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DEVELOPMENTS AND PRACTICE NOTES

CLASS CERTIFICATION AND INTERLOCUTORY REVIEW: RULE 23(f) IN THE COURTS*

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I. INTRODUCTION

The law abhors a vacuum, and Federal Rule of Civil Procedure 23(f) created a vacuum in providing a new route for appellate review of decisions granting or denying class action certification. This new section of the Rule, adopted in 1998, gave the courts of appeals carte blanche to develop standards for granting review in such cases. The development of the law in the ensuing years shows that the drafters were ill-advised to leave the courts to their own devices. Building on vague language in the Advisory Committee Notes, the circuits have developed

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multi-part tests that are hard to understand, hard to apply, and inconsistent with the limited role of the appellate courts. One of those tests, adopted by the Ninth Circuit in *Chamberlan v. Ford Motor Co.*,[1] illustrates these difficulties and signals that it is time to build more workable standards into Rule 23(f).

II. RULE 23(f) GIVES SOLE DISCRETION TO THE COURTS OF APPEALS

Some twenty years before the adoption of Rule 23(f), the Supreme Court in *Coopers & Lybrand v. Livesay*[2] had rejected the notion that class action certification orders are appealable final orders under 28 USC § 1291. This left parties seeking to challenge class certification orders with few options: pursuing the interlocutory appeal procedure available under 28 USC §1292(b), applying for writs of mandamus, and following other narrowly drawn routes for discretionary appellate review.[3]

These options had proven unsatisfactory, so Rule 23(f) opened a new path for review of class certification orders by providing that

> [a] court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.[4]

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1. 402 F.3d 952 (9th Cir. 2005).

2. 437 U.S. 463 (1978).

3. Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions,* 1 J. App. Prac. & Process 309, 314-18 (1999) (describing options formerly available to putative class representatives seeking leave to appeal, including invocation of the "collateral final order" doctrine, appeal under 28 U.S.C. §1292, and "stretching, if not perverting, the mandamus criteria").

4. Fed. R. Civ. P. 23(f) (available at http://uscode.house.gov). Note, however, that Rule 23(f) has been amended effective as of December 1, 2007, to state

> 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 10 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.

S. Ct. of the U.S., *Amendments to the Federal Rules of Civil Procedure* (Apr. 30, 2007) (available at http://www.supremecourtus.gov/orders/courtorders/frcv07p.pdf) (accessed

This new procedure removed some of the barriers to interlocutory review imposed by §1292(b): It eliminates the requirements that (1) the district court certify the ruling for appeal, (2) the district court's order involve a controlling question of law on which there is ground for difference of opinion, and (3) the district court find that an immediate appeal may materially advance the termination of the litigation.[5]

Is the purpose of Rule 23(f) to encourage more appeals of class certification orders? The Advisory Committee Notes straddle the fence. They say that "many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings."[6] But they also say—in the next sentence—that various "concerns" associated with class actions "justify expansion of present opportunities to appeal."[7]

The Notes acknowledge that Rule 23(f) gives the courts of appeals great latitude in accepting or denying petitions to appeal class certification orders. They state that "[a]ppeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals," and also that "[t]he court of appeals is given unfettered discretion whether to permit the appeal."[8] But at the same time the Notes contemplate the creation of a set of rules within which to exercise that discretion: "The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation."[9]

Despite this broad grant of discretionary authority, the Notes themselves describe two types of cases that may benefit

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Oct. 12, 2007; copy on file with Journal of Appellate Practice and Process). The Advisory Committee Notes indicate that this amendment does not change the substance of the Rule, for "[t]he style changes to the rules are intended to make no changes in substantive meaning." Fed. R. Civ. P. 1, Advisory Comm. N. (2007) (referring to the "Style Project," a comprehensive rewrite of the Federal Rules of Civil Procedure intended "to make them more easily understood and to make style and terminology consistent throughout the rules") (available at http://www.uscourts.gov/rules/supct1106/Excerpt_CV_Style.pdf) (accessed Oct. 12, 2007; copy on file with Journal of Appellate Practice and Process).

5. Fed. R. Civ. P. 23(f), Advisory Comm. N. (1998) (referring to 1998 amendment) (available at http://uscode.house.gov).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

from interlocutory review. First, where the named plaintiff's individual claim is small, denial of class certification may mean that plaintiff is unlikely to proceed to judgment in order to obtain appellate review of the certification order; in that circumstance, interlocutory appeal may be appropriate. Second, where granting certification may force a defendant to settle rather than incur the costs of defending on the merits to obtain eventual review of the certification order, interlocutory appeal can also be appropriate.

III. THE COURTS OF APPEALS STEP INTO THE VOID

In 1999, the Seventh Circuit was the first to address standards for accepting review of a class certification order. In *Blair v. Equifax Check Services, Inc.*, [10] citing the reference to the courts' "unfettered discretion" in the Notes, the court declined to

> draw up a list that determines how the power under Rule 23(f) will be exercised. 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.[11]

Instead of "inventing standards," Judge Easterbrook's opinion outlined the three types of cases that might appropriately be subject to interlocutory review under Rule 23(f).[12] The first two categories of cases draw on circumstances described in the Notes, but the third does not.

First is the death-knell case, in which the named plaintiff's individual claim is too small to justify the expense of litigation, and the denial of class status can mean the end of the case. In that circumstance, and if "plaintiff has a solid argument in opposition to the district court's decision,"[13] then appellate review may be appropriate.

Second is what is often called the reverse death-knell situation: a grant of class certification in a big-stakes case that

10. 181 F.3d 832 (7th Cir. 1999) (Easterbrook, J.).

11. *Id.* at 834.

12. *Id.*

13. *Id.* (echoing the first category of cases described in the Notes).

can put undue pressure on a defendant to settle regardless of the merits. According to *Blair*, review can be appropriate in that circumstance if the district court's ruling is "questionable."[14]

Third, allowing an appeal may be appropriate to "facilitate the development of the law."[15] This means that appellate review in a case raising a fundamental question of class action law may be appropriate even if it cannot readily be shown "that the district court's decision is shaky."[16] Judge Easterbrook found that the *Blair* case fit this third category, raising an "important" issue regarding the treatment of multiple overlapping class actions. He also noted that interlocutory appeal was appropriate because the issue was likely to evade review after judgment.[17]

While *Blair* signaled a preference for flexible analysis rather than application of multi-part tests, its articulation of three circumstances in which Rule 23(f) review could be appropriate has since ossified and it is now characterized as setting out three "standards" or "categories" for 23(f) review.[18] Other circuits have since adopted other multi-factor tests for accepting review under Rule 23(f), [19] all of which are variations of that articulated in *Blair*, and all of which include the death-knell test.[20]

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14. *Id.* at 835 (expanding on the second description of cases found in the Notes while pointing out that the appeals court is to "tak[e] into account the discretion the district judge possesses in implementing Rule 23, and the correspondingly deferential standard of appellate review," and cautioning that "[h]owever dramatic the effect of the grant or denial of class status in undercutting the plaintiff's claim or inducing the defendant to capitulate, if the ruling is impervious to revision there's no point to an interlocutory appeal").

15. *Id.*

16. *Id.*

17. *Id.* at 838. The Seventh Circuit accepted subsequent cases for review on the same ground: that deciding the issue would advance the development of the law of class actions. *See e.g. In re Household Int'l Tax Reduction Plan*, 441 F.3d 500, 501 (7th Cir. 2006) (Posner, J.); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 951 (7th Cir. 2006) (Easterbrook, J.) (noting that the case "presents some fundamental questions about the management of consumer class actions").

18. Christopher A. Kitchen, Student Author, *Interlocutory Appeal of Class Action Certification Decisions under Federal Rule of Civil Procedure 23(f): A Proposal for a New Guideline*, 2004 Colum. Bus. L. Rev. 231, 244-45 (introducing discussion of various circuit tests, and discussing *Blair* itself).

19. *Id.* at 246-53. Judge Posner has frowned on such tests: "Multifactor tests are notoriously difficult to apply, and the difficulties are not reduced by leaving the list of factors open-ended. More to my present point, multifactor tests invite tedious, meandering opinions." Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421, 1439 (1995).

20. *See generally* Carey M. Erhard, Student Author, *A Discussion of the Interlocutory*

IV. THE NINTH CIRCUIT'S *CHAMBERLAN* GUIDELINES

In 2005 the Ninth Circuit adopted its own set of guidelines for consideration of Rule 23(f) petitions.

> Review of class certification decisions will be most appropriate when:
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> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable;
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> (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or
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> (3) the district court's class certification decision is manifestly erroneous.[21]

The problem with these guidelines—and with the comparable tests adopted by other circuits—is that they tell litigants little if anything about the types of cases that are likely to receive interlocutory review. And as the following discussion will show, two of the factors advance the idea that the court of appeals must predict whether the class certification will result in early settlement or dismissal of the case, effectively resurrecting the death-knell doctrine that the Supreme Court rejected in *Livesay*.[22]

A. Chamberlan *Guideline 1: "Death Knell"*

1. The Guideline's Balancing Test

The first *Chamberlan* guideline states that review may be appropriate if the death-knell test points in the direction of premature termination of the litigation, and if the district court's

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Review of Class Certification Orders under Federal Rule of Civil Procedure 23(f), 51 Drake L. Rev. 151 (2002).

21. *Chamberlan*, 402 F.3d at 959 (noting in addition that this set of guidelines is modeled most closely on the standards adopted by the D.C. Circuit in *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100, 105 (D.C. Cir. 2002)).

22. *See infra* pp. 196-97.

opinion is "questionable." This death-knell factor—drawn from the Notes to Rule 23(f)—weighs the cost of litigation against either the value of the named plaintiff's claim (when certification is denied) or the pressure to settle (when certification is granted).[23] This calculation seeks to avoid a premature termination of the case—through voluntary dismissal or settlement—following an erroneous ruling on class certification.

What has never been made clear is the evidence the court should or could consider in balancing the cost of litigation against the risk of early termination. The record in the district court on class certification is unlikely to address the projected cost of future litigation, which means that the court of appeals may have no basis on which to reach a conclusion about costs before conducting the balancing test recommended by this guideline.[24] Similarly, the court is unlikely to find evidence in the record establishing the extent to which (1) a defendant will be pressured to settle following certification of a class, or (2) a plaintiff will be forced to drop his or her claim if certification is denied. The court can in consequence only speculate about whether the case would be terminated early on either basis.

Also unclear is the point at which to begin tallying the cost of litigation in order to compare it to either the value of the claim or the pressure to settle. Is it appropriate to consider the cost from the outset of the case, or only the cost from the date on which the district court issued its order on class certification? The choice is particularly important when deciding whether interlocutory appeal should be allowed following a denial of class certification. If sufficient discovery has occurred before the certification motion so that plaintiff would incur relatively little in additional fees when proceeding to trial, should interlocutory review be denied? Or is the cost of the litigation from the outset the relevant consideration? And if the court is to consider the entire cost of litigation, won't the plaintiff's claim in virtually every case be "worth far less than the cost of litigation," making it appropriate to review nearly every order denying

23. *Chamberlan*, 402 F.3d at 957.

24. One of the factors relevant to certifying a class action is whether "a class action is superior to other available methods" of adjudication. Fed. R. Civ. P. 23(b)(3). This superiority test may require the district court to inquire into the cost of litigation.

certification?[25] The small size of plaintiff's claim relative to the cost of the litigation is, after all, the very reason that most claims are pursued as class actions.

2. The Livesay Critique

The Supreme Court's decision in *Livesay*[26] highlights the practical difficulty inherent in asking the court of appeals to predict whether a certification decision will result in premature termination of the litigation. *Livesay* arose from a conflict in the circuits about the proper route for appellate review of orders denying class certification. Several circuits, including the Eighth (from which *Livesay* arose), had developed the rule that a denial of class certification could be reviewable as a final judgment under 28 USC § 1291 if it was likely to sound the death knell. As the Court put it, these circuits took the position that "without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination."[27] The Court then rejected the use of the death-knell analysis as a proxy for finality, and held that "orders relating to class certification are not independently appealable under § 1291 prior to judgment."[28]

The *Livesay* Court was critical of the death-knell rule because it amounted to an "arbitrary measure of finality" that did not take into account many factors that might play into a plaintiff's decision about whether to proceed in the face of an adverse certification ruling.[29] And to the extent that a court of appeals might seek to conduct a thorough analysis of the many factors relevant to a death-knell determination, that analysis would require plaintiff to build a record in the trial court

25. *Chamberlan*, 402 F.3d at 957 (recognizing that the small size of a plaintiff's claim relative to the cost of the litigation is the very reason that most claims are pursued as class actions).

26. 437 U.S. 463 (1978).

27. *Id.* at 469-70.

28. *Id.* at 470.

29. *Id.* at 472. The Court listed some of those other factors: "the plaintiff's resources; the size of his claim and his subjective willingness to finance prosecution of the claim; the probable cost of the litigation and the possibility of joining others who will share that cost; and the prospect of prevailing on the merits and reversing an order denying class certification." *Id.* at 471 n. 15.

regarding such issues as the size of his or her own claim and those of the class members in aggregate.[30]

The circuits that applied the death-knell rule had held that if the record was inadequate to enable the appeals court to assess the risk of premature termination, then remand was necessary for development of the facts.[31] The Court called such effort a "potential waste of judicial resources" and noted that its incremental benefit in identifying orders that would result in premature resolution was outweighed by the burden that it placed on the judicial system as a whole.[32]

It is curious, then, that the analysis rejected years ago by the *Livesay* Court as arbitrary and burdensome has emerged as a central feature of Rule 23(f)'s guidelines for granting appellate review. Significantly, unlike the courts of appeals that developed a death-knell rule before *Livesay*, courts applying Rule 23(f) have not required district courts to develop factual records on whether the grant or denial of certification would result in premature termination of the litigation. This means that courts considering Rule 23(f) review today have even less factual basis for their death-knell analysis than did the courts that used the test before it was criticized in *Livesay*.

B. Chamberlan *Guideline 2: "Likely to Evade End-of-the-Case Review"*

The second *Chamberlan* guideline states that review can be appropriate when the decision presents an "unsettled and fundamental issue of law" that is "likely to evade end-of-the-case review."[33] This guideline similarly provides little assistance

30. *Id.* at 473 and n. 20 (citing *Hooley v. Red Carpet Corp.*, 549 F.2d 643 (9th Cir. 1977), and *Ott v. Speedwriting Pub. Co.*, 518 F.2d 1143 (6th Cir. 1975)).

31. *Id.*

32. *Id.*

33. 402 F.3d at 959. This "likely to evade review" standard originated with the First Circuit's decision in *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), as a refinement of the third *Blair* category, which identified as appropriate for review cases involving fundamental issues of class action law. *See id.* at 293-94 (citing *Blair* and describing it as "cogently reasoned," noting that a "creative lawyer" can argue that any issue of class action law is fundamental, and determining that it is therefore necessary to review a fundamental issue only if it is "likely to escape effective review if left hanging until the end of the case").

to litigants. In fact, it seems to be substantially the same as the death-knell test: If the claim is likely to be dismissed or settled in the event that no appeal is allowed, then interlocutory review may be appropriate.

A certification decision is likely to evade review only if there is a settlement[34] or voluntary dismissal short of trial. In nearly every other circumstance, a certification order will not evade review. It will in most situations be appealable when the litigation is concluded, for a certification decision is appealable as a matter of right after the case is litigated to judgment.[35] In fact, a plaintiff who fails to obtain certification may appeal that decision following entry of judgment even if the case is mooted by an "involuntary" resolution caused by the defendant's payment into the court of all the damages claimed by the plaintiff. [36] In that circumstance, the plaintiff's individual claim is extinguished but he or she is nonetheless entitled to appeal the denial of class certification.[37] This means that, with limited exceptions,[38] only a voluntary dismissal or settlement short of trial will prevent end-of-case review of a certification decision.

Distilled to their essence, then, the first two guidelines show a preference for interlocutory review if a case is likely to be dismissed or settled following the determination on class certification. They differ only in that they temper the availability

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34. A plaintiff is not entitled, after voluntarily settling his claim and dismissing the case with prejudice, to appeal the denial of class certification. *Seidman v. Beverly Hills,* 785 F.2d 1447, 1448 (9th Cir. 1986) (noting that "[a] plaintiff may not appeal a voluntary dismissal because it is not an involuntary adverse judgment against him," and that "an appealable final judgment must still be adverse to the plaintiff [and] cannot be the product of a voluntary stipulation").

35. *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 393 (1977).

36. *Deposit Guaranty Natl. Bank v. Roper,* 445 U.S. 326, 332-33 (1980); *see also Pastor v. State Farm Mut. Auto. Ins. Co.,* 487 F.3d 1042, 1043-44 (7th Cir. 2007) (indicating that denial of class certification is appealable as a matter of right after plaintiff accepted a "modest offer of judgment . . . which terminated the case"; court of appeals had previously refused to accept interlocutory review under Rule 23(f)).

37. *Id.* (pointing out that the plaintiff retained the right to appeal the denial of class certification so long as he "retained an economic interest in class certification").

38. *Blair* itself illustrates an exception, according to the Seventh Circuit. There the issue was whether a settlement in one class action bound the plaintiffs in a second class action against the same defendant on the same grounds. The court stated that the issue before it concerned "the relation among (potentially inconsistent) *judgments,*" not just "the management of pending litigation," and because that issue might evade review at the end of the case, interlocutory appeal was appropriate. 181 F.3d at 837-38 (italics in original).

of interlocutory review by requiring that the district court ruling be "questionable" on the one hand or raise "unsettled and fundamental issues" on the other. As shown above, the courts of appeal are not well positioned to predict whether a litigant is likely either to dismiss a claim or to agree to a disadvantageous settlement if review is denied.[39] In that respect, the first two guidelines are difficult to apply, and in any event, they conflict with the Supreme Court's view of the appropriate role of the appellate courts.[40]

C. Chamberlan *Guideline 3: "Manifestly Erroneous"*

The Ninth Circuit's third guideline abandons the inquiry into the potential effect of the district court's certification decision, and asks only whether it was "manifestly erroneous."[41] What is unclear is how, if at all, this standard differs from the instruction in the first *Chamberlan* guideline advising appellants that to obtain review they must show that the District Court's decision was "questionable."[42] How does a court distinguish between "manifestly erroneous" legal rulings and "questionable" legal rulings?[43] Evidently the two standards are not the same,

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39. The Eleventh Circuit's approach to review under Rule 23(f) is noteworthy because it explicitly requires the appellate courts to step outside their limited role and inquire into issues unlikely to appear in the district court's record. According to *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000), the appeals court should look at five "guideposts," which include the status of discovery, whether settlement negotiations are underway, and whether there is an impending change in financial status of one of the parties, such as bankruptcy. *Id.* at 1276. These matters typically will not appear in the record below, and it is not the role of the federal courts of appeals to develop a record on such issues.

40. *See e.g. Livesay*, 437 U.S. at 476 (pointing out that "allowing appeals as of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—'that of maintaining the appropriate relationship between the respective courts.... This goal, in the absence of most compelling reasons to the contrary, is very much worth preserving'") (footnote and citation omitted).

41. This standard is already familiar to appellate courts, which commonly use it in reviewing objections relating to admissibility of evidence: A trial court's ruling on the admissibility of evidence is affirmed unless manifestly erroneous. *See e.g. Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1183 (9th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003).

42. *Chamberlan*, 402 F.3d 959 (setting out list of standards).

43. Compare this with the Ninth Circuit factors for accepting review by writ of mandamus, which include the requirement that the district court's decision be "clearly erroneous as a matter of law." *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977).

because only "questionable" rulings must be accompanied by a "death knell" effect on the litigation in order to merit review. But, again, the practitioner seeking to apply these standards has received no guidance from the Ninth Circuit on the shades of difference between them.

V. REVIEW OF CLASS CERTIFICATION ORDERS: A POTENTIAL NEW PATH

The experiment launched under Rule 23(f) left to the courts of appeals the task of developing standards for granting review of class certification orders. After ten years of experience, the courts have not strayed from the limited criteria, including the death-knell test, suggested in the Advisory Committee Notes. This leaves the appellate courts of today no better suited to apply that particular test than they were when the Supreme Court criticized it in *Livesay*.

It is time to revise Rule 23(f) so that it includes explicit criteria for accepting interlocutory review. Those criteria should exclude the death-knell test as unsuitable for application by appellate courts. And the other tests that the courts of appeals have identified—including a "questionable" ruling, a "manifestly erroneous" ruling, or one "raising unsettled and fundamental issues"—should be articulated in a revised Rule 23(f) that adds the following:

> Appeal will be allowed if the petitioner makes a substantial showing that the district court's certification order (1) contains an error of law, or (2) raises a novel legal question affecting the development of the law of class actions and merits immediate resolution.

This short and clear statement of the governing principles would help the courts of appeals achieve consistency in applying the Rule.

VI. CONCLUSION

As currently applied, Rule 23(f) requires the courts of appeals to predict the future of particular cases despite having access in each to little or no factual record on which to base the prediction. They must ask whether a refusal to accept

interlocutory review will cause premature termination of the litigation through settlement or dismissal, and they must do so even though the difficulties with that exercise were evident to the Supreme Court decades ago. Rule 23(f) should therefore be amended to end the murky predictions necessitated by the death-knell and likely-to-evade-review tests. Instead, the courts of appeals should be directed—in language like that set out above—to determine whether a proposed interlocutory appeal raises an error of law or a legal issue that merits immediate review.