

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gary v. Sheahan

188 F.3d 891 (7th Cir. 1999) · Decided August 19, 1999

SUMMARY

The Seventh Circuit held that a petition for leave to appeal under Federal Rule of Civil Procedure 23(f) must be filed within ten days of the original class-certification order, or a timely reconsideration disposition. A belated motion to decertify does not restart the Rule 23(f) period unless the district court materially alters the class-certification decision; the petition was therefore dismissed for lack of jurisdiction.

CASE DETAILS

|                       |                                                                                                                                                                                         |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | United States Court of Appeals for the Seventh Circuit                                                                                                                                  |
| WRITING FOR THE COURT | Frank H. Easterbrook; Evans; Wood                                                                                                                                                       |
| JURISDICTION          | Federal                                                                                                                                                                                 |
| DECIDED               | August 19, 1999                                                                                                                                                                         |
| DISPOSITION           | dismissed                                                                                                                                                                               |
| PROCEDURAL POSTURE    | The defendants petitioned under Federal Rule of Civil Procedure 23(f) for permission to take an interlocutory appeal from the district court's denial of a motion to decertify a class. |
| STANDARD OF REVIEW    | The court addressed appellate jurisdiction under Federal Rule of Civil Procedure 23(f) and did not review the merits of class certification or decertification.                         |
| PRECEDENTIAL VALUE    | Published precedential opinion                                                                                                                                                          |
| PARTIES               | Tania Hayes, Michael F. Sheahan v. Kenya Gary                                                                                                                                           |

TOPICS

- interlocutory appeal
- class actions
- appellate jurisdiction
- appellate procedure
- civil procedure

PRACTICE AREAS

- Civil procedure
- Appellate procedure
- Class actions

QUESTIONS PRESENTED

1. Whether a party may obtain interlocutory review under Federal Rule of Civil Procedure 23(f) by filing a petition within ten days after the denial of a motion to decertify a class when the motion was filed more than ten days after the original class-certification order.
2. Whether a belated or successive motion for reconsideration or decertification restarts the ten-day period for a Rule 23(f) petition.
3. Whether the exception for a materially altered decision applies when the district court denies the motion and leaves the class definition unchanged.

#### **HOLDINGS**

1. A party may not use a motion to decertify or a motion for reconsideration filed more than ten days after the class-certification order to create a new ten-day window for seeking permission to appeal under Rule 23(f).
2. An untimely or successive motion for reconsideration does not extend or restart the time for seeking appellate review under Rule 23(f).
3. If a district judge responds to a belated reconsideration motion by materially altering the class-certification decision, the party aggrieved by that alteration may seek permission to appeal within the normal Rule 23(f) period; that exception does not apply when the motion is denied and the class definition remains unchanged.

#### **KEY QUOTATIONS**

*“if the request for reconsideration is filed more than ten days after the order “granting or denying class action certification under this rule”, then appeal must wait until the final judgment.”* (188 F.3d at 891-92)

*“The petition for leave to appeal is dismissed for want of jurisdiction.”* (188 F.3d at 893)

#### **FACTUAL BACKGROUND**

The district court certified a class on April 10, 1997. More than a year later, the defendant moved to decertify the class, and the district court denied that motion on March 31, 1999. The defendant then sought permission to appeal within ten days of the denial, but the Seventh Circuit held that the delayed motion to decertify could not reopen the ten-day period for seeking a Rule 23(f) appeal.

#### **PROCEDURAL HISTORY**

The district court certified the class on April 10, 1997. In August 1998, the defendant moved to decertify the class, but the district court denied that motion on March 31, 1999. The petition for leave to appeal was filed within ten days of the denial, but the motion to decertify had been filed more than ten days after the original class-certification order. The Seventh Circuit dismissed the petition for lack of jurisdiction.

#### **DISPOSITION**

dismissed

## CASES CITED

- Blair v. Equifax Check Services, Inc., 181 F.3d 832 (7th Cir. 1999)
- Browder v. Director, Department of Corrections, 434 U.S. 257, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)
- Charles v. Daley, 799 F.2d 343, 347-48 (7th Cir. 1986)
- Midland Coal Co. v. Director, OWCP, 149 F.3d 558, 563-64 (7th Cir. 1998)
- FTC v. Minneapolis-Honeywell Co., 344 U.S. 206, 211, 73 S. Ct. 245, 97 L. Ed. 245 (1952)

## OPINION

EASTERBROOK, J.

EASTERBROOK, Circuit Judge. As in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir.1999), we have been asked to approve an interlocutory appeal under Fed. R. Civ. P. 23(f). See also 28 U.S.C. § 1292(e); Fed. R. App. P. 5. And as in *Blair*, there is a preliminary question about appellate jurisdiction. Rule 23(f) authorizes us to “permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order.” *Blair* held an appeal may be filed either from the order itself or from the disposition of a request for reconsideration filed within the time for appeal.

Now we drop the other shoe: if the request for reconsideration is filed more than ten days after the order “granting or denying class action certification under this rule”, then appeal must wait until the final judgment. This case was certified as a class action on April 10, 1997.

In August 1998 defendant asked the district court to decertify the class. Defendant’s motion was \*893denied on March 31, 1999, and a petition for leave to appeal was filed within ten days of that order. (Ten rule days, not ten calendar days; under Fed. R. Civ. P. 6(a) weekends and holidays do not count when a time limit prescribed by the civil rules is ten days or fewer.)

*Blair* shows that a motion to reconsider filed more than ten days after the order is too late to preserve the possibility of appeal under Rule 23(f), and we do not think that it matters what caption the litigant places on the motion to reconsider. ' This case demonstrates why that limit is essential. Otherwise, by styling a motion to reconsider as a motion to decertify the class, a litigant could defeat the function of the ten-day line drawn in Rule 23(f).

Interlocutory appeals are rare, because they may disrupt progress of the case. Because the decision whether a suit will proceed as a class action is so vital, and sometimes so hard to review at the end of the case, Rule 23(f) permits the court of appeals to accelerate appellate review; but to ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small.

Blair analogizes a motion for reconsideration to a post-judgment motion under Fed. R. Civ. P. 50 or 59(e). That analogy also supplies details about the effect of successive or belated motions in the district court. A motion filed after the time allowed by these rules does not extend the time for appellate review. *Browder v. Director, Department of Corrections*, 434 U.S. 257, 98 S.Ct.

556, 54 L.Ed.2d 521 (1978). A second or successive motion for reconsideration is just a motion filed after ten days: it does not restart the clock for appellate review. *Charles v. Daley*, 799 F.2d 343, 347-48 (7th Cir.1986). Cf. *Midland Coal Co. v. Director, OWCP*, 149 F.3d 558, 563-64 (7th Cir.1998) (same rule for judicial review of administrative action).

To this rule there is a solitary exception, which we fancy would apply to Rule 23(f) as well: if in response to a belated motion for reconsideration the judge materially alters the decision, then the party aggrieved by the alteration may appeal within the normal time. *FTC v. Minneapolis-Honeywell Co.*, 344 U.S. 206, 211, 73 S.Ct. 245, 97 L.Ed. 245 (1952); *Charles*, 799 F.2d at 348.

Thus, had the district judge granted defendant's motion and decertified the class, plaintiffs would have had ten days under Rule 23(f) to seek permission to appeal. Instead, however, the judge denied the motion and left the class definition in place. Accepting an appeal from such a decision would abandon the time limit for all practical purposes. That step would be both unauthorized and imprudent.

The petition for leave to appeal is dismissed for want of jurisdiction.