

COMMENTARY

N.J. Doesn't Need Rule 23(f)

Support for amending the New Jersey Court Rules to parallel Fed. R. Civ. P. 23(f) and increase interlocutory appeals from rulings on class certification is misguided. No such change is needed.

By Bruce D. Greenberg

The *Law Journal* recently editorialized in favor of amending the New Jersey Court Rules to parallel Fed. R. Civ. P. 23(f) and increase interlocutory appeals from rulings on class certification [169 N.J.L.J. 1204]. Differences between the federal and state systems, and the substantial experience of my firm, show that no such change is needed.

Before Rule 23(f), two hurdles impeded review of a federal court class certification decision. The district judge had to issue a statement under 28 U.S.C. 1292(b), and a Circuit Court of Appeals had discretion to deny review. Rule 23(f) eliminated the first of those roadblocks.

Existing court rules give the Appellate Division essentially the same discretion as federal circuit courts now have. There is no additional requirement of trial court

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approval. On the contrary, R. 4:42-2 forbids trial court involvement. Under R. 2:2-4, the Appellate Division may use the guidelines of *Newton v. Merrill Lynch*, 259 F.3d 154 (3d Cir. 2001), which the *Law Journal* endorses, or any other appropriate test.

Indeed, at least one consideration cited by the *Law Journal* — that denial of class certification makes continued litigation uneconomical — is already part of our law as seen in *Delgozzo v. Kenny*, 266 N.J. Super. 169, 193 (App. Div. 1993).

The *Law Journal* compares the “unfettered discretion” afforded by Rule 23(f) with state court cases cautioning that interlocutory review is granted “sparingly.” That equates apples (the bare text of a rule) with oranges (explanatory case law). A proper comparison shows the substantial similarity of the current federal and state regimes.

Under Rule 23(f), an appeals court may “in its discretion” permit an interlocutory appeal. R. 2:2-4 affords comparably broad discretion “in the interest of justice.” And, like the Appellate Division cases quoted by the *Law Journal*, federal

cases, such as *In re Lorazepam Antitrust Litigation*, 289 F.3d 98, 102-06 (D.C. Cir. 2002), state that Rule 23(f) review is available only in particular circumstances.

The *Law Journal* appears to presume that there are many mistaken grants of class certification. There is no evidence of that. In fact, since class certification is favored (particularly in consumer cases, the bulk of putative class actions in state court), as stated in *Strawn v. Canuso*, 140 N.J. 43, 68 (1995), and discretionary, as made clear by *In re Cadillac V 8-6-4 Class Action*, 93 N.J. 411, 436-37 (1983), grants of certification are likely correct.

Thus, “the trial court’s initial order certifying a plaintiff class is particularly inappropriate for interlocutory review.” Fuoco & Williams, *Class Actions in New Jersey State Courts*, 24 Rutgers L.J. 737, 765 (1993).

Under R. 2:2-4, the Appellate Division has reviewed both grants and denials of class certification. *E.g.*, *Varacallo v. Massachusetts Mutual Life Ins. Co.*, 332 N.J. Super. 31 (App. Div. 2000); *Carroll v. Celco Partnership*, 313 N.J. Super. 488 (App. Div. 1998). It has denied review of both types of decisions, too. This is as it would be under a New Jersey Rule 23(f). The Appellate Division undoubtedly has also considered “assist[ing] in developing class action jurisprudence,” one of the *Law Journal*’s reasons for adopting Rule 23(f) in New Jersey.

The *Law Journal* also mistakenly asserts that granting class certification imposes such great settlement pressure on defendants that immediate review is required. Some federal, nationwide class cases that might have bankrupted an entire industry, such as *In re Rhone-Poulenc*

Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995), have made that claim. Most state court class actions are statewide, however, and involve only a single defendant.

In *Princeton Economics Group, Inc. v. AT&T*, A-2375-95T1 (App. Div. Aug. 8, 1997), a nationwide case handled by my firm, the Appellate Division disagreed that class actions quickly settle once class certification is granted. *Princeton Economics*

was intensely litigated for two-and-a-half years after class certification. *Varacallo*, too, remains pending, more than two years after the Appellate Division ordered a class certification. Such experiences have typified many of my firm's cases. One case ended only after a two-week class trial and jury verdict.

In a number of my firm's cases, defendants did not even seek leave to appeal

when a class was certified, but simply continued to litigate. This occurred recently even in a case that certified a *multi-state* class. Experience thus shows that, in state court class actions, "settlement pressure" is overstated, or even just a myth.

There is no cogent reason for Rule 23(f) in state court. Existing court rules afford the flexibility that the *Law Journal* advocates. ■