would thus be thrown up to the Supreme Judicial Court. One might suppose that every four-two split on the appeals court could thus be certified to the Supreme Judicial Court if the two dissenters felt strongly enough about it, but that is not the case. Under the statute, this result can only be reached if the two dissenters happen to form a majority of the panel which originally decided the case. Otherwise, the decision of the appeals court would stand as final unless three justices of the Supreme Judicial Court could be persuaded to review it.

It must be conceded that this hypothetical situation is unlikely to occur. At this writing, no justice of the appeals court has dissented from an opinion of a panel of that court, nor has the full bench of the court been called upon to review the decisions of any of its panels. Instead, the court is diligently devoting itself to carrying out its legislative mandate, fully living up to the expectations of the proponents of this historic legislation.\(^{17}\)
§20.3. Class actions. The resort to "recently refurbished class actions in the relatively new civil rights field" resulted in significant procedural litigation in the federal courts during this Survey year. In *Yaffe v. Powers* the Court of Appeals for the First Circuit analyzed certain problems created by class actions brought to enforce broad civil rights and evidenced a greater tolerance of such actions than had been shown by the Federal District Court for Massachusetts.

The *Yaffe* case arose out of a demonstration in Fall River protesting United States military action in Cambodia and Ohio National Guard action at Kent State University. Fearing violence, the Fall River authorities dispatched a police photographer in plain clothes to photograph the activities. Photographs of the plaintiff Yaffe were allegedly given by the police to a newspaper and published in connection with a story on "Fall River radicals;" photographs of the other named plaintiff, Hornsby, were alleged to have been displayed in a public area of the Fall River police station for several weeks. Plaintiffs claimed that the police surveillance, attendant record keeping, and the circulation of information in the dossiers maintained by the police violated their constitutional rights. They sought a declaratory judgment and a broad injunction against such activities, except when conducted in aid of the apprehension of persons to be charged with specific crimes.

The plaintiffs further claimed to represent a class consisting of all other individuals who wish to . . . engage, in the city of Fall River, in peaceful political discussions . . . without surveillance and photographing by defendants . . . without becoming the subjects of dossiers, reports, and files maintained by the defendants, and without any publication by defendants to other persons of the contents of any such dossiers.

Accordingly they sought broad-ranging discovery of all police files re-

Acts of 1972, c. 740, §1, "[t]hree justices shall constitute a quorum to decide all matters required to be heard by the appeals court;" but under G.L., c. 279, §4, as added by Acts of 1972, c. 740, §17, a "justice of the appeals court" is empowered to stay execution of a sentence pending appeal. Thus it is unclear whether the appeals court is to have single justice powers similar to those of the Supreme Judicial Court. While its jurisdiction appears broad enough to encompass such matters, the requirement that three judges are necessary to constitute a quorum when coupled with only a single implicit exception in the same statute seems to suggest a contrary conclusion.

§20.3.1 *Yaffe v. Powers,* 454 F.2d 1362, 1365 (1st Cir. 1972). The reference to "recently refurbished class actions" apparently relates to the extensive revision of Fed. R. Civ. P. 23 in 1966 which has been the subject of much scholarly comment. See, e.g., Committee’s Criticism of Original Rule 23 and Notes to Revised Rule 23, 3B J. MOORE, FEDERAL PRACTICE §23.01[8]-[13] (2d ed. 1969).

2 454 F.2d 1362 (1st Cir. 1972).

lating to protests and demonstrations during 1969 and 1970. However, Judge Julian of the district court refused to certify the class and thus narrowed the scope of discovery to matters in police files pertaining to the two named plaintiffs. The plaintiffs appealed.

The court of appeals first faced the issue of the appealability of the order denying the plaintiffs the right to maintain the suit as a class action. The order was certainly not appealable as a final adjudication. However, 28 U.S.C. §1292(a) (1) provides that the United States Courts of Appeals shall have jurisdiction to hear appeals from "interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Plaintiffs therefore argued that the denial of class action certification so limited the scope of any possible injunctive relief that it constituted a denial of requested injunctive relief.

The court of appeals agreed that the denial of certification was "a denial of the broad injunctive relief sought," and that it was properly appealable under Section 1292 (a) (1):

if defendants are [merely] prohibited from recording, collecting and disseminating information on the named plaintiffs, as well as on others who may be persuaded to intervene, the assumed chilling effect of the continued surveillance of non-parties would reduce the class of persons willing to engage in public exchange of views on controversial subjects with those named in the complaint.

This ruling seems to significantly relax the requirements of 28 U.S.C. §1292(a) (1) by expanding the definition of "refusing injunctions." In the future, it would be prudent for plaintiffs seeking to represent a class to include a broad prayer for injunctive relief wherever possible. Should the district court deny class certification an immediate appeal would then be available under Yaffe, since a failure to certify inevitably cuts down the breadth of any injunction which might possibly be issued. Perhaps recognizing that such a tactic would result from its holding, the court suggested that "[h]ad the district court declined to determine a class provisionally, reserving final decision until more facts were presented, . . . the case would be in a different posture insofar as appealability is concerned." If the district court had in fact reserved its final decision, then the court of appeals would have had a more complete

4 454 F.2d at 1363-64.
6 454 F.2d 1362, 1364-65.
7 See Fed. R. Civ. P. 23(c)(1): "[A]fter the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."
8 454 F.2d 1362, 1365. It should be noted, however, that in order to have the scope of the action and hence the scope of discovery defined as early as possible, the trial judge is required to determine the question of certification "as soon as practicable." Fed. R. Civ. P. 23(c)(1).
Turning to the merits, the Court of Appeals first noted:

[h]ad the discretion lodged in the trial court by Rule 23(c) and (d) as to determination of classes and subclasses, conditional orders, imposing conditions, prescribing measures to prevent undue complication, etc., been properly exercised, we would have given its decision weighty deference. . . . But because of several fundamental legal misconceptions which significantly affected the court's receptiveness to plaintiff's application, much of the available discretion was not exercised and considerations of both judicial efficiency and ultimate fairness to the parties therefore require us to engage in a rather full review of the proceedings below.11

The "fundamental legal misconceptions" of the district court stemmed from its misapplication of the requirements for class status specified in Rule 23. Rule 23(a) enumerates the basic prerequisites that must be met by any party seeking class status.12 In addition, Rule 23(b) provides three alternative criteria, only one of which must also be met before a class action can be maintained. The district court's error was in applying the criteria of Rule 23(b) cumulatively, rather than alternatively.13

Specifically the district court denied class certification because certain criteria contained in Rule 23(b) (3)14 had not been met. However, Rule

9 Analogy may be made to a denial of a plaintiff's motion for summary judgment in an action for injunctive relief. Such an order does not go to the merits of the action, but merely recites that more facts are required before the merits can be determined. Therefore the order is not appealable. Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc., 385 U.S. 23 (1966), affording 351 F.2d 552 (1st Cir. 1965).


11 454 F.2d 1362, 1365-66. The Court of Appeals correctly termed this approach to class certification a "basic" error inasmuch as each of the further subdivisions of Rule 23(b) is explicitly referred to disjunctively in the rule itself.

12 Rule 23(a) provides that a class action may be maintained "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."

13 454 F.2d 1362, 1366. The Court of Appeals correctly termed this approach to class certification a "basic" error inasmuch as each of the further subdivisions of Rule 23(b) is explicitly referred to disjunctively in the rule itself.

14 In order that a class action may be maintained under FED. R. CIV. P. 23(b) (3) the court must find, in addition to the prerequisites of FED. R. CIV. P. 23(a), "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
23(b)(2) permits class actions to be maintained when the party opposing the class has acted on grounds which would make final injunctive or declaratory relief appropriate for the class as a whole.\footnote{15} Rule 23(b)(2) is particularly appropriate in civil rights actions such as \textit{Yaffe},\footnote{16} since civil rights litigation is most likely to result in injunctive relief. Class actions have been allowed in analogous circumstances, such as on behalf of impoverished individuals susceptible to arrest under Alabama vagrancy laws\footnote{17} and on behalf of all black persons living in or visiting Pittsburgh who have been or may be injured by a pattern of police harassment.\footnote{18}

Although the circuit court thus felt that the plaintiffs in \textit{Yaffe} probably represented a Rule 23(b)(2) class, it declined to order class certification, feeling that the wide discretion vested in the trial judge by Rule 23 required a reopening of the question in the district court.\footnote{19} However it was noted that a proper determination of the certification issue depended upon information which only the defendants could provide,\footnote{20} such as the extent of the alleged surveillance. Therefore the court strongly suggested that at least some discovery be allowed before a determination on class status,\footnote{21} and that the trial judge himself should follow the 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.”

\footnote{15} Specifically, in addition to the prerequisites of FED. R. CIV. P. 23(a), the complete finding required in order that class action may be maintained pursuant to FED. R. CIV. P. 23(b)(2) is that “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.” For an elucidation of the differences between a Rule 23(b)(2) class and a Rule 23(b)(3) class, see §20.7, infra.

\footnote{16} “In fact, the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists, making it uniquely suited to civil rights actions in which the members of the class are often ‘incapable of specific enumeration.’” 454 F.2d at 1366 quoting Committee’s Notes to Revised Rule 23, 3B J. Moore \textit{Federal Practice} ¶23.01 [10-2] (2d ed. 1969).


\footnote{19} “The genius of Rule 23 is that the trial judge is invested with both obligations and a wide spectrum of means to meet those obligations.” 454 F.2d 1362, 1367.

\footnote{20} “To pronounce finally, prior to allowing any discovery, the non-existence of a class or set of subclasses, when their existence may depend on information wholly within defendants’ ken, seems precipitate and contrary to the pragmatic spirit of Rule 23.” Id. at 1366. But see note 8, supra.

\footnote{21} “[P]rogress toward resolving the class definition issue would seem to require some discovery, under such terms as the court may see fit to impose, of the extent of, say, the practice of the police photographing and making such photographs available to others. Since a rule 23(b)(2) class is defined by the actions
course of the proceedings closely. Finally, the court intimated that it was not unreceptive to claims of the type presented in Yaffe. As Judge Coffin (now Chief Judge) wrote on behalf of the court:

there are certain standards governing the recognition of a class; . . . the burden of administering this kind of a class suit should not be pessimistically estimated; and . . . in the wise use of the power to determine when, how, and for how long, and subject to what conditions . . . a class should be recognized [lies] the special responsibility and opportunity of a federal trial court.

The approach taken by the Court of Appeals in Yaffe has not been greeted with enthusiasm by at least one of the district court judges charged with administering class actions on a day-to-day basis. In Dionne v. Springfield School Committee, Judge Wyzanski was faced with a situation similar to that presented in Yaffe: a high school girl who had been suspended from school sought to maintain a class action on behalf of herself and others whom she alleged were arbitrarily suspended without justifiable cause. In pursuing her claim she propounded interrogatories designed to elicit facts with respect to the suspension or dismissal of other high school students. Judge Wyzanski acknowledged that Yaffe "seems to support broad-ranging discovery in this type of litigation" to ascertain who might be in the plaintiff's class, but he sharply criticized the Yaffe approach: "[Yaffe] seems to me, as a former member of the Supreme Court's Committee on Rules of Civil Procedure for the District Courts, to be contrary to the purposes of Rule 23 of the F.R.C.P., and not likely to be followed either by the Court of Appeals or the Supreme Court of the United States." Remarking that district courts were overburdened by "nearly frivolous 'class suits' brought by counsel who seem chiefly interested in gaining experience [and] publicity," Judge Wyzanski denied which a defendant has taken toward the class, and which should arguably be enjoined, it may appear sensible to ascertain the nature of the actions taken with more precision than reference to pleadings and affidavits permits. While what we have said implies somewhat more initial discovery than that limited to information concerning the two plaintiffs, we do not imply that, prior at least to a definitive determination of a class, the entire police files over a substantial period be produced for adversary examination. Not only may there be sensible limits as to time and type of occasion, but as to materials said to be irrelevant or to involve potential harm to others the court may undertake an in camera inspection." Id. 1367.

22 "If a class action is to be managed with sensitivity both to the plaintiffs' reasonable demands and to defendants' responsibilities, the district judge must keep close to the heart of the litigation. Delegations of discreet chores to a magistrate must not be permitted to cause the judge to lose the feel of the pulse of the proceedings." Id.

23 Id.


25 Id. at 335. Judge Wyzanski failed to elaborate, however, on precisely why he found the Yaffe decision contrary to the purpose of Rule 23.
the plaintiff's motion to compel answers to her interrogatories with this curt aphorism: "Federal courts do not stage academic tournaments merely for Don Quixotes to practice knighthood."26

The availability and extent of the right to maintain a class action under Massachusetts state court practice were also under legislative discussion during this Survey year. The proposed revision of the Massachusetts Rules of Civil Procedure27 includes a rule governing class actions—a rule which would regulate an area heretofore recognized by Massachusetts law only in equity and, until recently, only to the extent permitted by case law.28 The types of class actions allowed under Proposed Rule 23 are much more limited than under the parallel federal rule. Proposed Rule 23(a) sets precisely the same requirements as appear in federal Rule 23(a).29 However the additional alternative requirements in federal Rule 23(b) have been eliminated "as unnecessary to state practice."30 Proposed Rule 23(b) merely adds two more requirements to the maintenance of a class action, both of which are contained in federal rule

26 Id. See also Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971) where, although Judge Wyzanski dealt thoroughly and thoughtfully with the merits, he declined to certify as a class the black and Spanish surnamed applicants who took and failed the 1968 to 1970 Boston police entrance examinations. The Court of Appeals reversed that portion of his decision in Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). The Court of Appeals held that, although the formal request for class certification was not made until after the close of the evidentiary hearing, the fact that the complaint and answer had treated the action as a class action and the court's obligation "[a]s soon as practicable after the commencement of an action brought as a class action [to] determine by order whether it is to be so maintained." [FED. R. Civ. P. 23(c)(1)] required class certification by the trial court.

27 The Massachusetts Proposed Rules of Trial and Appellate Procedure (Mass. R. Civ. P.) are the result of the intensive study and careful draft of the Advisory Committee on Rules of Civil Procedure of the Massachusetts Judicial Conference. The proposed rules have been presented to the Supreme Judicial Court for adoption by petition of the Massachusetts and Boston Bar Associations and the Massachusetts Trial Lawyers Association. Petition of the Massachusetts Bar Association, Docket No. 15,190. Concurrently, the Chairman of the Massachusetts Judiciary Committee has submitted legislation to bring the General Laws into conformity with the proposed rules. See Mass. Senate Bill 11 (1973).

Broadly speaking, the proposed Massachusetts rules follow the format of the Federal Rules of Civil Procedure.


29 See note 14, supra. The requirements of Proposed Rule 23(a) are in contrast to G.L., c. 93A, §9, added by Acts of 1969, c. 690, which permits consumer class actions where "the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if . . . the plaintiff adequately and fairly represents such other persons." See generally, Starrs, Consumer Class Actions, 49 B.U.L. Rev. 407 (1969).

30 Reporters' Notes, 103.
23(b)(3). Thus the distinction between a subdivision (b)(2) and a subdivision (b)(3) class, a major concern in Yaffe, will not be relevant under the proposed rule. However it is doubtful whether civil rights class actions like Yaffe and Dionne would be allowed under proposed Rule 23, since no provision is made for a class of persons formed because "the party opposing the class has acted or refused to act on grounds generally applicable to the class." For that reason, federal court will undoubtedly remain the most attractive forum for civil rights litigation.

As originally drafted by the Advisory Committee on Rules of Civil Procedure, Massachusetts Rule 23(e) would have been considerably more restrictive than the parallel federal rule. The original version of the state rule provided that "if in a class action damages are sought to be recovered in favor of or against any member of the class, the complaint must specifically name each member." Such a requirement would have operated as virtually a blanket prohibition upon broadly based consumer protection suits; for example, the beneficiaries of a telephone rate rebate probably could not all be known or identified at the outset of the litigation. The Civil Procedure Committee of the Boston Bar Association strongly protested this restrictive approach on the ground that it might be "an insuperable obstacle to a meritorious class action." The Bar Association argued that "in view of the power given the court by Rule 23(d) to 'impose such terms that shall fairly and adequately protect the interests of the class in whose behalf the action is brought,' the separate requirement of Rule 23(e) . . . would seem superfluous." In the face of this opposition, the Reporters and the Advisory Committee decided to delete proposed subdivision (e) entirely and proposed Rule 23 is presently before the Supreme Judicial Court without the original subdivision (e).

While the proposed Massachusetts Rule 23 is under scrutiny by the Supreme Judicial Court, legislation is pending which would greatly expand the availability of class action litigation under the present rules of procedure. This measure would permit the maintenance of class

31 Under Proposed Rule 23(b), a class action may be maintained only if, in addition to the requirements of Proposed Rule 23(a), "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." Mass. R. Civ. P. 23(b). No alternate types of classes are permitted. With the alternative bases for maintaining a class action set forth in the federal rule eliminated, it is difficult to understand why the draftsmen of the proposed Massachusetts rule did not include all the necessary requirements for maintaining a class action in a single subdivision of the state Rule 23.

32 Reporters' Notes, 100.


34 Memorandum of the Reporters to the Advisory Committee Re Changes in the Trial Rules 7, undated.

§20.4

CIVIL PROCEDURE

actions to enjoin public officials from repeatedly violating the laws of the United States or the Commonwealth or any rules or regulations promulgated under the authority of such laws. 36 Under the proposed legislation, "if a person aggrieved by such practices or procedures fairly represents the rights of a large number of persons who cannot readily be joined as parties, he may commence the suit as a class suit on behalf of all such persons who are similarly situated, affected, or likely to be affected." 37 This loose formulation of the elements of a class action goes significantly further than proposed Massachusetts Rule 23 and is very similar to a broad reading of Fed. R. Civ. P. 23(b)(2). Indeed, the proposed legislation, with its reference to all persons "likely to be affected," may well go beyond the federal rule, at least as regards actions against public officials.

Pending further judicial or legislative clarifications the procedural aspects of maintaining a class action under state (as well as federal) law remain unclear. The variety of available class actions and proposals for expanding such suits could result in extensive procedural litigation. Whatever the ultimate legislative and judicial result, the practitioner cannot now escape, in a variety of situations, the opportunities and challenges presented by this burgeoning area of the law.

§20.4. Personal jurisdiction—its extent and application. The exercise of personal jurisdiction over non-resident defendants pursuant to the Massachusetts Long Arm Statute1 has been commented upon in each SURVEY year since the enactment of the statute in 1968. 2 That statute provides personal jurisdiction over non-residents in six alternative situations. Two of these statutory alternatives are pertinent to the present discussion: Section 3(a) which provides jurisdiction of persons transacting business in Massachusetts; and Section 3(c) which provides jurisdiction of persons "causing tortious injury by an act of omission in this commonwealth." 3 This year the Supreme Judicial Court resolved a major issue concerning the statute's permissible reach under one alternative, Section 3(a). 4 Two months after the Massachusetts decision was handed

36 A similar bill [Mass. Senate Bill 526 (1972)] was pocket vetoed by the Governor in 1972 on the ground that with respect to the recovery of damages, it improperly discriminated between those who had brought the action and the other members of the class. The present measure (Senate No. 111) has been endorsed in principle by the Committee on Judicial Administration of the Massachusetts Bar Association and is under study by its Subcommittee on Administrative Law. See Burke, Minutes of the Meeting of the Committee on the Administration of Justice, January 27, 1973, 3-4.


§20.4. 1 G.L., c. 223A, §3.


3 G.L., c. 223A, §3(c).

down the United States Court of Appeals for the First Circuit—apparently unaware of the prior decision of the Supreme Judicial Court—reached a similar result in interpreting Section 3(a). That decision also provided a broad interpretation of Section 3(c) which had not been anticipated in any Massachusetts decisions.

In the federal case, *Murphy v. Erwin-Wasey, Inc.*, plaintiff brought a diversity suit against two foreign corporations, Erwin-Wasey, Inc., and its parent, Interpublic Group of Companies, Inc. Plaintiff claimed personal jurisdiction over the defendants on the basis of Sections 3(a) and 3(c). He alleged that Interpublic had transacted business in Massachusetts by making a single tender of payment within the state for the plaintiff's services, and furthermore, that Erwin-Wasey had caused tortious injury by an act or omission in Massachusetts by knowingly sending into the state a false statement with the intention that Murphy, a Massachusetts resident, would rely upon it.

At the outset, the court of appeals declared that "[t]he full reach of the jurisdiction of Massachusetts courts under ch. 223A, §3 has yet to be delineated by the Supreme Judicial Court." Although apparently overlooking the Supreme Judicial Court's decision in *Automatic Sprinkler Corp. of America v. Seneca Foods Corp.*, the court of appeals dealt unerringly with the specific jurisdictional issues before it in *Murphy*. As to Section 3(a) jurisdiction, there appeared to be a single contact with Massachusetts—the tender of payment for Murphy's services. Pointing out that analogous statutes enacted in New York and Illinois appear to require more than one tender of payment before subjecting a non-resident corporation to personal jurisdiction, the court said, "It is doubtful whether the Supreme Judicial Court would interpret 'transacting any business' broadly enough to encompass a single tender of payment." Accordingly, "in the absence of any clear direction from Massachusetts case law to the contrary, we are not prepared to hold that a single tender of payment satisfies the requirements of §§3(a)."

The court of appeals correctly perceived the direction which the Supreme Judicial Court had taken with regard to §§3(a). Much the same contacts were present in the "*Automatic Sprinkler* case; the defendant had signed a purchase order out of state, mailed it into the Commonwealth, and had later made part payment by mail upon certain machinery purchased. After noting that "[w]e see the function of the long arm statute as an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States," the Supreme Judi-

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5 460 F.2d 651 (1st Cir. 1972).
6 Id. at 663.
7 "Automatic" Sprinkler is not cited in Murphy.
8 460 F.2d 661, 665.
9 Id.
10 1972 Mass. Adv. Sh. 601, 603, 280 N.E.2d 423, 424. In something of an ironic twist, the Supreme Judicial Court carefully noted that the federal district court and at least one commentator had foreshadowed the conclusion reached in
cial Court nevertheless concluded that "the facts do not enable the courts of Massachusetts to exercise . . . jurisdiction." Although no attempt was made to define the minimum contacts necessary to confer section 3(a) jurisdiction, the Court distinguished the case from others where jurisdiction had been allowed. In one such case the defendant entered the forum state to make a contract, and the contract was performed in the forum state. In another, the contract was made through the mail, but was to be substantially performed in the forum state. The Court thus implied that such contracts would confer jurisdiction on Massachusetts state courts. Also distinguished was an earlier Massachusetts case involving a foreign insurer: "only the barest of contacts with the State are required for jurisdiction over insurers, the insurance field lending itself to the furthest extension of jurisdiction based on an isolated contact." Thus the Court also implied that the determination of jurisdiction depends at least in part on the type of business carried on by the defendant.

With regard to the second issue before the court in Murphy, the federal court's jurisdiction over Erwin-Wasey under section 3(c), the question before the court in Murphy was "whether the delivery in Massachusetts by mail or telephone of a false statement originating outside the state, followed by reliance in Massachusetts, is an 'act . . . within this commonwealth.'" The court noted a sharp diversity of opinion as to


11 Id. at 603, 280 N.E.2d at 425. The fact that both state and federal courts agree that a single tender of payment is insufficient to confer personal jurisdiction over the tenderor does not, however, relieve a nonresident insurer from being subject to the personal jurisdiction of the Commonwealth's courts. It is almost universally accepted that insurers are sui generis. "[S]pecial considerations . . . are recognized in problems of jurisdiction over insurers. . . ." Murphy v. Erwin-Wasey, Inc., 460 F.2d at 665 n.4, citing Wolfman v. Modern Life Ins. Co. 352 Mass. 356, 363, 226 N.E.2d 598, 603 (1967). "[O]nly the barest of contacts with the State are required for jurisdiction over insurers, the insurance field lending itself to the furthest extension of jurisdiction based on an isolated contact." "Automatic" Sprinkler Corp. v. Seneca Foods Corp., 1972 Mass. Adv. Sh. at 605, 280 N.E.2d at 426, also citing the Wolfman decision supra. See also McGee v. International Life Ins. Co., 355 U.S. 220 (1957).


15 460 F.2d at 664. The court of appeals indicated that the phrase to be in-
the scope of such language. The New York courts, interpreting synonymous language, have held that the mere shipment into New York of a product which was defectively manufactured and mislabelled elsewhere does not subject the manufacturer to the personal jurisdiction of the New York courts, even when the product causes injury in New York. The Second Circuit, on the other hand, interpreted a similar Connecticut statute, to hold that a New York publisher who distributed in Connecticut a newspaper allegedly libelling a Connecticut resident was subject to the personal jurisdiction of the Connecticut courts upon a theory that such actions were akin to a "gunman firing across a state line." The court in Murphy found the Second Circuit decision more persuasive and held that, "where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state."

It is significant that both the Supreme Judicial Court and the Court of Appeals adopted the language of the U. S. Supreme Court in Hanson v. Denckla, which set the constitutional limitation on a state's personal jurisdiction over foreign defendants: "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." If the Hanson test is to be dispositive, it is difficult to understand why a nonresident who tenders a single payment by mail into the Commonwealth is not purposefully availing himself of the privilege of conducting activities within the forum state, while a nonresident who mails a single misleading statement into the Commonwealth is purposefully availing himself of the privilege. Only in the latter case is it the nonresident's intent that the recipient of the misleading statement rely upon it to his disadvantage within the forum state; this intent is apparently sufficient to subject the

interpreted was born in controversy. "This language is derived from the Uniform Interstate and International Procedure Act and represents an effort to resolve, legislatively, the type of conflict over the meaning of the term 'tortious act within this state' which has developed between the Illinois and the New York courts." Id. at 663. Compare Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961) with Feathers v. McLucas, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965). Section 3(c) is intended to apply only when the act causing the injury occurs within the Commonwealth. St. Clair v. Righter, 250 F. Supp. 148, 150-51 (W.D. Va. 1966); Commissioners' Note, Uniform Interstate and International Procedural Act, 9B Uniform Laws Annot. § 1.03. Id. at 663-64.

17 Buckley v. New York Post Corp., 373 F.2d 175, 179 (2d Cir. 1967).
18 460 F.2d at 664.
20 460 F.2d at 664; see also 1972 Mass. Adv. Sh. at 604, 280 N.E.2d at 425.
nonresident to the personal jurisdiction of the Massachusetts courts.\footnote{21} It thus appears that the contacts necessary for the exercise of personal jurisdiction in a commercial or contractual context are somewhat greater than those necessary when tortious activity is alleged.\footnote{22}

\section*{§20.5. Judicial review of administrative actions.} There is presently no uniform procedure for judicial review of administrative actions in Massachusetts. The Massachusetts Administrative Procedure Act\footnote{1} must be followed if the subject of review is the decision of a state agency\footnote{2} made pursuant to an adjudicatory proceeding,\footnote{3} but it does not apply when the administrative proceeding is not "adjudicatory" in nature or when the subject of review is local action. When the Act does not apply, an attorney may be faced with considerable uncertainty whether to bring a petition for certiorari,\footnote{4} or mandamus,\footnote{5} or other extraordinary remedies, or seek declaratory relief.\footnote{6} During the 1972 Survey year the Supreme Judicial Court, in \textit{Reading v. Attorney General},\footnote{7} tried once again to elucidate the "clear line of distinction between mandamus and certiorari."\footnote{8}

The dispute arose when the Town of Reading adopted a by-law establishing a municipal liquor agency with authority to operate a liquor store under a retail license. Pursuant to statute, the town clerk submitted the by-law to the Attorney General for his approval. The Attorney General disapproved the by-law because he felt it was inconsistent with constitutional and statutory provisions which prohibit municipal legislation in matters reserved to the General Court. The town then sought a writ of mandamus to order the Attorney General to revoke his disapproval. It argued that the decision exceeded the Attorney General's authority or, alternatively, that it was erroneous as a matter of law. The Court sustained a demurrer and held that mandamus was not the appropriate remedy under these circumstances.\footnote{9} The opinion reaffirms the rule that mandamus is generally a remedy for administrative \textit{inaction} and is not usually available when action has already been taken.\footnote{10} Certiorari is the proper method for correcting errors.
of law which arise from administrative action. The Court distinguished Concord v. Attorney General\(^{11}\) which also involved disapproval of a municipal by-law by the Attorney General. The petitioner in Concord did not allege that the disapproval was unsupported by law but rather that the disapproval amounted to an expression of individual personal judgment and not the considered legal opinion of the Attorney General. Those allegations, if proved, would have constituted \textit{illegal performance} of duty whereas the allegations in Reading would not.\(^{12}\) Conceding that the differences between the cases were slight, the Court nevertheless refused to expand the admittedly “novel application of mandamus in the Concord case to a new situation.”\(^{13}\) The Reading opinion thus emphasized that apart from the areas of building and zoning code enforcement and enforcement of the election laws, mandamus is appropriate to compel an official to perform his duty but \textit{not to correct errors} in the performance of that duty.

Having concluded that certiorari, and not mandamus, was available to review the Attorney General’s disapproval of the town’s by-laws, the Court went on to offer some guidance to the practitioner. Chief Justice Tauro expressly stated that it was desirable to eliminate wasteful litigation on account of the wrong choice of remedies, and noted criticism of decisions which perpetuate distinctions between the various extraordinary remedies for purposes of reviewing administrative action. The possible desirability of a uniform method of judicial review of administrative action was noted, and the Court specifically commented on the provisions of Mass. Senate Bill 24 §§52, 229-231 (1972), which would amend existing statutes to conform to the proposed Massachusetts Rules of Civil Procedure.\(^{14}\) The proposed rules would abolish extraordinary writs and establish a single form of action in civil proceedings.\(^{15}\) The Court also noted that the Massachusetts Administrative Procedure Act does not follow the Federal Administrative Procedure Act, under which there is a single statutory form of judicial review for all agency action, but is limited to review of agency decisions in an adjudicatory proceed-

\textsuperscript{11} 336 Mass. 17, 142 N.E.2d 360 (1957).

\textsuperscript{12} 1972 Mass. Adv. Sh. 1363, 1364, 285 N.E.2d 429, 430. In the Concord case, the Court relied on a statement by Chief Justice Rugg that “Mandamus ... is the remedy to which resort usually is had to set aside the illegal performance of duty and to compel the performance of duty according to law by public officers intrusted with discretionary, administrative or political functions when it is their duty to act.” Id. quoting Attorney Gen. v. Suffolk County Apportionment Comm’rs., 224 Mass. 598, 609-10, 113 N.E. 581, 587. However, the Reading opinion carefully notes that Chief Justice Rugg’s statement pertained to an election law dispute and that a special mandamus statute (G.L., c. 56, §59) applied in that case. For a complete discussion of mandamus in Massachusetts see Brown, The Use of Extraordinary Legal and Equitable Remedies to Review Executive and Administrative Action in Massachusetts, 21 B.U.L. Rev. 632, 634-663 (1941).

\textsuperscript{13} Id. at 1366, 285 N.E.2d at 431.

\textsuperscript{14} Resubmitted as Mass. Senate Bill 11 (1973).

\textsuperscript{15} \textit{Massachusetts Proposed Rules of Trial and Appellate Procedure} 2, 81(b).
Two suggested alternatives to the dilemmas of selecting between mandamus and certiorari are the declaratory judgment procedure and petitions for a plurality of remedies. It may also be possible to amend a petition for one type of writ to a petition for another. Although the Attorney General's demurrer was sustained in Reading, the Court ordered that a motion to amend the petition for mandamus to a petition for certiorari, declaratory relief or other appropriate remedy should be allowed if timely filed.

The Court's opinion should be contrasted with a case decided only a few years earlier. In Johnson Products, Inc. v. City Council plaintiff sought a review of the decision of the Medford City Council denying a license to operate a retail gasoline outlet. Both a petition for a writ of certiorari and a bill for declaratory relief were filed seeking review of the order. A demurrer to the petition for the writ of certiorari was sustained, but a demurrer to the bill for declaratory relief was overruled. On appeal from a final decree for the defendant the Court upheld the ruling sustaining the demurrer to the petition for writ of certiorari, but concluded that the bill on its face failed to state a case within the declaratory judgment statute. The Court ruled that the petition for the writ of certiorari was properly demurrable since it failed to clearly allege an error of law. It viewed the petition in substance as a complaint that the petitioner had lost when it should have won, for a variety of reasons, none of which involved errors of law. The bill for declaratory relief made substantially the same allegations as those made in the writ of certiorari. Distinguishing an earlier case, the Court rejected the proposition that the declaratory judgment statute is an alternate or substitute remedy for a petition for certiorari and held that declaratory judgment was not a proper remedy on the facts at hand. Since licensing involved a somewhat wide area of discretion there could be no declaration of "right" as contemplated by G.L., c. 231A. The proper remedy was therefore an appeal for specific statutory review (as where a special statute provides that the decision in question is appealable in a certain manner), or a petition for a writ of certiorari. In any case, the Court held, declaratory relief was not appropriate.

Reading demonstrates a liberal attitude towards amendment and suggests that declaratory relief may be freely used in most cases. Despite that encouragement, however, Johnson cautions that declaratory relief is not available to review the discretionary actions of administrative agencies. If the agency acts, review by either certiorari or declaratory judgment can only be had of errors of law in the absence of a specific statutory appeal procedure.

17 G.L., c. 231A.
§20.6. Limitations imposed on the exercise of jurisdiction: Religious controversies. In *Gorodetzer v. Kraft,* the Supreme Judicial Court has again defined the circumstances under which it will be willing to intervene in a controversy which turns on theological dogma or religious law. The question presented to the Court was a narrow one and its resolution draws a clear line of demarcation between controversies capable of judicial resolution and religious controversies in which the Massachusetts courts will not become involved.

Gorodetzer, a Kosher caterer, alleged that Kraft libelled him by circulating a letter alleging (1) that Gorodetzer withheld certain funds which his clients intended be paid to the Associated Synagogues; (2) that from 1961 to 1963 he had been found guilty and fined by religious authority for the violation of certain Kashruth dietary regulations; and (3) that the religious authority had granted Kraft a hearing on allegations that the plaintiff had violated both Kashruth and Sabbath regulations during the period 1964 to 1966. Kraft moved to dismiss the plaintiff's declaration and the trial judge—treating the motion to dismiss as a demurrer—sustained it on the ground that the declaration presented a religious controversy beyond the competence of the courts.

On appeal the Supreme Judicial Court disagreed, concluding that, while the matters referred to in the plaintiff's declaration

may raise issues as to the occurrence of particular events, they do not appear to raise questions as to the authority of [a religious tribunal] or as to its rules and procedures for determining Kashruth or Sabbath violations. Thus... the plaintiff's claim in this case does not depend upon 'questions... determinable by reference to Jewish law...'.

Accordingly, the Court concluded that the plaintiff's declaration stated a justiciable cause of action and reversed the order sustaining the defendant's demurrer.

While the Court's decision is certainly supportable, the underlying premises are not stated with precision. Surely there is a certain core area of each denomination's beliefs where the very resolution of disputes by a secular court would so transgress the First Amendment freedom of religion as to be constitutionally impermissible. Typically the cases within this core require resolution of issues answerable solely by reference to religious laws. These cases are not within the competence of secular courts, because jurisdiction over the subject matter is precluded by the Constitution.

In addition to the lack of constitutional subject matter jurisdiction, Massachusetts courts have suggested another basis for refusing to adjudicate religious controversies: "Even apart from any constitutional considerations, we believe sound policy dictates that the denominations and not the courts, interpret 'their own body of church polity.'" This statement suggests a policy of voluntary abstention in religious controversies, as opposed to constitutionally required abstention. While such a policy may be eminently sound it may also be misleading if it is interpreted to require judicial abstinence in cases falling outside the constitutional core. On the contrary, Gorodetzer implies that the voluntary abstention

5 The Supreme Judicial Court noted these constitutional considerations by a passing reference to the decision in Presbyterian Church v. Hull Church, 393 U.S. 440 (1969). There the Supreme Court held, "[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. . . . First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." Id. at 449. See also Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

6 This does not mean, however, that there is a constitutional bar to any judicial review of the decisions of religious tribunals. Secular courts may entertain challenges to such decisions if the challenges are based upon secular grounds such as fraud or collusion. Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929). In Presbyterian Church v. Hull Church, 393 U.S. 440 (1969), the Court remarked, "It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes [First Amendment values]. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principals of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." Id. at 449.

7 1972 Mass. Adv. Sh. at 46, 277 N.E.2d at 686. The Court also stated, "Where the litigation involves an issue which is essentially ecclesiastical in nature, courts will not interfere because the whole subject of doctrinal theology, the customs, canonical laws both written and unwritten and the fundamental organization of the various religious denominations would need to be examined with care for the purpose of reaching authoritative conclusions." Id.
principle should extend no further than the Constitutional limit to jurisdiction.

The reason for abstention on policy grounds appears to rest on the availability of a more suitable forum for resolution of religious controversies. One of the statements in Kraft's allegedly defamatory letter "could be reasonably understood as an accusation that the plaintiff was guilty of larceny or embezzlement"—a libel in the most secular sense. The Court also noted that "[e]ven if this conduct were related to ecclesiastical activities it is difficult to conclude that such an accusation may be made with impunity." Obviously the policy of voluntary abstention does not require secular courts to defer to religious tribunals on secular issues merely because those issues are related to religious activities. Thus "voluntary" abstention would seem to be appropriate only in cases in which the Constitution has already deprived the courts of subject matter jurisdiction. Accordingly, Gorodetzer should not be read as suggesting that Massachusetts courts should show more restraint than is required under the First Amendment when confronted with controversies having religious dimensions.

STUDENT COMMENT

§20.7. Interlocutory appeals from orders denying class action certification: The injunction theory: The dilemma of the class action plaintiff denied class certification. Federal class action suits are maintainable to promote the efficient adjudication of claims where federal jurisdiction.

8 The considerations involved would appear analogous to those raised in a determination of whether or not a federal court should abstain from exercising its jurisdiction where state courts have traditionally adjudicated certain types of cases. See C. WRIGHT, FEDERAL COURTS §52 (2d ed. 1970). Professor Wright notes four somewhat distinct abstention doctrines at work in the federal courts: "(1) to avoid decision of a federal constitutional question when the case may be disposed of on questions of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket." Id. Certainly, if denominational concerns are substituted for state concerns in this formulation, we can see that elements (2) and (3) above are implicit in the policy determination discussed in both Moustakis and Gorodetzer.

10 Id., at 277 N.E.2d at 686-87.
11 See Canadian Religious Ass'n v. Parmenter, 180 Mass. 415, 423, 62 N.E. 740, 743-44 (1902) where it was held that where a church was held in trust for the benefit of all members, a majority cannot close the church against the wishes of a minority who desire to continue to worship in accordance with the terms of the trust. In Parmenter and also in Gray v. Christian Society, 137 Mass. 329 (1884) the Court was not hesitant about hearing controversies arising from disputes as to the interpretation and validity of by-laws of incorporated religious societies. In fact both decisions were made without discussion of possible jurisdictional questions.
diction exists\(^1\) and where the parties are so numerous as to make joinder impractical or impossible.\(^2\) The crucial point in a class action as such is when the court must consider an order to certify the purported class.\(^3\) This decision is ordinarily made early in the progress of the action.\(^4\)

Where an order is entered which denies class certification and does not allow the named plaintiff to pursue the action further, the order is clearly appealable as a final judgment. But where the order denying class certification does allow the named plaintiff to continue on his own behalf,\(^5\) the scope and complexion of the action are significantly altered. Nonetheless the order effecting the determination is generally not appealable until final judgment. The denial of certification is an interlocutory order and appeal from such denials is not expressly provided in the jurisdiction of the courts of appeals.\(^6\)

There is often, however, a need for immediate review of orders which deny class action certification. In the absence of interlocutory appeal, an action primarily for money damages\(^7\) may be voluntarily dropped by the named plaintiff if class certification is denied and his personal share of the damages is small.\(^8\) If the individual damages of all other possible plaintiffs are equally small, the members of the proposed class may be unable to assert their claims in individual actions.\(^9\) Even if the named plaintiff pursues the action to a favorable final judgment, he may choose not to appeal the denial of class action certification. In that case also,

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\(^3\) The statutory requirements for the maintenance of a class action in a federal court are set out in Rule 23 of the Federal Rules of Civil Procedure.

\(^4\) Fed. R. Civ. P. 23(c)(1) reads: "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 decision on the merits."


\(^7\) Such an action is generally brought under Fed. R. Civ. P. 23(b)(3), which permits a class action when "the court finds that the questions of law or fact common to the members of the class predominate ... and that a class action is superior to other methods for the fair and efficient adjudication of the controversy."

\(^8\) Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F.R.D. 275 (1972), raises serious criticisms of the use (or abuse) of the Rule 23(b)(3) class action device in cases where innumerable claimants, each seeking a recovery too small to justify an individual action, are joined in a class. These criticisms go mainly toward the difficulties in managing an action where monetary relief is sought for unknown plaintiffs, and the use of threats of such actions, which may often stand on meager legal footing, to bludgeon defendants into settlements. These are criticisms well worth evaluation and, if valid, do undermine the death knell theory of appeal (see text at note 29, infra), since they undermine the basis for bringing the actions to which it is applicable. The same considerations, however, do not generally apply to Rule 23(b)(2) actions and will not affect the injunction theory of appeal (see text at note 51 and following, infra).
the remaining class members, with claims too small to justify individual actions, will be unable to assert those claims. On the other hand, an action for injunctive relief under Rule 23(b)(2) generally concerns the vindication of a civil right or liberty and is not motivated by economic factors. For that reason, it is less likely to be dropped by the named plaintiff if class action certification is denied. Such a plaintiff is much more likely to pursue the action as an individual and appeal the denial of class certification after final judgment. Nevertheless if the denial of certification is reversed on appeal, the litigation will be prolonged and the plaintiff put to great expense by the almost certain necessity of a new trial on the questions presented in an action for the broader relief.

The preceding does not purport to draw a sharp line between Rule 23(b)(2) and 23(b)(3) actions based solely on the distinction between money damages and injunctive relief. Indeed, some actions may meet the requirements of both sections. Although in a Rule 23(b)(2) action the primary relief sought must be injunctive, damages may be granted. In other cases the injunction sought may be so related to economic

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11 Fed. R. Civ. P. 23(b)(2) permits a class action where "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...."
14 Another reason that an adverse order regarding certification in a class action for the vindication of a constitutional right will often result not in the termination of the litigation but in the prolonging of it is that the actions are often supported by an "institutional litigator" which will pursue the action. See Brief for the Appellant at 4, Yaffe v. Powers, 434 F.2d 1362 (1st Cir. 1972).
activity that the relief requested may be capable of monetary evaluation. In the latter case, a denial of class certification may be just as likely to result in voluntary termination of the action as in a Rule 23(b)(3) action as described above. Similarly, some Rule 23(b)(3) actions may involve the same personal rights as "classic" Rule 23(b)(2) actions, but may fail to qualify under 23(b)(2) because of the prominence of money damages in the requested relief, or because the relationship between the parties is not so obvious as is required by 23(b)(2). Such actions would follow the pattern of a "classic" Rule 23(b)(2) action should class certification be denied. In general, however, the distinction set out in the previous paragraph is sufficient to indicate the problems created by the general rule against interlocutory appeals of class certification orders and to allow a comparison between the various solutions to them.

These obstacles to immediate appeal tend to conflict with the spirit and purpose of the Federal Rules of Civil Procedure, "to secure the just, speedy, and inexpensive determination of every action." However, they are consistent with the strong policy of the federal courts against piecemeal appeals. The limited exceptions to this policy have provided no general theory under which class action certification orders could be held appealable before final judgment.

Three limited theories of interlocutory appeal have been developed through interpretation of sections 1291 and 1292 of the Judicial Code: the death knell theory, the collateral order theory, and the injunction theory. While the use of the collateral order doctrine has not yet been expanded by any court to appeals from class action certification orders, the other theories have met with limited application. The Second Circuit Court of Appeals has applied the death knell theory in a small number of cases to allow interlocutory appeals from orders denying class action certification, while

28 Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971); Green v. Wolfe Corp., 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969); Eisen
a decision of the First Circuit Court of Appeals, *Yaffe v. Powers*\(^{29}\) has provided the most recent application of the injunction theory. It is this theory, developed in *Yaffe* to what appears to be its outermost limit, with which this comment is primarily concerned. Initially, however, the comment will examine the other theories of appealability of class action certification orders in order to see the injunction theory in its proper perspective.

### A. Introduction to Theories of Interlocutory Appeal from Class Action Certification Orders

The Second Circuit Court of Appeals first applied the death knell theory to allow an interlocutory appeal from denial of class action certification in *Eisen v. Carlisle & Jacquelin*.\(^{30}\) In this action for damages based on securities fraud and brought under Rule 23(b)(3), the named plaintiff's claim was only $70. The court held that

Dismissal of the class action . . . [aspects of the complaint would] . . . irreparably harm Eisen and all others similarly situated, for, as we have already noted, it will for all practical purposes terminate the litigation. Where the effect of the district court’s order, if not reviewed, is the death knell of the action, review should be allowed.\(^{31}\)

It is only in those actions where “no lawyer of competence is going to undertake . . . [so] complex and costly [a] case” to obtain the recovery available in the narrower action that a denial of class certification will be appealable under the death knell theory.\(^{32}\) This theory operates only in the very limited circumstances where the plaintiff seeks monetary relief and the amount which could be recovered in an individual action would not justify the cost of maintaining the suit. The death knell theory finds its genesis in the collateral order doctrine,\(^{33}\) which was first developed in *Cohen v. Beneficial Loan Corp.*\(^{34}\) The court in *Eisen* looked to the policy

\(^{29}\) *454 F.2d 1362 (1st Cir. 1972).*

\(^{30}\) *370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967).*

\(^{31}\) Id. at 121.

\(^{32}\) Id. at 120.

\(^{33}\) *337 U.S. 541 (1949);* The Supreme Court in *Cohen*, interpreted 28 U.S.C. §1291 to allow an appeal before final judgment from an order dispositive of a right collateral to the merits of the action on the basis that the order did, in practical effect, “finally” determine the right in regard to which it was entered; see text at note 39, *infra.*
of that doctrine regarding the practical interpretation of the "finality" of an order and saw an analogous situation in the facts before it. In essence the death knell theory holds that an order denying certification should be appealable as a final order when its practical effect, in light of the costs of litigation, would be to end the lawsuit.

As yet, the Second Circuit is the only court to allow appeals under the death knell theory. The Ninth Circuit has applied the death knell criterion and held an order denying class action certification unappealable on the basis thereof in one case, while the Third Circuit has expressly rejected the theory. In the most recent appeal based on the death knell theory in the Second Circuit, Judge Friendly questioned its validity and workability but did not detail his criticisms.

One commentator has advanced the suggestion that the collateral order doctrine of Cohen ought to be applied to orders denying certification of class actions brought under Rule 23 (b) (3). He proposes that such orders should generally be immediately appealable, despite their interlocutory nature. In order to be immediately appealable under the collateral order doctrine, an interlocutory order must

... fall in that small class which finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. (Emphasis added).

The Supreme Court in Cohen interpreted Section 1291 of the Judicial Code to allow an immediate appeal from an interlocutory order which finally disposed of the right in question where the right was not integral to the merits of the action. No court has yet extended this theory to class action certification orders, although the policy of the collateral order doctrine is implicit in the death knell theory.

35 28 U.S.C. §1291 provides in 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."


38 Korn v. Franchard Corp., 443 F.2d 1301, 1307 (2d Cir. 1971) (concurring opinion).


41 See note 35, supra.

42 The appeal in Cohen was from an order of a federal district court denying the motion of the corporate party in a stockholders' derivative suit that the plaintiffs be required, pursuant to a state statute, to post a security bond for reasonable expenses of the defendant in the action.

43 See text at note 33, supra.
For the collateral order doctrine to be generally applicable to class certification orders, the viability of the purported class would have been determinable without regard to the merits of the action. This may be possible in Rule 23(b)(3) class actions where the existence of common questions of the fact and law define the scope of the class, though even in those cases it will sometimes be impossible to determine the class certification question without becoming bound up in a consideration of the merits. In Rule 23(b)(2) actions, an independent determination of the viability of the class will not generally be possible because in such actions "the conduct complained of is the benchmark for determining whether . . . a class exists." In those actions which do not involve constitutional rights and are maintainable under more than one subsection of Rule 23, the determination of the class may sometimes be collateral.

In a civil liberties case, however, the reasonableness of the alleged conduct toward the class will determine the merits while the identity of the persons to whom the conduct was directed determines the scope of the class. Since both issues depend on nearly identical operative facts, the collateral order doctrine would not apply.

Yaffe v. Powers illustrates the problem outlined above quite well. The plaintiffs in that case brought a class action for declaratory and injunctive relief against certain members of the police force to enjoin surveillance and surreptitious photography of public meetings of "peace groups." However, the class to which final relief could be granted would include only those persons whose First Amendment rights were unreasonably curtailed. Anyone whose conduct reasonably justified surveillance would be necessarily excluded from the class. The reasonableness of the surveillance determines the scope of the class as well as the merits. The collateral order doctrine, by definition, cannot apply in such a case.

The third theory under which interlocutory appeal from orders denying class action certification might be allowed is the injunction theory, which uses Section 1292(a)(1) of the Judicial Code as a vehicle for interlocutory appeal. Under this theory the First and Fourth Circuits have


46 See note 11, supra.

47 Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972).


49 454 F.2d 1362 (1st Cir. 1972).

50 See text at note 40, supra.

51 28 U.S.C. §1292(a)(1) (1964), the relevant portions of which are as follows:

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts . . . granting, continuing,
granted interlocutory appeals from orders denying class action certification in Rule 23(b)(2) actions, reasoning that denials of class certification so "narrowed the scope of possible injunctive relief . . . [that] the order . . . was a denial of the broad injunctive relief which the plaintiffs sought."\(^{52}\)

Like the death knell theory, the injunction theory allows appeals only from orders denying class certification. Such one-sidedness could lead to challenges to the workability and legality of the theory. The death knell theory, in fact, has been subject to such criticism.\(^{53}\) This criticism, however, fails to recognize that the plaintiff may have a compelling need for an immediate appeal, while the defendant does not. There are two major distinctions between erroneous denial of class certification, which the plaintiff should be able to appeal immediately, and erroneous certification of the class which the defendant may appeal only at final judgment. First, an erroneous denial of certification will not merge with final judgment for the plaintiff. Even if the plaintiff prevails on the merits, he must appeal to correct the error, or else the remainder of class is left without a remedy. On the other hand, an erroneous certification will merge with a final judgment for the defendant and he would have no reason to appeal. Second, an order denying class certification prevents final relief from being granted to the excluded members of the purported class,\(^{54}\) whereas an order permitting the action to continue as a class action is generally conditional\(^{55}\) and is not analogous to final injunctive relief.\(^{56}\) The first comparison indicates that the need for immediate appeal is not as great for the party opposing class certification as it is for the plaintiff. The second comparison shows that there is no practical reason to regard a certification as a final order, while there is good reason for so regarding a denial thereof.

B. The Development and Status of the Injunction Theory

The injunction theory, which allows interlocutory appeals from orders modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ."

\(^{52}\) Brunson v. Board of Trustees, 311 F.2d 107, 108 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972).


\(^{54}\) This will be true unless an adverse conditional determination is later reversed by the district court, but in that instance complicated problems would develop in regard to discovery, making such a reversal more unlikely than one from a conditional order granting class action status. Cf. Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969).

\(^{55}\) See Gold Strike Stamp Co. v. Christenson, 436 F.2d 791, 792, n.2 (10th Cir. 1970).

The plaintiffs, in a “spurious” class action under the old Rule 23(a)(3),\(^5^8\) sought injunctive relief to compel either a reorganization of the school system or an affirmative desegregation plan for an entire school district. The purported class consisted of forty-two Negro school children. The district court struck all references to all named plaintiffs except the first one, and that plaintiff appealed the denial of class certification. The Fourth Circuit Court of Appeals held the order appealable:

The limitation of each plaintiff to an individual action on his own account and the removal of all allegations appropriate to a class action narrowed the scope of possible injunctive relief to an order requiring the admission of a particular plaintiff to a school of his choice. In an individual action maintained by a single plaintiff for his sole benefit and without reference to anyone else, he could neither ask for nor hope for more. The order, therefore, was a denial of the broad injunctive relief which the plaintiffs sought, which presumably would have affected all schools and all grades in the School District. The order was, therefore, an appealable one under §1292, for it was a denial of the broad injunctive relief which the plaintiff sought.\(^5^9\)

The court could have avoided the injunction theory by holding the order to be “final” within the meaning of Section 1291. Since the named and only remaining plaintiff was to graduate from high school only a few days after entry of the order dismissing the class action aspects of the case, the action would have been moot in regard to him. By giving finality a “practical rather than a technical construction,”\(^6^0\) the court could have held that “the practical effect of the order was a dismissal as to all plaintiffs.”\(^6^1\) Nevertheless the court chose to break new ground. Although conceding that the denial might be construed as a final order, the court relied on Section 1292 to hold the order appealable as an interlocutory denial of an injunction.

In describing the injunctive relief as “narrowed,” the court’s opinion was broader than the facts required and is therefore open to question in future cases of similar tenor. This becomes apparent upon examining

\(^{57}\) 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963).

\(^{58}\) The “spurious” class action under old Rule 23(a)(3) was merely a device allowing permissive joinder. The class was defined by common questions of law and fact, subsection (a)(3) of the former Rule being a forerunner of present Rule 23(b)(3). The “spurious” class action was not binding on all members of the class but only on those who chose to be included. Prior to the promulgation of present Rule 23(b)(2), defining a new relationship upon which a class action could be based, old Rule 23(a)(3) was the primary vehicle for civil rights class actions. See 3B J. MOORE, FEDERAL PRACTICE ¶23.10[1], 23.10[2] (2d ed. 1969).

\(^{59}\) 311 F.2d 107, 108 (4th Cir. 1962).


\(^{61}\) Brunson v. Board of Trustees, 311 F.2d 107, 108 (4th Cir. 1962).
the means by which the "scope" of relief was narrowed. The denial of class certification in Brunson can be viewed not merely as narrowing the scope of relief but as substitution of a different form of relief in the newly restricted action. 62 Admission of a particular plaintiff to the school of his choice is a "narrowing" of such magnitude that it is different in type from desegregation of the entire school district, which was the relief sought in the plaintiff's complaint. 63

The court in Brunson emphasized that all of the members of the class who were stricken were named plaintiffs, and that the action involved no unnamed plaintiffs. It distinguished a Second Circuit case in which a denial of class action certification striking unnamed plaintiffs was found to be a nonappealable order. 64 This distinction leads us to inquire into the reasoning behind the holding of the court. The only authority cited in Brunson permitting an interlocutory appeal was Hood v. Board of Trustees. 65 In Hood, the Fourth Circuit held per curiam that denial of plaintiff's motion for summary judgment was appealable in an action for injunctive relief by construing the denial as an interlocutory order denying an injunction within the meaning of Section 1292. Hood is not very strong authority to be the sole basis for the decision, 66 nor was any policy cited to justify the departure from traditional rules of appealability. However, the logic does validly bring the order within the purview of Section 1292(a)(1) by examining the effect of the order rather than the technical niceties. 67

The court's distinction between named and unnamed plaintiffs suggests a comparison between denials of certification and dismissals involving multiple claims under Rule 54(b). The denial is very similar to such a dismissal, but because the action was brought as a class action rather than by joinder class members are denied the benefit of a Rule 54(b) order. 68 Had parties been joined and a Rule 54(b) order entered, the dismissal would be appealable under Section 1291. 69 The Brunson court used Section 1292 to achieve a similar result. Thus, Section 1292(a)(1) performs a function for class actions seeking injunctive relief which is similar to the function that Section 1291 performs in conjunction with Rule 54(b) dismissals.

62 See text at note 59, supra.
63 See text at note 75, infra.
64 All American Airways v. Elderd, 209 F.2d 247 (2d Cir. 1954).
68 Fed. R. Civ. P. 54 (b), permits entry of judgment on one or more of the plaintiff's claims while the others are still pending where the action involves multiple claims or plaintiffs.
69 Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).
The United States Court of Appeals for the First Circuit, in *Yaffe v. Powers*[^70] became the second court to allow an interlocutory appeal from an order denying class certification on the injunction theory. The plaintiffs here sought declaratory and injunctive relief against certain police officers to restrain police surveillance of themselves and “all other individuals who wish to . . . engage, in the City of Fall River, in peaceful political discussion.”[^71] The district court found that the requirements of Rule 23 had not been met. It refused to recognize the class, but permitted the named plaintiffs to continue the action.[^72]

The court of appeals addressed the issue of appealability but treated it in a most cursory manner, citing *Brunson* as the main authority.[^73] In fact, the holding in *Yaffe* is a significant extension of the *Brunson* rule, and not a mere restatement as the *Yaffe* opinion appears to suggest. The effect of the denial of class certification in *Yaffe* was *merely to narrow the scope of relief*; it was not a *conceptual alteration* of the form of relief as in *Brunson*.[^74] The means of “narrowing” the relief in *Brunson* and *Yaffe* appear to be similar, but an examination of the aggregate relief available to the plaintiffs in the restricted actions demonstrates the difference. Even if every member of the *Brunson* class brought an action in his own behalf and was admitted to the school of his choice, that relief would be different in type from an affirmative desegregation plan.

On the other hand, a series of separate injunctions prohibiting police surveillance of every possible member of the *Yaffe* class would be the functional equivalent of the relief sought in the class action. Therein lies the distinction and the reason that the holding in *Yaffe* is broader than that in *Brunson*. By interpreting the “narrowing” as a “denial of injunctive relief,” the *Yaffe* decision for the first time goes to the question of *scope qua scope* rather than *scope as substitution* of relief.

Only two circuits other than the first and fourth have considered the injunction theory.[^75] Both the Second and Fifth Circuit Courts of Appeals, would apparently reject the theory.

[^70]: 454 F.2d 1362 (1st Cir. 1972).
[^71]: Id. at 1364.
[^72]: The court of appeals, after holding the order appealable, considered the merits on the assumption that if a valid class did indeed exist it would be a class under Rule 23(b)(2), Id. at 1366; the court also noted that even if the plaintiffs were to prevail in the limited action, any relief granted would be of little practical value because of the “chilling effect” that continued surveillance would have on non-parties. Id. at 1364-65.
[^74]: See text at notes 59, 62, *supra*.
[^75]: The Third Circuit, in dictum, has indicated that the “injunction” theory
In *City of New York v. International Pipe & Ceramics Corp.*, the Second Circuit Court of Appeals rejected the appellant's argument that denial of class certification in a private antitrust suit was appealable under Section 1292(a)(1) as a denial of the broad injunctive relief sought. It is unclear on what basis the plaintiff predicated his argument. This was an antitrust suit for treble damages, and no injunctive relief appears to have been requested. It is possible that an injunction was sought as an ancillary remedy to prevent future violations and that the city argued that the denial would preclude the granting of broad injunctive relief which might be requested later.

The injunction theory may not have been applicable on the facts of the given case. It should be pointed out, however, that the injunction theory is more versatile than the death knell theory. Although the death knell theory applies only to Rule 23(b)(3) actions, the injunction theory should apply equally to Rule 23(b)(3) actions whenever the plaintiffs seek final injunctive relief as well as damages. There is no reason to foreclose an immediate appeal merely because a significant portion of the requested remedy is damages. However, the language of *International Pipe* suggests that the Second Circuit rejects the injunction theory:

> There is no basis for the City's supposition that the order may effectively preclude the granting of such [injunctive] relief. Judge Ryan neither issued nor denied any injunction; no such question was before him. (Citations omitted).

Such language looks to "denial of an injunction" in a technical rather than a practical sense. The court concludes that the order neither granted nor denied an injunction within the meaning of Section 1292(a)(1) because the order before the district court was not for an injunction as such. This strict approach to the meaning of "injunction" in

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76 410 F.2d 295 (2d Cir. 1969).
77 The court also found, under the factual situation, the order to be non-appealable under the "death knell" criteria. Id. at 298-99.
78 See reference to city's argument at 410 F.2d 295, 299 (2d Cir. 1969).
79 See text at notes 13, 32, supra.
80 An example of such a case, had the class been denied certification, is Contract Buyers League v. F & F Inv., 48 F.R.D. 7 (N.D. Ill. 1969).
81 410 F.2d 295, 299 (2d Cir. 1969).
Section 1292 cannot be reconciled with the liberal approach to interpreting "finality" under the death knell theory.83

The Second Circuit's reluctance to accept the injunction theory appeared as early as 1954 in All American Airways v. Elderd,84 where an appeal from dismissal of a counterclaim in the form of a "spurious" class action under the old Rule 23 seeking injunctive relief was denied.85 The repercussions of All American Airways and International Pipe were evident in Hyatt v. United Aircraft Corp.86 Citing both cases, the district judge refused to certify the issue of class determination for appeal under Section 1292(b)87 saying that such certification would "be contrary to the law in this circuit."88 The fact that the court of appeals had denied such an appeal as a matter of right should not necessarily have foreclosed an interlocutory appeal under Section 1292(b).89

This reluctance is ironic, particularly since the Second Circuit is the only court which has allowed appeals under the death knell theory. The death knell theory requires even greater manipulation of jurisdictional statutes than does the injunction theory.

In Oatis v. Crown Zellerbach Corp.90 the Fifth Circuit allowed an appeal in a case which might appear similar to Brunson and Yaffe, but in which there was an independent basis for allowing an appeal.91 Oatis was a class action seeking injunctive relief. The district court dismissed as to three of the four named plaintiffs and limited the scope of the class which could be certified. However, the district court entered judgment against those three plaintiffs as to whom the action had been dismissed under Rule 54(b).92 Even though a part of the original action was still pending, the appeal from the order denying certification was proper

84 209 F.2d 247 (2d Cir. 1954).
85 The court never really examined the possibility of allowing the appeal. The court simply held, "In any event the non-appealability of the order in this type of class action is apparent." Id. at 249. Although the order appealed from in this case very well may not have been appealable, even under the "injunction" theory, the authority cited by the court is far from conclusive on the point.
87 An appeal may be had under 28 U.S.C. 1292(b) (1966), in the discretion of the court of appeals, when the trial judge certifies an otherwise non-appealable order as a controlling question of law and "... that an immediate appeal may materially advance the ultimate termination of the litigation. ..."
88 50 F.R.D. at 248.
90 398 F.2d 496 (5th Cir. 1968).
91 The non-applicability of the injunction thereof in this case warrants explanation since at least one court has erroneously cited this case for the proposition that denial of class action certification may be appealable as a denial of the injunctive relief sought. Hackett v. General Host Corp., 455 F.2d 618, 622 (3rd Cir.), cert. denied, 407 U.S. 925 (1972).
92 See note 68, supra.
under Rule 54(b). Therefore, this case never confronted the appealability of a class action certification order standing alone.

In *DeBremaecker v. Short*, the Fifth Circuit was presented with an opportunity to follow the Fourth Circuit's approach in *Brunson*. There were two possible bases for appellate jurisdiction, one of which was the injunction theory, but here the court avoided the injunction theory and held the order appealable by the other route. The plaintiffs sought final and preliminary injunctive relief to restrain the police officers of Houston from harassing citizens of Texas active in the "peace movement." The district court dismissed the class action aspects of the suit and denied the preliminary injunction. The primary basis for appellate jurisdiction was the denial of the preliminary injunction, and the court simply assumed jurisdiction of the certification issue without discussion. It would appear that the *DeBremaecker* court took jurisdiction under the theory that the appealable order carried the nonappealable order with it, but it should be noted that in this case a determination of the class action order was not necessarily an underlying factor in the determination of the preliminary injunction order. For this reason the court could have refused to hear the appeal on the class action certification order.

The scope of review under Sections 1291 and 1292 is governed as much by a policy of self-restraint as it is by a reverence for the words of the statute. The purpose of this policy is to expedite the conduct of trials by avoiding interruption by appeals before final judgment. In *DeBremaecker*, the court's exercise of jurisdiction based on pendency to the appealable order is the more likely explanation for the lack of any statement regarding the appealability, and an implicit acceptance of the injunction theory should not be inferred. At the time *DeBremaecker* was decided, *Brunson* was the only case applying the injunction theory and an acceptance of that doctrine seemingly would have required acknowledgement and discussion. This conclusion is supported by a more recent decision in which the Fifth Circuit appears to have rejected the injunction theory. If, however, the injunction theory is viewed as a partner to the death knell theory, or as a logical correlative to appeals from

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93 398 F.2d 496, 497, n.1 (5th Cir. 1968).
94 433 F.2d 733 (5th Cir. 1970).
95 Id. at 735.
99 Lamarche v. Sunbeam Television Corp., 446 F.2d 880 (5th Cir. 1971) (per curiam) (semble); but cf. McCoy v. Louisiana State Board of Education, 343 F.2d 720 (5th Cir. 1965).
orders issued under Rule 54(b), then the Fifth Circuit may not be entirely hostile to interlocutory appeals from denial of class action certification.

C. THE INJUNCTION THEORY EXAMINED: NEED; LEGALITY; POLICY

Neither the First nor Fourth Circuits, in adopting the injunction theory, have adequately examined the basis for allowing such appeals. The validity of its application depends on three major questions: (1) whether there is a legitimate need for interlocutory appeals from denials of class certification; (2) whether there is any jurisdictional basis for allowing such appeals; (3) whether the need and the legal basis, when taken together, are sufficient to justify an exception to the strong federal policy against piecemeal appeals.

In the narrow range of cases in which the death knell theory operates, there is clearly a need for an interlocutory appeal. Should such an appeal not be granted, the merits of the action will never be reached because the amount in controversy for any individual plaintiff is too small to justify the cost of litigation. The same rationale does not necessarily apply to Rule 23(b)(2) actions for the vindication of a right upon which a money value cannot be placed, or to Rule 23(b)(3) actions involving the same personal rights as a "classic" Rule 23(b)(2) action. In these actions it is impossible to weigh the money value of the remedy against the cost of the action because the value of a civil right or liberty is subjective to the plaintiff and therefore incalculable. The objective standard which is implicit in the death knell theory could, therefore, not apply. The fact that a plaintiff may drop his action for subjective reasons if class certification is denied is not alone sufficient to justify interlocutory appeal for this would allow the plaintiff to intimidate the court into granting an appeal.

Where the death knell theory does not apply and the action may continue despite denial of class certification, there yet remain considerations that point to the need for an interlocutory appeal. Rule 23(c)(1) pro-

100 See text at notes 68, 69, supra.
102 See Hackett v. General Host Corp., 455 F.2d 618, 622 (3rd Cir.), cert. denied, 407 U.S. 925 (1972). Brief for the Appellant at 4, Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972), the pertinent part of which reads: "Because plaintiffs do not seek money damages and because this litigation is supported by an 'institutional litigator' (the Civil Liberties Union of Massachusetts) no claim is made that the district court's order would 'sound the death knell' of the litigation by making it unreasonable to expect plaintiffs or their attorneys to continue the litigation..."; see text at note 32, supra.
103 See Contract Buyers League v. F & F Inv., 48 F.R.D. 7 (N.D. Ill. 1969). At the same time there are some Rule 23(b)(2) actions in which the relief requested is capable of monetary evaluation and to which the death knell criteria could be applied to determine appealability of denial of class certification. See VanGemert v. Boeing Co., 259 F. Supp. 125 (S.D.N.Y. 1966).
vides for the trial court to make a determination of the validity of the class as soon as possible in order “to give clear definition to the action.” If the certification order cannot be appealed, the scope of the action cannot be finally determined until the appeal from final judgment after a full trial. If the trial court’s ruling on certification is reversed, a second trial on the merits is almost inevitable. Any broad injunctive relief which might be granted the class as a whole would then be further delayed at the risk of irreparable damage to the members excluded from the original class. The need for interlocutory appeals “to permit litigants to effectively challenge interlocutory orders of a serious, perhaps irreparable, consequence” is clear. Also, immediate appellate review would save both parties the cost of unnecessary litigation where the appellate court finds the order of the trial court to have been in error.

Appellate jurisdiction over interlocutory appeals may be found in the practical construction of the term “final decision” as it appears in Section 1291 of the Judicial Code, and in the statutory exceptions to the final order rule which are set forth in Section 1292. The collateral order doctrine is the primary basis for interlocutory appeals under Section 1291. Although this doctrine is difficult to apply to class certification orders, its derivative death knell theory supplies a limited basis for appeals in the situations which are outlined in detail above.

Alternatively, Section 1292(a)(1) permits appeals from interlocutory orders which grant or deny injunction. This jurisdiction extends to any orders the effect of which is to deny an injunction, and jurisdiction to review such indirect denials has been upheld by the Supreme Court. Many attempts to appeal such “effective denials” have failed, but appeals have been allowed in situations analogous to denials of class certification. Section 1292(a)(1) was first used primarily in patent infringement actions to permit appeals from interlocutory orders which dismissed complaints for injunctive relief without entirely disposing of the action. It has more recently been applied to permit appeals from orders

107 See text at note 44 and following, supra.
110 General Electric v. Marvel Rare Metals Co., 287 U.S. 430 (1932) (dismissal of counterclaim seeking injunctive relief); Steward-Warner Corp. v. Westinghouse Electric Corp., 325 F.2d 822 (2d Cir. 1963), cert. denied 376 U.S. 944 (1964) (dismissal of defendant-intervenor's counterclaim); Switzer Bros. v. Locklin, 207 F. 2d 484 (7th Cir. 1953) (denial of defendant-intervenor's counterclaim); Telechron, Inc. v. Parisi, 197 F.2d 757 (2d Cir. 1952) (order striking non-patent claims from complaint seeking injunctive relief); Cutting Room Appliance Corp. v. Empire Cutting Mach. Co., 186 F.2d 997 (2d Cir. 1951) (order dismissing portion of counterclaim for injunctive relief); In-A-Floor Safe Co. v. Diebold Safe & Lock Co., 91 F.2d 341 (9th Cir. 1937) (denial of right to file
dismissing as to some but not all of the complaints of defendants in class actions for injunctive relief.\footnote{111}

Given a need for interlocutory appeal and a legal basis for appealing the "effective denial" of an injunction,\footnote{112} the final question is whether the need for appeal outweighs the policy against piecemeal appeals. If it does, the court should then apply the injunction theory to allow appeal from the class action certification order.

The policy of the final judgment rule is to promote efficient judicial administration.\footnote{113} Obviously, a multitude of interlocutory appeals would burden the appellate dockets and interrupt the course of adjudications at the district court level. But judicial efficiency must be viewed from a broad perspective. Although the purpose of the final judgment rule is to promote judicial efficiency, it may actually hinder such efficiency if it is rigidly applied without reference to the posture of each case. If interlocutory appeal from a class certification order may not be had, then a second trial will be required after appeal in cases where a certification order is erroneously denied. On the other hand, if an interlocutory appeal is permitted, the need for a second trial on the merits can be eliminated. The latter procedure is more efficient, "[f]or two trials, one unnecessary, may take longer and cost more than two appeals where one [trial] would do."\footnote{114}

It would be unjust to the defendant to merely expand the judgment counterclaim); contra, National Mach. Co. v. Waterbury Farrel Foundry and Mach. Co., 290 F.2d 527 (2d Cir. 1961) (denial of leave to amend for injunctive relief).

\footnote{111} Spangler v. United States, 415 F.2d 1242 (9th Cir. 1969) (order striking plaintiff-intervenor's complaint to expand class action to desegregate certain schools in the system to the entire system, held appealable as an interlocutory order denying the injunctive relief sought); Build of Buffalo, Inc. v. Sedita, 441 F.2d 284 (2d Cir. 1971) (order dismissing complaint as to some defendants but not all where plaintiff sought injunctive relief held appealable as denial of the injunctive relief sought); see Tracey v. Robbins, 373 F.2d 13 (4th Cir. 1967) (order dismissing as to some defendants held not appealable but the court emphasized that "for all that now appears, all the relief to which the plaintiff may be entitled may be granted and made effective through the Chief of Police is the only remaining defendant." Id. at 14.) but see, e.g., Midwestern Developments, Inc. v. City of Tulsa, 319 F.2d 53 (10th Cir. 1963), cert denied, 379 U.S. 989 (1964).

\footnote{112} In Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc., 351 F.2d 552 (1st Cir. 1965), aff'd, 385 U.S. 23 (1966), the First Circuit attempted to differentiate the denial of an interlocutory injunction from the interlocutory denial of a permanent injunction. The Supreme Court, in affirming, rejected this distinction, arriving at the holding, "not because 'interlocutory' or preliminary may not at times embrace denials of permanent injunctions", but because denial of a motion for summary judgment merely requires that the action go to trial and is not analogous to denial of the injunction. 385 U.S. 23, 25 (1966).

\footnote{113} Catlin v. United States, 324 U.S. 229, 233-34 (1945); Coblledick v. United States, 309 U.S. 323, 324-25 (1940); see also 9 J. Moore, FEDERAL PRACTICE ¶110.07 (2d ed. 1972).

at trial to all members of the class.\textsuperscript{115} The denial of certification would limit discovery and the record on final judgment would provide the appellate court with only enough facts to vacate and remand for a new determination of the proper class.\textsuperscript{116} While Section 1292(a)(1) cannot be used merely to simplify the litigation,\textsuperscript{117} one of the purposes of the statute is to avoid unnecessarily protracted and extended litigation.\textsuperscript{118} Where an interlocutory appeal would promote the "just, speedy and inexpensive determination of the action"\textsuperscript{119} in the spirit of the Federal Rules of Civil Procedure, then Section 1292(a)(1) should be construed to permit appeal from orders denying class certification in actions for equitable relief. This interpretation would be consistent with the policy of the final judgment rule, which is to expedite the judicial process.

\textbf{Martin J. McMahon, Jr.}


\textsuperscript{116} See Yaffe v. Powers, 454 F.2d 1362, 1366-67 (1st Cir. 1972); Discovery orders cannot be appealed as injunctions, Borden v. Sylk, 410 F.2d 843 (3rd Cir. 1969); Wainwright v. Borden, 368 F.2d 1000 (5th Cir. 1966); see also 8 Wright & Miller, Federal Practice and Procedure \textsection{2006. But where the issues at trial are complicated and clarification of the proper scope of discovery will provide for a speedier determination on the merits, such as interlocutory order should be heard on appeal. See Atlantic City Electric Co., 207 F. Supp. 613, 620 (S.D.N.Y. 1962).


\textsuperscript{118} Milbert v. Bison Laboratories, 260 F.2d 431, 433 (3d Cir. 1958).

\textsuperscript{119} Fed. R. Civ. P. 1.