Nos. 09-502/503/504

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: WILKES & McHUGH, P.A., a Florida professional association (09-502);

In re: JAMES L. WILKES, II, a Florida citizen (09-503);

In re: TIMOTHY C. McHUGH, a California citizen (09-504),

Petitioners.

O R D E R

Before: MOORE, GILMAN, and ROGERS, Circuit Judges.

The Tennessee Medical Malpractice Act ("TMMA") allows "reasonable" attorneys' fees pursuant to a contingent-fee arrangement in a malpractice action, but not to exceed 33 1/3 % "of all damages awarded to the claimant." Tenn. Code Ann. § 29-26-120. In this action, the plaintiffs allege that Wilkes & McHugh, PA, and its individual owners, James L. Wilkes and Timothy C. McHugh, made a practice of violating that statute by entering contingency agreements with clients that provided for higher fees.

The district court certified a plaintiff class of

> individuals who signed a contingency fee agreement with Defendants in connection with any action Defendants filed and/or prosecuted in a Tennessee State or Federal Court, from December 7, 1999 to the present, in which a medical malpractice, medical negligence, or claim under the TMMA was asserted and in connection with which Defendants assessed a contingency fee in excess of 33 1/3 % of the gross settlement proceeds.

In these petitions brought under Fed. R. Civ. P. 23(f), the lawfirm, Attorney Wilkes, and Attorney McHugh all seek permission for an interlocutory appeal of the class certification.[1] The plaintiffs oppose the petitions.

The "court of appeals may permit an appeal from an order granting or denying class-action certification." Fed. R. Civ. P. 23(f). The certiorari-like discretion of Rule 23(f) allows consideration of any relevant factor. *See* Advisory Committee Notes, (1998 Amendments). There is no hard-and-fast test in support of immediate appeal, but rather a "broad discretion to grant or deny a Rule 23(f) petition," in which "any pertinent factor may be weighed." *In re Delta Airlines*, 310 F.3d 953, 959 (6th Cir. 2002), *cert. denied*, 539 U.S. 904 (2003). Rule 23(f) interlocutory appeals are not routinely accepted. *Id*. at 959.

The district court certified a plaintiff class under Rule 23(b)(3) after concluding that several common questions predominated over the individual issues. We are not persuaded that an interlocutory appeal is appropriate. Several of the petitioners' arguments – for example, that legal-malpractice claims are not assignable and therefore not subject to class-action treatment, or that the individual defendants have no liability in respondeat superior – challenge the district court's treatment of the merits of the action, and not the certification of the class. While the two are not entirely separable, an interlocutory appeal of class certification is not intended to provide early review of the merits. *Id*. at 960. Further, many class-action certifications "present familiar and almost routine issues" that do not compel interlocutory review. Fed. R. Civ. P. 23(f), Advisory

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[1]They also ask to file the petitions under seal. Although the exhibit documents sealed in the district court may remain under seal in this court, Sixth Cir. R. 25(j), there appears to be no reason to seal the petitions in support interlocutory appeal. Sixth Cir. R. 28(g). The requests to seal the petitions is denied.

Committee Notes (1998 Amendments). The district court's conclusions about the predominance of common issues appears to be such an issue.

Upon our review and consideration, the petitions for interlocutory appeal are **DENIED**.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk