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Motions for Appointment of Counsel and the Collateral Order Doctrine

INTRODUCTION

Before the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Risjord*, it seemed clear that orders denying appointment of counsel in title VII and in forma pauperis cases were immediately appealable as a matter of right. The courts of appeals that had considered these issues had held the orders immediately appealable under the finality rule set forth in 28 U.S.C. § 1291 and refined by the judicially created collateral order doctrine. The consensus of the circuits and the absence of any substantial analysis of the issue may have

2. Title VII provides for appointment of counsel in employment discrimination cases: "Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security." 42 U.S.C. § 2000e-5(f)(1) (1982).
3. Federal law permits the commencement of actions in forma pauperis, which in certain cases relieves an indigent claimant from having to pay costs and fees and allows the appointment of public counsel: "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d) (1982).
4. See *Bradshaw v. Zoological Socy.*, 662 F.2d 1301, 1305 (9th Cir. 1981); see also *Ray v. Robinson*, 640 F.2d 474, 476-77 (3d Cir. 1981). *But see Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984) (finding that the circuit's earlier holding in *Ray* had been "effectively overruled" by the Supreme Court's decision in H. *Flanagan v. United States*, 104 S. Ct. 1051 (1984)).

According to *Bradshaw*, all courts of appeals addressing the appealability of orders denying appointment of counsel in title VII cases before *Firestone* had "held such orders appealable, finding them to fall squarely within the Cohen 'collateral order' exception to the final judgment rule." 662 F.2d at 1305 (footnote omitted); see also *Jones v. WFYR Radio*, 626 F.2d 576, 578 (7th Cir. 1980) (per curiam), *overturned*, Randle v. Victor Welding Supply Co., 664 F.2d 1064 (7th Cir. 1981) (per curiam); Hudak v. Curators of the Univ. of Mo., 586 F.2d 105, 106 (8th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 985 (1979); Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1308 (5th Cir. 1977); Spanos v. Penn Cent. Transp. Co., 470 F.2d 806, 807 (3d Cir. 1972) (per curiam). Moreover, the Sixth Circuit, in *Harris v. Walgreen's Distrib. Center*, 456 F.2d 588 (6th Cir. 1972), "implicitly reached a similar result with respect to orders denying appointment of counsel in Title VII suits, without discussing the issue." *Bradshaw*, 662 F.2d at 1305-06 n.11. The Second Circuit reached the same conclusion regarding a motion for appointment of counsel under 28 U.S.C. § 1915(d) (1982). *Miller v. Pleasure*, 296 F.2d 283 (2d Cir. 1961) (per curiam), *cert. denied*, 370 U.S. 964 (1962). According to *Bradshaw*, "[t]he Miller reasoning is equally applicable to Title VII orders." 662 F.2d at 1305 n.11.

5. "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." 28 U.S.C. § 1291 (1982) (emphasis added). There are, however, several statutory and judicial exceptions to the finality rule. See 28 U.S.C. § 1292 (1982); note 38 infra.


7. The courts generally took the appeal after only a minimal analysis of the appealability issue. The resulting per curiam opinions often did little more than cite *Cohen v. Beneficial Indus.*
fostered a belief that the courts had settled the question of appealability of orders denying appointment of counsel.\(^8\)

In *Firestone*, the Supreme Court held that a *pretrial* order denying a motion to disqualify opposing counsel is not appealable before final judgment.\(^9\) As a result, the appeals courts began to reconsider their positions on the appealability of orders denying appointment of counsel. The Ninth and Third Circuits reaffirmed their original positions upholding immediate appeal.\(^10\) The Seventh Circuit overturned an earlier decision\(^11\) and held that orders denying motions to appoint counsel are not immediately appealable.\(^12\) The First and Tenth Circuits, facing the issue for the first time, also refused to hear an immediate appeal.\(^13\) Again, with one exception, the courts reached their results in a conclusory fashion.\(^14\)

Two recent cases have answered questions concerning the appealability of orders granting motions to disqualify counsel that the Court

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\(^12\) *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064 (7th Cir. 1981) (per curiam).

\(^13\) *Appleby v. Meachum*, 696 F.2d 145 (1st Cir. 1983) (per curiam); Cotner v. Mason, 657 F.2d 1390 (10th Cir. 1981) (per curiam).

\(^14\) The exception is *Bradshaw v. Zoological Socy.*, 662 F.2d 1301 (9th Cir. 1981). Dissenting in *Bradshaw*, Judge Wallace stated: "The opinions cited by the majority . . . contain so little analysis that they can hardly be considered persuasive. Some rely exclusively on *Caston* . . . which . . . contains only one paragraph of analysis." 662 F.2d at 1320 n.1. (Wallace, J., dissenting). Judge Wallace conceded, however, that "the majority more than makes up for this paucity of reasoning." 662 F.2d at 1320 n.1. Indeed, the Ninth Circuit devoted over fifteen pages to arguments supporting its conclusion that orders denying appointment of counsel are immediately appealable. 662 F.2d at 1303-18.
had left open in *Firestone*. In *Flanagan v. United States*, the Court ruled that such an order, in a criminal case, was not a final order immediately appealable under the collateral order exception. Since *Flanagan* was decided, the courts of appeals have again split on the question of whether orders denying appointment of counsel are immediately appealable. The Third Circuit found that *Flanagan* effectively overturned its post-*Firestone* decision that such orders are immediately appealable. The Sixth Circuit originally distinguished *Flanagan* and held that orders refusing appointment of counsel could be immediately appealed; however, it recently vacated that decision in accord with *Flanagan*. The Eighth Circuit reached the same result that the Sixth originally did, but did not discuss *Flanagan*.

In the 1985 case of *Richardson-Merrell, Inc. v. Koller* the Court expanded the holding of *Flanagan* to include orders disqualifying counsel in civil cases. It is not clear whether *Koller* will have an impact upon the circuit courts' analysis of cases involving trial court orders denying appointment of counsel.

This Note argues that denials of motions for appointment of counsel should be immediately appealable under the collateral order exception to 28 U.S.C. § 1291. Part I examines the extent to which the...
collateral order doctrine modifies the finality rule. It argues that recent Supreme Court decisions that at first appear to have narrowed the doctrine have in fact only restated it. Part II applies the collateral order doctrine to orders denying appointment of counsel, concluding that such denials qualify for immediate review. Part III argues that policy considerations support this conclusion.

I. THE FINALITY RULE AND THE COLLATERAL ORDER DOCTRINE: COHEN TO KOLLER

In the federal courts, only a final judgment is appealable under 28 U.S.C. § 1291. The Supreme Court has defined a final judgment as “one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” Moreover, section 1291 forbids appeals “even from fully consummated decisions, where they are but steps towards final judgments in which they will merge.” The final judgment rule implements the policy against permitting “piecemeal appeals” that might undermine the authority of district court judges.

Nevertheless, the courts and Congress have for some time recognized that strict and technical insistence on finality would be, at times, both inefficient and unjust. Congress has acknowledged this point by

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27. Firestone Tire & Rubber Co. v. Rjsjord, 449 U.S. 368, 374 (1981) (“‘Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system.’”).

28. See, e.g., Bradshaw v. Zoological Soc'y., 662 F.2d 1301, 1304 (9th Cir. 1981), (“[A] rigid insistence on technical finality would sometimes conflict with the purposes of the statute.”) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 471 (1978)); see also Note, The Finality Rule for Supreme Court Review of State Court Orders, 91 HARV. L. REV. 1004, 1008 (1978) (Rigid adherence to the finality rule may lead to “inefficient results.”); Note, Proposals for Interlocutory Appeals, 58 YALE L.J. 1186, 1187 (1949) (“In many instances, however, the final judg-
creating statutory exceptions to finality;\(^{29}\) the courts have developed the collateral order doctrine.\(^{30}\) That doctrine, embodied in *Cohen v. Beneficial Industrial Loan Corp.*\(^{31}\) and its progeny, reflects a concern on the part of the courts that the finality requirement be pragmatically construed so as to avoid potentially irreparable injuries to the litigant.\(^{32}\)

An individual seeking immediate appeal of an order declining to appoint counsel must invoke the collateral order doctrine. Neither mandamus nor interlocutory appeal under 28 U.S.C. § 1292(b)\(^{33}\) are helpful alternatives. Mandamus has long been considered an extraordinary avenue to appellate review; this perception, in part, has led to the adoption of alternative means of review like section 1292(b).\(^{34}\) Section 1292(b) is also an inadequate alternative since it allows interlocutory appeals to be certified only on controversial questions of law

\(^{29}\) 28 U.S.C. § 1292(a) (1982) provides for immediate review of orders dealing with injunctions, appointment of receivers, and admiralty cases. Section 1292(b) provides for interlocutory appeals if (1) the trial judge certifies that an 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" and (2) if the appellate court decides to accept such an appeal. Fed. R. Civ. P. 54(b) provides for interlocutory appeal under certain circumstances in multiple party or multiple claim litigation. Finally, 28 U.S.C. § 1651 (1982) provides for writs of mandamus, which may substitute for interlocutory appeal in extreme situations.

\(^{30}\) The collateral order doctrine is by far the most common judicial exception to finality. Several circuits formerly allowed another exception in cases where the order would effectively terminate the case by making it impossible for the plaintiff to continue. This approach, which came to be known as the "death knell" doctrine, was rejected by the Supreme Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). *See generally* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3912 (1982) [hereinafter cited as 15 FEDERAL PRACTICE]. In addition, the so-called Forgay doctrine provides a very limited exception to finality where hardship may result from orders that cannot be reviewed before final judgment are entered before complete disposition of a case. *See generally* 15 FEDERAL PRACTICE supra, at § 3910. This doctrine originated in *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848).

\(^{31}\) 337 U.S. 541 (1949). *Cohen* was a shareholder's derivative suit in which the trial court declined to require the plaintiff to post security for costs despite a state law that so required. The defendant appealed the ruling before final judgment and the appellate court reversed. The Supreme Court took this occasion to announce the collateral order doctrine and upheld the defendant's right to immediate appeal. While the collateral order doctrine is often thought to have originated in *Cohen*, the Supreme Court has noted that *Cohen* only reformulated an older rule. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981) ("*Cohen* did not establish new law; rather, it continued a tradition of giving § 1291 a 'practical rather than technical construction.'") (quoting *Cohen*, 337 U.S. at 546); *see also* Note, *Appellate Procedure: Firestone Tire & Rubber Co. v. Risjord: Tightening the Collateral Order Doctrine*, 50 UMKC L. REV. 99, 102 n.28 (1981) (agreeing that "only the formulation" of the doctrine was new).

\(^{32}\) According to *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976), the collateral order doctrine reflects "the core principle that statutorily created finality requirements should, if possible, be construed as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *See also* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).


on which a substantial basis for a difference of opinion exists and from which an appeal might expedite the litigation.35

A. The Collateral Order Doctrine as Articulated in Cohen

The collateral order doctrine formulated by Cohen v. Beneficial Industrial Loan Corp.36 permits an appeals court to treat “a ‘small class’ of orders that do not end the main litigation as final and appealable pursuant to § 1291.”37 It has repeatedly been described as a narrow exception to the finality requirement for appellate review set forth in 28 U.S.C. § 1291.38

The Supreme Court in Cohen set forth a test to determine which orders fall within the small class that can be treated as final. Pursuant to the Cohen standard, an order is immediately appealable if it “finally determine[s] 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.”39

Since Cohen, the Supreme Court’s determinations of finality under this test have not always been consistent.40 The Court itself has recognized that “[n]o verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future.”41 This is partly because finality frequently involves

35. 15 FEDERAL PRACTICE, supra note 30, § 3911, at 499 (footnote omitted); Again, however, [§ 1292(b)] does not provide strong reason for generally restricting the collateral order doctrine. Its application depends on a certificate of the district court that an order involves a controlling question of law . . . . The questions of law posed by truly collateral orders are not apt either to be ‘controlling’ in relation to the rest of the litigation, nor to be important to advancing ultimate termination.


38. E.g., Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (“Our decisions have recognized, however, a narrow exception to the requirement that all appeals under § 1291 await final judgment on the merits.”); Bradshaw v. Zoological Soc'y., 662 F.2d 1301, 1304 (9th Cir. 1981) (“We recognize that the Cohen doctrine is to be regarded as an exception to the final judgment rule . . . .”); Cotner v. Mason, 657 F.2d 1390, 1391 (10th Cir. 1981) (per curiam) (“A narrow exception to the final judgment rule is the ‘collateral order’ doctrine of Cohen . . . .”).

39. 337 U.S. at 546.

40. Compare Gillespie v. United States Steel Corp., 379 U.S. 148, 153 (1964) (“We cannot say that the Court of Appeals chose wrongly [in allowing an immediate appeal] under the circumstances. And it seems clear now that the case is before us that the eventual costs . . . will certainly be less if we now pass on the questions presented . . . .”), with Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376 (1981) (“To be appealable as a final collateral order, the challenged order must constitute ‘a complete, formal and, in the trial court, final rejection’ . . . of a claimed right ‘where denial of immediate review would render impossible any review whatsoever.’” (quoting Abney v. United States, 431 U.S. 651, 659 (1977) and United States v. Ryan, 402 U.S. 530, 533 (1971))).

close factual questions. Nevertheless, the Court has consistently articulated the Cohen test in evaluating requests for immediate review.

B. Collateral Order Cases Since Cohen and Their Effect on the Original Rule

Four recent decisions regarding the collateral order doctrine — Coopers & Lybrand v. Livesay, Firestone, Flanagan, and Koller — suggest that the Supreme Court has begun to retreat from the notion that finality should be given a "practical rather than a technical construction." In all four cases, the Supreme Court reversed lower court decisions allowing immediate appeal.

42. In Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 n.9 (1974), the Court noted: As Mr. Justice Black commented in Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964), "Whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and . . . it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality."

See also Comment, Requiem for the Final Judgment Rule, 45 Texas L. Rev. 292, 295-96 (1966).


44. 437 U.S. 463 (1978). In Coopers & Lybrand, the Supreme Court refused to find an order denying class certification immediately appealable despite the lower court's conclusion that such an order made it impractical for plaintiff to continue the case.


49. At the time Firestone was decided, six circuits refused to permit immediate appeal from orders refusing to disqualify opposing counsel while five permitted such appeals. Firestone, 449 U.S. at 373 n.10 (1981). Before 1979, the circuits had been split eight-to-three in favor of allowing appeal; but between 1979 and 1980, the Second, Sixth, and Eighth Circuits overruled previous holdings that had allowed immediate appeal. Firestone, 449 U.S. at 373 n.10.

Before Flanagan, seven circuits had allowed immediate appeals of orders disqualifying criminal defense counsel, while the Ninth Circuit had refused to do so. Flanagan, 465 U.S. at 1053 n.2. Similarly, at the time the Court decided Koller, two circuits refused to assert jurisdiction over immediate appeals of orders disqualifying counsel in civil cases, while four circuits did agree to hear such interlocutory appeals. Koller, 105 S. Ct. at 2762.

When the Supreme Court decided Coopers & Lybrand, it reversed the Eighth Circuit's holding that denials of motion for class certification were immediately appealable. At the time of that decision, at least three circuits allowed appeals from orders denying class certification, while two
But while the Supreme Court may be attempting to control the loose application of the collateral order doctrine, nothing in these four cases indicates that the Court has either changed its fundamental test for immediately appealable collateral orders or narrowed the basic principle set forth in *Cohen*. Indeed, despite its recent decisions denying the right to immediate appeal in certain contexts, the Supreme Court has continued to apply the collateral order doctrine in other situations. In *Coopers & Lybrand*, *Firestone*, *Flanagan*, and *Koller* reinforce the *Cohen* collateral order doctrine rather than undercut it.

In *Coopers & Lybrand*, although the Court reformulated the *Cohen* test slightly, it did not alter the substance of the test. The *Coopers & Lybrand* Court held that to be appealable under the collateral order doctrine, an "order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." This three-prong standard requires, as does the *Cohen* test, a conclusive order collateral to the merits of the action itself. It differs from such appeals. *Coopers & Lybrand*, 437 U.S. at 465 n.2. The *Coopers & Lybrand* holding also apparently overturned the death knell doctrine, which several circuits had used to allow immediate appeals. *Coopers & Lybrand*, 437 U.S. at 476 ("[T]he 'death knell' doctrine does not support appellate jurisdiction of prejudgment orders denying class certification.")

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50. See Note, *Civil Procedure-Interlocutory Appeals: Orders Denying Disqualification of Counsel Are Not Appealable Pursuant to the Collateral Order Exception*, 56 TUL. L. REV. 1035, 1040 (1982) ("[A]lthough the Supreme Court has stressed that the collateral order doctrine is a very narrow exception to the final judgment rule, the circuit courts have applied *Cohen* liberally to assert jurisdiction over a wide variety of interlocutory orders.") (footnote omitted); Note, supra note 31, at 107 (arguing that despite an apparent trend in the circuits to tighten the collateral order doctrine with respect to orders denying disqualification, the Supreme Court decided *Firestone* in an effort to accelerate the trend).


53. There is some confusion as to whether the collateral order test has three parts or four. Professors Wright, Miller, and Cooper see four separate requirements: (1) a conclusive order, (2) collateral to the merits, (3) that is effectively unreviewable after final judgment, and (4) that affects a substantial right. *FEDERAL PRACTICE*, supra note 30, § 3911, at 470-71 (1976). However, it is not at all clear that the fourth part survives as an explicit additional requirement. One commentator has said, "Some courts have continued to require 'public importance,' even though the [Supreme] Court has not emphasized it in recent cases." Comment, supra note 35, at 455-56 (footnotes omitted); see also Significant Development, *The Collateral Order Doctrine After Firestone Tire & Rubber Co. v. Risjord: The Appealability of Orders Denying Motions for Appointment of Counsel*, 62 B.U. L. REV. 845, 862-63 (1982) (interpreting "important issue" as a separate factor of the *Cohen* test but defining it as "the effect of the order on the particular litigant") (footnote omitted). In *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), however, the Supreme Court relied on the *Coopers & Lybrand* formulation of the
from the Cohen standard only in its specification that effective un-reviewability on appeal from final judgment is a requirement for immediate review. This specification really only clarifies the Cohen requirement that an order be "too important to be denied review."^54 In fact, in Cohen as well as in subsequent cases the Supreme Court has insisted upon a permanent loss of a substantial right as a prerequisite to interlocutory review.^55

Besides reformulating the Cohen test, the Court in Coopers & Lybrand also discarded the "death knell" doctrine as a basis for determining finality. This development does not, however, narrow the traditional Cohen rule. The death knell doctrine was developed by several courts of appeals as a means of permitting immediate review, independent of the Cohen exception, when an order would have the practical effect of terminating a case. A rejection of the death knell collateral order doctrine. There, the Court viewed the doctrine as a three-part test and ignored the "important issue" language in Coopers & Lybrand. 460 U.S. at 11-12 & n.13.

Actually it appears that Coopers & Lybrand may have quietly incorporated the fourth requirement into the second — the requirement that the order "resolve an important issue completely separate from the merits of the action." Coopers & Lybrand, 437 U.S. at 468; see also Cone, 460 U.S. at 12 (finding the second requirement satisfied because "[a]n order that amounts to a refusal to adjudicate the merits plainly presents an important issue separate from the merits") (footnote omitted). Nevertheless, the Court devoted little or no attention to the "substantial right" issue.

Even if the "important issue"/"substantial right" requirement survives, it is quite clearly met in the case of an order denying appointment of counsel. The right to appointed counsel is frequently so substantial that it is, as a practical matter, dispositive of the action. See Part III infra.

54. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); see also Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 n.10 (1978); Abney v. United States, 431 U.S. 651, 658-59 (1977) (characterizing Cohen's third prong as requiring that the decision involved "an important right which would be 'lost, probably irreparably,' if review had to await final judgment"). For an explanation of the requirement that the right involved be important, see note 53 supra.

55. See, e.g., Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); see also Abney v. United States, 431 U.S. 651, 658 (1977). Cohen is a clear example of a case in which review must be interlocutory if an issue is to be reviewed at all. The movant sought to assert his right not to post bond. If the action had proceeded to final judgment without appeal, the issue would have become moot. The Court observed that "[w]hen that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." 337 U.S. at 546; see also note 43 supra and cases cited therein.

56. According to the death knell doctrine, an order is appealable under 28 U.S.C. § 1291 (1982) if it is likely to sound the death knell of the litigation. Pursuant to this doctrine, several courts used language indicating that orders denying class certification would be immediately reviewable. See, e.g., Hartman v. Scott, 488 F.2d 1215 (8th Cir. 1973) (suggesting that if the order had operated as the death knell of the action, it would have been appealable); 15 Federal Practice, supra note 30, § 3912. The Supreme Court in Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) described the death knell doctrine as follows:

The "death knell" doctrine rested on the argument that in some situations an interlocutory decision (such as a refusal to certify a class) might terminate a suit as a practical matter because the named plaintiff would lack an economic incentive to pursue his individual claim. In a "death knell" case, however, the order sought to be appealed had no legal effect on the named plaintiff's ability to proceed with his individual claim in federal court. There is an obvious difference between a case in which the plaintiff himself may choose not to proceed, and a case in which the district court refuses to allow the plaintiff to litigate his claim in federal court.
concept preserves the collateral order doctrine as the primary judicially created exception to finality. While Coopers & Lybrand may reflect a concern over the emergence of multiple judicial exceptions to finality, it does not suggest a dissatisfaction with Cohen.

Implicit in Coopers & Lybrand's rejection of the death knell doctrine is a finding that a litigant is not entitled to immediate review under Cohen simply because a court anticipates that a certain order may cause the litigant to abandon her action. This is particularly true when the determination of whether a claim will be abandoned is unreliable,57 arbitrary,58 susceptible to manipulation,59 or inefficient.60 However, this finding does not restrict Cohen since Cohen never held that the possibility of unreviewability, by itself, justified an interlocutory appeal.61 Rather, the collateral order doctrine has always required unreviewability coupled with a final order collateral to the main action.

In addition, the Court in Coopers & Lybrand seems to have tightened the requirements for finding unreviewability by concluding that an order denying class status is not effectively unreviewable after final judgment despite the fact that it may be the death knell of the action. However, the Court also held, without discussion, that such an order is neither conclusive nor separate from the merits of the plaintiff's cause of action.62 In view of the Court's conclusion that the effect of

460 U.S. at 11 n.11 (emphasis in original).

57. In Coopers & Lybrand v. Livesay, 437 U.S. 463, 470-71 (1978), the Court stated: "What effect the economic disincentives created by an interlocutory order may have on the fate of any litigation will depend on a variety of factors. Under the 'death knell' doctrine, appealability turns on the court's perception of that impact in the individual case."

58. In Coopers & Lybrand, the Court found the death knell rule administratively difficult because "[s]ome courts have determined their jurisdiction by simply comparing the class of the named plaintiffs with an arbitrarily selected jurisdictional amount." The Court added: "Without a legislative prescription, an amount-in-controversy rule is necessarily an arbitrary measure of finality . . ." 437 U.S. at 471-72 (footnote omitted).

59. Coopers & Lybrand v. Livesay, 437 U.S. 463, 472-73 (1978) ("Moreover, if the jurisdictional amount is to be measured by the aggregated claims of the named plaintiffs, appellate jurisdiction may turn on the joinder decisions of counsel rather than the finality of the order.") (citation omitted).

60. Referring to one method of administering the death knell doctrine, the Court said, "The potential waste of judicial resources is plain." Coopers & Lybrand v. Livesay, 437 U.S. 463, 473 (1978).

61. "[T]he inarticulate premise that Cohen embraces every order that cannot be later reviewed on appeal is a false one." D'Ippolito v. American Oil Co., 401 F.2d 764, 765 (2d Cir. 1968) (per curiam).

62. 437 U.S. at 469. It is not clear from the Coopers & Lybrand opinion whether the Court viewed any one of these findings as more important than any other since it stated them, one after the other, with no discussion. One might argue that since the findings with regard to separability and finality are less controversial, the Court meant to base its holding on them and that the conclusory statement of the more controversial issue of effective reviewability was added as dictum. In a similar case, a court refused to allow immediate review of an order refusing class status but based its holding on a lack of finality and separability only. In re Cessna Aircraft Distributorship Antitrust Litig., 518 F.2d 213 (8th Cir.), cert. denied, 423 U.S. 947 (1975).
an order refusing to certify a class is uncertain, its holding with respect to reviewability may only reflect a hesitancy to permit courts of appeals to speculate as to whether a given order is, as a practical matter, reviewable.63

Similarly, in *Firestone*, an order denying defendants’ motion to disqualify plaintiffs’ counsel in a civil case was held not to fall within the collateral order exception because such an order could be effectively reviewed on an appeal from a final judgment.64 The Court in *Firestone* did not tighten the “effectively unreviewable” test, but decided only that the “petitioner fail[ed] to supply a single concrete example” of irreparable harm that would result from deferred review.65

The appellant’s position in *Firestone* differed significantly from that of the appellant in *Cohen*. In *Cohen*, if the lower court’s decision that the plaintiff was not required to post security for costs could not be appealed pending final judgment, the appellant would have lost the right it sought to assert — the right to have security posted *before* permitting the plaintiff to proceed with the action.66 *Firestone*, however, asserted a right only to avoid a prejudicial judgment that might arise out of a trial conducted by a particular attorney.67 That right would not be lost by postponing review because *Firestone* could still be given a new trial in which the asserted prejudice could be cured. Thus, unlike the appellant in *Cohen*, *Firestone* did not face the possibility of losing the right asserted. Nevertheless, *Firestone* could have obtained immediate review had it been able to establish the possibility of losing “the legal and practical value” of the right asserted.68 In the
absence of such a finding, the Supreme Court refused to apply the collateral order doctrine. 69

Further, the Court’s language in Firestone reflects no intent to limit the Cohen collateral order doctrine. Although the Court did not emphasize the tradition of giving section 1291 a practical rather than a technical interpretation, it did briefly reiterate that policy by quoting Cohen’s statement on the matter. 70 In addition, the Court suggested that instead of extending the collateral order doctrine beyond the limits set forth in Cohen, courts ought to rely more on the statutory exceptions to section 1291 to provide relief in appropriate cases. However, the Court did not propose that these statutory measures replace the collateral order doctrine in cases where the Cohen test is met. 71

In addition, although the Firestone Court stressed the narrowness of the collateral order exception 72 and the strictness of the effectively unreviewable standard, 73 it reaffirmed its position that the irreparable harm standard does not require that a right actually be lost if review is denied. 74 The Court reiterated that an order is effectively unreviewable when it irreparably denies a right as a practical matter even though it might not technically deny the right itself. 75 It was Firestone’s failure even to show evidence of such a practical denial that doomed its chances for immediate appeal. Firestone left open the questions of the immediate appealability of pretrial grants of disqualification motions in both criminal and civil cases and of pretrial denials of disqualification motions in criminal actions. 76 The Supreme Court has since resolved two of these issues by holding that a trial court’s

69. Firestone, 449 U.S. at 377. The Firestone Court did recognize, however, that there might be situations in which a party would be irreparably damaged if forced to wait until a final adjudication before securing review of an order denying its motion to disqualify opposing counsel. However, the Court decided that it was not necessary “to resolve those situations, [by creating] a general rule permitting the appeal of all such orders.” Instead, in those rare instances, “the moving party may seek sanctions short of disqualification” or it may pursue statutory exceptions to the finality rule. 449 U.S. at 378-79 n.13.


73. 449 U.S. at 374.

74. 449 U.S. at 376 (noting that in order to satisfy the effectively unreviewable standard, it must be the case that ‘denial of immediate review would render impossible any review whatsoever.’) (quoting United States v. Ryan, 402 U.S. 530, 533 (1971)).

75. 449 U.S. at 376 (“It is true that the finality requirement should ‘be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.’”) (quoting Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1976)).

76. All previous collateral orders, the Court stated, have “involved an asserted right the legal and practical value of which could be destroyed if it were not vindicated before trial.” Firestone, 449 U.S. at 377 (quoting United States v. MacDonald, 435 U.S. 850, 860 (1978)).

77. 449 U.S. at 372 n.8.
pretrial decision to disqualify counsel in either a criminal (Flanagan v. United States)\textsuperscript{78} or a civil (Richardson-Merrell, Inc. v. Koller)\textsuperscript{79} case is not immediately appealable.

Although Flanagan and Koller follow the path blazed by Coopers & Lybrand and Firestone, they do not undermine the validity of the collateral order exception. The Court found in both\textsuperscript{80} cases that if the right to be represented by counsel of one's choice were found to be improperly denied and to warrant reversal even without a showing of prejudice, the denial would not meet the third prong of the Coopers & Lybrand's test — the requirement that the order be “effectively unreviewable on appeal from a final judgment.”\textsuperscript{81} Alternatively, if the order could be reversed only upon a showing of prejudice, it would fail to satisfy the second Coopers & Lybrand condition that the order be truly collateral.\textsuperscript{82} Despite the results reached in these cases, the Court simply applied the Coopers & Lybrand test in reaching its decisions. No narrowing or undermining of the traditional collateral order doctrine occurred.

Thus, although some courts of appeal have relied on Firestone and Flanagan\textsuperscript{83} as precedent for denying immediate review of orders refusing to appoint counsel,\textsuperscript{84} the Cohen doctrine itself has not been fundamentally altered. Accordingly, if an order denying appointment of counsel satisfies the Cohen test, it ought to be appealable as a collateral order.

\textsuperscript{79} 105 S. Ct. 2757 (1985).
\textsuperscript{80} These cases were decided on very similar grounds. While the Flanagan Court emphasized the particularly compelling need to avoid piecemeal criminal prosecutions due to the strong interest both the public and the accused have in prompt resolution of criminal cases, 104 S. Ct. at 1054-55, any suggestions that the case's outcome turned upon its being a criminal rather than a civil dispute were resolved by Koller, 105 S. Ct. at 2763 (“Although delay is anathema in criminal cases, it is also undesirable in civil disputes . . . .”).
\textsuperscript{81} Koller, 105 S. Ct. at 2767 (quoting Coopers & Lybrand, 437 U.S. at 468) (footnote omitted); Flanagan, 104 S. Ct. at 1056 (quoting Coopers & Lybrand, 437 U.S. at 468) (footnote omitted).
\textsuperscript{82} Koller, 105 S. Ct. at 2764; Flanagan, 104 S. Ct. at 1056-57.
\textsuperscript{83} The impact of Koller, decided June 17, 1985, is not yet known.
\textsuperscript{84} Firestone led three courts of appeals to conclude that orders denying motions to appoint counsel were not immediately appealable. See Appleby v. Meachum, 696 F.2d 145, 146 (1st Cir. 1983) (per curiam); Randle v. Victor Welding Supply Co., 664 F.2d 1064, 1066 (7th Cir. 1981) (per curiam); Cotner v. Mason, 657 F.2d 1390, 1392 (10th Cir. 1981) (per curiam). The Third Circuit later concluded, in Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984), that Flanagan effectively overturned its earlier decision, Ray v. Robinson, 640 F.2d 474 (3d Cir. 1981), which had treated orders denying motions to appoint counsel as immediately appealable. The Sixth Circuit also vacated one of its earlier decisions in accordance with Flanagan. Henry v. City of Detroit Manpower Dept., 763 F.2d 757 (6th Cir. 1985) (vacating 739 F.2d 1109 (6th Cir. 1984)).
II. **THE COHEN TEST APPLIED TO DENIALS OF MOTIONS FOR APPOINTMENT OF COUNSEL**

To be immediately appealable as a collateral order, an order denying a motion to appoint counsel must satisfy the tripartite test set forth in *Cohen*. The *Cohen* test was formulated to advance the purposes of the final judgment rule, which are to avoid inefficiency and injustice and to protect the independence of district court judges. By bringing the collateral order doctrine into play only when these goals will be furthered, the *Cohen* test prevents courts from undermining the finality rule. This section applies the three-part test to orders denying appointment of counsel and concludes that each part of the test is satisfied.

A. **Conclusive Ruling**

The first requirement under the *Cohen* test is that the order be conclusive. To satisfy this requirement the order cannot be “inherently tentative.” Thus, an order such as a denial of class certifica-

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85. See notes 39 & 52-55 supra and accompanying text.

86. According to the Ninth Circuit, however, it is not altogether clear how courts should apply the *Cohen* test:

While in this case we have examined each of the elements of the *Cohen* rule separately, and have found that each is satisfied, we do not mean to suggest that this type of analysis is the only proper method to be used in determining whether the collateral order exception applies in cases involving other types of orders. The three *Cohen* criteria are in some instances interrelated. In some cases one element may be of far greater significance to the outcome than the others. We have noted earlier that two of the three elements are not absolute in nature. The separability determination is at times a relative one — “too independent of the cause itself.” The reviewability determination — *effectively* unreviewable — may require a similar kind of judgment. The same may in some instances be true with respect to the finality requirement.

Bradshaw v. Zoological Soc'y., 662 F.2d 1301, 1314 n.35 (9th Cir. 1981) (emphasis in original) (citation omitted). This reasoning suggests that courts will apply the *Cohen* test differently, depending on subjective perceptions of the nature and relative importance of each prong of the test. See notes 40-43 supra and accompanying text.

87. See notes 26-27 supra and accompanying text; see also Richardson-Merrell, Inc. v. Kollar, 105 S. Ct. 2757, 2760-61 (1985); Flanagan v. United States, 104 S. Ct. 1051, 1054 (1984); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); Cebbedick v. United States, 309 U.S. 323, 325 (1940). Cf. Note, The Finality and Appealability of Interlocutory Orders — A Structural Reform Toward Redefinition, 7 Suffolk U. L. Rev. 1037, 1045 (1973) (“In fact, the threat of irreparable harm seems to be the overriding consideration that evokes this collateral order doctrine to find appealability within section 1291.”) (footnote omitted); Comment, supra note 35, at 452 (“The final judgment rule can nevertheless lead to unjust results or inefficiencies in certain circumstances. Statutory and judicial exceptions have therefore been created to mitigate its effects.”); Comment, Collateral Orders and Extraordinary Writs as Exceptions to the Finality Rule, 51 Nw. U. L. Rev. 746, 757 (1957) (“Courts have recognized the frequent hardships which would attend an inflexible application of the final decision rule and have permitted it to be circumvented”).

88. Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 & n.11; Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 & n.14 (1983); see also 15 FEDERAL PRACTICE, supra note 30, § 3911, at 470 (“First, the matter to be reviewed must have been finally disposed of by the district court, so that its decision is not ‘tentative, informal or incomplete.’ ” (quoting *Cohen* v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949))).
tion, 89 which may be reconsidered by the district court, does not qualify for immediate review. 90 However, the mere fact that a court has the power to change its ruling does not mean that its order can never be found to be conclusive. 91 On the contrary, Cohen was only concerned with insuring that the order would not be "subject to reconsideration from time to time" by the trial court. 92 In this sense, a ruling is "inherently tentative" only when "some revision [by the lower court] might reasonably be expected in the ordinary course of litigation." 93 Under this standard, an order denying appointment of counsel is final and therefore appealable. 94

B. Separability

The circuit courts disagree on whether an order denying appointment of counsel embodies an issue sufficiently "separate from the merits of the action" to invoke the collateral order doctrine. 95 The Supreme Court's language suggests that the separability test is a rela-

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89. Federal Rule of Civil Procedure 23(c)(1) "provides that an order involving class status may be 'altered or amended before the decision on the merits.' " Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978).


91. 15 FEDERAL PRACTICE, supra note 30, § 3911, at 470.


94. See, e.g., Slaughter v. City of Maplewood, 731 F.2d 587, 588 (8th Cir. 1984); Bradshaw v. Zoological Socy., 662 F.2d 1301, 1306 (9th Cir. 1981) (conclusiveness requirement satisfied where "the district court . . . in no way indicat[ed] that its order was tentative"); Spanos v. Penn Cent. Transp. Co., 470 F.2d 806, 808 n.3 (3d Cir. 1972) (per curiam) (denial of motion to appoint counsel found to be conclusive notwithstanding district court's expressed willingness to reconsider motion at later point in action).

95. Several courts have suggested that a denial of a motion to appoint counsel is sufficiently collateral to qualify for immediate review, reasoning that the refusal to appoint an attorney is separable from the merits of the action. See Slaughter v. City of Maplewood, 731 F.2d 587, 588 (8th Cir. 1984); Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1308 (5th Cir. 1977); see also Ray v. Robinson, 640 F.2d 474, 477 (3d Cir. 1981). But see Smith-Bey v. Petsock, 741 F.2d 24, 26 (3d Cir. 1984) (emphasizing that the order denying counsel in Ray "clearly met the finality and separability requirements," but concluding that Ray's holding was erroneous insofar as it found the order effectively unreviewable).

However, Judge Wallace's dissent in Bradshaw maintains that "[t]o determine whether a district judge's decision on the appointment of counsel constitutes an abuse of discretion, we would have to become at least somewhat enmeshed in the merits." Bradshaw v. Zoological Socy., 662 F.2d 1301, 1322 (9th Cir. 1981) (Wallace, J., dissenting); see also Smith-Bey, 741 F.2d at 24; Appleby v. Meachum, 696 F.2d 145, 147 (1st Cir. 1983) (per curiam).
tive one. In Cohen, the Court said the separability requirement is satisfied when an order is "too independent of the cause itself to require that appellate consideration be deferred." Coopers & Lybrand defined noncollateral issues as questions that are "enmeshed in the factual and legal issues" of or "intimately involved with the merits" of the plaintiff's case. The Supreme Court does not, therefore, demand that a collateral order be wholly unrelated to the main action.

Under the Supreme Court's language, an order denying a motion to appoint counsel qualifies as independent. In evaluating such a motion, a judge must look to the plaintiff's financial resources, her efforts to secure counsel, and the legitimacy of her cause of action. Undeniably, an examination of the legitimacy of the plaintiff's claim will require some familiarity with the facts of that claim; however, it would not "enmesh" the court in those facts. It would require only an "inci-

96. See note 86 supra.
99. In Bradshaw v. Zoological Soc'y., 662 F.2d 1301 (9th Cir. 1981), the Ninth Circuit recognized the relative nature of the requirement. See note 86 supra. Professors Wright, Miller, and Cooper have alluded to the same conclusion: "Despite these formal requirements, however, examination of the separate requirements shows that if a sufficiently impressive showing of potential injury can be made, the requirement of separability can be tacitly ignored." 15 FEDERAL PRACTICE, supra note 30, § 3911, at 478.
100. See Bradshaw v. Zoological Soc'y., 662 F.2d 1301, 1318 (9th Cir. 1981); Caston v. Sears, Roebuck & Co., 556 F.2d 1305 (5th Cir. 1977); Significant Development, supra note 53, at 846 n.9.
dental" and "indirect" reference to the substance of the cause of action.\footnote{101}{Thus the order involves only incidental and usually indirect reference to the substance of the plaintiff's claim. It does not, under any circumstances, require the court to become "enmeshed" in the issues involved in a determination of the merits. . . .} In fact, resolution of such an appeal would require no more familiarity with the main claim than resolution of an appeal from an order denying permission to proceed in forma pauperis, which requires a similar finding as to the legitimacy of the cause of action.\footnote{102}{See Bradshaw v. Zoological Soc'y., 662 F.2d 1301, 1308 (9th Cir. 1981) ("forma pauperis status requires two findings very similar to those required in this case: (1) a finding of indigency, and (2) a finding that the underlying claim has some merit.") (footnote omitted).} The Supreme Court has already concluded that the denial of a motion to proceed in forma pauperis is immediately appealable, thereby recognizing that such a superficial examination of a plaintiff's lawsuit is separable from the merits.\footnote{103}{See Roberts v. United States Dist. Court, 339 U.S. 844 (1950) (per curiam).}

Immediate appeal of orders denying motions to appoint counsel would simply not produce any of the harms that the separability requirement is intended to prevent. One such harm is unwarranted interference by appellate courts in the merits of the case — issues that are properly reserved to the district courts until completion of the action.\footnote{104}{Bradshaw v. Zoological Soc'y., 662 F.2d 1301, 1307 (9th Cir. 1981).} However, a judgment based on the pleadings regarding the legitimacy of the action will not seriously interfere with the trial court's much more thorough inquiry into the merits of the claim.\footnote{105}{In Luna v. International Assn. of Machinists Local 36, 614 F.2d 529, 531 (5th Cir. 1980), the court looked to the facts alleged by the plaintiff to guide its determination of whether the cause had merit. In addition, in title VII cases, the courts often rely on the Equal Employment Opportunity Commission's issuance of a right-to-sue letter in determining whether a suit has merit. See Luna, 614 F.2d at 531; Bradshaw v. Zoological Soc'y., 662 F.2d 1301, 1319-20 (9th Cir. 1981) (deferring to agency finding that there was "reasonable cause to believe that the plaintiff was the victim of discrimination" and finding no further inquiry into the merits of the claim necessary).} A ruling by the appellate court regarding frivolousness would not control the trial court's findings on the merits because the ruling would not be directly tied to the merits. Nor would such a ruling create the possibility of repetitive consideration of the merits by the court of appeals — another danger that the separability requirement is intended to prevent.\footnote{106}{See 15 FEDERAL PRACTICE, supra note 30, § 3911, at 470-71.} The very brief reference to the facts needed for a determination regarding frivolousness would not duplicate the much closer examination of the facts that would be necessary upon appeal from final judgment.

\footnotesize{101. Thus the order involves only incidental and usually indirect reference to the substance of the plaintiff's claim. It . . . does not, under any circumstances, require the court to become "enmeshed" in the issues involved in a determination of the merits. . . .}

\footnotesize{102. See Bradshaw v. Zoological Soc'y., 662 F.2d 1301, 1308 (9th Cir. 1981) ("forma pauperis status requires two findings very similar to those required in this case: (1) a finding of indigency, and (2) a finding that the underlying claim has some merit.") (footnote omitted).}

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\footnotesize{106. See 15 FEDERAL PRACTICE, supra note 30, § 3911, at 470-71.
C. Availability of Effective Review After Trial

The third and perhaps most important prong of the collateral order test has generated the most disagreement among the circuits in cases involving appeals from orders denying appointment of counsel. The appeals courts that have refused immediate review of such orders have generally relied on this prong for their decisions.

There are several good reasons for concluding that orders denying appointment of counsel are only effectively reviewable before entry of a final judgement. 28 U.S.C. § 1915(d) and 42 U.S.C. § 2000e-5(f)(1) confer on certain litigants the right to appointed counsel. If that right is improperly denied, its "legal and practical value" may be permanently lost because the pro se litigant may make prejudicial errors during the first trial which would render a new trial, with or without the assistance of counsel, worthless. Since the collateral order doctrine defines as effectively unreviewable decisions denying rights, "the
legal and practical value of which could be destroyed if . . . not vindicated before trial," orders denying appointment of counsel should qualify as effectively unreviewable.

The Court's refusal to accept this argument in *Firestone* was not an outright rejection of the point. Instead, the Court's decision reflected a determination that the "petitioner fail[ed] to supply a single concrete example of the indelible stamp or taint of which it warn[ed]." The petitioner's only assertion was that without immediate review, the respondent might shape his clients' claims for relief in a way that irreparably increased petitioner's liability. The Court found that this result would not constitute sufficient injury, and that, in any case, petitioner did not establish conclusively that it was likely to occur in the absence of immediate appeal.

Similar considerations distinguish *Flanagan* and *Koller*. In both cases, the unavailability of interlocutory appeal did not leave any party without counsel at trial or on appeal. In contrast, a litigant who could not appeal an order denying a motion to appoint counsel would be forced to proceed as her own attorney — a formidable undertaking that might cause the plaintiff to give up altogether or to make blunders that would render her claim untenable even if counsel were appointed following a successful appeal from a final judgment.

Where a litigant is erroneously denied appointed counsel in a civil case, the limitations inherent in pro se litigation would irreparably jeopardize the right asserted in the absence of immediate review.

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111. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (quoting United States v. MacDonald, 435 U.S. 850, 860 (1978)). The Court in *Firestone* also stated that "the finality requirement should 'be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.'" *Firestone*, 449 U.S. at 376 (quoting Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1976)).

112. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981). In *Firestone*, the Court in fact admitted that there would be situations in which irreparable harm would result from a denial of immediate review. However, it expected such cases to be rare and thus thought alternative remedies could deal with them. *Firestone*, 449 U.S. at 378 n.13. Indeed, the availability of alternative remedies arguably distinguishes *Firestone* from a case in which a plaintiff's motion to appoint counsel has been denied. A litigant whose motion to appoint counsel has been denied has no alternative remedy. See *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1068 (7th Cir. 1981) (Swygert, J., dissenting).


114. *Firestone*, 449 U.S. at 376 ("Our cases require much more before a ruling may be considered 'effectively unreviewable' absent immediate appeal."). See also *Borden Co. v. Sylk*, 410 F.2d 843, 846 (3d Cir. 1969) (Pecuniary injury alone may not be sufficient to invoke review because "'[e]very interlocutory order involves, to some degree, a potential loss.'").

115. *Firestone*, 449 U.S. at 376. ("[P]etitioner has made no showing that its opportunity for meaningful review will perish unless immediate appeal is permitted.").

116. See *Henry v. City of Detroit Manpower Dept.*, 739 F.2d 1109, 1116 (6th Cir. 1984), vacated, 763 F.2d 757 (6th Cir. 1985).

117. See, e.g., *Poindexter v. FBI*, 737 F.2d 1173, 1180, 1188 (D.C. Cir. 1984). "Courts have long recognized the problems of the pro se litigant." *Randle v. Victor Welding Supply Co.*, 664 F.2d 1614, 1615 (7th Cir. 1981) (Swygert, J., dissenting). In addition, one commentator has stated, "Proceeding *pro se*, even in the presence of the most protective trial judge, the average
One study of federal pro se litigation has noted that “[t]he assistance of counsel is the most important prerequisite to obtaining fair review of federal claims . . . . There is simply no other way to assure [indigent] litigants substantial justice . . . .” 118 Another has noted that “[t]he pro se litigants' record of success is so poor that they have been characterized as a 'society of losers.'” 119

In addition, the courts, particularly in the criminal area, have repeatedly stressed that “[t]he assistance of counsel is often a requisite to the very existence of a fair trial.” 120 Finally, “[s]ubstantial differences have been found in the outcomes of the cases in which the defendant is unrepresented as compared with the cases in which he has counsel.” 121 These observations are equally applicable in civil cases. The courts recognize a constitutional right to counsel in criminal but not in civil cases because the potential loss is typically greater in a criminal trial, 122 not because a criminal trial presents more complex issues. 123

The difficulties confronting a pro se litigant threaten to injure irreparably both the legal and practical value of her asserted right to counsel unless an erroneous refusal to appoint counsel is immediately reviewable. The legal value is threatened not because the issue becomes immediately moot as in Cohen, but because an untrained pro se litigant may never make it to final judgment and subsequent appeal. A pro se litigant is unlikely to have the capacity to develop and follow an

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118. Zeigler & Hermann, supra note 117, at 211 (footnote omitted).


121. AMERICAN BAR ASSOCIATION, PROVIDING DEFENSE SERVICES 13 (1967).

122. See Argersinger v. Hamlin, 407 U.S. 25, 48 (1972) (Powell, J., concurring) (“When the deprivation of property rights and interests is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process.”) (footnote omitted).

123. See Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 7 (1964) (“Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries.”).
effective litigation strategy. As a result, she may become frustrated and abandon the claim before final judgment, forfeiting the legal value of the right to appointed counsel. Similarly, a pro se litigant might fail on a technicality to secure an appeal.

The practical value of the asserted right to appointed counsel is threatened because, although the litigant may actually obtain the right to appointed counsel following appeal, her errors in the first trial may have rendered the right meaningless. The pro se litigant might settle for an inadequate sum or prevail at trial but recover less than she would have recovered with the assistance of counsel. An even more serious threat to the practical value of the right to appointed counsel is posed by the fact that the pro se litigant will be bound in a

124. Bradshaw v. Zoological Socy., 662 F.2d 1301, 1312 (9th Cir. 1981). The typical pro se litigant has been characterized as "indigent, formally untutored in the law and often uneducated." Zeigler & Hermann, supra note 117, at 159 (footnotes omitted). Nor can a pro se litigant rely on help from the judge to ensure a fair trial. "Most pro se litigants . . . agree that a kindly attitude on the part of the court is no substitute for an attorney." Robbins & Herman, supra note 117, at 678. "[T]he fact remains that limitations on the court's jurisdiction can preclude, at times, assistance or forgiveness." Id. at 677.

125. See, e.g., Slaughter v. City of Maplewood, 731 F.2d 587, 589 (8th Cir. 1984); Bradshaw v. Zoological Socy., 662 F.2d 1301, 1310 (9th Cir. 1981); Robbins & Herman, supra note 117, at 677 ("[S]ome litigants, perplexed by the proceedings . . . or failing to recognize that the district court has erred, simply give up."); Zeigler & Hermann, supra note 117, at 212 ("Allowing complaint actions to remain open without assigning counsel is often very cruel, and results in distress, distrust, disgust and hatred for legal institutions."). If the plaintiff voluntarily dismissed the case, no appeal would be available. See Koller v. Richardson-Merrell, Inc., 737 F.2d 1038, 1052 (D.C. Cir. 1984), vacated, 105 S. Ct. 2757 (1985).

While the Supreme Court in Cooper's & Lybrand v. Livesay apparently abandoned the death knell doctrine as a basis for determining reviewability after final judgment, it is not entirely clear whether the Court abolished the doctrine altogether or only concluded that the mere fact that a litigant may abandon her claim is not, without more, sufficient to render an order effectively unreviewable. 437 U.S. 463, 477 (1978). Unlike Cooper's & Lybrand, even if the plaintiff who is erroneously denied counsel elects to pursue the claim, she is unlikely to be able to do so without causing irreparable damage to her cause of action. The situation is thus more aptly characterized as "death knell plus."

126. Slaughter v. City of Maplewood, 731 F.2d 587, 589 (8th Cir. 1984); Bradshaw v. Zoological Socy., 662 F.2d 1301, 1310 (9th Cir. 1981); see also Zeigler & Hermann, supra note 117, at 219-20.

It is more difficult to secure an appeal after final judgment because under 28 U.S.C. § 2111 (1982) and Federal Rule of Civil Procedure 61, a pro se litigant must not only show that the judge's order refusing counsel was erroneous, she must also show that it was prejudicial. This will increase her ultimate burden of proof, Bradshaw, 662 F.2d at 1313-14, since, if she were granted an immediate appeal, she would only need to show error.

In addition, commentators who conducted an extensive study of pro se litigation in the Second Circuit discovered that approximately 85% of all pro se appeals were terminated before or shortly after an appeal was noticed. Zeigler & Hermann, supra note 117, at 219. This is partly because of the complexity of the appeal procedures. Id. This study also revealed that in most of those cases which did survive the procedural phase of the appeal, relief was summarily denied. Id. at 242.

127. Randle v. Victor Welding Supply Co., 664 F.2d 1064, 1068 (7th Cir. 1981) (Swygert, J., dissenting) ("Thus, the pro se litigant . . . may feel pressured to compromise his substantive rights by settling on terms less favorable than those he could have negotiated had he been represented").

second trial by "the inevitable prejudicial errors" she may have made at the first trial.\textsuperscript{129} Under the Federal Rules of Evidence, admissions by a party opponent are admissible into evidence.\textsuperscript{130} Thus, any statement a pro se litigant might make in her first trial, either in pleadings, on the stand, or in depositions, could be introduced in the second trial. Moreover, the litigant's mistakes in the first action could taint the second even if counsel prevented those mistakes from being repeated. As the Supreme Court has observed with respect to criminal cases: "[A] second trial, even with counsel, might be unfair if the prosecutor could make use of evidence which came out at the first trial when the accused was unrepresented. If the second trial were held before the same judge, he might no longer be open-minded."\textsuperscript{131} Thus the absence of an immediate appeal, assuming an erroneous ruling by the lower court, effectively denies the plaintiff the value of her right to pursue her claim with the assistance of counsel.\textsuperscript{132}

III. THE POLICY SUPPORTING IMMEDIATE APPEAL FROM DENIALS OF MOTIONS TO APPOINT COUNSEL

The courts created the collateral order doctrine to mitigate the hardship caused by technical insistence\textsuperscript{133} on the finality rule.\textsuperscript{134} Thus, the collateral order doctrine reflects a balance struck between the inefficiency of piecemeal litigation and the possible injustice of delay.\textsuperscript{135}

\textsuperscript{129} Bradshaw v. Zoological Soc'y., 662 F.2d 1301, 1311-12 (9th Cir. 1981). According to the court in Bradshaw, the litigant could "be bound by or impeached with her earlier testimony, or suffer adverse consequences from uninformed and unwise stipulations." Bradshaw, 662 F.2d at 1312; see also text at note 121 supra.

\textsuperscript{130} FED. R. Evid. 801(d)(2).


\textsuperscript{132} In Firestone, the Court relied on alternative remedies, such as protective orders limiting counsel's ability to disclose confidential information, to take care of cases in which a denial of immediate review actually would result in irreparable harm. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 378 n.13 (1981). There does not appear to be an equivalent alternative remedy in cases in which a court has denied a motion to appoint counsel.

\textsuperscript{133} This Note has attempted to apply the Cohen test formally and to argue that all three parts are separately met; however, courts and commentators have suggested that the test need not be so strictly applied. See note 86 supra. "It would be difficult to quarrel with a tendentious statement that the finality requirement should not be applied as a sterile formality, but should instead be applied pragmatically with an eye to fulfilling its underlying purposes." 15 FEDERAL PRACTICE, supra note 30, § 3913, at 522. If an order denying a motion to appoint counsel qualifies for review under the more formal application of the rule, it certainly ought to qualify under a more pragmatic standard — especially where review furthers the purposes of the collateral order doctrine.

\textsuperscript{134} See note 87 supra and accompanying text. "Absent a sharp change in the course of events, the collateral order doctrine deserves to continue in substantially its present form, as a means of protection against irreparable injury in some of the many situations that do not fall within the narrow confines of the original hardship doctrine of Forgay v. Conrad." 15 FEDERAL PRACTICE, supra note 30, § 3911, at 500 (footnote omitted).

\textsuperscript{135} The determination of whether an order is immediately appealable "requires some evalu-
Immediate review of orders denying motions to appoint counsel will often promote efficiency. If the plaintiff is successful on interlocutory appeal, not only will a new trial be avoided, but the remainder of the pending action will be conducted more efficiently. Conversely, if the litigant's interlocutory appeal is unsuccessful, the litigation may come to an end. The interests of judicial economy are therefore "best served by permitting such appeals."  

Regardless of judicial efficiency, immediate appeal is justified to prevent the hardship that delayed review would impose on any plaintiff denied appointed counsel. The collateral order doctrine remains the principal means of avoiding the injustice that the finality rule sometimes produces. Delayed review of an order denying appointment of counsel could irreparably threaten the asserted right to the assistance of counsel. This right is particularly well-recognized with respect to criminal defendants, but also exists by congressional mandate for certain civil litigants. Congress' statutes reflect a long-standing policy against pro se litigation. The strength of this policy is clearly reflected in Faretta v. California, a criminal case in which
the Supreme Court seriously considered denying a litigant the right voluntarily to appear pro se in a state court proceeding.

Thus, a pro se litigant should have every opportunity to demonstrate that she has a right to have counsel appointed by the court. Clearly, one of the justifications for this policy is the inability of most pro se litigants to represent their own interests adequately. Thus, even if this policy does not quite compel a constitutional right to representation in civil cases, it at least justifies allowing pro se civil litigants the opportunity to vindicate their statutory rights to counsel before those rights are rendered meaningless.

CONCLUSION

Although the Supreme Court has recognized few instances in which denying immediate appeal of an interlocutory decision made later vindication of an individual’s claims impossible, courts ought to recognize such an instance in the case of a litigant whose motion to appoint counsel is denied. Since such a litigant may well “already have lost the rights he seeks to preserve”147 by the time the court enters a final judgment from which appeal may be taken, orders denying motions to appoint counsel are effectively unreviewable. These orders are also conclusive and collateral to the merits of the original action. Thus, under the collateral order doctrine, as developed in a long line of cases beginning with Cohen and ending for the moment with Koller, an order denying appointment of counsel qualifies for immediate review. Immediate review is necessary if the collateral order doctrine is to further justice where technical insistence on finality does not.

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