The Legal Intelligencer

Rule 23(f) Class Certification Appeals: Boon or Bust?

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Proponents of these diverse views agreed on one thing: Class certification was so important to the outcome of a case that immediate appeal was necessary. So in 1998, Federal Rule 23(f) was added to the Federal Rules of Civil Procedure to allow for interlocutory appeals.

How has it worked? Has it resulted in massive appeals that slow down the process of litigation? Or has it effected a modest but useful change valued by plaintiffs and defendants alike? The answer is that Rule 23 (f) is still evolving, that its use varies from one circuit to another, and that it has resulted in a relatively small number of interlocutory appeals. In the Third Circuit, counsel are fortunate to have an appellate court that is more active than most in reviewing class action orders at an early stage of proceedings.

In general, our judicial system is not receptive to interlocutory review of court orders. 28 U.S.C. § 1291 grants the federal courts of appeals jurisdiction over "appeals from all final decisions of the district courts."

Known as the "final judgment rule," this jurisdictional limitation conserves judicial resources by avoiding piecemeal appellate review of issues that later may become moot through settlement or victory on the merits. Nonetheless, courts have recognized that certain areas sometimes warrant a deviation from this rule.

One of these areas is class certification. A district court ruling on whether to certify a class can effectively preclude a final judgment on the merits. A denial of class certification can make the individual plaintiff's case cost prohibitive, potentially ending the case. A grant of class certification can put tremendous pressure on the defendant to settle, regardless of the merits, because of the substantial costs of discovery and potential damage awards at stake in class actions. As a result, the district court's ruling on class certification may, as a practical matter, be dispositive of the merits.

Recognizing this reality — at least from a plaintiff's perspective — in the 1970s, some courts of appeals formulated a "death knell" interpretation of the final judgment rule for class certification orders. Proponents of this doctrine argued that, in many cases, a decision denying class certification served as the "death knell" of the case because the individual plaintiff would not have the financial incentive to pursue the claim. Because orders denying class certification in those cases essentially ended the litigation, they should be treated as final judgments for appeal purposes.

The U.S. Supreme Court disagreed, however, in *Coopers & Lybrand v. Livesay* , 437 U.S. 463 (1978). The Supreme Court held that orders denying class certification were not final judgments and, thus, were not appealable on an interlocutory basis. The court noted that the "death knell" rule required the court of appeals to make an essentially arbitrary decision as to whether it believed the aggrieved plaintiff could pursue an individual claim. Furthermore, in direct conflict with the final judgment rule's purpose of speeding the administration of justice, the "death knell" doctrine would slow the trial process by requiring plaintiffs to build a record in the district court proceeding of their inability to pursue individual litigation should class status be denied. The court acknowledged that good reasons existed to make an exception to the final judgment rule for class certification decisions, but it labeled those reasons as "policy arguments," proper for legislative — not judicial — consideration.

Congress took up these policy arguments, albeit in a most uninvolved way, by passing 28 U.S.C. § 1292(e), which authorized the Supreme Court to issue rules providing exceptions to the final judgment rule. The Supreme Court then exercised its new authority by promulgating Rule 23(f). Going into effect on Dec. 1, 1998, Rule 23(f) gave the courts of appeals discretion to allow interlocutory appeals from district court orders granting or denying class certification. The rule reads, "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 14 days after the order is entered."

But the rule left open some important issues. It sets forth no criteria or standards for when an appellate court should accept an appeal under Rule 23(f). Indeed, the comments that accompanied the rule's passage stated, "The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." However, the comments went on to say that granting an appeal is most proper 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." The comments suggested that the circuit courts should use their experience to develop the particular standards for accepting Rule 23(f) petitions — while cautioning them to grant those petitions sparingly.

Predictably, the rule maker's diffidence has led the appellate courts to develop a dizzying array of standards. Every circuit except the Fifth and Eighth employs at least three core grounds for review, originally articulated by the U.S. Court of Appeals for the Seventh Circuit in *Blair v. Equifax Check Services* , 181 F.3d 832 (1999). First, these circuits have resuscitated the "death knell" doctrine, granting review of orders denying class certification where the order is questionable and would end the litigation by rendering the plaintiff's claim too small to justify the expense of litigation. Second, these circuits have adopted what has become known as the "reverse death knell" doctrine. Here, a court will grant a Rule 23(f) petition if a district court's decision granting class certification is questionable and that decision would put considerable

pressure on the defendant to settle. Finally, these circuits will accept Rule 23(f) appeals when they facilitate the development of fundamental issues of law likely to escape review if not immediately appealed.

Although the First, Second and Seventh circuits have largely confined themselves to these core grounds, other circuits have taken a more expansive view of the rule. The Third, Ninth, Tenth and D.C. circuits will grant Rule 23(f) petitions where the district court decision is clearly erroneous. The Fourth, Sixth and Eleventh circuits consider the status of the litigation, such as the progress of discovery, when deciding whether to grant Rule 23(f) petitions. At the extreme, the Fifth and Eighth circuits have not articulated any clear appellate criteria at all, seemingly using their discretion to grant or deny Rule 23(f) petitions as they see fit.

As a practical matter, however, what matters more than any particular court's grounds for granting review is the particular court's philosophy on Rule 23(f). For example, the Third Circuit and the D.C. Circuit use the same four-factor approach explained above, but the Third Circuit has a more hospitable approach to accepting Rule 23(f) review. The D.C. Circuit explained in *In re Lorazepam & Clorazepate Antitrust Litigation,* 289 F.3d 98, 105 (2002) *,* that "interlocutory appeals are generally disfavored as disruptive, time-consuming, and expensive for both the parties and the courts." In contrast, the Third Circuit, in *Newton v. Merrill Lynch, Pierce, Fenner & Smith* , 259 F.3d 154 (2001), emphasized the expansive discretion granted the courts of appeals in Rule 23(f). Accordingly, despite nominally employing the same grounds for Rule 23 (f) review, the Third Circuit grants review three times more often than the D.C. Circuit.

Even so, any attorney who believes that Rule 23(f) provides an easy avenue to interlocutory review of class certification is likely to be disappointed. Only about one-third of Rule 23(f) appeals are actually accepted for interlocutory review. To make matters worse, the courts of appeals frequently write no opinion when reviewing Rule 23(f) petitions. They summarily rule on these petitions 90 percent of the time, leaving counsel with a very thin judicial trail to follow when deciding whether to file an interlocutory appeal of a class certification order.

Despite the lack of published opinions, some trends are evident. For one, the odds on appeal favor defendants. Half of the time that defendants appeal under Rule 23(f), the appellate court agrees to hear the appeal. Plaintiffs, however, succeed on only 20 percent of their tries. And if an appeal is accepted for review, the record shows that a reversal is more likely than not. That is no surprise, however, because most circuits require some showing of likely error by the trial court.

In any event, defendants contesting district court orders granting certification are more likely to have their petition reviewed and the district court decision vacated or reversed than are plaintiffs seeking review of district court orders denying class certification. This suggests that trial courts give less deference to the "reverse death knell" effect of class certification than do the courts of appeals.

Because the courts are still quite measured in granting interlocutory review under Rule 23(f), lawyers should do everything they can to win the certification battle at the district court level. Still, the courts of appeals have recognized that the unique pressures in class actions provide compelling reasons to take immediate review of district court certification decisions under certain circumstances. Therefore, by knowing the reasons behind the rule, understanding the relevant standards in each circuit, and examining published opinions to get a sense of the particular philosophy of the court that is reviewing the petition, attorneys can take advantage of the discretionary space in Rule 23(f) and formulate innovative arguments to convince the court to grant or deny a petition in any particular case. Rule 23(f), then, is a boon, and it should be valued for the improvements it makes to the class certification process. •

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