Class Actions in the Seventh Circuit: Appealability of an Interlocutory Order Denying Class Status

Elizabeth Honnet Belkin
CLASS ACTIONS IN THE SEVENTH CIRCUIT: APPEALABILITY OF AN INTERLOCUTORY ORDER DENYING CLASS STATUS

*Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 97 S. Ct. 272 (1976)

The immediate appealability of an interlocutory order\(^1\) denying class status\(^2\) is important to plaintiffs in class action suits. Denial of such an interlocutory appeal could result in a plaintiff losing the opportunity to litigate his claim because of the expense involved. Cases decided by the circuit courts show that judges disagree as to whether a district court's refusal to allow a claim to be litigated as a class action may be appealed prior to a decision on the merits. A case decided by the Court of Appeals for the Seventh Circuit, *Anschul v. Sitmar Cruises, Inc.*,\(^3\) illustrates the division of opinion on this question. The United States Supreme Court recently denied certiorari to review the *Anschul* decision\(^4\) and thereby failed to resolve the disagreement among circuit court judges.

1. An interlocutory order is an order that is not a final disposition of the entire controversy. *See Simons v. Morris*, 325 Ill. 199, 200, 156 N.E. 280, 281 (1927).
2. FED. R. Civ. P. 23(a) and (b) describe the criteria for maintaining a class action as follows:
   (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
   (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
   (1) the prosecution of separate actions by or against individual members of the class would create a risk of
   (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
   (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
   (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
   (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
3. 544 F.2d 1364 (7th Cir.), *cert. denied*, 97 S. Ct. 272 (1976).
The action in *Anschul* originated as a result of a change of itinerary for a fourteen-day pleasure cruise run by Sitmar Cruises, Inc. Various travel agents had negotiated contracts for this cruise on Sitmar’s behalf. Before departure, Sitmar notified the travel agents of a change in ports because it was unable to secure sufficient fuel commitments. Simon Anschul, a passenger on the cruise, brought a claim on behalf of himself and all persons similarly situated seeking damages for the difference in value between the cruise as advertised and as performed or, in the alternative, the amount by which Sitmar had been unjustly enriched by the change. The district court denied Anschul’s motion for class certification on the grounds that notice of the claim was insufficient to preserve or create a cause of action for the other passengers.\(^5\)

When the Seventh Circuit was asked to review the district court’s denial of class certification, two of the three judges hearing this case, Judges Swygert and Bauer, voted to allow an interlocutory appeal. The Honorable Frederick van Pelt Bryan, Senior District Judge for the Southern District of New York, who heard the case by designation, voted to deny the interlocutory appeal. When the proposed opinion was circulated to other active members of the court pursuant to the court’s internal rules, it was rejected. Consequently, the Swygert-Bauer position became the dissent, and the per curiam opinion represents the view of the other members of the Seventh Circuit and Judge Bryan.

This comment will first discuss statutory authority, United States Supreme Court decisions and holdings in other circuits which govern the appealability of interlocutory orders denying class status. Second, the per curiam and dissenting opinions in *Anschul* will be analyzed. Finally, the *Anschul* opinions will be evaluated.

**Authority Governing the Appealability of Interlocutory Orders Denying Class Status**

**Statutes and United States Supreme Court Cases**

According to 28 U.S.C. § 1291, appellate courts can review a lower court ruling only after there has been a final decision on the merits of the case.\(^6\) If there were no other authority on the subject, the denial of an interlocutory appeal sought to obtain review of the district court’s determination of class status would clearly be the correct view. However, the United States Supreme Court established an exception to this section 1291 requirement of finality, the “collateral order” doctrine, which provides a possible avenue for an interlocutory appeal from the denial of class status.

---

\(^5\) 544 F.2d at 1366.

The collateral order doctrine was established in *Cohen v. Beneficial Industrial Loan Corp.* In that case the Court held that there could be an interlocutory appeal from the district court's denial of the defendant's motion that the plaintiff be required to post security for reasonable expenses of the suit. The Court 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 cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

The Court gave guidelines for applying the collateral order doctrine in *Dickinson v. Petroleum Conversion Corp.*, where the Court held that by failing to appeal from a final decree a party forfeited the right to appeal. It stated that, in determining whether an order is appealable, the inconvenience and costs of piecemeal review must be balanced against the danger of denying justice by delay. The purpose of requiring an immediate appeal was to reduce the uncertainty and hazard which would result if the appeal were delayed.

### The Death Knell Doctrine

Using the *Dickinson* balancing test in applying the collateral order doctrine to an interlocutory appeal from a trial court's denial of class status, the Court of Appeals for the Second Circuit developed the "death knell" doctrine. In *Eisen v. Carlisle* the Second Circuit held that an immediate

---

8. Id. at 546.
10. Id. at 511. Such a balancing test was used by the Court in deciding the question of appealability in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). In *Gillespie*, the mother of a drowned seaman sought to recover for negligence under the Jones Act, for unseaworthiness under general maritime law and the Ohio wrongful death statute and for the seaman's pain and suffering before dying under the Jones Act and general maritime law. The district court held that the Jones Act was the exclusive remedy and struck parts of the complaint referring to the Ohio statutes and unseaworthiness. The district court also struck references to recovery for the benefit of the seaman's brother and sisters. The United States Supreme Court held this order was appealable. The Court stated that in balancing the inconvenience and costs of piecemeal review against the danger of denying justice by delay, the eventual costs would be less if the appeal were allowed. 379 U.S. at 153.
11. 338 U.S. at 512.
12. 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035 (1967) [hereinafter referred to as *Eisen I*]. Litigation of this case involving allegations that two major odd-lot dealers on the New York Stock Exchange violated the Sherman Act and that the Exchange had breached its duties took several years. After allowing an interlocutory appeal from the denial of class status, the Second Circuit reversed and remanded the question of class in light of errors made. 391 F.2d 555 (2d Cir. 1968) [Eisen II]. The district court then held that the suit could be maintained as a class action. 52 F.R.D. 253 (S.D.N.Y. 1971). The Second Circuit reversed this decision, concluding, among other things, that the proposed class action was unmanageable. 479 F.2d 1005 (2d Cir. 1973) [hereinafter referred to as *Eisen III*]. The next year the United States Supreme Court ruled
appeal should be allowed where the effect of a district court’s denial of class status, if not immediately reviewed, would force the plaintiff to abandon his claim. In allowing the interlocutory appeal in *Eisen I* the court stated that no lawyer of competence would litigate the complex antitrust and securities issues involved in this case to recover seventy dollars for Mr. Eisen. Therefore, a dismissal of the interlocutory appeal would terminate the action and the circuit court would never have the opportunity to decide if the trial court had been correct in denying class status.\(^{13}\)

In developing the death knell doctrine, the Second Circuit created a per se application of the collateral order doctrine. The court in effect said that where the action will not be litigated because of the economic incapacity of the parties, the danger of denying justice by delay automatically outweighs the inconvenience and costs of piecemeal review. In such a case an interlocutory appeal from the denial of class status should always be allowed.

*Eisen* eventually reached the United States Supreme Court, but the Court confined its holding to the issue of the notice costs involved in the class action and did not reach the question of whether the Second Circuit’s death knell approach was correct.\(^{14}\) There have been different interpretations of the significance of the Court’s failure to clarify the appropriateness of interlocutory appeals regarding class status. In their dissent in *Anschul*, Judges Swygert and Bauer stated that the language in the *Eisen IV* opinion points toward a ruling that all class order determinations are appealable under the collateral order doctrine.\(^{15}\) In support of their interpretation that the Court favors allowing an interlocutory appeal, the judges stated that if the class determination were not appealable, there would have been no jurisdiction for earlier decisions in the *Eisen* litigation and, therefore, the question of notice would never have been reached by the Court.\(^{16}\) On the other hand, Judge Friendly of the Second Circuit, in his concurring opinion in *Parkinson v. April Industries, Inc.*,\(^ {17}\) stated that even though *Eisen IV* did not expressly reject the death knell doctrine, it significantly did not sanction it.\(^ {18}\)

The Seventh Circuit’s decision in *Anschul* provided the Court with another opportunity to decide whether an interlocutory appeal from a denial of class status was appropriate under section 1291. By denying certiorari,\(^ {19}\) the Court again failed to clarify this issue.

\(^{13}\) 370 F.2d at 120.

\(^{14}\) 417 U.S. 156, 156.

\(^{15}\) 544 F.2d at 1370.

\(^{16}\) *Id.*.

\(^{17}\) 520 F.2d 650 (2d Cir. 1975).

\(^{18}\) *Id.* at 659.

\(^{19}\) 97 S. Ct. 272 (1976).
Circuit Court Cases

The circuit courts do not agree on the issue of whether there may be an interlocutory appeal of a lower court’s ruling on class status under section 1291. The Second Circuit, which formulated the death knell doctrine, now accepts the most liberal interpretation of the collateral order doctrine and allows defendants as well as plaintiffs to appeal immediately from a district court’s decision. The Courts of Appeals for the Sixth, Eighth, Tenth and District of Columbia Circuits have accepted the death knell formula but have not extended the right of an interlocutory appeal to defendants seeking to contest the granting of class status. The Courts of Appeals for the Fifth and Ninth Circuits also recognize the death knell doctrine but have limited its application. Only the Court of Appeals for the Third Circuit has joined the Seventh Circuit in totally rejecting the death knell concept and refusing to allow any parties an interlocutory appeal under section 1291.

The Second Circuit’s liberal interpretation of the collateral order doctrine was articulated in Eisen III. In that case the court stated that the same considerations prompting the application of the collateral order doctrine to allow the plaintiff an immediate appeal from the denial of class status in Eisen required that a defendant be allowed an interlocutory appeal from an order granting class status. In Parkinson v. April Industries, Inc., the Second Circuit stated that where three conditions are met a defendant may be allowed an interlocutory appeal. First, the class action determination must be fundamental to the furtherance of the case. Second, review of that order must be separable from the merits of the case. Third, the order must be capable of causing irreparable harm to the defendant in terms of time and money spent in defending a huge class action.

The Sixth Circuit accepted the death knell doctrine in Ott v. Speedwriting Publishing Co. Ott involved an action brought against the licensors of a business school on the grounds that the requirement that students buy new textbooks which licensors furnished violated antitrust laws. In permitting an interlocutory appeal from the trial court’s denial of class status, the court held

20. See text accompanying notes 24-28 infra.
21. See text accompanying notes 29-37 infra.
22. See text accompanying notes 38-45 infra.
23. See text accompanying notes 46-56 infra.
24. 479 F.2d 1005 (2d Cir. 1973).
26. 479 F.2d 1005, 1007 n.1. Accord, Herbst v. International Tel. & Tel. Corp. 495 F.2d 1308, 1313 (2d Cir. 1974). In that case I.T.T. was appealing from a district court ruling that a suit against the company could be maintained as a class action.
27. 520 F.2d 650 (2d Cir. 1975).
28. Id. at 656.
29. 518 F.2d 1143 (6th Cir. 1975).
that the death knell doctrine is an exception to the section 1291 requirement of finality. Finding that the amount in controversy was only approximately thirty dollars, the court stated that an immediate review should be allowed since it would not be feasible to continue the litigation without class status.

Although in recent cases in the Eighth, Tenth and District of Columbia Circuits the courts did not find the death knell doctrine applicable, these cases are significant for their stated or implied acceptance of the doctrine where the facts warranted its use. In *Hartmann v. Scott*, an action alleging a deprivation of civil rights brought by inmates of a state hospital, the Eighth Circuit stated that an order refusing class status which was not the death knell of an action is not appealable as a final or interlocutory order. In saying this the court indicated its acceptance of the death knell doctrine where the denial of class status automatically terminates the litigation.

Similarly, in a recent case the Tenth Circuit recognized death knell as an exception to the section 1291 requirement of finality. Although in *Monarch Asphalt Sales Co. v. Wilshire Oil Co. of Texas* the court did not find that denial of the appeal would per se terminate the litigation and, therefore, failed to allow an immediate review, it acknowledged the right to an interlocutory appeal in such a death knell situation.

The District of Columbia Circuit indicated its acceptance of the death knell doctrine in *Williams v. Mumford*, where the court was asked to review denial of class certification in a civil rights case. The court held that the death knell exception did not govern in this case because the plaintiffs had sufficient incentive to continue the suit without class certification. Williams, for example, was said to have in excess of $10,000 at stake in the outcome of the litigation.

The Fifth and Ninth Circuits have not rejected the death knell doctrine as stated in *Anschul*, but these courts have limited its application. In *Graci v.*

30. *Id.* at 1149.
31. *Id.*
32. 488 F.2d 1215 (8th Cir. 1973).
33. *Id.* at 1223.
34. 511 F.2d 1073 (10th Cir. 1975).
35. *Id.* at 1076-77.
37. *Id.* at 367.
38. Both the per curiam opinion and the dissent in *Anschul* erred in stating that the death knell doctrine had been rejected in these circuits. The per curiam opinion stated "[w]e rejected the death knell doctrine in *King v. Kansas City Southern Industries*, 479 F.2d 1259 (7th Cir. 1973) as did other circuits in *Hackett v. General Host Corp.*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972); *Graci v. United States*, 472 F.2d 124 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Falk v. Dempsey-Tegeler & Co., Inc.*, 472 F.2d 142 (9th Cir. 1972)." 544 F.2d at 1367. The dissent used the same language as the majority. 544 F.2d at 1372.
United States the Fifth Circuit held that the death knell exception permits an immediate appeal where, considering the size of the individual plaintiff’s claim, the extent of his financial resources and the probable expense of litigation, the court determines that the plaintiff cannot feasibly continue his action without class status. However, the court placed the burden of proving that a death knell situation exists on the plaintiff. In Graci the court dismissed the appeal because the plaintiff did not introduce evidence establishing a death knell situation.

The Ninth Circuit apparently accepts the death knell doctrine but that court has not shown how a death knell situation can be established. In Falk v. Demsey-Tegeler & Co. the court held that the death knell doctrine did not apply to a securities fraud case where the plaintiff allegedly suffered losses because of the collapse of the price of a speculative over-the-counter stock. The court stated that “[t]he ‘death knell’ doctrine exists, but its application should be carefully limited.” It did not, however, describe situations in which the death knell approach might be used. Previously, the Ninth Circuit had found the death knell doctrine inappropriate in Weingartner v. Union Oil Co. of California. The court noted that since the fifteen plaintiffs had a $353,700 stake in the lawsuit, they had not established that they lacked the financial capacity to continue the litigation.

The Third Circuit’s rejection of the death knell doctrine came in Hackett v. General Host Corp., an action by consumers of bread for an alleged violation of the Sherman Antitrust Act. This case presented a perfect opportunity for the court to decide whether to accept the death knell doctrine because the individual plaintiff’s claim was estimated to be worth only nine dollars. In refusing an interlocutory appeal contesting the trial court’s denial of class status, the court stated several objections to the death knell doctrine. These objections are, first, the doctrine has limited applicability. It does not cover defendants seeking to contest the certification of a class action. Further, where the claim must exceed $10,000 to be heard in federal court, the death knell concept does not apply because a plaintiff would have incentive to

40. Id. at 126.
41. Id.
42. 472 F.2d 142 (9th Cir. 1972).
43. Id. at 144.
44. 431 F.2d 26 (9th Cir.), cert. denied, 400 U.S. 1000 (1971).
45. Id. at 29.
47. Id. at 620.
48. Id. at 622-24.
49. 28 U.S.C. § 1332 (1970) grants jurisdiction to United States district courts in suits between citizens of different states if “the matter in controversy exceeds the sum or value of $10,000.”
continue the litigation even if class status were denied. Second, the death
knell doctrine is not needed where an injunction is involved because relief is
available under 28 U.S.C. § 1292(a)(1).50 Third, even without class certifica-
tion, the holder of a small claim can hire an attorney since there are both
federal statutes which award litigation costs and a growing number of legal
aid services. Fourth, appellate courts must be protected from being over-
whelmed by interlocutory appeals.51 Finally, other appellate remedies are
available. Where there is substantial ground for difference of opinion as to a
controlling question of law and an immediate appeal may materially advance
the ultimate termination of the litigation, under 28 U.S.C. § 1292(b)52 a
district court judge may certify the case for immediate review.53 Federal Rule
of Civil Procedure 54(b)54 permits a district court judge to certify an order as
final and, thus, appealable, in an action involving multiple claims or parties
when the decision is final to less than all of the claims or parties involved.55

Further, litigants are protected against unfair treatment from a district court
judge by their ability to bring a mandamus action under 28 U.S.C. § 1651.56

Until the United States Supreme Court chooses to clarify its position
with regard to the immediate appealability of orders denying class status, it

50. 28 U.S.C. § 1292(a)(1) (1970) provides:
The courts of appeals shall have jurisdiction of appeals from interlocutory orders of
the district courts of the United States, the United States District Court for the District
of the Canal Zone, the District Court of Guam, and the District Court of the Virgin
Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolv-
ing injunctions, or refusing to dissolve or modify injunctions, except where a direct
review may be had in the Supreme Court.
51. See text accompanying notes 80-81 infra.
52. 28 U.S.C. § 1292(b) (1970) provides:
When a district judge, in making in a civil action an order not otherwise appealable
under this section, shall be of the opinion that such order involves a controlling
question of law as to which there is a substantial ground for difference of opinion and
that an immediate appeal from the order may materially advance the ultimate termina-
tion of the litigation, he shall so state in writing in such order. The Court of Appeals
may thereupon, in its discretion, permit an appeal to be taken from such order, if
application is made to it within ten days after the entry of the order: Provided, however,
That application for an appeal hereunder shall not stay proceedings in the district court
unless the district judge or the Court of Appeals or a judge thereof shall so order.
53. See text accompanying note 76 infra.
54. Fed. R. Civ. P. 54(b) [hereinafter referred to as rule 54(b)] states:
When more than one claim for relief is presented in an action, whether as a claim,
counterclaim, cross-claim, or third-party claim, or when multiple parties are involved,
the court may direct the entry of a final judgment as to one or more but fewer than all of
the claims or parties only upon an express determination that there is no just reason for
delay and upon an express direction for the entry of judgment. In the absence of such
determination and direction, any order or other form of decision, however designated,
which adjudicates fewer than all the claims or the rights and liabilities of fewer than all
the parties shall not terminate the action as to any of the claims or parties, and the order
or other form of decision is subject to revision at any time before the entry of judgment
adjudicating all the claims and the rights and liabilities of all the parties.
55. See text accompanying note 78 infra.
56. 28 U.S.C. § 1651(a) (1970) provides that the federal courts "may issue all writs
necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages
and principles of law." See text accompanying note 79 infra.
appears that there will continue to be disagreement about the use of the collateral order and death knell doctrines. The Anschul per curiam and dissenting opinions illustrate this disagreement.

THE ANSCHUL OPINION

In holding that the collateral order doctrine does not apply where a plaintiff seeks an appellate review of a district court’s denial of class status, the Anschul per curiam opinion is continuing the narrow reading of the collateral order doctrine and the rejection of the death knell doctrine followed by the Seventh Circuit in prior decisions. In King v. Kansas City Southern Industries, Inc., an action involving shareholders allegedly wronged in securities transactions, the Seventh Circuit held that the district court’s denial of class certification was not appealable under section 1291. In a five paragraph per curiam opinion the court stated: “[w]e decline to adopt and accordingly reject the so-called ‘death knell’ theory” but did not explain its reasons for doing so.

In a later case, Jenkins v. Blue Cross Mutual Hospital Insurance, Inc., a civil rights action challenging racial and sex discrimination in employment practices, the court noted that the plaintiff did not attempt to invoke the death knell and collateral order doctrines which “[h]ave been rejected in this circuit as a basis for permitting an appeal from an order refusing class status.” In this case the plaintiff brought an appeal from the denial of class certification under § 1292(a)(1). Again the Seventh Circuit did not state its rationale for rejecting the death knell doctrine.

In Anschul the court stated that since the order denying class status could be reviewed after there had been a final judgment no claim of right would escape review. The court said that if the question of class status was close, there could be an interlocutory appeal under 28 U.S.C. § 1292(b). Further, the court noted that the plaintiff was protected against a trial judge who acted arbitrarily or neglected to issue an initial ruling by the ability to bring a mandamus action under section 1651.

The dissent, on the other hand, favored a broad interpretation of the collateral order doctrine. Judges Swygert and Bauer stated that the Second Circuit’s recent decision in Herbst v. International Telephone & Telegraph

57. 479 F.2d 1259 (7th Cir. 1973).
58. Id. at 1260.
59. 522 F.2d 1235 (7th Cir. 1975).
60. Id. at 1237.
61. See note 50 supra.
62. 544 F.2d at 1368.
63. Id. at 1368-69. See note 52 supra.
64. Id. at 1368 n.5. See note 56 supra.
to allow a defendant an interlocutory appeal after a lower court had granted class status was the logical extension of the United States Supreme Court's holding in *Eisen IV*. The dissent interpreted the collateral order doctrine as allowing an interlocutory appeal not only by plaintiffs lacking the economic capacity to pursue their claims individually but also by any other plaintiffs denied class standing and by defendants seeking to contest the certification of a class action. Judges Swygert and Bauer rejected the majority's view that an immediate review of an order denying the right to litigate the case as a class action is unnecessary for a number of reasons. These reasons are, first, that the named plaintiff may lack the incentive to appeal the denial of class status after receiving a favorable verdict on the merits of the claim. This could result in unnamed plaintiffs never receiving a judgment despite the fact that the claim had been found to be valid by the district court. Second, an unnamed plaintiff might be denied his claim after the named plaintiff was successful on the merits because the victorious plaintiff, who no longer had an interest in the litigation, lacked standing to contest denial of class certification. Third, the named plaintiff's claim might be so small that he would not pursue it once he had lost class standing.

**Evaluation**

Several arguments can be made in support of the Seventh Circuit's decision to refuse an interlocutory appeal from the denial of class status brought under section 1291. First, it may be argued that an appeal under section 1291 is unnecessary because of other remedies available. Both the Third Circuit in *Hackett* and the Seventh Circuit in *Anschutz* stated that plaintiffs denied class status are protected by sections 1292(b) and 1651. The Third Circuit also mentioned rule 54(b) as an additional avenue by which a plaintiff may appeal. A second factor in favor of denying an interlocutory appeal is that appellate courts should be protected from being overwhelmed by interlocutory appeals. This consideration was discussed by *Id.* at 1372.

65. 495 F.2d 1308 (2d Cir. 1974).
66. 544 F.2d at 1371.
67. The dissent stated:
   We agree that there should be no distinction between the plaintiff who has such a small claim that an order denying a class action will sound the "death knell" of his action and the plaintiff whose claim is of such size that he is likely to pursue it despite the denial of a class action.
   *Id.* at 1372.
68. *Id.* at 1371-72.
69. 455 F.2d at 623-24.
70. 544 F.2d at 1368-69.
71. *See* note 52 *supra*.
72. *See* note 56 *supra*.
73. *See* note 54 *supra*.
74. 455 F.2d at 623-24.
the Third Circuit in Hackett.\textsuperscript{75} Third, a point not made by either the Third or Seventh Circuits is that an immediate review of the denial of class status is undesirable because if the district court finds no merit in the substance of the claim, the question of class status would be moot. Categorically denying an interlocutory appeal would save litigants the expense and time involved in appealing a lower court’s interlocutory order that ultimately had no effect on the outcome of the case. Fourth, another factor not considered by the Third or Seventh Circuit is that to allow an immediate review may encourage insignificant claims. These arguments do not, however, provide a convincing rationale for rejecting an interlocutory appeal, especially when the advantages of allowing an immediate review are considered.

To say that plaintiffs are protected by other remedies and, therefore, need not be allowed to bring an appeal under section 1291 is misleading. Even though section 1292(b) is an avenue by which to bring an interlocutory appeal in some cases, it does not protect all plaintiffs seeking an immediate review of a trial court’s order. An interlocutory appeal under section 1292(b) must be certified by the same court that denied class status.\textsuperscript{76} A court, having reviewed the facts and concluded that a class action was inappropriate, may be unwilling to certify that there was substantial ground for difference of opinion. If this happens, section 1292(b) is of little help.\textsuperscript{77} Similarly, an appeal under rule 54(b) requires the approval of the trial court which must direct entry of a final judgment.\textsuperscript{78} Where the court refuses to do this, plaintiffs denied class status cannot appeal under rule 54(b). The proposition that plaintiffs are protected against unfair treatment by a section 1651 remedy is of little help because appellate courts consider mandamus writs a drastic measure and use them sparingly.\textsuperscript{79} Although section 1292(b), rule 54(b) and section 1651 may be applicable in some situations, their existence does not mean that allowing an appeal under section 1291 is unnecessary.

While limiting the number of appeals is a legitimate concern,\textsuperscript{80} to deny

\textsuperscript{75} Id. at 623.
\textsuperscript{76} See note 52 supra.
\textsuperscript{78} See note 54 supra.
\textsuperscript{80} In 1974 a total of 16,436 appeals were filed in the United States courts of appeals as contrasted with 4,823 cases begun in 1962. 1974 Annual Report of the Director of the Administrative Office of the United States Courts 179.
interlocutory appeals from a trial court's refusal to grant class status would not significantly ease the appellate court case overload problem. Consequently, the goal of protecting the appellate courts from being overburdened by cases is not a convincing argument in support of the refusal to allow an immediate review of an order denying class status.

It is true that if the district court finds no merit in the substance of a claim, the question of class status would be moot. In a death knell situation, however, this argument for refusing an immediate appeal from an order denying class status is inapplicable. Where the denial of class status results in the termination of the litigation, the merits of the case will never be determined.

Finally, acceptance of the death knell doctrine will not result in courts being overwhelmed by insignificant actions. Where only a few people suffer a wrong which results in some minor damage, litigation is economically impractical even as a class action. Allowing an interlocutory appeal would have no effect on these claims. On the other hand, where a large number of people suffer relatively minor damages, taken as a whole their action is not insignificant. Such people should be able to litigate their cause for if they could not do so the other party would be substantially and unjustly enriched at their expense. For these people an interlocutory appeal from the denial of class status is necessary and should be granted.

The most important reason for allowing an immediate appeal of an interlocutory order denying class status is that no person should be denied the right to present his case because he cannot afford to do so. This is the rationale behind the death knell doctrine. As was indicated by the Second Circuit in formulating that doctrine, the denial of an immediate appeal in some cases terminates the action because the individual plaintiffs cannot continue without being able to share the cost of litigation with others.

Allowing an interlocutory appeal also has the advantage of informing the defendant of exactly what his stakes are in the litigation. If an interlocutory appeal regarding the denial of class status is not heard and the named plaintiff is successful on the merits of his action, the defendant is then faced with the possibility that class status will be granted at a time when he cannot relitigate the merits but rather is bound by res judicata. It is possible that the defendant's approach might have been different if he had realized the economic magnitude of the case from the start.

In light of these considerations, an interlocutory appeal from the denial

82. See text accompanying note 13 supra.
of class status should be allowed under section 1291. The Second Circuit's death knell approach is one way of assuring that each potential plaintiff has an opportunity to be heard without requiring that all interlocutory orders regarding class status be reviewed. At the very least, the members of the Seventh Circuit joining in the per curiam opinion should reconsider their rejection of the death knell doctrine. If the court is uncomfortable with the death knell doctrine, an alternative is to follow the approach suggested in the dissent and adopted by the Second Circuit—to read the collateral order doctrine quite broadly and to allow all parties dissatisfied with the lower court's ruling on class status an immediate review by the appellate court.

**CONCLUSION**

Whether there can be an interlocutory appeal under section 1291 from an order denying class status is a question on which judges disagree. The Third Circuit and the per curiam opinion in *Anschul* follow a strict interpretation of the collateral order doctrine and refuse an immediate appellate review of the denial of class status. At the other extreme, the recent decisions in the Second Circuit and the dissent in *Anschul* follow the most liberal interpretation of the collateral order doctrine and allow all parties an interlocutory appeal of class determination. Most circuits follow a middle position and allow an interlocutory appeal only in a death knell situation.

The best approach is at least to allow an immediate appellate court review of an order denying class status. To do otherwise might result in a party being deprived of an opportunity to litigate his claim. The judges joining in the per curiam opinion in *Anschul* should reconsider their rejection of the death knell doctrine in light of the arguments favoring an immediate review.

**ELIZABETH HONNET BELKIN**