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Interlocutory appeals set jurisdictional traps

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For decades, litigants seeking interlocutory appeal of a circuit court's class certification decision attempted to certify questions of law under Illinois Supreme Court Rule 308. But lawyers still in that mindset could potentially cause themselves procedural headaches — and possibly cost their clients the opportunity for interlocutory appeal. Ironically, this danger stems from Rule 306(a)(8), a provision added to aid interlocutory appeals of class certification rulings.

Mirroring a practice in federal courts, the Illinois Supreme Court first raised the use of a certified question of law under Rule 308 to obtain interlocutory review of a class certification order in Frank v. Teachers Insurance & Annuity Association of America, 71 Ill 2d 581 (1978). In 2003, Illinois adopted Rule 306(a)(8), permitting permissive interlocutory appeal of class certification orders without certification of a legal question.

Lawyers still in that mindset could potentially cause themselves procedural headaches — and possibly cost their clients the opportunity for interlocutory appeal.

Since the adoption of Rule 306(a)(8), Illinois courts have not considered how this new provision affects the process for permissive interlocutory appeals under Rule 308. Despite the absence of a definitive answer, all indications are that the adoption of Rule 306(a)(8) foreclosed the use of a certified question under Rule 308 to seek interlocutory review of class certification.

Rule 306 governs interlocutory appeals by permission. Since 2003, among those orders from which "[a] party may petition for leave to appeal to the Appellate Court" has been "an order of the circuit court denying or granting certification of a class action." Neither the explanatory note in the order announcing the addition of Subsection (a)(8) nor any subsequent committee comment explains the reasons for this addition.

Rule 308 governs certified questions. When a trial court enters an interlocutory order that "involves a question of law as to which there is substantial ground for difference of opinion" and the court deems "that an immediate appeal from the order may materially advance the ultimate termination of the litigation," the court may — on its own motion or at the request of a party — certify the question of law for appeal. A party then has 14 days to petition for appeal, which the appellate court has discretion to grant or deny. Rule 308 applies only to questions arising from "an interlocutory order not otherwise appealable." The early opinions in which Illinois courts allowed that class certification orders could be reviewed on interlocutory appeal under Rule 308 discussed this requirement, holding that one reason Rule 308 was an appropriate avenue for appeal was that class certification orders were otherwise unappealable until after trial. The addition of Rule 306(a)(8) seemingly removes class certification orders from the ambit of Rule 308.

Judicial construction of Rule 308 bolsters this reading. Illinois courts have repeatedly held that Rule 308's restrictions are jurisdictional. For example, where a party fails to petition for appeal within Rule 308(b)'s time limit, the appellate courts have held that they lack jurisdiction over the appeal. Similarly, the circuit court's failure to meet one of the conditions listed in Rule 308(a) bars appellate court jurisdiction. And when the circuit court meets the requirements for certifying a question, appellate jurisdiction is generally limited by the scope of the question the trial court certified. Given the courts' consistent practice of reading Rule 308's requirements as strict jurisdictional constraints, there is no reason to believe that the "not otherwise appealable" language is anything other than a jurisdictional limitation. It follows that Rule 308 should bar certification of questions arising from any order appealable under Rule 306(a)(8).

In contrast to the voluminous case law construing Rule 308, there is a dearth of law on the interplay between Rules 306 and 308. The Illinois Supreme Court sidestepped the issue in Healy v. Vaupel, 133 Ill. 2d 295 (1990). And though the court has recently heard two relevant cases, each comprised of consolidated appeals involving petitions filed under both rules, see De Bouse v. Bayer AG, 235 Ill. 2d 544 (2009); Cwik v. Giannoulias, 237 Ill. 2d 409 (2010), in each instance the question certified under Rule 308 involved an order related to but distinct from the class certification order appealed under Rule 306(a)(8). As a result, these cases demonstrate only — and unsurprisingly — that Illinois courts do not consider Rule 306(a)(8) to preclude interlocutory appeal of a separate, but related, order under Rule 308.

In the absence of a definitive answer about how Rule 306(a)(8) affects Rule 308, we can look to federal law for analogues. Illinois modeled Rule 308 on a similar federal provision and federal courts preceded Illinois courts in using certified questions for interlocutory review of class certification orders. As that process proved inadequate, the Federal Rules of Civil Procedure (in Rule 23(f)) and then the Illinois Rules (in Rule 306(a)(8)) expressly allowed permissive interlocutory appeals from class certification orders. Illinois courts have long acknowledged Rule 308's similarity to federal procedure and held that cases construing the federal provision "although not controlling, are nonetheless persuasive." Camp v. Chicago Transit Auth., 82

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Ill. App. 3d 1107, 1111 (1st Dist. 1980).

The 7th U.S. Circuit Court of Appeals decided the first case to consider Rule 23(f)'s effect on the practice of using certified questions to seek interlocutory appeal of class certification orders. See Richardson Elec., Ltd. v Panache Broad. of Pa., Inc., 202 F.3d 957 (7th Cir. 2000). Writing for the court, Judge Richard A. Posner stopped short of saying that an appeal that could be brought under Rule 23(f) was beyond the ambit of 28 U.S.C. §1292(b), but he expressed that an appeal that could be brought under 23(f) should be brought solely under that provision. Applying the 7th Circuit's approach to the Illinois Rules suggests that an appeal that can be brought under Rule 306(a)(8) should not be entertained under Rule 308.

Further, a comparison of the relevant provisions shows that the case for exclusive jurisdiction under the provision specific to class certification orders is stronger under Illinois law than under federal law. Rule 308 extends only to an appeal from "an interlocutory order not otherwise appealable." Its federal analogue, §1292(b), is limited to an appeal from "an order not otherwise appealable under this section." The "under this section" limitation in §1292(b) may not bar application of §1292(b) to a class certification order appealable under Rule 23(f), which does not appear "in this section" of the United States Code. But Rule 308 has no parallel caveat to "under this section." Rule 308 allows appeal from an order "not otherwise appealable." If the narrower limitation in §1292(b) is enough to prevent federal courts from using a certified question to appeal a class certification order in light of Rule 23(f), the broader exclusion in Rule 308(a) should be read to prohibit Illinois courts from using a certified question to appeal a class certification order in light of Rule 306(a)(8).

It is tempting to dismiss the interplay between Rules 306(a)(8) and 308 as academic; so long as there is an avenue to appeal a class certification order, why should litigators care about the tension between the newer and older mechanisms? The answer is that the absence of clear authority on how Rules 306(a)(8) and 308 interact creates uncertainty — an uncertainty with practical consequences because the time limitations for appeals under the two provisions differ.

At first glance, Rule 306 appears more generous, because Rule 306(c)(1) grants litigants 30 days from the entry of the order to be appealed, while Rule 308(b) provides only 14 days. However, the clock does not begin under Rule 308 until the circuit court has entered an order certifying a question of law for interlocutory appeal. Under Rule 306, the clock starts at entry of the underlying class certification order. (The 30-day window for appeal under Rule 306(a)(8) — unlike the 14-day window of Rule 308 — can be extended, but only by a motion filed before expiration of the initial window.)

The interplay between Rules 306 and 308, coupled with the lack of clear guidance from the courts, creates the possibility that an unwary litigator could easily wind up in a position where the deadline to appeal under Rule 306(a)(8) has passed and opposing counsel argues (probably correctly) that there is no appellate jurisdiction under Rule 308. While Illinois courts have not yet needed to address such a situation, this potential trap will likely be sprung in a future case. Because the trap is jurisdictional, the court will lack flexibility to show leniency to the unsuspecting litigant first snared.