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Class Actions in the Second Circuit: Do Plaintiffs Have Unfair Advantage?

By **Jonah Knobler**

Last month, in *Roach v. T.L. Cannon Corp.*,[1] the U.S. Court of Appeals for the Second Circuit reversed a district court's order that denied certification of a class of restaurant employees alleging labor-law violations. *Roach* is an important decision for class-action lawyers who practice in the Second Circuit, as it held that classes may (sometimes) be certified even if the assessment of damages will require individualized, person-by-person fact-finding. But perhaps as significant as *Roach's* holding was a single, easy-to-miss sentence in its standard-of-review paragraph: "We review a district court's class certification determination for abuse of discretion, *applying a 'noticeably less deferential' standard when the district court has denied class certification*."[2]

This is curious, to say the least. As one Second Circuit judge has noted, standards of review are ordinarily a function of the type of decision on appeal—motion to dismiss (de novo), motion for leave to amend a complaint (abuse of discretion), etc.—and "do not vary depending on the *outcome*" the district court reached.[3] Other courts have expressly rejected such an asymmetric standard, concluding that "the standard of review" (and the level of "deferen[ce]" to the lower court) "does not depend on whether the trial court grants or denies class certification."[4]

As it turns out, the plaintiff-favoring Roach standard may owe its existence to a clerical error. The Second Circuit first articulated it in a brief per curiam opinion, *Lundquist v. Security Pacific Automotive Financial Services Corp.* (1993).[5] In support of that standard, *Lundquist* cited an earlier Second Circuit decision, *Robidoux v. Celani* (1993),[6] which said nothing about reviewing class-certification denials more skeptically than grants.

Rather, *Robidoux* had observed that "abuse of discretion can be found more readily on appeals from the denial of class status *than in other areas [of law]*, for the courts have built a body of case law with respect to class action status."[7] *Robidoux*, in other words, contrasted class-certification motions with other types of motions where district courts enjoy greater leeway because precedent is scant. It did not favor class certification grants over denials.

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Following the citation trail one step further makes this point even clearer. *Robidoux,* in turn, cited *Abrams v. Interco* (1983), where the Second Circuit stated: "Abuse of discretion can be found more readily on appeals from the denial *or grant* of class status than when the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance."[8] *Abrams* made no distinction between "denial[s]" and "grant[s]" of class certification; indeed, it equated the two. Its point was simply that class-certification decisions—whatever the result—are more prone to reversal than other "discretionary" determinations.[9]

Somehow, the Lundquist decision (which, again, was a cursory per curiam) misread *Robidoux* as voicing a directional preference for class certification, when in truth, it merely distinguished class-certification appeals from other kinds of appeals. In *Lundquist* itself, that error was harmless, because the panel affirmed the district court's denial of class certification anyway. But once it appeared in the Federal Reporter, the error quickly propagated itself, cropping up in many other Second Circuit decisions, including some where it might have affected the outcome. For example, in *Augustin v. Jablonsky* (*In re Nassau County Strip Search Cases*) (2006), the Second Circuit held that the district court had "exceed[ed] its allowable discretion by failing to certify" the requested class.[10]

The Augustin panel's belief that class-certification denials are reviewed "less deferential[ly]" than grants may have played a role in that result.[11] And the same could have been true last month in *Roach*.

Even worse, the Lundquist panel's mistake has distorted district courts' class-certification decisions: If the denial of certification is viewed "less deferentially," a reversal-wary trial judge has a structural incentive to grant, rather than deny, certification. Thus, one judge in the Southern District of New York concluded that "when a court is in doubt as to whether

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or not to certify a class action, the court should err in favor of allowing the class to go forward."[12] In support, she cited Lundquist's statement that the Second Circuit "is 'noticeably less deferential'" when certification has been denied.[13]

The dubious Lundquist maxim led another Southern District judge to find it "beyond peradventure that the Second Circuit's general preference is for granting rather than denying class certification."[14] This observation, in turn, has been repeated almost 30 times in decisions of the Northern, Southern, Eastern, and Western districts of New York. Thus, the Lundquist panel's error is not only causing the Second Circuit to view district courts' certification decisions through a biased lens; it is biasing those initial district-court decisions themselves, thereby compounding the unfairness to defendants.

Exception to the Rule

The entrenchment of this mistake would be one thing if class certification were truly supposed to be the norm. The Supreme Court, however, has long held that aggregation of claims is "an exception to the usual rule."[15] It recently warned (in a decision reversing the Second Circuit, as it happens) that the Federal Rules "impose[] *stringent* requirements for certification that in practice *exclude most claims*."[16] If "most claims" are unsuited to certification, why would an appellate court look more skeptically, other things equal, at orders denying certification than at orders granting it? Shouldn't the reverse be true?[17]

Moreover, as the drafters of the 2003 amendments to Federal Rule 23 observed, "[a] court that is not satisfied that the requirements [for certification] have been met" should not give the plaintiff the benefit of the doubt, but "should *refuse certification* until they have been met."[18] A standard of review that invites the exact opposite is a strange thing indeed.

One might argue that an asymmetrical standard of review is justified by the so-called "death knell" theory: The denial of class certification effectively ends a case, because (in Seventh Circuit Judge Richard Posner's words) "only a lunatic or a fanatic sues for $30."[19] Thus, the argument goes, the denial of certification deserves especially close appellate scrutiny. But the same thing is true of the grant of certification. As Seventh Circuit Judge Frank Easterbrook has noted, "[j]ust as a denial of class status can doom the plaintiff, so a grant of class status…propel[s] the stakes of a case into the stratosphere," "put[ing] considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight."[20]

Indeed, many courts, including the Supreme Court, have observed that class certification routinely triggers prompt "blackmail settlements"[21] (a phrase popularized by the Second Circuit's own Judge Henry Friendly).[22] Because any class-certification decision is apt to terminate a litigation, there is no principled reason for an appeals court to favor grants over denials on account of finality.

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Amorphous Standard

In sum, the Lundquist "noticeably less deferential" standard is unreasoned, unjustifiable, and unfair. Attorneys opposing class certification would be wise to highlight the many problems with it, rather than accepting it at face value. Arguably, district courts and future appellate panels are free to reject it: under Second Circuit law, "a statement that is 'not essential to [a case's] holding' is non-binding dicta,'"[23] and it is not clear that this language has ever been truly "essential" to the outcome of a Second Circuit decision.

In some opinions, moreover, the Second Circuit has described the standard of review at length, without even hinting that it might vary based on the outcome below.[24] But even if courts consider themselves bound by the Lundquist double standard, it is so amorphous—how much less deferential is "noticeably" less?—that judges may be persuaded to pay it mere lip service, as the Lundquist panel itself arguably did.

Ultimately, one hopes that the Second Circuit will explicitly correct its mistake and remind the bench and bar that in class certification, as elsewhere, both sides deserve a level playing field. That court has previously been willing to confess error where it "has been less than clear as to the applicable standards for class certification" and "used language that…led [lower courts] astray."[25] It should do so again here.

1. No. 13-3070-cv, 2015 U.S. App. LEXIS 2054 (2d Cir. Feb. 10, 2015).
2. 2015 U.S. App. LEXIS 2054, at *8 (quoting *Augustin v. Jablonsky* (*In re Nassau Cnty. Strip Search Cases*), 461 F.3d 219, 224-25 (2d Cir. 2006)) (emphasis added).
3. *EEOC v. UPS*, 587 F.3d 136, 141 n.1 (2d Cir. 2009) (Newman, J., concurring).
4. *Creveling v. Gov't Emples. Ins. Co*., 828 A.2d 229, 240 (Md. 2003); see also *Davis v. Devon Energy Corp*., 218 P.3d 75, 80 (N.M. 2009) ("declining the plaintiffs' invitation to apply a 'less deferential standard' where the district court has denied [class] certification" (alteration in original)).
5. 993 F.2d 11 (2d Cir. 1993). The two judges who signed the per curiam opinion were Judge William Timbers, who died the following year, and Judge Joseph McLaughlin, who died in 2013. The third judge on the Lundquist panel, Charles Wellford of the U.S. Court of Appeals for the Sixth Circuit, wrote a separate concurrence.
6. 987 F.2d 931 (2d Cir. 1993).
7. Id. at 935 (emphasis added).
8. 719 F.2d 23, 28 (2d Cir. 1983) (emphasis added).
9. Id.
10. 461 F.3d at 221.
11. Id. at 225.
12. *In re Initial Pub. Offering Sec. Litig*., 227 F.R.D. 65, 90 (S.D.N.Y. 2004) (quoting *In re Indep. Energy Holdings PLC Sec. Litig*., 210 F.R.D. 476, 479 (S.D.N.Y. 2002)), rev'd, 471 F.3d 24 (2d Cir. 2006).
13. Id. at 90 n.213 (quoting *Moore v. PaineWebber*, 306 F.3d 1247, 1252 (2d Cir. 2002)).
14. *Leider v. Ralfe*, 2003 U.S. Dist. LEXIS 18270, at *25, *40 (S.D.N.Y. 2003) (quoting *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir. 2003)).
15. *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).
16. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (emphasis added).
17. Some district judges have made valiant (if perhaps unconvincing) attempts to "harmonize" the skeptical analysis required by Supreme Court precedent with the Second Circuit's supposed "general preference for granting rather than denying class certification." See, e.g., *Butto v. Collecto*, 290 F.R.D. 372, 380 (E.D.N.Y. 2013) (collecting cases).
18. *In re Initial Pub. Offering Sec. Litig*., 471 F.3d 24, 39 (2d Cir. 2006) (quoting Fed. R. Civ. P. 23 Advisory Committee Notes 2003) (emphasis added); see also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321-22 (3d Cir. 2008) (citing 2003 amendments for proposition that trial courts "should not suppress 'doubt' as to whether a Rule 23 requirement is met").
19. *Carnegie v. Household Int'l*, 376 F.3d 656, 661 (7th Cir. 2004); see also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-70 (1978).
20. *Blair v. Equifax Check Servs.*, 181 F.3d 832, 834 (7th Cir. 1999); see also *Coopers & Lybrand*, 437 U.S. at 476 (noting that the class certification decision "will often be of critical importance to defendants" as well as to plaintiffs).
21. *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995); see also *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co*., 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting); *Coopers & Lybrand*, 437 U.S. at 476; *In re New Motor Vehicles Canadian Export Antitrust Litig*., 522 F.3d 6, 26 (1st Cir. 2008); *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 164-65 (3d Cir. 2001); *Initial Pub. Offering Sec. Litig*., 471 F.3d at 38 n.9.
22. See Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).
23. *In re Indu Craft*, 749 F.3d 107, 116 n.12 (2014) (quoting *Willis Mgmt. (Vt.), Ltd. v. United States*, 652 F.3d 236, 243 (2d Cir. 2011)) (ellipsis omitted).
24. See, e.g., *Initial Pub. Offering Sec. Litig.*, 471 F.3d at 40-41.
25. Id. at 32, 39-40.