

# A DISCUSSION OF THE INTERLOCUTORY REVIEW OF CLASS CERTIFICATION ORDERS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(F)

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## I. INTRODUCTION

The grant or denial of a motion for class certification is undoubtedly a defining moment in any class action litigation. The class certification decision

marks the first pivotal point in litigation, and often can be dispositive of its outcome. Despite its decisive nature, until recently, class certification determinations were essentially unreviewable until the court ruled on the merits of the case. As a result, many potential class action suits were dismissed or settled before ever reaching a final determination. The importance of the class certification determination was recognized in the promulgation of Federal Rule of Civil Procedure 23(f) [hereinafter Rule 23(f)] in December 1998, which provided parties aggrieved by a district court's class certification determination an interlocutory appeal at the absolute discretion of the circuit court. This Note provides a detailed examination of the standards enumerated by a number of circuit courts as to when they will grant Rule 23(f) appeals, and further discusses the available case law regarding other issues surrounding Rule 23(f) appeals.

Part I introduces the final judgment rule and the mechanisms available for seeking interlocutory review of class certification orders prior to the enactment of Rule 23(f). Part II examines some history behind the enactment of Rule 23(f), and the arguments for and against the proposed Rule. The text of Rule 23(f), as well as the content of the Advisory Committee's Note to the Rule, will also be discussed in Part II. Part III discusses the scope of Rule 23(f) and sets out the types of issues that can be raised on a Rule 23(f) appeal. Part IV delves into the case law, and discusses the first case in each circuit that enumerates the types of cases that will be granted interlocutory review. Part V analyzes some of the trends observable in existing case law. Finally, Part VI deals with additional considerations in Rule 23(f) appeals, such as the timeliness of petitions, the staying of class actions and tolling of the statute of limitations while an appeal is pending, the constitutionality of Rule 23(f) and 28 U.S.C. § 1292(e), and the role of the district court in Rule 23(f) appeals.

## II. THE FINAL JUDGMENT RULE AND OPTIONS PRIOR TO THE ENACTMENT OF RULE 23(F)

The final judgment rule provides that "[t]he courts of appeal (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where direct review may be had in the Supreme Court."<sup>1</sup> Under the final judgment rule only final decisions are appealable.<sup>2</sup> The final judgment rule has many rationales, including: judicial efficiency,<sup>3</sup> preventing parties from using

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1. 28 U.S.C. § 1291 (2000).

2. *Id.*

3. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974) ("Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy.").

delay tactics and forcing settlements,<sup>4</sup> and preventing unnecessary appeals by parties that may ultimately prevail at trial.<sup>5</sup> The final judgment rule also emphasizes the deference appellate courts owe to trial court judges.<sup>6</sup> Class certification orders are interlocutory orders, not final decisions, in the context of the final judgment rule. Therefore, the final judgment rule makes it extremely difficult for a party to get interlocutory relief from a district court order granting or denying class certification.<sup>7</sup>

Despite the hardships the final judgment rule imposes on parties seeking interlocutory review of class certification decisions, it is not absolute. Prior to the enactment of Rule 23(f), three options existed for parties seeking interlocutory relief from adverse class certification orders.<sup>8</sup> The first is the collateral order doctrine.<sup>9</sup> To be appealable under the collateral order doctrine, three requirements must be met: (1) the order must conclusively determine the disputed question; (2) the appeal must resolve an important issue completely separate from the merits of the action; and (3) the issue must be effectively unreviewable on appeal from a final judgment.<sup>10</sup> In *Coopers & Lybrand v. Livesay*,<sup>11</sup> the district court denied class certification, and the court of appeals agreed to hear a direct appeal on the issue of class certification under the collateral order doctrine.<sup>12</sup> The court of appeals reasoned that it had jurisdiction because the denial of class certification would effectively end the litigation, preventing the plaintiffs from litigating their claims individually.<sup>13</sup> The Supreme

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4. See *Cunningham v. Hamilton County*, 527 U.S. 198, 203 (1999) (stating one intention of the final judgment rule is "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals") (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)); see also Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 726-29 (1993) (elaborating on the history behind the final judgment rule, and stating the final judgment rule was in part justified by the concern of parties using interlocutory appeals for purposes of harassment and delay).

5. Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1547-48 (2000).

6. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 374.

7. See James B. Weidner, *Rule 23(f) Appeals*, 1269 PRAC. L. INST. 717, 723 (Sec. Litig. 2001) ("As a practical matter . . . the final judgment rule [makes] it virtually impossible to obtain interlocutory appellate review.")

8. See *infra* notes 9-24 and accompanying text.

9. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (articulating the collateral order doctrine for the first time).

10. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

11. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

12. *Id.* at 467.

13. *Id.* at 469. A situation where a denial of class certification effectively ends the litigation because the plaintiffs' individual stakes in the litigation are too small to litigate their

Court agreed that denial of class certification would effectively end the litigation, but held that the final judgment rule applied, and reversed the court of appeals.<sup>14</sup> The holding in *Coopers* effectively prohibited the availability of the collateral order doctrine for interlocutory review of class certification, even in "death knell" situations.<sup>15</sup>

The second option is certification of a discretionary interlocutory appeal under 28 U.S.C. § 1292(b).<sup>16</sup> To qualify for a discretionary interlocutory appeal, three elements must be met: (1) the order must involve a controlling question of law; (2) there must be a substantial ground for a difference of opinion on the question; and (3) immediate appeal must materially advance the termination of the litigation.<sup>17</sup> Section 1292(b) appeals are rarely available to obtain review of a class certification order because it is unlikely that such an order will meet the three criteria.<sup>18</sup> Though § 1292(b) is not widely available for interlocutory review of class certification decisions, it has been used to review class certification decisions in rare cases.<sup>19</sup>

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individual claims is commonly termed a "death knell" situation. See, e.g., James N. Benedict, *Securities Litigation: Planning and Strategies*, SF86 A.L.I.-A.B.A. 1101, 1107 (2001) (defining and discussing the "death knell" argument as presented in *Livesay*).

14. *Coopers & Lybrand v. Livesay*, 437 U.S. at 477.

15. See *id.* (holding that even where denial of class certification causes a party to abandon their claim, the collateral order doctrine is unavailable for interlocutory relief).

16. The text of § 1292(b) reads:

When a district judge, in making a civil action an order not otherwise appealable under this section, shall be 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, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (2000).

17. Benedict, *supra* note 13, at 1106-07.

18. See Weidner, *supra* note 7, at 726 (concluding that while § 1292(b) has been used in rare cases to review class certification decisions, appeals of this kind were infrequently granted and § 1292(b) was effectively unavailable for parties seeking interlocutory relief of a class certification order).

19. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996) (allowing appeal of class certification decision under § 1292(b) and ultimately reversing the grant of certification); *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986) (reviewing order granting class certification pursuant to § 1292(b) and ultimately affirming the grant of class certification under Rule 23(b)(3)).

The third option is through a writ of mandamus issued pursuant to 28 U.S.C. § 1651(a).<sup>20</sup> Section 1651(a) provides that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>21</sup> Writs of mandamus have been used to allow appeals before final judgment, but only in the most extraordinary circumstances.<sup>22</sup> Writs of mandamus may be issued when two standards are met: (1) the challenged order causes irreparable harm and is therefore not effectively reviewable at the end of the case; and (2) the challenged order far exceeds the proper bounds of judicial discretion.<sup>23</sup> Writs of mandamus are difficult to obtain and are rarely granted absent extraordinary circumstances.<sup>24</sup> Though rare, some courts have issued writs of mandamus to review class certification decisions immediately, usually resulting in the decertification of an improperly certified class.<sup>25</sup>

### III. THE ENACTMENT OF RULE 23(F)

In response to concerns about the complex and confusing nature of the final judgment rule, Congress amended the Rules Enabling Act in the early 1990s to make rules defining a final judgment for appeal under 28 U.S.C. § 1291<sup>26</sup> and 28 U.S.C. § 1292 that allowed interlocutory appeals that were not before available under § 1292.<sup>27</sup> At the same time, the Advisory Committee on the

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20. 28 U.S.C. § 1651(a).

21. *Id.*

22. *See Will v. United States*, 389 U.S. 90, 95-96 (1967) (finding interlocutory review pursuant to a writ of mandamus appropriate where a district court has clearly violated its authority, no alternative relief exists, and the injury is irreparable).

23. *Benedict*, *supra* note 13, at 1107.

24. *Solimine & Hines*, *supra* note 5, at 1557.

25. *See, e.g., In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1090 (6th Cir. 1996) (stating that “although class certification orders are [generally] . . . not subject to mandamus review, . . . the district judge’s total disregard of the requirements of Rule 23 . . . warrant[ed] issuance of a writ of mandamus . . . limited [to the facts of the case]”); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995) (granting a writ of mandamus and directing the district court to decertify the plaintiff class); *In re Temple*, 851 F.2d 1269, 1273 (11th Cir. 1988) (finding the district court’s erroneous application of Rule 23 standard for class certification warranted the issuance of a writ of mandamus decertifying the class); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 307 (6th Cir. 1984) (issuing a writ of mandamus vacating the certification order).

26. *See* 28 U.S.C. § 2072 (Supp. 1991) (referring to the final judgment definition in subsection (c)).

27. *See* 28 U.S.C. § 1292(e) (Supp. 1993) (giving the Supreme Court the authority to prescribe rules that provide for appeal of an interlocutory decision that is not otherwise provided for in the statute).

Federal Rules of Civil Procedure considered amending Rule 23, and in 1996, it drafted what would become Rule 23(f).<sup>28</sup>

Inevitably, the proposed amendment attracted proponents and opponents. Supporters of proposed Rule 23(f) argued that the importance of the class certification rendered it deserving of immediate appeal.<sup>29</sup> Other supporters asserted that mandamus and § 1292(b) were ineffective in providing interlocutory review of class certification,<sup>30</sup> and "that the proposed rule would be a useful safety valve as courts began to implement the other proposed changes to Rule 23."<sup>31</sup> Supporters further argued that availability of an interlocutory appeal would encourage more careful decision making by the district court and deter the use of certification to coerce settlements of class actions.<sup>32</sup>

Opponents argued that defendants would abuse the rule by constantly appealing orders granting class certification.<sup>33</sup> Opponents also argued that plaintiffs would rarely use proposed Rule 23(f).<sup>34</sup> Opponents further argued that the availability of interlocutory review pursuant to mandamus and § 1292(b) adequately protected plaintiffs and defendants in appealing class certification decisions.<sup>35</sup> Opponents also took issue with the fact that the proposed rule offered absolutely no guidance on how it should be applied, and disregarded the views of the trial judge.<sup>36</sup> Finally, those against Rule 23(f) argued that it would only increase litigation expenses and further delays in resolving class actions.<sup>37</sup>

On December 1, 1998, Rule 23(f) went into effect.<sup>38</sup> Rule 23(f) provides:

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28. Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559, 559-66 (1996).

29. 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, at 409 (1997) [hereinafter Working Papers] (summary of comments by William T. Coleman, Jr.).

30. *Id.* at 410-11 (summary of comments by Miles N. Ruthberg and John L. McGoldrick (Bristol-Myers Squibb)).

31. Solimine & Hines, *supra* note 5, at 1565 (citing Working Papers, *supra* note 29, at 409 (summary of comments by Bartlett H. McGuire)).

32. Working Papers, *supra* note 29, at 410-12 (summary of comments by John L. Hill, Jr., Robert Dale Klein, and Richard S. Paul).

33. *Id.* at 407-08 (summary of comments of Michael Donovan, Patricia Sturdevant, and Stephen Gardner).

34. *Id.*

35. *Id.* (summary of comments of Melvyn I. Weiss, Richard A. Lockridge, and Gerald J. Rodos).

36. *Id.* at 407, 410 (summary of comments of Robert J. Reinstein, H. Laddie Montague, Jr., Melvyn I. Weiss, and Arthur R. Miller).

37. *Id.* at 408, 413 (summary of comments of Richard A. Lockridge, Michael D. Donovan, Stanley M. Chesley, and Joseph Goldberg).

38. See Proposed Amendments to the Federal Rules of Civil Procedure, Criminal Procedure, Evidence and Appellate Procedure, 177 F.R.D. 530 (1998) (providing the effective date

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge of the court of appeals so orders.<sup>39</sup>

Rule 23(f) was promulgated under 28 U.S.C. § 1292(e), which gives the Supreme Court the authority to “prescribe rules, in accordance with [the Rules Enabling Act] to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for . . . .”<sup>40</sup> Rule 23(f) is the only Federal Rule of Civil Procedure created under § 1292(e).<sup>41</sup>

It is within the “unfettered discretion” of the court of appeals to determine whether to permit a Rule 23(f) appeal from an order granting or denying class certification.<sup>42</sup> The Advisory Committee’s Note likens this discretion to that of the Supreme Court in reviewing a petition for certiorari,<sup>43</sup> and notes: “Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.”<sup>44</sup> In enacting Rule 23(f), the Committee foresaw granting permission to appeal “when the certification decision turns on a novel or unsettled question of law, or when . . . the decision on certification is likely dispositive of the litigation.”<sup>45</sup>

In promulgating Rule 23(f), the Committee voiced three situations or concerns justifying expansion of opportunities to appeal class certification decisions.<sup>46</sup> First, the “death knell” situation, in which denial of class certification effectively ends the litigation because the individual plaintiffs do not

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and transmitting proposed Rule 23(f) to Congress under the Rules Enabling Act); see also Solimine & Hines, *supra* note 5, at 1563 n.180 (discussing the abandonment of other proposed amendments to Rule 23 and the contemplation by Congress of legislation that would have enacted a provision similar to Rule 23(f)).

39. FED. R. CIV. P. 23(f). Rule 23(f) is the only amendment to Rule 23 since its promulgation on July 1, 1966. Michael P. Malakoff & Lorrie K. Albert, *Recent Case Law Addressing the Application and Effect of New Class Rule 23(f)*, 1241 PRAC. L. INST. 99, 102 (Consumer Fin. Servs. Litig. 2001).

40. 28 U.S.C. § 1292(e) (2000).

41. Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. OF APP. PRAC. & PROC. 309, 310 (Summer 1999).

42. FED. R. CIV. P. 23(f) advisory committee’s note.

43. See *id.* (“The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.”).

44. *Id.*

45. *Id.*

46. *Id.*

possess a large enough stake to litigate the claims individually.<sup>47</sup> The second concern was “reverse death knell” situations, in which an order granting class certification may force the defendant to settle rather than defend the suit and risk “potentially ruinous liability.”<sup>48</sup> Finally, resolving these concerns through permissive interlocutory appeal to the courts of appeals furthers judicial economy.<sup>49</sup>

A Rule 23(f) appeal differs from a permissive appeal under § 1292(b) in two ways. First, a Rule 23(f) appeal does not require a district court to certify the certification ruling for appeal.<sup>50</sup> However, “the district court often can assist the parties and the court of appeals by offering advice on the desirability of appeal.”<sup>51</sup> Second, Rule 23(f) appeals do not require that the district court order involve 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.”<sup>52</sup>

#### IV. SCOPE OF RULE 23(F)

If the court of appeals grants a Rule 23(f) petition, it may only address the issue of class certification.<sup>53</sup> Review of a class certification decision cannot involve an inquiry into the merits.<sup>54</sup> As the Eleventh Circuit stated in *Pickett v. Iowa Beef Processors*:<sup>55</sup> “Rule 23(f) provides for our jurisdiction over interlocutory appeals from a district court’s order granting class certification, and we limit our discussion to that issue. We do not address the merits of Plaintiffs’ claims.”<sup>56</sup> Despite the fact that a Rule 23(f) appeal is limited to the class certification decision, two circuits have held that it is appropriate in a Rule 23(f)

47. *Id.*

48. *Id.*

49. *See id.* (determining that granting permissive interlocutory appeal furthers judicial economy by addressing concerns of: (1) proceeding to final judgment on individual claims that by themselves are “much smaller than the costs of litigation”; and (2) forcing a defendant to “settle rather than incur the costs of defending a class action,” thus running the risk of “potentially ruinous liability”).

50. *Id.*

51. *Id.*

52. *Id.*

53. *See* 5 JAMES WM. MOORE ET. AL., MOORE’S FEDERAL PRACTICE § 23.61[9][b] (3d ed. 2000) (noting that “this avenue of appeal applies only to orders granting or denying certification, not to other types of orders in class actions”).

54. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

55. *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000).

56. *Id.* at 1279.

interlocutory appeal to address the issue of standing.<sup>57</sup> In *Bertulli v. Independent Association of Continental Pilots*,<sup>58</sup> the Fifth Circuit recognized that a party may only raise issues of class certification in a Rule 23(f) appeal.<sup>59</sup> However, the court went on to find that standing was “an inherent prerequisite to the class certification inquiry; thus, despite the limited nature of a Rule 23(f) appeal, defendants can raise the issue of standing . . . .”<sup>60</sup> The Fifth Circuit again considered the standing of plaintiffs under review pursuant to Rule 23(f) in *Rivera v. Wyeth-Ayerst Laboratories*,<sup>61</sup> where the court held that because standing is a prerequisite to a class certification determination, “standing may—indeed must—be addressed even under the limits of a rule 23(f) appeal.”<sup>62</sup> In *Carter v. West Publishing Co.*,<sup>63</sup> the Eleventh Circuit reasoned that in order to bring a class action under Title VII, the named plaintiff must have standing and the requirements of Rule 23 must be satisfied.<sup>64</sup> Therefore, “[a] determination on standing is a part of the class certification analysis, and thus, subject to review under Rule 23(f).”<sup>65</sup> However, while Article III standing is reviewable under a Rule 23(f) appeal because it is inherent in class certification, no other types of standing are reviewable on a Rule 23(f) appeal because they are not integral to class certification.<sup>66</sup>

## V. CIRCUITS ENUMERATING STANDARDS

Since the inception of Rule 23(f) on December 1, 1998, seven of the thirteen circuits have developed standards for determining when Rule 23(f) appellate review will be granted.<sup>67</sup> The following cases are presented in chronological order, from the first circuit decision enumerating standards to the

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57. See *infra* notes 58-64 and accompanying text.

58. *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290 (5th Cir. 2001).

59. *Id.* at 294.

60. *Id.* The Fifth Circuit additionally raised the point that federal courts have a “duty to determine whether standing exists even if not raised by the parties.” *Id.* (citing *Christoff v. Bergeron Indus., Inc.*, 748 F.3d 297, 298 (5th Cir. 1984)).

61. *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002).

62. *Id.* at 319.

63. *Carter v. West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000).

64. *Id.* at 1262.

65. *Id.* at 1263.

66. See *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 108 (D.C. Cir. 2002) (holding that “the issue of antitrust standing is beyond the scope of the court’s Rule 23(f) review”).

67. The number of circuits enumerating standards referred to in this sentence is the number that had set forth criteria for Rule 23(f) appeals by August 23, 2002.

most recent circuit court decision setting forth guideposts for granting Rule 23(f) appeals.

A. *Seventh Circuit—Blair v. Equifax Check Services, Inc.*<sup>68</sup>

In *Blair v. Equifax Check Services, Inc.*, the United States District Court for the Northern District of Illinois certified a plaintiff class consisting of shoppers who used Equifax's check verification system at retail chain stores.<sup>69</sup> At the same time, Equifax was also a defendant in litigation pending in the same district court.<sup>70</sup> On the same day the class was certified in *Blair*, the plaintiffs in *Crawford v. Equifax Check Services, Inc.* reached a settlement.<sup>71</sup> It was discovered that the plaintiff class in *Blair* was actually a sub-class of the plaintiff class in *Crawford*.<sup>72</sup> Consequently, any settlement or judgment in *Crawford* would be binding on the plaintiff class in *Blair*.<sup>73</sup> Based on the "newly discovered" information, Equifax moved the district court for a reversal of the class certification in *Blair*.<sup>74</sup> The district court denied the motion, and Equifax appealed the class certification order to the Seventh Circuit under Rule 23(f).<sup>75</sup>

In determining categories of cases appropriate for Rule 23(f) appellate review, the Seventh Circuit expressly stated that "[n]either a bright-line approach nor a catalogue of factors" would address the issue.<sup>76</sup> Drawing on the purposes of Rule 23(f) as expressed in the Advisory Committee's Note, the Seventh Circuit delineated three classes of cases where granting a Rule 23(f) petition would be proper.<sup>77</sup> The first class of cases appropriate for Rule 23(f) review were those in which a denial of class certification "sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation."<sup>78</sup> Despite the holding of *Coopers & Lybrand v. Livesay*, in which the Supreme Court held that an order denying class certification was

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68. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999). This case was the first published decision enumerating Rule 23(f) categories. The case was decided on June 22, 1999, by Judge Easterbrook who has since become a leader in Rule 23(f) jurisprudence.

69. *Id.* at 836.

70. *Id.* The case pending in the district court was *Crawford v. Equifax Check Services, Inc.* *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 837.

76. *Id.* at 834.

77. *Id.*

78. *Id.*

unavailable for § 1292(b) interlocutory review in “death knell” situations, appellate courts have the authority pursuant to Rule 23(f) to entertain interlocutory appeals in death knell cases.<sup>79</sup> Therefore, “when denial of class status seems likely to be fatal, and when the plaintiff has a solid argument in opposition to the district court’s decision, then a favorable exercise of appellate discretion is indicated.”<sup>80</sup>

The second class of cases appropriate for review under Rule 23(f) are “reverse death knell cases,” where the grant of class certification “can put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight.”<sup>81</sup> This second category is aimed at situations in which the plaintiff or the district judge wants to get a settlement from a defendant by certifying a class and where the defendant’s legal position is “justified, but unpopular.”<sup>82</sup> Therefore, “when the stakes are large and the risk of settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order.”<sup>83</sup>

If an appellant chooses to argue that Rule 23(f) review is appropriate based on either the first or second category, the appellant must additionally demonstrate that the district court’s ruling on class certification is questionable in light of the “discretion the district judge possesses in implementing Rule 23, and the correspondingly deferential standard of appellate review.”<sup>84</sup>

Finally, Rule 23(f) review is appropriately granted where an appeal may facilitate development of the law.<sup>85</sup> Because a large portion of class action lawsuits settle, some fundamental issues regarding class actions are poorly developed. When the justification for Rule 23(f) review is to develop the law, a showing that the district court’s decision was erroneous or shaky is less important.<sup>86</sup> “[T]he more fundamental the question and the greater the likelihood that it will escape effective disposition at the end of the case, the more appropriate is an appeal under Rule 23(f).”<sup>87</sup>

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 835.

84. *Id.*

85. *Id.* The court went on to note that “[l]aw may develop through affirmances as well as reversals.” *Id.*

86. *Id.*

87. *Id.*

After enumerating these categories, the Seventh Circuit accepted Equifax's appeal under the third category of cases appropriate for Rule 23(f) review.<sup>88</sup> The court noted that neither party could cite precedent to support its position that this was an issue that had evaded appellate resolution.<sup>89</sup> The Seventh Circuit ultimately held that until *Crawford* reached final judgment, *Blair* could proceed as a class action.<sup>90</sup> The court found no abuse of discretion in the certification of a class by the district court, and therefore affirmed the district court's grant of class certification.<sup>91</sup>

B. *First Circuit—Waste Management Holdings, Inc. v. Mowbray*<sup>92</sup>

In *Waste Management Holdings, Inc. v. Mowbray*, the plaintiff, Mowbray, sold his business in exchange for shares in Waste Management Holdings, Inc. (WMH).<sup>93</sup> Several years later, WMH announced that it had grossly overstated its earnings for the past eight years.<sup>94</sup> In the resulting securities litigation, Mowbray sought to certify a class of all persons who had sold assets to WMH in exchange for shares of WMH's common stock.<sup>95</sup> Though the district court denied certification as to some groups of individuals, it granted certification as to the "Warranty Group" under Rule 23(b)(3).<sup>96</sup> Consequently, WMH sought interlocutory review of the class certification order pursuant to Rule 23(f).<sup>97</sup>

In developing its own Rule 23(f) categories, the First Circuit recognized the structural soundness of the categories developed by the Seventh Circuit in *Blair*.<sup>98</sup> The First Circuit then proceeded to adopt the *Blair* categories as appropriate circumstances for exercising its authority under Rule 23(f), stating:

First, an appeal ordinarily should be permitted when a denial of class status effectively ends the case (because, say, the named plaintiff's claim is not of sufficient magnitude to warrant the costs of stand-alone litigation). Second, an appeal ordinarily should be permitted when the grant of class status raises the stakes of the litigation so substantially that the defendant will feel

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88. *Id.* at 837.

89. *Id.* at 838.

90. *Id.*

91. *Id.* at 839.

92. *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000).

93. *Id.* at 291.

94. *Id.*

95. *Id.*

96. *Id.* at 292.

97. *Id.*

98. *Id.* at 294.

irresistible pressure to settle. Third, an appeal ordinarily should be permitted when it will lead to clarification of a fundamental issue of law.<sup>99</sup>

Like *Blair*, the First Circuit held that to invoke either the first or second category, the petitioner must demonstrate that the district court's ruling was questionable against the backdrop of discretion the district court has in implementing Rule 23 and the deferential standard of appellate review under Rule 23(f).<sup>100</sup> Further, a mere showing of strong economic pressure to settle, alone, is not enough.<sup>101</sup> The Rule 23(f) applicant "must [also] demonstrate some significant weakness in the class certification decision."<sup>102</sup> As to the third category, the First Circuit held that the issue to be resolved carried more weight than the likelihood of reversal in determining whether a case falls into this category.<sup>103</sup> Moreover, "a showing that an end-of-case appeal promises to be an adequate remedy will weigh heavily against granting a Rule 23(f) application."<sup>104</sup>

Although the First Circuit essentially concurred with the standards enumerated in *Blair*, it worried that category three, as stated in *Blair*, would encourage many disappointed litigants to file fruitless Rule 23(f) applications.<sup>105</sup> Based on these concerns, the court restricted category three applications to "those instances in which an appeal will permit the resolution of an unsettled legal issue that is *important to the particular litigation as well as important in itself* and likely to escape effective review if left hanging until the end of the case."<sup>106</sup>

The court expressly stated that the categories listed were neither exhaustive nor exclusive.<sup>107</sup> The enumeration of categories did not foreclose the possibility that special circumstances would prompt the court to grant Rule 23(f) review of a case that did not fall into one of the categories.<sup>108</sup> Further, the discretionary nature of the provision allowed the courts of appeals to deny Rule 23(f) appellate review in cases that seemingly fell into one of the enumerated categories.<sup>109</sup> The court went on to note the "disruptive, time-consuming, and expensive" nature of interlocutory appeals, and determined that courts "should err, if at all, on the side

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99. *Id.* at 293 (citing *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999)).

100. *Id.* (citing *Blair v. Equifax Check Servs., Inc.*, 181 F.3d at 835).

101. *Id.* at 295.

102. *Id.*

103. *Id.* at 293 (citing *Blair v. Equifax Check Servs., Inc.*, 181 F.3d at 835).

104. *Id.* at 293-94 (citing *Blair v. Equifax Check Servs., Inc.*, 181 F.3d at 835).

105. *Id.* at 294.

106. *Id.* (emphasis added).

107. *Id.*

108. *Id.*

109. *Id.*

of allowing the district court an opportunity to fine-tune its class certification order . . . rather than opening the door too widely to interlocutory review."<sup>110</sup>

After adopting the *Blair* categories, with the modification to the third category, the court determined the case at hand did not fall into any of the three categories.<sup>111</sup> While this type of case would not normally be accepted for Rule 23(f) review, the court accepted the appeal due to the "special circumstances" surrounding the court's first opportunity to enumerate categories of cases in which Rule 23(f) interlocutory review was appropriate.<sup>112</sup> Based on the merits, the First Circuit affirmed, finding that the district court had not abused its discretion in certifying the class.<sup>113</sup>

### C. Eleventh Circuit—Prado-Steiman v. Bush<sup>114</sup>

In *Prado-Steiman v. Bush*, the plaintiffs (developmentally disabled persons) challenged Florida's administration of a program intended to provide Medicaid services to persons, like the plaintiffs, in their own homes and in community settings.<sup>115</sup> The district court granted the plaintiffs' motion for class certification, and the defendant filed a Rule 23(f) petition for interlocutory review of the class certification ruling.<sup>116</sup>

In evaluating the propriety of granting a Rule 23(f) appeal, the Eleventh Circuit found guidance in *Mowbray* and *Blair*, but determined that a more extensive review was necessary.<sup>117</sup> The Eleventh Circuit proceeded to adopt five "guideposts" for determining when a Rule 23(f) appeal should be granted.<sup>118</sup>

First, a Rule 23(f) appeal should be granted where the certification decision is likely dispositive of the litigation.<sup>119</sup> This guidepost encompasses both death knell and reverse death knell situations, and is limited to cases where the district court's ruling would effectively prevent the petitioner from pursuing the litigation.<sup>120</sup> Some factors relevant to making a determination under the first

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110. *Id.*

111. *Id.* at 295.

112. *Id.*

113. *Id.* at 299.

114. *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000).

115. *Id.* at 1268.

116. *Id.* at 1269-71.

117. *Id.* at 1272-73.

118. *Id.* at 1274.

119. *Id.*

120. *Id.*

guidepost are: (1) the nature of the remedy sought; (2) the size of the punitive class; and (3) the financial status of the parties.<sup>121</sup>

The second guidepost directs the circuit court to "consider whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion."<sup>122</sup> Review is appropriate where it would spare the parties the expense and burden of litigating the matter to final judgment only to have it reversed on appeal.<sup>123</sup> A mere demonstration that the ruling is questionable is insufficient to warrant review under this guidepost.<sup>124</sup> Review under this guidepost would be appropriate, for example, where the petitioner has shown that the district court applied the incorrect standard or overlooked controlling precedent in making its class certification ruling.<sup>125</sup>

Third, the court should consider whether an appeal "will permit the resolution of an unsettled legal issue that is important to the particular litigation" and important in and of itself.<sup>126</sup> Under the third guidepost, a grant of review is most appropriate if the following criteria are satisfied: (1) the issue will escape review if appeal must wait until the end of the case; (2) the ruling will assist the bench and the bar; (3) the suit contains a government entity or a strong public interest component; and (4) the unsettled issues "relate specifically to the requirements of Rule 23 or the mechanics of certifying a class."<sup>127</sup>

The fourth guidepost directs the court to consider the nature and status of the litigation.<sup>128</sup> Under the fourth guidepost, the circuit court should consider: (1) the status of discovery; (2) the pendency of relevant motions; and (3) the length of time the matter has been pending.<sup>129</sup> The Eleventh Circuit noted that an insufficient or limited record at the district court level would adversely affect the appellate court's ability to evaluate the class certification decision, and in those situations it would likely be improper to grant a Rule 23(f) appeal.<sup>130</sup>

Finally, the fifth guidepost directs the court to consider the likelihood that future events would make immediate appellate review more or less

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121. *Id.*

122. *Id.*

123. *Id.* at 1274-75.

124. *Id.* at 1275.

125. *Id.*

126. *Id.* (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000)).

127. *Id.* (citing *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d at 294).

128. *Id.* at 1276.

129. *Id.*

130. *Id.*

appropriate.<sup>131</sup> For example, pending settlement negotiations or a prospective change in a party's financial position would both be factors against granting Rule 23(f) review.<sup>132</sup> On the other hand, the court would favor a Rule 23(f) appeal where the case is one in a series of related actions that are likely to involve the same issues or parties.<sup>133</sup> In determining whether to grant Rule 23(f) review, the Eleventh Circuit emphasized that the district court's expression, or lack of expression, as to its views on a Rule 23(f) appeal would be significant to this guidepost.<sup>134</sup>

After enumerating the five guideposts, the Eleventh Circuit qualified them by asserting they were not exhaustive and that no single guidepost was necessarily conclusive.<sup>135</sup> The Eleventh Circuit stated that interlocutory appeals should be disfavored due to their inherently "disruptive, time-consuming, and expensive" nature.<sup>136</sup> Further, the Eleventh Circuit declared that a Rule 23(f) review would not be granted "as a matter of course," and that it would exercise restraint in accepting them.<sup>137</sup>

In analyzing the case at hand under the newly enumerated guideposts, the Eleventh Circuit concluded the case would not normally be a case that would warrant Rule 23(f) interlocutory review.<sup>138</sup> However, the court gave three reasons for hearing the lawsuit despite the fact that it was ill-fitted for Rule 23(f) review under the newly enumerated guideposts: (1) it gave the court an opportunity to state the standards for review under Rule 23(f); (2) there was a compelling public interest in determining the scope of the State's obligations to the plaintiffs; and (3) the lawsuit was of tremendous importance to thousands of developmentally disabled people in the State.<sup>139</sup> After review, the Eleventh Circuit ultimately vacated the district court's class certification order.<sup>140</sup>

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131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* (citing *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000)).

137. *Id.* at 1277.

138. *Id.*

139. *Id.*

140. *Id.* at 1283.

D. *Fourth Circuit*—*Lienhart v. Dryvit Systems, Inc.*<sup>141</sup>

In *Lienhart v. Dryvit Systems, Inc.*, the plaintiffs alleged the defendant's product was negligently designed and that the defendant had failed to warn consumers of the alleged defects in the product.<sup>142</sup> The district court certified a plaintiff class.<sup>143</sup> Dryvit petitioned the Fourth Circuit for review of the decision under Rule 23(f).<sup>144</sup>

In determining what factors should guide the court in evaluating Rule 23(f) petitions, the Fourth Circuit looked favorably upon the guideposts enumerated in *Prado-Steiman*, and ultimately adopted those guideposts with some variation.<sup>145</sup> The major addition the Fourth Circuit made to the *Prado-Steiman* factors was to analyze the "substantial weakness" factor on a sliding scale in conjunction with the other factors.<sup>146</sup> Under the Fourth Circuit's system of review, the stronger the showing of substantial weakness in the district court's decision, the less compelling the showing has to be under the remaining four factors to justify granting a Rule 23(f) appeal.<sup>147</sup> For example, if the certification decision is manifestly erroneous and certain to be reversed on appeal, a Rule 23(f) petition may be granted though the issues presented by the certification are not of general importance and the decision is not a death knell to the litigation.<sup>148</sup> The Fourth Circuit found that it would be a tremendous waste of judicial resources for a case to continue to final judgment and appeal just so an obviously defective class could be decertified.<sup>149</sup> Where the class certification decision is clearly erroneous, as in the hypothetical cases above, the Fourth Circuit found that the weakness of the certification decision *alone* may be sufficient to permit immediate review.<sup>150</sup> However, where the weakness of the class certification determination is less substantial, the other factors must be stronger in order to warrant Rule 23(f) review.<sup>151</sup>

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141. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001).

142. *Id.* at 141.

143. *Id.*

144. *Id.*

145. *Id.* at 144-45. The Fourth Circuit also stated it understood that "the *Prado-Steiman* court broadened the bases for a grant of review" from those previously articulated in *Mowbray*. *Id.*

146. *Id.* at 145-46 ("[T]he 'substantial weakness' prong operates on a sliding scale to determine the strength of the necessary showing regarding the other *Prado-Steiman* factors.").

147. *Id.*

148. *Id.* at 145.

149. *Id.*

150. *Id.*

151. *Id.*

In applying this "sliding scale" view of the basic *Prado-Steiman* guideposts, the Fourth Circuit found the class certification to be clearly erroneous and certain to be vacated on appeal from final judgment.<sup>152</sup> As discussed above, review of the certification decision in this case was appropriate, regardless of the other factors, because granting the Rule 23(f) appeal would avoid judicial diseconomy.<sup>153</sup> Because the record was not clear enough to determine if the class was appropriate under state law, the court vacated the certification order and remanded the case to the district court to consider certification in light of the statute.<sup>154</sup>

E. *Third Circuit*—*Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*<sup>155</sup>

In *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the district court denied certification of a class alleging that broker-dealers, who traded on the NASDAQ, breached their duty of best execution.<sup>156</sup> The plaintiffs appealed the denial of class certification under Rule 23(f).<sup>157</sup>

In determining what standards to adopt, the Third Circuit looked to the Advisory Committee's Note, *Blair, Mowbray, Prado-Steiman*, and *Leinhart* as "principles [that] provide a useful template for courts to work from when evaluating petitions under Rule 23(f)."<sup>158</sup> Ultimately, the Third Circuit adopted three categories of cases where the grant of a Rule 23(f) petition would be appropriate: (1) cases where accepting an appeal would end the effect of an imprudent class certification (where the decision is likely to be dispositive of the litigation); (2) cases of an erroneous ruling; and (3) cases facilitating the development of the law on class certification.<sup>159</sup>

These categories were intended to be guidelines only, and were not an expression of the court's entire authority or discretion.<sup>160</sup> Further, the Third

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152. *Id.* at 146.

153. *Id.*

154. *Id.* at 150.

155. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001).

156. *Id.* at 162.

157. *Id.*

158. *Id.* at 163.

159. *Id.* at 165. These categories of cases closely mimic the standards announced in *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), and *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999).

160. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d at 163.

Circuit made clear that it retained the authority under the Rule to grant Rule 23(f) review to cases outside of these categories.<sup>161</sup>

In analyzing the case at hand under these categories, the Third Circuit found that a grant of class certification would place “hydraulic pressure to settle on defendants” and that a denial would likely make the claims “too small to survive as individual claims.”<sup>162</sup> Therefore, grant of the Rule 23(f) petition was proper under the first category of cases.<sup>163</sup> The court also found that the case raised fundamental questions of what type of private securities claims merit class certification, and thus fell under the third category of cases appropriate for Rule 23(f) review.<sup>164</sup> On the merits, the court determined that the class could not meet the requirements of Rule 23(b)(3) and affirmed the denial of class certification.<sup>165</sup>

#### F. *Second Circuit—In re Sumitomo Copper Litigation*<sup>166</sup>

In *In re Sumitomo Copper Litigation*, the plaintiffs alleged that the defendants “conspired to manipulate the prices of copper futures contracts traded on the COMPEX division of the NY Mercantile Exchange” and sought to pursue the case as a class action.<sup>167</sup> The district court certified a class, and the defendants sought Rule 23(f) review of that determination from the Second Circuit.<sup>168</sup> Despite the Second Circuit’s denial of the Rule 23(f) petition, it still proceeded to enumerate the standards the court will apply to future petitions for interlocutory appeal of class certification decisions.<sup>169</sup>

The Second Circuit adopted two categories of cases for which a grant of Rule 23(f) review is appropriate.<sup>170</sup> The party seeking Rule 23(f) review must demonstrate either: (1) “the certification order will effectively terminate the litigation and there has been a substantial showing that the district court’s decision is questionable”; or (2) “that the certification order implicates a legal question about which there is a compelling need for immediate resolution.”<sup>171</sup>

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 193.

166. *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2d Cir. 2001).

167. *Id.* at 136.

168. *Id.*

169. *Id.*

170. *Id.* at 139.

171. *Id.* The Second Circuit stated that in adopting these two categories of cases it was concurring with the standards enumerated by its sister circuits, the First, Seventh, and Eleventh Circuits in *Blair*, *Mowbray*, and *Prado-Steiman*, respectively. *Id.*

The Second Circuit went on to state that the "standards of Rule 23(f) [would] rarely be met" and therefore, parties should not consider Rule 23(f) as a means to delay proceedings in the district court.<sup>172</sup> Additionally, the Second Circuit recognized that the district court was often in the best position to determine if class certification was proper,<sup>173</sup> and declared that opinions of district courts on the propriety of a Rule 23(f) petition would be highly valued.<sup>174</sup>

In applying these new standards to the case at hand, the Second Circuit held that the petitioner-defendant failed to show the case fell into either category, and consequently denied the Rule 23(f) petition.<sup>175</sup>

#### G. D.C. Circuit—*In re* Lorazepam & Clorazepate Antitrust Litigation<sup>176</sup>

In *In re Lorazepam & Clorazepate Antitrust Litigation*, the defendants, Mylan Laboratories, Inc. and its subsidiaries ("Mylan"), were accused of engaging in price fixing and monopolization of the market for the generic anti-anxiety drugs lorazepam and clorazepate in violation of the Sherman Act and the Clayton Act.<sup>177</sup> The district court certified a class of direct purchasers of the aforementioned generic anti-anxiety drugs.<sup>178</sup> Mylan appealed the grant of class certification on the ground that the class contained both direct and indirect purchasers in violation of the United States Supreme Court case *Illinois Brick Co. v. Illinois*.<sup>179</sup> Before addressing the merits of Mylan's contended error, the D.C. Circuit enumerated the standards it would follow in determining the propriety of granting a Rule 23(f) petition.<sup>180</sup>

The D.C. Circuit began its analysis by reviewing the Advisory Committee's Note to Rule 23(f), and then, through a methodic review of the standards that its sister circuits chose to employ.<sup>181</sup> Next, the court noted three subtle differences between the analyses utilized by its sister circuits.<sup>182</sup> First, the court noted that the Third and Fourth Circuits would grant Rule 23(f) appeals "if the district court's decision is erroneous, regardless [of] whether the other factors

172. *Id.* at 140.

173. *Id.* at 139.

174. *Id.* at 140.

175. *Id.*

176. *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002).

177. *Id.* at 99-101.

178. *Id.* at 101.

179. *Id.* at 101-02 (citing *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977)).

180. *Id.* at 102.

181. *See id.* at 102-04 (reiterating the standards expressed in *Blair, Mowbray, Sumitomo Copper Litigation, Prado-Steiman, Lienhart, and Newton*).

182. *Id.* at 104.

governing appeal under Rule 23(f) are present."<sup>183</sup> Second, the First and Seventh Circuits would allow Rule 23(f) appeals where an "unsettled and fundamental question of law [is raised], regardless [of] whether the district court likely erred."<sup>184</sup> Third, the First and Seventh Circuits direct that a Rule 23(f) appeal of an unsettled question of law "is only appropriate when the question may evade effective appellate review at the end of the trial court proceedings."<sup>185</sup>

After considering all of these sources, the D.C. Circuit set forth three situations in which Rule 23(f) review is appropriate: (1) where the class certification determination results in a death knell situation for either party, coupled with a questionable certification decision by the district court; (2) where an unsettled and fundamental issue of law is presented which is important to the litigation or important in and of itself, which will likely evade review; and (3) where the certification decision was manifestly erroneous.<sup>186</sup> The court further held, as the Seventh Circuit had, that the appropriateness of the district court's decision would not affect review under the second category.<sup>187</sup> However, unlike the First and Seventh Circuits, the D.C. Circuit determined that "error in certifying a class should not entirely be ignored outside the first category,"<sup>188</sup> and a manifestly erroneous class certification decision would warrant review even absent a death knell situation.<sup>189</sup>

In the case at hand, defendant Mylan asserted that the court should grant its Rule 23(f) petition because the petition presented important issues of antitrust standing, and because the certification decision was suspect.<sup>190</sup> The D.C. Circuit rejected Mylan's contentions and denied Rule 23(f) review because it fell outside the three categories appropriate for review.<sup>191</sup>

## VI. TRENDS

Some informative trends with regard to Rule 23(f) petitions emerge from a compilation of the cases published since the Rule's enactment in 1998.<sup>192</sup> From this compilation, it is apparent that circuit courts in general are more likely to

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183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 105.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 106.

191. *Id.*

192. *See infra* Part IX and accompanying table (listing cases that considered Rule 23(f) petitions).

consider Rule 23(f) appeals today than they were at the time the Rule was enacted in 1998. The number of published opinions in which a Rule 23(f) petition was considered rose from a mere three in the year 1999,<sup>193</sup> to eight in 2000,<sup>194</sup> and increased to nineteen in 2001.<sup>195</sup> As discussed in Part IV, the First,<sup>196</sup> Second,<sup>197</sup> Third,<sup>198</sup> Fourth,<sup>199</sup> Seventh,<sup>200</sup> Eleventh,<sup>201</sup> and D.C.<sup>202</sup> Circuits have enumerated standards to determine when to grant a Rule 23(f) petition for review of the class certification determination. Further, both the Eleventh and Third Circuits heard Rule 23(f) petitions before ever enumerating standards.<sup>203</sup> In addition, the Fifth,<sup>204</sup> Sixth,<sup>205</sup> Eighth,<sup>206</sup> and Ninth<sup>207</sup> Circuits

193. *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999); *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999).

194. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000); *Carter v. West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000); *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228 (11th Cir. 2000); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000); *Scott v. Dennis Reimer Co.*, No. 99-4465, 2000 WL 145397 (6th Cir. Feb. 1, 2000).

195. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341 (11th Cir. 2001); *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 270 F.3d 984 (2d Cir. 2001); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178 (3d Cir. 2001); *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001); *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2d Cir. 2001); *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001); *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir. 2001); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230 (9th Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001); *Shin v. Cobb County Bd. of Educ.*, 248 F.3d 1061 (11th Cir. 2001); *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001); *Turner v. Beneficial Corp.*, 242 F.3d 1023 (11th Cir. 2001); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290 (5th Cir. 2001); *In re LifeUSA Holding, Inc.*, 242 F.3d 136 (3d Cir. 2001); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417 (5th Cir. 2001).

196. *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000).

197. *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2d Cir. 2001).

198. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001).

199. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001).

200. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999).

201. *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000).

202. *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002).

203. *See infra* Part IX and accompanying table (listing cases that considered Rule 23(f) petitions). The Eleventh Circuit heard two cases, *Rustein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), and *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000), before setting forth its standards in *Prado-Steiman v. Bush*, 221 F.3d at 1266. The Third Circuit heard one case, *In re LifeUSA Holding Inc.*, 242 F.3d 136 (3d Cir. 2001), before setting forth its categories in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d at 154.

204. *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290 (5th Cir. 2001); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417 (5th Cir. 2001); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000).

have all entertained Rule 23(f) petitions without yet enumerating standards.<sup>208</sup> The Tenth Circuit has yet to publish any opinions in which a Rule 23(f) petition was considered.<sup>209</sup> The propensity of a circuit court to consider Rule 23(f) petitions is also illustrated by the compilation of cases in Part IX, Table 1. The following is a break down of the cases heard by circuit:

Circuit	Number of Reported Cases Which Consider Rule 23(f) Petitions <sup>210</sup>
First	1 <sup>211</sup>
Second	3 <sup>212</sup>
Third	4 <sup>213</sup>
Fourth	1 <sup>214</sup>
Fifth	5 <sup>215</sup>
Sixth	3 <sup>216</sup>

205. *Scott v. Dennis Reimer Co.*, No. 99-4465, 2000 WL 145397 (6th Cir. Feb. 1, 2000).

206. *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002).

207. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir. 2001); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230 (9th Cir. 2001); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2001).

208. See cases cited *supra* notes 204-07.

209. See *infra* Part IX and accompanying table (illustrating that the Tenth Circuit has not decided a case in which a Rule 23(f) petition was considered).

210. This table includes published cases and cases available on electronic databases like Westlaw, but does not include other unreported or unpublished cases.

211. *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000).

212. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001); *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 270 F.3d 984 (2d Cir. 2001); *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2d Cir. 2001).

213. *McKowan Lowe & Co., v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178 (3d Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001); *In re LifeUSA Holding, Inc.*, 242 F.3d 136 (3d Cir. 2001).

214. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001).

215. *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002); *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290 (5th Cir. 2001); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417 (5th Cir. 2001); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000).

216. *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002); *Casson v. Nissan Motor Acceptance Corp.*, No. 00-6483, 2002 WL 22351 (6th Cir. Jan. 7, 2002); *Scott v. Dennis Reimer Co.*, No. 99-4465, 2000 WL 145397 (6th Cir. Feb. 1, 2000).

Seventh	8 <sup>217</sup>
Eighth	1 <sup>218</sup>
Ninth	3 <sup>219</sup>
Tenth	0 <sup>220</sup>
Eleventh	10 <sup>221</sup>
D.C.	1 <sup>222</sup>

This data evinces the likely conclusion that certain circuits, such as the Seventh and the Eleventh, are more likely to hear Rule 23(f) petitions than other circuits. The greater frequency of Rule 23(f) petitions heard in the Eleventh and Seventh Circuits may also be attributable to the fact that both were among the first circuits to enumerate standards for Rule 23(f) appeals.<sup>223</sup> The increased instances of granting Rule 23(f) petitions in the Seventh and Eleventh Circuits could lead to forum shopping by prospective class action plaintiffs and defendants seeking to transfer to an alternative venue. The final and possibly most critical conclusion is that out of the forty published cases examined, thirty-one (over seventy-seven percent) of those petitions granted ultimately resulted in no class certification.<sup>224</sup> In twenty-two of the cases resulting in no class

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217. *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002); *West v. Prudential Secs., Inc.*, 282 F.3d 935 (7th Cir. 2002); *In re Bemis Co.*, 279 F.3d 419 (7th Cir. 2002); *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999); *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999).

218. *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002).

219. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir. 2001); *Hawkins v. Compamet-Cassani*, 251 F.3d 1230 (9th Cir. 2001); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000).

220. See *infra* Part IX and accompanying table (illustrating that the Tenth Circuit has not decided a case in which a Rule 23(f) petition was considered).

221. *Franze v. Equitable Assurance*, 296 F.3d 1250 (11th Cir. 2002); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341 (11th Cir. 2001); *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001); *Shin v. Cobb County Bd. of Educ.*, 248 F.3d 1061 (11th Cir. 2001); *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001); *Turner v. Beneficial Corp.*, 242 F.3d 1023 (11th Cir. 2001); *Carter v. West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000); *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228 (11th Cir. 2000); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000).

222. *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98 (D.C. Cir. 2002).

223. See *infra* Part IX and accompanying table.

224. See *Franze v. Equitable Assurance*, 296 F.3d at 1250 (class certification vacated); *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002) (class certification

certification (seventy percent), the circuit court vacated the district court's grant of class certification, and in nine of the cases (twenty-nine percent), the circuit court affirmed the district court's denial of class certification.<sup>225</sup> A probable conclusion from this data is that if a Rule 23(f) petition is granted, the circuit court will likely either vacate the grant of class certification or affirm the denial of class certification.<sup>226</sup>

In sum, while this compilation of published cases provides an overview of the trends in Rule 23(f) petitions, it is important to remember that many Rule 23(f) petitions may be disposed of by a mere order not accompanied by a published opinion. In those cases where the Rule 23(f) petition is denied, it is more likely that the case will ultimately settle, and there will be no accessible record of the Rule 23(f) petition or the reasons for its denial. Hence, it is impossible to draw on these types of cases for guidance in delineating what does *not* fall under the categories enumerated by the circuits, or in determining what types of cases do not meet the criteria for review in those circuits that have yet to enumerate standards.

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vacated); *McKowan Lowe & Co., v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002) (class certification vacated); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002) (class certification vacated); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002) (class certification vacated); *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002) (class certification vacated); *West v. Prudential Secs., Inc.*, 282 F.3d 935 (7th Cir. 2002) (class certification vacated); *In re Bemis Co.*, 279 F.3d 419 (7th Cir. 2002) (class certification denied); *Piazza v. Ebsco Indus., Inc.*, 273 F.3d at 1341 (class certification vacated); *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 270 F.3d 984 (2d Cir. 2001) (class certification denied); *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001) (class certification vacated); *Johnson v. HBO Film Mgmt., Inc.*, 265 F.3d 178 (3d Cir. 2001) (class certification denied); *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001) (class certification vacated); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001) (class certification denied); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001) (class certification vacated); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d at 1180 (class certification denied); *Hawkins v. Comparet-Cassani*, 251 F.3d at 1230 (class certification vacated); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001) (class certification vacated); *Shin v. Cobb County Bd. of Educ.*, 248 F.3d at 1061 (class certification denied); *Murray v. Auslander*, 244 F.3d at 807 (class certification vacated); *In re LifeUSA Holding, Inc.*, 242 F.3d 136 (3d Cir. 2001) (class certification vacated); *Turner v. Beneficial Corp.*, 242 F.3d at 1023 (class certification denied); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417 (5th Cir. 2001) (class certification vacated); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d at 1188 (class certification denied); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000) (class certification vacated); *Carter v. West Publ'g Co.*, 225 F.3d at 1258 (class certification vacated); *Prado-Steiman v. Bush*, 221 F.3d at 1266 (class certification vacated); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d at 1228 (class certification vacated); *Pickett v. Iowa Beef Processors*, 209 F.3d at 1276 (class certification vacated); *Scott v. Dennis Reimer Co., No. 99-4465*, 2000 WL 145397 (6th Cir. Feb. 1, 2000) (class certification denied); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999) (class certification vacated).

225. See *supra* parentheses accompanying note 224.

226. See *supra* note 224.

## VII. ADDITIONAL RULE 23(F) CONSIDERATIONS

A. *Timeliness of Rule 23(f) Petitions*

According to Rule 23(f), an application for appeal must be made within ten days after the entry of an order granting or denying class certification.<sup>227</sup> But, what is the effect of a motion for reconsideration on this ten-day period? "Federal courts have long held that a motion for reconsideration tolls the time for appeal if the motion is made within the time for appeal."<sup>228</sup> In *Blair*, the Seventh Circuit determined that if the motion for reconsideration is filed within ten days of the certification order, it tolls the time for making a Rule 23(f) application until after the judge has ruled on the motion for reconsideration.<sup>229</sup> The basis for this conclusion was that the district court should be allowed to reconsider its class certification order before an appeal to the circuit court is allowed under Rule 23(f),<sup>230</sup> and the statement in Rule 23(c) that an order regarding class certification can be altered or amended by the district court before a decision on the merits.<sup>231</sup>

In *Shin v. Cobb County Board of Education*,<sup>232</sup> the Eleventh Circuit adopted the holding of *Blair* on this issue.<sup>233</sup> The Eleventh Circuit agreed with *Blair* that the ten-day period would not commence until after the district court ruled on the motion for reconsideration.<sup>234</sup> However, the Eleventh Circuit made it clear this rule did *not* apply in two situations: (1) where a Rule 23(f) motion is filed after successive motions for reconsideration; or (2) where the judge materially alters the certification order in response to a motion for reconsideration filed more than ten days after the original certification order.<sup>235</sup>

In *Gary v. Sheahan*,<sup>236</sup> the Seventh Circuit also announced an exception to the rule proclaimed in *Blair*.<sup>237</sup> According to *Gary*, if the district court materially

227. FED. R. CIV. P. 23(f).

228. *Blair v. Equifax Check Servs.*, 181 F.3d 832, 837 (7th Cir. 1999).

229. *Id.*; see also *Malakoff & Albert*, *supra* note 38, at 116 (noting that tolling of time to appeal under Rule 23(f) can be accomplished by a motion for reconsideration or a motion to decertify filed within ten days after entry of the class certification order).

230. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d at 837; see also *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 288 (1st Cir. 2000) ("[C]ircuit courts should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order . . . rather than opening the door too widely to interlocutory appellate review.").

231. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d at 837; FED. R. CIV. P. 23(c).

232. *Shin v. Cobb County Bd. of Educ.*, 248 F.3d 1061 (11th Cir. 2001).

233. *Id.* at 1064-65.

234. *Id.*

235. *Id.* at 1065 n.2.

236. *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999).

alters the class certification order in response to an overdue motion for reconsideration, the party harmed by the change in the class certification order may make a Rule 23(f) application within ten days after entry of the altered class certification order.<sup>238</sup> However, if the court denies a belated motion for decertification, then the opportunity to seek interlocutory review pursuant to Rule 23(f) is lost.<sup>239</sup> Based on these holdings, the Seventh Circuit would allow a Rule 23(f) appeal made within ten days after a district court materially alters a class pursuant to a belated motion for reconsideration, while the Eleventh Circuit in the same situation would deny the Rule 23(f) petition as untimely.<sup>240</sup> From the position of the case law, it appears the rule to be applied depends on the jurisdiction in which the case resides.

Case law is unanimous in holding that because Rule 23(f) is part of the Federal Rules of Civil Procedure, Rule 6(a) would mandate that the ten-day filing period under Rule 23(f) not include weekends or legal holidays.<sup>241</sup> However, it is possible that future courts could determine that Federal Rule of Appellate Procedure 26(a) governs, in which case legal holidays and weekends would be counted unless the period is less than seven days.<sup>242</sup>

In *Richardson Electronics, Ltd. v. Panache Broadcasting of Pennsylvania, Inc.*,<sup>243</sup> the Seventh Circuit addressed the possibility that a party may attempt to circumvent Rule 23(f)'s ten-day limitation through an appeal pursuant to 28 U.S.C. § 1292(b).<sup>244</sup> Unlike Rule 23(f), there is no time limit for appeals under § 1292(b), so it is possible that a party could try to use § 1292(b) to evade the time limitation in Rule 23(f).<sup>245</sup> The Seventh Circuit held that where appeal is proper under Rule 23(f), a party is prohibited from seeking review under § 1292(b) in order to circumvent the ten-day limitation of Rule 23(f).<sup>246</sup> Implicit in this holding is the proposition that the Seventh Circuit would dismiss, for lack of jurisdiction, a party's attempt to seek review under § 1292(b) where Rule 23(f) is appropriate.<sup>247</sup> Further, where a party believes the order to be inappropriate for

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237. *Id.* at 893.

238. *Id.* (citing *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952)).

239. *Id.*; Malakoff & Albert, *supra* note 39, at 117.

240. *See supra* notes 232-39 and accompanying text.

241. *See, e.g.*, *Shin v. Cobb County Bd. of Educ.*, 248 F.3d 1061, 1065 (11th Cir. 2001); *Gary v. Sheahan*, 188 F.3d at 893; *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837 (7th Cir. 1999) (citing *FED. R. Civ. P.* 6(a)).

242. *FED. R. APP. P.* 26(a); Malakoff & Alberts, *supra* note 39, at 119.

243. *Richardson Elecs., Ltd. v. Panache Broad. of Pa., Inc.*, 202 F.3d 957 (7th Cir. 2000).

244. *Id.* at 959.

245. Malakoff & Albert, *supra* note 39, at 118; *see also* 28 U.S.C. § 1292(b) (2000).

246. *Richardson Elecs., Ltd. v. Panache Broad. of Pa., Inc.*, 202 F.3d at 959.

247. *See id.*

Rule 23(f) review, the party can protect his rights under both Rule 23(f) and § 1292(b) by "seeking the district judge's permission to take a 1292(b) appeal [and] at the same time [requesting the circuit court] to entertain his appeal under 23(f)."<sup>248</sup>

### B. *Stays of Class Actions and Tolling of the Statute of Limitations*

One important procedural aspect of Rule 23(f) is that proceedings are not automatically stayed at the district court level upon a grant of review under Rule 23(f).<sup>249</sup> If a stay is desired, the party seeking a Rule 23(f) appeal should first seek a stay from the district court.<sup>250</sup> If the district court denies the stay, the party can seek a stay from the appellate court.<sup>251</sup> However, if a stay is denied at the district court level, it is unlikely that an appellate court will grant a stay due to the direction of the Advisory Committee's note that the circuit court give the district court's determination "considerable weight."<sup>252</sup> Rule 23(f) and the Advisory Committee's Note are both silent as to whether the non-moving party can seek a stay under Rule 23(f).<sup>253</sup> The drafters' intention that Rule 23(f) avoid the delay of other avenues of appeal is evidenced by the no-automatic-stay language in Rule 23(f).<sup>254</sup>

An important reason for a moving party to request a stay is to toll the statute of limitations for the putative class members should class certification ultimately be denied.<sup>255</sup> District courts have recognized that "equity supports the issuance of a stay" to toll the statute of limitations pending the outcome of the

248. *Id.*; see also *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 205 F.R.D. 503, 509 (S.D. Ind. 2001) (denying Firestone's request for certification of the class certification order for interlocutory appeal under § 1292(b) where the defendant's contention with the class certification order could be voiced pursuant to a Rule 23(f) appeal).

249. FED. R. CIV. P. 23(f).

250. FED. R. CIV. P. 23(f) advisory committee's note. Granting of a stay turns on whether "the probability of error in the class certification decision is high enough that the costs of pressing ahead in district court exceed the costs of waiting." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999).

251. FED. R. CIV. P. 23(f) advisory committee's note.

252. *See id.*

253. *See* FED. R. CIV. P. 23(f) (lacking any mention as to whether it is appropriate, or allowable, for the party not moving for appeal pursuant to Rule 23(f) to seek a stay); FED. R. CIV. P. 23(f) advisory committee's note (same).

254. *Blair v. Equifax Check. Servs., Inc.*, 181 F.3d at 835 (stating that stays will be "infrequent," and that interlocutory appeals under Rule 23(f) should not "unduly retard the pace of litigation").

255. *See Malakoff & Alberts, supra* note 39, at 121-22 ("[T]he statute of limitations period should be tolled pending Rule 23(f) appellate review of an order denying class certification to preserve putative class members' claims and discourage them from pursuing individual actions before the court of appeals has reviewed the order.").

Rule 23(f) review.<sup>256</sup> Where a statute of limitations is at issue, the balancing of relative harms will likely weigh in favor of granting a stay to toll the statute of limitations where class certification has been denied. One court reasoned: "Were the statute of limitations to begin to run before an appeal is taken—or waived—hundreds of thousands of potentially viable claims might expire unless new actions were promptly brought."<sup>257</sup>

Other situations in which the grant of a stay is appropriate include: (1) where the plaintiff, after a denial of class certification, "is unduly burdened with a duty to proceed with discovery";<sup>258</sup> (2) where "appellate review may clarify Rule 23 case law";<sup>259</sup> and (3) where Rule 23(f) appeals are pending in cases with similar facts and legal issues.<sup>260</sup>

The District Court for the District of Columbia recently held that granting a stay where there is a pending Rule 23(f) petition should be evaluated under the same four-factor test used for determining whether preliminary injunctive relief should be granted.<sup>261</sup> Under this test, a stay will be granted where: (1) the movant can show a substantial likelihood of success on the merits; (2) the movant will suffer irreparable harm if the stay is not granted; (3) others will suffer harm if the stay is not granted; and (4) the public interest will be furthered by the grant of a stay.<sup>262</sup>

### C. *Constitutionality of Rule 23(f) and 28 U.S.C. § 1292(e)*

To date, the only case to address the constitutionality of Rule 23(f) and 28 U.S.C. § 1292(e) is *Bolin v. Sears, Roebuck & Co.*<sup>263</sup> In *Bolin*, the defendant appealed the grant of class certification via Rule 23(f).<sup>264</sup> The Fifth Circuit granted the Rule 23(f) petition.<sup>265</sup> The plaintiff had challenged the constitutionality of Rule 23(f) by asserting that § 1292(e) was an

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256. See, e.g., *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, No. 98 CV 1492, 2000 WL 1424931, at \*2 (E.D.N.Y. Sept. 26, 2000) (recognizing that "equity supports the issuance of a stay that has the effect of tolling the statute of limitations period should plaintiffs move for an interlocutory appeal under 23(f)").

257. *Id.*

258. *Malakoff & Alberts, supra* note 39, at 1220.

259. *Id.*

260. See *Marbury v. Colonial Mortgage Co.*, No. CIV. A. 98-D-355-N, 2001 WL 135719, at \*9 (M.D. Ala. Jan. 12, 2001) (issuing a stay on the plaintiff's motion for class certification pending the resolution of the appeals in similarly framed cases).

261. *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 3 (D.D.C. 2002).

262. *Id.*

263. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000).

264. *Id.* at 972.

265. *Id.*

"unconstitutional delegation of Congress's power to confer jurisdiction on the lower federal courts."<sup>266</sup> The crux of the plaintiff's contention was that § 1292(e) exceeded the scope of rulemaking power that Congress can "delegate to the Supreme Court because only Congress, not the Court, may confer jurisdiction on the lower federal courts."<sup>267</sup>

In *Bolin*, the Fifth Circuit defined the issue as: "[Whether] Congress's grant of authority to expand the circumstances in which interlocutory appeal is allowed constitutes a delegation of the power to confer jurisdiction, or rather rulemaking authority over the court's own practices?"<sup>268</sup> It was clear from the language of the statute that Congress intended to allow the Supreme Court to make new rules regarding the "availability of judicial review, including the defining of finality for purposes of appeal."<sup>269</sup> Further, the rulemaking authority granted to the Supreme Court through the Rules Enabling Act "encompass[es] activities within the 'central mission' of the judicial branch."<sup>270</sup> The Fifth Circuit held that "the Supreme Court may address the *timing* of appeals as interstitial rulemaking without affecting Congress's authority to determine the subject matter jurisdiction of the lower federal courts."<sup>271</sup> Rule 23(f) affects only *when* the court may hear an appeal, and therefore, permissibly regulates merely the timing of the appeal and does not attempt to alter the subject matter jurisdiction of the federal courts.<sup>272</sup> Section 1292(e) was found to be a "permissible delegation of rulemaking authority within the judiciary's central mission."<sup>273</sup>

#### D. *The Role of District Courts*

Although certification by the district court is not required in Rule 23(f) appeals, as it is in § 1292(b) appeals, the Advisory Committee's Note to Rule 23(f) provides that the opinion of the district court on the issue of the propriety of a Rule 23(f) appeal is still important in determining whether to grant Rule 23(f) review.<sup>274</sup> The Advisory Committee's Note provides:

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. . . . [A] statement of reasons bearing on the

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266. *Id.*  
 267. *Id.* at 973.  
 268. *Id.* at 974.  
 269. *Id.*  
 270. *Id.* (citing *Mistretta v. United States*, 488 U.S. 361, 388-90 (1989)).  
 271. *Id.*  
 272. *Id.*  
 273. *Id.*  
 274. FED. R. CIV. P. 23(f) advisory committee's note.

probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.<sup>275</sup>

In this section, some of the contributions and comments of district courts with regard to Rule 23(f) petitions will be discussed.

In *Simon v. Philip Morris, Inc.*,<sup>276</sup> the District Court for the Eastern District of New York took it upon itself to discuss, in great length, Rule 23(f) and the factors and principles that a circuit court should consider in examining a Rule 23(f) petition.<sup>277</sup> The court also addressed the role of Rule 23(f) in conjunction with a trial court's determination that certain issues should be severed for trial: "Interlocutory review under Rule 23(f) is inappropriate if the trial court's plan to sever issues for trial creates the appearance of a potential conflict with the Seventh Amendment."<sup>278</sup> The court further held that even if a potential conflict with the Seventh Amendment arose, "the reviewing court would ordinarily not vacate the class certification order on that basis alone—though advice by the appellate to the trial court on the issue and how it might be resolved would undoubtedly be welcomed by the trial court."<sup>279</sup> In a related case, *Simon v. Philip Morris, Inc.*,<sup>280</sup> the District Court for the Eastern District of New York stated that district courts "have an *obligation* to assist the appellate courts in applying Rule 23(f)."<sup>281</sup> The court also stated that district courts should "flesh[] out . . . the factual background of the underlying dispute so that the appellate court can fully and fairly evaluate certification in proper context . . ."<sup>282</sup>

Even though the Eighth Circuit has yet to enumerate the standards it will use in evaluating Rule 23(f) petitions, the District Court for the Eastern District of Arkansas analyzed the case of *Robinson v. Sears, Roebuck & Co.*<sup>283</sup> under the factors articulated by the First Circuit in *Mowbray*.<sup>284</sup> Based on this analysis, the district court concluded that the case at hand would fall into the third category of cases—a Rule 23(f) appeal would permit the resolution of an unsettled legal issue in the Eighth Circuit and that it would be important to the particular litigation as

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275. *Id.*

276. *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21 (E.D.N.Y. 2001).

277. *Id.* at 41-42.

278. *Id.* at 42-43. In this statement the court is referring to the possibility that severance may cause juror confusion or uncertainty amounting to a violation of the Seventh Amendment Reexamination Clause. *Id.* at 32-40.

279. *Id.* at 43.

280. *Simon v. Philip Morris, Inc.*, 194 F.R.D. 73 (E.D.N.Y. 2000).

281. *Id.* at 75 (emphasis added).

282. *Id.*

283. *Robinson v. Sears, Roebuck & Co.*, 111 F. Supp. 2d 1101 (E.D. Ark. 2000).

284. *Id.* at 1129.

well as important in itself.<sup>285</sup> The district court then stated that it would “consider staying the proceedings were it asked to do so.”<sup>286</sup>

In *Doe v. Karadic*,<sup>287</sup> the District Court for the Southern District of New York instructed that if a motion to decertify the class resulted in a material alteration of the original certification decision, there was a likelihood that the aggrieved party would appeal under Rule 23(f).<sup>288</sup> In that particular case, the district court advised the Second Circuit *not* to grant a Rule 23(f) appeal for two reasons: (1) the issue of certification would “unduly delay a final judgment and thus impose further human costs and impede the plaintiffs’ efforts to seek justice”; and (2) “the [c]ourt strongly recommend[ed] against permitting such an appeal” due to the case’s stage in the litigation.<sup>289</sup>

In *Ramirez v. DeCoster*,<sup>290</sup> the District Court for the District of Maine had to determine whether a settlement agreement, predicated on the finding of a plaintiff class, would remain enforceable if it was later found the class could not be certified as to the auxiliary fraud and contract claims.<sup>291</sup> While the district court ultimately held that the settlement agreement would remain enforceable even if a class could not be certified as to the fraud and contract claims, it *urged* the court of appeals to grant an appeal under Rule 23(f).<sup>292</sup>

#### E. The Federal Circuit

It is important to note that when the Court of Federal Claims rules on class certification, Rule 23(f) is not available to the aggrieved party to seek judicial review by the Federal Circuit of the class certification determination.<sup>293</sup> The rules of the Court of Federal Claims are the only rules applicable to its

285. *Id.* at 1130.

286. *Id.*

287. *Doe v. Karadic*, 192 F.R.D. 133 (S.D.N.Y. 2000).

288. *Id.* at 144-45 n.18.

289. *Id.*

290. *Ramirez v. DeCoster*, 203 F.R.D. 30 (D. Me. 2001).

291. *Id.* at 38-39.

292. *See id.* at 40. The court stated:

Unless there is a ruling on the appropriateness of the class certification and the enforceability of the antecedent settlement, the parties and the trial court will continue to invest enormous resources in a case whose outcome remains highly uncertain and which . . . cannot be resolved by any further settlement . . . . Passivity here is not a virtue.

*Id.*

293. *Christopher Vill., L.P. v. United States*, No. 688, 2001 WL 1646762, at \*1 (Fed. Cir. Nov. 29, 2001).

proceedings, thus precluding reliance on Rule 23(f).<sup>294</sup> Therefore, “a party may not seek interlocutory review of the [grant or] denial of class certification under the rules of the Court of Federal Claims.”<sup>295</sup>

### VIII. CONCLUSION

Obviously, Rule 23(f) jurisprudence is still in the developmental stages, and whether it will accomplish the goals it was enacted to fulfill remains to be seen. However, the mere fact that case law on the subject is relatively minimal, in combination with the statements of the circuit courts enumerating standards, suggests that contrary to the objections of those opposing the enactment of Rule 23(f), the circuit courts will exercise self-restraint in granting and reviewing class certification determinations under Rule 23(f). The grant of a Rule 23(f) petition appears to be the “exception” and not the rule. In this regard, the increased propensity of some circuit courts to grant Rule 23(f) petitions may result in forum shopping by litigants. This possibility should properly be considered by circuit courts in evaluating Rule 23(f) petitions. In conclusion, while Rule 23(f) grants circuit courts the absolute discretion as to when to grant a Rule 23(f) petition, it is important that circuit courts not make these determinations in a vacuum. In order for Rule 23(f) to fulfill the goals it was enacted to fulfill, circuit courts should look to the holdings and standards enumerated by their sister circuits so that a contiguous body of Rule 23(f) law may develop and flourish.

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294. *Id.*

295. *Id.* (citing *Stone Container Corp. v. United States*, 229 F.3d 1345, 1355 (Fed. Cir. 2000)).

## IX. APPENDIX

TABLE 1—PROCEDURE AND DISPOSITION OF CASES IN WHICH A RULE 23(F) PETITION WAS CONSIDERED\*

Case Name	Citation	Circuit	Year
Franze v. Equitable Assurance	296 F.3d 1250	11th Cir.	2002
Coleman v. General Motors Acceptance Corp.	296 F.3d 443	6th Cir.	2002
McKowan Lowe & Co., v. Jasmine, Ltd.	295 F.3d 380	3d Cir.	2002
<i>In re</i> Lorazepam & Clorazepate Antitrust Litigation	289 F.3d 98	D.C. Cir.	2002
<i>In re</i> Bridgestone/Firestone, Inc. Tires Products Liability Litigation	288 F.3d 1012	7th Cir.	2002
Glover v. Standard Federal Bank	283 F.3d 953	8th Cir.	2002
Rivera v. Wyeth-Ayerst Laboratories	282 F.3d 315	5th Cir.	2002
West v. Prudential Securities, Inc.	282 F.3d 935	7th Cir.	2002
<i>In re</i> Bemis Co.	279 F.3d 419	7th Cir.	2002
Casson v. Nissan Motor Acceptance Corp.	No. 00-6483 2002 WL 22351	6th Cir.	Jan. 7, 2002
<i>In re</i> Visa Check/Mastermoney Antitrust Litigation	280 F.3d 124	2d Cir.	2001
Piazza v. Ebsco Industries, Inc.	273 F.3d 1341	11th Cir.	2001
National Asbestos Workers Medical Fund v. Philip Morris, Inc.	270 F.3d 984	2d Cir.	2001
Johnston v. HBO Film Management, Inc.	265 F.3d 178	3d Cir.	2001
Smith v. Texaco, Inc.	263 F.3d 394	5th Cir.	2001
<i>In re</i> Sumitomo Copper Litigation	262 F.3d 134	2d Cir.	2001
Isaacs v. Sprint Corp.	261 F.3d 679	7th Cir.	2001
Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.	259 F.3d 154	3d Cir.	2001
Lienhart v. Dryvit Systems, Inc.	255 F.3d 138	4th Cir.	2001
Zinser v. Accufix Research Institute, Inc.	253 F.3d 1180	9th Cir.	2001
Culpepper v. Irwin Mortgage Corp.	253 F.3d 1324	11th Cir.	2001
Hawkins v. Comparet-Cassani	251 F.3d 1230	9th Cir.	2001
Szabo v. Bridgeport Machines, Inc.	249 F.3d 672	7th Cir.	2001
Shin v. Cobb County Board of Education	248 F.3d 1061	11th Cir.	2001
Murray v. Auslander	244 F.3d 807	11th Cir.	2001
Turner v. Beneficial Corp.	242 F.3d 1023	11th Cir.	2001
Bertulli v. Independent Association of Continental Pilots	242 F.3d 290	5th Cir.	2001

District Court Level		Circuit Court Level			Ultimate Position of the Case After 23(f) Petition
Certified Class	Denied Class Cert.	Denies	Affirmed 23(f)	Reversed	
X				X	Class Cert. Vacated
X				X	Class Cert. Vacated
	X			X	Class Cert. Vacated
X		X			Class Cert. Stands
X				X	Class Cert. Vacated
X				X	Class Cert. Vacated
X				X	Class Cert. Vacated
	X		X		Class Cert. Denied
X		X			Class Cert. Stands
X			X		Class Cert. Affirmed
X				X	Class Cert. Vacated
	X	X			Class Cert. Denied
	X		X		Class Cert. Denied
X				X	Class Cert. Vacated
X		X			Class Cert. Stands
X				X	Class Cert. Vacated
	X		X		Class Cert. Denied
X				X	Class Cert. Vacated
	X		X		Class Cert. Denied
X			X		Class Cert. Affirmed
X				X	Class Cert. Vacated
X				X	Class Cert. Vacated
	X	X			Class Cert. Denied
X				X	Class Cert. Vacated
	X		X		Class Cert. Denied
X			X		Class Cert. Affirmed

Case Name	Citation	Circuit	Year
<i>In re</i> LifeUSA Holding, Inc.	242 F.3d 136	3d Cir.	2001
Patterson v. Mobil Oil Corp.	241 F.3d 417	5th Cir.	2001
Smith v. University of Washington Law School	233 F.3d 1188	9th Cir.	2000
Bolin v. Sears, Roebuck & Co.	231 F.3d 970	5th Cir.	2000
Carter v. West Publishing Co.	225 F.3d 1258	11th Cir.	2000
Prado-Steiman v. Bush	221 F.3d 1266	11th Cir.	2000
Rutstein v. Avis Rent-A-Car Systems, Inc.	211 F.3d 1228	11th Cir.	2000
Pickett v. Iowa Beef Processors	209 F.3d 1276	11th Cir.	2000
Waste Management Holdings, Inc. v. Mowbray	208 F.3d 288	1st Cir.	2000
Scott v. Dennis Reimer Co.	No. 99-4465 2000 WL 145397	6th Cir.	Feb. 1, 2000
Jefferson v. Ingersoll International Inc.	195 F.3d 894	7th Cir.	1999
Gary v. Sheahan	188 F.3d 891	7th Cir.	1999
Blair v. Equifax Check Services, Inc.	181 F.3d 832	7th Cir.	1999

District Court Level		Circuit Court Level			Ultimate Position of the Case After 23(f) Petition
Certified Class	Denied Class Cert.	Denies	Affirmed 23(f)	Reversed	
X				X	Class Cert. Vacated
X				X	Class Cert. Vacated
	X		X		Class Cert. Denied
X				X	Class Cert. Vacated
X				X	Class Cert. Vacated
X				X	Class Cert. Vacated
X				X	Class Cert. Vacated
X			X		Class Cert. Affirmed
	X	X			Class Cert. Denied
X				X	Class Cert. Vacated
X		X			Class Cert. Affirmed
X			X		Class Cert. Affirmed

\* Table of cases was compiled through conducting a Westlaw search in the ALLFEDS database with the following search: 23(f) /p "class certification." Cases returned from that search were analyzed for pertinent content, and only the cases addressing relevant material were used to construct this table. The cases are listed in reverse chronological order, from most recent to least recent. The table lists all cases available on Westlaw through August 20, 2002.

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