

IN THE SUPREME COURT
OF THE STATE OF CONNECTICUT

NO. S.C. 17735

ELLEN PALMER, et al.,
On behalf of themselves and
All other similarly situated,
Plaintiffs-Appellants,

vs.

FRIENDLY ICE CREAM CORPORATION,
Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

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STATEMENT OF THE ISSUE

Is a trial court order denying a motion for certification of a class a final judgment for purposes of appeal?

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STATEMENT OF FACTS

This appeal arises in an action brought pursuant to the Connecticut Minimum Wage Act. Plaintiffs seek certification of the matter as a class action. The Court has also certified the appeal of the same issue in two other cases: Orozco v. Darden Restaurants, Inc., No. S.C. 17771, and Bucchere v. Brinker International, et al., No. S.C. 17770.

1. The Plaintiffs' Complaint. Plaintiffs Ellen Palmer, Cindy Brown, and Vicky Wilks commenced this action on October 4, 2004, alleging that Defendant, Friendly's Ice Cream Corporation ("Friendly's"), violated the Connecticut Minimum Wage Act by failing to properly segregate the time its servers spent performing service from non-service tasks, thereby rendering Friendly's ineligible to pay its servers the reduced minimum wage. The three servers, who were employed at the same Friendly's restaurant in Manchester, Connecticut, initially brought the action on behalf of all servers employed at Friendly's forty-eight Connecticut restaurants. Subsequently, by way of Amended Complaint filed on September 15, 2005, Plaintiffs added thirty-four additional plaintiffs for a total of thirty-seven, out of a putative class that numbers approximately two thousand servers.

2. The Superior Court's Order. On January 25, 2006, the Superior Court (Sferazza, J.) issued a memorandum of decision denying the Plaintiffs' motion for class certification. While the trial court found that Plaintiffs had satisfied the prerequisites for class certification in Connecticut Practice Book [hereinafter "Practice Book"] §9-7 - - numerosity, commonality, typicality, and adequacy of representation - - the trial court concluded that the Plaintiffs failed to carry their burden of proving, pursuant to Practice Book §9-8, that "the questions of law or fact common to the members of the class

predominate over any questions affecting only individual members...” Memorandum of Decision, Plaintiffs’ Appendix, 7-8.

Relying upon this Court’s decision in Collins v. Anthem Health Plans, Inc., 275 Conn. 309 (2005) (“Collins II”), the trial court rejected Plaintiffs’ contention that the predominance requirement is satisfied merely by proof at trial “that the defendant had a corporate policy of requiring all of its servers to perform the side tasks...; that the side tasks are non-service duties under Regulation 31-62-E4, and that Defendant failed to segregate the work hours devoted to these side duties from service duty time.” The trial court found that “plaintiffs’ blanket approach” to establishing liability “essentially amounts to an end run around the defendant’s right to have each class member prove the essential elements of liability” as recognized by Collins II. Memorandum of Decision, Plaintiffs’ Appendix, 9.

The trial court noted in its memorandum of decision that the same conclusion had been reached, and class certification denied, in similar litigation involving another restaurant chain, Galbreth v. Briad Restaurant Group, Superior Court C.L.D. Waterbury, D.N. X02-CV04-4000676-S (November 29, 2005). Since the issuance of the trial court’s memorandum of decision in this matter, several other courts have denied class certification in cases that raised similar claims under the Connecticut Minimum Wage Act. See Orozco v. Darden Restaurants, Inc., 2006 WL 2411520 (Conn. Super. Ct. August 3, 2006), cert. granted, Nov. 7, 2006 (No. S.C. 17771); Bucchere v. Brinker International, Inc., No. X01-CV-04-40002385 (Conn. Super. Ct. June 6, 2006), cert. granted, Nov. 7, 2006 (No. S.C. 17770); Galbreth v. Briad Restaurant Group, Superior Court C.L.D. Waterbury, D.N. X02-CV04-4000676-S (November 29, 2005); Bates v. C&L Diners, LLC, X03-CV-05-402211S (Conn. Super. Ct. December 12, 2006).

3. **Proceedings on Appeal.** Plaintiffs' motion for reargument in the trial court was denied without hearing on May 2, 2006. Plaintiffs subsequently appealed to the Appellate Court. Upon motion by Friendly's, the Appellate Court summarily dismissed Plaintiffs' appeal on July 12, 2006. Plaintiffs then filed a Petition for Certification of Appeal in this Court. This Court granted Plaintiffs' Petition on September 20, 2006, but limited the appeal to the following question: "Is an order denying a motion for class certification a final judgment for purposes of appeal?"

STANDARD OF REVIEW

The issue of whether a trial court order constitutes a final judgment for purposes of appeal implicates the subject matter jurisdiction of this Court and is thus a "question of law" over which this Court's review is plenary. Simes v. Simes, 95 Conn.App. 39, 42 (2006) (citing Sweeney v. Sweeney, 271 Conn. 193 (2004)).

SUMMARY OF ARGUMENT

Orders denying class certification are interlocutory orders, for which a majority of jurisdictions disallow immediate appeal. By their nature, interlocutory appeals are disruptive, time consuming, and invite delay. Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288, 294 (1st Cir. 2000). This Court has similarly recognized that limiting appeals to final judgments minimizes interference with trial court proceedings. Madigan v. Madigan, 224 Conn. 749, 753 (1993).

1. The Court's reasons for allowing an interlocutory appeal of an order *decertifying* a class in Rivera v. Veterans Memorial Medical Center, 262 Conn. 730 (2003) are fundamentally different than the considerations raised by the *denial* of class certification. First, the Court recognized in Rivera that the right to proceed as a class is not secured until the moving party demonstrates compliance with all class prerequisites. Plaintiffs here confuse the *duty* to protect class interests pending certification with the *right* to adjudicate on behalf of the class, which follows certification. Second, in Rivera, the class had been certified and the litigation had proceeded for *over two years* prior to decertification. No such reliance on proceeding to trial as a class obtains prior to certification.

2. An appeal from an order denying class certification lies outside the first prong of the test established in State v. Curcio, which allows an interlocutory appeal from a trial court order that "terminates a separate and distinct proceeding." State v. Curcio, 191 Conn. 27, 31 (1983). This standard requires that the interlocutory appeal "will not impact directly on any aspect of the [underlying] action." State v. Parker, 194 Conn. 650, 653 (1984). Applying that standard to a class denial order, it is plain that the underlying claims could not progress while the issues surrounding class certification are pending on appeal.

The issue of whether or not a plaintiff's claims will proceed as a class action have a direct impact on the number of claims to be adjudicated by the court; the identity of the plaintiffs; the level of proof required; and the potential defenses of class members. As recognized by the federal courts, "[d]isputes about class certification cannot be divorced from the merits..." Blair v. Equifax Check Services, Inc., 181 F.3d 832, 835 (7th Cir. 1999).

3. The second prong of Curcio focuses on the nature of the right involved. It requires the party seeking to appeal to establish that the trial court's order threatens the preservation of a right *already secured to them* and that the right will be irretrievably lost and the party irreparably harmed unless they may immediately appeal. Here, again, an order denying class certification fails the Curcio standards. A trial court's decision to certify a class is discretionary. Collins v. Anthem Health Plans, Inc., 266 Conn. 12, 23 (2003). The Court has long recognized that "when the statute vests the trial court with discretion to determine if a particular [party] is to be accorded a certain status, the [party] may not invoke the rights that attend the status as a basis for claiming that the court's decision not to confer that status deprives a [party] of protection to which [it]...is entitled." State v. Longo, 192 Conn. 85, 92-93 (1984). Because the right to proceed as a class is wholly discretionary, the trial court's denial of that right does not threaten a pre-existing right of which Plaintiffs were deprived by the denial of class certification.

4. Even under Fed. R. Civ. P. 23 (f), which was adopted in 1998 to allow for interlocutory appeal of a class determination order, acceptance of such appeals are rare. Review of class determination orders is to be provided "sparingly" in recognition of the "disruptive, time consuming and expensive" nature of interlocutory appeals. In Re: Lorazepam & Clorazepate Antitrust Litigation, 289 F.3d 102, 103 (D.C. Cir. 2003). Review

of the class determination order will generally be available under Fed. R. Civ. P. 23 (f) in three circumstances: (1) where there is a “death knell” situation for either plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a questionable class certification decision; (2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important to both the specific litigation and generally, that is likely to evade review; and (3) when the trial court’s decision is manifestly erroneous. Id. at 106. Should the Court determine to allow interlocutory review of the class determination order, it should do so only under the same stringent criteria.

ARGUMENT

Plaintiffs would provide class action litigants in Connecticut with an automatic right of interlocutory appeal of every trial court order denying class certification. See Brief of Plaintiffs-Appellants with Appendix [hereinafter "Plaintiffs' Brief"], at 7 ("[t]aken together, the Court's appealability precedents, the experience of other state and federal courts, the efficiency rationales of class action litigation, the risk that the order will constitute the "death knell" of the litigation, and the need to protect the rights of absent plaintiffs all point in one direction: toward permitting immediate appeals from orders denying class certification"). This position represents a stunning departure from both the legislative determination limiting appeals by aggrieved parties to final judgments, and this Court's policy to discourage "piecemeal litigation." State v. Curcio, 191 Conn. 27, 30 (1983).

Relying upon this Court's decision in Rivera v. Veterans Memorial Medical Center, 262 Conn. 730 (2003), Plaintiffs contend that the Court should put aside a "grudging, formalistic view of the final judgment rule" and establish an automatic right to the immediate appealability of class determinations. Plaintiffs' Brief, 24. Because the Court's precedents and sound considerations of public policy favor adherence to the final judgment rule, the Court should decline to establish such an automatic right of immediate appeal of trial court orders denying class certification.

I. Class Action Litigation in Connecticut Would Not be Well Served by Automatic Interlocutory Appeals of Class Denial Orders.

Class actions "serve a unique function in vindicating plaintiffs' rights." Rivera v. Veterans Memorial Medical Center, *supra*, 262 Conn. at 735. The Court recognized in Grimes v. Housing Authority, 242 Conn. 236 (1997) that class actions serve four essential and distinct functions: (1) promoting judicial economy and efficiency; (2) protecting

defendants from inconsistent obligations; (3) protecting the interests of absentee parties; and (4) providing access to judicial relief for small claimants. Grimes v. Housing Authority, 242 Conn. at 244.

The reasons for allowing class litigation, however, differ from and often conflict with the considerations that underlie the final judgment rule. While the principle of judicial economy is served by combining claims for litigation, for example, the very same principle militates against delay, disruption, and appeals concerning issues which ultimately may be mooted. See Millett v. Atlantic Richfield Company, 760 A.2d 250, 253 (Me. 2000). The sound policies underlying the final judgment rule should neither be turned on their head to engender a proliferation of piecemeal litigation, nor cited in support of such appeals when interruption and delay are employed as strategems. State v. Maine State Employee's Association, 482 A.2d 461, 464 (Me. 1984).

Nothing in the Court's decision in Rivera v. Veterans Memorial Medical Center, supra, supports Plaintiffs' argument for the interlocutory appeal of class certification denial. The principal issue in Rivera was whether the trial court had abused its discretion by changing the definition of a class previously certified for the class action lawsuit and thereafter de-certifying the class on the basis of the revised class definition. Rivera, 262 Conn. at 736. In Rivera, the plaintiffs had been certified as a class and litigated the claims in that case as a class for over two years before the trial court issued its decertification order. Id. at 734.

The Court recognized that "when the plaintiffs were certified as a class by the trial court they secured the right to proceed in a class action against the defendant and that when the class was decertified, the right to proceed as a class was irretrievably lost and the

plaintiffs were irreparably harmed.” Rivera, supra, 262 Conn. at 735. The rights implicated in class *decertification* are fundamentally different from Plaintiffs’ so-called “right” to proceed in a class action pending a decision on certification. Plaintiffs’ suggestion that both decertification orders and denial orders deprive absent class members of “rights,” see Plaintiffs’ Brief, 9, ignores this critical distinction.

Absent class members occupy a special, non-traditional status in litigation. 1 Newberg on Class Action §1:3 (4th Ed.). The U.S. Supreme Court has described absent class members as “passive parties” who are entitled to sit back and await the results of the class litigation. American Pipe and Construction Company v. Utah, 414 U.S. 538 (1974). Absent members have rights to adequate representation in the litigation, and notice of class certification rulings or of any proposed settlement or voluntary dismissal of the class action. 1 Newberg on Class Actions §1:3 (4th Ed.). The right to litigate and proceed to trial (or settlement) as a class, however, obtains only after all prerequisites and findings for certification are satisfied. Rivera, supra, at 735. Courts in Connecticut have long recognized, as well, that the right to litigate as a class is discretionary. Macomber v. Traveler’s Property and Casualty Corporation, 277 Conn. 617 (2006); Marr v. WMX Technologies, Inc., 244 Conn. 676 (1998) (*citing* Arduini v. Automobile Insurance Company of Hartford, 23 Conn. App. 585, 589-90 (1990)).

Plaintiffs argue that the Court’s existing case law supports the immediate appealability of class determinations, citing Collins v. Anthem Health Plans, Inc., 266 Conn. 12 (2003) (Collins I); Collins v. Anthem Health Plans, Inc., 275 Conn. 309 (2005) (Collins II); Macomber v. Traveler’s Property and Casualty Corp., 277 Conn. 617 (2006); and Marr v. WMX Technologies, Inc., 244 Conn. 676 (1998). Each of these decisions, however,

involve claims brought, in whole or in part, under the Connecticut Unfair Trade Practices Act (“CUTPA”), General Statute §42-110a, *et. seq.*, for which the Legislature has explicitly provided for a right of interlocutory appeal of the denial of class certification. As this Court has long held, in the absence of such legislative authorization, interlocutory appeal of denial of class certification should only be allowed if a trial court order satisfies the standards established under State v. Curcio. See Hartford Accident & Indemnity Co., v. Ace American Reinsurance Company, 279 Conn. 220, 237-38 (2006).

II. The Class Certification Proceeding is Enmeshed In the Merits and Cannot Constitute a “Separate and Distinct Proceeding” Under State v. Curcio.

“An otherwise interlocutory order is appealable in two circumstances: (1) [when] the order or action terminates a separate and distinct proceeding, [and] (2) [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them...” Hartford Accident & Indemnity Co. v. Ace American Reinsurance Company, et al., *supra*, 279 Conn. at 225 (2006) (*quoting State v. Curcio, supra*, 191 Conn. at 30, 31)). The first prong of the Curcio test requires that the order being appealed be “severable from the central cause of the action so that the main action can proceed independent of the ancillary proceeding...” Hartford Accident & Indemnity Co., *supra*, at 226 (*quoting State v. Parker*, 194 Conn. 650, 654 (1984)). If the interlocutory ruling is merely “a step along the road to final judgment,” then it does not satisfy the first prong of Curcio. State v. Parker, supra, at 653. The fact that the interlocutory ruling does not “implicate the merits of the principal issue at trial...does not necessarily render that ruling appealable. It must appear that the interlocutory ruling will not impact directly on any aspect of the [action].” Hartford Accident and Indemnity Company, supra, at 226 (*quoting State v. Parker, supra*, at 653). An

interlocutory ruling concerning an order denying certification must necessarily affect the underlying litigation.

A. The Class Determination Decision Is Enmeshed In the Merits of the Case

It is plain that the merits of the wage and hour claim at issue in this case - - or the merits of any matter - - could not progress while the issues surrounding its class action status were pending on appeal. The extent and nature of the proof required; potential defenses; and the number and identity of the plaintiffs each could affect the progress of the case. As one federal appeals court has recognized, “[d]isputes about class certification cannot be divorced from the merits...” Blair v. Equifax Check Services, Inc., 181 F.3d 832, 835 (7th Cir. 1999).

This Court reached the same conclusion when it acknowledged that “the class determination generally involves considerations that are *enmeshed* in the factual and legal issues comprising the plaintiffs’ cause of action”. Collins v. Anthem Health Plans, Inc., 266 Conn. 12, 24 (2003) (emphasis added) (*citing* General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982); *see also* Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (court must look past pleadings to understand the claims, defenses, relevant facts, and applicable law in order to make a meaningful determination of the certification issue).

A class certification order is far different than the types of rulings which the Court has found satisfied the “separate and distinct” requirement of Curcio. *See e.g.*, Lougee v. Grinnell, 216 Conn. 483, 487 (1990) (finding that trial court ruling on enforcement of deposition subpoena was separate proceeding), overruled on other grounds by, State v.

Salmon, 250 Conn. 147 (1999); see also State v. Parker, supra, 194 Conn. at 654 (discussing attachments and orders of mandamus).

In State v. Parker, supra, the Court found that an application for accelerated rehabilitation (and a motion for dismissal of the underlying charge based upon successful completion of the conditions for accelerated rehabilitation) could not constitute a separate and distinct proceeding because the effect of the early rehabilitation would be to delay, and possibly end, the underlying criminal prosecution. Parker, 194 Conn. at 655. The Court expressed its view that there are “only a small class of cases which meet the test of being effectively unreviewable on appeal from a final judgment and, therefore, suitable for interlocutory review.” Id. at 658.

The Court’s decision in Hartford Accident & Indemnity Co., supra, is particularly useful in analyzing whether an order denying class certification satisfies the first prong of Curcio. In that case, the plaintiffs claimed that the trial court’s denial of a motion to compel defendants to post pre-pleading security was immediately appealable under Curcio, because that issue was severable from the underlying action and could proceed unimpeded during the pendency of the appeal. Hartford Accident & Indemnity Co., supra, 279 Conn. at 227. In support of their argument, plaintiffs noted that the issue of whether they were entitled to pre-pleading security did not turn on the particular facts of the case, nor did the resolution of that issue affect the merits of the underlying litigation. Id.

Relying on State v. Parker, supra, the Court rejected plaintiff’s arguments. It found that an immediate appeal of a motion for pre-pleading security did not satisfy the first prong of Curcio because one potential outcome of the appeal would be to delay the underlying action in order to defend the appeal. Id. at 229-30. Because a successful interlocutory

appeal on the motion for pre-pleading security could delay or end the underlying action, such an appeal bore little similarity, for final judgment purposes, to an appeal from an order granting or denying a pre-judgment remedy such as an attachment. Id. at 230.

The considerations presented by an immediate appeal of an order denying class certification are no different than the concerns raised by the interlocutory appeals at issue in Hartford Accident & Indemnity Co. and State v. Parker. Here, a resolution on appeal that is favorable to the Plaintiffs likely could affect the progress, and even the outcome, of the underlying action. Hartford Accident & Indemnity Co., *supra*, 279 Conn. at 230. The nature and extent of discovery could vary significantly depending upon the number of plaintiffs. Further, the underlying case would likely be delayed while the certification issue was resolved. Consequently, this Court cannot conclude that a trial court order denying class certification constitutes a separate and distinct proceeding for the purposes of the first prong of Curcio. Id.

B. Plaintiffs Misapprehend National Case Law Supporting Immediate Appeal

To further support their argument, Plaintiffs contend that “both state and federal courts have permitted immediate appeals from orders denying class certification for reasons similar to or the same as those within the ambit of the first Curcio prong.” Plaintiffs’ Brief, 14-15. Plaintiffs cite some 20 cases from various state courts around the country in support of that statement. Upon examination, however, not all of the cited cases can reasonably be interpreted to support interlocutory appeal based upon the *first* prong of Curcio.

Several of the cases do permit interlocutory appeal of denial of class certification on the basis of the first prong of Curcio, i.e. the “death knell” of the litigation. See, e.g., Bell v.

Beneficial Consumer Discount Company, 465 Pa. 225 (1975); Miles v. NJ Motors, et al., 32 Ohio App.2d 350 (1972); Richmond v. Dart Industries, Inc., 29 Cal.3d 462 (1981). Other of the cases, however, allow appeal of the class determination decision based upon court rules or statutes or statutory authorization. See, e.g., Aetna Casualty & Surety Co. v. Cantrell, 297 Ga.App. 672 (1991); see also Martin v. Amana Refrigeration, Inc., 435 N.W.2d 364 (Iowa, 1989). Yet other cases permit interlocutory appeal of class certification denial because it affects a “substantial right” of a party. See e.g., McAllen Medical Center v. Cortez, 44 Tex.Sup.Ct.J. 1094 (2001). The latter two categories of cases appropriately fall under the *second* or “rights” prong of Curcio.

C. The Majority Rule Is That Denials of Class Certification are Interlocutory Orders and Are Unappealable in the Absence of a State Statute or Rule

In Millett v. Atlantic Richfield, 760 A.2d 250 (Me. 2000), the Maine Supreme Judicial Court undertook a comprehensive review of the treatment of class certification denial for purposes of interlocutory appeal. That court identified four categories of such treatment.

First, there are several jurisdictions with class action rules similar to Fed. R. Civ. P. 23 which follow the reasoning of Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) and hold that class certification denials are not an exception to the final judgment rule and are not immediately appealable. Millett, 760 A.2d at 254, fn. 4 (case citations omitted).

Second, other state courts hold that class certification orders are interlocutory, but immediately appealable pursuant to a statute or rule permitting these appeals as a matter of discretion or as of right. Id. fn. 5 (case citations omitted).

Third, certain jurisdictions hold orders denying class certification are final and appealable, such as California, id. (citing Daar v. Yellow Cab Co., 67 Cal.2d 695 (1967)),

or treat such orders as final when the trial court certifies them as final. Millet, 760 A.2d at 254 (*citing* Levine v. Empire Sav. & Loan Assoc., 192 Colo. 188, 189-190 (1976)).

Lastly, the Millett Court identified the Supreme Court of Alabama as standing alone in expressly rejecting the reasoning of Coopers & Lybrand v. Livesay, and holding that class certification orders are final decisions for appeal. Millett, *supra*, 760 A.2d at 255 (*citing* Butler v. Audio/Video Affiliates, Inc., 611 So.2d 330 (Ala. 1992)).

Based on its analysis, the Maine Supreme Judicial Court concluded, in Millett, that “the majority rule is that denials of class certification are interlocutory orders and are not immediately appealable in the absence of a state statute or rule either expressly authorizing appeals from class certification orders, or generally authorizing appeals from interlocutory orders.” Millett, 760 A.2d at 255. Plaintiffs here have offered this Court no evidence that the majority rule is otherwise.

D. Plaintiffs Misconstrue the Applicability of the “Death Knell” Doctrine

Relying upon California law which *preceded* the U.S. Supreme Court’s decision in Coopers & Lybrand, *supra*, and what appears to be the sole state in the nation to *expressly reject* the reasoning of Coopers & Lybrand, *supra*, and hold that class certification denial orders are immediately appealable - - Alabama - - Plaintiffs argue both that the denial of class certification sounds the “death knell” of litigation for the putative class and that the “death knell” rationale is particularly apt in wage and hour cases. Plaintiffs’ Brief, 16-17 (*citing* Butler v. Audio/Video Associates, Inc., 611 So.2d 330 (Ala. 1992) and Daar v. Yellow Cab Co., 67 Cal.2d. 695 (1967)). Because Plaintiffs erroneously view the “death knell” from the position of the *unnamed* plaintiffs, rather than from the standpoint of the *named* plaintiffs, and because class action litigation is often prosecuted by law firms with portfolios

of litigation and more than adequate resources to pursue such claims, Plaintiffs' contention that class denial is always fatal to small claimants rings hollow.

The "death knell" exception to the final judgment rule allows an appeal of an interlocutory order when that order acts as a "death knell" of the action. Millett v. Atlantic Richfield, supra, 760 A.2d at 253. It is a federal invention devised for the type of situation involved in this case: the denial of class certification. Id. (*citing* Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974)). Neither State v. Curcio, nor its progeny, however, discuss or analyze the death knell doctrine. While Plaintiffs invoke the doctrine to support a right of immediate appeal for the *unnamed* plaintiffs upon class denial, the death knell doctrine was only intended to apply when class denial ended the litigation for the *named* plaintiffs.

Plaintiffs here, like the plaintiffs in Millett v. Atlantic Richfield, supra, argue that the Court should view the death knell from the position of the unnamed plaintiffs. Plaintiffs' Brief, 7 ("...the risk that the [denial] order will constitute the death knell of the litigation, and the need to protect the rights of absent plaintiffs all point in one direction..."); see also Daar v. Yellow Cab, Co., 67 Cal.2d 695 (1967) (order denying class certification is tantamount to a dismissal of the action as to all members of the class other than the plaintiff.)

The U.S. Supreme Court, on the other hand, considers the death knell from the vantage point of the named plaintiffs "and sees the issue of whether the denial of class certification ends the entire case." Millett, 760 A.2d at 256 (*citing* Coopers & Lybrand v. Livesay, supra, 437 U.S. at 470-471). The Maine Supreme Judicial Court reasoned that:

It makes less sense to focus on the death of the unnamed plaintiffs' claims because the unnamed plaintiffs are not foreclosed from bringing their own action or from seeking to be added as a named plaintiff to the instant action. However, if the named plaintiffs are truly unable to proceed with the case because the certification is

denied, the action will have to be dismissed, either voluntarily or involuntarily, and, for them the case is dead.

Millett, 460 A.2d at 256. The Millett Court then declined to apply the death knell doctrine in that case, because there was no evidence in the record to indicate that the named plaintiffs were unable or unwilling to proceed with the action. Id.

Indeed, as other courts have recognized, many “class suits are prosecuted by law firms with portfolios of litigation, and these attorneys act as champions for the class even if the representative plaintiff would find it uneconomical to carry on the case.” Blair v. Equifax Check Services, Inc., 181 F.3d 832, 834 (7th Cir. 1999). Courts should be wary of entertaining appeals in “death knell” cases, “lest the mind hear a bell that is not tolling.” Id.

III. A Trial Court Order Denying Class Certification Lies Outside of Curcio’s “Rights” Prong, Because the Certification Decision is Within the Sound Discretion of the Trial Court

Plaintiffs argue that a trial court order denying class certification satisfies Curcio’s “rights” prong, because “when certification is denied, the plaintiffs lose a bundle of rights.” Plaintiffs’ Brief, 25. Plaintiffs also aver that a decision *denying* class certification leaves class plaintiffs in no different position than an order *de-certifying* a class because “both sets of plaintiffs have lost their rights to proceed as a class.” Id. Because this Court has long determined that the second prong of the Curcio test cannot be satisfied by a claimed right created by statute and subject to the discretion of the trial court, a trial court order denying class certification cannot satisfy the “rights” prong of Curcio.

A. The Right to Proceed As A Class Does Not Exist Independently of The Trial Court’s Certification Determination

Under the second prong of the Curcio test, “a party seeking to appeal must establish that the trial court’s order threatens the preservation of a right already secured and that the

right will be irretrievably lost and the party irreparably harmed unless an immediate appeal is permitted.” Hartford Accident & Indemnity Co. v. Ace American Reinsurance Company, *supra*, 279 Conn. at 231 (emphasis added). “An essential predicate to the applicability of this prong is the identification of jeopardy to [either] a statutory or constitutional right that the interlocutory appeal seeks to vindicate.” *Id.* at 231 (*quoting* Hartford Steam Boiler Inspection & Ins. Company v. Underwriters at Lloyds & Companies Collective, 271 Conn. 474, 497 (2004)). This right “cannot be a contingent right created by statute and subject to the discretion of the trial court”. Hartford Accident & Indemnity Co., 279 Conn. at 231 (*quoting* State v. Garcia, 233 Conn. 44, 66 (1995)). Rather, “the right must exist independently of the order from which the appeal is taken”. Hartford Accident & Indemnity Co., 279 Conn. at 231.

It is indisputable that “no party has a right to proceed via the class mechanism,” *see* Rivera v. Veterans Memorial Medical Center, *supra*, 262 Conn. at 743 (*quoting* Slaven v. BP America, Inc. 190 F.R.D. 649, 652 (C.D. Cal. 2000), and that the right to proceed as a class lies within the sound discretion of the trial court. Collins I, *supra*, 266 Conn. at 23. Thus, the denial of the class certification cannot possibly be construed to satisfy the second prong of Curcio because it is subject to the discretion of the trial court. Hartford Accident & Indemnity Co., *supra*, 279 Conn. at 231.

The conclusion that an order denying class certification is outside the ambit of the Curcio rights prong is distinguishable from the Court’s decision in Hartford Accident & Indemnity Co., *supra*. In Hartford, the Court found that plaintiffs satisfied the second prong of the Curcio test because they demonstrated that the statutory rights for pre-pleading security would have been irretrievably lost, thereby resulting in irreparable harm if they

were not permitted to immediately appeal the trial court's denial of their motion for such pre-pleading security. Hartford, supra, 279 Conn. at 232. The Court found that the only ability of the trial court to dispense with the requirement for security was contingent upon the availability of assets in the State sufficient to satisfy a judgment, and in this respect the defendant insurers did not contest the allegation that they lacked any assets in Connecticut. Id., at 233. Accordingly, the Court found that, to the extent that the plaintiffs were entitled to the benefit of pre-pleading security, the trial court was required to order the defendants before defending the action either to obtain proper authorization from the insurance commissioner to conduct business, or to provide security in an amount sufficient to satisfy a judgment against them. Id.

The Court held that "in this important respect, the present case is distinguishable from those cases in which we have concluded that a trial court's order failed the second prong of Curcio because a statute vests the trial court with discretion to determine *whether* to confer a right or status." Hartford Accident & Indemnity Co., supra, 279 Conn. at 234 (*citing* State v. Parker, supra, 194 Conn. at 658-59) (order denying defendant's motion to dismiss criminal charges predicated on his purported successful completion of accelerated rehabilitation failed second prong of Curcio because statute vested discretion in trial court to determine whether defendant successfully had completed rehabilitation program), and State v. Longo, supra, 192 Conn. at 92-93 (order denying youthful offender's status pursuant to General Statutes §54-76b did not constitute appealable final judgment because statute vested discretion in trial court to determine whether youthful offender's status should be granted).

Like the rights at issue in Parker and Longo, the trial court has absolute and broad discretion in determining whether a case should proceed as a class action. Collins I, supra, 266 Conn. at 23. Plaintiffs' argument that an order denying class certification lies within Curcio's second prong must fail.

B. Delaying Appellate Review of the Class Determination Will Not Prejudice Absent Class Members

Plaintiffs' argument that the claims of absent class members may be barred by the statute of limitations if resolution of the class issue is delayed until after the merits of the litigation, see Plaintiffs' Brief, 27, is a red herring. The putative class members' claims are not at risk upon the denial of the motion for certification. When an appellate court reverses a trial court's denial of class certification the status of the class members is determined by relation back to the initiation of the lawsuit. Gelman v. Westinghouse Electric Corporation, 556 F.2d 699 (3rd Cir. 1977).

In Gelman, the Third Circuit Court of Appeals considered a district court's denial of class certification in a securities fraud case and appellant's motions for an interlocutory appeal of the class denial under 28 U.S.C. § 1292(b). 556 F.2d at 700-01. The appellants urged that an interlocutory appeal of the class denial was critical, lest the class members be deprived of meaningful appellate review due to the operation of the applicable statute of limitations. Gelman, 556 F.2d at 701. Appellants argued that, under the rule of American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974), the district court's denial of class certification would start the statute of limitations running again. Id. By the time the court of appeals reviewed the propriety of that denial, "the statute would have run, thus barring the class members from taking advantage of any appellate ruling in favor of class certification." Id.

The Third Circuit quickly dismissed this argument. Relying on the Tenth Circuit's decision in Esplin v. Hirschi, 402 F.2d 94, 101 n. 12 (10th Cir. 1968) cert. denied, 394 U.S. 928 (1969), it found that:

When an appellate court reverses a district court denial of class certification the status of the class members is to be determined by relation back to the initiation of the suit.

Any other rule would result in denying class members any meaningful appellate review since, in most cases, such review will not be available until after the applicable limitations period has run.

556 F.2d at 701.

The decisions which bar the filing by absentees of successive class actions upon denial of class certification that Plaintiffs here rely upon, see Plaintiffs' Brief at 78 n.14, overlook Gelman. While Gelman has neither been adopted nor disfavored by the Second Circuit Court of Appeals, its rationale is the soundest treatment of the statute of limitations issue for putative class members. In order for Plaintiffs to convince this Court to allow interlocutory appeals of class certification denials based upon the potential operation of statutes of limitations to bar absent members' claims, the Court must ignore Gelman and Esplin v. Hirschi. There is no sound basis to do so.

C. The 'Preclusion Doctrine' Is Not Automatically Applied To State Class Actions As Plaintiffs' Suggest

Relying on the Seventh Circuit's decision in In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation, 333 F.3d 763 (7th Cir. 2003), Plaintiffs argue that without a right of immediate appeal of an order denying certification, absent *state* class members may be precluded in bringing a successive class action in a *state* court, even though these absent members would otherwise have had the right to bring the action. Plaintiffs' Brief,

29. This argument fails for numerous reasons: (1) In re Bridgestone concerns the preclusive effect of a judgment rendered by a federal court; (2) the case concerned multidistrict litigation in which class counsel had filed a master complaint and sought a single disposition of pre-trial matters, including certification; and (3) the Seventh Circuit later clarified its holding in In re Bridgestone and limited its applicability.

In In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation, the appeals court precluded the litigation of numerous state class actions where the federal appeals court had earlier reversed the district court's certification of a national class action in a massive nationwide products liability action. 333 F.3d at 767-68. Critical to the Seventh Circuit's decision to allow the issuance of an injunction precluding the successive state court suits was the fact that plaintiffs had filed a master complaint in the federal multidistrict litigation and sought a single disposition of pre-trial matters, and that certiorari had been sought and denied. Id.

Moreover, in Carnegie v. Household International, Inc., 376 F.3d 656 (7th Cir. 2004), the Seventh Circuit clarified that in In re Bridgestone/Firestone, it did not hold that "any ruling denying certification is binding in future litigation." Carnegie, 376 F.3d at 663 (emphasis in original). Rather, "[its] decision was more nuanced." Id. The binding effect of a class denial, for example, would depend on "whether the class members who would be affected were adequately protected by class representatives and class counsel." Id. Like the plaintiffs in Carnegie, Plaintiffs here read too much into In re Bridgestone/Firestone. Carnegie, 376 F.3d at 661.

Lastly, Plaintiffs cite no authority for the position that a state court denial of class certification acts to preclude a successive state class action by absent class members.

IV. Federal Law Provides for Interlocutory Appeal of Class Determinations in Rare Instances

Plaintiffs eagerly look to federal law to support their argument for interlocutory appeal of class certification determinations. They cite approvingly the adoption of Fed. R. Civ. P. 23 (f) in 1998. Plaintiffs' Brief, 18-19. Since that time, several federal courts of appeals have established criteria under which they will exercise discretion under Fed. R. Civ. P. 23 (f) and entertain an interlocutory appeal of a district court's class certification order. The law developed in these circuits indicates that such review is to be granted sparingly, rather than as a matter of course. See, e.g., In Re: Lorazepam & Clorazepate Antitrust Litigation, 289 F.3d 98, 102 (D.C. Cir. 2003).

It is well established that Fed. R. Civ. P. 23 is substantially similar to Practice Book Requirement §9-7 and 9-8, and that federal case law may be useful in aiding in the construction of these rules of practice. See Marr v. WMX Technologies, Inc., supra, 244 Conn. at 680. Fed. R. Civ. P. 23(f), added by amendment in 1998, provides that "[a] court of appeals may in its discretion permit an appeal from an order of a district granting or denying class action certification under this rule if application is made to it within ten days after enter of the order." Fed. R. Civ. P. 23(f). The advisory committee's note to Fed. R. Civ. P. 23 (f) states that "[a]ppeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals" and is "akin to the discretion exercised by the supreme court and acting on a petition for certiorari." Fed. R. Civ. P. 23(f) Advisory Committee Note. The Advisory Committee's Note also indicates that not all class certification issues warrant review, stating that "many suits or class action allegations present familiar and almost routine issues that are no more worthy of an immediate appeal than many other interlocutory rulings" and directed the "courts of appeal to develop

standards for granting review that reflect the changing areas of uncertainty in class litigation.” In Re: Lorazepam & Clorazepate Antitrust Litigation, *supra*, 289 F.3d at 102 (quoting Fed. Rule of Civil Procedure 23(f) Advisory Committee Note).

A. Federal Courts of Appeals Recognize The Value Underlying the Final Judgment Rule

In Blair v. Equifax Check Services, Inc., 181 F.3d 832 (7th Cir. 1999), the Seventh Circuit identified three categories of cases in which appellate review would be appropriate: (1) when the class determination sounded the “death knell” of the litigation because the plaintiffs’ claims were too small to maintain ongoing, expensive litigation; (2) when the grant of class status put substantial pressure on the defendant to settle independent of the merits of plaintiffs’ claims; and (3) when an appeal would facilitate the development of the law of class actions. Blair v. Equifax Check Services, Inc., *supra*, 181 F.3d at 834-35.

The First Circuit in Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000) agreed that Blair “captured the essential principles on which Rule 23 (f) rests.” *Id.* at 293. The First Circuit, however, narrowed the third category of cases to include only “those instances in which an appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case.” Waste Management Holdings, Inc. v. Mowbray, *supra*, 208 F.3d at 294.

The Eleventh Circuit in Prado-Steinman v. Bush, 221 F.3d 1266 (11th Cir. 2000), adopted five guideposts for Fed. R. Civ. P. 23 (f) review: (1) whether the certification ruling is likely to sound the death knell in the litigation; (2) whether the district court’s certification decision contains a substantial weakness, such that it was an abuse of discretion; (3) whether the appeal presents an unsettled legal question that is of specific and general

importance, e.g., if it involves issues likely to evade review, issues also appearing in related actions, or interests that affect the public interest; (4) the nature and status of the litigation before the trial court, e.g., the status of discovery, the pendency of relevant motions, and how long the matter has been pending; and (5) the likelihood that future events will make immediate appellate review more appropriate. Prado-Steinman, 221 F.3d at 1273-76.

The Fourth Circuit, in Lienhart v. Dryvit Systems, Inc., 255 F.3d 138 (4th Cir. 2001), generally adopted the Eleventh Circuit's approach, but stated that when the class certification decision is manifestly erroneous, interlocutory review is warranted regardless of the remaining factors. Lienhart, 255 F.3d at 145-46.

The Court of Appeals for the District of Columbia analyzed the existing law under Fed. R. Civ. P. 23 (f) in In Re: Lorazepam & Clorazepate Antitrust Litigation, 289 F.3d at 98 (D.C. Cir. 2002). Concluding that Fed. R. Civ. P. 23(f) review should be granted "rarely" when a case does not fall within one of the enumerated categories, the court found that review would ordinarily be appropriate in three circumstances: (1) when there is a death knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) when the certification decision involves an unsettled and fundamental issue of law, relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and (3) when the district court's class certification decision is manifestly erroneous. In Re: Lorazepam & Clorazepate Antitrust Litigation, 289 F.3d at 105.

The Second Circuit, in In Re: Sumitomo Copper Litigation v. Credit Lyonnais Rouse, LTD., 262 F.3d 134 (2nd Cir. 2001), ruled that petitioners seeking leave to appeal under

Fed.R.Civ.P. 23(f) must demonstrate either (1) that the certification order will effectively terminate the litigation, and there has been a substantial showing that the district's court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution. *Id.* at 139.

While Defendant Friendly's sees no reason for this Court to disturb its existing standards for granting interlocutory appeal under *State v. Curcio*, *supra*, it is plain that the disruptive and time consuming effects of interlocutory appeals suggests that any departure from the *Curcio* standards should be subject to the strict standards of review articulated by the courts of appeal in *Blair*, *Mowbray*, *Prado-Steinman*, *In Re: Lorazepam*, and *In Re: Sumitomo Copper Litigation*. Otherwise, the Court will be presented with "fruitless applications" [for review], see *Mowbray*, *supra*, 208 F.3d at 294, and will risk "the needless erosion of the final judgment rule and the policy values it ensures, including efficiency and deference." *In Re Sumitomo Copper Litigation*, *supra*, 262 F.3d at 140.

1. In Order To Justify Interlocutory Appellate Review Plaintiffs Must Demonstrate A 'Compelling Need' For Immediate Resolution of A Legal Issue, Not Simply Raise An Unsettled Issue of Law

Plaintiffs also argue that an immediate appeal from class certification denial is warranted because such an appeal may facilitate the development of the law. Plaintiffs' Brief, 22. Such a reason to allow interlocutory appeals has been endorsed in certain of the federal cases under Fed. R. Civ. P. 23(f), but with a much higher standard than Plaintiffs here suggest. See, e.g. *In Re: Sumitomo Copper Litigation v. Credit Lyonnais Rouse, LTD*, *supra*, 262 F.3d at 139 (petitioners seeking leave to appeal pursuant to 23(f) must demonstrate that the certification order implicates a legal question about which there is a

compelling need for immediate resolution); see also, Mowbray, 208 F.3d at 293; Blair, 181 F.3d at 835, and Prado-Steinman, 221 F.3d 1266.

In Prado-Steinman, the court recognized the “difficult precedent” of authorizing interlocutory review simply on the basis of “fundamental” or “unsettled” questions of law. Prado-Steinman, supra, 221 F.2d at 1274. “[G]iven the highly particularized nature of class action determinations, and the lack of case law applying Fed. R. Civ. P. 23 in many contexts, we imagine it relatively easy for a litigant to identify some question of law implicated by the class certification decision and in good faith characterize that question as novel or unsettled.” Id. In order to justify interlocutory review, there must be “a compelling need for resolution of the legal issue sooner rather than later.” Id.

This factor is simply not implicated here. Plaintiffs suggest only that a development-of-law exception applies here because much of the Court’s jurisprudence to date involves claims raised under the Connecticut Unfair Trade Practices Act. See Plaintiffs’ Brief, 23. That result is not an accident, but is by design. The Legislature has specifically authorized interlocutory appeals of class determinations under CUTPA. See Conn. Gen. Stat. § 42-110h. Plaintiffs offer no compelling need to invoke the Court’s discretion in order to review the legal issues raised in this case. Prado-Steinman, supra, 221 F.3d at 1274.

To further support their argument for interlocutory review of the class denial order, Plaintiffs also suggest that Connecticut trial courts “have had an exaggerated response” to the predominance analysis of the two Collins decisions. Plaintiffs’ Brief, 23. Citing the several other minimum wage class actions in which trial courts have denied class certification, see Plaintiffs’ Brief, 23-24, Plaintiffs aver that these involve “questionable applications” of the Collins II decision. Id. These conclusory allegations, however, are

entirely insufficient to require immediate review. See In Re: Sumitomo Copper Litigation v. Credit Lyonnais Rouse, LTD., *supra*, 262 F.3d at 139 (requiring a substantial showing that the district's court's decision is questionable); see also In Re: Lorazepam & Clorazepate Antitrust Litigation, *supra*, 289 F.3d at 105 (allowing review when the district court's decision is manifestly erroneous).

CONCLUSION

The Court's prior decisions, and sound reasons of public policy, overwhelmingly support the affirmation of the final judgment rule and the rejection of a right to immediate appeal of trial court orders denying class certification. The Court's concern over piecemeal litigation and the potential for costly and unnecessary interruption and delay in trial court proceedings greatly outweigh any claimed benefits of such an automatic right of interlocutory appeal.

An appeal from an order denying class certification cannot satisfy the first prong of State v. Curcio, which allows an interlocutory appeal from a trial court order that "terminates a separate and distinct proceeding." Because the issue of whether or not a plaintiff's claims will proceed as a class action has a direct impact on the number of claims to be adjudicated by the court; the identity of the parties; the level of proof required; and the potential defenses of class members, the issues of class certification necessarily become enmeshed in the merits of the litigation.

Similarly, Plaintiffs cannot demonstrate that a class certification denial falls within the "rights" prong of State v. Curcio. There is no right to class action status. Because the right to proceed as a class is wholly discretionary, the trial court's denial of that right does not threaten a pre-existing right of which Plaintiffs were deprived.

Were the Court to depart from the standards articulated in State v. Curcio and permit interlocutory appeal of class certification denial, it should establish criteria for acceptance of such interlocutory appeals no less stringent than articulated by the various Courts of Appeals. Only in the rarest of circumstances should an interlocutory appeal of a class certification denial be allowed.

Respectfully submitted,
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