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Abstract

In many instances, the order indicating that a lawsuit may proceed as a class action determines whether the suit will proceed at all. This note examines the rationale behind Florida courts' treatment of orders determining class standing.

KEYWORDS: review, class, orders

Appellate Review of Class Standing Orders in Florida

In many instances, the order indicating that a lawsuit may proceed as a class action determines whether the suit will proceed at all. This note examines the rationale behind Florida courts' treatment of orders determining class standing. Preliminarily, this note focuses on the present status of class standing orders in federal courts. Federal judges have the option of either certifying the suit as class action or refusing class action certification.[1] In either event, the federal trial court judge's discretion in certifying or refusing to certify a class action suit is not appealable except in rare cases which will be discussed below.

In Florida the law is unsettled in this area. A Florida judge has the same option of class action certification as his federal counterpart.[2] Differences arise, however, in that the Florida judge may order all allegations of a class suit stricken from the complaint or may dismiss the complaint entirely.[3]

After treatment of the federal viewpoint of class action certification orders, the focus of this note will shift to the effect a Florida judge's choice of action will have on whether a class action order is appealable.

Appeal Under 28 U.S.C. § 1291 in Federal Courts

Congress, by statute, created the federal appellate court power to hear final lower court decisions on appeal.[4] Generally, federal appellate courts hear appeals only from final judgments. However, because of the harshness sometimes associated with strict adherence to the final judgment rule, federal courts have created certain exceptions such as the collateral order doctrine.[5]

1. FED. R. CIV. P. 23.
2. FLA. R. CIV. P. 1.220.
3. *Id.*
4. 28 U.S.C. § 1291 (1970). "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." *Id.*
5. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

> [Some decisions appear] to fall in that small class which finally determines claims of rights 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.[6]

While this exception to the final judgment rule is approved by the United States Supreme Court, the Court specifically rejected its use regarding class standing orders in *Coopers & Lybrand v. Livesay*.[7] The grounds for such a rejection were threefold. First, these orders are subject to revisions in the district courts as part of the federal class action rule provides for amendment or alteration of a class standing order any time prior to final judgment on the merits.[8] Second, the considerations involved in determining whether a suit should proceed as a class action are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[9] Third, review can effectively be achieved after final judgment at the behest of the named representative or intervening class members.[10]

The Second Circuit Court of Appeals formulated another exception to the final judgment rule dealing specifically with class action certification denials called the "death-knell" doctrine.[11] This exception allowed for immediate appeal when denial of class certification would "for all practical purposes terminate the litigation,"[12] thereby causing irreparable harm to the plaintiff and the class.[13] Other circuits viewed the "death-knell" doctrine with mixed responses. Both the Eighth Circuit and the Tenth Circuit accepted the "death-knell" doctrine[14] while

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6. *Id.* at 546.
7. 437 U.S. 463 (1978).
8. *Id.* at 469.
9. *Id.*
10. *Id.*
11. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).
12. *Id.* at 121.
13. *Id.* In Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971), the court dropped the requirement that the class suffer irreparable harm and just looked to the named representative.
14. The death knell doctrine of the Second Circuit was accepted by the Eighth Circuit in Hartmann v. Scott, 488 F.2d 1215, 1220 (8th Cir. 1973) and the Tenth

the Third and Seventh Circuits rejected it altogether.[15]

The United States Supreme Court, however, killed the "death-knell" doctrine in *Coopers*.[16] In that case, Coopers & Lybrand, an accounting firm, certified that financial statements contained in a prospectus were correct. Relying upon the prospectus, respondents purchased shares in a company. The company later restated its earnings reported in the prospectus by writing down its net income. Thereafter, respondents sold their shares and sustained a loss of $2,650 on their investment. Respondents brought a suit on behalf of themselves and the class of similarly situated investors. Initially, the district court certified the suit as a class action but later decertified it. The court of appeals examined the amount of respondents' claims in relation to their financial resources and the probable cost of litigation and concluded that if class certification was not given the lawsuit would terminate. Under this "death-knell" doctrine, jurisdiction was accepted and the order decertifying the class was reversed.[17]

The United States Supreme Court disagreed and reasoned that an order which either refuses to certify or decertifies the class does not force the plaintiff to abandon his claim. Since the plaintiff is free to pursue his individual claim, orders refusing to certify are not final judgments and will be appealable only if they fall within an appropriate exception to the final-judgment rule.[18]

The Court, refusing to accept the "death-knell" doctrine as an appropriate exception to the final judgment rule based its decision on five reasons. First, the formation of an appellate rule which revolves around the amount of the plaintiff's claim is a legislative responsibility.[19] Congress has made "finality" the test of appealability, and an amount in controversy rule established by the Court would be arbitrary in that "it ignores the variables that inform a litigant's decision to proceed, or not

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Circuit in Ringsby Truck Lines, Inc. v. United States, 490 F.2d 620, 624 (10th Cir. 1973).

15. Both the Third Circuit, in Hackett v. General Host Corp., 455 F.2d 618, 621 (3d Cir. 1972), and the Seventh Circuit, in King v. Kansas City S. Indus., Inc., 479 F.2d 1259, 1260 (3d Cir. 1973), rejected the doctrine.

16. 437 U.S. 463. Justice Stevens delivered the opinion for a unanimous court.

17. *Id.* at 466.

18. *Id.* at 467.

19. *Id.* at 472.

to proceed, in the face of an adverse class ruling."[20] Second, acceptance of the "death-knell" rule would have serious debilitating effects on the administration of justice as further appeals from adverse rulings on other grounds would inevitably result.[21] Third, the "death-knell" doctrine's acceptance would result in indiscriminatory interlocutory review of the trial judge's decision.[22] Such indiscriminatory review would circumvent the purpose behind 28 U.S.C. § 1292(b) which allows for review only upon trial court's discretion and then only in special circumstances.[23] Fourth, since the doctrine only applies to class certification denial orders, it operates in favor of the plaintiffs even though the issues will often be of critical importance to the defendants as well.[24] Finally, by allowing appeals that turn on the particular facts of the case, appellate courts would be thrown into the trial process in a way which defeats one of the main purposes of the final judgment rule: maintaining appropriate relationships between the various courts.[25] Furthermore, the Court, in dicta, stated that approval of class certifications were interlocutory orders and not final judgments within the meaning of 28 U.S.C. § 1291.[26]

While the *Coopers* decision settled the issue of appealing class standing orders as final judgments, such appeals were not precluded under other federal rules or statutes.

Injunctions

District court interlocutory orders concerning injunctive relief are immediately appealable under 28 U.S.C. § 1292(a)(1).[27] In *Brunson v. Board of Trustees,*[28] appeal of class certification denials were available

20. *Id.*
21. *Id.* at 473.
22. *Id.* at 474.
23. *Id. See also* 28 U.S.C. § 1292(b) (1970).
24. *Coopers,* 437 U.S. at 476.
25. *Id.*
26. *Id.*
27. This section provides: "(a) The court of appeals shall have jurisdiction of appeal from: (1) Interlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ." 28 U.S.C. § 1292(a)(1)(1970).
28. Brunson v. Bd. of Trustees of School Dist. No. 1, 311 F.2d 107 (4th Cir.

under Section 1291(a)(1) on the theory that a denial of class certification would in effect narrow the scope of injunctive relief.[29] In *Brunson,* an action was brought by forty-two black children and their parents against the school board as a class action suit. Upon motion, the district court struck all of the plaintiffs except Brunson who was the first named plaintiff.[30] By forcing each individual to pursue his own claim, injunctions issued would only be directed with respect to that single plaintiff whereas if class action were successful general injunctive relief would be granted. Hence, the court concluded denial of class certification had the effect of narrowing the scope of injunctive relief.[31]

In *Gardner v. Westinghouse Broadcasting Co.,*[32] the United States Supreme Court, however, refused to accept this rationale by holding an order denying class certification was not appealable under the interlocutory injunctive relief statute.[33] The court noted the statute was created as an exception to the policy against piecemeal review and as such should not be enlarged or extended.[34] Under Federal Rule of Civil Procedure 23, class certification orders may be reviewed by the trial judge both prior to and after final judgment.[35] Finally, the Court concluded the class determination does not affect the merits of the representative's personal claim nor does it pass on the legal sufficiency of any claim for injunctive relief.[36] In the event that the order did pass on the legal sufficiency of a claim for injunctive relief or if it would effect the merits of the petitioner's own claim, the Court left open the possibility for review.[37]

1962).

29. *Id.* at 108. The same view has been taken in Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 522 F.2d 1235, 1237 (7th Cir. 1975), and Jones v. Diamond, 519 F.2d 1090, 1095 (5th Cir. 1975). Because the district court's refusal to certify the suit as a class action directly controlled the subsequent disposition of the request for preliminary injunction it too should be reviewable. *Jenkins,* 522 F.2d at 1237.

30. *Brunson,* 311 F.2d at 107.

31. *Id.*

32. 437 U.S. 478 (1978).

33. *Id.*

34. *Id.* at 480.

35. FED. R. CIV. P. 23(c)(1).

36. *Gardner,* 437 U.S. at 480.

37. *Id.*

Appeal of Denial of Class Action Certification Under Federal Rule 54(b)

Federal Rule of Civil Procedure 54(b)[38] provides an alternative way to appeal a denial of a class action certification. There have been cases where a trial judge has dismissed the action as to the absent class members and the judge certified the dismissal as a final judgment and therefore appeal was appropriately taken.[39]

This rule may also be utilized if the action is dismissed against the parties for reasons other than lack of class standing.[40] For example, in *Monarch Asphalt Sales Co. v. Wilshire Oil Co. of Texas,*[41] the trial court refused class status to private contractors. The contractors attempted to intervene in the suit but this was also denied. "Final judgment" was entered against the contractors in accordance with rule 54(b). The order denying class status was held reviewable under Federal Rule of Civil Procedure 54(b). "The general rule is [that] interlocutory orders from which no appeal lies are merged into the final judgment and open to review on appeal from that judgment."[42]

Since, the scope of rule 54(b) is limited to final judgment, and interlocutory orders merged into final judgments, the rule cannot extend to reviewing decisions granting status to a class.[43]

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38. FED. R. CIV. P. 54(b) states: "[W]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all 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 . . . ."

39. Windham v. American Brands, Inc., 539 F.2d 1016 (4th Cir. 1976), *cert. denied,* 435 U.S. 968 (1978), holding certification appropriate under FED. R. CIV. P. 54(b) to unnamed members of class upon denial of certification and final judgment of dismissal against them. *See also* Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1968) (dictum). *But see* West v. Capitol Fed. Sav. & Loan Ass'n, 558 F.2d 997, 980 (10th Cir. 1977), holding putative class members were not parties to the suit and declaring judgment dismissing action on behalf of the class void.

40. Monarch Asphalt Sales Co. v. Wilshire Oil Co. of Tex., 511 F.2d 1073 (10th Cir. 1977).

41. *Id.*

42. *Id.* at 1077.

43. *Katz,* 496 F.2d at 752.

Discretionary Appeal of Class Standing Determinations in Federal Courts Under 28 U.S.C. § 1292(b)

In *Coopers,*[44] the Supreme Court held that a class action certification was not appealable under section 1291 as a final judgment, but such a motion for appeal is not precluded under section 1292(b).[45] Under this statute, when a district court judge determines that an issue involves a controlling question of law on which there is substantial ground for difference of opinion and immediate appeal may materially advance the ultimate termination of the suit, the question may be certified to the court of appeals.[46] The court of appeals may then exercise its discretion as to whether to hear the appeal.[47] Policy reasons for allowing these appeals under section 1292(b) include judicial economy and protection of the parties from erroneous interlocutory orders.[48]

Due to the stringent requirements of 28 U.S.C. § 1292(b), as an interlocutory order, a class certification decision will be applicable only in special circumstances. Such special circumstances were demonstrated in *Tucker v. Arthur Anderson & Co..*[49] The trial court, in *Tucker,* stated that the order certifying a class could be considered a "controlling question" because considerable time and expense would be saved if the issue was immediately certified since reversal would probably mean termination of the suit.[50]

The same result was reached in *Aschul v. Sitmar Cruises,*[51] where a passenger on a fourteen day pleasure cruise brought an action on behalf of himself and other passengers against the shipping line alleging the cruise had not stopped in all the ports announced in its itiner-

44. 437 U.S. 463.

45. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 336 n.8 (1980).

46. 28 U.S.C. § 1292(b) (1970).

47. *Id.* This section is only used for orders that would not ordinarily be immediately appealable. "In some cases such appeal would promise substantial savings of time and resources or for other reasons should be viewed hospitably." *Roper*, 445 U.S. at 336 n.8.

48. Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir. 1974).

49. 67 F.R.D. 468 (S.D.N.Y. 1975).

50. *Id.* at 483. While the court held this should be sufficient, the questions certified to the court of appeals were more specific. *See also In re* U.S. Fin. Sec. Litig. v. Touche Ross & Co., 69 F.R.D. 24 (S.D. Cal. 1975) holding the same.

51. 544 F.2d 1364 (7th Cir. 1976).

ary. The trial court denied class action certification. On appeal, the court of appeals cited with approval the use of section 1292(b) in limited situations where the trial court determines that substantial grounds for difference of opinion on the class status question exists and immediate appeal may materially advance the end of litigation.[52]

Mandamus

The All Writs Act[53] provides another possible alternative for reviewing class standing determinations. Mandamus is labeled as one of the "most potent weapons in the judicial arsenal"[54] and accordingly its use is limited to cases where there has been a showing of an abuse of judicial power.[55]

In *Green v. Occidental Petroleum Corp.*,[56] the Securities and Exchange Commission filed a complaint for injunctive relief against Occidental Petroleum alleging violations of specific sections of the Securities Exchange Act. Based on the allegations of the SEC complaint numerous private actions were filed. After extensive briefing, the district judge entered an order certifying a class under rule 23(b)(1) and 23(b)(3) of the Federal Rules of Civil Procedure.[57] The district judge

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52. *Id.* at 1369.
53. 28 U.S.C. § 1651 (1970).
54. Will v. United States, 389 U.S. 90, 107 (1967).
55. *Id.* at 104.
56. 541 F.2d 1335 (9th Cir. 1976).
57. Suits brought under 23(b)(1) and 23(b)(3) of the Federal Rules of Civil Procedure have to meet the initial prerequisites of a class action. 23(b)(1) suits will be allowed when:

> (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 substanially impair or impede their ability to protect their interests;

Id.
23(b)(3) suits would be appropriate where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only

refused to certify the ruling on the class certification under 28 U.S.C. § 1292(b). The Ninth Circuit addressed the latter question first and held it was an inappropriate remedy to mandamus the district judge to exercise his discretion to certify a question under section 1292(b). Relying on earlier opinions of the Second and Eighth Circuits the court concluded that to issue the writ instructing a district judge to certify a question under section 1292(b) would circumvent the statutory requirement that the district court and the court of appeals agree on the propriety of such an appeal.[58]

As to certification of the class suit the court held that mandamus was inappropriate as to the 23(b)(3) class certification. The court accepted the district court judge's discretion in the certification. The court did, however, issue the writ as to the certification under rule 23(b)(1). After determining certification was improper the court concluded judicial efficiency required the issuance of the writ to correct the improper certification.[59]

Mandamus has also been used to review orders granting class action status to determine if the lower court acted beyond its power authorized by the rule. In *Schmidt v. Fuller Brush Co.*,[60] Schmidt brought an action on behalf of himself and others similarly situated alleging that they were employed by Fuller Brush Company and that Fuller Brush had failed to pay them minimum wages and overtime compensation allegedly required under the Fair Labor Standards Act.[61] After certifying the class, the district judge directed that notice be sent to the absent class members as required by rule 23. Under rule 23(c)(2) of the Federal Rules of Civil Procedure, unless a class member comes forward and asks to be excluded from the suit he will be bound by the judgment. On the otherhand, section 16(b) of the Fair Labor Standards Act provides that an employee must consent in writing to be a party plaintiff. The court concluded that these two provisions were irreconcilable and issued mandamus vacating class action

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individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy . . . ." *Id.*
Suits brought under 23(b)(3) have notice requirements not found in 23(b)(1) suits.

58. *Green,* 541 F.2d at 1337.
59. *Id.* at 1339.
60. 527 F.2d 532 (8th Cir. 1975).
61. *Id.*

order.[62]

The continuing viability of mandamus even in these limited situations has been thrown into question after the Supreme Court decisions of *Coopers*[63] and *Gardner*.[64] While not specifically addressing the issue of mandamus, the Court's attitude toward class actions may lead one to suspect they have closed the "back door" as well as the front one to any appeals of class action standing prior to final judgment.

Class Actions in Florida

The new Florida class action rule,[65] patterned after the federal rule,[66] went into effect January 1, 1980. While the language varies in many respects, the basic requirements for bringing a class suit are similar. The Florida rule contains detailed pleading requirements not found in Federal Rule 23.[67] Additionally, the notice requirements in Florida's rule are more explicit and stringent than in its federal counterpart.[68]

Under the federal rule, a judge initially determines whether the suit may proceed as a class action. If it may, the judge certifies the class. If not, the judge denies certification and the suit proceeds. Under the Florida rule, a judge has the same option but, additionally, the judge may strike the class allegations.[69] Two questions then arise: what is the legal significance attached to striking the class representation allegations? and what prompts striking?

Prior to the adoption of the new Florida rule, the Florida Supreme Court decided *Harrell v. Hess Oil & Chem. Corp.*[70] That case involved a complaint in the form of a class action. The trial court dismissed the entire complaint because it was improperly brought as a class action. The Florida Spreme Court held that where the complaint stated an individual claim which could withstand a motion to dismiss, it was im-

62. *Id.* at 536.
63. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).
64. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978).
65. FLA. R. CIV. P. 1.220.
66. FED. R. CIV. P. 23.
67. FLA. R. CIV. P. 1.220(c).
68. *Id.* at advisory committee note.
69. *Compare* FLA. R. CIV. P. 1.220(d)(1) *with* FED. R. CIV. P. 23(c).
70. 287 So. 2d 291 (Fla. 1973).

proper to dismiss the complaint. "Rather, the trial court could have treated those allegations relating solely to a class action suit as having been stricken from the complaint by ordering dismissal of the complaint insofar as a class action was asserted."[71] Other courts have repeatedly held that misjoinder of parties is not a basis for dismissal.[72] Since an order striking class allegations is not the equivalent of a dismissal against the individual representative, that representative should not be allowed to appeal the order prior to final judgment.[73] Under the Florida Supreme Court approach, the striking of class allegations is analogous to dismissal, thus arguably a final judgment as to the absent class members.[74] However, the rule provides that orders "[m]ay be conditional and may be altered or amended before entry of judgment on the merits of the action."[75] If this language is read to mean that a judge is free to change his mind during the course of the trial and reinstate the class allegations, the order is not final as to the class but interlocutory. As an interlocutory order, it can only be appealable if it falls within the scope of Florida Rule of Appellate Procedure 9.130 or if a district court grants a common-law writ of certiorari.

Class Standing Determinations as Final Judgments in Florida

In Florida, absent a contrary statute or rule of court, appeals will lie only from final judgments or decrees.[76] Class standing orders have been held not to be final judgments under Florida law.[77]

Prior to the adoption of the new Florida class action rule, the First

71. *Id.* at 295.

72. *Id.* at 294. *See also* Equitable Life Assurance Soc'y v. Fuller, 275 So. 2d 568, 569 (Fla. 3d Dist. Ct. App. 1973), and Gordon Fin. Co. v. Belzaguy, 216 So. 2d 240, 245 (Fla. 3d Dist. Ct. App. 1968).

73. This does not take into account remedies such as mandamus, common law certiorari, or interlocutory appeal under jurisdiction over the person.

74. *Harrell,* 287 So. 2d at 295.

75. FLA. R. CIV. P. 1.220(2)(1).

76. Brannon v. Johnson, 83 So. 2d 779, 780 (Fla. 1955).

77. Ero Properties, Inc. v. Cone, 395 So. 2d 1264 (Fla. 3d Dist. Ct. App. 1981); National Lake Dev., Inc. v. Lake Tippecanoe Owners Ass'n, 395 So. 2d 592 (Fla. 2d Dist. Ct. App. 1981); Palm Beach Towers, Inc. v. Korn, 400 So. 2d 110 (Fla. 4th Dist. Ct. App. 1981); American Heritage Inst. Sec., Inc. v. Price, 379 So. 2d 420 (Fla. 5th Dist. Ct. App. 1980).

District Court of Appeal decided *Cordell v. World Insurance Co.*[78] The court held the dismissal of a class action suit with prejudice a final order even though plaintiffs were entitled to file an amended complaint and pursue claims in their individual capacity. The order was final as to the proposed class even though it did not finally dispose of the case on the merits.[79]

With the new provision allowing the judge to strike class allegations, question arises as to whether it is permissible to dismiss an action that fails to meet the prerequisites of a class but does state an individual cause of action. While there is no authority under the new rule, the courts are likely to strike the class allegations in accordance with the rule, rather than entirely dismiss the complaint. The only time dismissal would be appropriate would be when the plaintiff has stated no claim for himself in which case dismissal would be a final judgment and appeal should be granted as a matter of right.

Appeal of Class Standing Determinations in Florida When Multiple Parties are Involved

There is no corresponding rule in Florida to rule 54(b) of the Federal Rules of Civil Procedure.[80] Accordingly, there is no rule that renders final a split judgment in a case involving multiple parties.[81]

Moreover, Florida has a strong policy against piecemeal review.[82] Therefore, appealability of an order dismissing less than all the parties will turn on the grounds of the dismissal.

The general rule in equity is that an order that dismisses one party (or which disposes of the claims of that party) is final and appealable as to the dismissed party.[83] The modern approach to actions at law is that these too should be immediately appealable.[84]

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78. 352 So. 2d 108 (Fla. 1st Dist. Ct. App. 1977).

79. *Id.* at 109.

80. *See supra* pp. 8-9.

81. Evin R. Welsh & Co. v. Johnson, 138 So. 2d 390, 391 (Fla. 2d Dist. Ct. App. 1962).

82. S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97, 99 (Fla. 1974).

83. *Evin R. Welch & Co.,* 138 So. 2d at 391. *See also* Shute v. Keystone State Bank, 159 So. 2d 106 (Fla. 1st Dist. Ct. App. 1964).

84. *Evin R. Welch & Co.,* 138 So. 2d at 394. *See also* Schneider v. Manheimere,

In *Conboy v. City of Naples*,[85] Vincent H. Conboy brought a class action suit in equity on behalf of himself and all other ad valorem tax payers residing in the City of Naples. The action named the City of Naples, its Tax Assessor, the State Controller, and two land development concerns as the defendants. Conboy asserted that for the year of 1966 the lands owned by these development concerns were greatly underassessed. Therefore, claimed Conboy, all lands in the City of Naples did not bear their just burden of taxation which resulted in an increase of taxes to the class. The trial judge entered a directed verdict in favor of one of the land development concerns. An order enacted "final judgment" was recorded in favor of the land concern. Six months later the entire case was disposed of against the class. The issue was whether the initial directed verdict in favor of the first land development concern was an interlocutory order or whether the directed verdict was a final judgment requiring appellate review. The Second District Court of Appeal ruled that in a class action, dismissal of one of the defendants was final as to him and appeal must be taken when the action was dismissed against that defendant and not when the entire suit was decided.[86]

Class Standing Appeals as Interlocutory Orders in Florida

Prior to the change in the interlocutory order appeal rule, decisions on whether a suit could proceed as a class action were the subject of appeal to the Florida district courts.[87] These interlocutory orders were appealable under Florida Appellate Rule of Procedure 4.2, which provided: "Appeals may be prosecuted in accordance with this rule from interlocutory orders in civil actions which, from the subject matter or relief sought are such as formerly were cognizable in equity . . ."[88] Equity has long held that one or more persons may sue or defend on behalf of others with common interests when it is impractical to

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170 So. 2d 75 (Fla. 3d Dist. Ct. App. 1964).

85. 226 So. 2d 108 (Fla. 2d Dist. Ct. App. 1969).

86. *Id.*

87. *See, e.g.*, Rosenwasser v. Frager, 307 So. 2d 865 (Fla. 3d Dist. Ct. App. 1975); Hendler v. Rogues House Condominium, Inc., 234 So. 2d 128 (Fla. 4th Dist. Ct. App. 1970).

88. FLA. R. APP. P. 4.2.

bring all before the court.[89] Since the replacement of rule 4.2 there is no longer immediate appellate review of interlocutory orders "formerly cognizable in equity."[90] As a result, to be appealable as an interlocutory order, class determinations must fall within one of the categories of non-final orders from which immediate appeal will lie.

The present rule specifically limits review on non-final orders[91] to include orders involving injunctive relief,[92] orders which determine the issue of liability in favor of the claimant,[93] and orders which determine jurisdiction over the person.[94]

A. Injunctions

The Florida rule allowing interlocutory appeal concerning injunctions[95] is almost identical to the federal statute.[96] As pointed out in *Gardner v. Westinghouse Broadcasting Co.*,[97] the considerations for a class action are completely different from the considerations for granting or denying injunctions.[98] While the denial of class certification may affect the possible scope of an injunction, it will not have any effect on whether the petitioner is entitled to such an injunction. Yet, Florida courts are free to disregard the *Gardner* decision and allow immediate appeal of class standing determinations which involve the request for an injunction. The Florida rule allows interlocutory appeal of orders involving injunctive relief. When read literally, however, the rule excludes orders of class standing. Yet, as was conceded by the United States Supreme Court, such orders may indirectly affect injunctive relief.[99] Whether Florida courts decide to allow such interlocutory review of class standing orders remains to be seen. If circumstances arise where the class standing determination would affect the merits of the

89. 379 So. 2d 420, 421 (Fla. 5th Dist. Ct. App. 1980).
90. FLA. R. APP. P. 4.2.
91. *Id.* at 9.130(a)(3).
92. *Id.* at 9.130(a)(3)(B).
93. *Id.* at 9.130(a)(3)(C)(iv).
94. *Id.* at 9.130(a)(3)(C)(i).
95. FLA. R. APP. P. 9.130(a)(3)(B).
96. 28 U.S.C. § 1292(a)(1) (1970).
97. 437 U.S. 478 (1978).
98. *Id.* at 480.
99. *Id.*

petitioner's own claim or pass on the legal sufficiency of any claims for injunctive relief, appellate review under the injunction section should be allowed.

B. Orders that Determine the Issue of Liability in Favor of the Claimant

Florida Rules of Appellate Procedure provide that a non-final order which determines "the issue of liability in favor of a party seeking affirmative relief" is immediately appealable.[100] In *American Heritage Institutional Securities v. Price,*[101] appellants filed an interlocutory appeal of the trial court's order denying appellants motion to strike and motion for judgment on the pleadings. Both motions were directed as to whether the cause of action stated in the complaint could be prosecuted as a class action. Appellants argued jurisdiction under 9.130(a)(3)(C)(iv) of the Florida Rules of Appellate Procedure which states, "Review of non-final orders of lower tribunals is limited to those which . . . determine . . . the issue of liability in favor of a party seeking affirmative relief." The Fifth District Court of Appeal rejected this contention. It held that in determining class standing, the court is judging whether a cause can appropriately be brought as a class suit or whether there are sufficient allegations to sustain a class suit.[102] Once this determination is made, the suit will then proceed toward a potential liability which has not been determined and may never be determined.[103]

The reasoning for this determination is sound since the subject of liability is not relevant to a class determination. Class standing determinations only decide who is participating in the lawsuit, not who is liable.

C. Orders that Determine Jurisdiction Over the Person

Thus far, the only way recognized by a Florida appellate court to appeal a class standing determination as an interlocutory order has

100. FLA. R. APP. P. 9.130(a)(3)(C)(iv).
101. 379 So. 2d 420 (Fla. 5th Dist. Ct. App. 1980).
102. *Id.* at 421.
103. *Id.*

been as a non-final order which determines jurisdiction over the person. In *Kohl v. Bay Colony Club Condominium, Inc.*,[104] the trial court had entered certain pre-trial orders including the determinaton that a class action suit could be maintained. The petitioner filed a petition for certiorari to have this ruling reviewed and the Fourth District Court of Appeal allowed an appeal. The appellate court held that since a class action was binding on all members of the class, the court obtained personal jurisdiction over them. As a result, these were orders that determined jurisdiction over the person and fell within this section of immediately appealable interlocutory orders.

The idea of interlocutory appeal based on jurisdiction over the person was emphatically rejected by the Second District Court of Appeal in *National Lake Developments, Inc. v. Lake Tippecanoe Owners Assoc.*[105] The court held that orders of class determination decide the makeup of the proper class, not whether the court has jurisdiction over the members of the class.[106] Court policy reasons alone were held sufficient to reject the *Kohl* view since acceptance of its rationale could lead to interlocutory appeal in all class suits.[107] This was something the Second District Court of Appeal did not believe the drafters of the appellate rules would have deemed proper under orders that determine jurisdiction over the person.[108]

The reason that immediate interlocutory appeal for jurisdiction over the person is allowed under the appellate rules is to eliminate useless labor.[109] This reason should be focused upon when trying to determine if class standing orders should be immediately appealable as interlocutory orders determining jurisdiction over the person. It is apparent that if one accepts the premise that class standing orders do determine jurisdiction over the person then all such orders are or would be immediately appealable. To allow this would create labor for the district courts as clearly the party that had the adverse class ruling may take an immediate appeal regardless of its merits. Yet, to make the parties go through the time and expense of a complete trial only to

104. 385 So. 2d 1028 (Fla. 4th Dist. Ct. App. 1980).
105. 395 So. 2d 592 (Fla. 2d Dist. Ct. App. 1981).
106. *Id.* at 593.
107. *Id.*
108. *Id.*
109. FLA. R. APP. P. 9.130 advisory committee note.

have the initial class determination reversed at the appellate level would circumvent the purpose of the appellate rules.

While this is a reason for allowing class standing orders to be immediately appealable, the ramifications of doing so under jurisdiction over the person will lead to both useless labor and a form of piecemeal review. Although there is always the possibility of a judge making an erroneous initial determination, such determination is subject to amendment or alteration at anytime prior to final judgment on the merits.[110] In cases of clear error there may be a possibility of a writ of mandamus or common law certiorari. If neither of those remedies work then there still is appeal after final judgment.

From the standpoint of useless labor, it becomes a choice between "floodgate" review for all class standing determinations or the isolated case where an erroneous decision is initially made and remains unchanged throughout the trial with no way to rectify it until final review. In that light, policy reasons dictate that the courts of Florida reject class standing determinations as determining jurisdiction over the person.

Jurisdiction over the person is the power to determine an action because the parties are lawfully before the court.[111] When defining jurisdiction over the person, Florida courts have included such things as service of process or applicability of the long arm statute to non-residents.[112] In *Atreco-Florida, Inc. v. Berliner,*[113] the Fourth District Court of Appeal held jurisdiction over the person to be limited to these types of considerations.[114] In so holding, the court refused to review an order which determined class status.[115] However, in *Kohl,* the Fourth District retreated from this limited view and extended the definition of jurisdiction over the person for purposes of the appellate rule.[116]

The issue to be resolved is whether approval or denial of certification of a class is an order determining jurisdiction over the person. In a

110. FLA. R. CIV. P. 1.220.
111. *National Lake Dev., Inc.,* 395 So. 2d at 593.
112. American Health Ass'n v. Helprin, 357 So. 2d 204 (Fla. 4th Dist. Ct. App. 1978).
113. 360 So. 2d 784 (Fla. 4th Dist. Ct. App. 1978).
114. *Id.*
115. *Id.*
116. 385 So. 2d at 1029.

class action suit, all members of the class will be bound by the court's final judgment. In this respect, the court is asserting jurisdiction over all members of the class. But, the right to challenge personal jurisdiction has traditionally been reserved to the person over whom the court is asserting jurisdiction.[117] The Florida class action rule provides methods which allow members of the class to exclude themselves from the court's jurisdiction.[118] These provisions of the rule protect the absent class members. Those class members who do not exclude themselves waive their objections to the court taking jurisdiction over them.

Mandamus as a Method of Reviewing Class Standing Determinations in Florida

Just as mandamus has been extremely limited at the federal level when dealing with class standing orders, it is equally limited in Florida. The Florida Constitution[119] and the Florida Rules of Appellate Procedure[120] empower the courts to issue writs of mandamus. For a writ of mandamus to be issued, the act commanded by the writ must be ministerial.[121] This writ may be used to command an officer to exercise his discretion, but not to exercise it in a particular way.[122]

While mandamus should not lie to review all class determinations, in certain instances mandamus review should be allowed. The discretion which mandamus does not control is the one the law has vested in the judge. When the judge abuses his discretion to a point that amounts to a failure to do the act as the law requires, mandamus is proper.[123] For example, the Florida rule requires the court to submit an order stating the findings of fact and conclusions of law upon which the determination is made.[124] Where such findings are totally inconsistent with the class status order, discretionary abuse is apparent, and manda-

117. *National Lake Dev., Inc.*, 395 So. 2d at 593.
118. FLA. R. CIV. P. 1.220(d)(2).
119. FLA. CONST. art. V, §§ 3(b)(8), 4(b)(3), 5(b).
120. FLA. R. APP. P. 9.030(a)(3), (b)(3), (c)(3).
121. State *ex rel.* Zuckerman-Veron Corp. v. City of Miramar, 306 So. 2d 173, 175 (Fla. 1st Dist. Ct. App. 1974).
122. Green v. Walter, 161 So. 2d 830, 834 (Fla. 1964).
123. Permenter v. Younan, 31 So. 2d 387, 390 (Fla. 1947).
124. FLA. R. CIV. P. 1.220(d)(1).

mus should be issued.

Common Law Certiorari to Review Class Standing Orders

An existing method which allows for immediate review of an otherwise non-reviewable order is the common law writ of certiorari.[125] Certiorari is a writ issued by a superior court to a lower tribunal exercising a judicial or quasi-judicial function.[126] Whether certiorari is a workable structure to allow review of these orders will depend on how liberally it is granted.

The general rule is that certiorari will be issued only when a lower court order, if allowed to stand, may cause material injury to the petitioner throughout the proceedings and later appeal would be inadequate.[127] There is at least an argument that the "death-knell" rationale should be used to grant review of some denials of class certifications. For example, where the plaintiff would not pursue his claims individually, denial of class suit participation may lead to material injury.

Kohl came to the Fourth District Court of Appeals by way of petition for writ of common law certiorari.[128] In rejecting the petition the court said, "[i]t has not been demonstrated either that the trial court exceeded its jurisdiction or that the essential requirements of law and due process have been violated."[129] Implicit in this statement is the fact that if a petitioner can demonstrate either of the above prerequisites, certiorari would be granted to review class orders.

Failure to observe the *essential requirements of law* has been interpreted to mean the commission of an error so fundamental in nature as to render the judgment void.[130] Yet in *Everglades Protective Syndicate, Inc. v. Makinney,*[131] the Fourth District Court of Appeal granted

125. *See generally* Haddad, *Common Law Writ of Certiorari in Florida,* 29 U. FLA. L. REV. 207 (1977).

126. Simmons v. Owen, 87 Fla. 485, 100 So. 735 (1924).

127. Travelers Indem. Co. v. Hill, 388 So. 2d 648, 650 (Fla. 5th Dist. Ct. App. 1980).

128. Kohl v. Bay Colony Club Condominium, Inc., 385 So. 2d 1028, 1029 (Fla. 4th Dist. Ct. App. 1980).

129. *Id.*

130. Jacksonville, T. & K.W. Ry. v. Boy, 34 Fla. 389, 16 So. 190 (1894).

131. 391 So. 2d 262 (Fla. 4th Dist. Ct. App. 1980).

certiorari and quashed a motion to compel discovery. Makinney was expelled from membership in The Everglades Club, a private social club. He filed a petition for a writ of mandamus in the Palm Beach Circuit Court seeking to compel the club to reinstate his membership. Makinney served the club with written interrogatories. The club answered some but refused to answer others on the grounds they were irrelevant and immaterial to any issue in the action. A motion to compel was granted by the trial court whereupon the club filed a petition for common-law certiorari.

The Fourth District Court of Appeal held that the interrogatories neither consisted of questions relevant to the subject matter involved in the litigation nor were they "reasonably calculated to lead to the discovery of admissible evidence."[132] This was sufficient to depart from the essential requirements of law. While answering irrelevant questions in interrogations is an inconvenience, the answers to the questions also have no bearing on the outcome of the suit. In this respect, it appears that a liberal interpretation of departing from the essential requirements of the law has been used. In a liberal setting it appears clear that there will arise cases where a sympathetic district court could grant a petition for certiorari and indeed change a class standing determination.

To obtain review of a class standing determination by common law certiorari, the petitioner must show that the judge's decision was erroneous when compared to the class action rule. The wasting of judicial time and expense associated with a second trial has been held insufficient justification for issuance of the writ.[133] Indeed, mere expediency[134] has not formed a basis for review by certiorari.

In *Schever v. Wille,*[135] plaintiff sought common law certiorari after the trial court granted defendant's motion to strike plaintiff's prayer for punitive damages but where the case was still pending on the issue of

132. *Id.* at 263.

133. Bowl Am. Fla., Inc. v. Schmit, 386 So. 2d 1203 (Fla. 5th Dist. Ct. App. 1980); Ford Motor Co. v. Nelson, 355 So. 2d 158 (Fla. 4th Dist. Ct. App. 1980); Professional Medical Specialties, Inc. v. Renfroe, 362 So. 2d 397 (Fla. 4th Dist. Ct. App. 1978); Whiteside v. Johnson, 351 So. 2d 759 (Fla. 2d Dist. Ct. App. 1977); Siegel v. Abramowitz, 309 So. 2d 234 (Fla. 4th Dist. Ct. App. 1975).

134. Schever v. Wille, 370 So. 2d 1166 (Fla. 4th Dist. Ct. App. 1979).

135. *Id.*

actual damages. In dismissing his petition, the court said: "[I]t is certainly not impossible that such a trial would finally resolve this case. Plaintiff may not prevail in the case . . . or the parties may in some fashion settle their differences and all issues will then be removed from the court's consideration."[136] The identical rationale could be used in the class action setting. If class certification is granted to the plaintiffs, there is no reason to assume that the defendant will lose the suit or decide to settle the case rather than litigate. Additionally, if defendant does lose the case, appeal will include the determination of whether the class suit was proper. Unquestionably inconvenient to the defendant to wait, review is available to him eventually. The same is equally true for the denial of class certification to the plaintiff.

It should be noted that in the commentary to the appellate rules, the advisory committee stated that they did not intend to abolish the common law writ of certiorari.[137] Yet, they recognized that due to the heavy burden on the petitioner, it would be extremely rare that erroneous interlocutory orders could be corrected by resorting to common law certiorari.[138] Perhaps, class standing orders may find their way into that extremely rare category the advisory committee had in mind.

Conclusion

Class standing determinations are not presently appealable as a final judgment. As a matter of law, this judgment is sound. Prerequisites to maintaining class actions do not theoretically address the merits of a claim. These prerequisites are a procedural device and unless the complaint is actually dismissed, a judge is free to amend or alter his or her decision at any time prior to final judgment on the merits.[139] With the new rule allowing for striking of class allegations there will be very few cases where a complaint is actually dismissed. If dismissal is granted, immediate appeal should be allowed as a final judgment.

If the judge strikes the class allegations, this order is final as to the class. Yet, it is unlikely that immediate appeal will be allowed. Since this order would not dismiss the complaint as to the individual plaintiff,

136. *Id.* at 1166.
137. FLA. R. APP. P. 9.130 advisory committee note.
138. *Id.*
139. FLA. R. CIV. P. 1.220(d)(1).

the entire lawsuit would probably have to run its course before appeal will be allowed.

While discretionary interlocutory appeals may be heard at the federal level,[140] Florida has no comparable rule or statute. To be heard as an interlocutory appeal, an order must fall into one of the specific categories laid down by the rule. Orders concerning injunctive relief ordinarily are not allowed as a vehicle for review of class standing orders. While such class standing orders may influence the scope of the injunction, the requirements for obtaining injunctive relief do not involve the same considerations as class standing determinations. Unless the merits of petitioner's own claim would be affected or the order passes on the legal sufficiency of a claim for injunctive relief, this coat-tail review should not be allowed.

Appeal by means of non-final orders which determine the issue of liability in favor of the claimant has equally been unacceptable for review of class standing determinations. Class determinations will show who is participating in the lawsuit, not who, if anyone, is liable. In isolated situations where a class standing determination would determine liability, such appeals will obviously be allowed.

Jurisdiction over the person as a basis for immediate appeal seems unsound yet if the Florida Supreme Court wishes immediate appealability of such interlocutory determinations, this may be the only way to accomplish the task. Under that rationale all class standing determinations would be reviewable. This was a concern which led the United States Supreme Court to reject the "death-knell" doctrine. Such indiscriminate review would circumvent judicial economy and lead to piecemeal review. This, Florida courts have long been opposed to, thus it is likely the Florida Supreme Court will reject the approach.

A liberal view of the writ of common law certiorari may allow appeals of class denials under the death-knell rationale. Yet it seems probable that this liberal view will not be accepted and this writ will be unavailable in all but the most exceptional cases.

As a final resort, mandamus is available in cases where there has been a clear showing of usurpation of judicial discretion. This remedy is available for improper class certification as well as improper denial of certification.

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140. 28 U.S.C. § 1292(b) (1970).

Orders which determine whether a suit may proceed as a class action should not be immediately appealable in all cases. At the present time the Florida courts are not in a position to use their discretion. Orders of this nature will either have to be immediately appealable or none may be appealed. What would seem vital to effective class action suits in Florida is some change in the appellate policy. A revision of the Rules of Appellate Procedure incorporating Federal Statute 1292(b) is needed. Since this is a form of procedure, the Florida Supreme Court should be able to make this necessary adoption.

Such an addition to rule 9.130 could be added as (a)(3)(D) and might read . . .

> (a)(3) "Review of non-final orders of lower tribunals is limited to those which:"[141]
> (D) involve a controlling question of law which there is substantial ground for difference of opinions, and an immediate appeal may materially advance the ultimate termination of the litigation. These appeals will be heard only upon the certification of a Circuit Court judge and acceptance by the District Court.[142]

This addition would allow the Florida courts the right to hear immediate class standing appeals in cases where immediate review would effectuate Florida's litigation policies.

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141. FLA. R. APP. P. 9.130(a)(3).
142. This suggestion is patterned after 28 U.S.C. § 1292(b) (1970).