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9th Circ. Unequal Class Cert. Appeal Treatment Is Problematic

By **Bradley Hamburger, Lauren Blas and Kelley Pettus** (June 19, 2020, 5:07 PM EDT)

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Over four decades ago, the U.S. Supreme Court in Califano v. Yamasaki held that the certification of a class under Rule 23 of the Federal Rules of Civil Procedure "is committed in the first instance to the discretion of the district court."[1]

Consistent with that directive, every federal court of appeals — except one — now applies the same abuse of discretion standard to all class certification rulings, treating orders that grant class certification exactly like those that deny class certification.

The one outlier is the U.S. Court of Appeals for the Ninth Circuit, which has repeatedly applied a differential standard of review for class action appeals that places a thumb on the scale in favor of class action plaintiffs. As explained earlier this year in Walker v. Life Insurance Co. of the Southwest, the Ninth Circuit "accords the district court noticeably more deference to a grant of certification than when it reviews a denial."[2]

The Ninth Circuit's application of greater deference to orders that grant class certification creates an incentive for district courts to err on the side of granting class certification, even though the Supreme Court has stated that Rule 23 should "in practice exclude most claims."[3]

Because there is no legitimate basis for the Ninth Circuit's approach to class certification appeals, class action defendants should make every effort to preserve challenges to this standard in all such appeals, and should consider seeking review of this important question from the en banc Ninth Circuit or the U.S. Supreme Court.

Origins of the Ninth Circuit's Differential Standard of Review in Class Certification Appeals

The Ninth Circuit's differential standard of review for class certification orders is rooted in a misreading of precedent imported from the U.S. Court of Appeals for the Second Circuit. While the Second Circuit eventually recognized its mistake, the Ninth Circuit continues to perpetuate it and treats orders denying class certification far differently than

those granting class certification.

The Second Circuit's experience on this issue was akin to a game of telephone gone awry. In a 1993 decision, Lundquist v. Security Pacific Automotive Financial Services Corp., the Second Circuit held — without providing any reasoned explanation — that it was "noticeably less deferential to the district court when that court has denied class status than when it has certified a class."[4]

As support for this proposition, the Lundquist opinion cited two Second Circuit decisions from 1983 and 1993, Abrams v. Interco Inc.[5] and Robidoux v. Celani,[6] neither of which drew any distinction between the standard of review for grants and denials of class certification. To the contrary, Abrams held that an abuse of discretion could be found more readily "on appeals from the denial or grant of class action status" than other areas of the law.[7]

Robidoux subsequently purported to summarize the standard outlined in Abrams, stating that "abuse of discretion can be found more readily on appeals from the denial of class status than in other areas," but it omitted the key "or grant of" language from Abrams.[8] In doing so, Robidoux laid the groundwork for the Second Circuit's adoption in Lundquist of a differential standard of review for class certification orders, which persisted for over two decades.

It was not until 2017 that the Second Circuit, in In re: Petrobras Securities, recognized its error and concluded that "no Second Circuit case provides any reasoning or justification for the idea that we review denials of class certification with more scrutiny than grants."[9]

The Ninth Circuit adopted the Second Circuit's differential abuse of discretion standard in a 2010 decision, Wolin v. Jaguar Land Rover North America LLC, without any analysis or justification beyond a citation to a Second Circuit decision that, in turn, was premised on the mistake made in Lundquist and Robidoux.[10] But despite having adopted its approach to reviewing class certification orders from the Second Circuit, the Ninth Circuit has yet to revisit the issue after Petrobras.

There Is no Reason to Apply Less Deference to Denials of Class Certification

The Ninth Circuit's current approach to class certification appeals cannot be reconciled with decisions of the Supreme Court. In Califano v. Yamasaki, as noted above, the court broadly committed the decision to certify a class to the discretion of district courts, and in no respect suggested that district courts would have greater or lesser discretion depending on the ultimate answer to the class certification question.[11]

In fact, as the Second Circuit recognized in Petrobras, "[t]he Supreme Court has never drawn a distinction between the standard used to review district court denials or grants of class certification."[12]

If anything, the Supreme Court's class action decisions — particularly those in the last decade — support the exact opposite rule as the one currently applied in the Ninth Circuit, because they have consistently emphasized the high standard for granting class certification. The court explained in American Express Co. v. Italian Colors Restaurant that Rule 23 "imposes stringent requirements for certification that in practice exclude most claims."[13]

Consistent with that approach to Rule 23, the court held in Wal-Mart Stores Inc. v. Dukes that district courts must engage in a rigorous analysis before granting class certification, and that plaintiffs seeking to

certify a class must be prepared to prove that the requirements of Rule 23 are satisfied.[14]

The due process rights of absent class members further undercut the case for applying a standard of review that favors the granting of class certification. In 1985, the Supreme Court recognized in Phillips Petroleum Co. v. Shutts that absent class members have a "constitutionally recognized property interest" in their claims and are entitled to due process.[15]

Close adherence to the procedural protections of Rule 23, which are grounded in due process, ensures that absent class members are not stripped of their constitutional rights via a class action.[16] But the Ninth Circuit's rule — which has the practical effect of encouraging district courts to grant class certification — risks undermining those critical protections.

Granting class certification should be the exception, not the rule. Applying a lesser amount of scrutiny to such exceptional rulings makes little sense, but that is exactly what the Ninth Circuit does when it comes to class certification appeals.

The Ninth Circuit should follow the Second Circuit's lead, and revisit the proper standard of review of class certification rulings. If it does not, the Supreme Court should step in and clarify once and for all that the same standard of review applies to all class certification orders, no matter what result they reach.

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[1] 442 U.S. 682, 703 (1979).

[2] 953 F.3d 624, 629 (9th Cir. 2020) (quoting Wolin v Jaguar Land Rover North America, LLC, 617 F.3d 1168, 1171 (9th Cir. 2010)) (cleaned up).

[3] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013).

[4] 993 F.2d 11, 14 (2d Cir. 1993).

[5] 719 F.2d 23 (2d Cir. 1983).

[6] 987 F.2d 931 (2d Cir. 1993).

[7] 719 F.2d at 28.

[8] 987 F.2d at 935.

[9] 862 F.3d 250, 260 n.11 (2d Cir. 2017).

[10] 617 F.3d at 1171 (citing In re Salomon Analyst Metromedia Litig., 544 F.3d 474, 480 (2d Cir. 2008)).

[11] 442 U.S. at 703.

[12] 862 F.3d at 260 n.11.

[13] 570 U.S. 228, 234 (2013).

[14] 564 U.S. 338, 350 (2011).

[15] 472 U.S. 797, 808, 811 (1985).

[16] Taylor v. Sturgell, 553 U.S. 880, 901 (2008).