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port with modern marketing. It remains to be seen, however, whether without legislative action the courts will allow variable price contracts to be enforced against non-signers or, indeed, if the Supreme Court would include variable pricing within the purview of the McGuire Act.

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DISMISSAL OF CLASS ACTIONS; THE SMALL CLAIM PLAINTIFF AND THE DOCTRINE OF FINALITY UNDER 28 U.S.C. § 1291

Today the individual consumer seems to be increasingly aware that he is subject to a wide range of economic abuses in the marketplace.[1] Through the medium of the class action,[2] however, the consumer may find that he can join with others similarly situated and seek redress of their aggregate injuries.[3] A dismissal of such a class action, which leaves the potential class representative to prosecute only his individual claim, can have a distinct impact on his substantive rights. If the personal claim is relatively small, he may be unwilling or unable to pursue an action against the corporate entity.[4] This is especially true in a consumer action where resolution of the issues will involve such complex facts and intricate law that redress would be likely to entail expenses totally dispropor-

[1]Protecting the consumer from abuse in the marketplace is not altogether a recent phenomenon. As early as 1906 consumers were deemed to have a cause of action under the Sherman Anti-Trust Act §§ 1-7, ch. 647, §§ 1-7, 28 Stat. 209 (1890), *as amended*, 15 U.S.C. §§ 1-3 (1970, when they were victims of monopoly price fixing. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396 (1906). Nevertheless, significant consumer reliance upon the courts for redress of economic injuries seems to be a relatively recent development. *See* Scher, *Antitrust and Consumerism: What is it all About?*, 22 CASE W. RES. L. REV. 11 (1970).

[2]FED. R. CIV. P. 23(a) provides:

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

[3]*See, e.g.*, Clayton Act § 4, 15 U.S.C. § 15 (1970), *formerly* ch. 323, § 4, 38 Stat. 731 (1914). Note 14 and accompanying text *infra*.

[4]Other than the class action, the procedural alternatives available for handling multiple litigation—intervention, joinder, consolidation—presuppose "a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention." Frankel, *Amended Rule 23 From a Judge's Point of View*, 32 ABA ANTITRUST SECTION 295, 298 (1966).

tionate to any of the individual claims.[5] Consequently, it seems that the reality of judicial relief for the consumer holding a small claim may in fact depend exclusively on the availability of a class action suit.[6]

Rule 23 of the Federal Rules of Civil Procedure sets out in detail the prerequisites for a class action,[7] yet Rule 23(c)(1) leaves it within the discretion of the trial court to decide whether the class action shall be maintained.[8] An order, pursuant to Rule 23(c)(1), which dismisses the class action allegations may effectively prevent an adjudication of the merits of the consumer action. Whether such an order is final and thus appealable under 28 U.S.C. § 1291[9] is an unsettled issue.

In *Hackett v. General Host Corp.*,[10] the Third Circuit Court of Appeals was confronted with the issue of the appealability of an adverse Rule 23(c)(1) order which left a single plaintiff to litigate her small damage claim.[11] Plaintiff had filed an antitrust class action complaint on behalf of herself and one and one-half million consumers similarly situated.[12] The action was brought under the Clayton Act[13] seeking treble

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[5]*See, e.g.*, Escott v. Barchris Constr. Corp., 340 F.2d 731 (2d Cir. 1965).

The successful plaintiff in an antitrust action is entitled under 15 U.S.C. § 15 (1970) to treble damages, attorney's fees and costs. Nevertheless he must be prepared for "the certainty that he will incur several thousand dollars in costs before trial is reached." Dweyer, *Proof of Injury—Elements of Damage*, in PRIVATE ANTITRUST ACTIONS 199, 206 (1968). A leading antitrust lawyer suggested that the costs alone in suing a "great" corporation might amount to as much as $25,000. *Hearings on the Role of Private Antitrust Enforcement in Protecting Small Business Before a Subcomm. of the Senate Comm. on Small Business*, 85th Cong., 2d Sess. at 164 (1958).

[6]This comment will focus primarily upon a case arising in the field of antitrust litigation. *See* 15 U.S.C. § 15 (1970). The class action, however, may also have a substantial impact on the specific areas of federal securities regulation; *see* [15 U.S.C. § 77aa (1964)]; civil rights [28 U.S.C. § 1343 (1970)]; and truth-in-lending [15 U.S.C. § 1640 (1970)].

In each of these situations the statute provides for federal jurisdiction regardless of the amount in controversy. In 1969 the Supreme Court rejected the contention that Rule 23 permitted aggregation of claims for purposes of jurisdictional amount. Snyder v. Harris, 394 U.S. 332 (1969).

[7]FED. R. CIV. P. 23(a), (b). Note 2 *supra* and note 16 *infra*.

[8]FED. R. CIV. P. 23(c)(1) provides in part:

> 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.

[9]28 U.S.C. § 1291 (1970) provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

[10]No. 19,320 (3d Cir., Jan. 14, 1972).

[11]The case arose subsequent to an indictment which charged that General Host Corporation and other named defendants had conspired to fix prices and terms of sale of bread in the Philadelphia market. *Id.* at 2.

[12]Plaintiff had purchased bread at retail from defendants and claimed that the price-fixing had injured her personally to the extent of nine dollars. *Id.*

[13]Note 3 *supra*.

damages, costs and attorney's fees[14] for alleged violations of sections one and two of the Sherman Act.[15]

The district court determined that the class which the plaintiff sought to represent was unmanageable[16] and pursuant to Rule 23(c)(1) disallowed[17] the class aspect of the allegations.[18] Plaintiff filed an appeal under 28 U.S.C. § 1291, contending that the Rule 23(c)(1) order was a final order within the scope of that section.[19]

The plaintiff's theory was that no attorney would undertake to repre-

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[14]Through the Clayton Act § 4, 15 U.S.C. 15 (1971), *formerly* ch. 323, § 4, 38 Stat. 731 (1914), Congress apparently hoped to make the antitrust laws self-enforcing. 15 U.S.C. § 15 (1970) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

It was expected that the provisions for a treble damage remedy would encourage private prosecution. The courts have repeatedly emphasized that the treble damage action was intended not only to redress personal injuries, but also to aid in achieving the broader purposes of the antitrust laws. *See, e.g.*, Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955); Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891, 893 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955). *See generally* Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

[15]15 U.S.C. §§ 1-2 (1970).

[16]Rule 23(b) enumerates three alternative requirements which, in addition to the prerequisites of Rule 23(b) [see note 2 supra], must be met in order to maintain a class action. Rule 23(b)(3) provides that the court may allow a class action if it

> finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include . . . the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b).

The management difficulties inherent in representing a large class usually relate to the requirements concerning notice to the individual class members. *See* FED. R. CIV. P. 23(c)(2). Various procedures have been suggested for overcoming these difficulties. *See, e.g.*, Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 568-70 (2d Cir. 1968) (3,750,000 individual and corporate buyers in the class); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 494 (N.D. Ill. 1969); Contract Buyers League v. F. & F. Inv., 48 F.R.D. 7, 15 (N.D. Ill. 1969). *See generally* Note, *Federal Rule 23(c)(2)—Notice In Class Actions*—Mullane *Reconsidered*, 43 TUL. L. REV. 369 (1969).

[17]Note 8 and accompanying text *supra*.

[18]The district court denied plaintiff's subsequent request that it certify its order for appeal in accordance with 28 U.S.C. § 1292(b) (1970). Note 58 and accompanying text *infra*.

[19]No. 19,320 at 3.

sent her in a complex and lengthy antitrust action in which she had only a nine-dollar personal claim.[20] She argued that the practical result of the district court's order was the termination of the litigation and that as such it was a final order.[21] The court of appeals disagreed and dismissed the motion for appeal.[22] It reasoned that due to the statutory provision for attorney's fees and costs in the litigation,[23] there was no conclusive basis for the assertion that plaintiff would be unable to secure counsel to represent her.[24]

Hackett is significant because the Third Circuit rejected any application of the "death knell" rule which first appeared in *Eisen v. Carlisle & Jacquelin*.[25] In that case plaintiff brought a class action on behalf of himself and all others similarly situated against odd-lot dealers on the New York Stock Exchange. The district court refused to permit the action to be maintained as a class action, in effect limiting plaintiff to his token seventy dollar individual claim.[26] The Second Circuit allowed an appeal of this order under section 1291 stating that:

> We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen. . . . If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23.
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> . . . Where the effect of a district court's order if not reviewed, is the death knell of the action, review should be allowed.[27]

Since the district court's order dismissing the *Eisen* class action would have had the practical effect of terminating the litigation, the order would not have been reviewable at all if appellate consideration could have taken place only after a final adjudication of the merits of the action. Through application of the death knell rule, the appellate court acknowledged that denial of an appeal of the order could have effectively precluded adequate judicial review of any aspect of the class action.[28]

The considerations which allowed an appeal in *Eisen* may seem to

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[20] *Id.* at 2-4.

[21] *Id.* at 3-4.

[22] Judge Rosenn entered a strong dissent. *Id.* at 14-26.

[23] 15 U.S.C. § 15 (1970).

[24] No. 19,320 at 7.

[25] 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

[26] Like in Hackett v. General Host Corp. [No. 19,320, at 1-2], the statute under which Mr. Eisen brought his claim contained a provision for the award of attorney's fees. *See* 15 U.S.C. § 15 (1970). 370 F.2d at 119-210.

[27] 370 F.2d at 120-21.

[28] *Id.*

contrast with the notion of overcrowded dockets[29] and the resulting policy of judicial economy in the courts. Federal law expresses this policy of judicial economy through both judicial[30] and legislative[31] hostility toward piecemeal appeals. In addition, this hostility is due to the potential for harassment of litigants through nuisance appeals and the fact that any appeal tends to delay trial or settlement of lawsuits.[32] The statutory framework provides that subject to certain explicit exceptions,[33] the appealability of interlocutory orders under section 1291 depends upon a judicial determination that such orders fall within the category of final orders.[34]

The central issue raised by *Hackett* involves the scope of section 1291. The appellate court, however, was not confronted with a final decision which was intended to complete the litigation.[35] Rather, it considered an order which was addressed to an issue tangential to the principal litigation. In *Cohen v. Beneficial Industrial Loan Corp.*,[36] certain of these orders were termed collateral orders and held immediately appealable as final decisions due to their irrevocable effect upon claims separable from the substantive issues of the litigation.[37] The district court's order in

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[29]*See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

[30]Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc., 385 U.S. 23, 25 (1966). Justice Harlan consistently dissented from the line of cases expanding the notion of finality. In Mercantile Nat'l Bank v. Langdeau he wrote:

> The Court's decision in these appeals throws the law of finality into a state of great uncertainty and will, I am afraid, tend to increase future efforts at piecemeal review.

371 U.S. 555, 575 (1963) (Harlan, J., dissenting) (footnote omitted).

[31]Congress expressed its policy by the promulgations of 28 U.S.C. §§ 1291, 1292(b). Under either section a trial court's order would have to meet certain criteria to be appealable. Note 9 *supra* and note 58 *infra*.

[32]*See, e.g.*, American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 278 (2d Cir. 1967).

[33]Note 74 *infra*.

[34]It should be noted that 28 U.S.C. § 1291 (1970) does not define the term "final order."

[35]The Supreme Court has said that a final decision may be "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945).

[36]337 U.S. 541 (1949).

[37]*Cohen* involved a stockholder's suit in which the defendant corporation appealed from the denial of a motion to require the plaintiff to post security for the defendant's costs. Mr. Justice Jackson, speaking for a unanimous Court as to the appealability of the order stated:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the

Hackett was arguably of such a nature as to bring the decision within the collateral order doctrine of *Cohen*.[38] Not only was the order denying Hackett's class action allegation a determination of a claim separable from the merits of the antitrust action, but that order would also not be reviewable if the litigation did not continue.

The development of the death knell doctrine in *Eisen*,[39] however, was founded upon a concept of finality more fundamental to the outcome of the action than the collateral order doctrine would require. The collateral order doctrine is addressed to determinations which, though made during the course of the litigation, do not impede the progress of the lawsuit. On the other hand, the death knell doctrine permitted an appeal in *Eisen* based upon the consideration that the purported interlocutory order of the district court effectively terminated the entire litigation. Support for this approach came from *Gillespie v. United States Steel Corp.*,[40] where the Supreme Court was confronted with the question of whether a certain interlocutory order was appealable under section 1291.[41] Conceding that it would be impossible to devise a strict formula for resolving cases coming within what it termed the " 'twilight zone' of finality," the Court invoked the *Cohen* requirement that finality be given a "practical rather than a technical construction."[42] A trial court's order may, as in *Hackett*, technically allow the plaintiff to continue with his action. Nevertheless, the further *Gillespie* consideration of "the danger of denying justice by delay [of review]"[43] seems to allow the courts of appeal to focus upon whether an order has the practical effect of terminating the litigation. The

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> cause itself to require that appellate consideration be deferred until the whole case is adjudicated.
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> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

337 U.S. 541, 546-47. *See* Roberts v. District Court, 339 U.S. 844 (1950) (denial of petition to proceed in forma pauperis held to be an order sufficiently collateral to the merits and of sufficient importance to permit review as a final decision).

[38]Judge Rosenn, the dissenting judge in *Hackett*, would have held the collateral order sufficient to permit an appeal. No. 19,320 at 25-26 (Rosenn, J., dissenting).

[39]Notes 25-28 and accompanying text *supra*.

[40]379 U.S. 148 (1964).

[41]In *Gillespie* the question was whether the Court had jurisdiction to review the denial of several causes of action for wrongful death under maritime law. The causes of action involved joinder of the decedent's dependent brothers and sisters, and the district court's order foreclosed their participation in the action.

[42]379 U.S. at 152, *quoting* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

[43]379 U.S. at 153. *See* Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

Eisen court balanced the inconvenience of piecemeal litigation[44] against the danger of denying justice and found that the latter was the predominant interest.[45]

By contrast the *Hackett* court found that there was an insignificant chance that the plaintiff's litigation would terminate and accordingly attributed a much smaller weight to this factor.[46] Thus *Hackett* presents a framework for consideration of the practical effect of a district court's order which revokes a class action designation and leaves the potential class representative to litigate his small personal claim. Prior to *Hackett* it seemed that the courts would attribute significance to the small size of the individual plaintiff's claim.[47] *Hackett*, however, appeared to minimize that consideration. The decision consequently reflects a controversy concerning the proper criteria to be applied in resolving whether it may be practical for the plaintiff to continue with his litigation.[48]

There is scant empirical data relating the size of a litigant's claim to the potential availability of counsel.[49] Consumer class litigation will frequently arise in a statutory context which provides that attorney's fees and costs will be awarded to the successful plaintiff.[50] Nevertheless, it

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[44]Notes 30-34 and accompanying text *supra*.

[45]370 F.2d at 120.

[46]No. 19,320 at 7-8.

[47]The plaintiff in *Hackett* had only a nine dollar personal claim, No. 19,320 at 2. Interestingly, this was smaller than the claims of previous class representatives in decisions where the death knell rule was held to permit appeal. *See* Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971) ($386 individual claim); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied, 395 U.S. 977 (1969) ($1000 individual claim); Eisen v. Carlisle &* Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967) ($70 individual claim).

[48]*See* Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971) (appeal from an order denying class action designation in securities action where actual loss to plaintiff was $386 and denying review of the dismissal would sound death knell of the action); Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967); *cf.* Caceres v. International Air Transp. Ass'n, 422 F.2d 141 (2d Cir. 1970); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969).

[49]Cursory attempts have been made to relate legal scholarship to an attorney's financial success. Garrison, *A Survey of the Wisconsin Bar*, 10 WIS. L. REV. 131, 161-65 (1935); Payne, *"And The 'C' Students Make the Money"??*, 18 ALA. L. REV. 23 (1966).

It should be noted that financially successful and purportedly competent attorneys, experienced in antitrust and securities fraud litigation, have attributed their financial status to their "ability to refuse" a doubtful case. *See Gadflies Who Put the Bite on Business*, BUSINESS WEEK, Oct. 14, 1967, at 124. These attorneys exhorted private enforcement of antitrust actions [under 15 U.S.C. § 15 (1970)] which allow the injured party to recover treble damages, considering such an award to be more effective than the maximum $50,000 fine. They had no experience with cases of the small scale of Mrs. Hackett's claim in which treble damages would amount to only twenty-seven dollars.

[50]There was such a provision underlying the actions in both *Hackett* and *Eisen*. Both actions were brought for violations of sections one and two of the Sherman Act. Thus, an

seems to be generally accepted that complex and lengthy antitrust actions[51] require a substantial amount in controversy to warrant the interest of either the plaintiff or his attorney.[52] Though seldom articulated, a lack of interest in antitrust actions may well turn on the fact that the plaintiff will bear his fees and court costs if the suit is unsuccessful.[53] The individual consumer may simply be unwilling to take that risk. The death knell rule as applied in a line of decisions in the Second Circuit reflects implicit consideration of this factor. The resulting determination was that dismissal of class action allegations would probably cause the practical termination of the small-claim consumer's action.[54] In contrast, *Hackett* weighed its assumption of a minimal danger of denying plaintiff access to the courts[55] against the policies which protect the court from piecemeal litigation[56] and denied the appeal.

Moreover, *Hackett* also assumed that there were alternative channels of appellate remedy open to the plaintiff and weighed this as a factor opposed to interlocutory review through section 1291.[57] The court concluded that by certification pursuant to 28 U.S.C. § 1292(b),[58] certification pursuant to Rule 54(b),[59] or petition for writ of mandamus under 28

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award of fees would have been contingent upon prevailing in the action. *See* 15 U.S.C. § 15 (1970).

[51]Note 5 and accompanying text *supra.*

[52]*Id.*

[53]In no statutes are the attorney's fees granted as of right. Generally they will be awarded to the party prevailing in the action. *See, e.g.*, 15 U.S.C. § 15 (1970). Moreover, the award of these fees may further depend upon the discretion of the trial court. *See* 15 U.S.C. § 77k(e) (1970).

[54]*See* Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

[55]No. 19,320 at 7.

[56]Notes 30-34 and accompanying text *supra.*

[57]No. 19,320 at 8-9.

[58]28 U.S.C. § 1292(b) (1970) is also known as the Interlocutory Appeals Act. It added subsection (b) to section 1292 to "expedite the ultimate termination of the litigation and thereby save unnecessary expense and delay." H.R. REP. NO. 1667, 85th Cong., 2d Sess. 1 (1958). Section 1292(b) provides:

> When a district judge, in making in a civil action an order . . . , shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order . . . .

[59]FED. R. CIV. P. 54(b) provides:

> When more than one claim . . . is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims. . . .

See notes 64-65 and accompanying text *infra.*

U.S.C. § 1651,[60] the consumer class action could be protected against an unreceptive district court.[61] A section 1292(b) appeal requires the discretionary approval of both the district court and the court of appeals. Under Rule 54(b) appeal is within the discretion of the district court, while review pursuant to section 1651 is within the discretion of the court of appeals. In each case an appeal would follow if the appropriate court determined that the harm that could be caused by denying access to review outweighed considerations opposed to piecemeal litigation.[62] Accordingly, the nature of these alternate channels of review seemed to comport with the forceful policy of judicial economy.

Analysis of the operation and effect of the alternate modes of review, however, reveals that they may be of illusory assistance to the potential class representative who is subject to an order which dismisses the class action aspect of the litigation. In the first place, section 1292(b) is available as a means of review only if the trial judge makes a discretionary determination that immediate appeal of his order would be essential to the litigation.[63] If he fails to certify the order for appeal, section 1292(b) ceases to be a potential mode of review. If he does certify the order, then the court of appeals makes the final determination whether to allow or disallow the appeal.

Secondly, a district court judge could direct pursuant to Rule 54(b)[64] that his order dismissing a class action allegation be entered as "a final judgment as to one . . . of the claims" in the action.[65] As under section 1292(b), the determination would be within the discretion of the trial judge and failure to certify would effectively preclude the litigant's use of the Rule 54(b) appeal. Thirdly, the potential consumer class representative will find that the use of the section 1651 writs of mandamus has been sharply limited. They are generally not to be used as substitutes for appeal.[66] The successful petitioner for mandamus must demonstrate an

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[60]28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Traditional use of mandamus under section 1651 has been to confine an inferior court to the exercise of its prescribed jurisdiction. *See* Schlagenhauf v. Holder, 379 U.S. 104, 109-10 (1964).

[61]No. 19,320 at 8-9.

[62]*Id.* at 8-10.

[63]28 U.S.C. 1292(b) (1970).

[64]FED. R. CIV. P. 54(b); note 57 *supra.*

[65]FED. R. CIV. P. 54(b).

[66]*See* Schlagenhauf v. Holder, 379 U.S. 104 (1964) (writ appropriately issued however when there is a "usurpation of power or a clear abuse of discretion"). The Supreme Court in *Ex parte* Fahey, 332 U.S. 258, 260 (1947), asserted in regard to petitions for mandamus:

abuse of discretion rather than mere discretionary error in the district court's adverse ruling.[67] It would seem, therefore, that the three alternative modes of review may be of little use to the consumer plaintiff who has received an order dismissing his class action. The availability of an appeal under section 1291 may consequently depend upon a realization by the court of appeals that not only may the district court's order, if unreviewed, practically terminate the litigation, but also that the alternate channels of review may not in fact be available.

In *Hackett*, the appellate court determined that the policy opposed to piecemeal litigation outweighed the slight chance that the district court's order would terminate the litigation.[68] Due in part to the uncertainty of the result of the order,[69] *Hackett* did not find the order to be final within the scope of section 1291.[70]

A more obvious instance of the practical effect of an adverse district court order was presented to the Fourth Circuit Court of Appeals in *Brunson v. Board of Trustees*.[71] There the court dealt with a procedural issue analogous to that which arose in *Hackett*. In *Brunson* forty-two school children brought a class action seeking general injunctive relief against a school board which was maintaining an allegedly segregated school system.[72] The district court ruled that each plaintiff would be limited to an individual action seeking admission to a particular school.[73] The Fourth Circuit held that the order striking the class aspect of the complaint had the practical effect of denying the broad injunctive relief sought by the parties and that the order was thus appealable under 28 U.S.C. § 1292(a)(1).[74] In *Brunson* there was little need to weigh considerations opposed to piecemeal litigation because section 1292(a) encompas-

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We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes.

[67]Parr v. United States, 351 U.S. 513, 520 (1956).

[68]No. 19,320 at 7-10.

[69]*Id.*

[70]*Id.* at 3-10.

[71]311 F.2d 107 (4th Cir. 1962).

[72]*Id.* at 107-08.

[73]*Id.* at 108.

[74]28 U.S.C. § 1292(a) (1970) allows appeal as of right from certain interlocutory orders by the district court. It provides:

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

(1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions . . .

(2) . . . orders appointing recievers . . .

(3) . . . decrees . . . determining the rights and liabilities of the parties to admiralty cases . . .

(4) Judgements in civil actions for patent infringement which are final except for accounting.

ses four specific orders—injunction, receivership, admiralty, and patent infringement[75]—which, in addition to orders found to be final under section 1291, are appealable as of right. Since the practical effect of the district court's order clearly brought it within the scope of the injunction provision of 1292(a)(1), appeal was allowed.[76]

In contrast to *Brunson*, the uncertainty of the practical effect of the district court's order in *Hackett* required a more definitive balancing approach by the circuit court. The balancing was complicated, however, by indistinct notions of the relation of either the death knell rule[77] or the policy against piecemeal litigation[78] to the procedural aspects of the case. The Third Circuit in *Hackett* was dealing with an order which was not addressed to the merits of the antitrust action,[79] yet which possibly had the practical effect of terminating consideration of the substantive issues of the case. The court seems to have had difficulty with the *Eisen* death knell approach due to its subsequent applications by the Second Circuit.[80] What had been perceived in *Eisen* as the necessity of weighing the danger of terminating the litigation against the policy opposed to piecemeal litigation[81] appeared to evolve in the Second Circuit as an automatic inquiry into the amount of the individual plaintiff's claim.[82] Judge Rosenn acknowledged the weakness of such an arbitrary formula in his dissent in *Hackett*.[83] He sought a return to the focus of the balancing concept of *Gillespie* and *Eisen*.[84]

In *Hackett*, the district court's order left plaintiff's small damage claim to stand alone in a complex and costly antitrust suit. A determination of the effect of that order clearly requires consideration of factors beyond the mere technical permission for plaintiff to continue with his

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[75]The fifth interlocutory order which is automatically appealable is an order in bankruptcy. 11 U.S.C. § 47 (1970).

[76]By comparison, the consumer class action dismissal cases focus upon the question of whether the district court's order practically terminates the litigation so as to be within the ambit of finality under section 1291.

[77]Notes 25-28 and accompanying text *supra*.

[78]Notes 30-34 and accompanying text *supra*.

[79]*See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); note 37 *supra*.

[80]*See* Korn v. Franchard, 443 F.2d 1301 (2d Cir. 1971); Caceres v. International Air Transp. Ass'n, 422 F.2d 141 (2d Cir. 1970); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

[81]*See* Gillespie v. United States Steel Corp., 379 U.S. 148, 152-54 (1964); Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

[82]*E.g.*, Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969).

[83]No. 19,320 at 20-21 (Rosenn, J., dissenting).

[84]*Id.*

personal action.[85] The Supreme Court in *Gillespie* did not require the certainty of a technical interpretation of the district court's order. Instead it emphasized the practical consequences. Nevertheless, the *Hackett* decision seemed to stress the fact that plaintiff's personal claim had not been formally dismissed by the district court and that she was therefore technically able to pursue her individual action. Thus the court was not persuaded by the possibility or probability that the action would necessarily terminate.[86] Instead its determination relied on the lack of a conclusive basis for the assumption that Hackett could not continue the litigation.[87]

Furthermore, the position taken by the court of appeals in *Hackett* seems actually to interfere with the underlying practical purpose of judicial economy.[88] The court postulates that the plaintiff's meager claim would not deter an attorney from taking up the antitrust suit. If this were in fact the case, an intolerable overcrowding of the district court dockets would follow[89] as each party injured by the defendant corporation sought to recover individual damages. In addition, each action would be subject to appellate review after final decision by the district court. Viewed in this light, the *Hackett* decision not to review the district court's dismissal of the class action seems to contrast with the policies against multiple litigation and multiple appeals.

Whether a district court order dismissing consumer class action allegations is final with regard to the potential class representative may largely depend upon the circuit court in which he files his complaint. The court of appeals in *Hackett* sought a positive basis for finding that the plaintiff's litigation would terminate. Finding none, it determined that the district court's order was less than a final decision under section 1291. The court also asserted that alternate appellate channels would permit continuation of plaintiff's action. It would seem that neither determination affected the practical approach to finality as described in *Gillespie*[90] and applied by the Second Circuit in *Eisen*.[91]

The unsettled issue of finality and resultant appealability of an adverse Rule 23(c)(1) order appears to warrant the establishment of unify-

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[85]Notes 4-5 and accompanying text *supra*.

[86]The majority's argument that the plaintiff may be able to rely upon the services of a publicly supported legal aid program can be rebutted by the fact that such organizations usually do not pursue contingent fee cases. *See* OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES FOR LEGAL SERVICES PROGRAMS 20 (undated).

[87]No. 19,320 at 7.

[88]*See* Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

[89]*See generally, Id.* at 548. Carrington foresees dire consequences arising from the predicted increase in the number of actions docketed.

[90]Notes 40-43 and accompanying text *supra*.

[91]Notes 44-45 and accompanying text *supra*.