From: Bruce D. Greenberg <BGreenberg@litedepalma.com>
Sent: Wednesday, March 9, 2022 11:33 AM
To: Comments Mailbox
Subject: [External]Comment on the Report of the Civil Practice Committee

Dear Judge Grant: Please accept this comment regarding the proposed amendment to Rule 2:2-3 that would permit immediate appeals as of right from "orders granting or denying as a final matter class certification." See proposed Rule 2:2-3(b)(9). This comment is submitted on my own behalf alone. It does not necessarily represent the views of my law firm, any organization with which I am affiliated, or any client that I represent.

In full disclosure, I have handled class action cases in state and federal courts for over 25 years. I mostly represent plaintiffs in class action cases, but have sometimes represented defendants in such matters as well.

I believe that this proposed amendment should not be adopted. There are several reasons why that is so.

First, the apparent basis for the proposed amendment is the Committee's comment that "[o]rders granting or denying class certification have a profound impact on the progress of a case in trial court." That comment is sometimes true, but not always. As discussed below, it is also more true of orders denying class certification than orders granting certification. The proposal to make all class certification orders immediately appealable as of right thus sweeps too broadly.

Orders denying class certification sound the death knell for claims of putative absent class members and make continued individual litigation uneconomical for the named plaintiff(s). Our courts have long recognized that reality. See, e.g., Delgozzo v. Kenny, 266 N.J. Super. 169, 180, 193 (App. Div. 1993). Orders granting certification, on the other hand, do not have any similar case-dispositive consequence. Defendants litigate putative class actions intensively from the outset, seeking to defeat plaintiffs' claims on the merits and/or to defeat class certification. In most cases, that does not change after a class is certified.

It is sometimes said that class certification creates undue pressure on defendants to settle cases. But experience shows that many defendants continue to fight cases vigorously after a class is certified, moving for summary judgment, seeking to preclude plaintiffs' expert testimony as a means of defeating claims on the merits, or even (in some instances) taking cases to trial. Moreover, putative class action cases in New Jersey state courts are almost invariably smaller matters involving putative classes of New Jersey citizens only, since defendants routinely remove to federal court most putative class action cases involving putative class members from more than one jurisdiction, under the Class Action Fairness Act of 2005, 28 U.S.C. 1332, 1453, 1711-1715. In the generally smaller cases that remain in state court, class certification often does not exert enough settlement pressure to justify an immediate appeal of a grant of class certification in every such case.

If Rule 2:2-3 were to be amended to permit immediate appeals as of right in the context of class certification, such an amendment should be limited to orders denying class certification. The current standards, discussed below, are sufficiently elastic to permit interlocutory appeals of grants of class certification in the relatively rare instances where immediate review is appropriate.

Second, the amendment is unnecessary. The discretionary "interest of justice" standard for interlocutory appeals in general, Rule 2:5-6, has long allowed our appellate courts to grant or deny immediate review of class certification grants or denials as appropriate. Moreover, in Daniels v. Hollister Co., 440 N.J. Super. 359, 361 n.1 (App. Div. 2015), the

Appellate Division announced that it would "as a general matter, liberally indulge applications for leave to appeal: (1) 'when a denial of class status effectively ends the case (because, say, the named plaintiff's claim is not of a sufficient magnitude to warrant the costs of stand-alone litigation)'; (2) 'when the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle'; and (3) when permitting leave to appeal 'will lead to a clarification of a fundamental issue of law'" (quoting Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293 (1st Cir. 2000)). That standard strikes an appropriate balance by retaining the settled rule that appeals of class certification rulings are interlocutory but fleshing out circumstances where interlocutory review will be more likely to be granted. The proposed amendment unnecessarily undoes Daniels.

Third, the proposed amendment would create an inordinate burden on our appellate courts. Putative class action cases involve high stakes for both sides. Given those high stakes, a right of immediate appeal of every class certification grant or denial will inevitably result in an appeal in virtually all such cases. The record on a class certification motion is generally voluminous, as plaintiffs have the burden of proof on all elements of class certification and defendants have great interest in defeating certification so as to limit their liability to the named plaintiff(s) alone. Thus, it is not only the sheer number of additional appeals from orders regarding class certification, but the fact that each such appeal requires above average time and attention by our appellate courts, that makes the proposed amendment unworkable from a systemic perspective.

Finally, the language of the proposed amendment, which covers "orders granting or denying as a final matter class certification," leads to questions as to which orders grant or deny "as a final matter." It has long been the law that cases certified as class actions can be decertified later. See, e.g., Muise v. GPU, Inc., 371 N.J. Super. 13, 31 (App. Div. 2004). And plaintiffs who lose a class certification motion often can file a new motion to certify a different class. See, e.g., In re Tropicana Orange Juice Mktg. & Sales Practices Litig., 2018 U.S. Dist. LEXIS 207081, at *5-7 (D.N.J. Dec. 28, 2018) (accepting a renewed motion for class certification and citing other authorities that have done so) (decided under Fed. R. Civ. P. 23, a rule that largely parallels R. 4:32). As a result, it is not clear which orders grant or deny class certification "as a final matter" or, indeed, whether there are any such orders.

For the foregoing reasons, this proposed amendment should not be adopted. Thank you very much for your consideration in transmitting this comment to the Supreme Court.

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