

March 28, 2005

Charles R. Fulbruge III  
Clerk

REVISED MARCH 29, 2005

In the  
**United States Court of Appeals**  
for the Fifth Circuit

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● 04-10819  
Summary Calendar

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LINDSEY BALDRIDGE; IRIS ELAINE MOSLEY; CINDY OPAITZ; LINDA SAUNDERS;  
SUSAN MIMMS; LEROY DURAN; FRANK BRISENO; JAMES BULLS; ROYCE GLENN;  
MICHAEL WATKINS; STEVEN MADRID; LINDA SAN PEDRO,

Plaintiffs-Appellees,

VERSUS

SBC COMMUNICATIONS, INC.,  
A DELAWARE CORPORATION;  
CINGULAR WIRELESS LLC,  
A DELAWARE LIMITED LIABILITY COMPANY,

Defendants-Appellants.

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Appeals from the United States District Court  
for the Northern District of Texas

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already used its discretionary power to certify a class, and has scheduled a decertification hearing before trial begins.<sup>3</sup>

The defendants correctly argue that the holding in *Coopers & Lybrand* is to the extent that the subsequently enacted Federal Rule of Civil Procedure 23(f) specifically allows for interlocutory review of certification decisions at the time of the decision. The defendants also argue that the policies of the district court observed, this involves a garden-variety class action, so 23(f) is inapplicable.

Although the holding of *Coopers & Lybrand* may have been abrogated by the enactment of rule 23(f), it is persuasive of the method by which we

<sup>2</sup>(...continued)

class certification does not fall in the category of the small class of decisions excepted from the final-judgment rule by *Cohen*. *Coopers & Lybrand*, 437 U.S. at 468-69.

<sup>3</sup> Although the defendants note that the burden of persuasion shifts to plaintiffs (to show the merits of certification) if the difference is irrelevant, the difference is irrelevant. A decertification decision would be a *revision* of the original order, so concerns regarding differing burdens of proof do not overcome the overriding interest in preventing the hazard of piecemeal appeals. *In re Nissan Motor Corp. Litig.*, 552 F.2d 1088, 1094 (5th Cir. 1977).

<sup>4</sup> Moreover, although *Lusardi* did not deal with certification orders under rule 23, it relied on the logic of *Coopers* and pre-dated the enactment of rule 23(f).

gress.<sup>6</sup> Accordingly, because the question of class certification has not yet been conclusively determined, the *Cohen* collateral order exception to § 1291 is inapplicable.

The appeal is DISMISSED for want of jurisdiction.<sup>7</sup>

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<sup>6</sup> A critical difference between a class action and a rule 23 class action is that the former requires each class member to opt in as a party plaintiff, but the latter includes all absent class members who do not affirmatively opt out. Consequently, Congress could rationally conclude that the default rule allows rule 23 certification orders, on average, to result in larger, more financially onerous classes, thereby giving stronger policy justification for a special procedural rule allowing interlocutory appeals of those orders and trumping the final judgment rule of § 1291.

<sup>7</sup> The plaintiffs have requested sanctions under Federal Rule of Civil Procedure 38 and our local rules. Because this appeal is not frivolous, we deny the request.