Legal Backgrounder

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FEDERAL COURT RULING UNDERMINES DEFENDANTS' ABILITY TO APPEAL CLASS ACTION CERTIFICATIONS

by

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Rule 23(f) was added to the Federal Rules of Civil Procedure in 1998 to expand the availability of interlocutory appellate relief from class certification decisions for a simple reason: whether a lawsuit is pursued individually or as a class action often has more practical significance than the underlying merits of the case. The federal courts of appeal have applied the rule grudgingly, however, limiting the availability of interlocutory review to the most extreme cases. In a recent decision, the U.S. Court of Appeals for the Ninth Circuit has further narrowed *defendants'* ability to seek timely interlocutory review of class certification rulings, and appears oblivious to the use of the class action device to extort huge settlements from businesses whose worst misstep may have been to lose the class certification battle in the district court.

When plaintiffs file a lawsuit on behalf of a potentially large class, the class certification decision often has a greater effect on the value of the litigation than the underlying merits of the claims. If liability for thousands or millions of persons can be decided in one fell swoop — and if a jury can pick one big number to compensate so many people — the financial risk may prevent any reasonable defendant from hazarding a judgment, no matter how weak the claim on the merits. On the other side, plaintiffs with modest disputes often lack incentives to invoke the civil litigation system to resolve their individual complaints, but far greater incentives motivate the plaintiffs' bar to underwrite actions on behalf of large groups where individual issues of cause, effect, and culpability may be obscured through the class litigation process. Thus, for many cases, once a class has been certified the defendant *must* settle, while if no class is certified, the plaintiff has neither the incentive nor the practical ability to maintain the lawsuit.

Rule 23(f) and the Committee Notes. To address these issues, Rule 23(f) provides for permissive interlocutory appeals of class certification orders without requiring parties first to obtain

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certification from the district court under 28 U.S.C. § 1292(b). The drafters of the Rule intentionally omitted the substantive restriction of Section 1292(b), which permits interlocutory appeals only when immediate resolution of a controlling issue of law, as to which there are grounds for substantial differences of opinion, would materially advance the final disposition of the case. Committee Notes, FED. R. CIV. P. 23(f). By contrast, the drafters intended to provide the courts of appeal with "unfettered discretion whether to permit the appeal … on the basis of any consideration that the court of appeals finds persuasive." *Id.*

The Committee identified the two "most likely" settings for interlocutory review: (1) "when the certification decision turns on a novel or unsettled question of law," and (2) "when, as a practical matter, the decision on certification is likely dispositive of the litigation." That is, review is warranted when the class certification ruling is likely to ring the death-knell on either the plaintiff's ability to proceed or the defendant's ability to risk a substantive defense. Just as certification may force a defendant to settle, the denial of certification may render a plaintiff's further pursuit of her claim futile if the cost of individual litigation is more than the value of the dispute.

Chamberlan v. Ford Motor Co.*: The Ninth Circuit Weighs In*. Over the years, the courts of appeal have developed criteria to guide their exercise of discretion under Rule 23(f). This spring the Ninth Circuit addressed Rule 23(f) in a published opinion for the first time. See *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005).

The plaintiffs in *Chamberlan* sued Ford Motor Company, alleging that Ford "knowingly manufactured, sold, and distributed" automobiles that contained defective "plastic intake manifolds." 402 F.3d at 955-56. Over Ford's opposition, the district court certified a class of (*id.* at 956):

> All consumers residing in California who currently own, or paid to repair or replace the plastic intake manifold in any of the following cars: 1996-2001 model year Mercury Grand Marquis, 1998-2001 model year Ford Mustangs, 2002 model year Ford Explores, 1996-2001 model year Ford Crown Victorias, or 1996-2001 Lincoln Town Cars.

Ford petitioned for an interlocutory appeal under Rule 23(f). Much of the Ninth Circuit's opinion denying the petition followed the well-worn path of other courts of appeals. Thus, the court of appeals held that review would be most appropriate when (1) a "questionable" certification decision produces "a death-knell situation for either the plaintiff or defendant"; (2) the certification decision presents "an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally," and likely to evade review on appeal from a final judgment; or (3) the decision is "manifestly erroneous." 402 F.3d at 959.

In explaining and applying these factors, however, the Ninth Circuit tilted the balance of Rule 23(f) toward plaintiffs in two significant ways. First, the court limited the "manifestly erroneous" ground for review to rulings that "appl[y] an incorrect Rule 23 standard or ignore[] a directly controlling case." *Id.* at 962. The court asserted that "[c]lass certification decisions rarely

will involve legal errors." *Id.* This holding essentially insulates from review even the least justified applications of law to fact that result in certifying disparately situated classes, so long as the district court recites the proper factors.

Second, and more important, the Ninth Circuit appeared to treat the "death-knell" as a concern applying, for practical purposes, almost exclusively to appeals by *plaintiffs*. Ford contended that litigating the claims of the 100,000-member class could result in an award exceeding $100 million, a risk that would be sufficient to place extraordinary pressure on Ford to settle the case without regard to the merits. The Ninth Circuit, however, limited its consideration to one factor: whether Ford would be ruined by the litigation. While noting that a potential $100 million recovery may be "unpleasant to a behemoth company," the court emphasized that the award "is *hardly terminal*" for *Ford*. 402 F.3d at 960. Although, as the Ninth Circuit seemed to recognize in passing, "death-knell" analysis normally addresses only whether "class certification w[ould] be the death of th[e] *litigation*," the Ninth Circuit seems to be saying that, when a defendant seeks interlocutory review on "death-knell" grounds, class certification must place the existence of the *defendant itself* at high risk.

That view misunderstands basic economics, the policies underlying Rule 23(f), and squarely conflicts with the approach of other circuits. Rule 23(f) was intended to reduce the number of significant cases effectively decided by unreviewed class certification orders. Review of "death-knell" orders results from a concern that the order effectively ends the litigation because a case costs too much to pursue individually (for plaintiffs) or risks too much to defend thoroughly (for defendants). Huge classes and huge damages can make the risks of litigation prohibitive even if the defendant could pay a judgment without liquidating. As the Seventh Circuit has explained, whenever "a grant of class status can propel the stakes of a case into the stratosphere" — for which $100 million surely qualifies — the "risk of a settlement or other disposition that does not reflect the merits of the claim is substantial." *Blair v. Equifax Check Serv.*, 181 F.3d 832, 834-35 (7th Cir. 1999). Corporate executives unwilling to risk 9- or 10- or 11-figure damages will settle "even when the plaintiff's probability of success on the merits is slight," particularly if the defendant's "legal positions are justified but unpopular." *Id.* at 834. Thus, certification may end the litigation even if the litigation would not destroy the defendant.

The Ninth Circuit wandered far from the purpose of Rule 23(f) when it seemingly restricted interlocutory review of certification orders on "death-knell" grounds to those that may destroy the defendant, not merely make an inflated and unwarranted settlement more likely. The relevant "death" in the "death-knell" is supposed to be that of the litigation, not of the litigant. Surely a plaintiff seeking review of an order *refusing* certification on death-knell grounds would not be forced to show that she would die rather than merely be precluded from litigating a meritorious case on the merits.

Conclusion. The Ninth Circuit soon will have an opportunity to clarify its standards under Rule 23(f); several months before rejecting the appeal in *Chamberlan*, the same court accepted an interlocutory appeal of an order certifying a 1.6 million-member class in a sex discrimination case against Wal-Mart. *See* Neil Buckley, *Wal-Mart wins right to appeal in sex case litigation*, FIN.

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TIMES (USA), Aug. 14, 2004. The *Wal-Mart* case is fully briefed and likely to result in a published opinion. However it decides the merits, the Ninth Circuit should take that opportunity to restore the "death-knell" to the even-handed status intended by the Rule 23(f)'s drafters.

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