

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

BUCKEYE DIAMOND LOGISTICS, INC., :
Plaintiff, :
vs. : Case No. 3:01cv440
CHEP USA, INC., : JUDGE WALTER HERBERT RICE
Defendant. :

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION FOR
CERTIFICATION OF ISSUE FOR INTERLOCUTORY APPEAL
(DOC. #158)

This litigation is before the Court on Plaintiff's Motion for Certification of Issue for Interlocutory Appeal (Doc. #158), with which it requests that the Court certify its decision to strike its jury demand for an immediate, interlocutory appeal. That motion is brought pursuant to 28 U.S.C. § 1292(b), under which this Court may certify one of its decisions for an immediate, interlocutory appeal, if it is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." As Plaintiff points out, the Sixth Circuit, in National Union Electric Corp. v. Wilson, 434 F.2d 986, 988 (6th Cir. 1970), noted that it is possible to seek immediate

appellate review of a decision to strike a jury demand. However, this Court can grant the Plaintiff's motion, pursuant to the mandate of § 1292(b), only if it is of the opinion that its decision presents a controlling issue of law about which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this litigation.

The Court's decision to strike Plaintiff's jury demand presents two questions of law, to wit: whether Plaintiff is entitled to a jury trial because its claim of unjust enrichment is legal, rather than being equitable as this Court has concluded; and whether Plaintiff is entitled to a jury trial, even if that claim is equitable, since a jury trial on that claim would have been available in accordance with Ohio law, given that Plaintiff filed this lawsuit in state court, from whence it was removed to this Court. Assuming for sake of argument that those legal questions are controlling issues of law about which there is substantial ground for difference of opinion, this Court is not of the opinion that an immediate appeal may materially advance the ultimate resolution of this lawsuit. Therefore, it overrules Plaintiff's motion.

By examining the possible impact of sustaining the Plaintiff's motion on the ultimate resolution of this litigation, the Court demonstrates why it cannot conclude that an immediate appeal may materially advance its ultimate termination.

If the Court were to grant Plaintiff's motion, it is possible that the Sixth Circuit would deny the interlocutory appeal. Under that circumstance, depending on how long it took the court to rule, certification would not only not have materially advanced the resolution of this litigation, it would have delayed that resolution. If the Sixth Circuit were to agree to hear the appeal, it would probably

take about 18 months to resolve, since that is about the average time for appeals that are fully briefed and argued by counsel. If, after 18 months, the Sixth Circuit were to agree with this Court that the right to a jury trial for an equitable, unjust enrichment claim does not exist, the only result of an immediate appeal would have been to delay the ultimate termination of this matter by that period of time. Under that circumstance, an immediate appeal would not have materially advanced the ultimate resolution of this lawsuit.

One could argue, however, that, if the Sixth Circuit were to disagree with this Court's conclusion concerning Plaintiff's right to a jury trial, an immediate appeal would have materially advanced the resolution of this suit, since a conclusion by the Sixth Circuit in a post-trial (rather than interlocutory) appeal would necessitate a new trial before a jury. This is not necessarily so. If the Plaintiff is satisfied with the Court's findings and conclusions as the trier of fact, it will not appeal, and one would not be able to argue that the resolution of this litigation would have been advanced by an interlocutory appeal. Moreover, granting an interlocutory appeal will not guarantee that there will be only one appeal, since the Court has entered summary judgment against the Plaintiff on a number of its claims, which it could well appeal if it is dissatisfied with the result after the first trial (regardless of whether that trial is to the Court or to a jury).

In sum, in order for the Court to opine that an immediate appeal may materially advance the ultimate termination of this litigation, it must make a number of assumptions. First, the Court must assume that the Sixth Circuit will agree to hear the interlocutory appeal. Second, if that assumption proves to be correct, the Court must also assume that the Sixth Circuit will disagree with the

Court's conclusion that Plaintiff is not entitled to a jury trial on its unjust enrichment claim; and that either the Plaintiff will be satisfied with the total result of this case after a jury trial or that if dissatisfied with that total result, causing it to appeal the earlier grant of summary judgment to the Defendant on Plaintiff's other claims, the Sixth Circuit will affirm that decision. Third, if the Court declines to certify its decision for an interlocutory appeal, it must assume that the Plaintiff will be dissatisfied with the Court's findings and conclusions and appeal the adverse judgment entered after a bench trial (perhaps together with the adverse ruling on Defendant's Motion for Summary Judgment) and that the Sixth Circuit will conclude that Plaintiff had a right to a jury trial. Since the Court is unable to make those assumptions, it is not of the opinion that an immediate, interlocutory appeal may materially advance the ultimate termination of this litigation.

Accordingly, the Court overrules Plaintiff's Motion for Certification of Issue for Interlocutory Appeal (Doc. #158).

October 25, 2004



WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:

Counsel of record.