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S178320
2nd Civil No. **B204943**

SUPREME COURT
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IN THE

SUPREME COURT

STATE OF CALIFORNIA

In re BAYCOL CASES I and II

AFTER ORDER BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT,
ON APPEAL FROM THE SUPERIOR COURT FOR LOS ANGELES COUNTY
HONORABLE WENDELL MORTIMER, JR., JUDGE
LASC Case Nos. JCCP 4217 and JCCP 4223

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner Douglas Shaw seeks extraordinary review of an unpublished decision that does not announce a new principle of law, does not create a conflict among the lower courts, and arose out of a very unusual set of procedural circumstances. Review is unwarranted and unnecessary.

The Court of Appeal followed well-settled law by dismissing as untimely Petitioner's appeal from a demurrer as to class allegations. The trial court sustained – on two independent grounds and with prejudice – the demurrer of Defendant and Respondent Bayer Corporation to the class allegations. The order expressly barred class certification. It was as final with respect to the putative class as a ruling denying a motion for class certification. Petitioner waited more than seven months to file an untimely notice of appeal from that decision, well outside the longest possible statutory period for an appeal. Cal. R. Ct. 104(a)(3), 108(e)(3).

Petitioner argues that his failure to act timely is excused both by the one final judgment rule, and because orders sustaining demurrers are not generally appealable. His argument comes forty years too late. This Court and the Courts of Appeal have long recognized an exception to the one final judgment rule in class actions and (under the so-called "death knell" doctrine) have uniformly treated orders barring or denying class certification as immediately appealable, regardless of the form or timing of the order. *See, e.g., Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 699 (1967). The Court of Appeal correctly applied these settled rules to Petitioner's case.

Moreover, as a practical matter, this case arises out of an unusual procedural posture that is not likely to recur with any frequency (if

at all). In the normal case, when a demurrer is sustained to all of the claims in a complaint without leave to amend, the Superior Court will thereafter enter judgment promptly. Here, however, due to a series of procedural missteps – all precipitated by Petitioner's filing of an unmeritorious motion for reconsideration – the Superior Court did not enter judgment on Petitioner's individual claims until 180 days after the demurrer was sustained – the last day of the statutory maximum period within which to notice an appeal. Cal. R. Ct. 8.104(a), 8.108(e). In those rare cases (like this one) in which a motion for reconsideration involving the class representative's individual claims is filed but not promptly decided, the proper course under settled law is for the plaintiff to file a timely appeal from the appealable order sustaining the demurrer to the class allegations; if the reconsideration motion is denied and judgment subsequently entered on the individual claims, then an appeal from that judgment can easily be consolidated with the earlier appeal on the class claims. Any alternative rule (such as the one proposed by Petitioner) would introduce unwarranted uncertainty and confusion into this area of established law.

STATEMENT OF FACTS AND PRIOR PROCEEDING

This Petition arises from a trial court order sustaining a demurrer without leave to amend. AA353-354. The trial court's order dismissed, on multiple grounds, Petitioner's individual claims and the class allegations. AA353-354. The trial court concluded that no class could be certified based on principles of res judicata/collateral estoppel and because, accepting the allegations in the complaint as true, Petitioner could not establish a community of interest. AA353-354. Notice of entry of the order was served by the clerk of the court on April 27, 2007, and also by Bayer on May 2, 2007. AA354, AA422-428.

An unusual set of procedural circumstances followed. On May 14, 2007, Petitioner filed a motion for reconsideration. AA356-373. Apparently unaware of the pending motion, the court entered a judgment on May 25, 2007. AA383-385. The trial court subsequently took the motion for reconsideration off calendar because the entry of judgment deprived it of jurisdiction to consider the matter. AA384-385.

On June 7, 2007, Petitioner filed a motion to set aside the judgment and reset the motion for reconsideration for hearing. AA386-400. On July 13, 2007, with the consent of the parties, the Court set aside the judgment and re-calendared the motion for reconsideration for hearing. AA466. After full briefing and oral argument, the trial court denied the motion on September 21, 2007. AA525-526. Although Petitioner waived notice at the hearing, Bayer served notice of entry of the order on October 5, 2007. AA526-531. The trial court entered a judgment of dismissal as to Petitioner's individual claims on October 24, 2007, and Bayer served notice of entry of that judgment on October 29, 2007. AA533-537.

On December 20, 2007, Petitioner filed a notice of appeal from (1) the April 27, 2007 order sustaining the demurrer to the class allegations and his individual claims; (2) the September 21, 2007 order denying his motion for reconsideration;[1] and (3) the October 24, 2007 judgment as to his individual claims. AA538-540. Bayer moved to dismiss the appeal from the April 27, 2007 order as untimely to the extent Petitioner sought to challenge the ruling as to the class claims. The Court of Appeal

[1] Petitioner subsequently abandoned his purported appeal from the September 21, 2007 order denying his motion for reconsideration.

consolidated the hearing on Bayer's motion to dismiss with the hearing on the merits.

In an unpublished opinion, the Court of Appeal dismissed as untimely the appeal from the order sustaining the demurrer to the class claims. Opinion, at 2 (Oct. 20, 2009). The Court of Appeal recognized that an order sustaining a demurrer without leave to amend is not itself ordinarily appealable, but, because the order fully and finally disposed of the class allegations, the "death-knell" exception applied. *Id.* at 8-9. The Court declined to invent an exception to the "death-knell" exception for the peculiar circumstances of this case:

> We are reluctant to carve out exceptions to the rule and thus introduce an element of uncertainty into what has otherwise been the established rule. Would the exception apply only where, as here, a single order sustains the demurrer without leave to amend as to both the class and individual claims? Would it apply where separate orders address the class and individual claims? A bright-line rule would eliminate any uncertainty. Accordingly, we adhere to the rule that "in a class action if the legal effect of the order is 'tantamount to a dismissal of the action as to all members of the class other than plaintiff,' and if the order 'has virtually demolished the action as a class action,'" the order is immediately appealable.

Id. at 9. Petitioner argues this refusal to create an exception for this case instead is an improper "expansion" of the death-knell doctrine.

ARGUMENT

Review by this Court is appropriate where "necessary to secure uniformity of decision or to settle an important question of law." Cal. R. Ct. 8.500(b)(1). This Petition would accomplish neither. This

Court and the Courts of Appeal uniformly treat orders precluding class certification as immediately appealable, regardless of their form or timing, under the so-called "death knell" doctrine. Although Petitioner argues that the Court of Appeal's unpublished disposition involves "pernicious" error that reflects "a pervasive misreading of this Court's 'death knell' doctrine" (Pet. at 2, 5), in reality the Court of Appeal simply – and correctly – applied established principles of law to Petitioner's appeal.

I. THE COURT OF APPEAL CORRECTLY APPLIED SETTLED LAW IN HOLDING THAT AN ORDER SUSTAINING A DEMURRER TO CLASS ALLEGATIONS WAS IMMEDIATELY APPEALABLE

California courts long have held that orders precluding certification are final judgments with respect to a putative class, and immediately appealable regardless of form or timing. *Richmond v. Dart Indus.*, 29 Cal. 3d 462, 470 (1981); *Daar*, 67 Cal. 2d at 699; *Alvarez v. May Dep't Stores Co.*, 143 Cal. App. 4th 1223, 1228, 1231 (2006); *Kennedy v. Baxter Healthcare Corp.*, 43 Cal. App. 4th 799, 809 (1996); *Stephen v. Enter. Rent-A-Car of S.F.*, 235 Cal. App. 3d 806, 811-12 (1991).[2] Indeed, one of the first decisions by this Court to address the appealability of orders precluding certification arose in the context of a demurrer. *Daar*, 67 Cal. 2d at 699; *accord Alvarez*, 143 Cal. App. 4th at 1228, 1231; *Kennedy*, 43 Cal. App. 4th at 809. This Court held "'that the question, as affecting the right of appeal, is not what the form of the order or judgment may be, but what is its legal effect.'" *Daar*, 67 Cal. 2d at 698-99 (quoting *Howe v. Key System Transit Co.* 198 Cal. 525, 531 (1926)). The Court treated an order

[2] *See also* Cal. R. Ct. 8.104(a), (f) (defining "judgment" to include any immediately appealable order).

sustaining a demurrer as appealable because it "demolished the action as a class action." *Daar*, 67 Cal. 2d at 699.

Here, the trial court ruled on demurrer that no class could be certified. Because the effect of that ruling was to "demolish[] the action as a class action," it was equivalent to a judgment as to the putative class and so was an immediately appealable order. *Id.*

In response to these well-established principles, Petitioner argues that the "one final judgment" rule precludes appeals from orders that simultaneously sustain demurrers to both class and individual claims. Pet. at 5, 11-12. In effect, Petitioner is turning *Daar* on its head and arguing that it is "the form of the order or judgment" that should take precedence over its legal effect. *See Daar*, 67 Cal. 2d at 698-99.

Under Petitioner's theory, a single order sustaining demurrers to both class claims and individual claims is *not* appealable, but an order sustaining a demurrer to class claims *would be* immediately appealable if it were entered one day before (or one day after) an order disposing of the individual claims. Indeed, under Petitioner's theory, an order sustaining a demurrer to class claims would be immediately appealable if it were entered one minute before (or after) an order disposing of individual claims – so long as it is a separate order, on a different piece of paper than the order sustaining the demurrer to the individual claims.

Such a rule – in which the appealability of an order would turn not on its substance but on the form or manner of the order – has nothing to recommend it and is contrary to both the case law and common sense. As this Court has explained, "[j]udgments that leave nothing to be decided between one or more parties and their adversaries, or that can be amended to encompass all controverted issues, [also] have the finality

required by section 904.1 ... ." *See Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 740-41 (1994). Where, as here, the trial court's order left nothing to be decided between Bayer and the putative class, it was an immediately appealable order – regardless of whether Petitioner's individual claims remained viable.[3]

That Petitioner had filed a motion for reconsideration on both the individual and class claims that remained pending for five months does not change the outcome. Regardless of when the trial court actually decides it, a valid motion for reconsideration does not extend the time to appeal from an appealable order beyond the statutory period of 180 days after entry of that appealable order.[4] Cal. R. Ct. 8.104(a), 8.108(e). Here, even assuming that Petitioner's time to appeal extended to the statutory maximum, the time to appeal ran no later than October 24, 2007 – *after* Petitioner's motion for reconsideration was denied and (coincidentally) the same day that judgment was entered. Petitioner's suggestion that it is somehow unfair to hold him to California law is without merit.

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[3] The three cases upon which Petitioner primarily relies, *see* Pet. at 19, do not support his position. Two of them involved demurrers sustained to claims that were legally defective; the trial courts had not separately ruled that a class never could have been certified if the complaint had stated viable individual claims. *See Cohen v. NuVasive, Inc.*, 164 Cal. App. 4th 868, 871 (2008); *Bell v. Blue Cross of Cal.*, 131 Cal. App. 4th 211, 214-15 (2005). In the third case, *Balikov v. S. Cal. Gas Co.*, 94 Cal. App. 4th 816 (2001), the plaintiff appealed a trial court order that both disposed of the claims in the case and struck the plaintiff's class allegations, but the plaintiff did not challenge on appeal the portion of the order striking the class allegations. *Id.* at 819, 820-21. Thus, the court in *Balikov* had no reason to (and did not) consider whether an appeal of the portion of the order striking the class allegations would have been timely.

[4] Petitioner conceded below that the order denying the motion for reconsideration was not independently appealable.

II. THE COURT OF APPEAL'S UNPUBLISHED DECISION DOES NOT EXPAND THE DEATH KNELL EXCEPTION OR THREATEN TO OVERTURN THE APPELLATE SYSTEM

The Court of Appeal's unpublished decision did not expand the death knell exception and, notwithstanding Petitioner's claims, will not upend the California appellate system. Pet. at 13-22.

As Petitioner's own authorities make clear, the death knell exception is properly limited to orders that – like the one at issue here – fully dispose of class claims. *Daar*, 67 Cal. 2d 698-99; *Farwell v. Sunset Mesa Property Owners Ass'n, Inc.*, 163 Cal. App. 4th 1545, 1547 (2008). In contrast, "excluded from the death knell doctrine are orders certifying a class, orders partially certifying a class, orders compelling the representative of a class to arbitrate, and orders directing service of notice to class members, to name four examples." *Farwell*, 163 Cal. App. 4th at 1547-48.

Petitioner states a concern that the Court of Appeal's decision will cause a multiplicity of appeals in class cases, but that is an issue that the courts have already addressed and resolved: the "death knell" doctrine is an exception to the "one final judgment" rule, but forty years of experience has shown that it is an exception that is entirely manageable. Long ago, this Court concluded that the risk of multiple appeals in class cases was outweighed by the importance of the right to obtain immediate appellate review of orders dismissing class claims. *See Daar*, 67 Cal. 2d at 699.

Finally, to the extent that Petitioner states his fear that the Court of Appeal's decision would introduce unwarranted ambiguity into the rules governing class action appeals, he has it exactly backwards. As the

Court of Appeal correctly explained, the existing law is clear and marked by bright lines; it is Petitioner's proposed modification of those rules that would "introduce an element of uncertainty into what has otherwise been the established rule." Opinion, at 9.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Review.

Dated: December 17, 2009

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c) and 8.504(d)(1))

The text of this brief consists of 2415 words as counted by the

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Dated: December 17, 2009

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is SIDLEY AUSTIN LLP, 555 West Fifth Street, Suite 4000, Los Angeles, California 90013-1010.

On **December 18, 2009**, I served the foregoing document described as **Answer to Petition for Review** on all interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

I served the foregoing document by U.S. Mail, as follows: I placed true copies of the document in a sealed envelope addressed to each interested party as shown above. I placed each such envelope with postage thereon fully prepaid, for collection and mailing at SIDLEY AUSTIN LLP, Los Angeles, California. I am readily familiar with SIDLEY AUSTIN LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **December 18, 2009**, at Los Angeles, California.

Dan Martinez
DAN MARTINEZ

In re Coordinated Proceeding Special Title (Rule 3.550(b))
In re Baycol Cases I and II
Shaw vs. Bayer Corporation
Appeal No. S178320

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