NEW JERSEY CIVIL JUSTICE INSTITUTE

MEMORANDUM

FROM: Alida Kass, Chief Counsel
SUBJECT: Class Action Reform/Interlocutory Appeal
DATE: March 3, 2014

Under existing law, class-certification decisions can be appealed as of right only after the case has been litigated to final judgment. Given the costs associated with the multi-year trials typically entailed in class action litigation, this often means that the class-certification is effectively the final judgment. The resources that would be spent defending the case are instead devoted to settlement.

A more efficient approach would be to permit either defendant or plaintiff to appeal the certification decision to ensure that it was made correctly according to the law. Our proposed change would permit litigants to contest that initial judicial determination immediately, by appealing that ruling to the Appellate Division of the Superior Court as of right.

Our proposed language would provide that for appeals of class certification orders:

a. An appeal of an order granting or denying a motion for class certification or decertification may be taken to the Appellate Division of the Superior Court as of right. An appeal of a decision of the Appellate Division of the Superior Court concerning class certification or decertification may be taken to the Supreme Court in the same manner as a final judgment of the Appellate Division of the Superior Court.

b. An appeal under this section stays all other proceedings in the Superior Court pending resolution of the appeal.

Such legislation would ensure that plaintiffs and defendants have an effective opportunity to correct errors in class certification. It also would facilitate the development of case law on requirements for class certification, which would enhance both predictability for litigants and judicial economy for the courts.

These changes are essential because the decision to certify a class is increasingly outcome determinative, as a practical matter. It is in fact very often the final decision made by the court, after which parties will reach a settlement. When a class certification is reviewable only after litigation to final judgment, it is effectively unreviewable.

In fact, the national trend at the state and federal level has been to expand access to interlocutory appeal of class certification.[1] The federal courts adopted Rule 23(f) out of a concern that too many erroneous class certification in lower court were escaping effective review. And in the fifteen years since, a number of states have changed their rules on interlocutory appeals, all in the direction of expanded access to class certification review.[2]

For plaintiffs and for defendants, the class certification decision often has a greater effect on the outcome of the litigation than the underlying merits of the case. For plaintiffs whose class certification has been denied, the costs of continuing the litigation as an individual party to final judgment in hopes of appealing the initial certification decision often are economically prohibitive. Indeed, the rationale for class actions is that they render economically feasible litigation that might never be pursued on an individual basis.

Similarly, for defendants, the decision to certify the class also typically means the end of litigation. As many have observed, "the high costs of class action litigation after the certification stage create considerable pressure to settle early."[3] The expert testimony and legal fees incurred in lengthy class action trials are costly. Since a defendant that litigates to final judgment in order to appeal the initial certification will never recoup those costs, even non-meritorious claims are not worth fighting at a cost that exceeds the cost of settlement.

In addition to the expense of the litigation itself, the risks of enormous potential damages also create strong pressure to settle. Even where the plaintiff's likelihood of success is small, defendants cannot be confident that they will prevail. As a result, whatever the likely merits of the case, litigating to final judgment often represents a risk that defendants simply cannot afford to take. Judges have noted and lamented the "irresistible pressure to settle" on defendants in high-stakes class actions,[4] and observed that "certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."[5] Discussing the massive potential liability that comes with class certification, Judge Posner noted that defendants "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."[6] As Judge Easterbrook put it, "many corporate executives are unwilling to bet their company that they are right in big-stakes

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[1] Alabama, Connecticut, Georgia, Louisiana, Ohio, Oklahoma, Tennessee, and Texas all provide for interlocutory appeal via statute. Arkansas, Florida, Iowa, Kentucky, and North Dakota permit via court rule. Pennsylvania permits immediate appeal of class certification orders as a matter of case law.

[2] Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 U. Kan. L. Rev. 1027, 1041 (2010).

[3] Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1302 (2002).

[4] *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (2008).

[5] Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S.Ct. 1184, 1206 (2013), (Scalia, J. dissenting).

[6] *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995).

litigation, and a grant of class status can propel the stakes of a case into the stratosphere."[7]

The costs and risks of litigation past the certification stage also create perverse incentives in the cases that are filed. The opportunity to extract settlements from defendants encourages plaintiffs to file, not according to the substantive merits of the case, but with the mere goal of making it past the stage of class certification.[8] Judge Friendly coined the term "blackmail settlements" to describe the phenomenon of settlements that are paid out of fear of the small probability of an immense judgment.[9] Absent an effective means of appealing an erroneous certification, the intense pressure for defendants to settle makes class actions an attractive avenue for plaintiffs with frivolous and weak claims.[10]

The inability to appeal class certification decisions has also led to a failure to develop the law on standards for class certification. As was the case in federal court prior to the adoption of Rule 23(f), restricted appeals mean fewer decisions, and primarily decisions on appeals that were permitted because the certification was granted in error.[11] But there is significant value to developing case law through the appeals process even when the outcome is that the class certification is upheld. More case law produces greater clarity and consistency. Permitting the appeal of class certification decision as of right would enhance the predictability and consistency in the law on class certification in general, in addition to the benefit to the parties themselves.

Class action reform to permit interlocutory appeal would further our goals of enhancing the predictability and fairness of the judicial process, and increasing the likelihood of reaching a correct outcome on the merits of the litigation.

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[7] Blair v. Equifax Check Services, Inc., 181 F.3d 832, 834 (1999).

[8] Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Annual Antitrust Review*, 71 COLUM.L.REV. 1, 8-9 (1971) "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail."

[9] *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) ("Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.' ") (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

[10] Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1255 (2002).

[11] "Because a large proportion of class actions settles or is resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed." Blair v. Equifax Check Services, Inc., 181 F.3d 832, 835 (1999).