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Federal District Court Consolidation Orders and the Final Judgment Rule

FEDERAL DISTRICT COURT CONSOLIDATION ORDERS AND THE FINAL JUDGMENT RULE

Rule 42(a) of the Federal Rules of Civil Procedure permits a federal judge, at his discretion, to order a joint hearing or trial when matters in issue, in different actions, involve a common question of law or fact. Such an order is called a consolidation order and has as its avowed purpose the avoidance of unnecessary costs or delay. Although not subject to immediate appeal within the meaning of section 1291 of the Judiciary and Judicial Procedure Code of 1948, there is substantial conflict among the courts of appeal as to whether exceptional circumstances warrant an appeal before a final judgment.[1] This conflict was most recently recognized by the Court of Appeals for the Third Circuit in *Kelly v. Greer*[2] where the appellant contested the validity of a consolidation order made by the district court judge on the motion of the plaintiff. The appellate court indicated that while some circuits had allowed immediate appellate

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70. Such a bill was introduced at the 1961 General Assembly. S.J.Res. 7, 92d Indiana General Assembly (1961). It passed the senate but was never reported out of the House Judiciary A Committee.

71. An amendment to article VI, § 11 of the Indiana constitution passed the 92d General Assembly in 1961. According to article XVI, § 2 of the constitution, no new amendment can be introduced while one is pending. If, however, the pending one is rejected by the 93d General Assembly, new ones could be introduced at that session.

72. There have been some indications that such an amendment would receive support in the 93d General Assembly. The 1962 Indiana Republican Platform, section on Tax Reforms and Repeal says: "We advocate an end to the unjust, confused and expensive assessment of household goods." The Marion County Republican candidates for the General Assembly have said that they will campaign on a platform calling for the elimination of the household personal property tax. Indianapolis Times, August 1, 1962, p. 15, cols. 3-5.

1. On appeal, the injury normally complained of is that the consolidation has either caused confusion to the jury or prejudiced the complainant's cause. See Williams v. National Sur. Corp., 257 F.2d 771 (5th Cir. 1958); United States v. Knauer, 149 F.2d 519 (7th Cir. 1945), *aff'd*, 328 U.S. 654 (1946); Polito v. Molarsky, 123 F.2d 258 (8th Cir. 1941), *cert. den.*, 315 U.S. 804 (1942); Associated Indem. Corp. v. Davis, 51 F. Supp. 835 (N.D. Pa. 1943).

2. 295 F.2d 18 (3d Cir. 1961).

review on the grounds that the order was subject to the collateral order doctrine[3] or that extraordinary circumstances were involved,[4] two circuits had held a consolidation order was not immediately reviewable because such an order was not a final judgment.[5] The court in the *Kelly* case decided, however, that it did not have to pass upon the question of whether a consolidation order was immediately appealable, because in granting the order the trial judge had properly exercised his discretion. The practical effect of the *Kelly* case was to permit an immediate appellate review of a consolidation order, but the court leaves to supposition the grounds upon which the order was considered to be immediately reviewable. In short, the court only added to the already existing conflict and further emphasized the need of a critical investigation of the merits and the methods of immediate appellate review of district court consolidation orders.

Federal Appellate Review Policy

A necessary antecedent to an investigation of the problem of immediate appellate review of consolidation orders is to consider the overall federal appellate review policy, since presumably any resolution of the consolidation problems should be consistent with that policy.

The federal courts and Congress have long had a policy against permitting piecemeal appeals.[6] Such appeals have the effect of taxing already overcrowded federal court dockets and of unnecessarily extending litigation. There exists, for instance, the possibility that the claim of error may be rendered moot by (1) the eventual determination of the action in favor of the claimant or (2) the settlement of the dispute out of court before a final judgment can be rendered. Added to these possible eventualities is the fact that errors which seem important at an early stage of litigation often-times seem trivial in light of the final decision.[7] Finally, there is the very real possibility that the appeal may be undertaken, not on its merits, but as a dilatory tactic interposed for the purpose of delay. The combination of these factors—added time, unnecessary expense, possible mootness and the potential use of the appeal as a dilatory

3. See MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958).

4. See Johnson v. Manhattan Ry., 61 F.2d 934 (2d Cir. 1932); Adler v. Seaman, 266 Fed. 828 (8th Cir. 1920).

5. See Travelers Indem. Co. v. Miller Mfg. Co., 276 F.2d 955 (6th Cir. 1960); Skirvin v. Mesta, 141 F.2d 668 (10th Cir. 1944).

6. See Panicella v. Pennsylvania R.R., 252 F.2d 452, 454 (3d Cir. 1958).

7. In discussing the final judgment doctrine, Judge Frank declared, "The philosophy behind this practice is that many mistakes, apparently important at the time will be seen to be trivial from the perspective of a final disposition of the case, and that disputes will, therefore, be more expeditiously settled [by requiring a final judgment]." Perkins v. Endicott Johnson Corp., 128 F.2d 208, 212 (2d Cir. 1942) (dictum).

tactic—dictated that a policy against piecemeal appeals be adopted if judicial review was to be efficient.[8]

Congress supplied the requisite policy in section 1291 of the Judiciary and Judicial Procedure Code of 1948: "The courts of appeals shall have jurisdiction of appeals *from all final decisions* of the district courts of the United States. . . ." (Emphasis added.)[9] Referred to as the final judgment rule or the doctrine of finality, section 1291 imposes a jurisdictional limitation on the courts of appeal by restricting them to appeals from final judgments only. The effect of this doctrine of finality is to combine in one judicial review all questions of the district court proceedings that may be effectively reviewed.[10] The court of appeals is thus able to review the trial proceedings as a whole and the possibility that a decision will result in an abstract declaration is virtually eliminated.[11]

The final judgment rule, however, has been subjected to vigorous criticism,[12] the essence of which concerns the wasteful formality of the final judgment rule and the possible irreparable injury to a litigant who must await a final judgment until he can appeal.[13] In many instances time and expense are not saved. For example, immediate appellate review of an order which is not a final judgment may end the litigation or prevent a later reversal and a new trial. Consequently, there are situations when the final judgment rule actually extends litigation. Statutory and judicial recognition of some of these problems is evident in the availability of immediate appellate review of certain orders which cannot ordinarily be classified as final judgments. Included in this category are certain interlocutory orders[14] and judgments upon multiple

8. ". . . [J]udicial review must not be leaden footed. Its momentum must not be arrested by permitting separate reviews of the component elements in a unified cause." Cobbledick v. United States, 309 U.S. 323, 325 (1940) (dictum).

9. "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the Disrict Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1958).

10. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

11. Taylor v. Board of Education, 288 F.2d 600, 605 (2d Cir. 1961) (dictum).

12. See Crick, *The Final Judgment as a Basis of Appeal,* 41 YALE L.J. 539 (1932); 58 YALE L.J. 1186 (1949).

13. *E.g.,* in Hartley Pen Co. v. United States Dist. Ct., 287 F.2d 324 (9th Cir. 1961), on a petition for a writ of mandamus, the court held that an order to disclose a secret formula in discovery proceedings was an abuse of discretion. The court noted that compliance with this order would destroy the value of the secret formula and this could not be remedied on appeal from a final judgment.

14. See 28 U.S.C. § 1292 (1958).

claims.[15] Moreover, the courts have broadened the concept of finality[16] and liberalized the granting of extraordinary writs in an attempt to alleviate some of the harshness of the finality rule.[17]

TREATMENT OF CONSOLIDATION AS A FINAL JUDGMENT

Adler v. Seaman,[18] the initial attempt to obtain immediate appellate review of a consolidation order, was allowed on the grounds that the particular order amounted to a final judgment. The *Adler* case was a consolidation of two different actions against the same defendant. In the first suit, Seaman had brought a derivative action asking for recovery of wasted sums and removal of the defendant corporation's directors. In a second suit, Adler filed a bill in equity praying for the court to place the defendant in the Seaman derivative suit in receivership. After a receiver had been appointed in the Adler equity suit, the parties in the Seaman derivative suit filed motions in both suits praying for consolidation and that the Adler equity suit be treated as an intervention in the Seaman derivative suit. Adler appealed from an order granting these motions.[19]

The Court of Appeals for the Eighth Circuit recognized that the purpose of these motions was to secure an intervention of the Adler equity suit in the Seaman derivative suit, making the Adler suit ancillary and supplemental to the existing litigation. The fact that the receiver already appointed in the Adler equity suit could qualify in the Seaman derivative suit was held by the court to be an insufficient basis for consolidation.[20] The court acknowledged that consolidation orders were not ordinarily appealable until a final judgment had been rendered. The order in this case, however, did not leave the Adler equity suit as an independent suit but subordinated it as an intervention in the Seaman deriv-

15. See FED. R. CIV. P. 54(b).

16. See MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958); Adler v. Seaman, 266 Fed. 828 (8th Cir. 1920).

17. See United Airlines Inc. v. Wiener, 286 F.2d 302 (9th Cir. 1961); American Pac. Prod. v. Dist. of Guam, 217 F.2d 589 (9th Cir. 1955).

18. 266 Fed. 828 (8th Cir. 1920).

19. Consolidation was allowed by Rev. Stat. § 921 (1875) which provided:
> When causes of a like nature or relative to the same question are pending before a Court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice and may consolidate said causes when it appears reasonable to do so.

20. Adler v. Seaman, 266 Fed. 828, 837 (8th Cir. 1920). Consolidated actions should preserve their separate identity and are not merged into a single action. Greenberg v. Gianini, 140 F.2d 550 (2d Cir. 1944); National Nut Co. of California v. Susu Nut Co., 61 F. Supp. 86 (D.C. Ill. 1944); United States v. Bregler, 3 F.D.R. 378 (D.C.N.Y. 1944).

ative suit. The order took from Adler the control of his own litigation and made his suit dependent on the success of other litigation. A review after a final decision, in the opinion of the court, would not have been an adequate remedy for Adler, because in the meantime the receiver would have wasted assets to which Adler was entitled.[21] The court therefore allowed immediate appellate review, notwithstanding the doctrine of finality.

The *Adler* case is the only case in which the final judgment argument, as such, has been presented. Although theoretically it is no violation of the policy against piecemeal appeals to allow immediate appellate review of an order which qualifies as a final judgment, it is contended that considering a consolidation order as a final judgment because of irreparable injury is a judicial fiction[22] which opens the door to piecemeal appellate review by the mere allegation of irreparable injury. The doctrinal weakness of the *Adler* case, however, is probably not the reason that the *Adler* final judgment doctrine has remained unused. The most plausible rationale is that later courts did not need to rely on *Adler* because they could accomplish the same result with the collateral order doctrine. In fact, it could be argued that the *Adler* case was nothing more than a primitive application of the contemporary collateral order doctrine. The *Adler* case irrespective of any of its weaknesses, however, does illustrate that where irreparable injury results from the grant or denial of a consolidation order there is need for a provision enabling an immediate appellate review of the order.

Immediate Review Through the Collateral Order Doctrine[23]

Although the collateral order doctrine existed before 1949, in that year a definitive standard was established in *Cohen v. Beneficial Industrial Loan Corp.*[24] The plaintiff in the *Cohen* case brought a derivative stockholder's suit. A state statute provided that plaintiffs in such actions may be required to give security for reasonable expenses of the defendant if they do not represent a given interest in the corporation. The defendant moved to require security and the district court denied the motion on the grounds that the state statute was procedural, not substantive,

21. Adler v. Seaman, *supra* note 20, at 840.

22. Generally an order granting or denying consolidation is treated as an interlocutory order. See Whiteman v. Petrie, 220 F.2d 914 (5th Cir. 1955) (dictum); Skirvin v. Mesta, 141 F.2d 668 (10th Cir. 1944) (dictum). See generally 2B Barron & Holtzoff, Federal Practice and Procedure, 179 (Rev. ed. 1961).

23. See generally 6 Moore, Federal Practice, ¶ 54.14 (2d ed. 1958); Underwood, *Appeals in the Federal Practice from Collateral Orders,* 36 Va. L. Rev. 731 (1950); 51 Nw. U.L. Rev. 751 (1957).

24. 337 U.S. 541 (1949).

hence the federal court need not apply state law in this diversity suit. The Supreme Court recognized that this order was not ordinarily appealable,[25] but held that an order which is a final disposition of a collateral claim of right, not an ingredient of the cause of action,[26] and which would not be considered on appeal from a final judgment, is immediately reviewable.[27]

The collateral right in the *Cohen* case was the right of the defendant to have plaintiff post security before plaintiff could bring his suit. This was a valuable interest to the defendant granted by statute, and the denial of the right was given the dignity of a final judgment which the court would immediately review. Similar treatment has been given to an order vacating attachment or garnishment,[28] an order denying a motion to reduce bail,[29] an order dismissing a petition for supplemental attorney's fees and for liens to secure payment thereof[30] and an order directing that notice of a tax lien be cancelled and a supersedeas bond be approved in lieu thereof.[31] These orders terminated a collateral proceeding and were treated as final judgments within the final judgment provision, section 1291.[32]

In *MacAlister v. Guterma,*[33] a derivative stockholder's action for breach of fiduciary duty was brought in three separate actions. A re-

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25. *Id.* at 545.

26. *Id.* at 546:

> This decision appears to fall into that small class which finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. . . . This order is appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

27. "[The order] did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When the time comes for review it will be too late to effectively review and the right conferred by the statute [if it is applicable] will have been lost, probably irreparably." *Ibid.*

28. See Swift and Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684 (1950); *contra,* Cushing v. Laird, 107 U.S. 69 (1882) (where an attachment or garnishment in a *quasi in rem* action was upheld pending a final determination on the merits).

29. See Stack v. Boyle, 342 U.S. 1 (1950).

30. See Preston v. United States, 284 F.2d 514 (9th Cir. 1960).

31. See Tomlinson v. Poller, 220 F.2d 308 (5th Cir. 1956).

32. See generally Underwood, *Appeals in the Federal Practice from Collateral Orders,* 36 VA. L. REV. 731, 736 (1950) where the author states:

> Final decisions as used in 28 U.S.C. § 1291 (1948) most often mean the decision terminating the litigation; but as we have seen, the term also covers orders which are collateral, but which are irreparable in their effect upon the rights of some party. Such an order is, in a sense, a separate proceeding and a litigation in itself. The order may initiate that particular constructive proceeding, but in any event the order also terminates it, and therefore is a final decision and falls within § 1291.

33. 263 F.2d 65 (2d Cir. 1958).

quest for consolidation of the actions for all purposes, including the pre-trial stages, was included in the preliminary motions of the defendant. The district judge denied consolidation of the actions for pre-trial, and this was one of the orders appealed from by the defendant who contended that pre-trial consolidation was proper and that the denial was an abuse of discretion. After presenting the test in the *Cohen* case,[34] the appellate court stated that,

> The finality required by statute has therefore been judicially qualified to mean, not only decisions terminating litigation, but also orders which are collateral and which are irreparable in their effect upon the rights of some party.[35]

The court in the *MacAlister* case noted that the question of whether denial of pre-trial consolidation was of the same character as orders reviewable under the collateral order doctrine was difficult and, therefore, it was not attempting to prescribe a universal rule for consolidation orders but the court felt the particular order met the *Cohen* collateral order test.[36] The court of appeals, however, affirmed the district court decision pointing out that the district court judge had exercised proper discretion in denying the motion since it was too early to determine if failure to consolidate would cause the duplication and confusion the defendant wished to avoid by his consolidation motion.[37]

The reasoning of the *MacAlister* case leaves unanswered some basic questions concerning the application of the collateral order doctrine to district court consolidation decisions. The court fails to identify the collateral claim of right that was established by a denial of pre-trial consolidation.[38] Is the collateral right the right to pre-trial consolidation, or is it more basic than that, *i.e.*, a right to avoid duplication and confusion? In the *Cohen* case posting security for defendant's expenses was a substantive matter outside the scope of the main litigation, based on a right conferred by a statute. The federal rule 42(a) consolidation provision, however, is merely a procedural step in the conduct of a trial and is not a right since the grant or denial of consolidation is a matter of discretion with the trial judge. Therefore, it would appear that this denial of consolidation was not reviewable as a collateral order. Recent decisions,

34. See note 26 *supra.*
35. MacAlister v. Guterma, 263 F.2d 65, 67 (2d Cir. 1958).
36. *Ibid.*
37. *Id.* at 70.
38. The court explicitly states, "A denial of the consolidation sought bears no relation to the substantive claims in the case, is collateral thereto and is not merged in the final judgment," without any previous discussion as to why this conclusion is true. *Id.* at 67.

however, indicate that the courts may be adopting a more liberal attitude in relation to the concept of the claim of right, thereby expanding the application of the *Cohen* collateral order test.[39] Although it is too early to determine if all the courts are going to adopt the more liberal attitude, it is contended that there may be some danger that a broad application of the collateral order doctrine would, in effect, destroy the policy against piecemeal appeals, since a litigant could conceivably argue that any ruling adverse to him is a collateral claim of right, hence subject to immediate appellate review.

IMMEDIATE APPELLATE REVIEW OF A CONSOLIDATION ORDER AS AN INTERLOCUTORY ORDER[40]

Since it appears that use of the collateral order doctrine final judgment rationale for immediate appellate review of consolidation orders will open the door to piecemeal review, the remaining alternative is to consider a consolidation order as an interlocutory order and reviewable as such.

Answering a call[41] for some type of relief from the harshness of section 1291, the final judgment provision, Congress amended section 1292,[42] the interlocutory order statute by adding:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon in its discretion permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *provided,* however, that application for an appeal hereunder shall not stay proceedings in the district court

39. See Harmar Drive-In Theater, Inc. v. Warner Bros. Pictures, 239 F.2d 555 (2d Cir. 1956) (an order denying a motion to disqualify attorneys); Weilbocher v. J. H. Winchester Co., 197 F.2d 303 (2d Cir. 1952) (an order vacating a court approved stipulation dismissing an appeal).

40. 28 U.S.C. § 1292(a) (1958), dealing with a limited number of interlocutory orders and 28 U.S.C. § 54(b) (1958), dealing with multiple parties and multiple claims would ordinarily not be applicable to a normal interlocutory consolidation order. However, if such an order had an effect other than consolidation, *i.e.,* accomplishing the purposes of receivership or determining rights of parties in admiralty cases, then § 1292(a) would be used.

41. See generally 58 COLUM. L. REV. 1306 (1958); 58 YALE L.J. 1186 (1948).

42. 28 U.S.C. § 1292(a) (1958).

unless the district judge or the Court of Appeals or a judge thereof shall so order.[43]

In order to obtain immediate appellate review of an interlocutory order by the district judge, the order must involve a controlling question of law as to which there is a substantial ground for difference of opinion.[44] Legislative history indicates that to be a controlling question of law, the legal question must be of the type that would, if decided, terminate the litigation in the favor of the appellant.[45] Although some courts have accepted this test,[46] the majority of the courts have rejected it and define a controlling question of law as any central question of law, not settled by controlling authority.[47] Even though there is conflict as to the definition of a controlling question of law, it appears that the courts are somewhat hostile to considering a discretionary order question as a controlling question of law under either definition.[48] Since an order pursuant to the federal rule 42(a) consolidation provision is a matter of discretion with the district judge it appears that such an order would not be immediately reviewable under section 1292(b).[49]

However, in a recent case, *United Airlines Inc. v. Wiener*,[50] jurisdiction to review the denial of a consolidation order under federal rule 42(a) was based on section 1292(b). In the *United Airlines* case, twenty-three actions were brought as a result of a collision between appellant's airplane and an airplane owned by the United States government. The United States made a motion for consolidation on the issue of liability and United Airlines filed a motion for consolidation on all the issues. The district court granted consolidation on the issue of liability only and United Airlines appealed. The court of appeals did not discuss whether the provisions of section 1292(b) had been satisfied but

43. 28 U.S.C. § 1292(b) (1958). See generally 47 GEO. L.J. 474 (1959); 72 HARV. L. REV. 584 (1959).

44. See 28 U.S.C. § 1292(b) (1958).

45. S. REP. No. 2434, 85th Cong. 2d Sess. (1958).

46. See Berger v. United States 170 F. Supp. 795, 797 (S.D.N.Y. 1959) where the judge stated, "I rest my decision, however, on the fact that there is not enough likelihood of success upon the appeal to warrant the exercise of my discretion in expediting it."

47. See, *e.g.*, *In re* Heddendorf, 263 F.2d 887 (1st Cir. 1959); Cordero v. Panama Canal Co. 170 F. Supp. 234 (S.D.N.Y. 1959); Orzulak v. Federal Commerce & Nav. Co., 168 F. Supp. 15 (E.D. Pa. 1958)

48. See United States v. Woodburry, 263 F.2d 784 (9th Cir. 1959); Seven-Up Co. v. O-So Grape Co., 179 F. Supp. 167 (S.D. Ill. 1959); Deepwater Exploration Co. v. Andrew Weir Ins. Co., 167 F. Supp. 185 (E.D. La 1958).

49. The second requirement, that the immediate appeal will materially advance the litigation has been strictly required and an appeal will be denied if it cannot materially advance the ultimate termination of the litigation. See Gottesman v. General Motors Corp., 268 F.2d 194 (2d Cir. 1959); Krock v. Texas Co., 167 F. Supp. 947 (S.D.N.Y. 1958).

50. 286 F.2d 302 (9th Cir. 1961).

merely stated that jurisdiction was based on section 1292(b).[51] In effect, the court allowed an appeal based on the trial judge's denial of consolidation, a discretionary order which had not been previously cited as the type of controlling question of law which was appealable.[52] There has been no indication whether the courts of appeal will follow the *United Airlines* case and allow a discretionary order to be immediately reviewed; however, the previous conservative practice of not allowing immediate appellate review of discretionary orders would indicate that this case may not be followed by the other circuits and the controlling question of law will have to be more than a discretionary order.

IMMEDIATE APPELLATE REVIEW THROUGH THE USE OF THE WRIT OF MANDAMUS[53]

A brief note should be made of another method of obtaining immediate appellate review of consolidation orders. Section 1651, referred to as the all writs statute, allows the appellate courts to issue all writs necessary or appropriate in aid of their jurisdiction.[54] One of these, the writ of mandamus, has traditionally been used to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority where it has a duty to do so.[55] There has been, however, an increase in the use of the petition for the writ of mandamus to effectuate immediate appellate review of a district judge's discretionary order, otherwise not reviewable until after a final judgment. Among those interlocutory orders reviewed by the petition for a writ of mandamus are: an order of reference to a master,[56] an order directing oral discovery in admiralty,[57] a transfer order whereby venue is changed[58]

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51. *Id.* at 304.

52. See note 48 *supra*, and accompanying text.

53. See generally 50 COLUM. L. REV. 1102 (1950); 4 DE PAUL L. REV. 279 (1955); 75 HARV. L. REV. 351, 375 (1962); 6 KAN. L. REV. 78 (1957).

54. 28 U.S.C. § 1651 (1958).

55. Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 16 (1941) (dictum):
> The traditional use of the writ of mandamus in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so; and even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal.

56. See LaBuy v. Howes Leather Co., 352 U.S. 249 (1957); *In re* Watkins, 271 F.2d 771 (5th Cir. 1959).

57. See Atlass v. Miner, 265 F.2d 312 (7th Cir. 1959) *aff'd*, 363 U.S. 641 (1960).

58. See Hotel Corp. v. United States Dist. Ct., 283 F.2d 470 (6th Cir. 1960); Chicago R.I. & P. Ry. v. Igoe, 220 F.2d 299 (7th Cir. 1955); Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir. 1950). In regard to transfer orders, the 1st and 3rd circuits have voiced strong opposition to the use of mandamus as a means of obtaining immediate appellate review of interlocutory orders. See *In re* Josephson, 218 F.2d 144 (1st Cir.

and a discovery order.[59] Use of this means of obtaining appellate review appears to be subject only to the limitation that no other means to obtain immediate appellate review is available.[60]

The use of the petition for the writ of mandamus as a method of obtaining immediate appellate review of consolidation orders was foreseen in 1932[61] and mandamus was finally used in *American Pacific Prod. v. District of Guam.*[62] In the *American Pacific* case, a writ of mandamus was sought to compel the district court to separate a consolidated action. Although the court ruled that a grant of mandamus was not proper because complainant had not shown any prejudice to his cause because of consolidation, the court, in effect, allowed immediate appellate review, through the petition for mandamus, of the district court's consolidation order. The *American Pacific* court did not discuss whether a mandamus proceeding was proper, but in the recent *Kelly* case,[63] where the multiple methods of obtaining immediate appellate review of consolidation orders were discussed, the court indicated that the *American Pacific* holding might be inconsistent with the proposition that a mandamus proceeding cannot be used to test the correctness of a district court's interlocutory order.[64] This statement indicates the use of the extraordinary writ as a means of immediate appellate review has not been well received by all the courts of appeal. The *American Pacific* case is an expansion of the ordinary application of the petition for the writ, but the trend away from the traditional use of mandamus has neither been held applicable to all interlocutory orders, nor do all the courts, irrespective of the situation before the court, follow a liberal practice of allowing immediate appellate review through the use of the

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1954); All States Freight v. Modarelli, 196 F.2d 1010 (3rd Cir. 1952). See generally 36 IND. L.J. 344, 357 (1960); 6 KAN. L. REV. 38 (1957).

59. See Hartley Pen Co. v. United States Dist. Ct., 287 F.2d 324 (9th Cir. 1961), where the court explicitly recognized that no jurisdictional question was involved but because of an abuse of discretion plus an inquiry that could not be corrected on appeal, the writ was granted.

60. In Allstate Ins. Co. v. United States Dist. Ct., 264 F.2d 38 (6th Cir. 1959), the court found no extraordinary circumstances that would justify the issuance of the writ of mandamus since petitioner had made no showing of having sought relief under § 1292(b).

61. A consolidation order was reviewed on an appeal from a final judgment. In discussing the appealability and effects of a consolidation order if a final judgment was not being reviewed, Judge Hand noted, "In such circumstances, in order to prevent the defeat of our appellate jurisdiction, we may have recourse to the writs appropriate to that situation." Johnson v. Manhattan Ry., 61 F.2d 934, 940 (2d Cir. 1932), *aff'd* 289 U.S. 479 (consolidation not reviewed).

62. 217 F.2d 589 (9th Cir. 1955).

63. Kelly v. Greer, 295 F.2d 18 (3d Cir. 1961).

64. See Regec v. Thornton, 275 F.2d 801 (6th Cir. 1960). It should be noted that in the *American Pacific* case, the majority did not adopt Judge Pope's concurring opinion that the petition failed to state the requested writ would be in aid of the appellate court's jurisdiction.

petition.[65] Therefore, a general statement concerning the mandamus method of immediate appellate review of consolidation orders cannot be made until the courts of appeal consider more cases in which the use of the petition is involved. There is, however, sentiment that the use of mandamus as a means of obtaining immediate appellate review will not be expanded[66] and perhaps section 1292(b), the recent amendment to the interlocutory order provision, obviates the need of the expansion of the writ of mandamus to obtain immediate appellate review of interlocutory orders.

CONCLUSION

Against the background of the policy against piecemeal review, the practical aspects of each fact situation must be considered in determining whether a consolidation order should be immediately reviewed.[67] The courts in allowing review seem to recognize the potential injury to a litigant who is not allowed immediate appellate review, but there is no uniformity as to which is the best method, and some of the methods being used foreshadow the danger of increased piecemeal review by a mere allegation of irreparable injury; namely, allowing immediate appellate review through an expansion of the use of the writ of mandamus, broadening the collateral order doctrine, and defining consolidation order in terms of a final judgment. If the interlocutory order statute, section 1292(b), is to be used for immediate appellate review, a clear expansion of the controlling question of law criterion will be required. The fact that none of these methods is clearly applicable to a consolidation may indicate it is not the type of interlocutory order which should be immediately reviewed, but this would be a harsh treatment since reversal of discretionary orders after a final judgment is rare.[68] Also, uniform

65. See note 58 *supra*.

66. See generally 75 HARV. L. REV. 351, 377-378 (1961).

67. ". . . the concept of finality as a condition of review has encountered situations which make clear that it need not invite self-defeating judicial construction." Dibella v. United States, 369 U.S. 121, 125 (1962) (dictum).

68. As one district judge said, "And judicial precedent is legion which suggests that the likelihood of successfully urging an abuse of discretion in an appellate court is comparable to the chance which an ice cube would have of retaining its obese proportions while floating in a pot of boiling water." Seven-Up Co. v. O-So Grape Co., 179 F. Supp. 167, 172 (S.D. Ill. 1959) (dictum). Only two early cases held that the consolidation was an abuse of discretion. Adler v. Seaman, 266 Fed. 828 (8th Cir. 1920); Johnson v. Manhattan Ry., 61 F.2d 934 (2d Cir. 1932). Since these two cases, research disclosed no cases in which abuse of discretion in granting or denying consolidation orders was found. See, *e.g.*, North Carolina Natural Gas Corp. v. Seaboard Sur. Co. 284 F.2d 164 (4th Cir. 1960); United States v. Knauer, 149 F.2d 519 (7th Cir. 1945), *aff'd*, 328 U.S. 653 (1946); Prudential Ins. Co. of America v. Saxe, 134 F.2d 16 (D.C. Cir. 1943), *cert. den.* 319 U.S. 745; Polito v. Molasky, 123 F.2d 258 (8th Cir. 1941), *cert. den.* 315 U.S. 804 (1942).

denial of immediate appellate review of consolidation orders ignores the practical consideration of the irreparable injury of some consolidation orders. Although this irreparable injury has not been found in many cases, this certainly does not preclude a future litigant from attempting to have an order pursuant to the federal rule 42(a) consolidation provision reversed, if he has, in fact, suffered an injury. Therefore, it would seem that immediate appellate review should be allowed for consolidation orders which, because of an abuse of discretion, cause irreparable injury. The obvious problem is to determine which method of obtaining immediate appellate review is best, without opening a floodgate of piecemeal review.

It would appear that the most practical way to provide for immediate appellate review would be to expand the controlling question of law standard of the interlocutory order statute, section 1292(b), to include discretionary orders of the trial court. Use of this method of appeal is most consistent with the objectives of the doctrine of finality in that the statute itself prevents the use of appeal as a dilatory tactic because (1) a review pursuant to section 1292(b) does not stay proceedings in the trial court and (2) the court of appeals has the discretion to permit or deny immediate appeal. Moreover, this method of allowing immediate appellate review would relieve the appellate court of straining logic to find a final judgment and allow the courts to limit the expansion of the petition for the writ of mandamus.