

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

BUCKEYE DIAMOND LOGISTICS, INC. :	:	
fka BUCKEYE RECYCLERS, INC. :	:	
	:	
Plaintiff,	:	
	:	Case No. C3-01-440
	:	
v.	:	
	:	Judge Walter Herbert Rice
CHEP USA, a general partnership :	:	
	:	
Defendant.	:	

**DEFENDANT CHEP USA'S MEMORANDUM IN OPPOSITION PLAINTIFF
BUCKEYE DIAMOND LOGISTICS' MOTION FOR CERTIFICATION
OF ISSUE FOR INTERLOCUTORY APPEAL**

On October 13, 2004, the Court notified the parties that it granted CHEP's Motion to Strike Buckeye's jury demand. Buckeye subsequently notified the Court and CHEP that it intended on appealing the Court's decision. Because the Court's decision is not a final appealable order, Buckeye must first seek certification from this Court pursuant to 28 U.S.C. § 1292(b). Because certification is intended only for exceptional cases and is to be used sparingly, Buckeye's motion should be denied.

A. Buckeye Fails to Establish That Certification is Proper

Pursuant to 28 U.S.C. § 1292(b), interlocutory appeals may be granted when (1) there is a substantial ground for differing opinions regarding a controlling issue of law and (2) an immediate appeal from the order would materially advance the ultimate termination of the litigation. See, International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Midland Steel Products Co., 771 F. Supp. 860, 861 (N.D.Ohio 1991) (denying

defendants' motion to certify an appeal). The Sixth Circuit has held that certification under § 1292(b) is to be "sparingly applied."¹ Kraus v. Board of Road Commissions, 364 F.2d 919, 922 (6th Cir. 1966). "Interlocutory appeals should not be used when it serves only to unnecessarily prolong litigation and to inconvenience the opposing party." International Union, supra at 862.

1. **There is no substantial ground for differing opinions regarding a controlling issue of law.**

Buckeye asserts that there are substantial grounds for difference of opinion concerning whether it is entitled to a jury trial on its claim for unjust enrichment. In particular, Buckeye claims that the following issues are matters of "first impression in the Sixth Circuit":

(a) whether under Ohio law and the Seventh Amendment, Buckeye's claim for unjust enrichment is a cause of action at law which it has a right to have determined by a jury, both (i) because monetary relief is the predominant form of damages sought and (ii) because the cause of action for unjust enrichment has common ancestry both in law and equity;

(b) whether right to a jury under Ohio Revised Code § 2311.04 is a substantive right that cannot be abridged by removal of this action from state court to this Court; and,

(c) whether right to a jury under Section 5, Article I of the Ohio Constitution is a substantive right that cannot be abridged by removal of this action from state court to this Court.

Buckeye's attempt to demonstrate that there are substantial grounds for difference of opinion fails for several reasons.

First, even assuming that the issues raised by Buckeye are matters of "first impression," that does not create a difference in opinion. Buckeye cites absolutely no controlling authority

¹ Buckeye cites three cases from other circuits for the proposition that an interlocutory appeal is the proper means for reviewing the parties' right to trial by jury. However, none of these cases support a blanket proposition that certification should be freely given in all cases in which a jury demand is at issue. In fact, other than a passing reference that the matter reached the court through certification, there is no discussion of 28 U.S.C. § 1292(b) or the standards for granting certification.

that differs from the authority cited both by the Court and by CHEP in its Motion to Strike Jury Demand and reply in support of the same. Because Buckeye completely fails to demonstrate that there is a substantial ground for differing opinions regarding a controlling issue of law, its motion for certification should be denied.

Second, Sixth Circuit and other circuits have repeatedly held that the fact that a plaintiff is seeking monetary relief is not determinative of the issue of whether the plaintiff's claims are legal or equitable. In Golden v. Kelsey-Hayes Company, 73 F.3d 648, 659 (6th Cir. 1996), the Sixth Circuit affirmed the trial court's granting of a motion to strike jury demand because the plaintiff's claims were entirely equitable and explained:

It is accepted throughout this country that a monetary award, generally, is a form of legal relief. [Citations omitted]. It is not true, however, that "any award of monetary relief must *necessarily* be 'legal' relief." [Citations omitted]. It is well settled that equitable relief includes monetary damages where required to afford complete relief.

Id. at 661 (first emphasis added, second emphasis in original). The only case cited by Buckeye on this issue is Hildebrand v. Board of Trustees of Michigan State University, 607 F.2d 705 (6th Cir. 1979). However, Hildebrand falls well short of demonstrating a difference in opinion and, in fact, cites to United States Supreme Court and Sixth Circuit decisions indicating that "not all money damages claims will be deemed 'legal.'" Id. at 708.

Moreover, the United State Supreme Court has recognized an exception to the general rule that monetary relief constitutes a legal remedy where the damages are restitutionary. See, Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 570, 110 S. Ct. 1339, 108 L.Ed.2d 519 (1990). That Buckeye's relief under its claim for unjust enrichment is restitutionary cannot be disputed. Pursuant to Restatement (Third) of Restitution & Unjust Enrichment § 1 (2000):

The source of a liability in restitution is the receipt of an economic benefit under circumstances such that its retention without payment would result in the unjust enrichment of the defendant at the expense of the plaintiff. The consequence of a liability in restitution is that the defendant must either restore the benefit in question (or its traceable product), or else pay money in the amount necessary to eliminate unjust enrichment.

Id. (emphasis added). Thus, pursuant to both controlling Supreme Court and Sixth Circuit law, it is undisputed that the mere fact that Buckeye is seeking monetary damages is of no consequence and does not transform its equitable claim for unjust enrichment into a legal claim.

Third, Buckeye's assertion that unjust enrichment has common ancestry both in law and equity does not create a difference in opinion regarding a controlling issue of law. The Sixth Circuit recognizes unjust enrichment as an equitable claim. Andersons, Inc. v. Consol, Inc., 348 F.3d 496, 502 (6th Cir. 2003) (explaining that the "doctrine of unjust enrichment provides an equitable remedy imposed to prevent injustice"). Buckeye cites no controlling authority holding that unjust enrichment is a legal claim. Thus, there is no difference of opinion on that issue.

Fourth, Buckeye's continued reliance on Ohio law is misplaced. Buckeye cites no authority for its proposition that Ohio law has any application to a federal jury question. In fact, one of the cases cited by Buckeye directly contradicts its assertion that Ohio law applies. In Kampa v. White Consol. Indus., Inc., 115 F.3d 585 (8th Cir. 1997), the court reviewed a question regarding the plaintiff's right to a jury trial. The court held that federal law controls the issue even in cases where the federal court is enforcing a state-created right and even when a state statute or state constitution specifically addresses the issue. Id. at 587. Thus, the only authority cited by Buckeye regarding the application of state law to federal jury issues specifically states that federal law, and only federal law, controls.

Because Buckeye entirely fails to prove that there is a substantial ground for differing opinions regarding a controlling issue of law on any of the issues raised in its Motion for Certification, the Court should overrule the Motion.

2. **An immediate appeal would not materially advance the ultimate termination of the litigation.**

Buckeye claims that an immediate appeal would advance the ultimate termination of this litigation by insuring that the Court's and the parties' resources "are not wasted on a trial that would have to be duplicated if the Sixth Circuit finds Buckeye [is] entitled to a jury." (Motion at 3.) This is not a proper basis for certifying the appeal. The Supreme Court previously "declined to find the costs associated with the unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order." Lauro Lines SRL v. Chasser, 490 U.S. 495, 499, 109 S. Ct. 1976, 104 L.Ed.2d 548 (1989). Further, the parties have already expended a considerable amount of time and money preparing for the trial in this matter. This case was originally filed on September 18, 2001 and the parties have already prepared for trial on multiple occasions. Thus, the Court should overrule Buckeye's Motion. See, International Union, 771 F. Supp. at 862 (explaining that the "action has already consumed a considerable amount of time, discovery has been completed, and this case is now ready for trial; permitting an interlocutory appeal would only serve to further delay the resolution of this litigation.")

Moreover, the costs associated with proceeding with an immediate bench trial at this time when the parties and their witnesses are fully prepared would be far less than the costs associated with continuing the trial, waiting a year or more for the Sixth Circuit to rule, and then having to once again prepare for either a bench or jury trial. Additionally, Buckeye has already indicated, on numerous occasions, that it fully intends on appealing the Court's previous decision on CHEP's Motion for Summary Judgment. Thus, Buckeye can appeal the Court's ruling on the

Motion to Strike at the same time and avoid piecemeal appeals, which is a proper basis for denying a motion for certification. Local 836 of United Auto. Aerospace and Agr. Implement Workers of America (UAW) v. Echlin, Inc., 670 F. Supp. 697, 708 (E.D. Mich. 1987) (explaining that 28 U.S.C. § 1292(b) is intended only for exceptional cases and "does not authorize piecemeal appeals") (citing Kraus v. Board of Road Commissioners, 364 F.2d 919 (6th Cir. 1986)).

Finally, Buckeye claims that any delay would be minimal because it will seek expedited briefing on the appeal. However, there is no basis to believe that this matter, which was scheduled to begin trial on October 14, 2004, will not be significantly delayed simply because Buckeye will request expedited briefing. As the Court and counsel are well aware, the Sixth Circuit maintains a very full docket. It is probable that any interlocutory appeal could take up to a year before a resolution is reached. According to the Administrative Office of the United States Courts, the median time from the filing of a notice of appeal to final disposition in the Sixth Circuit is 18.6 months. Attached at Tab "A" is a table provided by the Administrative Office of the United States Courts reflecting this information. Even assuming that the median time would be reduced by 50% as a result of a request for an expedited briefing schedule, the interlocutory appeal would still be pending for over nine months. Thus, the requested interlocutory appeal would not materially advance the ultimate termination of the litigation but, rather, would unnecessarily delay the litigation.

B. Conclusion

Because Buckeye fails to demonstrate that (1) there is a substantial ground for differing opinions regarding a controlling issue of law and (2) an immediate appeal from the order would

materially advance the ultimate termination of the litigation, its Motion for Certification of Issue for Interlocutory Appeal pursuant to 28 U.S.C. § 1292(b) should be overruled.

Respectfully submitted,

s/ John C. McDonald

John C. McDonald, Esq. (0012190)

P.O. Box 165020

Columbus, Ohio 43216

Tele: (614) 462-2700

Fax: (614) 462-5135

Trial Attorney for Defendant,

CHEP USA

OF COUNSEL:

Kevin L. Murch, Esq. (0066833)

Schottenstein, Zox & Dunn

P.O. Box 165020

Columbus, Ohio 43216

Tele: (614) 462-2700

Fax: (614) 462-5135

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served the 15th day of October, 2004, via the Court's electronic filing notification upon:

James A. Wilson
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Trial Attorney for Plaintiff

s/ John C. McDonald

John C. McDonald