In the

Supreme Court of the United States

COOPERS & LYBRAND, Petitioner, v. CECIL LIVESAY and DOROTHY LIVESAY, Respondents.	No. 76-1836
----------and----------	
PUNTA GORDA ISLES, INC., et al., Petitioners, v. CECIL LIVESAY and DOROTHY LIVESAY, Respondents.	No. 76-1837

Washington, D.C.
March 22, 1978

Pages 1 thru 54

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Petitioner,

v. No. 76-1836

CECIL LIVESAY and DOROTHY LIVESAY,

Respondents.

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PUNTA GORDA ISLES, INC., et al.,

Petitioners,

v. No. 76-1837

CECIL LIVESAY and DOROTHY LIVESAY,

Respondents.

Washington, D. C.,

Wednesday, March 22, 1978.

The above-entitled matters came on for consolidated argument at 11:32 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

THOMAS C. WALSH, ESQ., Bryan, Cave, McPheeters & McRoberts, 500 North Broadway, St. Louis, Missouri 63102; on behalf of the Petitioners.

MELVYN I. WEISS, ESQ., Milberg, Weiss, Bershad & Specthrie, One Pennsylvania Plaza, New York, New York 10001; on behalf of the Respondents.

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C O N T E N T S

[Afternoon session - page 25]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1836, Coopers & Lybrand against Livesay; and 76-1837, Punta Gorda Isles against Livesay.

Mr. Walsh, you may proceed whenever you're ready.

ORAL ARGUMENT OF THOMAS C. WALSH, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WALSH: Mr. Chief Justice and may it please the Court:

This is a death knell case. The Court today, in this matter, is being asked to decide the validity of the so-called death knell exception to the venerable final judgment rule of Section 1291 of Title 8, United States Code.

The death knell doctrine was first formulated by the Second Circuit in the original Eisen case in 1966.

Simply stated, it permits an appeal by a class action plaintiff from an order refusing to certify the case for class action treatment if the plantiff can convince the Court of Appeals that he would abandon his individual claim if he is not permitted to represent the class.

Under those circumstances, the Court of Appeals in Eisen deemed the refusal to certify to be a final judgment because it sounded the so-called death knell of the case.

The purpose for the death knell doctrine, as originally conceived and as it has been applied, where it has

been applied, is not to create some special right of action or special right of appeal in a class action plaintiff, as the respondents in this case seem to indicate. Rather, the only purpose for the death knell doctrine was to make sure that an order refusing to certify a class action would not ultimately go unreviewed. In other words, the question is, when the order refusing to certify is issued, does that forever mean that this matter will not be maintained as a class action?

And I think it is important to bear that purpose of the death knell doctrine in mind through our discussion this morning.

In the intervening twelve years since Eisen I, the death knell doctrine frankly has not fared well. Its validity has repeatedly been questioned by the Second Circuit itself, including in particular Judge Henry Friendly, who has called for its abolition, the doctrine has been rejected flatly by the Third Circuit and the Seventh Circuit. It has been applied in modified form by the Fifth Circuit and in very limited form by the Ninth Circuit.

We are here this morning asking this Court to uphold the judgment of the Third Circuit and the Seventh Circuit, to reverse the judgment of the Eighth Circuit in the instant case, and, if the Court will, to sound the death knell for the death knell doctrine.

It might be appropriate and helpful at this point to

review in summary fashion the facts of the instant case.

This is an action brought in 1973 under the Securities Act of 1933 and the Securities Exchange Act of 1934. The complaint charged that a registration statement and a prospectus issued by the co-petitioner, Punta Gorda Isles, Incorporated, contained certain false statements.

Although the original complaint made class action allegations, the plaintiffs themselves waited more than nine months before they initially requested the court to certify a class. And even at that time they did not request a hearing on that issue.

Eventually, some 18 months after the action was originally filed, they finally requested a hearing, after being prompted to do so by the Court of Appeals.

A hearing was held promptly and within one month after the final brief was filed by the parties on the class action question, the district court in St. Louis certified the case for class action treatment. However, at the same time, the district court issued an order to the attorney for the class action plaintiffs to show cause why they should not be enjoined from representing the class. And the background of that was that it came out in the hearing on the class action question that those attorneys who were representing the plaintiffs and thus purported to represent the class had in fact represented one of the underwriters who was involved in the offering. It

was on unrelated matters, but it had had a continuing relationship with that underwriter. And their refusal to join the underwriters as defendants in the lawsuit caused some questions to come up about whether that judgment was a fair one or whether it might have been tained by a conflict of interest.

So, at the time that the trial judge certified the matter for class action treatment, he also issued an order to show cause to the attorneys why they should not be enjoined. They chose not to contest that, and they withdrew from the action, at which time present counsel for the respondents appeared.

Immediately upon the appearance of new counsel, the trial judge inquired of them whether they intended to join the underwriters in the lawsuit. In the judge's view at that time it was still not clear who the parties to this case were going to be.

He was not given an answer to that question until late in October of 1975, at which time it became clear to him that the reason the underwriters had not been joined was the statute of limitations had undoubtedly run against them, while initial counsel for the respondents had been struggling to keep the conflict of interest from coming to the court's attentinn.

At that time --

QUESTION: So there was a period when the action could have been taken?

MR. WALSH: Against the underwriters? I believe so, yes, Yourhonor. At the outset, I think, at least a couple of the theories of the respondents in their complaint, the underwriters could properly have been joined as defendants.

Upon coming to this realization in October of 1975, the trial court --

QUESTION: Did they join all the members of the underwriting syndicate except this one?

MR. WALSH: No, Your Honor, none of the underwriters joined.

QUESTION: Oh, none were.

MR. WALSH: None of them were. The parties were Punta Gorda Isles, the issuer, its officers and directors, and Coopers & Lybrand, the accounting firm.

QUESTION: What would be the theory of proceeding against the underwriters?

MR. WALSH: Well, it's standard procedure in securities cases, Your Honor, to join the underwriters. Their liability is virtually automatic if you establish the other elements of liability under Section 11, for instance, of the '33 Act.

It's a fairly routine matter, that the trial court just wanted to know why it wasn't done, and never really did get a satisfactory answer, and was caused to become concerned that there were other reasons just than the merits of the case --

QUESTION: How big a percentage of the offering did

the underwriter with respect to which the conflict existed have?

MR. WALSH: A small percentage, Your Honor, very small.

In its October 23rd, 1975, order, the trial court expressly said that he was concerned about the adequacy of the representation of the class that was being exhibited by these respondents, and he directed at that time that a notice be sent to the class, advising him of what had happened to date in the lawsuit, and specifically requesting petitions either for intervention or for appointment of a new class representative.

Also at that time the court directed the respondents to initiate discovery as to the names and addresses of the class members for the purpose of sending this notice. He had stayed discovery up to that point on the merits, until the class action questions were finally resolved.

Again, however, the respondents did not comply with the order, and in fact they waited more than six months even to informally request the names and addresses of the class members, and more than nine months before they actually initiated the discovery procedures under the rules.

At that point a motion to decertify the class was filed, and, on September 1, 1976, the court, exasperated with the behavior of the respondents and vitally concerned about both their adequacy of representation and the delays that had occurred, decertified the class and ordered that the respondents'

individual claims could proceed.

At that time the respondents did not ask for a Section 1292(b) certification. Instead they filed a notice of appeal to the Eighth Circuit, under Section 1291, and, in a separate independent proceeding, they asked the court to issue a Writ of Mandamus against the decertification order.

The Eighth Circuit denied our motion to dismiss the appeal and, after argument on the merits, held that the decertification order was appealable under the death knell doctrine. It then ruled that the district court had erred in decertifying the case, and it ordered it recertified, without any discussion of whether it should have been certified in the first place.

In permitting the appeal, the Eighth Circuit took note of the fact that the respondents' individual claim was in the amount of $2650, and that the expenses of prosecuting the action would exceed that amount. It therefore held that the death knell doctrine -- the death knell of the case had sounded, and it denied the Mandamus petition as moot.

The primary question presented to this Court on certiorari deals with the jurisdiction of the Court of Appeals to entertain the appeal from the decertification order.

The secondary question presented in our petition is that if jurisdiction is found to exist in the Court of Appeals, did the Eighth Circuit overstep the permissible bounds of

judicial appellate review in substituting its judgment for that of the district court.

I will confine my oral remarks primarily to the first point, which I think is of most interest to the Court, and I think the second point has been adequately briefed, and we rely principally on our briefs in that connection.

We submit that the death knell doctrine is an improper reading of Section 1291 of Title 28.

Section 1291, of course, embodies the final judgment rule, which traces its roots back to the first Judiciary Act of 1789. It has been described as the dominant rule of federal appellate jurisdiction designed to prevent piecemeal appeals and undue litigiousness.

In Carroll vs. United States, which is perhaps the closest case in its facts to the instant matter, the Court held that a judgment is final only if the termination of the action is the necessary result of the order. And it also held that appealability cannot depend on the facts of a given case.

Well, the death knell doctrine, in our view, violates these principles. The order which decertified the class in the present case did not act in any way upon the claim of the individual respondents. They came into court with a claim for $2650. After the class action was certified, they still had a claim for $2650.

QUESTION: In some court other than a federal court?

They need a little over ten thousand for the federal court.

MR. WALSH: No, this was under the Securities Act, Your Honor, so they qualify without regard to amount in controversy.

QUESTION: That's right.

MR. WALSH: After the action was decertified, they still had a claim for $2650.

QUESTION: But no lawyers.

MR. WALSH: Well, that's not clear, either. The record that was made in the district court of course was not made with a view toward determining whether the death knell would eventually sound, and it never did -- with few exceptions. But the record does show in this case that the individual respondent, Cecil Livesay, acknowledged in his deposition, where he was asked, "Will you continue to proceed with this case if it does not go forward on a class basis?" He said, "Well, I'll have to think about that; I'll have to leave that decision up to my lawyer. If my lawyer says yes, then, yes, I'll proceed."

Well, he personally didn't consider the claim to be unviable, and it shows that the decision is really that of the lawyer. It's an economic decision by the lawyer, rather than an order which acts upon a claim. The decertification order did not act upon their claim. It created a situation in which the lawyer had to make a decision whether he wanted to undertake

this claim under these facts at this time.

Furthermore, the respondents, in an earlier petition for Mandamus to the Court of Appeals, had told the Court that they intended to continue with the claim even if class action certification was denied. So there they were trying to get the Court to act on the representation that they did intend to puruse the matter on an individualized basis. And, in fact, after the decertification order was issued by the Court of Appeals, they did continue.

Now, they engaged in considerable discovery on -- at a time when the only thing that was pending were their individual claims. And respondent Cecil Livesay, in opposition to the certification order, filed an affidavit in which he said, "I do intend, I am committed to this case, and I do intend to follow it up."

We think that the death knell doctrine is a judicially created exception to the finality requirement which, in practice, primarily applies to antitrust and securities laws claims, in which ordinarily it does not apply to such cases as civil rights actions or diversity cases.

We think it ignores the teachinges of this Court in Baltimore Contractors vs. Bodinger and Liberty Mutual vs. Wetzel, which hold that the amendments to the finality requirement of Section 1291 are really matters for Congress, and that in that area Section 1292(b) has been created as the vehicle for review

of interlocutory orders, and that further judicial exceptions to the finality requirement are unwarranted and unwise.

We think that there are a number of reasons, most of which are set forth in our brief at some length, why the death knell doctrine is inadvisable, improper, and unwarranted.

Reason No. 1 has to do with the language of Rule 23 itself. Rule 23, in its own terms, provides that any order certifying or refusing to certify a class action is conditional, and it provides that it may be altered or amended at any time. By definition, therefore, a class action determination is not final.

Moreover, even if Rule 23 did not so provide, general concepts of judicial husbandry reveal that the trial court has continuing jurisdiction over prior orders and has the power to amend them at any time prior to final disposition of the case.

QUESTION: But the theory of the death knell is not that the order of declining to certify is not capable of being changed by the trial court, but that if it is initially entered it means the case just won't be further prosecuted.

MR. WALSH: It assumes that it will not.

QUESTION: Yes.

MR. WALSH: Yes. But --

QUESTION: So the fact that the trial court might, if prosecution continued, later change his mind doesn't undermine the basis for the death knell doctrine, I would think.

MR. WALSH: Well, the death knell doctrine really is designed to make sure that the -- the determination that this matter shall never be adjudicated on a class-wide basis is somehow preserved for appellate review.

Now, the fact that the individual plaintiff in a case may not choose to go forward does not mean that these issues are forever resolved. You have the possibility of intervention, you have the possibility of another class action being filed.

And you have the possibility that if this plaintiff's claim really is not abandoned --

QUESTION: Wait a minute.

MR. WALSH: -- he, too, sooner or later will be able to obtain class certification, maybe because someone else is willing to come in and join as an intervenor.

QUESTION: In this specific case, could another member of the class file a brand-new case?

MR. WALSH: Yes, Your Honor. I see no reason why not. He could file --

QUESTION: And have class action?

MR. WALSH: He could certainly seek to maintain a class action, yes.

QUESTION: No, but could he maintain it after this decision in this case?

MR. WALSH: There would be no res adjudicata problem

with it. The basis for the --

QUESTION: There's no estoppel there?

MR. WALSH: No, Your Honor.

QUESTION: There's no law of the case there?

MR. WALSH: No, Your Honor.

The reason why this class action was decertified had to do with the adequacy of the class plaintiffs and with the delay that they had caused. If an adequate plantiff -- an adequate representative came in and asked to be named the class representative, we would still contend that the class action is unmanageable and improper for other reasons, but there are the same reasons that we raised before in this proceeding, but there's no res adjudicata problem with it, or collateral estoppel, in my opinion.

QUESTION: Do you think the considerations are the same with respect to denial of class certification, as they are when there's been a certification and then a decertification?

MR. WALSH: I see no reason to differentiate, Mr. Justice White. These rules that have grown up around the death knell doctrine have been applied in both instances, both initial refusals to certify and ultimate decertifications. It seems to me that --

QUESTION: None of the cases upholding the death knell doctrine have distinguished between the two? Have some of them dealt with decertification?

MR. WALSH: Yes, Your Honor. There are at least two --

QUESTION: This one, for example.

MR. WALSH: Yes. But in the Korn and Milberg cases in the Second Circuit, one of those was a decertification as distinguished from a refusal to certify.

QUESTION: Well, until decertification, though, the lawsuit was going forward, not only on behalf of the named plaintiff, but on behalf of others.

MR. WALSH: That's correct.

QUESTION: And the decertifications terminated that case on behalf of others. There's no question about that, is there?

MR. WALSH: Well, it has terminated this case as a class action, and to the extent that --

QUESTION: Well, it's terminated -- whatever this case had to do with others has been terminated. It was going forward on behalf of others, although unnamed in there.

MR. WALSH: Yes, but not to their prejudice.

QUESTION: Well, it isn't going forward nevertheless, it's been dismissed with respect to others.

MR. WALSH: Yes, that's correct.

QUESTION: In a way that it wouldn't have been had the trial judge simply initially refused to certify a class.

MR. WALSH: I think the result is the same as far as the absent class members are concerned.

QUESTION: Well, but except where the trial judge initially refuses to certify, there never has been a going ahead with respect to class members.

MR. WALSH: Well, the Court has held, for instance, for statute of limitation purposes, that it is a class action until -- from the time that it's filed until an order is entered refusing to certify.

QUESTION: And that case is just that, they were originally denied certification, weren't they?

MR. WALSH: That's correct, You Honor.

And that's the way it's usually applied, but my position is that it really doesn't make any difference.

QUESTION: Well, what if notice had gone out?

QUESTION: Yes.

QUESTION: You wouldn't think it would make any difference, would you?

MR. WALSH: Well, you have to send another notice advising them that it had been terminated, I would think, but the result would be the same.

QUESTION: Yes. In terms of finality it would be the same result, even though notice had gone out?

MR. WALSH: Yes. It would not be appealable then, Your Honor.

The second major problem with the death knell doctrine, we think, is that it requires the appellate court to make a

determination of finality on a record that is ordinarily unsuited to such a determination. The record that's made before the trial court on the question of whether the class action should be certified does not address the issue of what will happen if it's not certified.

Now, the Fifth Circuit has indicated that it will only accept death knell appeals if that record does affirmatively show that in the absence of certification there will be no further continuance.

But we think that, to the extent that the death knell doctrine interjects the appellate into the fact-finding process, in the first instance, it's unwise and it's unsound. And usually it requires the Court of Appeals to make a guess as to the intentions of the counsel for the plaintiffs.

QUESTION: Well, if you were in the Fifth Circuit, appearing before a district judge in the Fifth Circuit, would you think that he was acting properly if he rejected an offer of proof as to whether or not the action would go forward, in view of the Fifth Circuit's holding?

MR. WALSH: No, I think that would be an appropriate thing for him to inquire into and for you to produce if you're the plaintiff. In the Fifth Circuit you have the burden of establishing that the death knell will sound if you are refused class action.

QUESTION: Then the appellate court isn't engaged in

first-round fact-finding.

MR. WALSH: That's right. That's one way that the burden of the death knell doctrine has been ameliorated somewhat by one court.

We think that except for that kind of a ruling that the death knell doctrine does embody an inefficient use of manpower because of the requirement that the appellate courts try to comb through a record made for other purposes to make an informed, or perhaps uninformed, guess as to whether the plaintiff's counsel deems this case --

QUESTION: Well, what if your class members had notice and you're perfectly happy, as a matter of fact, you're delighted the case is going forward on behalf of the class which includes you, and then you're notified that the case is no longer going forward on your behalf, it's been dismissed, and you're going to have to spend your own money, I guess, if you want to litigate.

I take it you would say that you couldn't intervene either, and appeal the denial, the decertification?

MR. WALSH: Oh, you're absolutely correct, Your Honor. That's United States vs. McDonald.

QUESTION: That's right.

MR. WALSH: I'm sorry, United Airlines vs. McDonald.

QUESTION: That's right.

MR. WALSH: That's exactly what was done.

QUESTION: Well, why could that person intervene then and appeal?

MR. WALSH: The appeal relates only to the class certification --

QUESTION: Well, I know, but the reason -- you're suggesting that he could appeal because there's been a final judgment.

MR. WALSH: Oh, no, he can appeal only at such time as there is a final judgment.

QUESTION: Well, that's what I asked you, and you said that a final didn't say -- hold that, did it?

MR. WALSH: No. It held that were a refusal to certify occurred and then the case later went either to settlement or judgment, then the intervenor can come in and test --

QUESTION: Well, what about the -- it didn't hold that the intervenor couldn't intervene earlier?

MR. WALSH: He could intervene, certainly, but he couldn't appeal.

QUESTION: Well, why couldn't he appeal and say "There's been a final judgment here; the case that was going forward on my behalf has been dismissed"?

MR. WALSH: Because the case has not been dismissed in its entirety, the final judgment --

QUESTION: I know, but it has -- his case has been

dismissed.

MR. WALSH: Well, it's not really his case. The case was filed --

QUESTION: I don't know why not. He got notice telling him it was his case.

MR. WALSH: He got notice saying: There has been a lawsuit filed, you are a member of the class on whose behalf it's being prosecuted.

Now, until that case is disposed of --

QUESTION: But he was notified too, as a class member.

MR. WALSH: That's right. But, Your Honor, there's no final judgment in any case until an order is entered disposing of all parties and all issues, and the fact that two or three plantiffs are dismissed out of a case, or all but one, for instance, does not make it a final judgment.

QUESTION: Well, they weren't really dismissed, either.

MR. WALSH: Not in the final --

QUESTION: Well, Rule 54 at least requires that there be a finding by the court in such a case, doesn't it?

MR. WALSH: That's correct. No just reason for delay. Yes.

Our third quarrel with the death knell doctrine is that it destroys the certainty and the predictability that

Section 1291 was designed to achieve.

In some instances I can conceive that if the death knell doctrine is adopted, a lawyer is required to file an appeal in an interlocutory situation, just to make sure that the order that was entered is not deemed to be final -- later, after the case is over, and therefore he's barred from appeal. That was the Dickinson case some years ago.

I think it also spawned a considerable number of new requests for exceptions to the final judgment rule, producing a flood of interlocutory appeals which will overwhelm our already over-burdened federal appellate courts.

QUESTION: Has that happened since this decision?

MR. WALSH: Well, certainly the number of appeals has tripled since 1966, Your Honor. How many of that are attributable to the death knell doctrine, I can't tell.

QUESTION: Well, not many Circuits have the death knell doctrine. The Second and now the Eighth --

MR. WALSH: The Second and the Eighth.

QUESTION: -- and the Fifth in a modified form.

MR. WALSH: And the Ninth in an even more modified form.

QUESTION: Well, has it increased in the Second Circuit?

MR.WALSH: I don't have any statistics on that.

QUESTION: Well, how can you make the statement about

what's going to happen?

MR. WALSH: Well, certainly if --

QUESTION: If it hasn't already happened, how can I assume it will happen?

MR. WALSH: If you permit any plaintiff who files a class action and then is denied the right to represent the class to file an interlocutory appeal, then you're going to increase the number of appeals filed, and you're also going to increase the number of class actions that are filed. I can't prove that, but that's what my senses tell me.

I think also the logical corollary of the death knell doctrine is that any time I could convince an appellate court that I don't want to continue my case any further because it's economically undesirable for me to continue in the wake of the order that's been entered, then logically I should be able to appeal that order. That's really what the death knell doctrine says.

QUESTION: You mean an order denying summary judgment?

MR. WALSH: Anything.

QUESTION: Without any respect to class action?

MR. WALSH: Right. Irrespective of the class action question. Any time I can convince the court that that order has effectively prevented me from wanting to continue my case further, I ought to be able to appeal it, because that's the exact rationale of the death knell doctrine.

We think certainly, too, that the death knell doctrine, as has been recognized by many courts, unfairly discriminates against class action defendants and in favor of class action plaintiffs. An order refusing to certify a class action is immediately appealable under the death knell doctrine.

On the other hand, an order granting class certification is not appealable.

QUESTION: Aren't there some Circuits that allow appeal of orders granting class certification?

MR. WALSH: The Second Circuit has experimented with what they call the reverse death knell doctrine, and has applied it in a couple of cases, and has later concluded that it really isn't any more workable than the death knell doctrine itself.

And, although I think, in my own opinion, that more often than not the grant of class certification is the death knell of the case than the refusal of the grant, because experience shows us that an overwhelming majority of these class actions, particularly in the securities area, are settled and never tried, because of the in terrorem effect of the grant of class certification.

But, again, that calls for speculation, as does this whole area. And that's why this certainty that 1291 is broken and has been denied.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

[Whereupon, at 12:00 noon, the Court was recessed.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Weiss, you may proceed whenever you're ready.

ORAL ARGUMENT OF MELVYN I. WEISS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. WEISS: Mr. Chief Justice, and may it please the Court:

We have already gone through four and a half years of this litigation. This is a relatively simple case for class treatment. It was brought on behalf of approximately 1800 direct purchases of securities pursuant to a prospectus. Approximately a year after the prospectus was issued, Punta Gorda wrote down the earnings reported in the prospectus by decreasing one year's earnings to one-third of what was reported and another year's earnings to 60 percent of what was reported.

In spite of those facts, most of the time that has been spent in this litigation has been exhaustively spent on the class question.

QUESTION: Well, that's the only question here, isn't it?

MR. WEISS: That's correct, Your Honor, but I think it's important to see the background so that we can determine whether it was the death knell in the context of this case.

During three of the years the district court stayed discovery on the merits. There is presently a stay entered on the district court's own motion of all proceedings. An order decertifying the action as a class action was entered three years after the action was instituted. The basis --

QUESTION: But a part of that delay was your failure to move on the class action point, wasn't it?

MR. WEISS: That's not correct, Mr. Justice Marshall.

QUESTION: Well, correct it.

MR. WEISS: The court had already certified the class after that purported delay occurred. We came into the case long after that transpired. We were the second counsel in the case.

QUESTION: Well, did that help delay it?

MR. WEISS: No, it didn't, Your Honor, not in my view, because --

QUESTION: You mean changing counsel doesn't delay a case?

MR. WEISS: No. I'm saying that the nine months at the beginning of the case, before the motion was made for the certification of the class, did not delay the action. It's not uncommon for the first nine months to be taken up with the pleadings, joinder of issue, service of interrogatories, first requests for production of documents, and response thereto.

The delay, as the Eighth Circuit pointed out, was

provoked almost entirely by the actions of the district court judge and the defendants in their defensive tactics.

QUESTION: But the activities you describe, counsel, as typically taking up the first nine months, discovery, interrogatories, that sort of thing, are themselves quite expensive and time-consuming, aren't they?

MR. WEISS: That's correct, Your Honor.

QUESTION: And yet you do that without any knowledge that you will succeed in having your class certified.

MR. WEISS: That's correct, Your Honor.

QUESTION: So doesn't that take something away from your death knell claim?

MR. WEISS: Not really, Your Honor, because we hope that the class issue will be early determined. The Rule, in fact, requires that it be determined as soon as practicable.

If a litigant starts an action such as this, he has to assume that the court is going to adhere to the Rule, and indeed I think in Eisen there was some urging that that be done quickly.

So we have to assume that these things are going to occur quickly. But the out-of-pocket expenses incurred during that part of the case are certainly a lot less than were actually incurred after two and a half more years of litigation.

And that changes the circumstances in this case.

I will try to fashion a standard for death knell as

I proceed in my argument, that I think makes some sense, and might be applicable on a standard basis throughout the courts.

One of the problems I have with the death knell doctrine is that it's very difficult to decide what exactly it is. Some courts say $70 is what it requires, and others say $7500 isn't the death knell; and we have to find out really what the standard should be if it's going to work.

QUESTION: That's partly because of no record, isn't it?

MR. WEISS: Well, no, I will demonstrate, I hope, that on this record in this case we have enough to apply the standard that I will suggest.

QUESTION: Well, conceptually, there's a difference of opinion about the death knell doctrine, too, isn't there? One view being that it is a final judgment, as a practical matter; and the other view being that it's not a final judgment, but, nonetheless, it's appealable because of the peculiar equities of the situation.

MR. WEISS: And some read it as part of the collateral order doctrine.

QUESTION: Right. Yes.

MR. WEISS: Some cases merge the two concepts, and other separate them. I think they fall into both, and think it is final, as a practical matter, I think it also fits well within the collateral order doctrine.

And I hope to demonstrate that this particular case, in this particular case the Gillespie doctrine is sufficient support to sustain the Eighth Circuit's finding, irrespective of whether or not the death knell doctrine is accepted by this Court as a viable doctrine.

What happened was that the district court decertified the class using a standard that is not mentioned in Rule 23. He decertified on the grounds that the actions of plaintiff's counsel had caused a delay in the litigation, thereby taking away rights from the defendants to a speedy trial.

The record indicates that the only delay that was involved in that particular aspect of the case was approximately three months where there was a dispute between counsel over the production of transfer records. We had relied upon a letter received from Punta Gorda's counsel in August 1975 promising to deliver the transfer records. At our request, after the judge fashioned an order which took something like four months for us to get after we submitted suggested forms, we called counsel for Punta Gorda and they refused to produce these documents.

The record at the hearing on the motion for class certification also indicated that those records were readily available to counsel for Punta Gorda.

We argued with them telephonically about this issue, and then we sought the assistance of the court by asking for a

conference on this issue. When we got to that conference, we were met with a motion by defendant Coopers & Lybrand to decertify the class, but they didn't prosecute.

Three years after the litigation was commenced, and after an enormous amount of work was performed by both sides, it was a shocking type of a motion to me, and frankly I gave it little credence at the time. I guess I should have treated it with more seriousness, because the judge granted it.

We did put in papers in response. We also had motions -- requests for production then pending. There was a stay on discovery at the time.

So there we were with a respondent -- with clients whose losses were approximately $2650. They had already been required to incur substantial out-of-pocket costs, and they had not as yet taken their first deposition of a defendant in the case, nor were they able to receive the first document in discovery from defendant Coopers & Lybrand.

The economic reality caused by the decertification order was that to continue the litigation, with the major portion of the case on the merits still ahead of us, would require an expenditure on respondents' part of funds far in excess of the amount of their claims.

It is clear from the record that even if respondents succeeded in winning their case on the merits at the trial, their recovery could not reimburse them for the out-of-pocket

requirements to complete the litigation on the merits.

Now, one of the problems with the death knell, as I stated before, is: What standard do we apply in these situations?

And I suggest to Your Honors that the standard should be this: If a plaintiff in this kind of a case, having won on the merits on an individual claim, could not recoup the out-of-pocket expenses incurred by him during the prosecution of the action, it makes no economic sense for him to proceed.

And we're not talking about legal fees. Legal fees is what he's concerned with at the beginning of the case. He has to attract an attorney to take his case, to proceed, start the case, start the litigation. We're now three years into the litigation in this case. Chief Livesay and his wife have already incurred certain expenses. They look down the road and they say, "We have two-thirds of the case yet to go on the merits; it's going to cost $15,000 to litigate it. We do not have a class. The only reason we started this action is because we thought we would have a class, so that if we won on the merits we would be reimbursed for the expenses that we laid out on behalf of the class."

It makes no economic sense to bring a $2650 action, where, if you personally get a judgment at the end for that amount, with the taxable costs, you cannot recover the $15,000. It only makes sense if you can be a class representative and be

assured that after recovery on the merits you will be reimbursed for those expenses.

QUESTION: Are you suggesting that taxable costs would be a great deal more if there were a class certification than if there were not?

MR. WEISS: No, but typically, Your Honor, when a recovery is made on a class basis, all of the out-of-pocket expenses incurred in connection with the prosecution of the action are reimbursed to the party off the --

QUESTION: Out of the funds recovered.

MR. WEISS: Out of the funds recovered.

QUESTION: Not from the defendants separate and apart from their liability for the judgment.

MR. WEISS: Exactly. Out of the funds recovered.

So here Chief Livesay is confronted with a situation where it would be impossible, if he continued this action and tried his case on the merits and won, for him to recover, to recoup these expenses. That's --

QUESTION: Mr. Weiss, --

MR. WEISS: Yes.

QUESTION: -- to what extent is the possible intervention of people with more at stake relevant? I mean, there's something in the record about other clients who might have been interested in recovery, too. How does that -- how do you fit that into the whole test in your analysis of the case?

MR. WEISS: Your Honor, I don't think that's a good approach. It's something that the Ninth Circuit looks at. I think it makes a mess of the proceedings at the early stage of the case when class is decided. It requires evidentiary hearings. It requires the necessity for interventions which American Pipe and Rule 23 seek to avoid. We're seeking to avoid multiplicity of litigation.

QUESTION: Well, but on the other hand if the district judge thought -- I don't know whether he's right or not, but if he thought there was something wrong with a particular class representative, can't the defect, if it be one, sometimes be cured by getting a new party in, with a little more financial resources, and maybe not have the deficiency that the first plaintiff did?

MR. WEISS: Well, how would we go about doing that, Your Honor?

QUESTION: Well, wasn't there testimony that the original counsel represented a lot of people who had bought some of this stock, and who knew about the action, might have gotten notice before the decertification, and would have an interest in being sure it survived.

MR. WEISS: Your Honor, I am an attorney who has to comply with my ethical responsibilities, I can't go out and solicit clients. If a client doesn't knock on my door, I have no client. There was nothing I could do as an attorney in

those circumstances, to go out and solicit and drum up litigation. At least that's the way I perceived it at the time. And there's no record that anybody else came to me. And indeed nobody intervened.

QUESTION: Is there anything to prevent your primary client from doing this?

MR. WEISS: I suppose not, but he thought he was an adequate class representative. I think he's proven that he is. He has diligently stood behind us throughout this hectic litigation for four and a half years. Indeed, I spoke to him last night.

Why should he have to go out and seek somebody else? He has rights personally under Rule 23. His right is to bring a class action, and if he feels that he's an adequate class representative and the district court abused its discretion in decertifying the class, with him as the class standard-bearer, why should he have to go out and search for somebody else?

QUESTION: But that's true in the case of any plaintiff or any defendant who feels the district court has made an erroneous ruling against him. He has a right which may have been infringed.

MR. WEISS: Exactly. But in a death knell situation, he hasn't got the means to go forward to the end of the case, so he can remedy that wrong after the trial.

QUESTION: Well, frequently, and in many non-class

action situations, he will not have the means to go ahead and remedy it.

MR. WEISS: I understand that, but Rule 23 gives him a right. This is a collateral right, and it's a right recognized by the framers of Rule 23 as necessary for him to have his cause heard in court. Without that right he can't be in court.

QUESTION: That's not the original class action theory, though. The original class action theory was that this was not a right, it was a procedure by which, where the class was too numerous to name, they could be brought in. But it didn't give any rights to the original plaintiff at all.

MR. WEISS: It didn't --

QUESTION: Do you agree with that?

MR. WEISS: I agree that it didn't give him substantive rights.

QUESTION: But you're saying it does.

MR. WEISS: No, I don't say it gives him substantive rights, I say it gives him procedural rights. The procedural right is that he can have his day in court by representing a class. Without that procedural right he has no day in court.

QUESTION: But he's not complaining about representing the class. He's complaining because he can't pay this bill alone.

MR. WEISS: He's complaining --

QUESTION: Isn't that what he's complaining about?

MR. WEISS: I don't think so, Your Honor. I think what --

QUESTION: As of right now, isn't that what he's complaining about?

MR. WEISS: No, I think he's complaining --

QUESTION: Well, if not, what are you complaining?

MR. WEISS: We're complaining that the district court wrongfully stripped him of the ability to go forward was a class representative, so that if he wins the case on the merits he can get back his incurred expenses.

That's what we're complaining about.

QUESTION: Well, go borrow the money. How about that?

MR. WEISS: There are some cases that say you can't do that, Mr. Justice Marshall.

QUESTION: And there are quite a few cases that are lost for lack of money to prosecute them.

QUESTION: Well, Mr. Weiss, suppose four people decide to sue a company, they all have what they think are similar problems, and they agree to share expenses, and they are all named plaintiffs. Early in the litigation, however, it turns out that the judge thinks three of them aren't in the same position and dismisses their case -- dismisses them out of the case. The remaining plaintiff just doesn't feel that he can get very far by himself, he hasn't got the money.

Now, he isn't in very much different position than your client, but --

MR. WEISS: Well, I assume he's lost on the -- they've lost on the merits in that situation.

QUESTION: Well, but it isn't appealable without -- unless the judge makes some additional finding that there's no reason for delay, they just -- he just -- even the ones who've been dismissed can't appeal.

MR. WEISS: I would think, Your Honor, that in that situation 54(b) might be appropriate and --

QUESTION: Well, I know, but not unless the judge is cooperative.

MR. WEISS: That's correct. And I agree that when you have a judge who doesn't appear to be cooperative, you have a special kind of a problem, and that's the one we --

QUESTION: Yes, but it's not appealable under the Rule unless the judge makes a -- does whatever he's supposed to do. And it isn't appealable just because the plaintiff may decide, the remaining plaintiff may decide, "I can't go forward."

MR. WEISS: Well, Your Honor, if I were in that situation, as you portray it, I think I might attempt to go up under the doctrine that was adopted in the *in forma pauperis* situation.

QUESTION: Well, that may be so. All I'm asking, though, is is that subject to appeal?

MR. WEISS: Well, I would argue that it is a final decision in those peculiar circumstances.

QUESTION: Well, Wetzel said it wasn't, I thought.

MR. WEISS: Well, I'm just not familiar with that.

QUESTION: Well, there isn't really much difference between that plaintiff I described and your client.

MR. WEISS: Well, I think there is, because here there --

QUESTION: The four people certainly had the right under the -- the procedural right under the Rule to sue jointly.

MR. WEISS: Well, the difference is that we have Rule 23, which, if I can call it a statute for the moment, gives certain rights.

And those rights are rights that Chief Livesay and his wife has. There are no similar rights in your example. There are such similar rights in the in forma pauperis situation.

QUESTION: I would think these people, a fortiori, have rights. I mean, they are named plaintiffs, they have a right to institute litigation.

MR. WEISS: Yes, those are substantive rights, Your Honor, and I'm making the distinction --

QUESTION: They had procedural rights, too, didn't they? To be in court.

MR. WEISS: But they don't have Rule 23 rights. And

the framers of Rule 23 suggest that this is an important right that they wanted to give to small claims holders.

QUESTION: Well, your argument suggests that Rule 23 is to be elevated above all other procedural and substantive rights.

MR. WEISS: No, I'm saying that Rule 23 has to be read together with it, and that since there is a right under Rule 23 to bring this action as a small claims holder because of a recognition that without Rule 23 you could not bring it.

QUESTION: Well, you could bring it in State court.

MR. WEISS: Not a Section 11 case -- I'm sorry, yes, you can; but not a 10(b)(5) case.

QUESTION: But this is a Section 11 action.

MR. WEISS: An 10(b)(5) is here also.

Section 11 is mutual, but 10(b)(5) is not.

QUESTION: What about attempts to add parties to a case? And, say a third-party claim, and gets dismissed?

MR. WEISS: Your Honor, I don't know if the defendants would like very much having a procedure whereby a notice would be sent out to attract other people. I think I might enjoy it immensely, and who would pay for it is another question.

I would take that as an alternative to some of these problems, if we can send out a notice to attract additional people into the case.

I don't think the defendants would spring forth.

QUESTION: Mr. Weiss, you didn't seek a 1292(b), did you?

MR. WEISS: No, we didn't, Your Honor. We didn't --

QUESTION: Did you have a reason? Did you have a reason not to go that route?

MR. WEISS: Oh, yes.

QUESTION: What was it?

MR. WEISS: First of all, there had been four Circuits that had adopted the death knell doctrine at that point. We thought therefore we had an absolute right to appeal, so we filed a notice of appeal. We don't think a discretionary right is equal to an absolute right.

Secondly, we felt we had a mandamus situation, and we filed a Petition for Mandamus in the Circuit Court. We felt it would be inconsistent to go to a district court judge from whose decisions we were seeking mandamus for abuse of discretion, asking him to exercise his discretion in our favor.

I think as a practical matter that's a good reason.

Thirdly, in the hearings on the class motion, the district court judge himself stated that he wanted to make a record because the plaintiff would have a right to go up under death knell. So we read that to mean that he, himself, accepted the death knell doctrine as a viable way to appeal this case, or an avenue open to us.

QUESTION: Did you have any doubt that if you had wanted to go the interlocutory appeal route, that 1292(b) covered an appeal from a decertification notice?

MR. WEISS: Your Honor, there is some doubt on that question, because the courts differ on what type of order can be appealed under 1292(b).

QUESTION: Well, there's a requirement that may materially advance the ultimate termination of litigation -- but that's already terminated, isn't it?

MR. WEISS: It had already been terminated. And, two, what is the controlling question of law?

Now, I think in this case we had it, except that it had already terminated; by the controlling question of law issue, I think we had it, because we felt that the judge decertified the class on criteria outside of Rule 23, which was a peculiar circumstance. And we felt that this was a broader question than just the questions that arose in the litigation.

We didn't proceed in that fashion for the reasons I stated before.

QUESTION: Even though, independently of any reservations whether you could?

MR. WEISS: That's right.

QUESTION: Yes.

MR. WEISS: And of course Rule 54(b) is also a discretionary rule, and we had the same reasons for not seeking

the discretionary Rule 54(b) treatment.

QUESTION: But if you don't get the favorable exercise of discretion under Rule 54(b), the order is simply not appealable.

QUESTION: Not final.

QUESTION: It's not final.

MR. WEISS: The 54(b) test situation?

QUESTION: Yes.

MR. WEISS: That's correct. So it was inconsistent with our belief that the death knell doctrine gave us an absolute right to appeal.

Now, we did file the mandamus, and it was declared moot by the Eighth Circuit, because they gave us our relief under 1291. And we believe that the grant of mandamus can be read into their decision in this case. They ruled that the district court did abuse his discretion, and they reversed him.

Now, we refute the petitioner's contention that if this Court does accept -- does not accept the death knell as meeting the requirements of Section 1291, or the collateral order doctrine exception, that this Court does not have the power to remand this case to the Eighth Circuit for a determination of respondent's mandamus petition.

Moore, 9 Moore Federal Practice, paragraph 110.28 of pages 315 and 316, recognizes that while the procedure set

forth in the rule for mandamus -- that's Rule 21 of the Rules of Appellate Procedure -- should be followed. The Courts of Appeals can and frequently do treat a notice of appeal as a petition for mandamus, if the order sought to be reviewed is not applicable but the question presented is subject to review by mandamus.

So the court had the power to treat the 1291 appeal, even if found that it wasn't an appropriate appeal remedy. As a mandamus petition. And, as such, this case -- we are now reviewing that decision, and we say that the Eighth Circuit can again take the mandamus petition and --

QUESTION: And then you get mandamus for every interlocutory order of every trial.

MR. WEISS: Well, Your Honor, that brings me to Gillespie, and Gillespie --

QUESTION: Well, do you go that far? You don't go that far, do you?

MR. WEISS: No, I don't say that there should be an interlocutory appeal from every order, but in a situation when there is conduct at the district court level that is appropriate for a mandamus, I think that the right of the parties clearly should be able to go up on the mandamus petition. The Eighth Circuit didn't decide it as moot, because it had decided in our favor under 1291.

QUESTION: So that any non-final judgment can be

appealed by mandamus?

MR. WEISS: Oh, I agree, Your Honor, that is a totally inadequate remedy for a person in that situation --

QUESTION: I didn't say it was inadequate, I said it was impossible.

MR. WEISS: Impossible, I agree with that, and that's one of the reasons why we say we have finality here. Mandamus isn't adequate. 1292(b) is discretionary. And we say that that's not adequate.

So that we're left with 1291. But in this particular -- that's as a general proposition. In this particular case we feel that mandamus was appropriate.

And before my time runs out I'd like to get into Gillespie, because this ties my whole argument up.

The Gillespie doctrine is one which will avoid the requirement, the further findings and rulings at the appellate level on the questions raised in this case.

The order being reviewed here was at least of marginal finality. Why was it of marginal finality? The district court had stated that he felt the death knell doctrine was appropriate. The district court made a death knell record. Four other Circuits, at that point in time, had adopted the death knell doctrine. The Eisen IV decision appeared to support the theory.

So there were reasonable grounds for the Eighth

Circuit to accept the death knell doctrine. Having now spent all the time and effort in deciding the issues, which it did, it was a painstaking decision, went into every detail of the lower court's conduct, it made findings, and it reversed.

Under these circumstances, where the order is fundamental to the further conduct of the case, and we say it is, and the Circuit Court in good faith accepted the appeal and expended the time in deciding the issue, Gillespie holds that this Court can, without further ado, accept the decision of the Eighth Circuit.

QUESTION: And yet this Court's point of view is precisely the opposite of yours, I think, Mr. Weiss. I understand perfectly what you say about your client's interest, but we took the case to decide whether there is such a thing as the death knell doctrine. And if we decide it on the Gillespie basis, we decide nothing except that your case can proceed.

MR. WEISS: Well, I have clients here, and they are my first concern, although I specialize in class action litigation. I have to tell you that the doctrine itself is less important to me than these people.

QUESTION: Well, you're pursuing your -- the ends you should pursue. I'm just saying that it may not persuade all of us who have a somewhat different point of view.

MR. WEISS: Well, Your Honor, it's possible that

Your Honors don't accept the death knell doctrine, and so state, but at the same time you sustain my position in this case, or in effect affirm the Eighth Circuit's decision.

I think -- what I'd like to also point out is that Mr. Justice Marshall this morning made a point, what will happen in these death knell situations, will it flood the appellate courts?

I respectfully suggest that I don't think it will. In all the years that I've been in practice, and I have a rather large firm specializing in this field, this is the first time that we sought a death knell type of appeal.

We don't normally seek it. We think that the final decision rule is a sound one, and we try to prevent clogging the courts. There are exceptional circumstances from time to time, and we think this case is one of them.

QUESTION: And you promise us that if we grant in your favor, in the future you won't bring it again?

[Laughter.]

QUESTION: Unless you do it in that form, I'm unimpressed.

MR. WEISS: But, Your Honor, you know, the defendants -- there's a great risk to the plaintiff in that situation, because the Circuit Court can indeed rule for the defendants and put an end to the litigation. And not only put an end to this litigation, but put an end to any other case that might

seek similar relief as a class where there's a, quote, "better representative of the class", unquote.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Walsh, you have two minutes.

REBUTTAL ARGUMENT OF THOMAS C. WALSH, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WALSH: Thank you, Mr. Chief Justice.

I just have a couple brief points to make.

The first, as Mr. Justice Stevens has indicated, the death knell doctrine does encourage litigation by class action representatives who have the least at stake; as we've pointed out here, this claim by these respondents was some $2650, yet the record shows that the counsel that originally filed that claim in their behalf also represented one claimant who had a half a million dollar loss, another claimant who had $140,000 loss, who was a neighbor of his, who he had known for 25 years and who he described as a millionaire.

Now, I suggest that it's a fair inference --

QUESTION: But, Mr. Walsh, what's your response to counsel's point that it would have been unethical for him to call up those people and say, "Would you like me to represent you"?

MR. WALSH: Your Hon or, the district court, in its October 23, 1975 order, suggested and ordered that a notice go

out to the class members, suggesting that they apply for appointment as class representative, and that problem was solved in that manner.

QUESTION: You mean that such a notice did go out?

MR. WALSH: Well, it was proposed to go out at the time that the class action was decertified.

QUESTION: Then it did not go out?

MR. WALSH: It did not go out.

QUESTION: So then how does that respond to his concern?

MR. WALSH: Well, if there had been cooperation by the respondents in the preparation and dissemination of that notice, it would have gone out, Your Honor. That's what the trial court was trying to do, to get a class representative who could finance it and who was adequate.

QUESTION: Well, Mr. Walsh, how long would a millionaire be a millionaire if he paid $15,000 to collect $2600?

MR. WALSH: Well, this particular claim --

QUESTION: Sir? How long would it be? If he consistently spent $15,000 to get $2600?

MR. WALSH: Not very long.

QUESTION: He wouldn't be a millionaire long, would he?

MR. WALSH: That's true. But the millionaire had a loss of $140,000 supposedly.

QUESTION: Mr. Walsh, I think you said in your original argument that you felt a 1292(b) appeal was available here. Are you convinced of that?

MR. WALSH: No, I said that it is a viable alternative in some matters, but I would not take --

QUESTION: Well, wouldn't you have some problems with the --

MR. WALSH: We would oppose it in this case, Your Honor; yes, sir, we would.

QUESTION: Yes. I think you would.

MR. WALSH: It is not a cure-all, but I think in the Liberty Mutual case --

QUESTION: No, but I mean within the text of the requirements in the 1292(b) itself, wouldn't you have problems?

MR. WALSH: In this case I would, Your Honor. And in a lot of class action denials it might be appropriate; in others it might not.

QUESTION: Well, how about mandamus? If you prevail on finality.

MR. WALSH: Your HOnor, they have not cross-petitioned from --

QUESTION: Well, I know that, but what about the cases -- say, are there any cases sustaining the mandamus in this situation?

MR. WALSH: Not -- there's only one mandamus case

in the class action context that I'm aware of, it's in the Ninth Circuit, where it ordered the district judge to decertify a class that he had certified. I know of no other cases ordering the court to certify the class under mandamus.

QUESTION: Mr. Walsh, suppose this went to trial on the merits and they got a verdict for the named plaintiff of $2650 -- period. How is he going to get an appeal on a decertification order in that circumstance? He wins.

MR. WALSH: Your Honor, he's entitled to appeal under those circumstances, because he is not --

QUESTION: At that time?

MR. WALSH: Yes, Your Honor. That's our position.

I think United Airlines v. McDonald so contemplates, because the rationale there was that the other stewardess who was the bystander had the right to assume that --

QUESTION: Well, I know, but here is a lawsuit in which he wins.

MR. WALSH: Yes.

QUESTION: He wins $2650.

MR. WALSH: Yes. Yes. That was the assumption. That also has happened in Esplin v. Hershey in the Tenth Circuit, Your Honor, and I think --

QUESTION: You mean the named plaintiff --

MR. WALSH: The named plaintiff --

QUESTION: -- made an appeal rather than some

intervenor?

MR. WALSH: Yes. Yes, Your Honor.

QUESTION: McDonald dealt with an intervenor, didn't it?

MR. WALSH: That's correct, but the assumption --

QUESTION: The named plaintiff had won, by the settlement in the --

MR. WALSH: Yes, he --

QUESTION: But this is the named plaintiff I'm talking about.

MR. WALSH: Yes, the assumption --

QUESTION: No intervenor comes in here.

MR. WALSH: The assumption that justified the timeliness holding as to the intervenor was that she could expect the class representative, the named plaintiff, to appeal even if she won.

QUESTION: Well, at least up to the time that she won.

MR. WALSH: Yes.

And Judge Seitz in his concurring opinion in the Gardner case, which is the next case you will hear, also reasoned that if the named plaintiff goes through his or her case and does win, he still has the right to appeal prior to denial of class certification.

QUESTION: And what relief does he get? If he wins.

In the Court of Appeals.

MR. WALSH: On the class question? There's no such --

QUESTION: Yes, what relief does he get?

MR. WALSH: The case goes back for trial on the class question.

QUESTION: All over again?

MR. WALSH: Yes, sir.

QUESTION: And then he could lose.

MR. WALSH: Well, I'm assuming that when the case goes up there's going to be appeal both on his individual claim and on the class claim.

QUESTION: That wasn't the question, though. The question was, could he appeal the class action point?

MR. WALSH: Yes. Well, he --

QUESTION: And then the court says, "Yes, you can have the class action", and you go back and you try the case all over again.

MR. WALSH: I don't think you try it as to his individual claim. That would be the law of the case.

QUESTION: Well, how could you -- what would happen?

MR. WALSH: Well, as I see it, if the only question on appeal was the denial of the class certification and that was reversed, the case would go back to the trial court and the class issues would be adjudicated, and the claim of the individual plaintiff would no longer --

QUESTION: Then you run into a real old case called Hansberry v. Lee, which says you just can't do that.

MR. WALSH: Well, I think the 1966 amendments to Rule 23 were designed to overcome the obstacles of Hansberry v. Lee, and they say you can do that now.

That would be my position.

QUESTION: Mr. Walsh, as I understood my brother Brennan's earlier question to you about 1292(b), it was whether a refusal to certify a class action or an order, as in this case, decertifying a class could ever fall within the definitive language of 1292(b), which requires a controlling question of law and that an appeal may materially advance the ultimate determination of the litigation.

I think that was his question. In any event, it's mine.

MR. WALSH: Yes, sir.

QUESTION: Isn't it arguable that no such order could ever fall -- even be eligible for consideration, for discretionary consideration under 1292(b)?

MR. WALSH: Well, it has been used, 1292 has been used in a number of cases.

QUESTION: Well, what's your position? You concede that --

MR. WALSH: I concede it could be in a lot of class action questions.

QUESTION: And at least generically it could be available?

MR. WALSH: Yes. In some cases I would have --

QUESTION: Has any Circuit ever faced that question that you know of?

MR. WALSH: Yes, we've cited cases in our brief.

QUESTION: You mean that squarely faced it?

MR. WALSH: Yes.

QUESTION: In some cases it could be used to appeal the refusal to certify?

MR. WALSH: Yes, sir.

It has been used, and I can't put my finger on it right --

QUESTION: Well, don't bother, if it's in the brief.

MR. WALSH: It's in the brief.

Thank you very much, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:37 o'clock, p.m., the case in the above-entitled matter was submitted.]

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