



Class Action Reform: Interlocutory Appeals Increase Fairness & Efficiency

Although designed to promote judicial efficiency and fairness, class actions have become a means to extort a settlement out of defendants without considering the merits of the case. Amending New Jersey court rules to permit interlocutory appeal of class certification decisions would enhance the predictability and fairness of the judicial process, and increase the likelihood that cases are decided on the merits rather than the cost of litigation.

Class Certification is Often the 1st and Only Step in New Jersey Class Actions

Class action suits play an important role in the judicial system. By allowing for the consolidation of similar cases, the courts are able to conserve judicial resources; make litigation more cost effective and efficient for both plaintiffs and defendants; and ensure that all injured parties, not just the first to file, are able to receive redress of their grievances.

Class actions get their name from the first step in the multi-plaintiff litigation process - certification by the judge that a group, or class, of plaintiffs exists.

In New Jersey, certification is proper when:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[And]

(1) the prosecution of separate actions by or against individual members of the class would create a risk either of :

(A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and

(D) the difficulties likely to be encountered in the management of a class action.¹

The rule is at its core a balancing test to be applied by the judge. Balancing tests are inherently subjective, so judges often make questionable decisions at the certification stage. Unfortunately these decisions stand because New Jersey law limits the ability of parties to have the certification decision reviewed.²

Parties to class action suits in New Jersey state courts do not have a right to an immediate, or interlocutory, appeal of a court's decision to certify, or not certify, a class of plaintiffs. Parties can only appeal certification decisions at the time they are made if the appellate court gives them permission to do so. Most courts are loath to grant a motion for interlocutory review because they generally do not doubt their own decision-making. This means that class certification decisions can be appealed as of right only after the case has been litigated to final judgment.

Why is this bad?

New Jersey's current practice disfavoring interlocutory review of certifications emphasizes economics over justice, and invites plaintiffs to file weak claims.

In New Jersey state courts, 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 to final judgment as an individual party often are economically prohibitive.

¹ Rules Governing the Courts of the State of New Jersey, Rule 4:32-1. Requirements for Maintaining Class Action, available at <https://www.judiciary.state.nj.us/rules/r4-32.htm>.

² Rules Governing the Courts of the State of New Jersey, Rule 2:2. Appealable Judgments And Determinations, available at <https://www.judiciary.state.nj.us/rules/r2-2.htm>.

Class certification frequently triggers the end of litigation for defendants as well. As many have observed, “the high costs of class action litigation after the certification stage create considerable pressure to settle early.”³ When a questionable class certification decision is made, the defendant faces a no-win situation: it can spend resources litigating a class action case that may have been erroneously certified, or it can settle, even if it did nothing wrong. 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 risk of losing the case and owing damages increases the 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 litigation, and a grant of class status can propel the stakes of a case into the stratosphere.”⁷

The costs and risks of litigating beyond 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 goal of just making it past the class certification stage.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

When class certification serves as the death knell for litigation, the interests of justice are not being served.

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).

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).

Allowing for an Interlocutory Appeal as of Right Would Solve This Problem

A rule change permitting interlocutory appeal of class certification decisions would enhance the predictability and fairness of the judicial process, and increase the likelihood that courts reach decisions based on the merits of the cases before them. Other court systems have already come to this conclusion.

Out of a concern that too many erroneous class certifications by lower court were escaping effective review, the federal courts adopted Rule 23(f).¹¹ The rule grants parties the right to interlocutory review of certifications. As a result of the federal rule change, federal case law on the standards has been more fully developed, making future certification errors less likely.

New Jersey case law on certification is much less clear because parties rarely choose to fully litigate a matter in order to challenge a preliminary procedural ruling. Prior to the adoption of Rule 23(f), the federal courts faced the same dilemma.¹² Restricted appeals necessarily result in fewer decisions and less development of the law.

The value of more case law is greater clarity and consistency, particularly with regards to procedural questions. Permitting the appeal of class certification decisions as of right would enhance the predictability and consistency of the law on class certification in general, and thereby increase judicial economy.

A number of states have followed the federal system's example and are allowing interlocutory appeal of class certification decisions.¹³ A similar change to New Jersey law would ensure this state's litigants have an opportunity to correct class certification errors.

Either the Courts or the Legislature Could Address This Issue

Though they are by definition procedural, class certifications are in practice dispositive, and thus substantive. This means that either the courts or the legislature could make this policy change. NJCJI will continue to press this issue with both branches.

¹¹ "Appeals. 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. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." Federal Rules of Civil Procedure, 23(f), available at <http://www.uscourts.gov/uscourts/rules/civil-procedure.pdf>.

¹² "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).

¹³ 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.

At NJCJI's request, the New Jersey Supreme Court Committee on Civil Practices has formed a subcommittee to consider changing court rules to allow for the interlocutory appeal of class action certifications as of right.¹⁴ The next report of the Committee will be issued in early 2016.

Bills establishing a right to appeal class certifications have been introduced during the past few legislative sessions at NJCJI's encouragement. This session, Assemblyman Wisneiwski has introduced A2756, which would establish an immediate right to interlocutory appeal of certification decisions. Introduction of a companion bill in the Senate is forthcoming.

¹⁴ 2014 Report of the Supreme Court Civil Practice Committee, Jan. 27, 2014, available at <http://www.judiciary.state.nj.us/reports2014/CPC.pdf>.