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June 9, 2011

Honorable Gary R. Chiusano
115 Demarest Rd., Suite 2B
Sparta, New Jersey 07871

Dear Assemblyman Chiusano:

I am writing in response to your request for information and legislation regarding the automatic right to file an interlocutory appeal from a determination as to whether a group of plaintiffs is certified as a class in a class action lawsuit. Enclosed is a draft of legislation that would create this right of appeal. It is my understanding that Donald Dinsmore of your office has been in contact with Rafaela Garcia, who informed him that this legislation may implicate constitutional separation of powers issues.

Under the present system, a litigant must either move for leave to file an interlocutory appeal or await final judgment to appeal a determination as to the grant or denial of class certification in a class action lawsuit. Leave to file interlocutory appeals is rarely granted, primarily because the judiciary prefers to avoid "piecemeal review" of cases where all issues have not been fully resolved by a final judgment. Because our State Constitution provides that the New Jersey Supreme Court has sole authority over "practice and procedure" in State courts, it is possible that, were this legislation enacted, it might be struck down as unconstitutional.

N.J. Const. (1947), Art. VI, Sec. II, par. 3 provides in pertinent part:

> The Supreme Court shall makes rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts.

The leading case interpreting this constitutional provision, Winberry v. Salisbury, 5 N.J. 240, cert. den. 340 U.S. 877 (1950), holds that the Supreme Court has exclusive powers to enact rules of practice and procedure. The "rule-making power of the Supreme Court is not subject to overriding legislation, but is confined to practice, procedure and administration as such." Id. at 255.

The Supreme Court has promulgated several Rules of Court setting forth the rights and procedures pertaining to the appellate process. Rules 2:2-3 and 2:2-4 provide that the Appellate Division may hear interlocutory appeals by leave granted or "in such cases as are provided by law." There do not appear to be any statutes that establish a right to interlocutory appeal. Rule 2:2-2 provides that appeals to the Supreme Court from interlocutory orders may be taken by leave of the Court "when necessary to prevent irreparable injury" or on certification by the Court.

You may wish to consider that, generally, when the Legislature seeks to change the administration of the judicial appeals process, it has done so using a resolution instead of a bill. For example, Assembly Resolution No. 126, introduced in 1998, requested the Administrative Office of the Courts to expedite the preparation of transcripts for appeals in capital cases. Additionally, statutes that establish a direct right of appeal generally make such right of appeal subject to the rules and procedures established by the Supreme Court.[1]

You may also wish to consider that there are two Assembly Bills in the current session, Nos. 3518 and 3519, which are similar to your proposal. Assembly Bill No. 3519 would permit immediate interlocutory appeals from determinations as to public entity immunity under the Tort Claims Act. Assembly Bill No. 3158 would establish the right to an immediate interlocutory appeal from a determination as to public entity immunity in claims brought under both the Law Against Discrimination and the Conscientious Employee Protection Act. It appears that both of these bills may implicate the prohibition against Legislative encroachment into the Supreme Court's authority to regulate the administration, practice, and procedure of the judiciary discussed above.

With regard to the attached draft, please note that I have made several small adjustments to the proposed statutory language included with your request. These changes make the language of bill draft consistent with the language used elsewhere in Title 2A of the New Jersey Statutes. Additionally, the proposed statutory language would have made this bill applicable to all matters pending as of the effective date, as well as matters filed on or after the effective date. I have changed this to make it effective on the 91st day following enactment and applicable only to cases filed on or after that effective date. Were the bill applicable to all pending matters, it could create administrative difficulties as ongoing cases would have to be stayed pending appeal of class certification determinations, which would likely disrupt court calendars and cause inconvenience to litigants, attorneys, witnesses, and jurors. Similarly, the Appellate Division

[1] See, e.g. N.J.S.A.2A:23A-7; N.J.S.A.2B:13-4; N.J.S.A.34:15-66.

and Supreme Court would likely experience difficulty processing appeals in all or a significant number of the class action suits currently pending, which would exacerbate the delays, additional expense, and inconveniences experienced at the trial level. A delayed effective date would give the judiciary time to adjust to the new legislation. Please let me know if you would prefer the bill use the original effective date.

I hope this information is helpful to you. Please feel free to contact me if you have any questions. I can be reached by phone at 609-292-5526 or by email at mfahncke@njleg.org.

Sincerely,

Michael Fahncke
Deputy Counsel I