

## Pendent Appellate Jurisdiction in Class Actions Addressed by Fourth Circuit

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When a class certification decision overlaps with merits issues, can a court of appeals deciding an interlocutory appeal from a class certification order also review an earlier decision on a motion to dismiss if it was integral to the class certification order? Yes, according to a new Fourth Circuit decision.

*Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*, No. 22-1853, – F.4th –, 2024 WL 995480 (4th Cir. Mar. 8, 2024), is one of many cases brought against property insurers seeking coverage for business income losses arising from the COVID-19 pandemic. With near unanimity, these lawsuits have been dismissed on Rule 12 motions and almost all those dismissals have been affirmed on appeal. But here the district court denied a motion to dismiss and declined to certify that ruling for interlocutory appeal under 28 U.S.C. § 1292(b). It later certified a class of the defendant's commercial property insurance policyholders in Virginia that were affected by COVID-19 government orders and whose insurance claims were denied. The Fourth Circuit granted the insurer permission to appeal the class certification order under Rule 23(f).

When the case reached the Fourth Circuit, that court had previously affirmed the dismissal of a similar case under West Virginia law. The insurer asked the Fourth Circuit to review the earlier ruling on its motion to dismiss in addition to the class certification order. The Fourth Circuit majority held that it could review the motion to dismiss decision under its pendent appellate jurisdiction. Under that circuit's jurisprudence, it can exercise pendent appellate jurisdiction if the rulings are "so interconnected" that "either (1) an issue is inextricably intertwined with a question that is the proper subject of an immediate appeal, or (2) review of a jurisdictionally sufficient issue is necessary to ensure meaningful review of an immediately appealable issue." (Cleaned up.) The second of those two alternative prongs applied here. The district court's ruling on the motion to dismiss was relied upon in its class certification decision, and "was integral to the district court's later conclusion that the class members could prove their claims through evidence common to the class." Because the court of appeals could not "meaningfully review the class certification order" while ignoring its own recent decision on the insurance coverage issues that were the subject of the motion to dismiss ruling, pendent appellate jurisdiction was appropriate. The Fourth Circuit then applied its recent decision on the merits issues, finding Virginia law functionally the same as West Virginia law. It therefore reversed both the motion to dismiss and class certification orders, remanding with direction to dismiss the entire case.

Judge Wynn concurred in the reversal of the class certification order, but otherwise dissented. He disagreed with the majority's finding of pendent appellate jurisdiction, concluding that such jurisdiction should be exercised only in "exceedingly rare circumstances." He would have reversed the class certification order because, even assuming the district court correctly found the possibility of coverage for the claimed losses, this "would require an individual review of each denied claim to determine whether the loss of business income claimed was due to the [COVID-19] executive orders or to another cause." He noted that the named plaintiff had "business troubles [that] long predated COVID-19" and had closed before the government orders took effect. His opinion suggests that he would exercise pendent appellate jurisdiction in this procedural posture only if it would be "impossible" to review the class certification order without reviewing a motion to dismiss decision. He expressed concerns that the majority opinion might unduly open the door to defendants seeking review of merits issues on class certification appeals.

The majority's opinion puts the Fourth Circuit in line with other circuits. Often courts of appeals have ruled on a merits issue simply because it formed part of the analysis of the class certification issues, without finding it necessary to rely on pendent appellate jurisdiction. See, e.g., *Van v. LLR, Inc.*, 61 F.4th 1053, 1065 (9th Cir. 2023); *In re State Farm Fire & Cas. Co.*, 872 F.3d 567, 572-73 (8th Cir. 2017); *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 381 (5th Cir. 2007).

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