In the

Supreme Court of the United States

JO ANN EVANS GARDNER,

PETITIONER,

V.

WESTINGHOUSE BROADCASTING COMPANY,

RESPONDENT.

No. 77-560

Washington, D. C.
March 22, 1978

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JO ANN EVANS GARDNER, Petitioner,	:	
v.	:	No. 77-560
WESTINGHOUSE BROADCASTING COMPANY, Respondent.	:	

Washington, D. C.,

Wednesday, March 22, 1978.

The above-entitled matter came on for argument at 1:38 o'clock, p.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:

ROBERT N. HACKETT, ESQ., Baskin, Boreman, Wilner, Sachs, Gondelman & Craig, 10th Floor Frick Building, Pittsburgh, Pennsylvania 15219; on behalf of the Petitioner.

LEONARD L. SCHEINHOLTZ, ESQ., Reed, Smith, Shaw & McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania 15219; on behalf of the Respondent.

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C O N T E N T S

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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 Gardner against Westinghouse.

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

ORAL ARGUMENT OF ROBERT N. HACKETT, ESQ.,

ON BEHALF OF THE PETITIONER

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

The argument of the petitioner, Jo Ann Evans Gardner, will be presented first with a little statement of facts, then I would like to discuss the legal issue of the heart of the relief sought in the case, then I would like to discuss the unconditional denial of the class, then I would like to discuss the rationale that the courts have used in interpreting Section 1292(a)(1) as a means of appealing a denial of injunction.

Then I would like to look at the logic of the cases under 1292(a)(1), starting with the early cases in the Thirties, and finally finished with Switzerland Cheese case in 1966.

Then I would like to discuss the issue of a permanent versus a preliminary injunction, and then I would like to discuss the strong policy to allow civil rights class actions, and finally the general floodgate argument that has been proposed by the respondent concerning the floodgate of appeals.

Jo Ann Evans Gardner filed this case on May 29, 1975,

seeking a wide class action under Rule 23(b)(2), seeking, as the heart of the relief, injunctive relief.

The scope of the class is set forth in pages 8a to 11a of the Appendix, and the injunctive relief is set forth in the complaint that it was requested in pages 13a to 14a.

We moved within 90 days as required by the local rule for a class determination. We filed the class interrogatories. On February 3, 1976, the lower court denied the class action, stating that Ms. Gardner was an inadequate representative of the class under 23(a)(4), because she sought a job that some other woman might want, and therefore she was antagonistic to the class.

This was an unconditional order.

Then we appealed that decision as a matter of right under 1292(a)(1) as a denial of our injunctive relief, because it narrowed the scope of the relief. And the Third Circuit dismissed with no jurisdiction, saying that 1292(a)(1) did not apply.

First, I think it is obvious that the injunctive relief under (b)(2) is the heart of relief sought in a wide civil rights case. We sought an across-the-board class action, as has been sanctioned by the Fifth Circuit in Long vs. Sapp, and the denial of the broad injunctive relief has been recognized by four Circuits, the first Circuit doing so was the Fourth in about 1962, under Brunson vs. Board of Trustees.

The First, Fifth and Ninth Circuits have all agreed with that under Yaffee vs. Powers, Jones vs. Diamond, and Price vs. Lucky Stores.

Further, the determination by Judge McCune that it was an unconditional denial was a matter of law and he gained no possibility except within his scope of being reversed, because if she's antagonistic to the class, she's going to stay antagonistic to the class.

Thus, as Justice Stewart said in United Airlines vs. McDonald, the action was stripped of its character as a class action.

QUESTION: Didn't the possibility remain open to you of persuading Judge McCune to change his mind?

MR. HACKETT: I don't believe we could persuade Judge McCune to change his mind. We could have tried, but we felt, first of all, that we had a right of appeal because of the four Circuit cases, and only, at that time, one or two against us; and secondly, it's been our experience in the Western District court that it is simply too unsure and heavy a burden to try and get class action denials changed. And I guess that was a policy decision on my part.

The unconditional denial doctrine was recognized in Yaffee vs. Powers when they said the broad injunctive relief was denied.

And I'd like to move to the general rationale of

what the courts have used to interpret 1292(a)(1).

The words that the courts have used since General Electric vs. Marvel Rare Products to Switzerland Cheese has not changed. That is, if the substantial effect of the order is to deny an injunction, then they have considered that rationale as what they will look at.

QUESTION: What if I -- what if a friend of mine and I sue for an injunction and two other friends move to intervene and they're denied?

MR. HACKETT: Under --

QUESTION: Are they -- is that denial appealable?

MR. HACKETT: Is that permissive intervention, sir?

QUESTION: Yes. And is it appealable?

MR. HACKETT: Under permissive intervention, I don't believe it's appealable.

Under --

QUESTION: Even though, arguably, that certainly denies them an injunction, right?

MR. HACKETT: Arguably it does, but they are free right there to institute their own suit, and they know about it, and there is no problem then instituting the suit.

I think that's a little different fact situation. I think the class action situation is more like General Electric vs. Marvel Rare Products, where a counterclaim asks for an injunction, and the counterclaim was denied, and they held it

was a denial of an injunction.

The courts all the way through General Electric to Switzerland Cheese have said that the substantial effect doctrine will apply.

Now, let's look at what the results were of the 1291 cases. I submit that if you follow the logic of looking, if the decision affects the ultimate relief sought, then it should be appealable under 1292(a)(1).

Now, for example, if you're just delaying the decision in Switzerland Cheese, where you fail to grant a summary judgment, and then you leave the equitable relief possibility open to the end because there's an issue of fact, you are not affecting the ultimate relief that you could get. You're only delaying it.

Again, in Baltimore Contractors, if you're simply saying, refusing to stay an accounting, an accounting does not give you the ultimate relief. An accounting is only a means used to show if something is owed or not. But in a class action, you are drastically reducing the scope of the relief sought.

As Justice Stevens said in his dissent in Sprogis, you must have a class action in order to get the wide injunctive relief, or it would be unfair to the defendant.

And this Court, Justice Stewart, in the Teamsters vs. U.S. case, and Justice Brennan in Franks vs. Bowman, set forth

the burden of proof in class action cases, and the injunction granted in a class action sets the perimeters for that burden of proof. So that you have a completely different burden of proof in class action cases and in the scope of the relief than you do in a McDonald Douglas vs. Green case, which was the individual opinion by Justice Powell.

QUESTION: But if I joined two or three claims in a suit against a defendant and the judge terminates my case with respect to two of my claims and has permanently reduced the kind of a judgment that I can get, I still can't appeal unless he cooperates with me.

MR. HACKETT: If you joined the suits, and you have claims where --

QUESTION: I have claims and everybody agrees that if I prevailed on all three claims I'd have a million dollars, if I prevail on one instead of three I'll have $100,000.

MR. HACKETT: But I don't believe that's injunctive relief sought, is it, sir?

QUESTION: Well, it may not be, but it certainly affects the scope of my judgment.

MR. HACKETT: Oh, yes, sir, but it isn't the scope of the judgment that's at issue. Mr. Justice White, it's the scope of the injunctive relief, that 1292(a)(1) speaks to. It has to be a denial of a relief that is equitable in nature and injunctive in nature, and not just a change in --

QUESTION: So you are saying that you would have the same -- you would be ma-ing the same argument if I joined three claims for an injunction, and if I won on all of them that would be an injunction of a certain scope, and if I only win on one it would be a much narrower injunction. You say that it doesn't --

MR. HACKETT: It wouldn't have to --

QUESTION: -- have to be a 1291 case if the judge dismisses two of my claims?

MR. HACKETT: If you have three claims joined, all asking for injunction, --

QUESTION: Yes.

MR. HACKETT: -- and the claim as to the injunctions is dismissed, one or two of them, I think that's exactly the General Electric-Marvel case, where the counterclaim came in, he dismissed the counterclaim, the counterclaim asked for an injunction, held appealable. I think that's that fact, sir.

QUESTION: Under 1291?

MR. HACKETT: Under 1292, sir.

QUESTION: Yes. Well, that requires the judge to take --

MR. HACKETT: 1292 is --

QUESTION: I mean 1292, 1292(a).

MR. HACKETT: (a)(1) doesn't require the judge to cooperate.

QUESTION: No, under that one, that's right.

QUESTION: Well, would you say Rule 54 is not involved at all in that 1292(a) appeal?

MR. HACKETT: No. That's correct, Justice Rehnquist. We have it as a matter of right. In other words, it's an exception to the rule.

I think it's also clear that 1292(a) applies to a permanent as well as a preliminary injunction. There is no question that there is precedent for this in this Court's cases, in George vs. Victor Talking Machine in 1934, and John Simmons case in 1922, and I think Mr. Justice Rehnquist, in his opinion in Wetzel indicated that an appeal would have been possible under 1292(a)(1) by the granting of an injunction, but we had the parties mixed up in Wetzel. So that we couldn't get it.

But he indicated in that case that it would be possible on a permanent injunction, not just a preliminary injunction. Judge Friendly in the Second Circuit, in Stewart-Warner vs. Westinghouse, in his dissent, indicated that only -- 1292(a)(1) only applies to a preliminary injunction. No other Circuits have accepted that. There are many Circuit cases and Supreme Court cases that don't accept that. And he cited Justice Frankfurter's argument in 1928, Business of the Court, and other legislative history.

Now, I think it's very close --

QUESTION: But it was true that the old three-judge court, you couldn't get a three-judge court unless you asked for a preliminary injunction.

MR. HACKETT: Yes, sir.

QUESTION: This is no longer true, so I guess maybe that might be the reason for that.

MR. HACKETT: I think that's true. That was -- I believe you discussed that in Goldstein vs. Cox and in the Tidewater case, Mr. Justice Marshall.

QUESTION: It could be what the -- but that's not true any more.

MR. HACKETT: But it's a good thing to point that out, I think, sir, that the expediting act says particularly "preliminary injunction". 1292(a)(1) doesn't say preliminary injunction.

QUESTION: What if you have six defendants and you're having a hearing on a preliminary injunction before a district judge, and he grants a motion to dismiss as to one of the six defendants; is that appealable under 1292(a)?

MR. HACKETT: If -- are the defendants requesting, in a counterclaim, injunctive relief?

QUESTION: No.

QUESTION: No.

MR. HACKETT: And you're requesting -- yes, that has been held appealable in some Circuit cases, where they said

that the dismissal of three or four defendants, where you narrowed the scope of the injunctive relief, that would be appealable under 1292(a).

QUESTION: And you say that goes for just dismissal of one out of ten defendants, too?

MR. HACKETT: I'm not sure of the exact number, but --

QUESTION: Well, how can it possibly make any difference as to the exact number?

MR. HACKETT: I don't think it does, conceptually.

QUESTION: I don't think it does, either.

MR. HACKETT: Unless it was just deminimal. In other words, you have to say, and we have to use the test, is the substantial effect is to limit the injunctive relief sought.

QUESTION: Where do you get the word "substantial" in that?

MR. HACKETT: The substantial effect comes from all the previous cases, the Enelow-Edison cases, the General Electric case, it's cited in Baltimore Contractors --

QUESTION: Do you have the cases cited that you were referring to in response to Mr. Justice Rehnquist's question?

MR. HACKETT: The particular --

QUESTION: About dismissing particular defendants?

MR. HACKETT: That is a Circuit case, sir, Build of

Buffalo.

QUESTION: Well, that's not from this Court, then?

MR. HACKETT: Not from -- that particular case is not from this Court. But the substantial effect language is from this Court.

QUESTION: Is that cited in your brief?

MR. HACKETT: Build of Buffalo? Yes, it is, sir.

QUESTION: Mr. Hackett, I believe you referred to a dissent by Judge Friendly in a Stewart-Warner case, I --

MR. HACKETT: Stewart-Warner vs. Westinghouse.

QUESTION: -- can't seem to find it in your main brief.

MR. HACKETT: I believe we cited Stewart-Warner.

QUESTION: Well, don't trouble yourself now. I can't find it in the list, but we will locate it.

MR. HACKETT: The next subject that I would like to move to is the strong policy that this Court has --

QUESTION: Before you move to that, let me ask you one more question. Supposing, again in a hypothetical case, you have six defendants, hearing on a preliminary injunction, the district court grants a preliminary injunction as to five of the defendants, says he reserves ruling as to the sixth defendant, will not issue a preliminary injunction, doesn't dismiss him, and puts the whole matter over for hearing on final injunction. Appealable?

MR. HACKETT: There is authority that a delay or continuance in the granting of a preliminary injunction is appealable. I don't believe it's from this Court.

QUESTION: An authority from this Court?

MR. HACKETT: No, sir. It's not from this Court.

I'd like the Court to look at the strong public policy that was announced in this Court in the Albemarle case by Mr. Justice Stewart, citing the 1972 amendments to Title VII, and saying that those amendments were not to do anything which would discourage private class action.

It's important to realize that the class action tool is the catalyst tool to enforce Title VII by plaintiffs, and this Court, in looking at the class action, in almost all of their decisions, in Franks vs. Bowman, Albemarle, and in Teamsters vs. U.S., has recognized that strong public policy not to deteriorate the use of the class action device. And I think one of the reasons it shouldn't deteriorate the use of the class action device is that one of the very purposes of Rule 23 was to prevent the multiplicity of suits. That is, that if you're suing a corporation and you're asking for broad injunctive relief on a wide basis, there is then no need to have individual suits.

And this particular use of the device is exactly what is meant to be used in Title VII, and the decisions of this Court in Title VII have really focused on stating the vast

difference in the burden of proof, and the vast differences in the presumptions that are available to class plaintiffs when a decision has been made on a stage one or liability proceeding of class actions in Title VII.

Now, the answer -- the first ten pages of the respondent's argument and the questions that came from this Court in the previous argument focused a good deal on the floodgate problem: will we have a floodgate of appeals if we allow this?

I think it's very interesting to look at the annual reports of the Director of the Administrative Office of the United States Courts. We have done that. We have taken the average percentage of appeals, excluding bankruptcy, which are civil rights appeals. Now, for the years 1965 to 1977 only 6.17 percent of the appeals were civil rights appeals. That's the average of all Circuits.

QUESTION: You mean under the statute, under --

MR. HACKETT: Not under just Title VII, but it also includes 1983 and other statutes that are civil rights related.

QUESTION: I see.

MR. HACKETT: I'm not sure of just every statute --

QUESTION: But that's broader than just under the 1964 Act as amended?

MR. HACKETT: Plus, also plus the --

QUESTION: It's broader, I say -- or you say?

MR. HACKETT: Yes.

QUESTION: Unh-hunh.

MR. HACKETT: For example -- and then it's interesting to note, isn't it logical -- isn't it logical if we're going to have a floodgate of appeals that if we went to the Fourth Circuit, and we went to Brunson vs. Board of Trustees, which we decided in 1962, that since that time, in the Fourth Circuit, the appeals would have greatly increased percentagewise, compared to Circuits that didn't have this doctrine.

That's not true. If we look at the Fourth Circuit from 1966 to 1977, we see that they had an average increase of 21.14 percent. But in the D. C. Circuit which never had the doctrine and still doesn't have it, because Williams vs. Mumford denied the doctrine in '75, they had an increase of 42.89 percent.

QUESTION: Is that all appeals or class action --

MR. HACKETT: That's all appeals, sir. Right.

QUESTION: Well, --

MR. HACKETT: Well, obviously, though, if this opened the floodgate there would be some increase in percentage, because you couldn't factor that percentage increase out, Mr. Justice Stevens, I don't believe.

So it's important to realize that we're only talking about 6 percent, roughly 6 percent of all appeals in the

civil rights area, and that there's no indication that the decisions of the Ninth Circuit, the Fifth Circuit, the Fourth Circuit and the First Circuit have increased the appeals percentagewise, when they switched to this doctrine.

Some of them go down.

Therefore, I think the floodgate of appeals argument is not only factually wrong, but also I believe that Mr. Justice Burger in U. S. vs. Abney indicated that under 1291 and under the whole Court's philosophy in looking at appeals, that whether you have to do, in essence, more work doesn't make a legal reason not to have an appeal if, as a matter of right, you have it under 1292(a)(1), or under any statute.

The philosophy has always been we give the practical and non-technical approach. And I do not think it is a legal argument to argue that an increase in load is a legal reason for refusing the appeal.

And in closing, of course, I'd like to say that, in any event, the floodgate statistics presented in the respondent's brief are not well-founded, and I believe an analysis of the Administrative Courts will show that they are not correct.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hackett.

Mr. Scheinholtz.

ORAL ARGUMENT OF LEONARD L. SCHEINHOLTZ, ESQ.,

ON BEHALF OF THE RESPONDENT

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

This case presents the narrow question as to whether the denial of class certification in a lawsuit seeking permanent but not preliminary injunctive relief is immediately appealable as of right under 28 U. S. Code 1292(a)(1) as an interlocutory order refusing an injunction.

It is undisputed that Congress, in adopting 1292, intended a very limited exception to the final judgment rule embodied in 1291, which, since the First Judiciary Act has been the dominant rule of appellate practice. Congress has determined that with respect to certain categories, specific categories of interlocutory orders, set forth in subsection (a), an immediate appeal should be allowed as a right.

And it's also provided, for discretionary appellate review of other interlocutory orders, under 1292(b), provided the conditions set forth in that subsection are met.

This Court has recognized, in a number of decisions, that appeal rights cannot depend upon the facts of a particular case. Congress has necessarily had to draw the jurisdictional statutes in terms of categories. Thus the issue in any given case, including this one, is whether the particular order appealed from fits within the category of appeals allowed by

Congress. Or whether the appeal is not permissible in the light of the principles and the history concerning appellate jurisdiction and, in particular, the long-standing congressional policy against piecemeal appeals.

Section 1292 does not expressly provide a right of appeal with respect to orders, either granting or denying class action status. Notwithstanding that fact, Mrs. Gardner sought to appeal the district court's denial of certification and argues that her appeal comes within the narrow exception to the final judgment rule set forth in 1292(a)(1), which permits an appeal from an interlocutory order granting or refusing an injunction.

Now, in that connection, it is significant that no application for a preliminary injunction was ever made, and preliminary injunctive relief was not even requested in the complaint.

While the complaint does contain a prayer for permanent injunctive relief, the district court, in refusing to permit this case to proceed as a class action, did not state that the claim for permanent injunctive relief had no merit, nor that it lacked jurisdiction to grant that injunction, nor did it even express any opinion as to whether injunctive relief might be warranted at any particular point in the proceedings.

QUESTION: Well, if they had to ask for a preliminary injunction, you'd be making the same argument, wouldn't you?

MR. SCHEINHOLTZ: We would have made the same arguments, certainly.

QUESTION: Well, you led me astray there for a minute.

MR. SCHEINHOLTZ: Yes. We would have made precisely the same argument, and our position is the same.

As Mr. Hackett indicated, Judge Marshall, there is a question as to whether 1292(a)(1) applies to the denial of grant in permanent injunctions as well as preliminary injunctions. I think that it's clear that what Congress really intended to reach here were denials of preliminary injunction.

And in Switzerland Cheese, when this Court had that issue before it, it expressly decided that it would not decide whether 1292(a)(1) did or did not apply to permanent as well as preliminary injunctions.

However, I think our position, for the reasons that I will state, would be the same regardless of whether this Court decides that 1292(a)(1) applies to permanent as well as preliminary injunctions.

QUESTION: Well, what would you say if the complaint does ask for a preliminary injunction and for class certification, then if the judge just denies the class certification you would still be making the same argument here?

MR. SCHEINHOLTZ: Oh, absolutely.

QUESTION: Sure.

MR. SCHEINHOLTZ: Certainly.

The district court in this case, however, made no order with respect to the merits of the suit. The district court simply decided that Mrs. Gardner had failed to satisfy the requirements of Rule 23(a)(2), (3) and (4), and concluded that for that reason she was an inadequate class representative, and that the case could not proceed as a class action. This class determination order was wholly procedural, and did not in any way determine the merits of the controversy.

QUESTION: Well, did Judge McCune's order rule out the possibility of Mrs. Gardner ultimately obtaining on her own an injunction?

MR. SCHEINHOLTZ: Not at all. Not at all, Justice Rehnquist. Not only did it not rule that out, but it is entirely possible that if she proved the kind of case that she alleged in her complaint, that the relief that she might get in her individual case might redound to the benefit of the punitive clients.

In other words, the fact that this case would proceed only as an individual action, in and of itself, would not determine the total scope of possible injunctive relief. That would not be known and could not be known until a final hearing on the merits.

QUESTION: What about four plaintiffs, all of them ask for preliminary relief, the judge grants preliminary relief

for two and refuses it for two. And the two want to appeal. Now, that's under 1292, I suppose?

MR. SCHEINHOLTZ: I don't believe that they would have the right to appeal it under 1292(a)(1), Your Honor.

QUESTION: Because?

MR. SCHEINHOLTZ: Because I think that that is not a -- with respect to the Act -- well, I'm sorry, you're saying if these cases are heard on the merits and they are --

QUESTION: No. They just -- he just grants a preliminary injunction for two of the plaintiffs, and denies it for the others.

MR. SCHEINHOLTZ: Denies for the other two. I think that that would be appealable, yes.

QUESTION: By the other two.

MR. SCHEINHOLTZ: By the other two, yes.

I had misunderstood your question.

I think that, however, here of course that didn't happen.

QUESTION: And I suppose if the -- I suppose if, on the preliminary injunction hearing, the judge, with respect to two of the parties, says, "Well, you just don't have any claim anyway, so I'm dismissing your claim".

MR. SCHEINHOLTZ: That would be the same. But the difference between that case and this case is that there the action of the court has an immediate impact. The injunction

is denied. It is expressly denied.

In this case, that has not happened, and may not happen. That is the difference.

QUESTION: But you are determining that there are a lot of unnamed plaintiffs who cannot have an injunction.

MR. SCHEINHOLTZ: No, sir, Your Honor, we're not determining that.

QUESTION: Well, under your -- there's a lot of unnamed plaintiffs that can't have any relief at all.

MR. SCHEINHOLTZ: No. All we're saying is that this case cannot proceed as a class action. Those people would have the right of intervention, they would have -- they could come in as intervenors.

QUESTION: Right.

MR. SCHEINHOLTZ: The only thing that the court decided is the procedural question that this case could not proceed as a class action. It made no determination with respect to the merits of the case, with respect to the unnamed members of the class.

Not only that, but as Justice Rehnquist recognized, that decision, that this case could not proceed as a class action, is subject to subsequent alteration or amendment at any time prior to final judgment. Both with respect to Rule 23(c)(1) and of course the court's inherent power to modify any order that is not a final order. And Mr. Hackett, if he

were persuasive enough, might have convinced Judge McCune at some future date that he was wrong and that the case should proceed as a class action in the same way as in the Coopers& Lybrand, that judge changed his mind and said that the case he originally thought should proceed as a class action should be decertified, and not proceed as a class action.

So it was simply, by its terms, a tentative provisional order. It decided nothing except that for now and until the judge changed his mind that this would be an individual action in which others could intervene to assert their rights, but that it could not be a class action.

Now, Mrs. Gardner argues that she has a right to appeal under 1292(a)(1) because the denial of class certification amounted to the effective denial of broad injunctive relief sought in behalf of the clients, and therefore constituted an order of immediate and irreparable consequences within the meaning of Baltimore Contractors. That's her argument.

The contention is without merit, for a number of reasons. Section 1292(a)(1) is clearly, as I've indicated, intended to provide interlocutory appellate review only for those orders which directly and immediately either grant or refuse injunctive relief.

Congress recognized that unless immediate appeal were permitted, that there could be no effective review of an order, for example, granting or refusing a preliminary injunction.

And that to delay review until after a final decision on the merits would be practical equivalent of no review at all. It would be impossible to review the grant or denial of the preliminary injunction after the case had proceeded to a merits determination, and the court had made a decision.

So, consequently, it adopted 1292(a)(1).

The order Mrs. Gardner appealed from here does not possess this characteristic, which is essential to a right of appeal under 1292(a)(1). The denial of class certification does not amount to the denial of an injunction, and it has no immediate impact or effect. It is strictly a procedural pre-trial order which in no way touches on the merits of the claim.

As a matter of fact, even if this case were appealable and if the Court of Appeals were to reverse the class certification, this would not result in an automatic injunction, the case would be sent back to the district court and the district court would have to decide whether an injunction was appropriate in this case.

QUESTION: Well, if I file a complaint asking for a permanent injunction, --

MR. SCHEINHOLTZ: Right.

QUESTION: -- and there's a motion to dismiss it for want of jurisdiction, --

MR. SCHEINHOLTZ: Right.

QUESTION: -- and granted.

MR. SCHEINHOLTZ: Right.

QUESTION: Is that appealable as a --

MR. SCHEINHOLTZ: I would say that's appealable under 1291.

QUESTION: All right. What if I'm a defendant, and I file a counterclaim, and ask for an injunction, and it's dismissed for want of jurisdiction?

MR. SCHEINHOLTZ: Again I think that that would be appealable, for the reason that --

QUESTION: As a what?

MR. SCHEINHOLTZ: As a final order with respect to the counterclaim.

QUESTION: Well, that isn't what this Court held.

MR. SCHEINHOLTZ: That's what this Court held in GE vs. Marvel, and --

QUESTION: But it held it was appealable under the predecessor to 1292.

MR. SCHEINHOLTZ: Well, I -- you may be right on that, Your Honor, it did; but the difference between the GE vs. Marvel case and this case is that there, when the court dismisses the counterclaim seeking injunctive relief, it is acting now and immediately. That is the denial of an injunction when it dismisses a counterclaim. That is the difference between that case and this case. Is that there it operates immediately, it

operates now, whereas here it may never operate.

Now, even if we were to assume, arguendo, as I've indicated, that the denial of class action status may narrow the scope of injunctive relief, which may ultimately be awarded, and that's her claim, is this effect will occur, if it occurs at all, only after a decision on the merits. And that's the difference between this case and the GE vs. Marvel case.

And at that time -- at that time, when there has been a determination on the merits, that action is fully reviewable along with the final decision on the merits, regardless of whether Mrs. Gardner wins or loses with respect to her individual claim; and that's the United Airlines vs. McDonald /sic/ Douglas case, recognizes that.

Moreover, and quite apart from that, many types of interlocutory orders of a trial court have a significant impact on a litigant's ability to obtain equitable relief. And this consideration has never been reviewed as a sufficient ground for contravention of the strong and explicit congressional policy against piecemeal appeals. As a typical example, an order granting or refusing discovery, where an evidentiary ruling may have a vital effect on the scope of the relief ultimately obtained. And yet that doesn't convert them into appealable orders.

QUESTION: You think that an order granting a pre-

liminary injunction and requiring the plaintiff to post a $50,000 bond is appealable by the plaintiff as to the question of the amount of the bond?

MR. SCHEINHOLTZ: Well, that's the collateral order doctrine, or something like the collateral order doctrine, and would not come up under 1292(a)(1), it would come up under the /sic/ Cohen vs. Beneficial Insurance Company rule, I believe.

Now, we talked about the matter of the docket of the appellate courts, and I think that it is a matter of concern to this Court. We have the statistics set forth at pages 13 to 14 of our brief. But briefly, in a 15-year period, from 1962 to 1977, the number of actions filed increased by 300 percent and the number of -- this is on the appellate docket -- and the number of appeals pending increased by 400 percent. And in over half of the Circuits the number of pending cases that have increased, appeals have increased by 600 percent.

That's an alarming statistic. And if this appeal that Mrs. Gardner has were allowed, that -- there will be no limitation on the number of appeals that you could have. Because what would happen is that in every case where it is possible a plaintiff would include a prayer for injunctive relief. He would be foolish if he didn't.

And then if there is any order that he says might affect the scope of relief, then he could take an interlocutory appeal under 1292(a)(1), because their argument isn't limited

to class certification questions. The statute doesn't deal with that. The principle that he's attempting to assert is that any time there is an order which might affect the scope of injunctive relief, then that is the practical equivalent of the denial of an injunction as appealable under 1292(a)(1).

And there would be many, many more appeals under that type of rationale than we have now, as bad as the current docket is.

Now, --

QUESTION: It's not your argument, in giving us those figures, that those figures themselves are the result of what is being contended for now?

MR. SCHEINHOLTZ: No. What we're saying is that they are bad. And can get much worse.

QUESTION: That they are bad, and you don't want to increase the number. Yes. Right.

MR. SCHEINHOLTZ: That's right. No, I'm not saying that this doctrine --

QUESTION: That they aren't attributable at all to it.

MR. SCHEINHOLTZ: All I'm saying is that as bad as they are, they would be much, much worse, --

QUESTION: Right.

MR. SCHEINHOLTZ: -- if we didn't have that.

QUESTION: Are there some cases on the appealability

or orders denying intervention in injunctive suits?

MR. SCHEINHOLTZ: I'm sorry? In the --?

QUESTION: Are there some decisions on the appealability of orders denying intervention in injunction suits?

MR. SCHEINHOLTZ: Yes, there are. The --

QUESTION: Are there figures on it?

MR. SCHEINHOLTZ: No, there are no figures.

QUESTION: How about some -- are there decisions, though, some decisions holding appealable or unappealable?

MR. SCHEINHOLTZ: Yes, there are three Circuits that hold that the denial of certification is not appealable under 1292(a)(1). That would be the Third Circuit, the D. C. Circuit and the Second Circuit. The Seventh Circuit says that where there is no prayer for injunctive relief and no hearing on preliminary injunctive relief, no right to appeal the adverse class determination under 1292(a)(1), and there are four Circuits that go the other way.

QUESTION: How about just a plain prayer to intervene, is denied; is that appealable?

QUESTION: Right.

MR. SCHEINHOLTZ: I would not think that that would be appealable.

QUESTION: Have you cited some cases on it?

MR. SCHEINHOLTZ: I have not seen any cases on it, Your Honor, I don't know of any.

QUESTION: How about the Utah Construction --

QUESTION: A denial to intervene is appealable?

MR. SCHEINHOLTZ: It is appealable to --

QUESTION: Individually, but --

QUESTION: Was that an injunction suit?

QUESTION: But if it's granted, it's not appealable; if it's denied, it is appealable. At least it used to be.

MR. SCHEINHOLTZ: You may be correct on that, and I'm sure I must be in error.

A rule of appealability, based upon the eventual effect of an order has, of course, no easily definable limit. And will provide the plaintiffs with more than one opportunity to obtain piecemeal review of a wide variety of interlocutory orders. Which would mean that the final judgment rule would eventually be swallowed up by what Congress intended to be a narrow exception.

Moreover, such a rule of appealability, we believe, is clearly inconsistent with Justice Rehnquist's decision in Wetzel, which held that an order granting judgment on the merits for the plaintiff, without ruling on the request for injunctive relief, was not appealable by the defendants under 1292(a)(1), despite its inherent effect on the ultimate availability of injunctive relief.

A rule of appealability such as that advocated by Mrs. Gardner would further burden the appellate courts with the

task of determining, in each case, the jurisdictional question of whether the order appealed from had the effect of granting or denying an injunction. And it would have to do so on the basis of a record which might well be inadequate for that purpose.

Now, Mrs. Gardner also argues that 1292(a)(1) should be extended to interlocutory orders denying class status, because immediate review might avoid an unnecessary trial and expense.

Well, it would have done the same thing in Baltimore Contractors, as Mr. Justice Black mentioned in his dissent, but that consideration really isn't germane. It's the function of Congress to determine whether the time and expense that might be saved by permitting interlocutory appeals sufficiently outweighs the impact of the effect of permitting those appeals on the docket of the appellate court. That's the function of Congress.

This Court has repeatedly said that it is not authorized to approve or declare judicial modification of the jurisdictional statutes, regardless of the importance of the issue or other considerations.

We have to look at the statute. Does it permit an appeal or doesn't it? This statute doesn't say that an order, which directly or indirectly grants an injunction which -- nor does it say that which effectively grants or denies an injunction

is appealable; it says an interlocutory order granting or refusing an injunction.

QUESTION: Counsel, in Wetzel, it was Liberty Mutual that was appealing. Liberty Mutal hadn't sought any injunction. Wasn't that the reason we said that that was not appealable as an order denying an injunction?

MR. SCHEINHOLTZ: Well, Your Honor, that's true. That's true. On the other hand -- and it was dictum in that case, and you were --

QUESTION: But you referred to it, and I thought perhaps you ought to --

MR. SCHEINHOLTZ: Yes. No, you're right. But of course the ultimate impact that, if you adopted their argument, they could have said that the effect of that order granting liability was to effectively grant an injunction, even though the only thing that was left to be done by Judge Weber was to issue the injunction.

That's what we mean by that statement.

So if you followed an effective standard, you would have permitted an appeal in Wetzel, we believe.

Now, for those reason, we believe that the Third Circuit was clearly correct in its conclusion that Mrs. Gardner's theory of appealability would represent an unwarranted expansion of 1292(a)(1).

Now, I'd like to go to the second point that we would

argue, and that is that even if the effective denial of an injunction standard is a correct standard under 1292(a)(1), that standard has no application here, because the denial of class certification cannot constitute the effective denial of an injunction.

We say that for three reasons.

First, because the order was tentative and provisional under Rule 23(c)(1), it could be altered at any time.

Secondly, because it is by no means clear what relief, if any, Mrs. Gardner could get in her lawsuit. That fact would not be known until after a final hearing on the merits. And to ask an appellate court on a 1292(a)(1) appeal to speculate as to what relief she might be able to get, if she proves her case on the basis of an inadequate record, I think is an unworkable standard and places an impossible burden on the Court of Appeals.

The plain fact of the matter is that that will not be known until she puts in her proof.

Now, third, of course, is the fact that at any time there could be intervention by other persons in the punitive class. And if those persons appeal, then the scope of the relief might be different than if she proceeds with an individual action, or it might not.

But, again, that is something that will occur at some time in the future.

But the fact of the matter is that intervention by other people in this lawsuit might make a difference with respect to the injunctive relief that might ultimately be attained and obtained.

So, for both -- for all three of those reasons, we say the denial of class certification cannot possibly constitute the effective denial of an injunction.

Now, Mrs. Gardner makes a point in her brief that if she is not permitted to appeal now, that it is likely that this case will never be appealed, and she says that for two reasons.

She says, first, "If I lose on the merits, I have no right to appeal the adverse class determination under Rodriquez." And she says, "If I win on my individual case, I will have no incentive to appeal."

Now, the first is incorrect as a matter of law; the second is purely speculative and irrelevant at best.

First, Rodriquez, as we read it, says nothing about her right to appeal the adverse class determination after final judgment if she loses her case. United Airlines says that.

Secondly, you cannot fashion a rule of law --

QUESTION: If she wins her case, do you think she can appeal?

MR. SCHEINHOLTZ: I'm sorry?

QUESTION: If she wins her case, do you think she can

appeal?

MR. SCHEINHOLTZ: Yes. American Airlines says that as well. Because there the Court referred to, and there were two cases that were referred to, Galvan vs. Levine and Esplin vs. Hirshi, where the plaintiff won below, and where -- and notwithstanding the fact that she won, she was permitted to appeal the adverse class determination question. And I think there's good reason for that.

QUESTION: Are those Courts of Appeals --

MR. SCHEINHOLTZ: Those are Courts of Appeals decisions.

QUESTION: Which one?

MR. SCHEINHOLTZ: Both of them.

QUESTION: I know, but which Courts of Appeals? Well, don't bother, don't bother.

MR. SCHEINHOLTZ: They are in our brief, Mr. Justice White.

QUESTION: And they were cited in the opinion --

MR. SCHEINHOLTZ: They were cited in the opinion in United Airlines.

And I think there's good reason for that. For one thing, attorney's fees. Attorney's fees would be greater, obviously, if they were class action than if the case proceeded as an individual action.

Secondly, plaintiff, as she regards herself, or he

regards himself, as a private attorney general, may well fee that they have an institutional interest in attempting to protect the punitive class.

So, even though they win their case, they will want to appeal the adverse class determination, and there may well be other considerations.

But the critical fact isn't that she may not, she may decide for herself that she doesn't want to appeal, the critical fact is that she has the right to do so.

And if she fails to do so, for whatever reason, under United Airlines, the punitive members of the class could intervene at that time for the purpose of appealing the adverse class determination.

So there is no question --

QUESTION: Just so long as they act promptly.

MR. SCHEINHOLTZ: Promptly. Within the time that she could have done so herself.

QUESTION: Right.

MR. SCHEINHOLTZ: So that, you know, there's no question that they are protected in that respect.

Now, if you have somebody who is unaware of the pendency of this class action, and who hasn't filed charges, I think that the answer to the first part, if they're unaware of this action, they certainly haven't relied upon its existence in refraining from prosecuting a claim, and if they

haven't filed charges, I suggest it's because they believe that they haven't been injured.

But, in any event, they would not be barred by principles of res judicata by anything that happened in this case.

Now, we have other arguments in the case, policy considerations, and I think they are amply set forth --

QUESTION: You say they may not be injured; they may be aided, however?

MR. SCHEINHOLTZ: They may be what?

QUESTION: They may be injured, but they might conceivably be aided by the results of the first case.

MR. SCHEINHOLTZ: Possibly. Or possibly not.

Thank you.

MR. CHIEF JUSTICE BURGER: Anything further, Mr. Hackett?

REBUTTAL ARGUMENT OF ROBERT N. HACKETT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HACKETT: Yes.

In answer to Justice White's question, the Ninth Circuit case, Spangler vs. U.S. held that the striking of intervention allegations was a denial of an injunction. It's cited in our brief.

In general, I would like to narrow the grounds of our appeal to say that they're based on the first, really the

first argument in our brief. That is, the argument that the immediate result of this order means that a person who had applied for a job at a Westinghouse broadcasting station in Los Angeles is not going to get injunctive relief this case if there is no class. The immediacy is not the immediate harm to a person, the named plaintiff, the immediacy argument is not relevant to the appeal under 1292(a)(1).

There is no legislative history or cases that say the harm must be immediate. They say that the harm must be irreparable to the case.

Now, there is no defendant that I know of that is going to say that "I can have an injunction giving me an affirmative-action program in the Los Angeles Westinghouse broadcasting station if I don't have a class action; if I lose the class action, I'm never going to get that in this case."

QUESTION: You say your client is never going to get an injunction in this case?

MR. HACKETT: No, it's not my client, sir. My client, Mr. Justice Rehnquist, it's possible she alone will get it. But the scope of the injunction will not be like under Teamsters vs. U.S. unless it is a perforce case. That is, if it's an unconstitutionality or illegality use of a test. And the test is being used everywhere; perforce I would get relief.

But in this particular case, which is an across-the-board situation, there is no way that the people in various

radio stations or people who are discriminated because they use all male salesmen, if they do, are going to be relieved. The injunctive relief, as Mr. Justice Stevens pointed out, would only flow to the individual plaintiff.

QUESTION: Well, assuming when the final judgment is made, the class action has been reinstated, what happens?

MR. HACKETT: Well, that's true, Mr. Justice Marshall.

QUESTION: What happens?

MR. HACKETT: If it's reinstated, it would have to go down and be tried all over again.

QUESTION: No, no.

MR. HACKETT: As a class action.

QUESTION: If you hadn't stopped it when you did stop it, suppose you had gone on and tried it as an individual.

MR. HACKETT: Yes, sir.

QUESTION: And just before the judgment, the judge says, "Look, I decided I was wrong about that class action; bring the class in now."

MR. HACKETT: Yes, that could happen.

QUESTION: Could he do that?

MR. HACKETT: I believe --

QUESTION: Could he do that?

MR. HACKETT: I believe that under Mr. Justice Stewart's language in United Airlines vs. McDonald, there is some doubt that after you strip the class of its character,

strip the action of the class --

QUESTION: I thought the Rule said specifically that -- the Rule says that it can be.

QUESTION: Rule 23(c), you mean?

MR. HACKETT: Yes. The Rule says that -- (c)(1) -- (c)(2) says that it's conditional.

QUESTION: Do you want me to ignore that Rule?

MR. HACKETT: No, I don't want you to, sir. But any interlocutory order is conditional. He can do this --

QUESTION: No, I mean this particular Rule says that this can be changed.

MR. HACKETT: Absolutely.

QUESTION: And so the judge could have changed this one?

MR. HACKETT: The judge can change it, but the order as it stands, as was said in Yaffee vs. Powers, is conditional.

QUESTION: I know, but you read the point as saying there was no way that this woman in Los Angeles could get any relief. Isn't that what you said?

MR. HACKETT: That is correct, sir, but --

QUESTION: Do you want to change that?

MR. HACKETT: Yes, sir, I do. If the judge changes his mind, absolutely they can get relief. But I call your attention to 1292(a)(1) itself, which says that any order granting, continuing, modifying, refusing or dissolving injunc-

tions, or refusing to dissolve or to modify injunctions.

Now, --

QUESTION: Well, what in this order used the word "injunction"?

MR. HACKETT: In the class denial, sir?

QUESTION: Yes. It didn't say one word about injunction.

MR. HACKETT: He did not use it. The effect of --

QUESTION: And you hadn't reached the injunction point in the case yet, had you?

MR. HACKETT: That is correct, Justice Marshall.

QUESTION: So how can we use that language?

MR. HACKETT: Because the cases interpreting the denial of injunction say you don't have to use the word. If the interlocutory order has the effect of denying an injunction, then the law applies.

In the Enelow-Edison rule, and in all the affirmative decisions under 1292(a)(1), there was no actual use of the word "injunction" in many of those cases.

QUESTION: Well, it could happen in this case that this woman is the wrong woman. So then you're appealing that now.

MR. HACKETT: It's possible, yes.

QUESTION: Because they denied her an injunction.

MR. HACKETT: It's possible that she is the wrong

woman, although I don't think that's really the relevant inquiry to the effectiveness of the order.

QUESTION: Well, it could have been denied because she moved to Timbuktu.

MR. HACKETT: Well, --

QUESTION: I'm talking about when the case is finished, which could be three years from now.

MR. HACKETT: Yes, sir.

QUESTION: I can't project that far off.

MR. HACKETT: Yes, but I think 1292(a)(1) says you have to. If the effect is -- just like you would dismiss for jurisdiction in General Electric, I think it has that effect.

QUESTION: Well, what if it's a result of a refusal to make discovery on the part of the plaintiff? The district court enters an order that a particular paragraph in the plaintiff's request for instruction will be deemed denied. Is that appealable under your theory?

MR. HACKETT: You have to use the test of having the court see if the substantial effect of the order was to deny an injunction. It's a substantial effect test.

QUESTION: Well, then, why isn't counsel's argument in response to my question in Liberty Mutual a perfectly good one? Judge Weber in that case had come right down to the wire and had all but granted an injunction against Liberty Mutual?

MR. HACKETT: Because it was a pure stage one proceeding,

he only found liability, he did not do anything to move forward. And they did not comply with 1292(a)(1).

QUESTION: But it seems to me he was a lot further along the road to granting an injunction against Liberty Mutual than your case was here.

MR. HACKETT: No, because -- I don't believe, because I think his order only found that a certain procedure was illegal. He may not have found that any injunctive relief was appropriate in that case. Nor whether there was -- was there a request by the plaintiff or the right party for injunctive relief.

QUESTION: But Judge McCune might have found no injunctive relief was available here in this case. Even though he had ruled the other way on your class certification question.

MR. HACKETT: He could find it, but by throwing the class out, he has effectively found it already, as to the class. That's the gist of the argument.

Because we now have no class.

QUESTION: May I ask, why would there be any irreparable injury in your case of employees in other radio stations?

MR. HACKETT: Well, --

QUESTION: They could bring suit themselves later.

MR. HACKETT: Well, they can, but I think the whole idea of Title VII in class actions is to have a class action

and prevent a multiplicity of suits.

QUESTION: Yes, but isn't it possible that one of these other employees would be recognized by a court as being an appropriate class representative?

MR. HACKETT: I think it's possible, but I don't think that, in the class situation, we're under a legal duty to go out and look for them, or --

QUESTION: No, but --

MR. HACKETT: And also the class action, remember, tolls their statute of limitations. After the denial, the substantive statute of limitations continues to run. And they may lose their rights, simply by the fact that the statute runs. And not know about the fact that their right as a discharged employee, that his statute had run. The class action device is meant to head that off.

And I believeit does that.

I would like to say, of course, that any interlocutory order can be modified. I don't think there's any question about that.

And I would like to say that the class action device, as Spottswood Robinson said, in the D. C. Circuit, is a very necessary device to Title VII cases. Any restriction of the class action device will work as a detriment to the enforcement of Title VII.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:37 o'clock, p.m., the case in the above-entitled matter was submitted.]

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