Appealing Class Certification Orders

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Class action litigation involves complex procedural issues and significant appellate practice. For example, Rule 23(f) of the Federal Rules of Civil Procedure, adopted in 1998, allows an appeal from an order granting or denying class certification. Class certification, the process by which a court determines whether a class action is, in fact, the proper format for the litigation, is a key issue for both plaintiffs and defendants. Carlton Fields shareholder Frank Burt co-leads the firm's national appellate practice group, and has defended thousands of class action lawsuits. He recently talked about the challenges these cases present, the application of Rule 23(f), and why few class actions are tried. An edited version of that conversation follows. **Q:** *Procedurally, how does a class action lawsuit typically unfold?* **Mr. Burt:** The class action is filed, we defend it on the merits initially, usually with motions to dismiss or for judgment on the pleadings. Assuming it's not dismissed, plaintiffs file a motion for class certification, which we oppose with briefing, experts and often a substantial evidentiary hearing. Once there is an order on class certification, there may be a Rule 23 (f) appeal. Although we have tried class actions to defense verdicts, because of the huge exposures in these cases, they often settle. [Carlton Fields' latest annual Class Action Survey indicates that, on average, companies settle nearly 69 percent of class actions.] Each class settlement must be approved by a federal district court and all class members have to receive notice in most cases. In the most common form of class action, they must also have the opportunity to opt out. Then, during hearings, federal district judges consider the facts of the case, whether the settlement is fair, and hear from the objectors before making a decision.

There are usually appeals by objectors—from professional objectors, competing class action lawyers with cases in other localities, or both. **Q.** *What are professional objectors?* **Mr. Burt**: Attorneys who file objections to class action settlements on behalf of non-named class members, and threaten to file appeals from district court approvals merely to extract payoffs. This is the business model for a small group of lawyers who are regularly excoriated by courts, but then are often paid off by the parties to facilitate implementation of many of the larger class settlements. **Q.** *Why is class certification such a critical issue?* **Mr. Burt:** For defendants, certification of a plaintiff class can drastically increase the potential exposure in the case, such that defendants may be inordinately pressured to settle, and never reach the merits of the claim. For plaintiffs, in cases where each individual claim is so small it would be cost-prohibitive to try the cases separately, failure to certify a class may make continuing the case infeasible. **Q:** *How receptive are courts to reviewing class certification rulings?* **Mr. Burt**: Only about 20 percent of Rule 23(f) petitions seeking review of a class certification decision are accepted by the federal circuit courts. That is why it is critical for counsel to pick arguments that will likely resonate with an appellate court, and encourage the district court to avoid an improper or questionable class certification. **Q:** *Why is review so rarely granted?* **Mr. Burt**: The committee note to Rule 23(f) suggests interlocutory review should be sparingly granted, explaining that it will be most appropriate in cases where the certification decision turns on a novel legal question or is likely dispositive of the litigation. That generally makes sense because there is already an opportunity for appellate review at the end of every case. But the 23(f) appeal is designed for circumstances where that later review is unlikely. **Q:** *How soon after an order on class certification must a party file a Rule 23(f) petition?* **Mr. Burt**: The rule provides that you can only do this within 14 days after entry of the order on class certification. But class certification orders are often modified as the case develops. Whenever that happens the 14-day clock is re-set, and you can then seek a new appeal. But you can't just file a Rule 23(f) petition every time the certification order changes—no appellate court will take you seriously. You have to pick your issues and times considering factors such as what aspect of the order was changed, whether you have previously petitioned, and in which circuit your case is pending. For example, the Fifth Circuit may be more receptive to 23(f) appeals than the Ninth. **Q.** *What standards do appellate courts use to determine whether to review a class certification ruling?* **Mr. Burt:** Different courts articulate the standards differently, but the tests are generally consistent. Courts will consider the 'death knell' issue—whether the district court's certification decision will effectively end the litigation. For plaintiffs, the failure to certify a class can be the 'death knell' for the case if each plaintiff's individual claim is so small that only a class action can justify the litigation costs. For defendants, class certification can be a 'death knell' where it so vastly increases the potential exposure in the case that it would force the defendant to settle rather than reach the merits of the claims. In both of these situations, appellate courts are more likely to grant review. Another test is whether the appeal will resolve an important and novel legal issue—if so, review is more likely to be granted. Courts also consider the status of the litigation, looking at issues like the status of discovery, whether any relevant motions are pending, and how long the case has been pending to determine whether interlocutory review is appropriate. An Eleventh Circuit test weighs whether the appeal presents an unsettled legal issue, the

certification order contains a substantial weakness, and if future events would make interlocutory appellate review more or less appropriate. Finally, courts look at whether the district court's certification decision was "manifestly erroneous" —that is, whether it seems like the judge just got it wrong. **Q:** *Why are so few class actions tried?* **Mr. Burt**: For defendants, potential exposure drives settlement. Substantially similar cases are often brought against a defendant group in, for example, California, New York, Texas, Florida, and elsewhere by competing class action lawyers filing in their own localities. You can try to fight all the cases, but you'll be fighting all over the country at great cost. The only way to eliminate the exposure everywhere is to either try one of the cases, with all of the uncertainty of a jury trial, or enter into a class settlement at a negotiated cost, which is why most of these cases settle. The objector appeals then follow.

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