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Third Circuit Reaffirms Its Liberal Standard for Interlocutory Appeals From Class Certification Decisions

For both sides, a liberal standard for interlocutory appeal increases the opportunity for appellate review of a class certification decision at the most appropriate and efficient time.

By David E. Sellinger and Clarissa A. Gomez | June 23, 2022 | New Jersey Law Journal

The Third Circuit recently reaffirmed its liberal standard for permitting a Rule 23(f) appeal from a district court's order granting or denying class certification in *Laudato v. EQT Corp.*, 23 F.4th 256 (3d Cir. 2022), providing an important reminder of the availability of interlocutory appellate review of a class certification order where either side believes the decision was incorrect. Contrary to "more limited approaches" other circuits have adopted, the Third Circuit stated it exercises "very broad discretion" in permitting Rule 23(f) appeals. *Laudato* provides a case in point of why this liberal approach is important.

In *Laudato*, a putative class action filed in the Western District of Pennsylvania, plaintiff sought class certification on behalf of himself and a group of other landowners whose land was near EQT's storage fields, alleging that defendant had been storing natural gas and utilizing the landowners' underground pore space without providing them due compensation. On Laudato's motion for class certification, the district court rejected plaintiff's proposed class definition, finding it raised significant problems, but nevertheless agreed with plaintiff that "it would seem in everyone's best interests to resolve this case on a class basis," and held that "class certification will be granted, with instructions." *Asbury v. EQT Corp.*, 2:18-cv-1005-CB, 2021 U.S. Dist. LEXIS 186451, at *4 (W.D. Pa. Sept. 29, 2021) (emphasis in original). The district court did so over the opposition of EQT, which had argued that a class could not be certified. The district court directed

the parties to meet and confer "regarding the establishment of an appropriate class definition." *Id.* at *9. Notwithstanding that the order failed to, among other things, define the class, the district court made clear that class certification "will be granted." *Id.* at *4. The district court's order stated only in a footnote that it found that "the Rule 23 prerequisites have been met" (*id.* at *n.6), citing to plaintiff's briefing and stating the Rule's required elements for class certification without any analysis. The defendant then filed a petition seeking interlocutory review under Rule 23(f).

On appeal, preliminarily, the Third Circuit rejected plaintiff's argument that the court of appeals lacked jurisdiction to hear the appeal because the order was not a grant or denial of certification, but was merely "preliminary" in nature. The panel found that the district court's order "contained its final word on certification itself" and "clearly stated a grant of class certification," and that the order indicated the judge was going to summarily adopt a "reasonable proposal" on the class definition arising from the meet and confer. *Laudato*, 23 F.4th at 259.

The Third Circuit then discussed the standard for permitting Rule 23(f) appeals, reiterating that this circuit, contrary to more limited approaches some other circuits utilize, exercises its "very broad discretion" using a more liberal standard.

The Third Circuit first articulated its liberal standard for granting or denying a Rule 23(f) interlocutory appeal in *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154 (3d Cir. 2001), and has, since then, issued several decisions reaffirming its liberal view.

Under the Third Circuit's liberal standard, as stated in *Newton* and reaffirmed in *Rodriguez v. Nat'l City Bank*, 726 F. 3d 372 (3d Cir. 2013), appellate review is appropriate in several circumstances, including: "(1) 'when denial of certification effectively terminates the litigation because the value of each plaintiff's claim is outweighed by the costs of stand-alone litigation'; (2) when class certification risks placing 'inordinate … pressure on defendants to settle'; (3) 'when an appeal implicates novel or unsettled questions of law'; (4) when the district court's class certification determination was erroneous; and (5) when the appeal 'might facilitate development of the law on class certification.'" *Rodriguez*, 726 F.3d at 376-77 (quoting *Newton*, 259 F.3d at 164-65).

Rule 23 permits appeals "from an order granting or denying class-action certification." The *Laudato* panel relied heavily on the Committee Notes on Rule 23's 1998 amendment as giving courts of appeal "unfettered discretion" to take an interlocutory appeal. The opinion noted that the liberal standard adopted by the Third Circuit stands in contrast to the approach taken by certain other circuit courts which disfavor Rule 23(f) appeals, and that the Second and Ninth Circuits apply standards that "will rarely be met." *Laudato*, 23 F.4th at n.5 (quoting *Sumitomo Copper Litig. v. Credit Lyonnais Rouse*, 262 F.3d 134, 140 (2d Cir. 2001)).

For example, the Second Circuit has held that a petitioner seeking leave to appeal pursuant to Rule 23(f) must demonstrate either "(1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Sumitomo*, 262 F.3d at 139. Similarly, the Ninth Circuit, when analyzing a Rule 23(f) petition, begins with the premise that Rule 23(f) review should be "a rare occurrence," and that review is justified only where there is "the presence of a death knell situation for either party absent review and the presence of an unsettled and fundamental issue of law related to class actions—along with an additional criterion, manifest error in the district court's certification decision." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005). The majority of the circuits that have weighed in on this issue take the more restrictive approach to Rule 23(f) appeals than the Third Circuit's liberal standard.

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In *Laudato*, a precedential opinion, the panel was most troubled by the coercive pressure on the defendant to settle created by the district court's order. The Third Circuit found that interlocutory review was appropriate there because "a class-action-certification order that leaves unresolved a crucial element—the class definition—is no less likely to exert substantial pressure on a defendant to settle than a standard class-action-certification order." *Laudato*, 23 F.4th at 261. The Court continued, "in some circumstances, that uncertainty may even create *more* pressure to settle." *Id.* (emphasis in original). The decision pointed to language in the district court's order that "hinted at the consequences of not playing along." The panel concluded, "[b]ecause of the apparent pressure the purported certification places on EQT to settle and this Court's opportunity to facilitate development of the law on class certification, review of the district court's order is appropriate under *Rodriguez*." *Id.* at 261.

The decision advised the parties that the panel is considering summary action and invited briefing on whether summary action is appropriate. The parties then submitted briefing on that issue, appearing to agree that the district court erred in at least having failed to define the class, and the previously issued appeal briefing notice was vacated. Given the strong language of the decision, and the infirmities of the district court order, it seems likely that the panel will summarily decide to vacate and remand the class certification order with instructions to the district court to conduct the "rigorous analysis" of whether the requirements for class certification pursuant to Rule 23 are met as required by the Third Circuit's precedents, based on a stated class definition.

The standard for permitting a Rule 23(f) appeal is important to class action practitioners on both sides, as the decision on class certification is the major event in a putative class action. For defendants, a decision to certify a class places extraordinary—potentially ruinous—pressure on a defendant to settle, even if the case is one in which the defendant believes it has a good chance of prevailing on the merits. Corporate counsel will find relief in the *Laudato* panel's sensitivity to the danger of inordinate settlement pressure. For plaintiffs, a denial of class certification raises the prospect of having to decide whether to litigate the case through conclusion as an individual action that will bind only the parties, even if the plaintiff's counsel believes he or she has a good case on the merits, which will in many instances deter that case from going forward. Therefore, for both sides, a liberal standard for interlocutory appeal increases the opportunity for appellate review of a class certification decision at the most appropriate and efficient time.

Laudato reminds practitioners that a district court's class certification decision is not necessarily the end of the day for a case in the Third Circuit. Wise practitioners on the losing side of a class certification order, or even those fearing such an order, will be wise to evaluate whether the case fits any of the criteria in the Third Circuit's liberal standard for a Rule 23(f) appeal.

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