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United Airlines, Inc. v. McDonald: Class Certification and the Uncertain Sound, 11 J. Marshall J. of Prac. & Proc. 635 (1978)

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CASENOTE

UNITED AIRLINES, INC. v McDONALD: CLASS CERTIFICATION AND THE "UNCERTAIN SOUND"

> For if the trumpet give an uncertain sound, who shall prepare himself for battle?
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> I Corinthians 14:8

The class action had its genesis in equity more than one hundred seventy five years ago.[1] Today, it is specifically provided for in Rule 23 of the Federal Rules of Civil Procedure.[2] Despite problems of cost and manageability, class actions have been filed with increasing frequency in the post World War II period and loom as the procedural vehicle of the future.[3] By permitting large groups of similarly situated claimants to be represented by a relatively few active litigants, the class action has served as a practical answer to the complex procedural problems spawned by the wide ranging social legislation en-

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1. Moore & Cohen, *Federal Class Actions*, 32 ILL. L. REV. 307 (1937). Class suits evolved in English equity through necessity. In order to do complete justice, compulsory joinder of all interested persons became the accepted rule in chancery. The practicality of the class action gave impetus to its development. *See generally* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356, 375-400 (1967) [hereinafter cited as *1966 Amendments*]; 3B MOORE'S FEDERAL PRACTICE § 23.08 (2d ed. 1976) [hereinafter cited as MOORE'S].

2. Fed. R. Civ. P. 23. Section (a), which states the requirements for a class action, provides:

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

For an in-depth study of class actions see Note, *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).

3. Congress has recently created numerous opportunities for public and private enforcement of public interest legislation. Class actions provide an economical procedure for implementation of such legislation. *E.g.*, Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c-15h(1976); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1976); Truth in Lending Act, 15 U.S.C. §§ 1601-1667 (1976); Consumer Product Safety Act, 15 U.S.C. §§ 2051-2081 (1976); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970 & Supp. V); Clean Air Act of 1970, 42 U.S.C. §§ 1857a-18571 (1970 & Supp. V).

acted in the last twenty-five years.[4] This policy, of empowering a few individuals to champion the interests of a larger class of claimants, has frequently been resorted to by Congress for the implementation of numerous legislative programs. Thus, the enforcement of modern social legislation has increasingly fallen upon the shoulders of the class champion.[5]

For a class action to be permitted under Rule 23, a suit must initially be certified by the district court "as soon as practicable" after the action is commenced.[6] While the question of whether a particular class should be so certified may be a difficult one, the more critical question is when does the denial or grant of a class certification become a final determination for purposes of appeal.[7] In confronting the latter question, a court will invariably be presented with competing goals. On the one hand lies

4. For example, the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-11 (1970 & Supp. V) [hereinafter cited as Title VII] is an excellent example of such social legislation. In reference to the section that deals with unlawful discrimination in employment, the Supreme Court has stated that the object of the Act is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

5. The broad scope intended by Congress for public policy legislation such as the Civil Rights Act of 1964 was noted in Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969). In this sex discrimination case brought by women against a weight lifting restriction placed on female but not male job descriptions, the court stated that "[a] suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e., race, sex, religion or national origin." 416 F.2d at 719. A similar conclusion was reached in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) where the Court held that since vindication of the public interest is dependent upon private suits, the suits are private in form only and a plaintiff who obtains an injunction does so "as a private attorney general," thus effecting a policy that Congress considered of the highest priority. *See also* Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); Jenkins v. United Gas Corp., 400 F.2d 28, 35 (5th Cir. 1968).

6. Fed. R. Civ. P. 23(c)(1) provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

7. Generally the statutes, principles, and case law governing appealability in the federal courts apply in class actions in the same manner as in civil actions. This is particularly true of the final judgment rule. 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 1802, at 269-284 (1972) [hereinafter cited as WRIGHT & MILLER]. *But see* Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 COL. L. REV. 1292 (1970) [hereinafter cited as *Interlocutory Appeal*].

The most recent ruling on the question of the appealability of a determination of class certification by a district court appeared in Coopers & Lybrand v. Livesay, —U.S.—, 98 S. Ct. 2454 (1978). The Supreme Court addressed the question whether a district court's determination that an action may not be maintained as a class action under Fed. R. Civ. P. 23 is a "final decision" within the meaning of 28 U.S.C. § 1291; and therefore, appealable as a matter of right. The Court concluded that a determination of class

the often stated Congressional objective that all parties whose interest may be affected by the outcome of the suit should be included in the class. On the other hand exists the traditional judical objective that litigation must end, despite the fact that some final orders will fail to include all possible claimants.[8]

The inherent conflict in a procedure that strives to include all individuals with an interest in the outcome while simultaneously attempting to insure some modicum of manageability is reflected in the divergent approaches taken by the circuit courts when reviewing orders denying class certification.[9] Generally, an appeal as a matter of right is available under 28 U.S.C. section 1291[10] from decisions of a district court that are considered final; that is, a decision that "ends the litigation on the merits and leaves nothing for the courts to do but execute the judgment."[11] Generally, orders denying class certification are viewed as interlocutory in nature and, hence, lacking the elements of finality required under section 1291.

An exception to this view, however, known as the "death knell" doctrine, had been recognized by a number of circuits.[12] This doctrine provided that a denial of class certification is a fi-

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certification is *not* a final order, and therefore not entitled to an appeal as of right. *Id.* at 2456.

8. The basic rationale of the finality rule is conservation of judicial resources. Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351 (1969) [hereinafter cited as, *Appealability in Federal Courts*].

9. Coopers & Lybrand v. Livesay, —U.S.—, 98 S.Ct. 2454 (1978) (appeal of denial of class certification by a group alleging false information on a stock prospectus); Williams v. Wallace Silversmiths, Inc., 566 F.2d 364 (2d Cir. 1977) (appeal on order denying motion for certification in a Title VII race discrimination suit not allowed); Kohn v. Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974) (appeal from order granting class action standing to woman law student contesting hiring practices discriminated on basis of sex); Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308 (2d Cir. 1974) (appeal from order allowing class action for all Hartford shareholders who had exchanged their shares for ITT).

10. 28 U.S.C. § 1291 (1970) reads in part: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." *See generally Appealability in Federal Courts, supra* note 8, at 353-57.

11. Catlin v. United States, 324 U.S. 229, 233 (1945).

12. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966) (class action on behalf of all odd-lot traders on New York Stock Exchange). "Dismissal of the class action . . . will irreparably harm Eisen and all others similarly situated . . . . Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed." *Id.* at 121. *See also* Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152-53 (1964):

> [t]he requirement of the finality [rule] is to be given a practical rather than a technical construction . . . . [I]n deciding the question of finality the most important competing considerations are the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other.

nal order since without the financial incentive of a possible group recovery, an individual plaintiff, with a small financial stake in the outcome, would feel it economically imprudent to pursue his lawsuit to a final determination.[13] This view of finality under section 1291 has recently been discredited by the Supreme Court in *Cooper & Lybrand v. Livesay*.[14]

Despite the conflict on what constitutes finality of class certification, after a denial of class certification by which a lawsuit is then "stripped of its class status,"[15] the named plaintiffs may continue to press for a judgment by maintaining the law suit in their individual capacity. In such instances, an appeal is not allowed until a final order on the merits has been entered.[16] Under Rule 23 (d)(4),[17] the trial court may, if the individual claims are sufficiently large, order the pleadings amended to eliminate allegations regarding the representations of putative class members and then allow the individual action to proceed accordingly. In this situation, a putative class member is unable to participate in the litigation.

A putative class member, one who has been excluded because class action status has been denied, may yet protect his interests by means of intervention under Rule 24 of the Federal Rules of Civil Procedure.[18] Intervention may be granted as a

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13. In a case where a plaintiff simply could not continue his lawsuit alone, the "death knell" doctrine would provide immediate review of a refusal of class suit designation. Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308 (2d Cir. 1974); Korn v. Franchard Corp., 443 F.2d 1301, 1306 (2d Cir. 1971). *See also Appealability in Federal Courts, supra* note 8, at 364-67. Even before the Supreme Court decision in Cooper & Lybrand v. Livesay, discussed in text accompanying notes 79-87 *infra*, the death knell doctrine had been rejected in a number of circuits as being too mechanical and as having a discriminatory effect in that it did not permit appeals by parties who had the economic ability to prosecute the lawsuit on their own behalf. *E.g.*, Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); Shayne v. Madison Square Garden Corp., 491 F.2d 397 (2d Cir. 1974). *See* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B. C. INDUST. & COM. L. REV. 501 (1969); WRIGHT & MILLER, *supra* note 7, §1802.

14. —U.S.—, 98 S.Ct. 2454 (1978).

15. Proposed Rules of Civil Procedure, Advisory Comm. Note, 39 F.R.D. 69, 104 (1966).

16. 28 U.S.C. § 1291 (1970) provides: "the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." *See generally Appealability in Federal Courts, supra* note 8, at 353-57.

17. Rule 23(d)(4) states: "In the conduct of actions to which this rule applies, the Court may make appropriate orders requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly."

18. FED. R. CIV. P. 24 reads in pertinent part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action; (1) when a statute . . . confers an un-

matter of right or by permission of the district court. After viewing all the circumstances, the district court must exercise its discretion in determining whether a party shall be allowed to intervene.[19] Once the motion to intervene has been granted, the intervenor becomes a named party to the action. The considerations of when a motion is timely for purposes of intervention and when a denial of class certification can be appealed came to the forefront in *United Air Lines v. McDonald*.[20] In *McDonald*, the U.S. Supreme Court addressed the following question: whether a putative class member's motion to intervene is timely if it is made for the limited purpose of appealing an order denying class certification, when that motion is made after a judgment on the merits had already been entered by the trial court for the named plaintiffs.

UNITED AIR LINES V. MCDONALD

Facts

Liane Buix McDonald, respondent in the Supreme Court, was discharged by United Airlines in 1968 under the "no-marriage" rule which applied to female stewardesses but not to male stewards.[21] McDonald was aware that other stewardesses who had also been terminated had already filed complaints with the Equal Employment Opportunity Commission (EEOC),[22]

conditional right to intervene; or (2) when the applicant claims an interest relating to the . . . subject of the action and . . . disposition of the action may . . . impair or impede his ability to protect that interest. (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action; (1) when a statute . . . confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

19. Joseph Skillken & Co. v. Toledo, 528 F.2d 867 (D.C. Pa. 1975); Jones v. United Gas Improvement Corp., 69 F.R.D. 398 (D.C. Pa. 1975) (timeliness is a matter committed to discretion of a trial court whose determination can be reversed only if it is an abuse of discretion).

20. United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977). Hereinafter cited as *McDonald*.

21. Until November 7, 1968, United followed a policy requiring stewardesses to terminate their employment upon marriage. The policy was abandoned in 1968 by a formal agreement between the Air Line Pilots Association and United providing that any flight attendant who had been terminated because of the rule and who had registered some form of complaint would be entitled to reinstatement without loss of seniority but without back pay. Brief for Petitioner at 3, United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977).

22. The Equal Employment Opportunity Commission (EEOC) was created to enforce the Civil Rights Act of 1964 §2000e-4, 42 U.S.C. §2000e-4 (1970 & Supp. V).

and therefore, she did not feel compelled to take any action at that time.[23] In 1970, based on EEOC findings, Carole Romasanta filed a class action against United Airlines,[24] making McDonald a putative class member. The basis for this complaint was sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[25] In response, United immediately moved to strike the class allegation in *Romasanta*. Ruling on this motion, the district court defined the class as consisting of only those stewardesses who had been discharged because of United's no-marriage rule and who had protested the no-marriage rule by filing a grievance under United's collective bargaining agreement or with the EEOC. Since the class, as so construed, was too small to satisfy the numerosity requirements of Rule 23(a)(1), the district court granted United's motion to strip the action of its class action status.[26] Under 28 U.S.C. section 1292(b)[27], the district court then certified for appeal its or-

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23. Title VII of the Civil Rights Act of 1964, §706(e), as amended, 42 U.S.C. § 2003-5(e),(f) provides that a charge shall be filed 180 days after the alleged unlawful employment practice occurred. If the charge is either dismissed or the Commission hasn't filed a civil action, EEOC shall notify the complainant and, within 90 days after receipt of the letter to sue, the complainant may bring a civil action. McDonald was terminated in September 1968. Ms. McDonald did not file a grievance with either EEOC or ALPA under the union agreement within 180 days of her discharge.

24. Romasanta v. United Air Lines, Inc., No. 70C1157 (N.D. Ill. May 15, 1970).

25. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-11 (1970 & Supp. V) reads in pertinent part: (a) It shall be an unlawful employment practice for an employer (1) . . . to discharge any individual, . . . because of such individual's race, color, religion, sex, or national origin. *Id.* 42 U.S.C. § 2000e-2 (Supp. V).

26. In November 1968, when United revoked its no-marriage policy by agreement with the Air Line Pilots Association, the Airline reported that 30 stewardesses qualified for and were offered reinstatement under the agreement: eleven accepted, three tendered resignations, two did not respond, and three had claims pending before the State of New York Division of Human Rights. Brief for Petitioner at A4, 432 U.S. 385 (1977).

The District Court Judge, in an order dated December 6, 1972, stated:

> [A]ll allegations of the complaint relating to class action be stricken. The class of plaintiffs who protested their termination does not meet the numerosity requirement of Rule 23(a) of the Federal Rules of Civil Procedure . . . . This court is more than ever convinced a class action would not be expedious or efficient . . . . [B]ased on only what is before us [the court] is more than ever convinced that it has a series of individual suits within a suit, that the merits may vary from individual to individual, that all are not similarly situated.

Brief for Petitioner at 7 (app.).

27. 28 U.S.C. 1292(b) (1970) provides for review of interlocutory decisions of trial court only:

> When a district judge . . . shall be of the opinion that an [interlocutory] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation,

der striking the class allegations. The Seventh Circuit Court of Appeals, however, declined to accept the interlocutory appeal.

After this, twelve married stewardesses, who had protested their discharge, moved to intervene in order to be joined as named plaintiffs with Romasanta. This motion was granted in December, 1972, and the litigation proceeded as a joint suit on behalf of Ms. Romasanta and these additional plaintiffs. At this time, Ms. McDonald did not attempt to intervene. Furthermore, the relatively short statute of limitations under Title VII had now expired.

While the appeal of class certification in Romasanta's original complaint was pending, the substantive liability of United under Title VII was resolved in *Sprogis v. United Airlines*[28] which was an individual action. In *Sprogis*, the Seventh Circuit affirmed the lower court's opinion that United's "no marriage" rule did violate Title VII.

After *Sprogis* was affirmed, in July, 1974, the district court in *Romasanta* granted the plaintiffs' motion for summary judgment on the issue of United's liability and appointed a special master to fashion appropriate remedies for each plaintiff. By October 1974, the parties had arrived at a settlement that provided for reinstatement of the included plaintiffs and also an award for backpay. The district court dismissed *Romasanta* with prejudice and incorporated the settlements into its final order.

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he shall so state in writing in such order. The court of appeals may . . . in its discretion, permit an appeal to be taken from such order.

28. Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1970) *aff'd* 517 F.2d 387 (7th Cir. 1975), *cert. denied*, 404 U.S. 991 (1971). The first complaint against United's no-marriage rule was filed with the EEOC by Mary Sprogis who had been terminated by United in 1966. In 1968, the EEOC found cause to believe that United's policy constituted illegal sex discrimination, and on October 31, 1968 it issued Sprogis a right to sue letter. She then filed a timely *individual* action against United in the Northern District of Illinois. Although Sprogis was filed as an individual action, the district court retained jurisdiction to determine whether relief should be granted to other stewardesses discharged by United pursuant to the policy held illegal under Title VII. 308 F. Supp. 959, 961. United urged that the class aspect of a Title VII action must be established *prior* to judgment on the merits. 444 F.2d at 1201. The appellate court, however, held that vindication of the public interest constituted an important facet of private litigation under Title VII and that the district court did have power to consider "extending relief beyond the named plaintiff." *Id.* at 1202. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 428-29 (8th Cir. 1970); Hutchings v. United States Indus., Inc., 428 F.2d 303, 311-12 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969) (weight lifting restrictions on female job descriptions); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968). Since interests of other members of the class are at stake, the court has a special responsibility to devise remedies that effectuate not only the policies of the act but also afford private relief to the individual employee instituting the complaint.

One week after entry of this final order, McDonald learned that the Romasanta plaintiffs, despite their fruitless interlocutory appeal, had decided not to appeal the district court's prior order denying class certification. Eighteen days after the judgment had been entered, McDonald filed a motion to intervene for the limited purpose of appealing the adverse class certification order. The district court denied intervention on the grounds that McDonald's motion was not timely.[29] McDonald then appealed this order and the district court's previous order denying class certification of the original *Romasanta* class. The Court of Appeals for the Seventh Circuit reversed both orders and certified the class as described in Romasanta's complaint: a class consisting of all United stewardesses discharged because of the no-marriage rule, whether or not they had formally protested their discharge.

By reversing the district court, the court of appeals decision presented United with increased liability. An unidentified class of stewardesses who were now represented by Ms. McDonald had emerged overnight. Each of these now recognized class members was entitled to benefits commensurate with those received by the Romasanta plaintiffs.

In the United States Supreme Court, United did not seek review of the determination that its no-marriage rule violated Title VII, nor did it contest the merits of the court of appeals' decision on the class certification issue.[30] The only issue United raised was whether Ms. McDonald's post-judgment motion to intervene was timely.

Decision of the Supreme Court

The United States Supreme Court dealt with three distinct concepts of timeliness in *McDonald*. The first concept concerned the application of Title VII's statutes of limitation as applied to Ms. McDonald and the class she championed. The second involved the discretionary ruling of a district court on the timeliness of a motion to intervene under Rule 24. The third

29. United Airlines Inc. v. McDonald, 432 U.S. 385 (1977) quoting from the unpublished opinion of the district court:

> Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek relief from this court in any way during that period of time, and litigation must end. I must deny this motion. Of course, that is an appealable order itself, and if I am in error then the court of appeals can reverse me and we will grant a hearing, but in my judgment this is too late to come in.

Id. at 390.

30. 432 U.S. 385, 391 (1977).

pertained to the time alloted for appeal under Rule 4(a) of the Federal Rules of Appellate Procedure.[31] In deciding that McDonald had made a timely motion to intervene by meeting the requirements of Rule 4a, the Supreme Court grafted one concept of timeliness onto the others and held that the tolling of the statute of limitation continued even after class status had been denied. To reach this holding, the Court differentiated between an intervenor who seeks to appeal the denial of class certification, and one who attempts to join the suit as an additional party.[32]

The Indestructible Class

A major problem faced by the Court was that if McDonald's motion to intervene was denied, she would then be barred by the statute of limitations of Title VII from obtaining any relief.[33] Dealing with this dilemma, the Court juggled two ideas: first, whether the class was disbanded when class action status was denied by the district court, and second, whether the statute of limitations had any effect on Ms. McDonald's attempt to intervene for purposes of appeal.

The Court first acknowledged a point that United was willing to concede: McDonald was a member of the class of stewardesses defined in Romasanta's complaint who had been discharged under United's no-marriage rule at the time the complaint had been filed. The crucial factor in the Court's analysis, however, was its reasoning that McDonald *remained* a member of the class *after* the district court had denied class status.[34] The effect of this analysis was a tacit acknowledgement that the class was indestructible.

To understand the impact of this conclusion, it is necessary to examine the issue that was decided in *American Pipe & Construction Co. v. Utah*,[35] which United relied upon in contending

31. Rule 4(a) of the Federal Rules of Appellate Procedure provides in pertinent part: "notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from . . . . "

32. United Air Lines, Inc. v. McDonald, 432 U.S. 392 (1977).

33. *See* note 23 *supra*.

34. *See* note 26 *supra*.

35. American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974). An anti-trust action had been filed eleven days before the applicable one-year statutory period expired. Seven months later, the trial court issued its order denying class action status, basing it upon lack of numerosity. Eight days thereafter a number of potential class members sought to intervene. Intervention was denied on the theory that denial of class status had the effect of "untolling" the statute of limitations as though the class suit had not been filed. The court of appeals disagreed and held that permissive

that McDonald's motion to intervene was barred by the statute of limitations. In *American Pipe*, the Supreme Court allowed a number of governmental units which were purported members of the class that had been denied class status to intervene as individual plaintiffs though their motions were filed after the applicable statute of limitations had expired. The Supreme Court only said that the statute of limitations is tolled "during the *pendency* of a motion to strike a class action."[36] This holding rested on the principle that statutes of limitation are favored in the law because they "promote repose by giving security and stability to human affairs."[37] The logical extension of this ruling would imply that if the motion to strike the class allegations is granted, the statute of limitations would again start running.[38]

United's reliance on *American Pipe* as controlling precedent was dismissed by the Seventh Circuit Court of Appeals in a footnote.[39] In the Supreme Court opinion, however, Mr. Justice Stewart, speaking for the majority, addressed the question in the text, and agreed with the appellate court that United's reliance was misplaced. Citing no specific cases to illustrate why *American Pipe* should not control, the Court pointed out that McDonald would have occupied the same position as the intervenors in *American Pipe* had she wished to be joined as a plaintiff. McDonald's purpose, however, was "wholly different."[40] She intended only to appeal the denial of class certification. By differentiating between an intervenor who seeks to appeal the denial of class certification and one who attempts to join the suit as an additional party, the Court, in effect, held that the statute of limitations is "tolled from the filing of a class action complaint

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intervention was timely under Rule 24(b)(2). The Supreme Court granted certiorari and concluded that:

> [A]t least where class action status has been denied solely because of failure to demonstrate that the class is so numerous that joinder of all members is impracticable, the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene.

Id. at 553.

36. American Pipe & Construction Co. v. Utah, 414 U.S. 538, 560 (1974) (emphasis added).

37. 432 U.S. at 401 (Powell, J., dissenting) *citing* Wood v. Carpenter, 101 U.S. 135, 139 (1879).

38. Romasanta v. United Air Lines, Inc., 537 F.2d 915, 922 (1976) (Pell, J., dissenting) (the tolling procedure established by the Supreme Court in *American Pipe* would have no meaning without its corollary requirement that as soon as the class is decertified, former class members who want relief must "make timely motions to intervene"). *But see* Wheeler, *Predismissal Notice and Statutes of Limitations in Federal Class Actions After American Pipe and Construction Co. v. Utah*, 48 S. CAL. L. REV. 771 (1971).

39. 537 F.2d 915, 918, n.6 (1976).

40. 432 U.S. at 392.

until such time after final judgment when the intervenor can determine that the interests of the class members will no longer be protected by the named class representatives."[41] The Court, therefore, concluded that members may rely on the class champion until he or she abdicates.[42]

The Court, however, failed to note the difference between United and American Pipe in reference to the issue of liability. In *American Pipe*, the intervenors still had to litigate the liability issue. In *McDonald*, United's liability had been fixed in *Sprogis*, obviating Ms. McDonald's problem with Title VII's statute of limitations. When the Court held that Ms. McDonald's motion was timely, it breathed life into the class that McDonald represented and gave them the ability to recover for United's past violations of Title VII.

By giving the class a life that survives the district court's denial of class certification, it would appear the Court viewed Rule 23 in a new perspective. Rule 23 would seem to support the concept that once class status is denied, the litigation loses its class character in every respect.[43] The district court has broad discretion in determining whether a class action may be maintained.[44] The justification for investing a district court judge with a wide latitude of discretion is to ensure that complex class actions remain manageable.

The Court acknowledged that in *Romasanta*, in which McDonald was a putative class member, the purported class was "stripped of its character" as a class action. Nevertheless, the Court pointed to *Philadelphia Electric Co. v. Anaconda American Brass Co.*,[45] for the proposition that "[w]here the determination is negative . . . it does not necessarily follow that the case must be treated as if there never had been an action brought on behalf of the absent class members."[46]

Philadelphia Electric recognized that if a negative determination were the result of "judicial housekeeping" considerations, there should, at the minimum, be afforded an opportunity

41. *Id.* at 394 (Powell, J., dissenting).

42. Romasanta v. United Air Lines, Inc., 537 F.2d 915, 918 (7th Cir. 1976).

43. Proposed Rules of Civil Procedure, 39 F.R.D. 94, 104 (1966) provides that a negative determination means that the action should be stripped of its character as a class action. *E.g.*, Pearson v. Ecological Science, 522 F.2d 171 (5th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976) (named plaintiffs and intervenors have no continuing duty to excluded class members after denial of class status). *See* WRIGHT & MILLER, *supra* note 7, § 1795, at 220-22.

44. *See* WRIGHT & MILLER, *supra* note 7, § 1785, at 128-34.

45. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 461 (E.D. Pa. 1968) (ten related private actions for alleged violations of the antitrust laws filed against thirteen defendants).

46. *Id.* at 461.

for putative class members to prove that their reliance upon the "purported class action [was] sufficient to toll the statute of limitations."[47] Since the courts are in the "exploratory stage" of the application of Rule 23, the *Philadelphia Electric* court noted that application of the statutes of limitations under Rule 23 was an open question but encouraged a practical approach to problems dealing with the rights of putative class members. Four years later, the Supreme Court in *American Pipe* addressed the question of whether putative class members have any rights after the negative determination of class certification. *American Pipe* clearly implied that denial of class certification is the "critical stage"[48] that gives constructive notice to putative class members that they must personally act to protect their rights. But the *McDonald* Court rejected the applicability of *American Pipe* on the narrow distinction that McDonald's purpose for intervening was *to appeal*, not to join.

Appellate Review of Class Determinations

The Court determined that since McDonald filed her motion for intervention in compliance with the time limitation for lodging an appeal under Rule 4(a) of the Federal Rules of Appellate Procedure, her motion to intervene for purposes of appeal was indeed timely. Since McDonald's appeal was successful, she and all other putative class members from the *Romasanta* action were given relief. *McDonald*, therefore, suggests that from United's viewpoint the word "timely" has been stretched to its outer limits. For if one accepts the view that the original denial of class certification is the critical stage for putative class members, then immediate review of the denial of class certification would have been more opportune strategically for United had it occurred in 1972 when certification was denied, rather than in 1977 when McDonald was permitted to intervene. One of the objectives of the 1966 amendments to Rule 23 was to prevent pu-

47. *Id.*

48. NAACP v. New York, 413 U.S. 345, 367 (1974). The Court upheld a district court's ruling that an attempted intervention seventeen days after the would-be intervenors first learned of the pendency of a suit then three months old was untimely under Rule 24. The suit had then reached a "critical stage" and it was "incumbent upon [them] at that stage of the proceedings, to take immediate affirmative steps to protect their interests . . . by way of an immediate motion to intervene." *Id.* at 367. *See also* SEC v. Bloomberg, 299 F.2d 315, 320 (2d Cir. 1962) (affirmed denial of SEC's motion to intervene in reorganization proceedings as untimely because the SEC had waited 40 days after it was in a position to intervene); Hoots v. Penna., 495 F.2d 1095, 1097 (3d Cir. 1974), *cert. denied*, 419 U.S. 884 (1974) (intervention denied because "petitioners could not reasonably claim ignorance either of the proceedings or the necessity for intervention at a much earlier date").

tative class members from joining an action after liability had been determined. *McDonald* frustrates this objective by allowing an entire class to wait and see whether the outcome of the suit is in its favor.

If the class denial had been reviewed in 1972, there would have been no need to consider Ms. McDonald's motion to intervene. Thus, a major question not specifically raised by *McDonald* is whether class certification decisions should be immediately appealable. In *Herbst v. ITT*,[49] the Second Circuit stated that immediate review "will aid the district courts in disposing of these cases and promote the sound administration of justice." *Herbst* went on to point out that defendants in class actions often face "potential damages in the millions of dollars."[50] Even though the validity of the plaintiff's claims may be doubtful, this potential liability is a great inducement for defendants to settle before an appeallate court reviews a class certification decision.

Traditionally, a class certification order under Rule 23 is an interlocutory order that is not immediately appealable as a matter of right. There are, however, other provisions that allow for an immediate appeal of a class determination.[51] The plaintiffs in *Romasanta* attempted to use the most common method by taking an interlocutory appeal from the denial of class status under 28 U.S.C. section 1292(b).[52] But the Seventh Circuit re-

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49. 495 F.2d 1308, 1312 (2d. Cir. 1974).

50. 495 F.2d at 1313. *See also* City of New York v. Int'l Pipe & Ceramics Corp., 410 F.2d 295, 300 (2d Cir. 1969) (Hays, J., dissenting). *See generally* Note, *Interlocutory Appeal from Orders Striking Class Action Allegations*, 70 COL. L. REV. 1292 (1970).

51. Immediate appeal had been made available under 28 U.S.C. § 1291 in those cases in which the claims of the individual class members are so small that the order necessarily sounds the "death knell" of the litigation. Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *but see* Cooper & Lybrand v. Livesay, —U.S.—, 98 S.Ct. 2454 (1978), *discussed* in notes 79-87 *infra*. Another method for immediate appeal under 28 U.S.C. § 1291 is through the "collateral order" exception which is:

> [T]hat small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the case itself to require that appellate consideration be deferred until the whole case is adjudicated.

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The second method available to avoid the effect of the final judgment rule is based on 28 U.S.C. 1292 (a) which expressly permits interlocutory appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions." The parties may also seek appeal under 28 U.S.C. 1292(b) which provides for certification by the district court to the appellate court of a question about which there is a "substantial ground for difference of opinion." The remaining method of obtaining review of an interlocutory order is through a writ of mandamus issued by the appellate court under 28 U.S.C. § 1651.

52. Professor Kaplan, Reporter of the Advisory Committee which

fused to grant leave to appeal notwithstanding certification by the trial court.

The Seventh Circuit considered the district court's refusal to certify the class of stewardesses to be subject to appellate review *only* after final judgment in accordance with the provisions of 28 U.S.C. section 1291.[53] The Supreme Court, agreeing with the Seventh Circuit, cited *Share v. Air Properties G. Inc.*[54] as determinative on the question of post judgment appeal. In *Share*, the Ninth Circuit held that a trial court order denying class certification is not an appealable order until after final judgment.[55] Thus the Court followed the reasoning in *Share* that if at least one individual among the putative class members possesses a substantial claim, that individual could champion the cause of the excluded class members and challenge on appeal the denial of class certification.[56]

United conceded that Ms. Romasanta and the additional parties plaintiff were entitled to an appeal after a final judgment. But United argued that Ms. McDonald was barred by the statute of limitations and hence, not entitled to intervene notwithstanding the unwillingness of the named plaintiffs to appeal the denial order after final judgment.

One pivotal point in any determination of class status under Rule 23 is whether the parties representing the class "fairly and adequately protect the interests of the class." Under Rule 24, intervention becomes necessary at the point when a putative class member is not adequately represented by named parties, and runs the risk of not being able to protect his interests as a practical matter. In class actions this point is reached when the named plaintiffs do not appeal the original order denying class certification.

From the individual's point of view, the incentive of gaining a group with which to share expenses and attorney's fees, usually insures that the class question will be appealed by the named plaintiffs. If this is the situation, intervention by putative class members is unnecessary. In *Romasanta*, however, despite such economic incentives, the named plaintiffs settled

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drafted revised Rule 23, urged liberal use of the § 1292(b) procedure. *1966 Amendments, supra* note 1, at 390, n.131. For text of this section, see note 27 *supra*.

53. Romasanta v. United Air Lines, 532 F.2d 915, 918 (7th Cir. 1976).

54. 538 F.2d 279 (9th Cir. 1976) (class action against promoters of land development project).

55. *Id.* at 283. *Accord*, Anschul v. Sitmar Cruises, Inc., 544 F.2d 1364 (7th Cir. 1976) (denial of class certification was not reviewable as an interlocutory order on the theory that it was collateral to the rights asserted in the action).

56. United Air Lines, Inc. v. McDonald, 432 U.S. 385, 388, n.4 (1977).

with the defendant and agreed not to appeal the class certification question. Against this background, the question became whether a motion to intervene after judgment by the trial court and for the limited purpose of appealing the class certification question is timely.

The Timeliness Question

Answering United's argument that *only* the named plaintiffs were entitled to appeal after judgment, the Court weighed two factors: first, whether McDonald's reliance on the *Romasanta* plaintiffs to take an appeal was reasonable; second, whether McDonald's motion to intervene was timely. Reviewing McDonald's reliance on the plaintiffs, the Court determined that since the action was commenced as a class action, McDonald was entitled to rely on the named plaintiffs as long as they adequately represented her interests.[57] Under Title VII, a plaintiff is placed in the position of a "private attorney general"[58] who is expected to champion and protect the rights of the entire class. Since the named plaintiffs in *Romasanta* had attempted to take an interlocutory appeal from an order denying class certification when it was entered, the Court found McDonald's reliance that there would be a later appeal to be reasonable.[59] When the *Romasanta* plaintiffs decided not to appeal, McDonald could no longer rely. She had to act.

The Court tested whether McDonald's actions, after she discovered that she could no longer depend on Romasanta, were timely. Whether a motion is timely is determined from all the circumstances.[60] The amount of time that has elapsed since the

57. *Id.* at 394. The 4th circuit recently addressed the question of reliance of putative class members when the named plaintiffs voluntarily reach a pre-certification settlement. The court acknowledged that by asserting a representative role on behalf of the alleged class these parties voluntarily accept a fiduciary obligation towards the members of the putative class. Nevertheless, if the parties reach a settlement and after a full hearing the court finds that there has been no misuse of the class action procedure and no unreasonable prejudice to the absent potential class members the district court is not required to make a certification determination which might involve notice to the absent class members. Shelton v. Pargo, Inc., 47 U.S.L.W. 2133 (August 28, 1978).

58. Bowe v. Colgate-Palmolive, 416 F.2d 711 (7th Cir. 1969). *See* text accompanying notes 67-74 *infra*.

59. 432 U.S. at 394 (1977).

60. *E.g.*, NAACP v. New York, 413 U.S. 345 (1974) stating:

> Intervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely". If it is untimely, intervention must be denied . . . . Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not

litigation began is not in and of itself the determinative factor. The court should also look to all related circumstances, including the purpose for which intervention is sought, before exercising its discretion in determining whether the motion to intervene is in fact timely.[61] Unless that discretion is abused, the court's ruling will not be disturbed on review.[62]

After reviewing all the circumstances, it was obvious that if McDonald were unable to intervene, she would be denied all relief. Not mentioning this consequence, the Court pointed to the "critical fact;"[63] as soon as the entry of judgment made the adverse class determination appealable, McDonald immediately sought to intervene for purposes of appeal. Since she did move to intervene within the time allowed for appeals,[64] the Court concluded that her action was "timely" as measured by the standards of Rule 24. By filing a class action, Ms. Romasanta put United on notice that the case could potentially involve classwide liability. Therefore, the Court reasoned that United should have expected the named plaintiffs to appeal the denial of class certification. The Court concluded that the appeal by a putative class member was not prejudicial to United's interests.[65]

Finally, the Court noted that to allow post-judgment intervention was consistent with a number of federal decisions.[66] The major thrust of the cases cited was that post-judgment in-

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solely dispositive. Timeliness is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

Id. at 365-66. *See also* MOORE'S § 24.13, *supra* note 1.

61. *E.g.*, United Air Lines, Inc. v. McDonald, 432 U.S. 385, 395-96 (1977); Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. Cir. 1972).

62. NAACP v. New York, 413 U.S. 345, 356-66 (1974); EEOC v. United Air Lines, 515 F.2d 946, 950 (7th Cir. 1975) (denial of intervention for untimeliness lies within sound discretion of court and is subject to review only for abuse of that discretion); Black v. Central Motor Lines, Inc., 500 F.2d 407, 408 (4th Cir. 1974) (district court did not abuse its discretion by denying motion of 12 black employees to intervene in consent judgment).

63. 432 U.S. at 390.

64. FED. R. APP. P. 4(a) provides that notice of appeal shall be filed within 30 days after the entry of the judgment.

65. 432 U.S. at 394 (1977). Although United would be permitted to introduce evidence which would mitigate McDonald's claim and the claims of others in her class, United pointed out that "assembling rebuttal evidence at this late date is an awesome burden." Brief for Petitioner at 21.

66. *Id.* at 395 n.16. Cases allowing post-judgment intervention that Court cited were: Hodgson v. United Mine Workers, 473 F.2d 118 (D.C. Cir. 1972) (intervenors' motion was timely even though made seven years after trial because they sought to participate in remedial or appellate phases of the case); Pellegrino v. Nesbit, 203 F.2d 463 (9th Cir. 1953) (application for intervention after final judgment was timely to allow stockholder to appeal from adverse judgment rendered in corporation's suit against named officers to recover profits); American Brake Shoe & Foundry Co. v. Interbor-

tervention should be allowed to preserve a right which would otherwise not be protected. In essence, the decision in *McDonald* is premised on protecting the rights of people, not on enforcing the technicalities of procedure.

In the final analysis, the *McDonald* decision ought to be viewed narrowly. After *McDonald*, persons who are members of a purported class when an action is filed under Title VII, but later excluded by a denial of class certification, may take a post-judgment appeal if the named parties do not.

THE IMPACT OF MCDONALD

The *McDonald* court was faced with establishing a balance between two competing interests—on the one hand, the traditional doctrine favoring settlements and repose; on the other, the Congressional directive encouraging liberal enforcement of social welfare legislation. After *McDonald*, the scales have clearly tipped toward the Congressional directive.

The Congressional policy underlying Title VII[67] and the landmark cases implementing the legislative direction reflect the objective of affording wide reaching relief for victims of employment discrimination. In 1968, the year McDonald was discharged, the Fifth Circuit held in *Oatis v. Crown Zellerbach*,[68] that a class action was proper in cases seeking injunctive relief. A year later, the Seventh Circuit Court of Appeals in *Bowe v. Colgate-Palmolive*,[69] established that a class action was proper under Title VII for pecuniary as well as injunctive relief. *Bowe*

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ough Rapid Transit Co., 3 F.R.D. 162 (S.D.N.Y. 1942) (nonsurrendering bond holder permitted to intervene for purpose of appeal).

67. *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971). This is the first case filed to challenge United's no-marriage rule. The court said that "[t]he scope of Section 703(a)(1) is not confined to explicit discriminations based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex sterotypes." 444 F.2d at 1198. In Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969) the court held that suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of class characteristics.

The psychological reaction to class actions was noted in Donelan, *The Advantages and Disadvantages of a Class Suit Under New Rule 23, as Seen by the Treble Damage Plaintiff*, 32 ABA ANTITRUST L. J. 264 (1966). The class action is a particularly valuable privilege where the individual claims would be too small to justify individual litigation. A collateral aspect of this procedure is the sympathy which may be aroused by a suit of small parties against big and powerful opponents. "The sheer number of the class . . . smacks of the Boston Tea Party and Concord and Lexington, and all the other trappings of the downtrodden rising at last against injustice." *Id.* at 268.

68. 398 F.2d 496 (5th Cir. 1968).

69. 416 F.2d 711 (7th Cir. 1969).

held that the named plaintiff acts as a "private attorney general"[70] championing all the interests of the class. No longer was it necessary for each person to file a grievance with the EEOC; one private plaintiff could speak for all.

In 1972, members of Congress became concerned that the far reaching enforcement of the Act was becoming unmanageable. Attempts to limit the scope of Title VII actions, however, were unsuccessful.[71] *Albemarle Paper Co. v. Moody*,[72] decided by the Supreme Court after the 1972 amendments, sums up the underlying result sought by Title VII. The objective is "to make persons whole for injuries suffered on account of unlawful employment discrimination."[73] Furthermore, *Albemarle* makes it clear that "full relief under Title VII may be awarded on a class basis . . . without exhaustion of administrative procedures by the unnamed class members."[74]

Although the *McDonald* holding is consistent with the objectives of Title VII, it can not be easily reconciled with traditional notions of settlement and repose. Settlement is always preferred to litigation. Title VII suits are certainly no exception to this principle.[75] By allowing a post judgment intervention for

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70. *Id.* at 715.

71. The "Erlenborn substitute" is indicative of attempts made by some congressional members to restrict the scope of Title VII. Individual members argued:

> [W]e would also provide in a class action a limitation so that those who join in the class action or those who by timely motion intervene could be considered as the proper class, but not all who may be similarly situated but who are not even aware of the fact that a case had been filed.

117 CONG. REC. 31974 (1971). The House bill would have made it mandatory for the statute of limitations to run once suit was filed under Title VII.

> To avoid the litigation of stale charges and to preclude respondents from being subject to indefinite liabilities it is clear that a precise statute of limitations is needed. In view of the tremendous backlog currently existing at the EEOC, and the failure to require a prompt serving of the charges on named respondents as discussed hereafter, equitable principles require a limitation on liability.

See H.R. Rep. No. 92-238, 92d Cong., 2d Sess. 66, *reprinted* in [1972] U.S. Code & Ad. News 2137, 2175. The House bill was rejected and the liberal Senate bill of amendments to Title VII was enacted. See *S. Conf. Rep.* 92-681, 92d Cong., 2d Sess. at 18, 19, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2183.

72. 422 U.S. 405 (1975).

73. *Id.* at 418.

74. *Id.* at 411 n.8.

75. ALSSA v. American Airlines, 455 F.2d 101 (7th Cir. 1972), *quoting from* Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968):

> [A]s a general proposition the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where "there is great emphasis . . . on private settlement and the elimination of unfair practices without litigation."

455 F.2d at 109.

purposes of appeal to putative class members, the Court tacitly supported a wait and see attitude that appears antithetical to the usual judicial aim of encouraging settlements.[76]

In the negotiation process that is directed toward an out-of-court settlement, the parties, if they reach a mutually acceptable agreement, will usually avoid the risk of any further appeal. Customarily, it is agreed in the settlement that neither party will appeal. United contended that since the *Romasanta* plaintiffs had entered into a settlement, they were not entitled to an appeal.[77] The named plaintiffs, however, did not appeal; the excluded members of the indestructible class did. The dissent recognized the impediment to settlements created by allowing intervention by putative class members after the named parties had negotiated an agreement.[78] The majority failed to address this question, and instead, directed its attention toward the policy of Title VII actions.

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76. An anomaly created by the *McDonald* decision is: "[t]hat parties who unsuccessfully brought their own suits to protest United's former no-marriage rule were now barred by the statute of limitations and res judicata from being granted relief while McDonald and other purported class members, who have done nothing for the last eight years, may now seek recovery." Brief for Petitioner at 19, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

The fact is that each individual stewardess presents a different situation as to remedy. Stewardess A might well have hated her job, and have been delighted to marry, settle down and raise a family. Stewardess B, on the other hand, might sincerely have wished to stay on flying status after marriage. The only objective way of determining damages for stewardesses A and B would be to consider their actions after termination.

In United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), decided one month before McDonald, the Court held that Carolyn J. Evans, who had been discharged in 1968 because of the no-marriage rule and who was rehired in 1972, was barred from relief under Title VII because of the statute of limitations. United refused to give her seniority credit for her years of service prior to 1968. The Court decided that since Evans had failed to file with the EEOC within 90 days of her wrongful discharge in 1968, she was barred by the statute of limitations from relief under Title VII. Had she filed she could have saved her seniority status. *E.g.*, Collins v. United Air Lines, 514 F.2d 594 (9th Cir. 1975).

77. United stated that counsel for Romasanta admitted in open court, "[t]hey have settled their individual claims, and consequently the original class action representatives are not in a position to take the appeal." Brief for Petitioner at 15, 432 U.S. 385 (1977). Counsel for Romasanta countered by saying: "We could on behalf of the class action representatives . . . file a notice of appeal . . . but our plaintiffs have chosen not to do so." Brief for Respondent at 27.

78. United Air Lines, Inc. v. McDonald, 432 U.S. 385, 400 (1977) (Powell, J., dissenting). *Accord*, Pearson v. Ecological Science Corp., 522 F.2d 171 (5th Cir. 1975). Here, the court refused an intervention motion made by putative class members excluded by previous denial of class status. The intervenors sought to overturn a settlement agreement on the grounds that the original and interventing plaintiffs owed a fiduciary duty to the excluded members to take an appeal.

The scope and continued validity of the holding in *McDonald* can be further discerned in *Cooper & Lybrand v. Livesay*,[79] decided by the Court subsequent to *McDonald*. Because of a conflict among the circuits, the Supreme Court decided the following issue in *Cooper & Lybrand*: whether a district court's determination that an action cannot be maintained as a class action was a "final decision" for purposes of appeal under 28 U.S.C. section 1291.[80] In holding that such an order is *not* appealable under section 1291, the Court relied on its decision in *McDonald* by striking down one of the respondent's contentions favoring appealability.

The *Cooper & Lybrand* respondents rested their argument that the denial of class certification was within a court's federal appellate jurisdiction on two theories: first, such orders came within the "collateral order" exception of *Cohen v. Beneficial Industrial Loan Corp.*;[81] secondly, the denial of certification in the case sounded the "death knell" of the action and hence, was appealable.[82] The Supreme Court cited *McDonald* for the proposition that an order denying class certification is subject to effective review after final judgment. Thus one of the criteria for the "collateral order" exception was not satisfied. An order denying class certification can be *effectively* reviewed because not only may the named plaintiff appeal such an order after final judgment, but also, according to *McDonald*, putative class members may now intervene after a final judgment solely for the purpose of appealing such an order. The *Cooper & Lybrand* Court also discarded the "death knell" doctrine stating under section 1291 that orders relating to class certification are not independently appealable prior to judgment.[83]

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79. —U.S.—, 98 S.Ct. 2454 (1978).

80. *Id.* at 2456.

81. 337 U.S. 541 (1949). This exception from the final judgment rule under *Cohen* is a narrow one. To fall within it, the following criteria must be satisfied: first, the order must conclusively determine the disputed question; second, the order must resolve an important issue completely separate from the merits of the action; third, the order must be effectively unreviewable on appeal from a final judgment. 337 U.S. at 546. The Court in *Cooper & Lybrand* held that none of the above criteria was met. —U.S.—, 98 S.Ct. at 2458.

82. This case was appealed from the Eighth Circuit which had previously recognized the "death knell" doctrine as a basis for appellate jurisdiction under §1291 in Hartman v. Scott, 488 F.2d 1291 (8th Cir. 1973). *Accord*, Ott v. Speedwriting Pub. Co., 518 F.2d 1143 (6th Cir. 1975); Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). *Contra*, King v. Kansas City Southern Indus. Inc., 479 F.2d 1259 (7th Cir. 1973); Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972), *cert. denied*, 407 U.S. 925 (1972).

83. —U.S.—, 98 S.Ct. at 2458.

Acknowledging that the philosophy supporting the "collateral order" exception and the "death knell" doctrine may serve the congressional objective of preserving a viable cause of action for individuals with small financial claims, the Court, nevertheless, considered such policy arguments "proper for legislative considerations."[84] In reference to the question of appealability, these policies are not relevant, as the Court stated:

> There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provision governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation.[85]

The *Cooper & Lybrand* Court, therefore, by supporting both the strict application of the finality rule, and the holding in *McDonald* has not alleviated the problem confronted by United.

The problem, argued and mentioned by the dissent in *McDonald*, is that post-judgment intervention by putative class members creates a degree of uncertainty sufficient to discourage possible prejudgment settlements.[86] The *Cooper & Lyband* Court has addressed this problem by deferring to the legislature. It is Congress that possesses the authority to grant an immediate right of appeal to those class representatives whose individual claims fall below a specific monetary amount. Congress has failed to do so, and instead, has provided that "finality" be the test for determining appellate jurisdiction. Furthermore, the need that in certain situations nonfinal orders should be subject to immediate review is already furnished by the Interlocutory Appeals Act of 1958, 28 U.S.C. section 1292(b).[87]

CONCLUSION

McDonald would probably not have reached the Supreme Court if the procedural guidelines for both class certification under Rule 23 and intervention under Rule 24 were more clearly defined.[88] The procedures contained in these rules are being employed with greater frequency because they are practical means for implementing the social policy legislation authored by the U.S. Congress in recent years. The operation of Rules 23 and 24 can be uniform only if it is clear what procedure they prescribe. It would indeed appear that the ruling against the

84. *Id.* at 2459.
85. *Id.*
86. *See* text accompanying note 65 *supra.*
87. For text of §1292(b) see note 27 *supra.*
88. *See Interlocutory Appeal, supra* note 7, at 1293-95.

class was an "uncertain sound" both for McDonald and United. McDonald chose not to enter the battle, while United proceeded to mitigate the effects of its no-marriage policy by eliminating the rule and then negotiating a settlement with the individual named plaintiffs.

Two problem areas must be considered in order to clarify Rules 23 and 24. First, it is imperative that the district court be free to exercise broad discretion.[89] Second, it should be recognized that *immediate appeal* of orders granting or denying class certification or intervention would "aid the district courts in disposing of these cases and promote the sound administration of justice."[90] After the decision in *Cooper & Lybrand*, the responsibility to set down guide lines is with Congress. As the *Cooper & Lybrand* Court stated; "Congress is in a position to weigh the competing interests of the docket of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on the litigants."[91]

Congress should be aware that a prompt final determination of the issues of class certification or intervention would enable the parties to determine what procedures and tactics would be most profitable and economical. Although Rule 23 provides for early determination of the class status question, there is no provision for direct appeal as a matter of right.[92] Determinations of both class status and intervention have traditionally been held to be interlocutory orders appealable only after final judgment.[93]

Nevertheless, a defendant is entitled to know not only the nature of the charge brought against him, but he should also know, at the commencement of the litigation, who has brought the action. His strategy will necessarily be different if he is confronted with a seven member platoon rather than a full division. Because of the complexity inherent in class actions and suits involving motions for intervention, the district court judge is in a

89. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) "Appeal gives the upper court a power to review, not [a power] of intervention."

90. Herbst v. ITT, 495 F.2d 1308 (2d Cir. 1974). *See* text accompanying note 49 *supra*. *See generally Interlocutory Appeal, supra* note 7, at 1301.

91. Coopers & Lybrand v. Livesay, —U.S.—, 98 S.Ct. 2454, 2462 n.28 (1978).

92. After the decision in Coopers & Lybrand v. Livesay, the only remaining avenue to appeal an order denying class status is §1292(b). *Id.* at 4760. The availability of this avenue is limited since a party seeking appeal must overcome two hurdles. A party must first obtain the consent of the trial judge to certify the question for appeal. Then, he must persuade the court of appeals that exceptional circumstances exist to justify a departure from the final order rule. *Id.*

93. *See* text accompanying notes 43-51 *supra*.

better position to fairly determine whether the prerequisites of the rules have been satisfied. But the mere fact that the district court is free to exercise its discretion need not preclude immediate appellate review.[94] In the interest of judicial economy and fairness to the parties, it would seem preferable to permit appeal in all cases while recognizing that large areas of discretion do exist.

Miriam F. Hunter

94. *See 1966 Amendments, supra* note 1, at 761; *Interlocutory Appeal, supra* note 5, at 1301-04.