

Ninth Circuit Establishes Guidelines for Interlocutory Appeals of Class Certification Orders

By Steve D. Larson and David F. Rees

Federal Rule of Civil Procedure 23(f), which became effective in 1998, allows federal courts of appeal to permit a discretionary interlocutory review of an order of a district court granting or denying class action certification. Rule 23(f) provides no standards for determining when the appellate court should exercise its discretion to grant review. The drafters envisioned that "the courts of appeal will develop standards for granting review that reflect the changing areas of uncertainty in class litigation." See Advisory Committee Notes to Rule 23(f). Appellate courts in other circuits had examined the appropriate scope of Rule 23(f), but until recently, the Ninth U.S. Circuit Court of Appeals had not.

In *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005), a unanimous panel of the Court set forth the criteria the Ninth Circuit will consider in evaluating whether to grant a petition seeking interlocutory review under Rule 23(f). Given the recent enactment of the Class Action Fairness Act, class action lawyers will increasingly find themselves prosecuting and defending class actions in federal courts, so this new law may be particularly important. See 28 U.S.C. § 1332(d).

In *Chamberlan*, the plaintiffs sought to certify a class action against Ford Motor Company under the California Consumer Legal Remedies Act, California Civil Code § 1750, *et seq.* Plaintiffs alleged that



Ford knowingly manufactured, sold and distributed automobiles containing defective plastic intake manifolds, which failed shortly after the manufacturer's warranty expired. Plaintiff alleged that Ford was aware of the defect and concealed it, and that its limited recall campaign improperly excluded the majority of affected cars. The plaintiffs in *Chamberlan* sought damages and injunctive relief in the form of a complete notification and recall campaign, among other things. See 402 F.3d at 955-56 (discussing background facts of case). The U.S. District Court for the Northern District of California certified a class consisting of "all consumers residing in California who currently own, or paid to repair or replace, the plastic intake manifold on any of the following cars: 1996-2001 Model Year Mercury Marquis, 1998-2001 Model Year Ford Mustangs, 2002 Model

Year Ford Explorers, 1996-2001 Model Year Ford Crown Victorias, or 1996-2001 Lincoln Towncars." *Id.* at 956.

Ford filed a motion for permission to file a discretionary, interlocutory appeal under 23(f) within ten days, as required by the rule. Ford argued that the class certification order was improper because individual issues of fact (such as which type of vehicle claimant owned, when that vehicle was produced, and what each individual buyer's expectations were regarding the durability of the intake manifold) predominated over the common issues regarding the alleged product defect. Ford also argued that the Ninth Circuit should review the class certification order immediately because otherwise the order would sound the "death knell" of the litigation by placing irresistible pressure on Ford to settle, rather than risking huge liability.

Please continue on next page

Interlocutory Appeals

continued from page 25

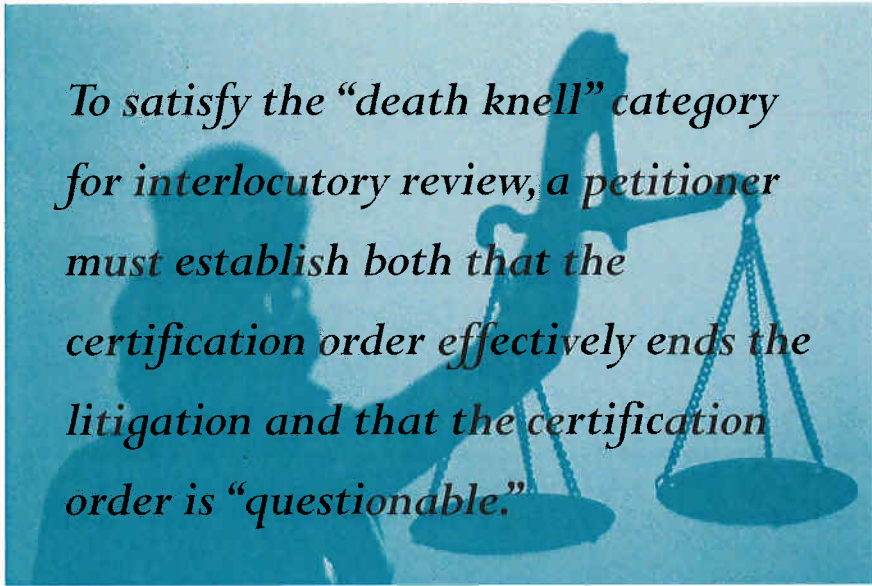
In addressing Ford's petition, the *Chamberlan* court began by setting forth the purposes of Rule 23(f) review. The court noted that "first, the rule provides a mechanism through which appellate courts, in the interest of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritless claim or defense before trial."

Chamberlan, 402 F.3d at 958-59, quoting *Waste Mgm't Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000). And second, "the rule furnishes an avenue, if the need is sufficiently acute, whereby the court of appeals can take earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of law." *Id.*

Building on a solid foundation of case law from sister circuits, the Ninth Circuit set forth its guidelines for when Rule 23(f) review should be accepted. As with all of the circuits that have addressed such review, this Court held that interlocutory review of class certification orders "should be granted sparingly." *Chamberlan*, 402 F.3d at 959. Such appeals are disfavored as they "add to the heavy workload of the appellate courts, require consideration of issues that may become moot, and undermine the district court's ability to manage the class action." *Id.*

The *Chamberlan* court articulated the following three categories of cases where Rule 23(f) review of a certification order may be appropriate:

(1) there is a death-knell situa-



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tion 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; (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 (3) the district court's class certification decision is manifestly erroneous.

402 F.3d at 959. Although the Court stated that the categories are to be used as guidelines, it made clear that a case warranting review ordinarily "must come within one or more of the specified categories." *Id.* at 960.

The Death Knell Category

To satisfy the "death knell" category for interlocutory review, a petitioner must establish both that the certification order effectively ends the litigation and that the certification order is "question-

able." *Chamberlan*, 402 F.3d at 959. The first of these two requirements necessitates a showing that either: (1) the certification order certifying a class will place irresistible pressure on a defendant to settle, regardless of the merits of the claims, because the potential liability threatens to overwhelm the defendants' resources; or (2) a certification order denying a motion for

class certification will force the plaintiffs to abandon their claims as pursuing the individual claims to judgment makes no economic sense. See *Id.* at 957.

The *Chamberlan* Court established that merely asserting "death knell" circumstances without factual support is not enough. The Court stated: "Significantly, Ford's claims [of death knell circumstances] are conclusory and are not backed up by declarations, documents, or other evidence demonstrating potential liability or financial condition." *Id.* at 960. Specifically, the *Chamberlan* court noted that Ford made no showing that its potential liability in the class action would force a company of its size to settle or that it lacked the resources to defend the case through trial and appeal without risking ruinous liability. *Id.* The court concluded that "the potential recovery here may be 'unpleasant to a behemoth' company, but it is hardly terminal. . . . [T]he impact of the class certification alone does not support an appeal." *Id.* (quoting *Mowbray*, 208 F.3d at 294).

Because Ford did not make the required showing of death knell circumstances, the *Chamberlan* court did not address whether the district court's certi-

Please continue on next page

Interlocutory Appeals

continued from page 26

fication order was "questionable." See 402 F.3d at 960-61. However, other circuits have held that to establish that a district court's class certification order is "questionable" requires a showing of a likelihood of success in overturning the order. *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999); *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st

Cir. 2000). Moreover, other circuits have held that, in evaluating the district court's certification order, the reviewing court should "tak[e] into account the discretion the district judge possesses in implementing Rule 23 and the correspondingly deferential standard of appellate review." *Blair*, 181 F.3d at 835; *In re Delta Airlines*, 310 F.3d 953, 960 (6th Cir. 2002).

Unsettled Fundamental Issue of Law Category

To satisfy the unsettled question of law criterion, a Rule 23(f) petitioner must establish that the requested appeal would enable the circuit court to settle a novel and fundamental question of law that: (1) relates to class actions; (2) is important both to this lawsuit and generally; and (3) is likely to evade end-of-the-case review. *Chamberlan*, 402 F.3d at 959.

Addressing Ford's petition regarding the unsettled questions of law category, the court rejected Ford's argument that its petition raised unsettled questions of law because there was a split between the circuits as to whether class certification required a " cursory analysis" or "rigorous review." *Chamberlan*, 402 F.3d at 961 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011

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(1998) (upholding certification of a national class against an auto manufacturer), and *Valentino v. Carter-Wallace Inc.*, 97 F.3d 1227 (1996) (remanding so that the district court could provide further details justifying its decision). The *Chamberlan* court declined to find any such conflict or unsettled question of law, and it reconciled these cases by explaining that they rested on different facts: *Hanlon* entailed plain issues and analytical framework, while *Valentino* required "deeper probing." 402 F.3d at 961.

The Manifest Error Category

Departing slightly from the Seventh and First Circuits, the *Chamberlan* court held that a showing that a district court's class certification order is "manifestly erroneous" alone suffices for immediate review under Rule 23(f), even if there are no other factors present. 402 F.3d at 959. The court stated: "We see no reason for a party to endure the costs of litigation when a certification decision is erroneous and inevitably will be overturned." *Id.*

To establish "manifest error," the *Chamberlan* court held:

The error in the district court's decision must be significant; bare assertions of error will not suffice. Any error must be truly "manifest," meaning easily ascertainable from the petition itself. If it is not, then consideration of the petition will devolve into a time-consuming consideration of the merits, and that delay could detract from planning for

the trial in the district court.

402 F.3d at 959. The court went on to state that it would be "difficult to show that a class certification order is manifestly erroneous unless the district court applies an incorrect Rule 23 standard or ignores a directly controlling case." *Id.* at 962.

The *Chamberlan* court rejected Ford's argument that the district court's decision was manifestly erroneous because it egregiously dispensed in a single sentence with the "predominance" requirement that common issues of law and fact must predominate over individual ones. The court found that "the [common] issues were readily apparent," and that the district court affirmatively found that a common nucleus of facts and potential legal remedies dominate this litigation, such as whether Ford had a duty to disclose its knowledge and failed to do so.

Application of Chamberlan and Rule 23(f)

The *Chamberlan* decision is important for lawyers who work on class actions because the Ninth Circuit has set a fairly high standard for obtaining inter-

Please continue on next page

Interlocutory Appeals

continued from page 27

locutory permission to appeal. The court made it clear that it will continue to defer to the district court's discretion and broad authority in analyzing and deciding class certification issues.¹

This Ninth Circuit ruling recently came into play into a case pending in the Federal District Court of Oregon. In *Ashby, et al. v. Farmers Insurance Company of Oregon*, USDC Case No. CV 01-1446 BR, Judge Brown certified a class of automobile and property insurance policyholders of Farmers Insurance Company of Oregon ("FICO") who suffered the "adverse action" of having their insurance premiums increased based on their consumer credit report, but allegedly did not receive a proper notice of this "adverse action" as required by the Fair Credit Reporting Act. See 15 U.S.C. § 1681m(a). FICO petitioned for permissive appeal under F.R.C.P. 23(f).² FICO argued that (1) the class certification decision sounded the "death-knell" for the case because FICO will be forced to settle regardless of the merits; (2) several of the district court's rulings were erroneous; and (3) the case presented several novel questions of law.

While the petition was pending, the *Chamberlan* decision was handed down. The panel handling the petition in the *Ashby* case asked for supplemental briefing in light of the new Ninth Circuit standards set forth in *Chamberlan*. In response, plaintiffs filed a supplemental opposition pointing out that FICO provided nothing more than a conclusory "estimate" of its exposure and failed to submit any competent evidence establishing either its exposure or its inability to defend itself on the merits through trial and appeal without risking ruinous liability. Plaintiffs also argued that the class action issues involved were routine and involved the district court's proper exercise of discretion based on the factual record before it, and thus FICO failed to

identify any unsettled and fundamental issue of law important to both this case and the class action jurisprudence generally, that is likely to invade into the case review. Finally, plaintiffs argued that there was no "manifest error" as Judge Brown's opinion carefully applied the law to the facts, and addressed the proper controlling precedents and rules in certifying the class.

The Ninth Circuit, in a one-sentence order, stated as follows:

The court, in its discretion, denies the petition for permission to appeal the district court's October 18, 2004 order granting class action certification. See Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005).

Although the *Chamberlan* court set forth new law in establishing the Ninth Circuit's standard for applying Rule 23(f), the decision largely echoes a long-standing policy of deference to district courts in class action matters. The *Chamberlan* decision emphasizes the importance of class certification issues at the trial level, as these issues often involve evaluations of complicated factual records and the exercise of discretion by trial court judges. The *Chamberlan* court stated:

When considering whether to allow interlocutory appeals, we will avoid "both micromanagement of complex class actions as they evolve in the district court and inhibition of the district court's willingness to revise the class certification for fear of triggering another round of appellate review." *In re Lorazepam*, 289 F.3d at 105. **We underscore that the decision to permit interlocutory appeal is, at**

bottom, a discretionary one.

402 F.3d at 960 (emphasis added). Thus, although Rule 23(f) provides a limited avenue for interlocutory appeals of class certification orders, the critical battle for class certification, which often makes or breaks a high stakes lawsuit, will continue to be won or lost primarily in the trial courts.

(Footnotes)

1 The holding in *Chamberlan* did not directly address the situation where plaintiff was denied the petition for class certification. The Advisory Committee Notes to Rule 23(f) suggest that a 23(f) petition may be warranted where "the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the cost of litigation." It would appear that class actions more often than not present class representatives who cannot proceed to trial on an individual claim, and therefore may have a basis for seeking immediate appellate review. However, plaintiffs pursuing such interlocutory review should submit evidence, such as affidavits, documents or declarations establishing that, absent class certification, the case cannot proceed to judgment on the merits because the costs of litigation would be too high.

2 FICO did not seek court permission to file a Rule 23(f) petition, but it had moved the district court for immediate stay pending adjudication of the petition. Whether or not to grant the stay is discretionary with both the trial court and appellate court. Fed. R. Civ. P. 23(f). Judge Brown did not stay the case.