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Civil Procedure -- Finality of Determinations under Federal Rule 23(c)(1)

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adequately protected in the initial proceeding.[50] If every possible means of reaching the defendant have been exhausted, it would be unreasonable for the court not to sustain the validity of constructive service. If it were impossible to get a valid personal judgment under these circumstances, "it would seem that the plaintiff would be unduly burdened and the defendant pemitted the advantage of a windfall gained through his own undesirable conduct."[51]

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Civil Procedure—Finality of Determinations under Federal Rule 23(c)(1)

On January 11, 1966, two indictments alleging a criminal conspiracy to monopolize the low pressure pipe industry were returned in the federal District Court for New Jersey.[1] The defendants pled *nolo contendere* and were sentenced on April 29, 1966.[2] On April 28, 1967, the City of New York, alleging the identical conspiracy, brought an antitrust action against some of the defendants in the New Jersey criminal action.[3] New York City filed the complaint as representative for a Federal Rule 23(b)(3)[4] class alleged to include "all state and municipal governments, government agencies, authorities and subdivisions in the United States."[5] This action was begun within one year following the end of a federal criminal antitrust prosecution during which the running of the statute of limitations is suspended.[6] The defendants moved to strike allegations of

[50] For a similar conclusion reached by a state court, see Cradduck v. Financial Indem. Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966). But, of course, the insured is his own best witness, and therefore it can be forcefully argued that his interests can never be adequately protected without his presence.

[51] Comment, *Personal Jurisdiction Over Absent Natural Persons*, 44 CAL. L. REV. 737, 742 (1956).

[1] United States v. International Pipe & Ceramics Corp., Criminal No. 9-66 (D.N.J., Apr. 29, 1966); United States v. International Pipe & Ceramics Corp., Criminal No. 10-66 (D.N.J., Apr. 29, 1966).

[2] *See* City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 296-97 (2d Cir. 1969).

[3] City of New York v. International Pipe & Ceramics Corp., 67 Civil No. 1698 (S.D.N.Y., filed Apr. 28, 1967).

[4] FED. R. CIV. P. 23(b)(3).

[5] City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 296 (2d Cir. 1969).

[6] Clayton Act, 15 U.S.C. §§ 15b, 16(b) (1964).

class action by requesting the court to make a rule 23(c)(1)[7] determination that the action could not be maintained in a representative capacity. After a delay of several months to permit further discovery, the court concluded that "treatment of this suit as a class action would not be 'superior to other available methods for the fair and efficient adjudication of the controversy.' "[8] From this order, interlocutory on its face, appeal was taken to the Court of Appeals for the Second Circuit.[9]

The appellate court dismissed the appeal in *City of New York v. International Pipe & Ceramics Corp.*[10] It held that a determination under rule 23(c)(1) is not ordinarily a final judgment from which appeal may be taken under section 1291 of title 28 of the United States Code.[11] The court found that the parties would be able to urge their respective positions on a later appeal and would be unhindered by the denial of class action. Nor did this denial effectively determine any collateral rights of parties to the action.[12]

The decision reiterated the fundamental principle that only an order that is final as to parties, subject matter, and claims for relief is appealable.[13] This principle—the final-judgment rule—is meant to increase the efficiency and over-all fairness of both the trial and appellate courts.[14] The rule eliminates not only disruptive appeals from interlocutory orders that may be intended by one party to harass the opponent and to delay the proceedings, but also unnecessary appeals on both procedural and substantive rulings that may be adverse to the eventual winner. The review only of complete judgments provides appellate courts with an overview

[7] "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." FED. R. CIV. P. 23(c)(1).

[8] City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 297 (2d Cir. 1969).

[9] The district judge did not make the certification of a controlling question of law, permitted by 28 U.S.C. § 1292(b) (1964), that would have allowed immediate appeal of the rule 23(c)(1) order. City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969).

[10] 410 F.2d 295 (2d Cir. 1969).

[11] "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ..." 28 U.S.C. § 1291 (1964).

[12] 410 F.2d at 295. The interlocutory nature of affirmative rule 23(c)(1) orders has not been questioned.

[13] Arnold v. United States *ex rel.* W. B. Guimarin & Co., 263 U.S. 427 (1923).

[14] *See* American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967); Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292 (1966); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

of the entire proceedings rather than a limited look at a portion of them.[15] However, because the requirement of finality is to be construed in a reasonable and liberal manner rather than a technical one, orders, otherwise interlocutory, have been treated as final when they have effectively decided the outcome of a case.[16]

In *Cohen v. Beneficial Industrial Loan Corp.*,[17] the Supreme Court created an exception to the final-judgment rule. A New Jersey statute provided defendants in certain types of stockholders' derivative suits the right to a security bond for defense expenses. A federal court, exercising diversity jurisdiction, denied a request for such a bond. The defendants' appeal from this order was allowed. The Court held that this order was one of a

> . . . small class which finally determines claims of right, separable from and collateral to, rights asserted in the action, too important to be denied review, and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[18]

This small class of appealable collateral orders was significantly enlarged by *Gillespie v. United States Steel Corp.*,[19] in which the Court held that the compelling considerations in deciding whether to accept an appeal from an interlocutory order were "the inconvenience and costs of review on the one hand and the danger of denying justice on the other."[20] The Court based its decision upon the the merits of the case, rather than a detached consideration of the finality of the order or the completeness of the proceedings. A desire to do justice as the Court saw fit prevailed over any question of jurisdictional niceties.

Eisen v. Carlisle & Jacqueline[21] first took up the finality and consequent appealability of determinations under rule 23(c)(1). Eisen brought a private antitrust action alleging a conspiracy to monopolize odd-lot trading on the New York Stock Exchange. Eisen's personal damages amounted to seventy dollars, but he filed his action as representative for a rule

[15] Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292 (1966).
[16] *E.g.*, Kelly v. Greer, 354 F.2d 209 (5th Cir. 1965); United States v. Cefaratti, 202 F.2d 13 (D.C. Cir. 1952).
[17] 337 U.S. 541 (1949).
[18] *Id.* at 546.
[19] 379 U.S. 148 (1964).
[20] *Id.* at 152.
[21] 370 F.2d 119 (2d Cir.), *denying motion to dismiss appeal from* 41 F.R.D. 147 (S.D.N.Y. 1966), *cert. denied*, 386 U.S. 1035 (1967).

23(b)(3) class numbering several million people. Upon defendants' motion, the allegation of class action was dismissed although the individual claim (for seventy dollars) was allowed to stand.[22] From this order Eisen appealed. The court held that the dismissal of the allegation of class action ended the lawsuit "for all practical purposes"[23] and thus was a final order, appealable as such. It found that "no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen."[24] Disallowance of the suit as a class action would prevent not only the adjudication of Eisen's substantive claims, but also any review of the 23(c)(1) determination that decided the outcome of the suit.[25] The ruling of the trial court in *Eisen* was not a final determination of a collateral issue, but was, in effect, a termination of the whole case. It appears that the appeal was allowed because of the traditional construction of the final-judgment rule in a "practical," "liberal," and "reasonable" manner, not because the trial court's decision fell into the category of orders excepted from the general rule by *Cohen* and *Gillespie*.

In *City of New York v. International Pipe and Ceramics Corp.*,[26] the court distinguished the fact situation from that in *Eisen* because the denial of class-action status would not end the litigation. New York City had alleged enough damages to warrant complete prosecution of the case individually.[27] It also had sufficient financial resources so that the loss of class-action status would not influence the decision whether to continue the suit.[28] Review of the rule 23(c)(1) determination would not be prevented by failure to consider it immediately, but could be raised, if the City should so desire, upon a later appeal. The only resulting harm to New York City would be a loss of the bargaining power belonging to a representative in a class action; however, a class action is not to be a device by which bargaining power is increased.[29] The facts of *Eisen* are not comparable; the city as plaintiff would continue the fight.

The holding in *Eisen* apparently will apply only if some purported

[22] Eisen v. Carlisle & Jacqueline, 41 F.R.D. 147 (S.D.N.Y. 1966).
[23] Eisen v. Carlisle & Jacqueline, 370 F.2d 119, 120 (2d Cir. 1966).
[24] *Id.*
[25] *Id.*
[26] 410 F.2d 295 (2d Cir. 1969).
[27] New York City alleged damages in excess of 520,000 dollars. Memorandum in Support of Motion to Dismiss Appeals for Martin Marietta Corporation, at 2, City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969).
[28] 410 F.2d at 301.
[29] Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 328 (E.D. Pa. 1967).

party is found who cannot assert his rights because of the denial of class action. One day before the end of the one-year suspension of the statute of limitations, New York City filed its suit as a class action. The bringing of a sustainable class action tolls the statute for all members of the alleged class.[30] Thirty-seven members of that class intervened in the suit after the year was up.[31] While such passage of time certainly puts a burden upon the intervenors to rebut the effect of the statute of limitations, it can hardly be said that the court's denial of class-action status to the suit amounted to a final judgment as to their rights.

Conceivably some of the intervenors may have relied to their detriment upon the class action by the city to toll the statute of limitations. There was only one day between the filing of the class action and the end of the year of grace in which other parties might have filed actions of their own. Nevertheless, any equitable considerations—such as detrimental reliance[32]—on behalf of an intervening or non-intervening member of the alleged class should be used as a defense against the statute of limitations rather than as grounds to lower the requirements for a class action.

Other than by way of detrimental reliance, it would seem that no intervenor could claim that his rights in the action were in any way decided by the dismissal of the class allegations. This class was not the type for which an aggregation of claims was necessary because each member was as financially capable as New York City to continue the suit and each of them had alleged substantial damages.[33] If the statute of limitations is held to bar their actions, they may take up the negative rule 23(c)(1) determination on an appeal of the limitations holding. Review will not be prevented, as it was in *Eisen*, by a dismissal of the immediate appeal. The rule 23(c)(1) determination cannot be considered

[30] Escott v. Bachris Constr. Corp., 340 F.2d 731 (2d Cir. 1965), *cert. denied sub nom.*, Drexel & Co. v. Hall, 382 U.S. 816 (1966).

[31] 410 F.2d at 297.

[32] "[I]t may well be that . . . an opportunity should be presented for proof of reliance upon the pendency of the purported class action sufficient to toll the statute of limitations. Any other approach would make it virtually mandatory for every class member to file a cautionary separate action within the limitations period." Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 460 (E.D. Pa. 1968).

[33] The intervenor-plaintiffs included the states of Alaska, Ohio, and Wisconsin; the cities of Detroit, Philadelphia, and Cleveland; and the Port of New York Authority. Memorandum in Opposition to Motion of Defendant Kerr Concrete Pipe Company for an Order Determining that this Action is Not to be Maintained as a Class Action by the City of New York, at 6-7, City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969).

to be a final judgment, in either a practical or a technical sense, for any of the named parties in the case.

In order to find the rule 23(c)(1) order a final judgment, there must be discovered among the non-intervening, unnamed class members at least one that had some right cut off. The Second Circuit had held earlier that unnamed class members do not have a practical or legally cognizable existence. In dismissing an appeal from a denial of a "spurious" class-action status, the court pointed out:

> The defendants quite certainly aided the process of hypostasis of these nameless and as yet disembodied spirits by christening them "related defendants" . . . and treating them thereafter as persons, who, as urged on this appeal, may forever forfeit their rights to review unless now [the right is] claimed.[34]

Judge Hays, in his dissent in *International Pipe*, suggested that the rule 23(c)(1) determination was a final judgment for some of the unnamed class members, whose existence he seemed to accept.[35] He pointed out that if New York City is individually successful on the merits, it will have no reason to appeal the dismissal of class-action status. If the intervenors prevail over a statute-of-limitations defense, they also will have no cause to appeal the adverse decision under rule 23(c)(1). If these two contingencies are realized, the unnamed class members will lose any review of the denial of class-action status. Furthermore, if they commence separate actions, they will have to prevail over the statute of limitations. According to Judge Hays, the possibility will still remain that some of the unnamed plaintiffs will have neither the financial resources nor the damages at stake to justify individual litigation; class-action status alone will permit them to litigate their rights.[36] Such unnamed plaintiffs are the only parties whose rights may have been decided by the rule 23(c)(1) order. Whether the representative plaintiffs ought to be able to appeal this determination upon their behalf is the crucial issue.

New York City filed its complaint as representative for a Federal Rule 23(b)(3) class.[37] An action under this provision is the successor of the

[34] All American Airways v. Eldred, 209 F.2d 247, 249 (2d Cir. 1954) (Clark, C. J.).

[35] 410 F.2d at 300, 301 (Hays, J., dissenting).

[36] *Id.* at 301.

[37] *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

(3) the court finds that the *questions of law or fact common to the*

so-called "spurious" class action, authorized under the old rule 23.[38] The essence of both the new and the old rules is that although the claims are separate and distinct, there are issues of fact or law common to all members of the alleged class.

Under the Federal Rules, there are procedures other than rule 23 (b)(3) class actions by which claims having common issues of fact or law may be consolidated. An example is permissive intervention under Federal Rule 24(b),[39] which permits a party having such claims to prosecute them in the same proceedings with an action filed earlier by a different litigant. Denial of permissive intervention often has been held unappealable.[40] Another procedure, permissive joinder under Federal Rule 20, is most similar to those actions in which the class is the defendant.[41] However, the finality and consequent appealability of the denial of consolidation under its aegis has apparently not been considered by any court.

The class action under rule 23(b)(3) was established for the convenience of the court and the benefit of the public.[42] The courts have permitted the use of the rule 23(b)(3) action and its predecessor in order to dispose of any issue of fact or law for which an adequate representative has come forward. The courts have pointed out that consolidation of such claims relieves overcrowded calendars and helps to achieve

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members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3) (emphasis added).

[38] [a class action may be maintained] . . . when the character of the right sought to be enforced for or against the class is

. . . .

(3) several, and there is a *common question of law or fact* affecting the several rights and a common relief is sought.

FED. R. CIV. P. 23(a)(3), 39 F.R.D. 69, 95 (1966) (emphasis added).

[39] FED. R. CIV. P. 24(b)(2).

[40] Brotherhood of R.R. Trainmen v. Baltimore & O.R.R., 331 U.S. 519 (1947); Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 368 nn.129 & 130 (1968).

[41] FED. R. CIV. P. 20(a).

[42] Z. CHAFEE, SOME PROBLEMS OF EQUITY 202 (1950).

a fair adjudication of all claims.[43] There is no right to maintain an action as a representative of a rule 23(b)(3) type of class.[44] Each claim to be consolidated under authority of rule 23(b)(3) is separate and distinct and otherwise could be prosecuted to a complete and effective judgment.[45] No party's rights are necessarily affected by exclusion from a 23(b)(3) class or by a refusal to recognize such a class. No party should be able to claim a right to a procedure established for the convenience and efficiency of the courts, especially when the procedure is found both inconvenient and inefficient by the trial court itself, for whose particular benefit it was created.

Another and more compelling purpose for the rule 23(b)(3) action and its predecessor, the "spurious" class action, is that by permitting the aggregation of many claims otherwise too small to justify individual litigation, claimants are enabled collectively to enforce their rights.[46] This procedure is especially useful in private enforcement of antitrust legislation, a field in which the parties often have damages far too small for litigation individually. Private enforcement of these semi-public rights, induced by the provisions for treble damages and for adequate attorney's fees, was contemplated as the chief means of carrying out the policies of such legislation.[47] Such considerations suggest that in antitrust cases, the public interest may best be served by permitting plaintiffs to bring rule 23(b)(3) class actions as a matter of right.

This approach would, indeed, serve to facilitate private prosecutions. However, there is a significant difference between consolidating cases such as *International Pipe* and those such as *Eisen*. As noted previously, in a case such as *Eisen* denial of class-action status will serve to terminate the entire litigation because of the insignificance of the individual plaintiffs' damages. The same factors that cause the class action to be necessary to induce private antitrust suits also require that denial of this status be immediately appealable. The opposite is true with cases

[43] *Cf.* Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 740-41 (7th Cir. 1952).

[44] There may be a right to maintain a representative suit with regard to a rule 23(b)(1) type of class, and possibly with regard to a rule 23(b)(2) type of class. In these types of classes no effective judgment can be given unless parties too numerous to join are bound. This is not the case with the rule 23(b)(3) category.

[45] *Cf.* Snyder v. Harris, 394 U.S. 332 (1969).

[46] Welsh, *Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale*, 13 VILL. L. REV. 370, 385 (1968).

[47] Kalven & Rosenfeld, *The Contemporary Function of a Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

like *International Pipe*. Any governmental agency or subdivision is likely to be financially able to sustain protracted litigation. Since low pressure and sewage pipes are used for large projects, any agency using them will sustain substantial damages for excessive prices, easily enough damages to warrant an individual suit.

The class action was not meant to be a device by which the statute of limitations may be extended and the defendant confronted with a horde of stale claims. "The theory [of the statute of limitations] is that even if one has a just cause, *it is unjust not to put the adversary on notice to defend within the period of limitations* and the right to be free from stale claims comes in time to prevail over the right to prosecute them."[48] Any class action, however, fails to give the defendant notice that a particular claim will be prosecuted. Rather, a general warning of the type of claim to be advanced by both named and unnamed parties is given. The complex and protracted nature of antitrust litigation intensifies this objection.[49] Nevertheless, the statute is tolled for all members of the class at the time of the filing of the class suit.[50] The tolling of the statute in this manner thwarts in large part its purpose by allowing the resurrection of claims impossible in many circumstances to refute. To lower the requirements for class actions in order to facilitate their use in tolling the statute of limitations would further undermine the rationale of the statute. The inability to toll the statute's running certainly hinders unnamed plaintiffs, and perhaps bars their claims, but these results should not create a right to toll the statute by use of Federal Rule 23.

The trial court's determination under rule 23(c)(1), with regard to an alleged rule 23(b)(3) class, is both discretionary and tentative.[51] Significant discretion is given to the trial judge in making the decision. The criteria for deciding whether a class action is superior to individual actions are based in part upon subjective determinations by the judge of questions of the difficulty of management of a class action and the desirability of the concentration of litigation on the claims. The issues of

[48] Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944) (emphasis added).

[49] Welsh, *Class Actions Under New Rule 23 and Federal Statutes of Limitations: A Study of Conflicting Rationale*, 13 VILL. L. REV. 370, 387 (1968).

[50] Escott v. Bachris Constr. Corp., 340 F.2d 731, 733 (2d Cir. 1965). Judge Friendly dissented vigorously from this part of the decision. *Id.* at 735.

[51] Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 45 (S.D.N.Y. 1966).

fact and law will often be ready for trial on the merits before any conclusion as to the superiority of the class action can be made.[52] Yet, because of notice requirements and the inherent difference between litigating as an individual plaintiff and as a class representative, some tentative decision must be reached early in the proceedings.[53] Rule 23(c)(1) provides that the determination may be altered or amended and may be subject to such conditions as the intervention of additional representative plaintiffs.

The judge's decision is by both its tentativeness and discretionary nature excluded from immediate appeal. Except for abuse, discretionary orders may not be appealed at any time.[54] In *International Pipe*, the issue of abuse of discretion was not raised. Orders subject to reconsideration and correction at the trial level also cannot be appealed.[55] The tentative nature of such orders is lost by appellate review unless the higher court order is amendable by the trial court. A rule 23(c)(1) order is correctable at the trial level up until trial on the merits. Only at that point, even if there has been an abuse of discretion, does the trial court lose its power to correct the order. By that time, however, allowing an appeal no longer serves the purpose outlined in *Gillespie v. United States Steel Corp.*[56] No cost is saved, and no denial of justice threatened.[57] The same decision that will make binding the rule 23(c)(1) determination will make the whole case immediately appealable as a final judgment on the merits.

The order at issue in *International Pipe* was made upon the trial judge's discretion with regard to the convenience and efficiency of his own court. To subject a procedural order, especially one of so discretionary a nature as the rule 23(c)(1) determination, to appellate supervision, as suggested by Judge Hays, is not in the public interest.[58] Permitting the appeal of such orders would subvert the authority and impair the public respect for the trial courts, centralize legal power in the ap-

[52] Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 41-42 (1967).
[53] *Id.* at 40-41.
[54] *Cf., e.g.*, Stadin v. Union Elec. Co., 309 F.2d 912 (8th Cir. 1962).
[55] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949); Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292, 296 (1966).
[56] 379 U.S. 148 (1964).
[57] *See* p. 628 *supra*.
[58] Wright, *The Doubtful Omniscience of the Appellate Courts*, 41 MINN. L. REV. 751, 781-82 (1957).

pellate bench, and multiply requests for ordinary and extraordinary review beyond the capacity of appellate judges to consider them properly.[59]

HUGH J. BEARD, JR.

Civil Procedure—Specificity in Pleading under North Carolina Rule 8(a)(1)

A problem now[1] facing the North Carolina practitioner desiring to bring an action is drafting a complaint[2] that will satisfy the requirements of rule 8(a)(1) of the North Carolina Rules of Civil Procedure[3] (NCRCP). The drafter is no longer required to set out "[a] plain and concise statement of the facts constituting a cause of action . . . ."[4] but rather is supposed to draft "[a] short and plain statement of the claim sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief . . . ."[5]

Since the new North Carolina rules are based almost entirely on the Federal Rules of Civil Procedure[6] (FRCP), from which have developed a sizable body of case law, the North Carolina pleader could rapidly determine the standard that he is required to meet in his complaint were it not for the phrase "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions

[59] *Id.* at 779. The Second Circuit reiterated its limitation of the applicability of *Eisen* in Carceres v. International Air Transport Ass'n, Civil Nos. 33433-39 (2d Cir., Jan. 13, 1970), in which a similar appeal from a negative rule 23(c)(1) determination was dismissed. Upon the authority of *International Pipe*, Judge Hays reluctantly concurred.

[1] The North Carolina Rules of Civil Procedure were adopted by the General Assembly during the 1967 session and were to become effective July 1, 1969. Ch. 954, § 10, [1967] N.C. Sess. L. 1354. The 1969 session of the General Assembly postponed the effective date until January 1, 1970. Ch. 895, § 21, [1969] N.C. Sess. L. —.

[2] Throughout this note, in the interest of simplicity, the pleading alleging a claim will be called a complaint; the pleading party, plaintiff; and the party attacking the complaint, defendant.

[3] N.C.R. CIV. P. 1-84, N.C. GEN. STAT. § 1A-1 (1969). The North Carolina rules are basically the same as the Federal Rules of Civil Procedure; most of the differences between the two sets of rules are discussed herein.

[4] N.C. GEN. STAT. 1-122 (1953) (repealed Jan. 1, 1970). This statute was originally enacted August 18, 1868, as § 93 of the 1868 Code of Civil Procedure.

[5] N.C.R. CIV. P. 8(a)(1).

[6] FED. R. CIV. P. 1-86, 28 U.S.C., app., Rules of Civil Procedure for the United States District Courts (1964).