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Appeals Of Class Certification Decisions Under FRCP 23(f)

Introduction and Overview

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Interlocutory Appeals Are Generally Disfavored

1. In *McLish v. Roff*, 141 U.S. 661, 665-66 (1891), the Supreme Court noted that piecemeal appeals had been disfavored since the enactment of the Judiciary Act of 1789:

   > From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

2. That is still the case. 28 U.S.C. § 1291 provides that "[t]he 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." (emphasis added).

3. Generally, a "final decision" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

But There Are Exceptions To The "Ends The Litigation" Rule

I. There Are "Final" Orders That Do Not Necessarily End The Case:
   A. Judgments entered as to some, but not all, parties or claims under Rule 54(b) are appealable under 28 U.S.C. § 1291 when the district court certifies there is no just reason for delay;
   B. Some "collateral orders" are appealable under Section 1291 where the order resolves important questions completely separate from the merits and those questions might not be effectively reviewed if review is delayed. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

II. Some Interlocutory Appeals Are Made Appealable Under Section 1292:
   A. Interlocutory appeals as of right under Section 1292(a):
      1. Injunctions; receiverships; admiralty.
   B. Permissive Interlocutory Appeals under Section 1292(b):
      1. The district judge may certify a "controlling question of law" as to which there is "substantial ground for difference of opinion," if an immediate appeal "may materially advance the ultimate termination of the litigation."
      2. Party wishing to appeal must make application to court of appeals within ten days of entry of order by the district court. Application does not stay effect of order.
      3. The court of appeals has discretion to accept or reject certification.

1970s: "Death Knell" Theory Of Appealability For Denials Of Class Certifications

1. In the 1970s, some courts of appeals held that an order denying class certification may be sufficiently "final," as a practical matter, to be appealable as a collateral order under Section 1291.

2. Theory: Denying class certification effectively ends litigation for plaintiffs with small individual claims because of the high cost of complex litigation. Appeal should be allowed because the judgment is a "death knell" for the plaintiffs' case.

3. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Supreme Court rejected the death knell theory. Justice Stevens wrote for a unanimous Court:

   a) A class certification decision is not a collateral order because it is subject to revision by the district court.

   b) There are no special appealability rules for class actions. Thus, if the Court were to adopt the death knell theory for class actions, it would also have to allow interlocutory appeals, as a general matter, of orders pertaining to venue, discovery and summary judgment where the "tactical economic significance [of] . . . defeat is tantamount to a 'death knell' for the entire case."

   c) Allowing appeals from denials—but not from grants—of class certification favors plaintiffs over defendants. Allowing appeals from orders based on a court's economic assessment of the consequences of the denial of class certification would be wasteful of judicial resources and uncertain in application.

   d) Whether to allow appeals from denials but not grants, and, if so, on what terms, raises important policy issues. If action is warranted, Congress should act, not the courts.

1992: Legislative Response

1. In 1992, Congress amended Section 1292 to permit the Supreme Court to promulgate rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d) . . ." 28 U.S.C. § 1292(e).

2. The Senate report explained:

> This section further implements a recommendation of the Study Committee . . . which called for Congress to consider delegating to the Supreme Court the authority to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals. . . .
>
> The state of law on when a district court ruling is an appealable interlocutory action strikes many observers as unsatisfactory in several respects. . . . Decisional doctrines—such as "practical finality" and the "collateral order" rule—blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review.

S. Rep. No. 102-342, at 24 (1992).

3. Six years later, Rule 23(f) was promulgated.

Problems With Prohibiting Appeals

Certification And Settlement Pressures

1. If the courts prior to *Coopers & Lybrand* were concerned about the negative impact on plaintiffs of not allowing appeals from *denials* of class certification, the Seventh Circuit in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), demonstrated that it was also concerned about the opposite problem: the negative impact on defendants of not being able to appeal from an order *granting* class certification.

2. In *Rhone-Poulenc*, the Seventh Circuit allowed the defendant drug companies to challenge by mandamus the trial judge's order granting class certification. The court, speaking through Judge Posner, stated that delaying review of class certification until after final judgment does irreparable harm to defendants because of "the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them." 51 F.3d at 1297.

3. Judge Posner reasoned along these lines: Suppose a defendant can expect to win most of the 300 individual pending cases, and might face total liability of $125 million for the 25 or so it would lose. Class certification could easily expand the potential plaintiff class to 5,000. Suddenly, a potential liability of $25 billion rests on the outcome of the case. Even if the defendant is likely to win, Judge Posner suggested, "[t]hey may not wish to roll these dice. That is putting it mildly." Adopting Judge Friendly's phrase, Judge Posner noted that the result would be "blackmail settlements." 51 F.3d at 1298.

Rule 23(f)

"A court of appeals may permit an appeal from an order *granting or denying* class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk *within 10 days* after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." (emphasis added).

Section 1292(b) And Rule 23(f): Similarities And Differences

- Appeal under Rule 23(f) is analogous to an interlocutory appeal under Section 1292(b) in the sense that the appeal is not a matter of right, but permissive.
- Appeal under Rule 23(f) is different from an interlocutory appeal under Section 1292(b) in three important ways:
  - Permission to appeal needs to be secured at only one level of the judicial system, not two.
  - The district court does not have to certify the appeal or make a finding that there is 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." *Compare* 28 U.S.C. § 1292(b) *and* Fed. R. Civ. P. 23(f).
  - The appellate court's discretion to grant or deny the appeal also is not bounded by the criteria set forth in 1292(b).

How, When, And Where The Rule 23(f) Appeal Is Perfected

1. Appeal is commenced by filing a petition for permission to appeal with the clerk of the court of appeals, *not* by filing a notice of appeal (or anything else) with the clerk of the district court.

2. The petition for permission to appeal must be filed within ten days of the date on which the order granting or denying certification is entered or when a timely motion for reconsideration is granted or denied. *See Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192-93 (3d Cir. 2008) (motion to reconsider *filed within the ten day window* tolls time limit); *see also, Shin v. Cobb County Board of Education*, 248 F.3d 1061, 1064-65 (11th Cir. 2001) ("[w]here a motion to reconsider a class certification order is timely filed, the 10-day period to file a Rule 23(f) petition does not start until the district judge rules on the motion for reconsideration."). Weekends and holidays are not counted in computing the ten-day deadline. *Shin*, 248 F.3d at 1065.

3. The ten-day period is absolute. Courts have described the ten-day deadline as "inflexible," "mandatory," "essential," and representative of a "single window of opportunity." *See, e.g.*, *Jenkins v. Bellsouth Corp.*, 491 F.3d 1288, 1290 (11th Cir. 2007).

How, When, And Where The Rule 23(f) Appeal Is Perfected, Cont'd.

4. The filing of a petition for permission to appeal does not stay the effect of the order granting or denying class certification. If a stay is desired, it should be sought from the district court in the first instance. *See* Fed. R. Civ. P. 23(f) Advisory Committee Note. In *Daniels v. City of New York*, the court stated:

> In deciding whether to grant a stay pending appeal, a court should consider: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated 'a substantial possibility, although less than a likelihood, of success' on appeal, and (4) the public interests that may be affected."

Daniels v. City of New York, 138 F. Supp. 2d 562, 564 (S.D.N.Y. 2001) (citing *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994) (quoting *Hirschfeld v. Board of Elections*, 984 F.2d 35, 39 (2d Cir. 1993))).

5. The court of appeals also has discretion to grant or deny a stay, but it will accord substantial weight to the decision of the trial court. *See In re Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 140 (2d Cir. 2001). To secure a stay from the court of appeals, the party seeking relief must show that the likelihood of error on the part of the district court tips the balance of hardships in the movant's favor. *Id.* at 140.

The Court Of Appeals' Decision Whether To Grant Rule 23(f) Appeal

1. The Advisory Committee Note indicates that:
   - In deciding to grant or deny an appeal, the courts of appeals have "unfettered" discretion modeled on that exercised by the Supreme Court in deciding whether to grant or deny certiorari.
   - The court of appeals should grant permission to appeal where the certification decision turns on a novel or unsettled question of law or when the decision on certification is likely to be dispositive of the litigation.
   - The courts of appeals "will develop standards for granting review that reflect changing areas of uncertainty in class litigation."
2. In general, and consistent with the general bias against interlocutory review, the courts have indicated that Rule 23(f) appeals will not often be granted. *See, e.g.*, *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959, (9th Cir. 2005) (agreeing with other circuits that Rule 23(f) review should be granted "sparingly," though some "rare cases" merit interlocutory review).

The Court Of Appeals' Decision Whether To Grant Rule 23(f) Appeal, Cont'd.

3. A recent empirical study showed that the courts of appeals granted 36% of the petitions they considered on the merits, but that both the number of petitions filed and the percentage of petitions granted varied greatly from circuit to circuit. In addition, this study showed that most of the decisions granting or denying petitions (90%) were decided without a published opinion. Barry Sullivan and Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 283-86 (2008).

4. Several years ago, Judge Diane P. Wood of the United States Court of Appeals for the Seventh Circuit remarked on the latter phenomenon: "The vast majority of our rulings on 23(f) motions are not published. It just happens quietly in the chambers of the judges and we normally don't take them, so you're going to have a distorted view of what's going on if you're looking only at the published opinions." *Id.* at 277.

Have The Courts Of Appeals Adopted Standards For Deciding Whether To Grant Or Deny Permission To Appeal?

A. What do the published decisions show about how the courts structure their discretion?

1. The Fifth, Eighth, and Tenth Circuits have no stated rule as to how they will exercise their discretion. The Eighth Circuit has specifically declined to adopt a rule. *See Liles v. Del Campo*, 350 F.3d 742, 746 n.5 (8th Cir. 2003).
2. The First, Second, Third, and Seventh Circuits have substantially adopted the factors identified in the Committee Notes. *In re Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-85 (7th Cir. 1999); *Waste Management Holdings, Inc., v. Mowbray*, 208 F.3d 288, 294-95 (1st Cir. 1999) (clarifying that unsettled legal issues must also be important to the litigation and likely to escape effective review if left until an appeal from a final judgment).
3. The Fourth and Eleventh Circuits have adopted a sliding scale approach, which takes into account:
   - Death-knell or blackmail-settlement situations;
   - Whether district court certification decision contains a substantial weakness;
   - Whether appeal would resolve an unsettled legal question of general importance;
   - The nature and status of the litigation before the district court;
   - The likelihood that future events will make appellate review more or less appropriate.

   Lienhart v. Dryvit Systems, Inc., 255 F.3d 138, 145 (4th Cir. 2001); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274-76 (11th Cir. 2000).

Have The Courts Of Appeals Adopted Standards For Deciding Whether To Grant Or Deny Permission To Appeal?, Cont'd.

4. The Ninth and D.C. Circuits add an inquiry into whether the district court's certification decision is "manifestly erroneous" (similar to the Fourth and Eleventh Circuits' second factor) to the Advisory Committee factors. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959, (9th Cir. 2005); *In re Lorazepam & Clorazepate Antitrust Litigation*, 289 F.3d 98, 105 (D.C. Cir. 2002).
5. The Sixth Circuit adds another factor to those considered by the Ninth and D.C. Circuits: "the posture of the case as it is pending before the district court." *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002).

See also Sullivan and Trueblood at 284-85 (discussing variance of standards across circuits).

B. How much do we know from the published decisions?

1. The extent to which the various circuits follow their own guidelines, when they depart from them, and why they depart from them are all good questions.
2. Given the absence of reported case law (*i.e.*, the fact that 90% of Rule 23(f) decisions are decided without published opinion), we do not really know what the answers to those questions are when the entire universe of cases in all circuits is considered.
3. Nonetheless, it is important to recognize that we know more about some circuits than others. The publication rate varies greatly from circuit to circuit. The Eleventh Circuit, which had the largest number of Rule 23(f) appeals, for example, published only 4% of its decisions granting or denying Rule 23(f) petitions, whereas the District of Columbia Circuit, which had the third lowest number, published 67% of its decisions, during the period that was studied.

What Rules Do The Courts Follow In Reviewing Certification Decisions Once They Have Granted Review?

1. Courts of appeals review certification decisions under an abuse of discretion standard. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (pre-Rule 23(f) decision reviewing certification of nationwide class for abuse of discretion); *Blair*, 181 F.3d at 839 (applying abuse of discretion standard under Rule 23(f)).
2. The Second Circuit has a special rule, according more deference to a decision granting certification than to a decision denying certification. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006); *but see, e.g.*, *American Seed Co., Inc. v. Monsanto Co.*, 271 Fed. App'x. 138, 140 (3d Cir. 2008) (articulating identical abuse of discretion standards for grants and denials of class certification).

Conclusions: Unfettered Discretion And Decisions Without Reasons

1. *Coopers & Lybrand* got to the Supreme Court because some courts had perceived the need to permit interlocutory appeals with respect to denials of class certification, but the existing statutes and rules did not provide a doctrinal basis for that. The Supreme Court decided *Coopers & Lybrand* in the way it did because of that lack of fit, but also because of the lack of a principled basis for creating the particular rule the lower courts had created. Even if the existing standards were sufficiently capacious to permit interlocutory appeals in those circumstances, how could one justify a judicially-crafted rule that allowed appeals of some denials but not others, and no appeals from any grants? In *Rhone-Poulenc*, Judge Posner viewed the equities from the other side.
2. Section 1292(e) was meant to solve both of these problems:
   a) to provide a basis in law for interlocutory appeals in class action cases that did not necessarily meet the requirements of Section 1292(b), and
   b) to create a rule that provided a principled basis on which appeals could be granted or denied.

Conclusions: Unfettered Discretion And Decisions Without Reasons, Cont'd.

3. Rule 23(f) was the chosen solution. The recent empirical study suggests that Section 1292(e) and Rule 23(f) may have been more successful in satisfying the first goal than in satisfying the second. That study shows a wide variety among the circuits in terms of receptiveness to Rule 23(f) petitions, a wide variety in terms of results, and a wide variety in terms of transparency.
4. Notwithstanding the Advisory Committee Note, the analogy to the Supreme Court's certiorari jurisdiction is not a very good one. What the courts of appeals are doing here is not really analogous to the resolution of conflicts or the articulation of nationwide principles.