

Class Actions & Derivative Suits

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Co-Chair's Corner

California Dreamin'

by Scott L. Nelson

As the thermometer brushes the 100 mark, it is definitely not winter in Washington, DC. Even so, with apologies to the Mamas and the Papas, I'm California dreamin' on such a summer day. Why? Three of the season's most interesting class action issues have come from federal and state courts in California, and I thought I'd briefly share my reflections on them in my final column in this space.

The first case on my radar screen poses the question: When is a class action "hellhole" not a hellhole? Perhaps the answer is when a defendant wants to settle a case.

The case is called *America Online Spin-Off Accounts Litigation*, No. 04-1581 (C.D. Cal.), an MDL proceeding involving an as-yet uncertified class action against America Online (AOL) involving allegedly wrongful billing practices. This spring, after discussions with the MDL plaintiffs had failed to lead to a settlement, AOL announced that it was resolving the claims of all the MDL plaintiffs via a settlement with a nationwide class in a separate action in St. Clair County, Illinois — one of the jurisdictions that was frequently cited by proponents of the Class Action Fairness Act (CAFA) as a state-court "hellhole" from which defendants needed to be able to remove cases in order to receive fairer treatment by a federal court.

Until the St. Clair County settlement was announced, AOL had appeared to be a proponent of the MDL as the proper forum for resolving the claims at issue. Once the settlement was announced, however, AOL not surprisingly wanted the St. Clair County action to take precedence over the MDL, even though the St. Clair County action had not previously involved the claims asserted in the MDL, and the complaint in the case apparently had to be amended so that the MDL claims could be included in the settlement.

U.S. District Judge Ronald Lew, however, saw matters differently from AOL: He issued an All Writs Act injunction forbidding AOL to proceed with the St. Clair County settlement. Judge Lew stated that the injunction was necessary in aid of the federal court's jurisdiction because the St. Clair County settlement "has the likelihood of eviscerating the Court's MDL jurisdiction"

toward allowing more diverse, nation-wide employment discrimination class actions. Of course, the decision may be reversed by the Ninth Circuit or may signal only a further split in the standards applied across the various circuits. If history teaches us anything, it is that only with hindsight will we be able to determine if the *Wal-Mart Action* signals a new trend or proves to be an interesting footnote in the evolving law in this arena.

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1 The Ninth Circuit heard oral argument in *Dukes v. Wal-Mart Stores, Inc.*, (Nos. 04-16688 & 04-16720) on August 8, 2005.

CLASS ACTION APPEALS: RULE 23(f) AND ITS JURISPRUDENCE

by James P. Muehlberger, Nicolas P. Mizell
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Federal Rule of Civil Procedure 23(f) provides a mechanism for the federal circuit courts to clarify fundamental issues about class actions that had previously remained unresolved due to the relatively small number of class action suits that actually proceed to a final litigated result. In order to accomplish this goal, Rule 23(f) eliminates restrictive requirements found in other interlocutory appeal vehicles and provides the circuit courts with “unfettered discretion” in granting or denying reviews. 1998 Advisory Committee Notes to Rule 23(f). Nine federal circuit courts have now rendered opinions delineating the types of cases that are appeal-worthy.

This article will first briefly review the vehicles for appellate review of class actions that existed prior to the enactment of Rule 23(f). The purposes underlying the enactment of Rule 23(f) will then be discussed, and the federal circuit court cases interpreting the Rule will be surveyed. Finally, this article concludes that Rule 23(f) provides fertile grounds for appeal from many class certification orders.

Appellate Review of Class Certification Orders Prior to Enactment of Rule 23(f)

Prior to enactment of Rule 23(f), parties faced with a questionable ruling on class certification were forced to resort to an interlocutory appeal under 28 U.S.C. § 1292, a finding that the certification order was a final judgment under Rule 54(b), or a writ of mandamus under 28 U.S.C. § 1651. None of these options provided ready access to the appellate process.

Under 28 U.S.C. § 1292, three requirements had to be met before an appeal of a class certification order would be permitted: 1) the order had to “involve a controlling question of law”; 2) there must have been “substantial ground for differences of opinion”; and, 3) it had to be shown that the interlocutory appeal “may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b) (2000). Further, the district court had to issue a written opinion that these requirements were met, at which time the appellate court would, in its discretion, hear the appeal.

The Advisory Committee Notes specifically point out that 23(f) is distinguished from § 1292(b) in two “significant” ways: 1) “It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal”; and, 2) “[I]t does not include the potentially limiting requirements of § 1292(b) that the district court order ‘involve[] 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.’” 1998 Advisory Committee Notes.

A special finding that the certification order was a final judgment under Rule 54(b) also required approval by the district court. Rule 54(b) states that the “court may direct the entry of a final judgment...only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” Fed. R. Civ. P. 54(b).

The final option involved petitioning the appellate court for a writ of mandamus, which provided additional hurdles to overcome. The

Supreme Court recently affirmed that the writ of mandamus must be used “sparingly and only in the most critical and exigent circumstances.” *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 125 S.Ct. 2 (2004). The Court has also directed that, “[T]he writ is not to be used as a substitute for appeal...even though hardship may result from delay and perhaps unnecessary trial.” *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964).

This historical bias against interlocutory appeals generally springs from a concern that they interrupt the flow of litigation.¹ Rule 23(f) was designed to avoid delay. “The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings.” 1998 Advisory Committee Notes. Further, the Committee Notes specifically indicate that quick action is expected from the appellate courts in making their preliminary decision on whether to permit appeal. *Id.*

Under the onerous burdens imposed by § 1292(b), Rule 54(b), and writs of mandamus, relatively few class action interlocutory appeal petitions were granted a review. Aimee G. Mackay, *Appealability of Class Certification Orders Under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW.U.L.REV. 755, 767 (2002). By eliminating the unduly restrictive elements that made appeals difficult in the past, and by specifically attempting to minimize the disruptive nature of an interlocutory appeal, Rule 23(f) calls for increased access to the appellate review process.²

Implicitly discouraging the use of these old standards for granting interlocutory review, the Advisory Committee Notes suggest: “The courts of appeal will develop standards for granting review that reflect the changing areas of uncertainty in class litigation.” *Id.* (emphasis added). To date, nine circuits have complied with the directive and provided standards for granting review under Rule 23(f). With one exception, each of these circuits has expressly indicated that the court retains the discretion to review any lower court decision, regardless of whether it fits within a previously identified category of appropriate cases for review.³ See *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) (“We emphasize,

however, the discretionary nature of the authority ceded to us by the rule.”); *Sumitomo Copper Lit. v. Credit Lyonnais Rouse, LTD.*, 262 F.3d 134, 140 (2^d Cir. 2001) (“In so holding, we leave open the possibility that a petition failing to satisfy either of the foregoing requirements may nevertheless be granted where it presents special circumstances that mitigate in favor of an immediate appeal.”); *Newton v. Merrill Lynch*, 259 F.3d 154, 165 (3^d Cir. 2001) (“But these instances should not circumscribe our discretion; there may also be other valid reasons for the exercise of interlocutory review.”); *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (“Like the courts that have spoken on the issue, we eschew any hard-and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor of or against an interlocutory appeal.”); *Blair v. Equifax Check Services*, 181 F.3d 832, 834 (7th Cir. 1999) (“Neither a bright-line approach nor a catalog of factors would serve well—especially at the outset, when courts necessarily must experiment with the new class of appeals.”); *Chamberlan v. Ford Motor Co.*, 2005 WL 730192, *5 (9th Cir. 2005) (“The three categories we outline do not constitute an exhaustive list of factors and are not intended to circumscribe the broad discretion granted the court of appeals by Rule 23(f).”); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000) (“Our authority to accept Rule 23(f) petitions is highly discretionary, and the foregoing list of factors is not intended to be exhaustive; there may well be special circumstances that lead us to grant or deny a Rule 23(f) petition even where some or all of the relevant factors point to a different result.”); and *In re: Lorazepam & Clorazepate Antitrust Lit.*, 289 F.3d 98, 105 (D.C. Cir. 2002) (“Nonetheless, the circuit courts addressing Rule 23(f) are in agreement that restrictions on review should not preclude review in special circumstances...”)⁴

An argument in favor of a lenient approach to appellate review of class certification decisions derives from the 2003 amendment to Rule 23. With the 2003 amendment, conditional certification is no longer permissible under Rule 23. As a result, class certification decisions more closely resemble final judgments. This new development may warrant reconsideration of the guidelines that were established in most circuits prior to the 2003 amendment.⁵

Rule 23(f) Was Intended to Provide More Opportunities For Appellate Review of Class Certification Decisions

As Judge Easterbrook noted in the seminal case addressing Rule 23(f), there are certain fundamental issues about class actions that remain poorly developed because the cases frequently settle or are resolved in some other manner prior to a final adjudication. *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). “Recent proposals to amend Rule 23 were designed in part to clear up some of these questions. Instead, the Advisory Committee and the Standing Committee elected to wait, anticipating that appeals under Rule 23(f) would resolve some questions and illuminate others.” *Id.* See also *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000) (noting the purpose of the rule is to provide an avenue whereby the court can take “earlier-than-usual cognizance of important, unsettled legal questions thus contributing to...the orderly development of the law.”); and *Newton v. Merrill Lynch*, 259 F.3d 154, 162 (3^d Cir. 2001) (“[T]he Rule acknowledges the extraordinary nature of class actions and permits the appellate courts to develop a coherent body of jurisprudence in this area.”).

Other authorities, while not indicating that the overall purpose of the Rule is to establish a body of law on class certification, do indicate that the rule is intended to provide more opportunities for appellate review. The Committee Notes acknowledge, “[S]everal concerns justify expansion of present opportunities to appeal.” 1998 Advisory Committee Notes (emphasis added). The Fourth Circuit has stated that the purpose of Rule 23(f) is to “eliminate the unduly restrictive review practices” where mandamus was the only option available in the absence of consent from the district court. *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 145 (4th Cir. 2001).

Although the Committee Notes focus heavily on the discretionary nature of Rule 23(f), it also provides some guidance to the courts on what types of cases would be appropriate for appeal: “Permission is most likely to be granted when the certification decision turns on a novel or unsettled

question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.” 1998 Advisory Committee Notes.⁶ The Committee Notes expand on the dispositive nature of a class certification ruling by noting situations where a denial of certification “may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of the litigation.” *Id.* The Committee Notes also point to situations where granting certification “may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.” *Id.*

Rule 23(f) Jurisprudence

Blair v. Equifax Check Services, Inc.

In the first case to address Rule 23(f), the Seventh Circuit borrowed heavily from the Committee Notes to establish three distinct categories of cases that would warrant review. *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999). The first two categories are mirror images of the “death-knell” rationales discussed in the Committee Notes. “For some cases the denial of class status sounds the death knell of the litigation, because the representative plaintiff’s claim is too small to justify the expense of litigation.” *Id.* at 834. In other cases, “the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial.” *Id.* at 835. In both situations, the Seventh Circuit agreed that these types of cases would merit review but only if the claimant could also show that the certification decision was “questionable.” *Id.* at 834-35. Finally, the court found that an appeal was appropriate where it might “facilitate the development of the law.” *Id.* at 835. With this type of case, the court concluded that it was “less important to show that the district judge’s decision is shaky.” *Id.*

The defendant’s failure to advise debtors of their right to demand verification of the debt. *Id.* On the same day that a class action was certified in one case, plaintiffs and defendants reached a

The wide discretion afforded the circuit courts under Rule 23(f) is unmatched by any other interlocutory appeal process.

