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Appealing Class Certification Orders Under Rule 23(f)

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A trial court's decision on a motion for class certification, as a practical matter, often determines the outcome of the litigation. For defendants, the certification of a plaintiff class can dramatically increase their potential exposure, creating, in the words of the Second Circuit, an "inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability."[1] On the plaintiffs' side, a denial of class certification can be the equivalent of a dismissal: If no single plaintiff has a large enough claim to justify the costs and risks of going it alone, then it may not be feasible to carry on the suit.

In federal court, however, the district court does not necessarily have the last word on class certification. In 1998, Federal Rule of Civil Procedure 23 was amended to add subsection 23(f), which permits parties to petition the circuit court for interlocutory review of a class-certification order. In contrast to petitions for certiorari or other petitions for discretionary review, Rule 23(f) petitions are granted with some frequency. Despite the circuits' general aversion to interlocutory review, studies have concluded that Rule 23(f) petitions are granted about 25 percent of the time both in the Second Circuit and in the federal system as a whole.[2] A survey suggests that the success rate in recent years has been even higher.[3] Although the vast majority of Rule 23(f) petitions are still denied, a one-in-four success rate means that counsel on the losing side of a class-certification decision in federal court should

always consider whether Rule 23(f) is a viable option.

This article discusses the practical and strategic issues that ought to be considered when filing a Rule 23(f) petition, and suggests approaches to improve the likelihood of securing or defeating interlocutory review.

The Logistical Considerations

Rule 23(f) states: "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." That 14-day deadline is set in stone: Courts of appeals are expressly forbidden from extending the deadline by Federal Rule of Appellate Procedure 26(b)(1), and although the Second Circuit has not decided whether the deadline is jurisdictional, it views the time limit as "a rigid and inflexible restriction."[4]

Consequently, counsel needs to start thinking about the possibility of filing a Rule 23(f) petition even before certification is decided, as two weeks is not a lot of time to draft a persuasive brief. Note that a litigant might be able to extend the 14-day deadline by moving the district court to reconsider or amend its class-certification order. "Might" is the appropriate word because the Second Circuit has avoided deciding whether such motions toll the 14-day deadline.[5] Other circuits have held that Rule 23(f)'s 14-day deadline does not begin to run until the district court has ruled on a timely motion to reconsider.[6] Nevertheless, given the uncertain state of the law in the Second Circuit, the safest course is to file the Rule 23(f) petition within the 14-day deadline even if one simultaneously moves for reconsideration.

It is not unusual for a district court to amend the class definition or otherwise change the parameters of its certification order during the course of a case. Whenever a class-certification order is amended, the parties have 14 days to file a new Rule 23(f) petition addressing any changes to the original order. However, any certification issue that could have been raised within 14 days of the original order cannot be challenged following the issuance of an amended order. In the words of Judge Richard Posner, "There is no reason why such an alteration should open the door to an interlocutory appeal unrelated to the alteration."[7]

One of the biggest challenges in drafting an effective petition is that there is generally a lot to say in a small amount of space. Federal Rule of Appellate Procedure 5(c) prescribes a 20-page limit for Rule 23(f) petitions. Given the requirement that filings in federal appeals courts must be double-spaced and in 14-point font, that is not much room to discuss what are often complex certification questions. There are, however, two strategies for increasing the amount of advocacy one can put before the Second Circuit.

Petitioners seeking interlocutory review should emphasize the real-world effects of the certification decision on the case itself.

The first strategy is to solicit an amicus to support the petition. An amicus may be able to address issues that the petitioner cannot on account of space limitations. Moreover, an amicus submission signals to the circuit that the petition raises important issues. That can be critical because the goal of a Rule 23(f) petition is not to succeed on the merits but rather to convince a panel of circuit judges that the certification order warrants immediate attention.

The second strategy is to submit a reply brief. The Federal Rules do not specifically permit the submission of a reply in conjunction with a Rule 23(f) petition. Nevertheless, Federal Rule of Appellate Procedure 27 contemplates the submission of a reply brief within seven days of an opposition to a motion, and a Rule 23(f) petition (at least in the Second Circuit) is treated as akin to a motion. Because there is no automatic right to reply, a petitioner must ask for permission, but such motions are routinely granted in the Second Circuit when they are submitted in a timely fashion.

Content Considerations

The goal of a Rule 23(f) petition is not to convince the Second Circuit beyond a shadow of a doubt that a certification order was erroneous. Rather, the aim is to persuade the court that the certification order raises an important legal issue that the district court may have gotten wrong and that must be reviewed now if at all. Accordingly, the approach for drafting a Rule 23(f) petition differs from the strategy at the certification stage.

As a general matter, the circuits have "unfettered discretion whether to permit" a Rule 23(f) appeal, according to the Advisory Committee Notes to Rule 23(f). To guide that discretion, the Second Circuit in *Sumitomo Copper Litigation v. Credit Lyonnais Rouse* articulated a two-prong test: the petition must show either that (1) the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable; or that (2) the certification order implicates a legal question about which there is a compelling need for immediate resolution.[8]

A common component of both prongs is the need to show that appellate review of the certification order is effectively now or never. Under the first prong, the petitioner must show that the grant or denial of certification will be the "death knell" of the case. Similarly, under the second prong, the Second Circuit has suggested that it will grant review only when certification involves a compelling legal question that

is "likely to escape effective review after entry of final judgment."[9] For instance, where a significant legal question arose in the context of a securities class action, the Second Circuit granted a Rule 23(f) petition because securities class actions are rarely litigated to final judgment.[10] Conversely, if the Second Circuit thinks that it can postpone resolving the class certification issue until after final judgment, it is less likely to grant the petition.

Accordingly, petitioners seeking interlocutory review should emphasize the real-world effects of the certification decision on the case itself. If the potential damages are large enough, a party opposing certification should discuss the total exposure that it faces as a result of the certification order and argue that settlement will be inevitable if the order stands given the amount at stake. If the defendant is a small company, a comparison between the potential damages and the defendant's net value can also drive home the inevitability of settlement. For plaintiffs seeking interlocutory review of a denial of class certification, demonstrating that no potential class member holds a claim of any magnitude worth pursuing individually may be sufficient to show that the litigation will be dropped unless the circuit intervenes. Either way, whether representing a plaintiff or a defendant, counsel should try to show that litigation to a final judgment is unlikely.

The other common component of the two *Sumitomo* prongs is the importance of demonstrating error—or, at least, substantial doubt. Often, a petitioner tries to show that the district court erred in the application of the Rule 23 requirements—commonality, typicality, adequacy, and (with Rule 23(b)(3) classes) predominance." But because discovery is usually in its early stages by the time of certification, the facts pertaining to those factors are often sparse. A more effective approach is to argue that the district court committed a predicate substantive legal error that was necessary to its certification ruling. That way, the Second Circuit can train its attention on a purely legal issue that does not require detailed knowledge of the facts of the case.

A recent example illustrates the point. In *Johnson v. Nextel Communications*, the district court certified a class of clients bringing malpractice claims against a law firm that previously had represented them.[11] As part of its certification order, the district court performed a choice-of-law analysis and determined that each putative class member's claim would be governed by New York law. Based in part on that ruling, the district court determined that all of the claims could be efficiently litigated on a classwide basis.

The defendant's Rule 23(f) petition challenged the correctness of the district court's choice-of-law analysis. The Second Circuit granted the petition and ultimately vacated the certification order. In the process, the Second Circuit held that the district court had erred in its choice-of-law analysis: Rather than all being governed by New York law, the claims actually turned on the laws of 27 different states, depending on the domicile of the putative class member. Moreover, the resolution of the malpractice claims under some of the 27 states' laws would require highly individualized inquiries that would make class-action treatment impossible. In other words, once the Second Circuit overturned the district court's choice-of-law analysis, it could easily conclude that the putative class members' claims could not be tried together efficiently.

Johnson illustrates one other point, as well. Even as a petition should focus on legal questions, it should not lose sight of—indeed, it should emphasize—the way those legal questions will affect the actual litigation of the putative class action. A petition seeking to overturn a class certification should press the circuit to consider whether it will truly be possible to litigate all the substantive questions of liability (and perhaps damages) in a single proceeding, especially where the plaintiffs have not set out a trial plan, or the district court has not explained how it intends to conduct the litigation. Conversely, the 23(f) opponent should show that there exist case-management techniques to handle complex legal issues, or that what appears to be complexity and variation in the class claims is really uniformity beneath the surface. Either way, the ultimate conclusion should turn on the specifics of how the case actually will be tried.

Conclusion

Although Rule 23(f) petitions face long odds, those odds are not insurmountable if the petition can establish (1) that the district court committed a purely legal error that was necessary to its certification ruling, and (2) that the error is unlikely to present itself for review later because the case probably will not be litigated to a final judgment. If a petitioner is able to do that, and persuade the circuit to grant review, then the odds suddenly and dramatically turn in the petitioner's favor. For once a petition is granted, it becomes highly likely (although by no means certain) that the certification decision will be reversed.

1. *In re Visa Check/Mastercard Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2011).

2. Barry Sullivan & Amy Kobelski Trueblood, "Rule 23(f): A Note on Law and Discretion in the Courts of Appeals," 246 F.R.D. 277, 290 (2008); Julian W. Poon et al., "Interlocutory Appellate Review of Class-Certification Ruling under Rule 23(f): Do Articulated Standards Matter?," Certworthy, at 1 (Winter 2009).

3. David L. Blaser et al., "Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource," Bloomberg BNA Class Action Litigation Report (2014).

4. E.g., *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011).

5. See id. at 32 n.6.

6. E.g., *McNair v. Synapse Grp.*, 672 F.3d 213, 222 n.8 (3d Cir. 2012).

7. *Driver v. AppleIllinois*, 739 F.3d 1073, 1076 (7th Cir. 2014).

8. 262 F.3d 134, 139 (2d Cir. 2001).

9. *Hevesi v. CitiGroup*, 366 F.3d 70, 80 (2d Cir. 2004).

10. Id.

11. 780 F.3d 128 (2d Cir. 2015). The authors' firm was involved in this case.