

RULE 23(F): ON THE WAY TO ACHIEVING LAUDABLE GOALS, DESPITE MULTIPLE INTERPRETATIONS

Tanner Franklin*

I. INTRODUCTION

In the summer of 1999, shortly after the enactment of Federal Rule of Civil Procedure 23(f) (“Rule 23(f)”), Professor Kenneth S. Gould published an article in the *Journal of Appellate Practice and Process* on the new rule authorizing interlocutory appeals for class action certification decisions.¹ In his article, Professor Gould wrote:

Because the courts of appeals’ discretion under rule 23(f) is absolute and without guidelines, only experience over time will tell whether the rule will achieve its laudable goals on the one hand, carve out an unbounded exception to the final judgment rule on the other, or simply become another seldom-used, ineffectual relic of the appellate process²

At the time, Professor Gould was concerned about how Rule 23(f) would evolve in regard to its utility,³ but now, some commentators and organizations worry that appellate courts are using Rule 23(f) to routinely deny plaintiff class action suits.⁴ This comment focuses on the development and use of Rule 23(f) over the last decade and a half since Professor Gould made his initial assessment. Specifically, this comment looks at the various approaches taken by the courts of appeal in determining whether or not to

*Tanner Gerald McClure Franklin, Law Clerk for the Honorable Marcia Crone, United States District Judge for the Eastern District of Texas, Baylor University School of Law, Spring 2015. I would like to express my sincerest appreciation to the faculty and staff at Baylor Law School for their encouragement, support, and inspiration. Special thanks to Professor Luke Meier for his guidance in preparing this comment. Finally, I want to recognize my parents Dr. Geralyn McClure Franklin and Kenneth G. Franklin, Jr. for their love and unwavering support in all my endeavors.

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

² *Id.* at 338.

³ *See id.*

⁴ Center for Study of Responsive Law, *Possible Law Review Topics* (May 18, 2009), <http://csrl.org/possible-law-review-topics>.

2015]

RULE 23(F)

413

grant interlocutory review under Rule 23(f), whether the tests applied comport with the original intentions of the rule's drafters, and what additional steps the courts should take with respect to Rule 23(f) appeals.

II. BACKGROUND OF RULE 23(F)

Originally enacted in 1998, Federal Rule of Civil Procedure 23(f) expressly allows appellate courts to hear interlocutory appeals of a district court's decision whether or not to certify a class action.⁵ The current version of the rule reads as follows:

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.⁶

A. Exception to the Final Judgment Rule

By its clear language, Rule 23(f) operates as an exception to the final judgment rule by granting the appellate court discretion to hear an appeal as to the denial or grant of class action certification.⁷ Rule 23(f)'s statutory basis is found in 28 U.S.C. 1292(e), which allows the Supreme Court to create methods for interlocutory review in addition to those expressly listed in 28 U.S.C. 1292.⁸

The new rule was a practical response, albeit 20 years later, to the Supreme Court's 1978 decision in *Coopers & Lybrand v. Livesay*.⁹ In *Livesay*, the Court held that a class action certification order was neither a final judgment nor an appealable collateral order; thus, interlocutory review

⁵ See FED. R. CIV. P. 23(f) & advisory committee's notes.

⁶ FED. R. CIV. P. 23(f).

⁷ See FED. R. CIV. P. 23(f) & advisory committee's notes.

⁸ 28 U.S.C. § 1292(e) (2012) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title [28 U.S.C. § 2072], to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)."); FED. R. CIV. P. 23(f) & advisory committee's notes.

⁹ Gould, *supra* note 1, at 310–18; see also Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 833–35 (7th Cir. 1999) (providing a discussion as to the origins of Rule 23(f)).

was improper.¹⁰ Prior to *Livesay*, appellate courts had been granting interlocutory review of class action certification under the so-called “death-knell doctrine.”¹¹ However, after *Livesay*, and prior to Rule 23(f), the primary method of review of a class action certification order was through a permissive appeal under 28 U.S.C. 1292(b).¹²

Along with the enactment of Rule 23(f), Federal Rule of Appellate Procedure 5 (“Rule 5”) was also modified in 1998.¹³ Rule 5 was broadened to reflect “the possibility of new rules authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, the Committee believes it is preferable to amend Rule 5 so that it will govern all such appeals.”¹⁴ Further, “[t]his new Rule 5 is intended to govern all discretionary appeals from district-court orders, judgments, or decrees. . . . If additional interlocutory appeals are authorized under § 1292(e), the new rule is intended to govern them if the appeals are discretionary.”¹⁵ Thus, Rule 23(f) operates as an express exception to the final judgment rule

¹⁰ 437 U.S. 463, 467 (1978) (holding that regardless of practical effect, a denial of a class action certification was not a final judgment within the express confines of the final judgment rule, 28 U.S.C. § 1291).

¹¹ See, e.g., *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120–21 (2d Cir. 1996) (stating that an order denying class certification is appealable, if for all practical purpose it would terminate the litigation).

¹² See 28 U.S.C. § 1292(b) (2012) (“discretionary interlocutory review”). While an available option for litigants, this procedure requires the district judge to certify the appeal to the appellate court, which then has discretion on whether to hear the appeal. *Id.* The requirements of 1292(b) have often prevented litigants from successfully seeking interlocutory review under this method. See Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 732–33 (1993). Litigants could also seek review under the narrow “collateral final order doctrine,” or by trying to squeeze into mandamus review. Gould, *supra* note 1, at 318. For a discussion on these procedures and their limitations, see 7B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1802 (3d ed. 2014); see also *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294–95 (7th Cir. 1995) (allowing mandamus review for a class action certification decision in a mass tort case where the case was “quite extraordinary when all its dimensions [were] apprehended”).

¹³ See FED. R. APP. P. 5; Judicial Conference of the United States, Advisory Committee on Appellate Rules, Minutes of April 15, 1996, 1996 WL 936781, at *10–11 (primary purpose of revising rule 5 was to expand its scope to govern all interlocutory appeals); FED. R. CIV. P. 23(f) advisory committee’s notes (“Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).”).

¹⁴ FED. R. APP. P. 5 advisory committee’s note.

¹⁵ *Id.*

2015]

RULE 23(F)

415

making interlocutory review permissible and Rule 5 provides the procedure for petitioning for appeal.

B. Addressing the Practical Concern that Class Action Certification Frequently Ends Litigation

Rule 23(f) addresses the practical fact that in many cases the district court's decision whether or not to certify a class effectively ends litigation.¹⁶ This rationale was essentially the same as the rationale of the pre-*Livesay* "death-knell doctrine."¹⁷ The drafters of Rule 23(f) recognized that although class certification may practically end the litigation, it may not end in a true final judgment.¹⁸ Thus, the decision on class certification effectively becomes insulated from appeal.¹⁹

The drafters of Rule 23(f) focused on three important scenarios where the granting or denying of class action certification was particularly profound:

1. Denial of class action certification, which makes individual plaintiff's claims too small to justify the economic time and expense of litigation.
2. Granting of class action certification, which forces the defendant to settle in order to avoid the costs of defending the class action and potentially larger liability.
3. Cases that present an important, unsettled legal issue that may be resolved on appeal.²⁰

By referencing these three scenarios in the advisory committee notes accompanying Rule 23(f), the drafters expressly intended for interlocutory

¹⁶ See MANUAL FOR COMPLEX LITIGATION (THIRD) 30.1 (1995).

¹⁷ See, e.g., *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120–21 (2d Cir. 1996) (stating that order denying class certification is appealable, if for all practical purpose it would terminate the litigation).

¹⁸ FED. R. CIV. P. 23(f) & advisory committee's notes; see also Judicial Conference of the United States, Advisory Committee on Civil Rules, Minutes of February 16–17, 1995, 1995 WL 870909, at *17 (comments of Robert V. Heim) ("The opportunity to appeal grant or denial of class certification may impede pressure for settlement, but that is a good thing.").

¹⁹ See *id.*

²⁰ FED. R. CIV. P. 23(f) advisory committee's notes ("Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.").

review to be applicable when these situations arise during the course of class action litigation.²¹

Further, in stark contrast to § 1292(b), permissive appeals, the drafters left the decision of whether or not to hear interlocutory appeal on the grant or denial of a class action to the “unfettered discretion” of the Circuit Courts of Appeal.²² Based on the committee notes and comments, it is clear that the drafters intentionally excluded the district courts in order to make these appeals more readily available to litigants.²³

III. “UNFETTERED DISCRETION”

According to the drafters of Rule 23(f), “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.”²⁴ Although there was some apprehension to such a broad grant of discretion, the drafters felt that class action certification decisions warranted such discretion.²⁵ In fact the original version of Rule 23(f) began with the phrase, “the court of appeals may *in its discretion* permit an appeal”²⁶ As part of the 2007 restyling, the direct reference to the discretion of the court of appeals was removed.²⁷ However, the drafters made it explicitly clear that the restyling had no substantive effect on the level of discretion.²⁸

²¹ *See id.*

²² *Id.*

²³ *Id.*; Judicial Conference of the United States, Advisory Committee on Civil Rules, Minutes of November 9–10, 1995, 1995 WL 870908, at *3.

²⁴ FED. R. CIV. P. 23(f) advisory committee’s notes.

²⁵ Judicial Conference of the United States, Advisory Committee on Civil Rules, Minutes of November 9–10, 1995, 1995 WL 870908, at *5; *see also* Gould, *supra* note 1, at 318–22 (discussing the competing rationales expressed in the Rule 23(f) drafting sessions for allowing interlocutory review of class action certifications and not allowing interlocutory review).

²⁶ FED. R. CIV. P. 23(f) (1998).

²⁷ *See* FED. R. CIV. P. 23(f).

²⁸ FED. R. CIV. P. 23(f) advisory committee’s note (“Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.”).

IV. THE CIRCUITS DEFINE “UNFETTERED DISCRETION”

After Rule 23(f) was enacted, the courts of appeals were given “unfettered discretion” to hear interlocutory appeals of class actions.²⁹ The Seventh Circuit first addressed an interlocutory appeal in *Blair v. Equifax Check Services* and developed a three-prong test to determine whether or not to grant review under Rule 23(f).³⁰ Shortly thereafter, the Eleventh Circuit expressly addressed the issue in *Prado-Steiman v. Bush*.³¹ The Eleventh Circuit developed a five-part test incorporating the three-prong *Blair* test but adding two additional prudential prongs.³² Subsequently, most of the other circuits have adopted tests along the lines of the Seventh Circuit in *Blair*,³³ or the Eleventh Circuit in *Prado*,³⁴ or a hybrid approach.³⁵ It is important to note at the outset that no matter the test employed, each circuit has recognized that there are no absolute rules in granting Rule 23(f) review and that unique or unforeseen facts or circumstances could justify review outside of the express parameters.³⁶

A. The Seventh Circuit’s Three-Prong Approach

The Seventh Circuit first set forth the three-part test in *Blair v. Equifax Check Services*.³⁷ The court initially recognized the three situations which Rule 23(f) was designed to address: (1) the denial of class action

²⁹ FED. R. CIV. P. 23(f).

³⁰ 181 F.3d 832, 833–35 (7th Cir. 1999).

³¹ See 221 F.3d 1266, 1272–76 (11th Cir. 2000).

³² *Id.* at 1274–77.

³³ See, e.g., *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293–95 (1st Cir. 2000).

³⁴ See, e.g., *In re Delta Air Lines*, 310 F.3d 953, 958–60 (6th Cir. 2002); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144–46 (4th Cir. 2001).

³⁵ See, e.g., *Vallario v. Vandehey*, 554 F.3d 1259, 1263–64 (10th Cir. 2009); *Chamberlain v. Ford Motor Co.*, 402 F.3d 952, 957–60 (9th Cir. 2005); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 104–05 (D.C. Cir. 2002); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001).

³⁶ See, e.g., *Chamberlain*, 402 F.3d at 960 (stating that there is no rigid test and the court has broad discretion under Rule 23(f)); *Newton*, 259 F.3d at 165 (“We emphasize that the courts of appeals have been afforded the authority to grant or deny these petitions on the basis of any consideration that the court of appeals finds persuasive.”); *Prado-Steiman*, 221 F.3d at 1276 (establishing that the factors are non-exhaustive and the court has broad discretion under Rule 23(f)).

³⁷ 181 F.3d 832, 834–35 (7th Cir. 1999).

certification serves as a death-knell to the plaintiff's case due to economic constraints or pursuing individual litigation; (2) the grant of class action certification serves as a death-knell to the defendant's case by creating a "forced settlement" situation; and (3) the grant or denial of class action certification involves "fundamental" questions of law, which need to be immediately subject to review.³⁸ The court then accepted that if one of these scenarios existed, then it was proper for a circuit court to exercise its discretion to hear a Rule 23(f) appeal.³⁹

The court's three-prong test follows the rationale of the drafters of Rule 23(f) and their grant for "unfettered discretion" for "death-knell" litigation and certifications which present "fundamental questions of law."⁴⁰ The court declined to provide elements or even factors: "[I]t would be a mistake for us to draw up a list that determines how the power under Rule 23(f) will be exercised. Neither a bright-line approach nor a catalog of factors would serve well . . ."⁴¹ Thus, under the Seventh Circuit's approach the court of appeals is seemingly given broad discretion on whether to hear the appeal.⁴²

Blair itself addressed the fundamental question prong.⁴³ The court held that the settlement of one class action prior to final judgment did not stay the continuance of another class action involving the same defendants and the plaintiffs in another court.⁴⁴ The issue had been previously unresolved in the circuit and therefore was proper under the fundamental question prong.⁴⁵

The Seventh Circuit addressed the "death-knell" prong as to defendants in *Szabo v. Bridgeport Machines, Inc.*⁴⁶ In *Szabo*, the district court took

³⁸ *Id.* ("Instead of inventing standards, we keep in mind the reasons Rule 23(f) came into being.").

³⁹ *Id.* The "death-knell" concept can apply in situations where the denial of class action certification would force the plaintiffs' to drop the case due to it being uneconomical to bring the action, or when the certification order force the defendants to settle because the risk of litigating and losing is too great. *See id.*

⁴⁰ *Id.*; FED. R. CIV. P. 23(f) advisory committee's notes (discussing the intended application of the rule when the question of certification would dispose of the action, or when there were novel questions of law).

⁴¹ *Blair*, 181 F.3d at 834.

⁴² *Id.* at 834–35.

⁴³ *Id.* at 837–38; *see also* *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) (resolving a "fundamental" question of law).

⁴⁴ *Blair*, 181 F.3d at 839.

⁴⁵ *Id.*

⁴⁶ *See generally* 249 F.3d 672 (7th Cir 2001).

2015]

RULE 23(F)

419

what was originally a \$200,000 dispute and certified a class action, making a \$200 million dollar suit.⁴⁷ The court described the certification as creating a “bet-your-company decision to Bridgeport’s managers.”⁴⁸ The court saw this scenario as a forced settlement situation where Bridgeport was forced to settle the suit or risk its entire company in defending the class action.⁴⁹ However, the court failed to give any express guidance for determining when a forced settlement situation existed; rather, the court simply described the situation as one of “big stakes.”⁵⁰ The court also failed to set forth any guidance in the subsequent case of *Isaacs v. Sprint*.⁵¹ Thus, the Seventh Circuit has taken the broad amount of discretion afforded under Rule 23(f) and seemingly adopted an approach of “I’ll know it when I see it,” to quote the late Justice Potter Stewart,⁵² in deciding whether or not to grant interlocutory appeals on class action certification orders, particularly in “death-knell” situations.

1. The First Circuit Follows the Seventh Circuit’s Lead

In *Waste Management Holdings’ v. Mowbray*, the First Circuit adopted the Seventh Circuit’s approach in *Blair*, but modified the third prong concerning fundamental questions of law.⁵³ The First Circuit was concerned that too many appeals could be filed under a broad fundamental question prong, noting “a creative lawyer almost always will be able to argue that deciding her case would clarify some ‘fundamental’ issue.”⁵⁴

The court looked to the advisory committee’s note and found, “interlocutory appeals should be the exception, not the rule; after all, many (if not most) class certification decisions turn on ‘familiar and almost routine issues.’”⁵⁵ The court stated, “We believe, therefore, that Blair’s *third* category should be restricted to those instances in which an appeal will permit the resolution of an unsettled legal issue that is important to the

⁴⁷ *Id.* at 675.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See 261 F.3d 679, 680–81 (7th Cir. 2001).

⁵² See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (referencing that obscenity in First Amendment cases is determined based on the particular circumstances).

⁵³ 208 F.3d 288, 293–95 (1st Cir. 2000).

⁵⁴ *Id.* at 294.

⁵⁵ *Id.* (quoting FED. R. CIV. P. 23(f) advisory committee’s notes).

particular litigation as well as important in itself”⁵⁶ Thus, the court sought to narrow the third prong by requiring that a “fundamental question” be fundamental not only to the particular case but also to the law as a whole.⁵⁷ The court concluded, “With this small emendation, we adopt the *Blair* taxonomy.”⁵⁸ Interestingly, even though the court essentially adopted the broad Blair approach, the court’s statement that “interlocutory appeals should be the exception, not the rule,” became a key source of support to other circuits which limited the application of Rule 23(f).⁵⁹

2. The Third Circuit

The Third Circuit explicitly set forth its standard for hearing Rule 23(f) appeals in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*⁶⁰ The court, relying on the advisory committee notes and *Blair*, articulated a standard that a Rule 23(f) appeal would be proper when: “(1) the possible case-ending effect of an imprudent class certification decision (the decision is likely dispositive of the litigation); (2) an erroneous ruling; or (3) facilitate development of the law on class certification”⁶¹ The Third Circuit also noted that “there may also be other valid reasons for the exercise of interlocutory review.”⁶² Thus, while the court essentially adopted the position of the Seventh Circuit in *Blair*, the court left open the possibility that *Blair* could be expanded based on a given set of facts.⁶³

In *Newton*, the district court denied class action certification in a securities fraud case.⁶⁴ The case involved purported securities fraud whereby the defendants, broker-dealers in securities, allegedly breached their duty of best execution to their investors.⁶⁵ The Third Circuit granted interlocutory review because the case implicated all three of the scenarios

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See, e.g., *In re Delta Air Lines*, 310 F.3d 953, 959–60 (6th Cir. 2002); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1273–74 (11th Cir. 2000).

⁶⁰ See generally 259 F.3d 154 (3d Cir. 2001).

⁶¹ *Id.* at 165; see also *Rodriguez v. Nat’l City Bank*, 726 F.3d 372, 376–77 (3d Cir. 2013).

⁶² *Newton*, 259 F.3d at 165.

⁶³ See *id.*; Aimee G. Mackay, Comment, *Appealability of Class Certification Orders Under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW. U.L. REV. 755, 788–89 (2002) (commenting on the Third Circuit Approach).

⁶⁴ *Newton*, 259 F.3d at 162.

⁶⁵ *Id.*

2015]

RULE 23(F)

421

expressed by the advisory committee and in *Blair*.⁶⁶ The case could be proper based on the fact that some of the claims were “too small to survive as individual claims” or certification could place undesirable pressure on the defendants to settle.⁶⁷ Also, the court noted that the case implicated fundamental questions of securities law, making interlocutory review proper under the third-prong.⁶⁸ However, the court did not expressly state under which prong it was granting review; rather it proceeded directly to review of the class.⁶⁹ Ultimately, the court held that class action certification was improper because the plaintiffs could not meet the requirements of Rule 23(b)(3), a prerequisite for the type of action brought and affirmed the district court.⁷⁰

B. The Eleventh Circuit’s Five-Part Approach (Sliding Scale Test)

Contrary to the Seventh Circuit, the Eleventh Circuit has adopted a more restrictive, sliding-scale approach.⁷¹ The Eleventh was the third circuit court to address a Rule 23(f) appeal.⁷² In *Prado-Steiman v. Bush*, the Eleventh Circuit provided a five-part approach to determining whether a court should grant interlocutory appeal:

1. A court should consider whether a death-knell situation exists.⁷³
2. “A court should consider whether the petitioner has shown a *substantial weakness*” in the class certification order, such that the grant or denial of the order equals abuse of discretion.⁷⁴

⁶⁶ *Id.* at 165 (“The claims here touch on several reasons justifying interlocutory appeal.”); *see also* FED. R. CIV. P. 23(f) advisory committee’s notes; *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834–35 (7th Cir. 1999).

⁶⁷ *Newton*, 259 F.3d at 165.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 193.

⁷¹ *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1274–76 (11th Cir. 2000).

⁷² *Id.* at 1271.

⁷³ *Id.* at 1274.

⁷⁴ *Id.* at 1274–75.

3. A court should consider whether the appeal will resolve an unsettled legal issue that is “important to the particular litigation as well as important in itself.”⁷⁵
4. “A court should consider the nature and status of the litigation” in the district court.⁷⁶
5. A court should consider whether future events will “make immediate appellate review more or less appropriate.”⁷⁷

While the court accepted the *Blair* death-knell situations as a reason for granting a Rule 23(f) review, the court adopted the First Circuit’s *Mowbray* definition of the “fundamental question” prong, requiring the unsettled legal issue to be “important to the particular litigation as well as important in itself.”⁷⁸

The court went on to state, “We find both the *Blair* and *Mowbray* opinions to be cogent explications of the Rule 23(f) inquiry. We think it important, however, to emphasize some additional considerations that may weigh against frequent interlocutory appellate review of class action certification decisions.”⁷⁹ The court then established that whether the petitioner could show that the grant or denial of the class action amounted to abuse of discretion by the lower court was a factor for consideration.⁸⁰ The court clarified, “Interlocutory review may be appropriate when it promises to spare the parties and the district court the expense and burden of litigating the matter to final judgment only to have it inevitably reversed by this Court on an appeal after final judgment.”⁸¹ The court believed that an important factor was whether the petitioner had shown how the district court’s order was abuse of discretion.⁸² The court made it clear that while abuse of discretion lends weight toward granting interlocutory review, it was not necessarily required.⁸³ But, when the petitioner has shown clear

⁷⁵ *Id.* at 1275–76.

⁷⁶ *Id.* at 1276.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1275; *see also* *Waste Mgmt. Holdings v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000).

⁷⁹ *Prado-Steiman*, 221 F.3d at 1273.

⁸⁰ *Id.* at 1274–75.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

2015]

RULE 23(F)

423

abuse of discretion in the district court's order, that factor may be so strong as to negate the requirements of other factors.⁸⁴ Thus, while many see the *Prado-Steiman* approach as more restrictive than the *Blair* approach, when the petitioner can show substantial weakness in the class certification order, it may actually be more expansive.⁸⁵

Also, the court added two additional prudential factors to the analysis.⁸⁶ The court initially recognized that there were often "case management concerns" when interlocutory appeals were granted.⁸⁷ Class certification orders are not by their very nature final judgments and are often modified and reviewed by the lower courts.⁸⁸ Further, the court looked to Rule 23(c) which gives the district court the power to alter or amend a class certification order at any time prior to judgment on the merits.⁸⁹ The court believed that too prompt an interlocutory review would effectively cut off the power of the district court to modify or review its order.⁹⁰ The court believed that reviewing courts needed to be cautious in granting interlocutory appeals: "Quite simply, 'we 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.'"⁹¹

Consequently, the court recognized that reviewing courts should look to the nature and status of litigation, in the district court:

Some cases plainly will be in a better pre-trial posture for interlocutory appellate review than others. As noted above,

⁸⁴ *Id.* at 1275 ("[W]hen the district court expressly applies the incorrect Rule 23 standard or overlooks directly controlling precedent . . . interlocutory review may be warranted even if none of the other factors supports granting the Rule 23(f) petition."); *see also* *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001) (noting the "somewhat more expansive list of factors [under *Prado-Steiman*] capable of supporting a grant of a Rule 23(f) petition").

⁸⁵ *See Prado-Steiman*, 221 F.3d at 1274–75; *see also Lienhart*, 255 F.3d at 145 ("We do not believe that *Prado-Steiman* limited *Mowbray*; to the contrary, by adding the weakness of the district court's certification decision as an independent factor supporting review and noting that the impact of a question raised in a Rule 23(f) petition on related litigation can favor review, the *Prado-Steiman* court broadened the bases for a grant of review.").

⁸⁶ *Prado-Steiman*, 221 F.3d at 1276.

⁸⁷ *Id.* at 1273.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1274.

the propriety of granting or denying a class, as well as the proper scope of any class that has been granted, may change significantly as new facts are uncovered through discovery. Similarly, a limited or insufficient record may adversely affect the appellate court's ability to evaluate fully and fairly the class certification decision. Moreover, a district court's ruling on dispositive motions or a motion to add new class representatives, parties, or claims may significantly redefine the issues in the case and thereby affect the scope of or need for a class. Accordingly, the decision on a Rule 23(f) petition may take into account such considerations as the status of discovery, the pendency of relevant motions, and the length of time the matter already has been pending. In certain circumstances the court may also consider the current impact on the parties of rulings by the district court that, while not themselves subject to Rule 23(f) review nevertheless are inextricably tied to the class certification decision.⁹²

The court believed that there were procedural events that simply had a definitive impact on whether or not an interlocutory appeal was appropriate.⁹³ Specifically, the court emphasized the need for sufficient record from which to fully and fairly evaluate the class action certification.⁹⁴ If the case is still in the pre-trial stages, often the record is not sufficiently developed for appropriate appellate review.⁹⁵

Lastly, the court stated that courts should take in account, "the likelihood that future events may make immediate appellate review more or less appropriate."⁹⁶ The court pointed to on-going settlement negotiations as a possible future event which would make immediate review less appropriate.⁹⁷ Some commentators believe that this factor directly conflicts with the intent of Rule 23(f) regarding death-knell scenarios.⁹⁸ However, if

⁹² *Id.* at 1276 (discussing the fourth factor, the nature and status of the litigation before the district court).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Mackay, *supra* note 63, at 780–81.

2015]

RULE 23(F)

425

the parties are negotiating settlements while at the same time trying to file an interlocutory appeal, it can indicate: (1) that the case may not truly be a death-knell type situation; or (2) the party does not genuinely believe that the certification was granted in error.⁹⁹ Thus, the likelihood of future events impacting an ongoing case can be a significant concern under the Eleventh Circuit's test.¹⁰⁰

1. The Fourth Circuit

In *Lienhart v. Dryvit Sys., Inc.*, the Fourth Circuit “adopted, with some elaboration, the five-factor *Prado-Steiman* test for determining when to grant a Rule 23(f) petition. . . .”¹⁰¹ The court discussed the “manifestly erroneous factor” of the *Prado-Steiman* test as a sliding-scale element, such that: “Where a district court’s certification decision is manifestly erroneous and virtually certain to be reversed on appeal, the issues involved need not be of general importance, nor must the certification decision constitute a “death knell” for the litigation.”¹⁰² The court recognized that the element is not necessarily required for appellate review to be proper, but it may alone be sufficient to justify review.¹⁰³ Thus, the Fourth Circuit emphasized that the *Prado-Steiman* approach is a “sliding-scale” test among the factors, not a rigid test.¹⁰⁴

2. The Sixth Circuit

The Sixth Circuit set forth its standard in *In re Delta Air Lines*.¹⁰⁵ After reviewing all the other circuits’ decisions, the court “eschew[ed] any hard-and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor of or against an interlocutory appeal.”¹⁰⁶ However, the court ultimately adopted the five factors of *Prado-Steiman* and the Eleventh Circuit’s approach in large part because of a concern “that appeal should

⁹⁹ See *Prado-Steiman*, 221 F.3d at 1276.

¹⁰⁰ *Id.*

¹⁰¹ 255 F.3d 138, 146 (4th Cir. 2001).

¹⁰² *Id.* at 145–46.

¹⁰³ *Id.*

¹⁰⁴ See *id.*

¹⁰⁵ 310 F.3d 953, 959–60 (6th Cir. 2002) (per curiam).

¹⁰⁶ *Id.* at 959.

not become a vehicle for early review of a legal theory that underlies the merits of a class action.”¹⁰⁷

C. The “Hybrids”

The Second,¹⁰⁸ D.C.,¹⁰⁹ Ninth,¹¹⁰ and Tenth¹¹¹ Circuits have adopted “hybrid” approaches which blend parts of the Seventh and Eleventh Circuits approaches. The “hybrid” approach seems to be the growing trend as well.¹¹²

1. The Second Circuit’s Two-Part Test

The Second Circuit has adopted a unique hybrid approach to Rule 23(f) review.¹¹³ The Second Circuit requires that:

[P]etitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate either (1) that 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.¹¹⁴

The Second Circuit combined the *Blair* three-prong approach, regarding death-knell situations, with the *Prado-Steiman* “manifestly erroneous” factor.¹¹⁵ However, this approach requires that petitioners establish that the

¹⁰⁷ *Id.* at 960.

¹⁰⁸ *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001).

¹⁰⁹ *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105–106 (D.C. Cir. 2002).

¹¹⁰ *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959–60 (9th Cir. 2005).

¹¹¹ *Vallario v. Vandehey*, 554 F.3d 1259, 1263–64 (10th Cir. 2009).

¹¹² Since 2002, all the circuits defining their approach to rule 23(f) have incorporated components from both *Prado-Steiman* and *Blair*. See, e.g., *Vallario*, 554 F.3d at 1263–64; *Chamberlan*, 402 F.3d at 959–60; *In re Lorazepam*, 289 F.3d at 105–106.

¹¹³ See *Sumitomo*, 262 F.3d at 139.

¹¹⁴ *Id.*

¹¹⁵ *Id.*; see also *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274–75 (11th Cir. 2000) (considering whether the petitioner has shown a “substantial weakness” in the district court’s class certification decision as an important factor in determining whether interlocutory review is appropriate); see also *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834–35 (7th Cir. 1999) (setting forth the three situations where rule 23(f) review was likely appropriate).

2015]

RULE 23(F)

427

district court's certification was at least "questionable."¹¹⁶ The court gave district court deference because of a "longstanding view that the district court is often in the best position to assess the propriety of the class and has the ability, pursuant to Rule 23(c)(4)(B), to alter or modify the class, create subclasses, and decertify the class whenever warranted."¹¹⁷ Thus, the Second Circuit requires a petitioner to show questionable actions by the district court in death-knell situations, although such showing is not required if there is a legal question in need of immediate resolution.¹¹⁸

2. The DC Circuit

The DC Circuit also adopted a hybrid approach, similar to the Second Circuit.¹¹⁹ In *in re Lorazepam & Clorazepate Antitrust Litig.*, the DC Circuit established:

Rule 23(f) review will ordinarily be appropriate in three circumstances: (1) when there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification; (2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and (3) when the district court's class certification decision is manifestly erroneous.¹²⁰

The DC Circuit's approach incorporates the *Blair* three-prong approach but also includes *Prado-Steiman*'s concerns about denying the discretion granted to the district court by granting interlocutory review prematurely.¹²¹ However, the court choose to couch this in term of "taking into account the

¹¹⁶ *Sumitomo*, 262 F.3d at 139.

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ *See In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105–106 (D.C. Cir. 2002); *see also Sumitomo*, 262 F.3d at 139.

¹²⁰ 289 F.3d at 105.

¹²¹ *Id.*

discretion of the district court,” rather than specific factors.¹²² The court also incorporated the “manifestly erroneous” factor of *Prado-Steiman* as an independent grounds for granting Rule 23(f) review, thus expanding beyond the three initial prongs of *Blair*.¹²³

3. The Ninth Circuit

The Ninth Circuit adopted its standard in *Chamberlan v. Ford Motor Co.*¹²⁴ The court held that interlocutory review under Rule 23(f) is proper when:

(1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court’s class certification decision is manifestly erroneous.¹²⁵

The Ninth Circuit essentially adopted the approach of the DC Circuit with some slight modification.¹²⁶ However, rather than expressly giving deference to the district court, the rule requires the petitioner to show that the decision of the district court was “questionable,” in line with the Second Circuit’s approach.¹²⁷

¹²² *Id.* But see *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274–76 (11th Cir. 2000) (setting forth relevant factors to be considered).

¹²³ *In re Lorazepam*, 289 F.3d at 105–106; *Prado-Steiman*, 221 F.3d at 1274–76 (“[W]hen the district court expressly applies the incorrect Rule 23 standard or overlooks directly controlling precedent . . . interlocutory review may be warranted even if none of the other factors supports granting the Rule 23(f) petition.”). But see *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834–35 (7th Cir. 1999) (setting-forth the three situations where rule 23(f) review was likely appropriate and manifestly erroneous decisions of the district court is not expressly included).

¹²⁴ 402 F.3d 952, 957–60 (9th Cir. 2005).

¹²⁵ *Id.* at 959.

¹²⁶ See *id.* (“This framework most closely approximates the standard adopted by the D.C. Circuit.”).

¹²⁷ *Id.*; see also *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001).

4. The Tenth Circuit

The Tenth Circuit, in *Vallario v. Vandehey*, adopted the Ninth Circuit's rule in *Chamberlan*, but the court did not include the requirement that a petitioner in a death-knell situation prove that the district court's order was questionable.¹²⁸ However, the court emphasized the need for judicial restraint stating, "interlocutory review constitutes the exception rather than the rule," and that the court, "will exercise restraint in accepting Rule 23(f) petitions and will not accept such petitions as a matter of course."¹²⁹ While these statements indicate that the court believed the decisions of the district court should be given deference, the court did not expressly include it in its articulation of the rule.¹³⁰

D. *The Undecided and Undefined: The Eighth and Fifth Circuits*

The Eighth Circuit has not expressly defined its standard for Rule 23(f) review. Rule 23(f). The court did review a class certification order *Powers v. Credit Mgmt. Servs., Inc.*, but did not explicitly set-forth a standard for when Rule 23(f) review is proper.¹³¹ Rather, the court noted that the case involved a Rule 23(f) appeal an proceed to decided that the class was improperly certified for failing to meet key requirements.¹³² Consequently, the Eight Circuit has established no established standard for when Rule 23(f) review is proper.

The Fifth Circuit has accepted appeals under Rule 23(f).¹³³ In *Regents*, the case involved a question of unsettled law. However, the court did not define a particular standard under which Rule 23(f) review is proper or adopt a particular approach.¹³⁴ Rather, the court simply referenced the advisory committee's note and found that Rule 23(f) review was appropriate.¹³⁵ The court also failed to articulate any standard in *Bolin v.*

¹²⁸ 554 F.3d 1259, 1263–64 (10th Cir. 2009).

¹²⁹ *Id.* at 1262.

¹³⁰ *See id.* at 1263–64.

¹³¹ 776 F.3d 567 (8th Cir. 2015).

¹³² *See id.*

¹³³ *E.g.*, *Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007).

¹³⁴ *See id.* at 380.

¹³⁵ *Id.*

*Sears, Roebuck & Co.*¹³⁶ and *Patterson v. Mobil Oil Corp.*¹³⁷ Once again, in *Madison v. Chalmette Ref., L.L.C.*, the court simply accepted that it had discretion to review the class action certification decision under Rule 23(f) and proceeded to the merits of the certification.¹³⁸ In all three cases, the Fifth Circuit vacated class action certifications.¹³⁹ Perhaps this is why some organizations are concerned that Rule 23(f) is being used to effectively kill plaintiff class-actions at the appellate level.¹⁴⁰ However, the drafters of Rule 23(f) gave “unfettered discretion” to the appellate courts, and the Fifth Circuit can exercise the discretion as it sees fit.¹⁴¹ Ultimately, although the Fifth Circuit grants review under Rule 23(f), the circuit does not have an expressly established test to determine when interlocutory review is appropriate.

V. POTENTIAL PITFALLS BEFORE “UNFETTERED DISCRETION” CAN EVEN COME INTO PLAY

While it is easy to get bogged down in the Circuits’ various approaches to Rule 23(f) appeals, it is important to remember that there are procedural timing issues that must be met, and the circuits have discretion to deny review on subject matter jurisdiction grounds.¹⁴² Although the circuits are split in regard to whether or not to hear a Rule 23(f) appeal, they are rather uniform in respect to the procedural requirements.¹⁴³

¹³⁶231 F.3d 970, 975 (5th Cir. 2000). Also of note, the Fifth Circuit did uphold the constitutionality of Rule 23(f) under the rule-making authority of 28 U.S.C. 1292(e) in this case. *Id.* at 974.

¹³⁷241 F.3d 417, 418–19 (5th Cir. 2001).

¹³⁸637 F.3d 551, 554 (5th Cir. 2011).

¹³⁹*Bolin*, 231 F.3d at 972; *Patterson*, 241 F.3d at 419; *Madison*, 637 F.3d at 557.

¹⁴⁰See Center for Study of Responsive Law, *Possible Law Review Topics* (May 18, 2009), <http://csrl.org/possible-law-review-topics> (“Rule 23 (f) . . . is a tool for defendants to undermine class litigation. An informal look . . . showed that the permissive appeals allowed to date were almost exclusively for defendants seeking to overturn class certification.”).

¹⁴¹See FED. R. CIV. P. 23(f) advisory committee’s note.

¹⁴²See, e.g., *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192, 198 (3d Cir. 2008) (procedural time limits are strict and inflexible); *In re James*, 444 F.3d 643, 645–48 (D.C. Cir. 2006) (Rule 23(f) review is limited to the class certification decision only); *Bertulli v. Indep. Ass’n of Cont’l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001) (dismissing a Rule 23(f) appeal for lack of constitutional standing).

¹⁴³See *id.*; 5-23 MOORE’S FEDERAL PRACTICE – CIVIL, § 23.88[2][a],[b].

A. Timing Issues

Under Rule 23(f), a party wishing to file an interlocutory appeal has 14 days from the time the district court enters the order certifying or denying class certification to file its petition for appeal.¹⁴⁴ Originally, the party had only 10 days, but the time period was changed to 14 days in 2009.¹⁴⁵

The Circuits view the 14 day time period as inflexible and absolute. As the Third Circuit noted, “Although the time limit in Rule 23(f) is claims-processing rather than jurisdictional, it is clearly a strict and inflexible one.”¹⁴⁶ The courts support this strict interpretation based on the clear language of the rule and the belief that it is important that any possible interlocutory appeal be heard quickly, so as to be minimally disruptive to the proceeding in the district court.¹⁴⁷ The Seventh Circuit found the time period to be “deliberately small.”¹⁴⁸ Thus, courts view the 14 day time period to be inflexible and essential to Rule 23(f) appeals.

In fact, many Rule 23(f) appeals are denied because the appeal was untimely filed.¹⁴⁹ The only “tolling” to the 14 day window is that a motion for reconsideration filed within the time allowed for the petition for appeal will toll the 14 day time period.¹⁵⁰ However, the motion for reconsideration itself must be filed within the 14 day window, because a motion for reconsideration filed outside the initial 14 day window does not revive or toll the 14 day time period for review.¹⁵¹

Although the time period is purely procedural, it is an effective means for courts to not only avoid having to hear a Rule 23(f) appeal, but also for the court to give deference to the district court by not delaying

¹⁴⁴FED. R. CIV. P. 23(f).

¹⁴⁵FED. R. CIV. P. 23(f) advisory committee’s notes; *see also* Fed. R. Civ. P. 23 (f) (1998) (providing 10 day appeal window).

¹⁴⁶*Gutierrez*, 523 F.3d at 198.

¹⁴⁷*E.g.*, *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011); *Gutierrez*, 523 F.3d at 199; *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999).

¹⁴⁸*Gary*, 188 F.3d at 893.

¹⁴⁹*E.g.*, *In re DC Water & Sewer Auth.*, 561 F.3d 494, 497 (D.C. Cir. 2009); *Gutierrez*, 523 F.3d at 199; *Coco v. Inc. Vill. of Belle Terre*, 448 F.3d 490, 491–92 (2d Cir. 2006).

¹⁵⁰*See, e.g.*, *Gutierrez*, 523 F.3d at 193; *McNamara v. Felderhof*, 410 F.3d 277, 280–81 (5th Cir. 2005).

¹⁵¹*E.g.*, *Fleishman*, 639 F.3d at 31; *Gutierrez*, 523 F.3d at 199; *Gary*, 188 F.3d at 892–93.

proceedings.¹⁵² After all, a Rule 23(f) appeal is driven by unique circumstances; it is not an absolute right.¹⁵³

B. Subject-Matter Jurisdiction Issues

Generally, the appellate court will only address the class certification order itself under Rule 23(f).¹⁵⁴ However, the Fifth Circuit allows a review of subject matter jurisdiction of the matter.¹⁵⁵ Some circuits review Rule 23(f) appeals to determine if the parties have proper standing.¹⁵⁶ In fact, the Fifth Circuit allows the reviewing court to go into the actual merits of the case so long as they relate to the district court's certification order.¹⁵⁷ While these types of inquiries are not explicitly authorized under Rule 23(f), they are nonetheless routinely applied to deny appeals under Rule 23(f).¹⁵⁸ Thus, a party seeking Rule 23(f) interlocutory review should be prepared to deal with any potential issues concerning standing or subject-matter jurisdiction on appeal.

VI. CONCLUSION: WHERE ARE WE AND WHERE DO WE GO FROM HERE?

As Professor Gould commented back in 1999, “only experience over time will tell whether the rule will achieve its laudable goals on the one hand, carve out an unbounded exception to the final judgment rule on the other, or simply become another seldom-used, ineffectual relic of the

¹⁵² See, e.g., *Gutierrez*, 523 F.3d at 199 (stating that the purpose of the time limit is to not overly disrupt proceeding of the district court); *Gary*, 188 F.3d at 893 (same); *Fleishman*, 639 F.3d at 31 (same).

¹⁵³ See FED. R. CIV. P. 23(f) advisory committee's notes.

¹⁵⁴ See, e.g., *In re James*, 444 F.3d 643, 645–48 (D.C. Cir. 2006) (Rule 23 (f) review is limited to the class certification decision only); *In re Delta Airlines*, 310 F.3d 953, 959 (6th Cir. 2002); *Franze v. Equitable Assurance*, 296 F.3d 1250, 1252 (11th Cir. 2002).

¹⁵⁵ *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 324 (5th Cir. 2008) (reviewing the case to determine if the federal courts had subject-matter jurisdiction).

¹⁵⁶ *City of Hialeah v. Rojas*, 311 F.3d 1096, 1101 (11th Cir. 2002); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 294 (5th Cir. 2001).

¹⁵⁷ See *Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007).

¹⁵⁸ See FED. R. CIV. P. 23 (f). *But see* FED. R. CIV. P. 23 (f) advisory committee's notes (granting “unfettered discretion” to the appellate courts); *Rojas*, 311 F.3d at 1101 (denying a rule 23(f) appeal for lack of standing).

appellate process.”¹⁵⁹ Clearly, Rule 23(f) has certainly not become an “unbounded exception.”¹⁶⁰ Most of the Circuits have now defined their standards for granting Rule 23(f) review, and for the most part they are anything but “unbounded.” Currently, it appears that most Circuits have taken a narrow view of Rule 23(f) appeals and often require the petitioner to prove how the district court’s decision was “questionable,” at the very least. Certainly, the growing trend appears to be more restrictive than expansive. Further, the Circuits have narrowed Rule 23(f)’s application by imposing strict time-period limitations and also incorporating standing and other procedural elements into the inquiry.¹⁶¹

Although Rule 23(f) came into being with a worthy goal to address practical realities associated with class action certifications, it has been significantly narrowed. While not as difficult to obtain as traditional mandamus review, Rule 23(f) appeals are rarely granted and even when they are granted it is usually granted based on novel questions of law. Unfortunately, another important rationale behind Rule 23(f), providing immediate relief in “death-knell” situations, is seldom addressed by the Circuit Courts.

Going forward, the Circuits should review their decisions and standards with respect to Rule 23(f) class action appeals and focus on defining what constitutes a “death-knell” situation from both the plaintiff’s and defendant’s perspectives. The Circuits have done well in defining important, unsettled questions of law. In fact, most of the Circuits have adopted a fairly uniform standard as to when a novel question of law, worthy of interlocutory review, exists.¹⁶²

¹⁵⁹ GOULD, *supra* note 1, at 338.

¹⁶⁰ *See id.*

¹⁶¹ *See infra* Part V.

¹⁶² *See* Vallario v. Vandehey, 554 F.3d 1259, 1263 (10th Cir. 2009) (regarding unsettled questions of law, the “issue must be significant to the case at hand, as well as to class action cases generally”); Chamberlan v. Ford Motor Co., 402 F.3d 952, 960 (9th Cir. 2005) (“[T]he certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review”); *In re* Delta Airlines, 310 F.3d 953, 959–60 (6th Cir. 2002) (*per curiam*); *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 99–100 (D.C. Cir. 2002) (review is appropriate “when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review.”); Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 139 (2d Cir. 2001) (“[T]he certification order implicates a legal question about which there is a compelling need for immediate resolution.”); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138,

After all, one of the drafters' primary goals of Rule 23(f) was to allow interlocutory appeals when the grant or denial of the class action certification effectively terminated the case by settlement or dismissal, thus insulating the certification decision from appellate review.¹⁶³ Thus, it is safe to assume that the drafters expected the Circuits to develop standards for defining "death-knell" situations.¹⁶⁴

Better defining "death-knell" situations would also alleviate criticisms that the various Circuits are manipulating Rule 23(f) based on political ideology, rather than actual law. Additionally, although the drafters gave the Circuits "unfettered discretion" to hear Rule 23(f) appeals, practically it is important that there be some defined parameters for litigators, especially since the Class Action Fairness Act of 2005 has pushed more class actions into the federal courts.¹⁶⁵ If the Circuits can articulate standards for when a "death-knell" situation truly exists, the practical and theoretical purpose of Rule 23(f) would be fulfilled.

141, 144 (4th Cir. 2001) (quoting the *Mowbray* standard with approval); *Waste Mgmt. Holdings v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) (stating that an "unsettled legal issue" must be "important to the particular litigation as well as important in itself"); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1275–76 (11th Cir. 2000) ("A court should consider whether the appeal will resolve an unsettled legal issue that is important to the particular litigation as well as important in itself.").

¹⁶³ See FED. R. CIV. P. 23(f) advisory committee's notes ("[S]everal concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.").

¹⁶⁴ See *id.*

¹⁶⁵ See EMERY G. LEE III, THOMAS E. WILLGING, FED. JUD. CTR., *THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS* (2008), available at <https://bulk.resource.org/courts.gov/fjc/cafa0408.pdf> (2008) (finding a 72% increase in class action activity in 88 district courts during a period in 2007 compared to a period in 2001).