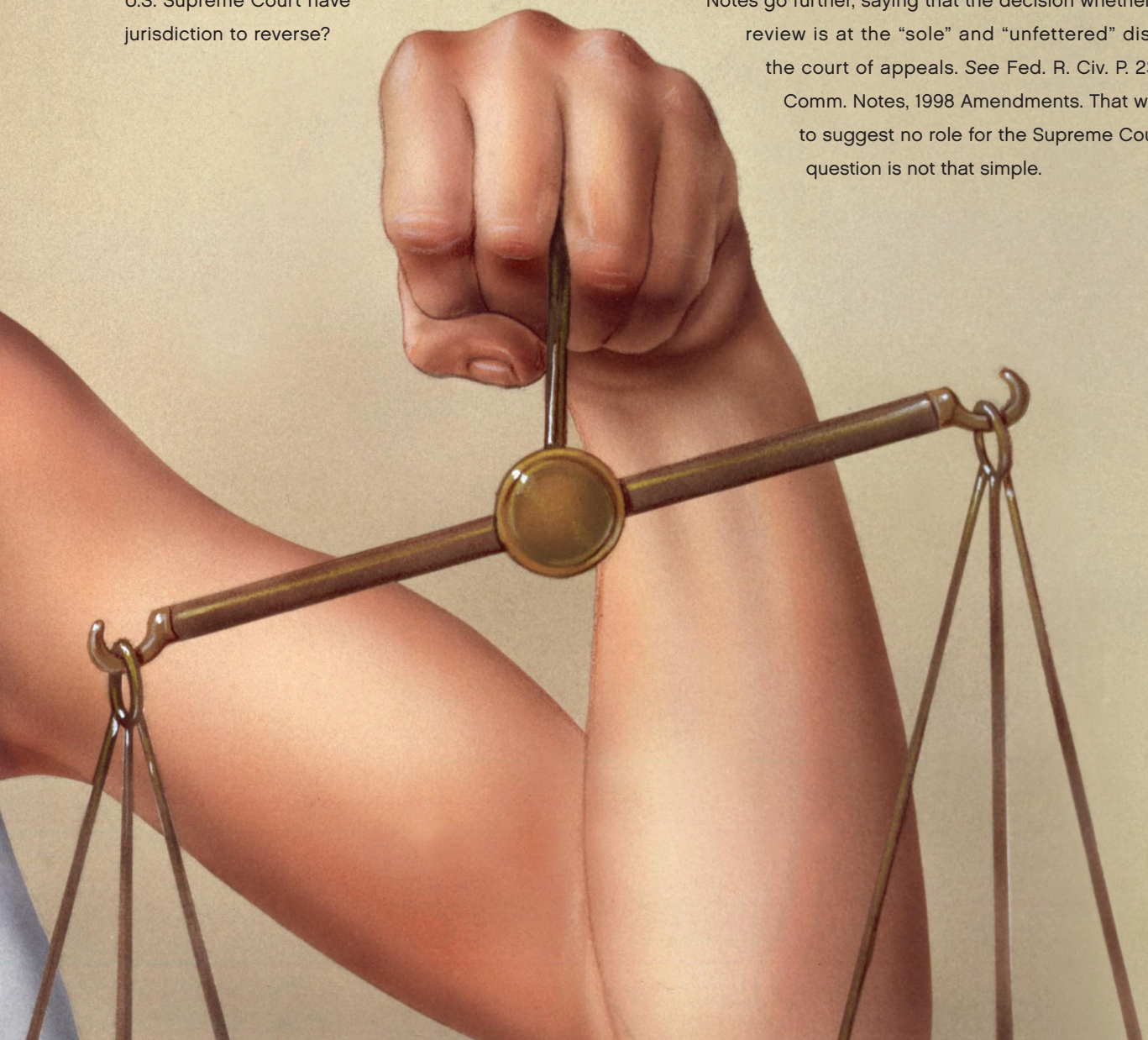
That's Why They're "Supreme": If the Justices Want to Hear an Appeal, They Can Always Find a Way

by Theodore M. Grossman and Todd R. Geremia

At oral argument on a motion for class certification in a RICO case alleging that cigarette companies had defrauded 50 million purchasers of "light" cigarettes (*Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006), now on appeal as *McLaughlin v. American Tobacco Co.*, No. 06-4666-cv (2d Cir.)), Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York asked the following question: If the district court certified a class, and the court of appeals declined discretionary review under Federal Rule of Civil Procedure 23(f), would the U.S. Supreme Court have jurisdiction to reverse?

The answer is now moot in *McLaughlin*, as the U.S. Court of Appeals for the Second Circuit granted a motion for permission to appeal under Rule 23(f) after the district court certified a class. The question, however, is bound to arise again in other large class actions, and it's worth closer evaluation.

Rule 23(f), on its face, says nothing about Supreme Court jurisdiction. It provides only that the court of appeals "may in its discretion permit" an interlocutory appeal of a class certification order. Fed. R. Civ. P. 23(f). The Advisory Committee Notes go further, saying that the decision whether to accept review is at the "sole" and "unfettered" discretion of the court of appeals. *See* Fed. R. Civ. P. 23 Advisory Comm. Notes, 1998 Amendments. That would seem to suggest no role for the Supreme Court, but the question is not that simple.



The Advisory Committee Notes notwithstanding, the Supreme Court's jurisdiction is established by Title 28, which, when read with Rule 23(f), creates "fetters." Indeed, Title 28 appears to establish two bases for review in the Supreme Court, one allowing substantive review of the class certification order itself, and the other allowing review of a court of appeals' decision to decline an interlocutory appeal. Mandamus jurisdiction, which existed before Rule 23(f) and was undisturbed by it, would also provide an avenue for review, although presumably a more difficult one.

Title 28 is quite clear. It expressly allows the Supreme Court to review "[c]ases in the court of appeals" by writ of certiorari granted "before or after rendition of judgment or decree." 28 U.S.C. § 1254(1). That creates two separate potential bases for jurisdiction. First, the filing of a Rule 23(f) petition appears to put a case "in the court of appeals" regardless of whether the court of appeals grants it, thereby creating Supreme Court jurisdiction; second, there is jurisdiction if an order denying a Rule 23(f) petition is a "decree" within the meaning of Title 28. Both bases appear to be solid.

The power of the Supreme Court to entertain substantive review of the class certification order is demonstrated by the analogous case of *Hohn v. United States*, 524 U.S. 236 (1998). There, a petitioner moved to vacate his conviction for use of a firearm under the Antiterrorism and Effective Death Penalty Act. *See id.* at 239. Under that act, an appeal could not be heard unless the petitioner obtained a "certificate of appealability" upon a showing of probable cause of denial of constitutional rights. *Id.* at 240. The petitioner sought such a certificate, but a panel of the court of appeals denied the request, and the petitioner sought certiorari in the Supreme Court. *See id.* Certiorari was granted, the Court holding that the request for a "certificate of appealability" put the case "in the court of appeals" and therefore created a predicate for Supreme Court review. *Id.* at 241, 248. *See also Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (granting writ of certiorari in a case where the court of appeals summarily dismissed appeal on the ground that the order was not appealable; "case was 'in' the Court of Appeals under § 1254 and properly within our certiorari jurisdiction").

Indeed, the "in the court of appeals" basis for jurisdiction not only allows substantive Supreme Court review of the class certification order, but by its terms allows review "before" the appellate court has rendered a decision, although for obvious institutional and policy reasons, obtaining such a review by the Supreme Court wouldn't be easy. *Cf. Hohn*, 524 U.S. at 248 (canvassing case law and concluding that "these decisions foreclose the proposition that the failure to satisfy a threshold prerequisite for court of appeals jurisdiction, such as the issuance of a certificate of appealability, prevents a case from being in the court of appeals for purposes of § 1254(1)"); *see also* 28 U.S.C. § 2101(e) (providing for "an application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals"). Convincing the Court to review the class certification order itself where the court of appeals had not considered it first would require a showing that "the case is of such imperative public importance as to justify a deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. But where the class is big and coercive enough—say, on the order of *McLaughlin* (with $800 billion at stake); *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (seeking back pay for all women employed by Wal-Mart); or *In re Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005) (seeking punitive damages for anyone with heart disease, cancer, or other diseases who ever smoked even a single cigarette)—the chances for review are greater.

A party could also persuade the Court to review a class certification order before the appellate court had ruled on it "when a similar or identical question of constitutional or other importance is currently before the Court in another case," but that would depend on serendipity. Robert L. Stern, Eugene Gressman et al., *Supreme Court Practice* § 4.20, at 262 & n.65 (8th ed. 2002) (collecting cases, including *Bolling v. Sharpe*, 344 U.S. 873 (1952), where the Court invited a petition for certiorari before judgment in light of *Brown v. Board of Education*, 344 U.S. 1 (1952)).

Apart from having power to undertake substantive review of the class certification order, the Court would also have jurisdiction to review the court of appeals' procedural decision not to accept a Rule 23(f) petition, and this avenue for review would present fewer institutional obstacles. Under *Hohn*'s analogous ruling, the court of appeals' rejection of the Rule 23(f) petition would be a "decree," from which a party could properly seek review by certiorari under § 1254(1). *See Hohn*, 524 U.S. at 253 (Court has jurisdiction to review propriety of order denying application for certificate of appeal-

ability). Further, as the Supreme Court has not yet ruled on the standard the courts of appeals should use in determining whether to grant a Rule 23(f) petition, the likelihood of a split in the circuits on the identification of such standards and their application increases the chance that the Court could consider an important-enough case.

Two additional factors increase the likelihood that the Supreme Court will review a court of appeals' denial of a Rule 23(f) petition in the right case. First is the developing understanding that class certification orders are often dispositive and that an interlocutory appeal is effectively the only potential for appellate review. The Advisory Committee Notes to Rule 23(f) themselves make this clear, noting that an order granting certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *See* Fed. R. Civ. P. 23 Advisory Comm. Notes, 1998 Amendments. Noting the same factors before the promulgation of Rule 23(f), the Seventh Circuit granted mandamus from a class certification in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), ruling that the coercive effect of class certification would render the certification effectively unreviewable at the end of the case. After promulgation of Rule 23(f), the Seventh Circuit noted that an appeal may be "in order" to counter the blackmail effect of a certification order in a high-stakes case: "[W]hen the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). "This interaction of procedure with the merits justifies an earlier appellate look." *Id.* at 835.

The second factor increasing the likelihood of Supreme Court review is the increasing extent to which the lower courts' discretion in certifying classes has been circumscribed. Indeed, in considering the court of appeals' discretion whether to consider an interlocutory appeal, one must also consider that a district court's decision whether to certify a class is reviewed under an "abuse of discretion" standard. By a succession of appellate decisions and changes in the rules, however, the nominal "discretion" to certify a class has been largely replaced with clear rules, and if those rules are ignored or misapplied, the Supreme Court may have good reason to accept jurisdiction before a final judgment has been entered.

The lower courts' "discretion" to certify a class was, for example, greatly circumscribed in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), where the Supreme Court held that "limited fund" class actions could be certified only when a clearly defined and precisely calculated fund predated the litigation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), among other things, circumscribed the lower courts' discretion to certify settlement classes. The 2003 amendments to Rule 23 eliminated the discretion for lower courts to enter "conditional" certifications of classes, requiring that all the elements of Rule 23 be met before any class could be certified. *See* Fed. R. Civ. P. 23(c)(1)(C); *see also* Fed. R. Civ. P. 23 Advisory Comm. Notes, 2003 Amendments ("The provision that a class certification 'may be conditional' is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification. . . ."). The appellate courts have further limited discretion of the district courts in this regard as well. For example, in *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), the Second Circuit reversed its own prior holdings and required the district court to apply stricter scrutiny of expert opinions necessary to sustain plaintiffs' burden on class certification.

To note that Rule 23(f) gives the courts of appeals "discretion" to review class certification orders, therefore, does not end the analysis. The answer to Judge Weinstein's question appears to be yes—the Supreme Court has the power to review a court of appeals' decision not to entertain a Rule 23(f) appeal, and in the right case, it may do so. ■

***A version of this article was originally published in the May 14, 2007, edition of* The National Law Journal.**

THEODORE M. GROSSMAN
1.216.586.7268
tgrossman@jonesday.com

TODD R. GEREMIA
1.212.326.3429
trgeremia@jonesday.com