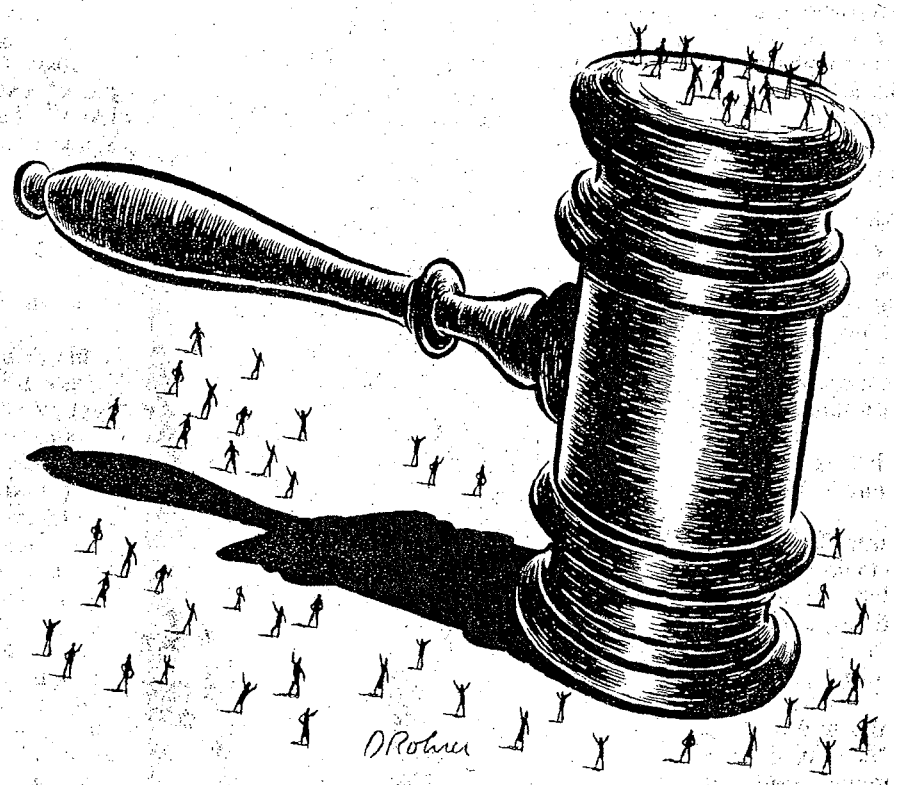
Class-Action Statute Fails To Address Appellate Questions

By Benjamin G. Shatz and Lara M. Krieger

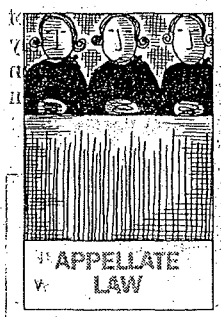


In February, Congress passed the Class Action Fairness Act of 2005, which significantly changes class action practice in state and federal courts nationwide. The act expands federal diversity jurisdiction over most class actions, such that jurisdiction now exists over class actions involving classes of at least 100 members if the members' aggregated claims exceed $5 million and at least one class member is diverse from at least one defendant. See 28 U.S.C. Sections 1332(d)(9) and 1453(d) (excluding certain securities and corporate governance class actions).

The Class Action Fairness Act's expansion of federal jurisdiction gives plaintiffs greater flexibility in deciding whether to file class actions in federal, rather than state, court. More significantly, the act's expansion of federal jurisdiction means that defendants will remove more state court class actions to federal court.

In contrast to ordinary removal procedures, the Class Action Fairness Act allows any single defendant to remove a class action to federal court without first obtaining the consent of the other defendants. This increase in removals to federal court will produce a similar increase in the number of motions to remand and thus will result in more district court orders granting or denying a remand to state court.

Ordinarily, appellate review of such rulings is very limited. See 28 U.S.C. Section 1447(d) (precluding appellate review of remand orders based on timely raised defect in removal procedure or lack of subject matter jurisdiction); see also, e.g., *Abada v. Charles Schwab & Co.*, 300 F.3d 1112 (2002).



The Class Action Fairness Act, however, creates a new type of discretionary and expedited appeal from orders either granting or denying a discretionary, interlocutory appeal of a class certification order under Federal Rule of Civil Procedure 23(f).

The criteria identified by *Chamberlain* may similarly inform the court's decision to accept a Class Action Fairness Act appeal given that both Federal Rule of Civil Procedure 23(f) and the act concern discretionary, interlocutory appeals in the class action context.

In *Chamberlain*, the 9th Circuit explained that interlocutory review should be granted "sparingly," but that a Federal Rule of Civil Procedure 23(f) interlocutory appeal may be appropriate when (1) "there is a death-knell situation" for either party and the certification order is "questionable"; (2) the district court order "presents an unsettled and fundamental issue of law" and the issue will otherwise evade review; or (3) the district court's order is manifestly erroneous.

Applying this to the context of remand order appeals under the Class Action Fairness Act, the ordinary method of attempting to invoke a court of appeals' discretionary jurisdiction is by a petition under Federal Rule of Appellate Procedure 5. Rule 5(a)(1) allows a party to file a petition requesting permission to appeal "when an appeal is within the court of appeals' discretion." Under Rule 5(b), the petition must include, among other things, "the reasons why the appeal should be allowed and is authorized by statute or rule." As explained in *Chamberlain*, this is the route that an aspiring appellant must take for the 9th Circuit to exercise discretionary interlocutory appeal of a class certification order under Federal Rule of Civil Procedure 23(f).

Accordingly, this probably is a more reasonable approach for practitioners to adopt, and it avoids the problem of obtaining a ruling on a request for interlocutory appeal within the seven-day time frame required by the Class Action Fairness Act.

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Schwab & Co., 300 F.3d 1112 (2002). The Class Action Fairness Act, however, creates a new type of discretionary and expedited appeal from orders either granting or denying a motion to remand.

The act's new appellate statute, codified at 28 U.S.C. Section 1453(c), makes two clear points. First, entertaining an appeal from a class action remand order is discretionary with the court of appeals. Second, if the court accepts the appeal, the parties and the court must work quickly. Specifically, the moving party must apply for appellate review within seven days of the remand order. If the court accepts the appeal, it must rule within 60 days. 28 U.S.C. Section 1453(c)(2). The parties, however, may stipulate to an extension of this 60-day period for "any period of time," and the court may sua sponte extend this statutory period by 10 days. 28 U.S.C. Section 1453(c)(3).

If the court does not rule within the 60-day statutory period, or any extended period, the appeal is deemed denied. 28 U.S.C. Section 1453(c)(4). It is not yet clear whether these strict — and unprecedented — time limitations will discourage the appellate courts from accepting interlocutory appeals from Class Action Fairness Act remand orders.

The act provides no guidance on how the courts should exercise their discretionary jurisdiction, and fails to identify any procedural mechanism for invoking the appellate court's discretionary jurisdiction. The statute's legislative history, however, provides a few — but not many — answers about what factors the court of appeals may find relevant in deciding whether to exercise appellate jurisdiction.

The Senate Judiciary Committee's report indicates that Congress expected the appellate courts to generate a "body of clear and consistent guidance for district courts that will be interpreting this legislation" and sought to "particularly encourage appellate courts to review cases that raise jurisdictional issues likely to arise in future cases."

Though there are not yet any published cases interpreting discretionary appeals from the act, *Chamberlain v. Ford Motor Co.*, 402 F.3d 952 (2005), is instructive. In *Chamberlain*, the 9th U.S. Circuit Court of Appeals set out the factors relevant to considering whether it will permit fundamental issue of law" and the issue will otherwise evade review; or (3) the district court's order is manifestly erroneous.

Applying this to the context of remand order appeals under the Class Action Fairness Act, the 9th Circuit may grant such appeals where the remand order raises a fundamental, unsettled issue that might otherwise evade review, or where the remand order is manifestly erroneous.

The Class Action Fairness Act also does not identify the proper procedure for requesting interlocutory appellate review.

Before the act, the typical manner of invoking the court of appeals' discretionary jurisdiction to review a remand order was by requesting certification for interlocutory appeal under 28 U.S.C. Section 1292(b). Indeed, the Rutter Guide on Ninth Circuit Practice suggests this method of seeking review for Class Action Fairness Act appeals. Ninth Circuit Federal Civil Appellate Practice, Section 2:346.10a (Rutter Group 2005) (noting that the Class Action Fairness Act does not describe the "application" process for obtaining appellate review).

Section 1292(b) allows a district court to certify an order for immediate appeal by finding that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." This blessing by the district court may entice the court of appeals to exercise its own discretionary jurisdiction, and appellate courts have long considered interlocutory appeals of remand orders certified under Section 1292(b). See, e.g., *Lee v. American National Insurance Co.*, 260 F.3d 997 (2001).

This route has an inherent risk that the district court may refuse to certify the remand order, which may influence the appellate court not to exercise discretion. Furthermore, pursuing an additional motion in the district court may delay the entire appellate process — indeed, this delay may be fatal, given that under the Class Action Fairness Act, the request for appellate review must be filed within seven days of the order on the remand motion.

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Given the act's recent passage, there is not much judicial guidance about its appellate aspects. To date, only one court of appeals has published a decision considering an appeal under the act. In that case, *Pritchett v. Office Depot Inc.*, 404 F.3d 1232 (2005), the defendant removed a class action to federal court, and the district court granted the plaintiffs' subsequent motion to remand. Within the required seven-day period, the defendant filed a "Petition for leave to appeal under 28 U.S.C. 1453(c)," as well as an emergency motion for a stay with the 10th U.S. Circuit Court of Appeals.

In an unpublished order, the 10th Circuit denied the petition for permission to appeal for lack of subject matter jurisdiction on the ground that the underlying class action was commenced before the Class Action Fairness Act's effective date. In a later published opinion, the 10th Circuit, under its inherent power to consider its own jurisdiction, analyzed the issue of the act's effective date and found that there was no federal jurisdiction over the underlying action given that the Class Action Fairness Act did not apply retroactively.

In short, the Class Action Fairness Act expands not only the district courts' jurisdiction over class actions, but also appellate jurisdiction to review a district court's order on a remand motion. It is too soon to predict how the various courts of appeals will exercise their expanded appellate jurisdiction. The act itself gives no guidance on how the courts should exercise their discretion in accepting appeals, and it fails to identify the procedure for invoking the appellate court's discretionary jurisdiction.

Accordingly, the courts will no doubt soon address these issues.

Benjamin G. Shatz, a certified specialist in appellate law, is counsel — and **Lara M. Krieger** is an associate — in the Los Angeles office of Manatt, Phelps & Phillips. Both are members of Manatt's appellate practice group.

Letters to the Editor

Amnesty International: Don't Forget Constitution

Regarding "Criminalizing Lawyers' Undermines Bid to Protect Human Rights" (June 9 Daily Journal):

Thanks to [author Kurt A.] Schlichter for a fine, insightful article. There is but one thing to add.

Protecting people from the criminaliza- and more carefully.

Cheryl Matthews
Novato

Pledge's Roots Also Lie in Marketing

story is the Pledge of Allegiance, which was commissioned to publicize the dedication of the Chicago World Fair in 1892.

In its original form, the pledge did not contain the words "under God." Although its author, Francis Bellamy, was a Baptist minister and a Christian socialist, the