NO. 374A14-1 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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KAYE W. FISHER, DAN LEWIS, GEORGE ABBOTT, ROBERT C. BOYETTE, KYLE A. COX, C. MONROE ENZOR, JR., Executor of the Estate of Crawford Monroe Enzor, Sr., ARCHIE HILL, KENDALL HILL,WHITNEY E. KING, CRAY MILLIGAN, RICHARD RENEGAR, LINWOOD SCOTT, JR., ORVILLE WIGGINS, ALFORD JAMES WORLEY, Executor of the Estate of Dennis Anderson, CHANDLER WORLEY, HAROLD WRIGHT, and OTHERS SIMILARLY SITUATED, Plaintiffs-Appellees,	)	From Wake County
v.	)	
FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORPORATION, Defendant-Appellant.	)	

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MOTION BY THE NORTH CAROLINA CHAMBER FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The North Carolina Chamber ("Chamber") respectfully moves this Honorable Court for leave to file the attached brief *amicus curiae* in support of

Defendant-Appellant Flue-Cured Tobacco Cooperative Stabilization Corporation (now known as the United States Tobacco Cooperative, Inc.) (the "Cooperative"). Pursuant to North Carolina Rule of Appellate Procedure 28(i), the Chamber sets forth below the nature of its interests, the issues of law to be addressed in its brief, its positions on those issues, and the reasons why the Chamber believes that an *amicus curiae* brief is desirable.

NATURE OF THE CHAMBER'S INTEREST

The Chamber is a nonprofit, nonpartisan business advocacy organization dedicated to improving the lives of all North Carolinians. To achieve this mission, the Chamber serves as the public voice of thousands of North Carolina businesses that seek to foster economic development, build an educated and competitive workforce, and create a business climate that will enable our state to continue to attract and retain good jobs for its citizens. Formerly known as NCCBI (North Carolina Citizens for Business and Industry), the Chamber has also served as North Carolina's official state representative to the U.S. Chamber of Commerce for more than 30 years. With a strong interest in creating a healthy business climate that will benefit all North Carolina citizens, the Chamber is especially interested in the law governing the conduct of business within the state.

REASONS WHY THE CHAMBER SHOULD BE HEARD

Amicus participation by the Chamber will permit this Court to hear the voice of thousands of North Carolina businesses in determining the appealability of interlocutory appeals from orders certifying class actions and the limits of Rule 23 of the North Carolina Rules of Civil Procedure. The Chamber submits that it can provide a broad perspective on the legal issues, including legal and economic policy dimensions that will not be addressed by other parties. This perspective would aid the Court in understanding these important legal questions.

ISSUES OF LAW TO BE ADDRESSED & CHAMBER'S POSITION

I. The Importance of Permitting Appeals from Orders Granting Class Certification

The first issue the Chamber intends to address is whether the Court should permit appeals from orders *granting* class certification. This issue holds particular significance for businesses within North Carolina because the question of class certification can effectively determine the outcome of the case. The Cooperative contends that the trial court erred in certifying a massive class containing members with antagonistic interests, violated other requirements to maintain a class action, and disregarded statutory requirements applicable to derivative actions. By the attached brief, the Chamber explains *why* the Court should address these issues.

The Chamber's brief sets out why the Court should review orders granting class certification notwithstanding that they are interlocutory orders. First, without

interlocutory review, the improper certification of a large class action can force a company to settle even if it is nearly certain it would ultimately prevail on appeal. An order improperly certifying a class does far more than subject a defendant to unwarranted legal expenses. If a company cannot appeal until after a final judgment, a decision to proceed carries with it the risk of a massive damages award. Indeed, a company may never have the opportunity to find out if it would win an appeal—the requirement to recognize the judgment as a liability for accounting purposes could force it into bankruptcy. Recognizing the judgment as a liability could also create a default under loan covenants essential to the company's capital flow. Likewise, posting a bond large enough to stay the judgment pending appeal—often 150% of the judgment—creates an extraordinary expense.

These pressures force many defendants to settle cases if certification is granted—even when the evidence militates against the decision to settle. Legal policy should be crafted to assure, as far as practicable, that cases will be decided on their merits—not because a defendant cannot withstand the overall risks of trying a class action that should never have been certified in the first instance.

Second, the Court should recognize that interlocutory appeals in class actions provide useful guidance to trial courts. Indeed, without interlocutory appeals, North Carolina would have little if any precedent on class actions, given that every major class action decision since the adoption of Rule 23 has been

rendered in the context of an interlocutory appeal. The current development of precedent, however, is skewed. Interlocutory appeals are unlimited when it comes to orders *denying* class certification. For orders *granting* class actions, such as the one issued in the present case, the Court has only rarely recognized that they affect a substantial right, although it has granted certiorari with more frequency. The disparity in appealability means that the appellate courts will continue to see more decisions that interpret Rule 23 too narrowly, while decisions that improperly expand class certification often escape appellate review, resulting in the development of more precedents that favor certification. This unbalanced approach also creates a perverse incentive for trial courts—judges who err in favor of certification are far less likely to suffer reversal, while judges who deny certification will see their rulings immediately appealed.

Finally, allowing the case to proceed without a review of the class certification ruling defeats judicial efficiency, a central feature of class action design. In this case, the litigation has already lasted nine years. If the Court does not accept review and the Cooperative litigates the case to a final judgment, years more work may be wasted—all to be able to appeal a decision that the Court could review today. In short, allowing plaintiffs to proceed as a class when they cannot satisfy the legal requirements of Rule 23 does not conserve judicial resources; it wastes them.

II. The Need for Clarity and Rigor in Analyzing Whether a Proposed Class Complies with Rule 23

The Chamber would also like to draw the Court's attention to the importance of insisting that trial courts take particular care in analyzing whether a putative class action complies with the requirements of Rule 23 of the North Carolina Rules of Civil Procedure. Class actions are among the most powerful tools available to a court. If misused, they are also among the greatest litigation threats faced by North Carolina businesses. Rarely, if ever, has a trial court certified a class like this one. It consists of hundreds of thousands of members, a small proportion of whom—the named plaintiffs—seek to assert claims regarding tobacco sales that began when Lyndon Johnson was president. If this Court affirms the trial court's order, there will be no limit to the kind of claims that creative attorneys will attempt to pursue.

In certifying a class, the trial court effectively determines that an individual or small group can adjudicate the rights of a theoretically unlimited number of other people, most of whom will not even be aware that their case is before the court. Careful analysis should be required in all class actions, but it is especially important in cases that raise questions about the ability of the representative plaintiffs to represent absent class members and the identity of class members. These questions go to the heart of Rule 23, which requires a trial court to determine whether the class representatives can "fairly insure the adequate representation of all." In cases such as this one, the size of the class intensifies the

need to answer these questions properly. If a trial court improperly certifies a class with hundreds of thousands of members, as happened here, the burdens become enormous, and a trial court must not impose them unless it is fully confident that the proposed class complies with requirements of Rule 23.

In this case, the trial court erred in determining that the proposed class could be certified under North Carolina law. As the Cooperative explains in its brief, the various members of the class have interests that cannot be fairly and adequately represented by plaintiffs. The trial court also failed to consider how the class claims will necessarily raise individualized issues that cannot be decided on a class-wide basis, and it erred in determining that the plaintiffs met the commonality and superiority requirements of Rule 23.

The Chamber's brief addresses two related issues that it believes will assist the Court in resolving these important questions. First, the Chamber explains how the plaintiffs' theory of the case conflicts with class treatment. Throughout their complaint, plaintiffs allege that a group of Cooperative members are attempting to enrich themselves at the expense of other current and former members of the Cooperative. Plaintiffs refer to this group as the "last men standing." What the trial court failed to consider is that it could not certify a class containing both the "last men standing" and their alleged victims. This Court has held that all of the members of a class must have the same interests, and that due process requires fair

representation of all members to protect those interests. As the Chamber's brief explains, the class certified by the trial court fails to comply with this critical requirement.

Second, the Chamber addresses an issue of critical importance to North Carolina businesses: the requirement of an identifiable class. The court must be able to determine the members of the class without an individualized inquiry into the facts of each case. To do otherwise would defeat the entire purpose of a class action, which is the efficient adjudication of common issues in a single proceeding. Yet the trial court violated this requirement when it certified a class of "all individuals, proprietorships, partnerships, corporations, or their heirs, representatives, executors or assigns" who have been members/shareholders of the Cooperative from 1946 through 2004. It is difficult to imagine how any trial court could even consider attempting to adjudicate claims involving nearly six decades. But what is even more confounding, and fatal to class treatment, is that the members of this class are not just unknown—they are unknowable. Determining who currently holds the right to profits from tobacco sold to the Cooperative many decades would be an extraordinary undertaking for just a single member. For 800,000, it would be nearly impossible. This is the reason that the law requires an identifiable class—to avoid exactly the kind of sprawling, unmanageable litigation that would result from allowing the trial court's order in this case to stand.

WHEREFORE, the Chamber respectfully moves this Honorable Court to grant this motion for leave to file a brief *amicus curiae*.

This the 14th day of November, 2014.

ROBINSON, BRADSHAW & HINSON, P.A.

Electronically Submitted

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF** was electronically filed with the North Carolina Supreme Court today and has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

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NO. 374A14-1 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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KAYE W. FISHER, DAN LEWIS, GEORGE ABBOTT, ROBERT C. BOYETTE, KYLE A. COX, C. MONROE ENZOR, JR., Executor of the Estate of Crawford Monroe Enzor, Sr., ARCHIE HILL, KENDALL HILL,WHITNEY E. KING, CRAY MILLIGAN, RICHARD RENEGAR, LINWOOD SCOTT, JR., ORVILLE WIGGINS, ALFORD JAMES WORLEY, Executor of the Estate of Dennis Anderson, CHANDLER WORLEY, HAROLD WRIGHT, and OTHERS SIMILARLY SITUATED, Plaintiffs-Appellees,	)	From Wake County
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BRIEF *AMICUS CURIAE* ON BEHALF OF THE NORTH CAROLINA CHAMBER

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE NORTH CAROLINA CHAMBER

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ISSUES PRESENTED

SHOULD THE COURT EXERCISE JURISDICTION AND REVERSE THE TRIAL COURT'S ORDER CERTIFYING THE CLASS?

STATEMENT OF THE CASE AND THE FACTS

The North Carolina Chamber (the "Chamber") adopts the statement of the case and the facts set forth in the brief of Defendant-Appellant Flue-Cured Tobacco Cooperative Stabilization Corporation (now known as the United States Tobacco Cooperative, Inc.) (the "Cooperative").

ARGUMENT

The North Carolina Chamber asks the Court to consider how a decision to affirm the trial court's certification order would impact North Carolina businesses. It is difficult to conceive of a trial court certifying a class as unwieldy, as riddled with conflict, and as far beyond the boundaries of Rule 23 as this one. If this Court approves it, there will be no limit to the types of claims that enterprising attorneys might seek to pursue against North Carolina businesses.

This case raises two issues holding particular significance for the businesses represented by the Chamber. First, this appeal—including its extraordinary path to this Court—demonstrates the necessity of interlocutory review of orders granting class certification. Under current law, as primarily developed by the Court of Appeals, plaintiffs can immediately appeal orders *denying* class certification. When it comes to orders *granting* class certification, by contrast, defendants must

generally await final judgment before they can appeal. This imbalanced approach must be corrected. Interlocutory review will help ensure that cases will be decided on their merits—not because an order certifying a class forced a defendant to settle. Recognizing that an order granting class certification can affect substantial rights will also advance the development of North Carolina law on class actions and promote judicial efficiency.

Second, this case demonstrates the need for this Court to ensure that trial courts apply the requirements of Rule 23 with clarity and rigor. The putative class encompasses nearly six decades and hundreds of thousands of individuals, living and dead. The trial court erred in concluding that these individuals could satisfy the Rule 23 requirement for multiple reasons. Most notably, it failed to recognize that a class cannot be certified when its members have conflicting interests. The facts of this case may be complicated, but it is clear that the class includes both current and former tobacco farmers. The interests of these two groups are irreconcilably opposed. Current members depend on the Cooperative for their livelihoods, while former members are interested only in a share of the Cooperative's reserves, to the extent they have any interest at all. Although the trial court acknowledged this conflict in its order, it failed to recognize its consequences for class certification. The Court should correct these errors, and it should give trial courts the guidance they need to avoid similar errors in future cases.

I. THE COURT SHOULD PERMIT INTERLOCUTORY REVIEW OF ORDERS GRANTING CLASS CERTIFICATION.

This Court has cautioned that "the usefulness of the class action device must be balanced … against inefficiency or other drawbacks." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 284, 354 S.E.2d 459, 466 (1987). Used properly, class actions can "serve useful purposes such as preventing a multiplicity of suits or inconsistent results." *Id.* If not handled properly, however, a class action can be transformed from a useful and efficient tool into a mechanism for unfair leverage and abuse. When a trial court improperly certifies a class, as happened in this case, appellate courts must correct the error. But at what stage of the proceedings should this review occur?

The Chamber submits that this case demonstrates the need for interlocutory review of orders granting class certification. The trial court's certification order may be interlocutory, but it involves more litigants (800,000), more judicial and party resources (nine years of litigation and counting), and more at stake (hundreds of millions of dollars and a serious threat to the Cooperative itself) than most if not all of final appeals heard by the Court. And while this order presents an extreme example, many class certification decisions involve high stakes. An order certifying a significant class will often force a defendant to settle, even when the defendant firmly believes it will prevail on the merits or that the order would

ultimately be reversed on appeal.[1] A defendant forced to settle under these circumstances has lost the right to have its case decided on the merits. The protection of this right warrants interlocutory review. Moreover, permitting interlocutory review of orders granting class certification in appropriate cases will provide essential guidance to the trial courts and conserve judicial resources.

A. Certification of a large class action can prejudice a defendant's substantial rights unless promptly reviewed.

Section 1-277 of the North Carolina General Statutes governs interlocutory appeals of class certification orders. "An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, … which affects a *substantial right* claimed in any action or proceeding…." N.C. Gen. Stat. § 1-277 (emphasis added). The prevention of avoidable injury is the principle at the center of the case law on substantial rights. *See, e.g.*, *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 634, 652 S.E.2d 231, 233-34 (2007) (holding that "an interlocutory order may be reviewed if it will injuriously affect a substantial right unless corrected before entry of a final judgment").

Central to our adversary system is the right to a full defense on the merits of each case. But in cases like this—where the class encompasses hundreds of

[1] This case illustrates vividly the settlement pressures imposed by certification of a large class, but the Chamber's argument does not indicate the Cooperative's position on that issue.

thousands of class members covering a period beginning just after World War II—certification can effectively determine the outcome:

> Just as a denial of class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.

Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999). All cases involve pressures to settle; many interlocutory orders can affect this decision. Here, however—in a situation unique to decisions certifying a class action of massive size and scope—a defendant's decision to settle may be completely divorced from the actual merits of the claim against it.

"To effectively allow certification to deprive a party of a defense cannot be what the adversary process is about." *Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 281 (4th Cir. 2010) (Wilkinson, J., concurring). Yet this is precisely what can occur if a party is forced to defend a major class action that has been improperly certified, even when the defendant is certain it could eventually prevail. *See Regents of Univ. of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) ("[C]lass certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits."); *In re*

Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015-16 (7th Cir. 2002) (granting interlocutory review because, in some cases, certification "makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims").

In large class actions, the promise of appellate review following final judgment is often illusory. The certification decision—not a trial on the merits—often decides the case. *See Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 657 (2d Cir. 1974) (noting that "the sheer size and complexity of the action … may force the defendant, despite the doubtful merit of the claims, to settle rather than to pursue the long and costly litigation route required for review of the class action certification"); *Blue Chip Stamps v. Superior Court*, 556 P.2d 755, 759 n.4 (Cal. 1976) ("[A]ppeal from a final judgment is not a practical remedy."); Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D. 195, 211 (1986) ("If class certification is erroneously granted, a defendant faces potentially ruinous liability and may be forced to settle a case rather than run the economic risk of trial in order to secure review of the certification ruling.").

Without interlocutory review, Defendants who do not settle must proceed to trial if they wish to appeal an improper certification order. This approach holds serious economic consequences. If defendants proceed to trial and win, they will

still have incurred massive legal costs. Although courts have noted that avoiding the expense of trial may not be a substantial right, a defendant who prevails at trial against an improperly certified class will have incurred expenses orders of magnitude higher than in a case tried individually. Even if defendants do not have a substantial right to avoid legal fees in an ordinary case, the calculus is so different in a case with thousands of class members that it requires a different approach to the substantial rights analysis. This need is especially pressing when, as in this case, the proper application of Rule 23 would prevent those individuals from proceeding as a class in the first place.

The consequences of improper certification are even more severe if the plaintiff prevails at trial. Almost by definition, a class verdict against a company will be significant. Recognizing such a liability on a company's financial statements may result in insolvency, forcing the company into bankruptcy. Entry of a class-wide judgment may also put a company in breach of credit agreements with lenders, triggering demands for immediate repayment of outstanding amounts. Even a defendant who can weather the immediate financial blow will be harmed—to stay a large judgment pending appeal, the defendant would need to deposit an even larger amount of money to secure an appeal bond. The theoretical availability of post-judgment relief provides no comfort for defendants who cannot risk recognition of an adverse judgment or post a bond sufficient to pursue an appeal.

For these reasons, courts across the country have recognized the need for interlocutory appeals from decisions granting class certification. *See, e.g.*, *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 217 (Md. 2000) (holding that the denial of appellate review would require the parties to "incur significant costs and delays," and that if "such expenses have been endured on account of a judgment by the Circuit Court that suffers from underlying legal error or an abuse of discretion, they would be losses as monumental in their unfairness as in their sheer amount"); *Carr v. GAF, Inc.*, 702 So. 2d 1384, 1385 (La. 1997) ("Louisiana courts have repeatedly held that an interlocutory ruling certifying a large class of plaintiffs may, in some cases, create irreparable harm to the defendants and thus justify appellate review."). Other states provide for interlocutory appeal by rule or statute, having previously recognized the need for review by judicial decision.[2]

Although the procedure varies, they all share one thing in common—they recognize the need to permit interlocutory review from decisions denying *or* granting class certification. Following extensive research, amicus counsel has been

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[2] North Carolina courts have previously recognized that decisions from other jurisdictions can properly inform our approach to class actions. *See, e.g.*, *Nobles v. First Carolina Communications, Inc.*, 108 N.C. App. 127, 133, 423 S.E.2d 312, 316 (1992) (holding that certification orders require findings of fact "in accord with the law of other states" despite the lack of a requirement in Rule 23); *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 269, 664 S.E.2d 569, 578 (2008) (adopting a federal requirement that judges review voluntary dismissals of class actions to avoid the "unacceptable risk that parties may abuse the class-action mechanism in myriad ways").

unable to find any jurisdiction that permits appeals from orders denying certification without also allowing for appeals from orders granting class certification. North Carolina took the first step towards a more balanced approach in *Dunn v. State*, where the Court of Appeals first recognized that an order granting class certification can affect a substantial right. 179 N.C. App. 753, 757, 635 S.E.2d 604, 606 (2006). Although *Dunn* addressed issues of immunity, a separate basis for interlocutory review, the Court of Appeals agreed that the financial impact of the class certification decision was a factor in finding that a substantial right was affected. *See id.* at 757, 635 S.E.2d at 606 (acknowledging that "the potential injury to Defendants of their inability to avoid a budget exigency" affects a substantial right). The same is true here. This Court should recognize that an order certifying a class of such massive size and scope as the one presented here affects a substantial right.

B. The Court should grant interlocutory review to clarify the legal issues in this case and promote the proper development of the law.

This case presents issues central to the conduct of class actions in North Carolina, including the conflict among class members discussed below. The Court should grant interlocutory review to provide proper guidance to other trial courts and the Court of Appeals on these issues. Consistent with its role as the state's highest judicial authority, this Court should take the opportunity to address questions such as conflicts among class members so that the mistakes made here

are not repeated. *See State v. Lawrence*, 365 N.C. 506, 511, 723 S.E.2d 326, 330 (2012) ("It is the institutional role of this Court to provide guidance and clarification when the law is unclear or applied inconsistently.").

Permitting interlocutory review of orders granting class certification in appropriate cases will also yield benefits beyond clarification of the issues raised here. As the Seventh Circuit has explained, interlocutory appeals of class action decisions facilitate the development of the law: "Because a large proportion of class actions settles or is resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed." *Blair v. Equifax Check Servs.*, Inc., 181 F.3d 832, 835 (7th Cir. 1999).

The truth of this proposition is evident in the North Carolina decisions. This Court first laid out the class action requirements under North Carolina Rule 23 in *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 354 S.E.2d 459 (1987). In the past 27 years, our appellate courts have cited *Crow* in sixteen decisions reviewing orders granting or denying class certification. Only two came on appeal from final judgment—and in both cases, the court had already taken an earlier interlocutory appeal.[3] Indeed, going back to the adoption of Rule 23 in 1967, it appears that this

[3] *Blitz v. Agean, Inc.*, 743 S.E.2d 247 (N.C. Ct. App. 2013), involved an appeal from final judgment following the Court's lengthy review of the initial class certification decision in *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 677 S.E.2d 1 (2009). *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N. Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997), was an appeal from final judgment, but only

Court has never decided a post-judgment appeal of an order certifying a class action against a private party.[4] If this Court recognizes that orders granting class actions can be appealed before final judgment in appropriate cases, it will put North Carolina on the path toward resolving the unsettled questions of class action law now prevailing in our state.

Allowing interlocutory appeals from orders granting class certification will also help ensure that the law develops in a balanced fashion. Under current law, orders denying class certification have proved easier to appeal than orders granting class certification. *See Frost v. Mazda Motor of America, Inc.*, 353 N.C. 188, 193, 540 S.E.2d 324, 327 (2000) (holding that "*denial* of class certification has been held to affect a substantial right because it determines the action as to the unnamed plaintiffs," but that "no order allowing class certification has been held to similarly affect a substantial right such that interlocutory appeal would be permitted").[5] As a

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after an interlocutory appeal of the trial court's initial class certification ruling some four years earlier. 108 N.C. App. 357, 376, 424 S.E.2d 420, 430 (1993).

[4] *Faulkenbury*, *supra*, is the only case where this Court reviewed an order granting class certification after final judgment. There, the defendant was the State of North Carolina, a party to whom the financial constraints discussed above do not apply.

[5] This statement does not necessarily follow. An order denying class certification means that unnamed plaintiffs are not members of the class, but it does not determine the validity of their individual claims. For example, the 800 unnamed plaintiffs in *Beroth Oil Co. v. N. Carolina Dep't of Transp.*, 757 S.E.2d 466, 471 (N.C. 2014), did not lose their takings claims when class certification was denied. And if unnamed class members have a substantial right to insist on participation in

result, orders where the trial court erred in favor of class certification are less likely to be corrected. If this persists over time, appellate courts will decide more cases involving the denial of certification, and the law could shift towards a more relaxed view of Rule 23.

Favoring appeals of orders denying class certification also leads to unfair results in individual cases. For example, the Court of Appeals has held that "findings of fact are required by the trial court when rendering a judgment *granting or denying* class certification." *Nobles v. First Carolina Communications, Inc.*, 108 N.C. App. 127, 133, 423 S.E.2d 312, 316 (1992) (emphasis added). If the trial court fails to make findings of fact in an order *denying* class certification, the plaintiff can take an interlocutory appeal to fix the error. But if the trial court fails to make proper findings of fact in an order *granting* class certification, the defendant might have to litigate the case to final judgment and then appeal, only to have the appellate court reverse order for entry of proper findings. Why should it be more difficult for a defendant to rectify the same error?

Finally, an imbalanced approach risks influencing outcomes. Trial judges have little to fear if they err in favor of certification. If they deny certification, by contrast, their decisions will be subject to immediate appeal and potential reversal. To avoid scrutiny of a certification order and reversal on appeal, a trial judge may

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a class, defendants should have a corresponding right to insist that such participation is limited to classes that actually comply with Rule 23.

be motivated to resolve motions in favor of certification, safe in the knowledge that any order certifying a class will be difficult to appeal—and, for the reasons discussed above, is unlikely ever to be reviewed. Thus, an imbalanced approach creates an improper incentive for trial judges to certify classes. Erroneous class certification decisions must be corrected in the same fashion, regardless of which party suffers from the error.

C. Interlocutory review of orders granting class certification promotes efficient use of judicial resources.

North Carolina imposes limits on interlocutory appeals out of concern for judicial efficiency. As the Court explained in *Veazey v. Durham*,

> Back of every legal principle lies the reason that gave it birth. Hence, a rule of law can be best interpreted and applied if due heed is paid to the reason which called it into being…. The rules regulating appeals … are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer "right and justice…without sale, denial, or delay."

231 N.C. 357, 362, 57 S.E. 2d 377, 381 (1950) (quoting N.C. Const. Art. I, § 35). Restricting interlocutory appeals from orders granting class certification disserves the goal of judicial efficiency and prompt resolution of cases. The order at issue in this appeal is the most significant ruling in many years of litigation. If not corrected, the trial court and the parties will devote more years to litigation based

on the erroneous premise that this case can proceed as a class.[6] Accordingly, as many courts have recognized, permitting interlocutory review in this situation promotes judicial efficiency. *See, e.g.*, *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 718, 752 A.2d 200, 216 (2000) ("The legal propriety of certifying a class action in the present case, whose logistical magnitude alone is staggering and which concomitantly may significantly impact or divert the public resources earmarked for the judiciary for the next several years, calls for this Court's earlier than usual attention."); *Hampton v. Illinois Central RR Co.*, 730 So.2d 1091, 1093 (La. Ct. App. 1999) (""[I]f, at a later time, after trial on the merits and review, it is determined that the trial judge erred in permitting the matter to be tried as a class action, immeasurable expense and innumerable wasted court days will have resulted.").

Allowing plaintiffs' class to proceed unreviewed would frustrate the judicial efficiency that class actions were designed to promote. The purpose of a class action is to adjudicate common issues in a single proceeding. But when the claims lack the connection required by Rule 23, there is no efficiency to be gained. Although Rule 23 will ultimately prevent plaintiffs from proceeding as a class,

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[6] This litigation will likely prove especially complicated and expensive given the enormous size of the class. *See Morris v. Burchard*, 51 F.R.D. 530, 535 (S.D.N.Y. 1971) ("It cannot be lightly overlooked that as a class gets larger it may transform a litigation into a gigantic burden on the Court's resources beyond its capacity to manage or effectively control.").

absent an interlocutory appeal, their claims would need to be tried together, appealed, decertified, and then tried separately as to any plaintiffs who wish to proceed individually. This defines inefficiency.

Equally important, a decision to postpone review offers no benefit. An appeal in future years will require the Court to address the same flaws in the class certification order that are manifest today. These errors will not be resolved by further proceedings in the trial court, nor will the Court's analysis benefit from additional factual development. *See Regents of Univ. of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379-80 (5th Cir. 2007) (granting review and noting that the "broad legal issues" presented in the interlocutory appeal were "not especially contingent on particular facts likely to be further developed in the district court"). Delay will not clarify the facts or legal issues for a later appeal, and the parties and the trial court will have wasted significant resources if the Court ultimately determines that the class should never have been certified. In summary, there is no reason to wait, and much to be gained, by reviewing the decision now.[7]

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[7] For this reason, if the Court does not determine that the appeal affects the Cooperative's substantial rights, the Court should grant its conditional petition for certiorari. *See Frost*, 353 N.C. at 195, 540 S.E.2d at 329 (granting certiorari "because this question is important to all class actions"); *Stetser v. Tap Pharmaceutical Products, Inc.*, 165 N.C. App. 1, 12, 598 S.E.2d 570, 578 (2004) (granting certiorari because the court "recognize[d] the significance of the issues in dispute," which "affect[ed] numerous individuals and corporations and "involve[d] a substantial amount of potential liability"); *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 108 N.C. App. 357, 375, 424 S.E.2d 420, 429 (1993)

II. THE COURT SHOULD REVERSE THE TRIAL COURT'S ORDER CERTIFYING THE CLASS.

A. The trial court erred in certifying a class that includes both the victims and the perpetrators of the alleged wrongdoing.

One of the central themes of plaintiffs' complaint is that a select group of Cooperative members are trying to enrich themselves at the expense of the rest. For example, the Complaint alleges that the Cooperative developed a program to "eliminate the vast majority of member/shareholders leaving hundreds of millions of dollars under the control and for the benefit of the 'last men standing,' all to the detriment, harm, injury, loss, and against the wished of Plaintiffs and other member/shareholders." (R p 124; *see also* R p 123 (alleging that the Cooperative "is attempting to create a 'last man standing' scenario in which a few hundred remaining member/shareholders potentially have the benefit of hundreds of millions of dollars in assets which have been created through the efforts of all member/shareholders"); R p 129 (alleging that the Cooperative had the "goal of creating a 'last man standing' or to bestow huge benefits upon its limited number of existing members to the detriment of Plaintiffs")). These alleged "last men standing" are the primary villains of the Complaint. They are also, as alleged in the

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("Taking into consideration the importance of this case and the fact that we permitted the appeals on the other issues, we have decided to exercise our discretion and grant certiorari to address this appeal on its merits.").

Complaint, members of the Cooperative—a "limited number of farmers who would directly benefit from a 'last man standing.'" (R p 141).

The trial court directly acknowledged this issue in the class certification order. As the order states, Plaintiffs allege "a scheme designed to disenfranchise a large number of members/shareholders in an effort to increase the interests of a select group of surviving members/ shareholders in Defendant's accumulated assets." (R p 272). What the court failed to recognize was that this theory cannot be reconciled with the class it proceeded to certify—a class that includes the "last men standing," the alleged perpetrators of the purported scheme to enrich themselves at the expense of the other members of the class.

There is no way that a class representative seeking to maximize his recovery from the Cooperative can represent fairly the members of the class who continue to farm tobacco and rely on the Cooperative to help them sell their crop. As the Court held in *Crow*, a class action requires that "the named and unnamed members *each* have an interest in either the same issue of law or of fact." 319 N.C. at 280, 354 S.E.2d at 464 (emphasis added). The requirement that the named representatives "establish that they will fairly and adequately represent the interests of all members of the class" is a requirement of due process specifically imposed by Rule 23. *Id.* at 282, 354 S.E.2d at 465.

Plaintiffs' failure to meet their burden on this issue means that they cannot proceed as class. *Id; see also Peverall v. Cnty. of Alamance*, 184 N.C. App. 88, 95, 645 S.E.2d 416, 421 (2007) ("As an adequate representative of the potential class, a plaintiff also must establish that he has no conflict of interest with any member of the class who is not a named party…."). Indeed, the conflict between current and former farmers is not the only fundamental conflict among class members. As noted in the Cooperative's brief, one of the named plaintiffs is a Director of the Cooperative and has voted for the decisions challenged in the complaint. There is also a conflict between class members based on the years that they sold tobacco to the Cooperative, and a group of class members in a separate federal court action has expressly stated that the plaintiffs in this case cannot adequately represent them.

These conflicts among class members prevent plaintiffs from adequately representing the interests of all class members. In the face of these conflicts, the trial court proceeded to certify the class. This ruling abused the trial court's discretion. This Court should reverse. More important, from the Chamber's perspective, the error demonstrates the need for this Court to provide clear guidance to this State's lower courts regarding the impermissibility of conflicts among class members.

B. The Court should make clear that class actions cannot proceed without an identifiable class.

The Cooperative has argued that the class certified by the trial court violates Rule 23 because it does not provide adequate representation for absent class members. This is certainly correct, especially given the conflicts discussed above. The Cooperative has also pointed out the impossibility of managing a class that covers some 800,000 individuals who were members of the Cooperative over a period of many decades. This feature of the class creates a manageability problem and undermines the trial court's determination that a class action is the superior method of adjudication. But the fact that the class covers unknown numbers of heirs and assigns of class members that may never learn that they are members of the class also raises a separate impediment to certification. Indeed, the problem with this class is not only that so many class members are unknown—it is that they are unknowable.

To proceed as a class, plaintiffs first must show that a class exists. *See Crow*, 319 N.C. at 282, 354 S.E.2d at 465 ("First, parties seeking to employ the class action procedure under our Rule 23 must establish the existence of a class."). It is "an essential prerequisite . . . that the class must be currently and readily ascertainable based on objective criteria." *Marcus v. BMW of North America,* 687 F.3d 583, 592-93 (3d Cir. 2012). Thus, following this Court's language in *Crow*, the Court of Appeals has affirmed the denial of certification of class where the

"identity and number of individuals [in the class] was unknown and could not be known." *Peverall*, 184 N.C. App. at 93, 645 S.E.2d at 420.

This case demonstrates why courts have required that classes consist of readily identifiable members. As the Third Circuit explained last year in *Carrera v. Bayer Corp.*,

> If a class cannot be ascertained in an economical and administratively feasible manner, significant benefits of a class action are lost. Accordingly, a trial court should ensure that class members can be identified without extensive and individualized fact-finding or mini-trials, a determination which must be made at the class certification stage.

727 F.3d 300, 303-04 (3d Cir. 2013) (internal citations and quotation marks omitted); *cf. Beroth Oil Co. v. N. Carolina Dep't of Transp.*, 757 S.E.2d 466, 476 (N.C. 2014) (affirming the denial of certification because "a trial on the merits would require far too many individualized, fact-intensive determinations for class certification to be proper"). If the class cannot be ascertained or identified, the Court need go no further—that is the end of the inquiry. *Crow*, 319 N.C. at 282, 354 S.E.2d at 465.

Here, the proposed class cannot be identified because there is no way to determine class membership without an individualized, fact-specific inquiry into transactions between the Cooperative and its members dating back as many as 47 years, to certificates issued in 1967. The Fourth Circuit recently addressed a similar situation in *EQT Production Co. v. Adair*, 764 F.3d 347, 359 (4th Cir.

2014). The trial court certified a class of individuals who alleged they had not been paid royalty payments for methane gas rights they claimed to own. In the Fourth Circuit's view, the problem was that some of the schedules demonstrating ownership of gas royalty rights were as much as 20 years old, and determining current ownership of these rights would require a "complicated and individualized process."

In determining that certification of this class was "manifestly improper," the Fourth Circuit criticized the trial court for having "largely glossed over" the problem of identifying class members. The trial court had explained that changes in membership interests over time could be determined by reference to local land records. *Id.* at 357, 359. The Fourth Circuit viewed this approach as inadequate, especially given the "numerous heirship, intestacy, and title defect issues [that] plague many of the potential class members' claims." *Id.*

The class in this case suffers the same problems to a far greater degree than the class in *EQT*. The class definition specifically covers "any heirs, representatives, executors, successors or assigns" of members of the Cooperative. But how can these individuals possibly be identified? In *EQT*, the problem was that there were hundreds of potential class members with interests dating back to the 1990s. Here, there are hundreds of thousands of potential class members with interests dating to the 1940s. In *EQT*, moreover, current ownership of the gas

royalties could be determined by resort to individual land records—a difficult but potentially achievable task.

Here, the difficulties involved in ascertaining the current holders of member interests are unfathomable. The necessary mechanics of class member identification merit evaluation. Tracking the heirs of even a single deceased member of the Cooperative would be an enormous undertaking.[8] If an investigator were lucky enough to find an estate filed in the county probate court of the member's last known address, the investigator might be able to identify at least the first transfer. But many members will have died intestate, and determining their heirs would require individual searches of the type that genealogical search firms charge thousands of dollars to complete, even for a single estate. Moreover, the gas royalty interests at issue in *EQT* had the notable advantage of staying in one place. In contrast, the heirs of former Cooperative members—and any records regarding their relation to the Cooperative—are likely scattered around the country, if not the world.

Accordingly, the Court should determine that the trial court abused its discretion in certifying the class and, for the benefit of future cases, instruct trial

[8] Some Cooperative memberships were held in the name of a business rather than a natural person. Those entities present a separate set of individualized issues regarding mergers, sales, dissolution, and other business events.

courts regarding the prerequisite that classes consist only of members who can be identified readily, without individualized inquiry regarding each.

CONCLUSION

For the foregoing reasons, the NC Chamber respectfully requests the Court to determine that the trial court's order granting class certification affects a substantial right, exercise jurisdiction over this appeal, and hold that the trial court abused its discretion in certifying a class.

Respectfully submitted, this 14th day of November, 2014.

ROBINSON, BRADSHAW & HINSON, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **BRIEF *AMICUS CURIAE* ON BEHALF OF THE NORTH CAROLINA CHAMBER** was electronically filed with the North Carolina Supreme Court today and has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

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CONTENTS OF APPENDIX

West's North Carolina General Statutes Annotated
Chapter 1. Civil Procedure
Subchapter IX. Appeal
Article 27. Appeal (Refs & Annos)

N.C.G.S.A. § 1-277

§ 1-277. Appeal from superior or district court judge

Currentness

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.

Credits
Amended by Laws 1967, c. 954, § 3(j); Laws 1971, c. 268, § 10.

Notes of Decisions (925)

N.C.G.S.A. § 1-277, NC ST § 1-277
The statutes and Constitution are current through Chapters 1-74 of the 2014 Regular Session of the General Assembly.

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West's North Carolina General Statutes Annotated
Chapter 1A. Rules of Civil Procedure (Refs & Annos)
Article 4. Parties

Rules Civ.Proc., G.S. § 1A-1, Rule 23

Rule 23. Class actions

Effective: October 1, 2008
Currentness

(a) Representation.--If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

(b) Secondary action by shareholders.--In an action brought to enforce a secondary right on the part of one or more shareholders or members of a corporation or an unincorporated association because the corporation or association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath.

(c) Dismissal or compromise.--A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

(d) Tax Class Actions.--In addition to all of the requirements set out in this rule, a class action seeking the refund of a State tax paid due to an alleged unconstitutional statute may be brought and maintained only as provided in G.S. 105-241.18.

Credits
Added by Laws 1967, c. 954, § 1; S.L. 2008-107, § 28.28(a), eff. Oct. 1, 2008.

Editors' Notes

COMMENT

Section (a). -- In respect to class actions, the Commission adheres rather closely to the statutory provisions in North Carolina. See former § 1-70. It will be seen that three requirements are present. First, there must be a "class." Second, there must be such numerosity as to make impracticable the joinder of all members of the class. Third, there must be an assurance of adequacy of representation. This last requirement, while not contained in the statute, is surely necessary if the class action is to have any binding effect on absentees. See Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).

Section (b). -- The Commission has not followed the federal rule in this section in its requirements that a shareholder must allege that he was a shareholder at the time of the transaction of which he complains. It was the Commission's thought that such a requirement may well deprive shareholders of any remedy when the corporation has suffered grievous injury. The Commission has also chosen not to follow the federal rule in its requirement of allegations in respect to the shareholder's efforts to persuade the managing directors to take remedial action. The Commission does not, however, take the positive approach of saying such allegations are unnecessary. Rule 8 governing what a complaint must contain is a sufficient guide in this matter.

Section (c). -- This section seems obviously desirable in the protection that it affords absentees.

Notes of Decisions (198)

Rules Civ. Proc., G.S. § 1A-1, Rule 23, NC ST RCP § 1A-1, Rule 23
The statutes and Constitution are current through Chapters 1-74 of the 2014 Regular Session of the General Assembly.

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