

# **Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f)**

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## I. INTRODUCTION

The class action device has always presented a powerful vehicle for litigants in federal courts. In addition to its role in presenting otherwise underrepresented legal claims, the class action has encouraged the growth of a unique community of specialized attorneys whose work makes a large contribution to expanding federal dockets. “The determination whether or not to certify an action as a class action has enormous implications for all the participants—the named parties, the absent class members, and the court itself.”<sup>1</sup> However, “there are too many class actions filed each year for federal appeals courts practicably to adjudicate class certification decisions on an interlocutory basis as a matter of course.”<sup>2</sup> In addition to other statutory grants of appellate jurisdiction, Federal Rule of Civil Procedure 23(f) gives courts of appeals a special power to accept certain appeals of class certification decisions.

Although commentators have addressed the standards governing Rule 23(f) appeals,<sup>3</sup> the jurisprudence has developed significantly in

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<sup>1</sup> 7AA WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 1785; accord *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 871 n.3 (8th Cir. 1977) (“The impact of a class action determination on the dimensions of the trial and the exposure to liability can be enormous.”).

<sup>2</sup> *Prado-Steiman v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000). (“As a statistical point of reference, we observe that according to the Federal Judicial Center, as of 1998 there were 1,742 active federal cases with class action activity. In 1994, there were only 816 such cases. A similar rise is reported for this Circuit; in 1998, according to the data, there were 221 active cases in this Circuit with class action activity, almost double the number of such cases, 114, during 1994. Given these numbers, and the large volume of ordinary final judgments that by law must be considered by the courts of appeals, routinely granting interlocutory appellate review of class certification decisions is simply not practicable.”).

<sup>3</sup> See *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228 (11th Cir. 2000); 114 HARV. L. REV. 1793 (2001); See also, Scott E. Gant, *The Law of Unintended Consequences: Supreme Court Jurisdiction over Interlocutory Class Certification Rulings*, 6 J. APP. PRAC. & PROCESS 249 (2004); Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. APP. PRAC. & PROCESS 309 (1999); Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), a Good Rulemaking*, 69 TENN. L. REV. 97 (2001); Michael L. 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 (2000); Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527 (2002); Carey M. Erhard, Note, *A Discussion of the Interlocutory Review of Class Action Certification Orders Under Federal Rule of Civil Procedure 23(f)*, 51 DRAKE L. REV. 151 (2002); Nicole Hitch, Note, *Reconsidering the Scope and Consequences of Appellate Review in the Certification Decision of Dukes*

recent years. This paper presents the state of the law under Rule 23(f). Part II reviews the basic elements of the modern class action and Part III reviews the various grants of the appellate jurisdiction for the courts of appeals. Part IV examines the development of Rule 23(f), focusing on the Advisory Committee's work and some decisions concerning the Rule's constitutionality. Part V surveys all cases addressing Rule 23(f) in the Courts of Appeals, presenting the current trends with respect to procedure, form, and substance, as well as some critical analysis of the current Rule 23(f) frameworks.

## II. THE MODERN CLASS ACTION

Federal Rule of Civil Procedure 23 governs class action suits in all federal courts,<sup>4</sup> and strictly regulates a litigant's ability to maintain a class action. The party invoking Rule 23 to maintain a class action must satisfy two sets of requirements. First, the suit must meet the conjunctive requirements of Rule 23(a), which accepts classes only if:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>5</sup>

Second, the suit must fall within one or more of Rule 23(b)'s prescribed categories of class actions: actions where separate actions would adversely affect the class, actions for injunctive or declaratory

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v. Wal-Mart Stores, Inc., 53 CLEV. ST. L. REV. 747 (2005-06); Christopher A. Kitchen, Note, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal for a New Guideline*, 2004 COLUM. BUS. L. REV. 231 (2004); Aimee G. Mackay, Comment, *Appealability of Class Certification Orders Under Federal Rules of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW. U. L. REV. 755 (2002).

<sup>4</sup> *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 427 n.7 (1996) ("It is settled that if the Rule in point is consonant with the Rules Enabling Act . . . and the Constitution, the Federal Rule applies regardless of contrary state law.") (citing *Burlington N. R.R. v. Woods*, 480 U.S. 1, 4-5 (1987); *Hanna v. Plumer*, 380 U.S. 460 469-74 (1965)); 7A WRIGHT, MILLER & COOPER, *supra* note 1, § 1758. See generally 7A WRIGHT, MILLER & COOPER, *supra* note 1, at § 1751 (discussing the English roots and common law evolution of class action suits). Special rules govern shareholder derivative suits, FED. R. CIV. P. 23.1,<sup>3</sup> and unincorporated associations' suits, FED. R. CIV. P. 23.2.

<sup>5</sup> FED. R. CIV. P. 23(a). The Rule 23(a) requirements are commonly referred to as requirements of numerosity, commonality, typicality, and adequacy.

relief, actions where common questions predominate over individual questions, and/or hybrid class actions.<sup>6</sup>

Rule 23 vests trial courts with significant discretion in their certification decisions. The Rule requires courts to decide whether or not to certify a class action “at an early practicable time,”<sup>7</sup> and although trial courts need not hold evidentiary hearings (extensive or otherwise) on class certification questions, many appellate courts express a strong preference for such hearings.<sup>8</sup> Certification decisions must always address the Rule 23 certification prerequisites, and must not rest on a consideration of the underlying claim’s merits, *per se*.<sup>9</sup> Nonetheless, certification inquiries often present important issues underlying the substance of a claim. For example, if a court evaluating certification needed to identify the existence of predominant common issues and other threshold questions, the court could look beyond the face of the pleadings into at least some view of the substantive issues involved.<sup>10</sup> Failure of a class to meet the Rule 23(a) and (b) requirements does not necessarily end the action entirely, because courts denying class certification may allow the suit to continue against individually named litigants.<sup>11</sup> In addition, certification decisions are often fluid— “[t]he

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<sup>6</sup> FED. R. CIV. P. 23(b); 7AA WRIGHT, MILLER & COOPER, *supra* note 1, §§ 1772-84.1.

<sup>7</sup> FED. R. CIV. P. 23(c)(1)(a). In addition, both plaintiffs and defendants may move for a class certification decision under this rule. 7AA WRIGHT, MILLER & COOPER, *supra* note 1, §§ 1785, 1785.3.

<sup>8</sup> *E.g.*, *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24, 41 (2d Cir. 2006) (“[A] district judge has ample discretion to circumscribe both the extent of discovery concerning *Rule 23* requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.”); *Merrill v. S. Methodist Univ.*, 806 F.2d 600, 608 (5th Cir. 1986) (“*Rule 23* does not itself require an evidentiary hearing on the question of class certification. However, we have stated on numerous occasions that the district court should ordinarily conduct an evidentiary hearing on this question.” (citations omitted)); *see also* 7AA WRIGHT, MILLER & COOPER, *supra* note 1, § 1785.

<sup>9</sup> *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177–78 (1974) (“We find nothing in either the language or history of *Rule 23* that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”).

<sup>10</sup> *Unger v. Amedisys Inc.*, 401 F.3d 316, 320–21 (5th Cir. 2005) (“Class certification hearings should not be mini-trials on the merits of the class or individual claims. At the same time, however, ‘going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.’” (citations omitted) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996))); *see also* 7AA WRIGHT, MILLER & COOPER, *supra* note 1, § 1785.

<sup>11</sup> *E.g.*, *Payton v. County of Kane*, 308 F.3d 673, 676–77 (7th Cir. 2002) (“[T]he proper remedy for [the failure to meet certification requirements] is not dismissal of the entire action, but rather an order denying class certification and permitting the case to

district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts.”<sup>12</sup> While a trial court’s selection of legal standards is subject to de novo review, a trial court’s application of the correct legal standards is reversible only where there is an abuse of discretion.<sup>13</sup>

### III. GENERAL STANDARDS GOVERNING CLASS ACTION CERTIFICATION APPEALS

#### A. *The Final Judgment Rule and Its Judicial Exceptions*

The United States Courts of Appeals possess only that jurisdiction which Congress confers upon them by statute.<sup>14</sup> Federal statute 28 U.S.C. section 1291 establishes one such source of jurisdiction: “The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.”<sup>15</sup> Unlike decisions involving the scope of federal jurisdiction generally, which implicate concerns of federal power and state sovereignty, the final judgment rule and its progeny concern only the distribution of decisionmaking powers among the various federal courts.<sup>16</sup> Nonetheless, the final judgment rule is of enormous import and has earned “deep reverence” from federal courts.<sup>17</sup> While the exact purposes of the rule are difficult to define with precision, some general principles are commonly recited:

[T]he finality rule of § 1291 protects a variety of interests that contribute to the efficiency of the legal system. Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the finality doctrine protects the

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continue as an individual suit.”); *see also* 7AA WRIGHT, MILLER & COOPER, *supra* note 1, § 1785.

<sup>12</sup> *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983); *accord In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 792–94 (3d Cir. 1995); 7AA WRIGHT, MILLER & COOPER, *supra* note 1, § 1785.4.

<sup>13</sup> *E.g.*, *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1337 (11th Cir. 2006).

<sup>14</sup> *Carroll v. United States*, 354 U.S. 394, 399–400 (1957) (“It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute.”)

<sup>15</sup> 28 U.S.C. § 1291 (2006).

<sup>16</sup> 15A WRIGHT, MILLER & COOPER, *supra* note 1, § 3905.

<sup>17</sup> *Id.* at § 3906.

strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference.<sup>18</sup>

A decision is “final” within the meaning of section 1291 when it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”<sup>19</sup> In the class action context, decisions that *both* reject certification and dismiss the suit, or decisions on the merits of the underlying class action claim, constitute final judgments which may be immediately appealed under section 1291.<sup>20</sup> An order that denies class certification while allowing the suit to continue as an individual action is *not* a final judgment within the meaning of section 1291.<sup>21</sup> Despite section 1291’s language, courts have adopted several exceptions to the final judgment rule, including the collateral order and death-knell doctrines.

Under the collateral order doctrine, most commonly attributed to *Cohen v. Beneficial Industrial Loan Corp.*,<sup>22</sup> an order may be appealed if the order “conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment.”<sup>23</sup> The Supreme Court in *Coopers & Lybrand v. Livesay* held that class certification decisions do not qualify as collateral orders because they are constantly subject to revision, because they involve significant portions of the case’s merits, and because they may always be reviewed after final

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<sup>18</sup> *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987); *accord* *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 429–30 (1985) (citing concerns for “efficient judicial administration, . . . the deference appellate courts owe to the district judge’s decisions on the many questions of law and fact, . . . unreasonable disruption, delay, and expense, . . . [and] the ability of district judges to supervise litigation”); *Flanagan v. United States*, 465 U.S. 259, 263–64 (1984) (citing concerns for “the respect due trial judges[,] . . . [and] the ability of litigants to harass opponents and to clog the courts”); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373–74 (1981) (citing concerns for “the deference that appellate courts owe to the trial judge[,] . . . piecemeal appeals [that] would undermine the independence of the district judge[,] . . . harassment and cost of a succession of separate appeals[,] . . . [and] efficient judicial administration”).

<sup>19</sup> *Cunningham v. Hamilton County*, 527 U.S. 198, 204 (1999) (citing *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

<sup>20</sup> *E.g.*, *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. 1982) (“A dismissal with prejudice clearly is a decision that ends the litigation on the merits and leaves nothing for the court to do but execute a judgment.”); *Sullivan v. Pac. Indem. Co.*, 566 F.2d 444, 445 (3d Cir. 1977) (“To be appealable as an interlocutory matter, the class certification decision must involve special circumstances prompting certification by the district judge under 28 U.S.C. § 1292(b) and approval by [the Court of Appeals].”).

<sup>21</sup> *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978).

<sup>22</sup> 337 U.S. 541 (1949).

<sup>23</sup> *Coopers & Lybrand*, 437 U.S. at 468–69.

judgment.<sup>24</sup> The *Coopers & Lybrand* holding on this issue is firmly established in federal courts, eliminating section 1291 as a source of appellate jurisdiction over class certification orders.

For a short time, the final judgment rule also admitted another exception: the death knell doctrine: “The ‘death knell’ doctrine assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination.”<sup>25</sup> Courts adopting the death knell doctrine used a “practical rather than a technical construction” of section 1291 to determine the likelihood of the suit proceeding as an individual claim without class certification.<sup>26</sup> Those courts evaluated the following factors:

[T]he plaintiff’s resources; the size of his claim and his subjective willingness to finance prosecution of the claim; the probable cost of the litigation and the possibility of joining others who will share that cost; and the prospect of prevailing on the merits and reversing an order denying class certification.<sup>27</sup>

However, in *Coopers & Lybrand*, the Supreme Court addressed a class certification appeal and unanimously held that section 1291 does not confer jurisdiction over death knell orders.<sup>28</sup> Responding to arguments for a separate set of rules regarding class-action certification appeals, and with language that presaged Rule 23(f), the Court determined that “[t]here are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals.”<sup>29</sup> As a

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119, 120 (2d Cir. 1966) (“In deciding the question of finality the most important competing considerations are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.” (quoting *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152–53 (1964))).

<sup>27</sup> *Coopers & Lybrand*, 437 U.S. at 470 (“[I]f the court believes that the plaintiff has adequate incentive to continue, the order is considered interlocutory; but if the court concludes that the ruling, as a practical matter, makes further litigation improbable, it is considered an appealable final decision.”). Compare *Carlisle & Jacquelin*, 370 F.2d at 119–21 (finding that a \$70 claim involving complex claims against a large securities dealer and the New York Stock Exchange would not survive a denial of class certification), with *City of New York v. Int’l Pipe & Ceramics Corp.*, 410 F.2d 295, 298–99 (2d Cir. 1969) (finding that the City’s “substantial” antitrust claim against pipe manufacturers was backed by “adequate resources” and would survive a denial of class certification).

<sup>28</sup> *Coopers & Lybrand*, 437 U.S. at 469.

<sup>29</sup> *Id.* at 470.

result, the Court evaluated the death knell doctrine under the general section 1291 finality framework to determine whether class certification orders fell within “that limited category of orders which, though nonfinal, may be appealed without undermining the policies served by the general rule [of finality].”<sup>30</sup>

Initially, the Court rejected a strain of decisions where courts had identified death knell orders by referring to a predetermined threshold of a plaintiff’s claim amount. According to *Coopers & Lybrand*, these lower courts had created inconsistent and unprincipled claim thresholds, “plainly a legislative, not a judicial, function.”<sup>31</sup> Similarly, the Court rejected a second strain of decisions where the lower courts had identified death knell orders by conducting a case-by-case evaluation to determine whether a claim was truly viable without certification. The marginal benefit of those decisions was “outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system’s overall capacity to administer justice.”<sup>32</sup> Finally, the Court rejected both permutations of the death knell doctrine because of its inherent tendency to favor plaintiffs, and because the doctrine threatened a vital purpose of the final judgment rule—the balanced relationship between trial and appellate courts.<sup>33</sup> Thus, “orders relating to class certification are not independently appealable under section 1291 prior to judgment.”<sup>34</sup>

#### *B. Statutory Exceptions to the Final Judgment Rule*

In addition to the final judgment rule in section 1291, Congress has provided a number of potential avenues for appealing class certification orders. The Interlocutory Appeals Act, 28 U.S.C. § 1292(b), provides for appeals from certain district court orders:

When a district judge, in making in 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

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<sup>30</sup> *Id.* at 471.

<sup>31</sup> *Id.* at 471–72.

<sup>32</sup> *Id.* at 473. The Court emphasized the undesirable need for significant factual development and the possibility of multiple burdensome appeals within one certification decision. *Id.* at 473–76.

<sup>33</sup> *Coopers & Lybrand*, 437 U.S. at 476.

<sup>34</sup> *Id.* at 470.



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.<sup>35</sup>

Unlike the various permutations of the final judgment rule, section 1292's interlocutory appeal framework permits appeals from orders that are admittedly not final judgments. To appeal an order with section 1292(b), the district court must first certify that the 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 . . . ."<sup>36</sup> Courts interpret this language not as a set of rigid requirements, *per se*, but as a command to flexibly evaluate the relative worth of allowing appeal.<sup>37</sup> As a result, trial judges retain wide discretion to certify orders under § 1292(b).<sup>38</sup> When a district court has made the requisite certification, appeal may not be perfected until and unless the court of appeals "thereupon, in its discretion, permit[s] an appeal to be taken from such order."<sup>39</sup> Unlike the district court's decision, which the statute directs towards at least some substantive criteria, the court of appeals' discretion is without substantial limit. In fact, "[t]he appellate court may

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<sup>35</sup> 28 U.S.C. § 1292(b) (2000).

<sup>36</sup> *Id.*; *see also* 16 WRIGHT, MILLER & COOPER, *supra* note 1, § 3930.

<sup>37</sup> *See* *Lipsett v. Univ. of P.R.*, 740 F. Supp. 921, 923 (D.P.R. 1990) ("When considering whether to certify an interlocutory appeal, the district court must consider the relative advantages and disadvantages of immediate appeal in light of the guidelines provided in the statute."); *Gen. Dynamics Corp. v. AT&T*, 658 F. Supp. 417, 418 (N.D. Ill. 1987). The Minnesota Supreme Court interpreted a comparable state rule: "Importance depends in large measure on a weighing of probabilities. Importance increases with the probability that resolution of the question will have statewide impact and the probability of reversal. It increases with the length of the proceedings terminated by reversal and with the amount of harm inflicted on the parties by a wrong ruling by the trial court. Importance decreases with the probability of affirmance, the probability that trial will moot the issue, or the probability that a resolution at variance with that of the trial court will not terminate the action or that reversal will not relieve the parties of any significant burden." *Emme v. C.O.M.B., Inc.*, 418 N.W.2d 176, 180 (Minn. 1988) (citations omitted).

<sup>38</sup> *See* *Gottesman v. Gen. Motors Corp.*, 268 F.2d 194, 198 (2d Cir. 1959) ("This statute was intended to give to the trial judge who is charged with the responsibility of facing a future burdened by one of these protracted cases discretion in sending some important phase of the case which might materially advance the ultimate termination of the litigation to an appellate court for review.").

<sup>39</sup> 28 U.S.C. § 1292(b) (2000).

deny the appeal for any reason, including docket congestion.”<sup>40</sup> Nonetheless, class certification decisions are often reviewed under section 1292(b), albeit without any strong unifying trend. Although a complete survey is beyond the scope of this work, it may be sufficient to note that “1292(b) appeals indeed have been used for a wide variety of class-action rulings.”<sup>41</sup>

The All Writs Act, 28 U.S.C. § 1651, provides another relevant jurisdictional source: “The 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>42</sup> Although section 1651 recognizes only those writs “necessary or appropriate in aid of their respective jurisdictions,”<sup>43</sup> the act is “not confined to . . . jurisdiction[s] already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.”<sup>44</sup> Section 1651 creates only a narrow power because the writs do not serve as substitutes for appeal.<sup>45</sup> The writs, both at common law and under the federal rules, function to “confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority” when its duty requires.<sup>46</sup>

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<sup>40</sup> *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). “[Section] 1292 is not a panacea, both because it depends to a degree on the indulgence of the court from which review is sought and because the discretion to decline to hear an appeal is broad.” *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 n.9 (1994).

<sup>41</sup> 16 WRIGHT, MILLER & COOPER, *supra* note 1, § 3931 (collecting cases); *See, e.g.*, *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1016 (5th Cir. 1992) (accepting a section 1292(b) appeal from an order “defin[ing] the class and class issues, designat[ing] class representatives, and set[ting] a trial plan”); *Tucker v. Phyfer*, 819 F.2d 1030 (11th Cir. 1987) (accepting a section 1292(b) appeal from an order denying class certification); *Henson v. E. Lincoln Twp.*, 814 F.2d 410 (7th Cir. 1987) (accepting a section 1292(b) appeal from an order denying partition of the defendant class); *McKenna v. Champion Int’l Corp.*, 747 F.2d 1211 (8th Cir. 1984) (accepting a section 1292(b) appeal from an order directing notice to potential class members); *Green v. McCall*, 710 F.2d 29 (2d Cir. 1983) (accepting a section 1292(b) appeal from an order recognizing personal jurisdiction over defendant class members); *Thompson v. Bd. of Educ.*, 709 F.2d 1200 (6th Cir. 1983) (accepting a section 1292(b) appeal from an order recognizing plaintiff’s standing).

<sup>42</sup> 28 U.S.C. § 1651(a) (1949). *See generally* 16 WRIGHT, MILLER & COOPER, *supra* note 1, §§ 3932–3933.

<sup>43</sup> 28 U.S.C. § 1651(a).

<sup>44</sup> *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 25 (1943) (“Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal.”).

<sup>45</sup> *Id.*; *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382–83 (1953).

<sup>46</sup> *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943) (“[A]ppellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal.”); *accord Will v. United States*, 389 U.S. 90, 104 (1967) (limiting writs to the function of “confin[ing] the lower court to the sphere of its discretionary power”); *Bankers Life &*

Because courts continue to reserve the section 1651 writ power for “really extraordinary causes,”<sup>47</sup> courts rarely exercise this power to allow appeal from class certification decisions.<sup>48</sup> In particular, courts reject most appeals from class certification decisions brought under section 1651 because of the district court’s wide discretion in the merits of the certification decision,<sup>49</sup> and because appeal from the final judgment is generally available.<sup>50</sup> Courts exercising section 1651 have accepted appeals of class action certification orders in only the most extreme circumstances, such as a class certification order constituting a “clear abuse of discretion . . . inconsistent with any tenable interpretation of Rule 23,”<sup>51</sup> and a lower court’s “abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation.”<sup>52</sup> As a result, section 1651 does not generally operate as a reliable method of appealing class action certification orders.

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Casualty Co. v. Holland, 346 U.S. 379, 383 (1953) (“The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power” (quotations omitted)).

<sup>47</sup> Will v. United States, 389 U.S. 90, 107 (1967) (quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947)).

<sup>48</sup> *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 163 (3d Cir. 2001) (observing that, before the adoption of Rule 23(f) “courts granted writs of mandamus to review certification decisions but with an uneasiness that their actions stretched the writ’s traditionally restrictive parameters”).

<sup>49</sup> *DeMasi v. Wells*, 669 F.2d 114, 117 (3d Cir. 1982) (recognizing appeal by writ only when “the court in entering a class action order acts outside its jurisdiction” or when the court acts “in disregard of appropriate procedural safeguards”) (citation omitted); *In re Allegheny Corp.*, 634 F.2d 1148, 1149–51 (8th Cir. 1980); *J. H. Cohn & Co. Self-Employment Ret. Trust v. Am. Appraisal Assocs., Inc.*, 628 F.2d 994, 998 (7th Cir. 1980) (“Since all that is at issue is mandamus relief it is sufficient to note that a decision to certify a class action rests in the discretion of the district court, and that the district court did not usurp its judicial power or indisputably abuse its discretion in ruling not to certify the class.” (citations omitted)); *U.S. Fid. & Guar. Co. v. Lord*, 585 F.2d 860, 865 (8th Cir. 1978) (“[T]he remedy of mandamus remains available in those extraordinary instances when the district court, in granting the maintenance of a class action, has exceeded the sphere of its discretionary power.”) (citation omitted).

<sup>50</sup> See *In re NLO, Inc.*, 5 F.3d 154, 159 (6th Cir. 1993) (rejecting an attempt to appeal a class certification order because “class certification is clearly reviewable on direct appeal once a final disposition of the case has been reached.”). At least one court has suggested that review by writ of a class certification decision is never appropriate. See *In re Catwaba Indian Tribe of S.C.*, 973 F.2d 1133, 1137 (4th Cir. 1992).

<sup>51</sup> *McDonnell Douglas Corp. v. U.S. Dist. Court*, 523 F.2d 1083, 1087 (9th Cir. 1975).

<sup>52</sup> *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (confronting “a refusal on his [petitioner’s] part, as a judge, to try the causes in due course”); see also *Rodgers v. U.S. Steel Corp.*, 508 F.2d 152, 162 (3d Cir. 1975) (confronting an “across-the-board prohibition of communication” with potential members of the class by the plaintiffs or their attorneys). In at least one case, the Court approved the use of mandamus in less drastic circumstances. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (approving the

Rule 54(b) provides another potential source of appellate jurisdiction over class certification appeals:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.<sup>53</sup>

Rule 54(b)'s requirement of an express determination and direction makes identification of appealable orders relatively simple for litigants.<sup>54</sup> District courts applying Rule 54's determination and direction prerequisites must make separate and distinct inquiries.<sup>55</sup> The district court must identify a claim that is "'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'"<sup>56</sup> Most importantly for the consideration of class certification orders, Rule 54(b)'s "final judgments" and section 1291's "final decisions" represent an identical set of decisions.<sup>57</sup> That is, "[t]he District Court *cannot*, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of section 1291."<sup>58</sup>

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use of mandamus to review "the basic, undecided question of whether a district court could order the mental or physical examination of a defendant").

<sup>53</sup> Fed. R. Civ. P. 54(b). *See generally* 10 WRIGHT, MILLER & COOPER, *supra* note 1, §§ 2653–2661.

<sup>54</sup> Indeed, the creation of a clear and unambiguous result for litigants was an important purpose of the Rule. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950) (analyzing the Advisory Committee's work on Rule 54).

<sup>55</sup> *Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1026 (6th Cir. 1994) ("Rule 54(b) certification requires two *independent* findings." (emphasis added)). "The determination that a particular order ultimately disposes of a separable claim is a question of law reviewed *de novo*, while the finding of no just reason for delay is only reviewed for an abuse of discretion." *Id.* at 1027.

<sup>56</sup> *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980) (citation omitted).

<sup>57</sup> *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956); *see* 10 WRIGHT, MILLER & COOPER, *supra* note 1, § 2658.1 (comparing the principles animating § 1291 and Rule 54(b)).

<sup>58</sup> *Sears, Roebuck & Co.*, 351 U.S. at 437. "Rule 54(b) . . . does not supersede any statute controlling appellate jurisdiction. It scrupulously recognizes the statutory

As a result, the *Coopers & Lybrand* holding that class certification decisions are not “final decisions” forecloses both section 1291 and Rule 54(b) as means of appealing these orders.<sup>59</sup>

#### IV. THE DEVELOPMENT OF RULE 23(F)

The Federal Courts Administration Act of 1992 created the Supreme Court’s authority to “prescribe rules . . . 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)” of 28 U.S.C. § 1292.<sup>60</sup> In 1998, the Supreme Court exercised this new power for the first time by promulgating Federal Rule of Civil Procedure 23(f):

(f) Appeals. 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 or the court of appeals so orders.<sup>61</sup>

The Advisory Committee notes accompanying 23(f) anticipate the creation of new substantive standards of appeal under 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.”<sup>62</sup> In addition to appeals involving “novel or unsettled question[s] of law,” the Advisory Committee approved of two

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requirement of a ‘final decision’ under section 1291 as a basic requirement for an appeal to the Court of Appeals.” *Id.* at 438; *accord* *Oestreicher v. Am. Nat’l. Stores, Inc.*, 225 S.E.2d 797, 802–05 (N.C. 1976) (interpreting a state rule parallel to Rule 54(b) with federal jurisprudence).

<sup>59</sup> *Minority Police Officers Ass’n. v. City of S. Bend*, 721 F.2d 197 (7th Cir. 1983); *accord* *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 (9th Cir. 2002) (asserting that denials of class certification are “not final judgments severable for immediate appeal pursuant to Rule 54(b), but interlocutory orders”); *Akerman v. Oryx Commc’ns, Inc.*, 810 F.2d 336, 339 (2d Cir. 1987) (rejecting a district court’s 54(b) certification of a class certification order); *West v. Capitol Fed. Sav. & Loan Ass’n*, 558 F.2d 977, 982 (1977) (“If section 1291 does not apply because of the lack of finality, recourse may not be had to Rule 54(b) because it applies only to a ‘final judgment.’”).

<sup>60</sup> Federal Courts Administration Act of 1992 § 101, 28 U.S.C. § 1292(e) (2000); *see generally* 4 WRIGHT, MILLER & COOPER, *supra* note 1, § 1007 (tracking the work of the Advisory Committee on Civil Rules from 1958 to present).

<sup>61</sup> FED. R. CIV. P. 23(f).

<sup>62</sup> FED. R. CIV. P. 23(f) advisory committee’s note. According to the Committee, “[t]he courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation.” *Id.* “Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.” *Id.*

additional types of class certification appeals.<sup>63</sup> First, the Committee approved of appeals from class certification decisions that resemble the plaintiff's death knell doctrine—where “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.”<sup>64</sup> Second, the Committee approved of appeals from orders granting certification where the defendant is forced “to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”<sup>65</sup> The Committee predicted that “[p]ermission 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.”<sup>66</sup>

Both Rule 23(f)'s text and accompanying notes suggest a grant of appellate review that differs significantly from other statutory grants of appellate jurisdiction over interlocutory orders. Rule 23(f) differs from section 1292(b) in two respects. Unlike section 1292(b), which requires district court certification of class certification orders, Rule 23(f) “does not require that the district court certify the certification ruling for appeal.”<sup>67</sup> Additionally, unlike section 1292(b), which permits appeal only where there exists a “controlling question of law as to which there is substantial ground for difference,”<sup>68</sup> Rule 23(f) contains no such limit. Despite some apparent overlap, courts consistently refuse to interpret Rule 23(f) as a repeal or supercession of section 1292(b).<sup>69</sup> Nor does Rule 23(f) limit its scope like the All Writs Act, which grants the power to issue only those writs “necessary or appropriate in aid of their respective jurisdictions.”<sup>70</sup> Under Rule 23(f), “[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.”<sup>71</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* District courts may, nonetheless, speak to the issue in an assisting or advisory capacity. *Id.* According to the Committee, “a statement of reasons bearing on the 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.” *Id.*

<sup>68</sup> 28 U.S.C. § 1292(b) (2000).

<sup>69</sup> See *Panache Bd. of Pa. v. Richardson Elecs., Ltd.*, No. 90-C-6400, 1999 WL 1024560, \*2 (N.D. Ill. Oct. 29, 1999) (“Rule 23(f) was enacted to expand the ways for taking an interlocutory appeal, and it contains a different structure and procedure than section 1292(b).”).

<sup>70</sup> 28 U.S.C. § 1651(a) (2000).

<sup>71</sup> FED. R. CIV. P. 23(f) advisory committee's note.

The Fifth Circuit confronted a direct constitutional challenge to Rule 23(f) in *Bolin v. Sears, Roebuck & Co.*, where the respondent asserted that “28 U.S.C. § 1292(e), the authorizing authority for Rule 23(f), exceeds the scope of rulemaking power that Congress may permissibly delegate to the Supreme Court because only Congress, not the Court, may confer jurisdiction on the lower federal courts.”<sup>72</sup> The court narrowed the question to whether Rule 23(f) is an expansion of *jurisdiction*, which poses significant constitutional questions with respect to Article III, or whether the rule is an acceptable grant of “rulemaking authority over the courts’ own practices.”<sup>73</sup> After surveying recent rulemaking practices, the court concluded that “none of these rules, including Rule 23(f), affect the matters reviewable by the courts of appeals.”<sup>74</sup> Instead, “[t]hey affect only *when* those courts may hear the appeals, an issue apart from the right to confer original jurisdiction on the lower federal courts.”<sup>75</sup> Since that decision, the constitutional propriety of Rule 23(f) has gone unchallenged.

#### V. THE APPLICATION OF RULE 23(F) IN THE UNITED STATES COURTS OF APPEALS

This Part surveys all published cases addressing Rule 23(f) in the Courts of Appeals.<sup>76</sup> Several issues arise during Rule 23(f) decisions which merit independent consideration: announcement of Rule 23(f) decision frameworks; procedure under Rule 23(f); and the accepted categories of Rule 23(f) appeals.

##### A. *The Announcement of Rule 23(f) Decision Frameworks*

Apart from the question of whether or not to grant a Rule 23(f) appeal, the courts of appeals (and judges within the courts) diverge on the question of whether or not to announce the reasons for accepting or rejecting a Rule 23(f) appeal. In many decisions, courts simply note near the factual recitation that appeal was granted (or denied) pursuant to Rule 23(f), without more discussion. With one recent exception,<sup>77</sup> the Fifth Circuit has never announced the substantive grounds which guide its Rule 23(f) decisions.<sup>78</sup> After initial decisions outlining general categories

<sup>72</sup> *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 973 (5th Cir. 2000).

<sup>73</sup> *Id.* at 974.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> This article does not include cases published after Sept. 25, 2007.

<sup>77</sup> *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007).

<sup>78</sup> See *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521 (5th Cir. 2007); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007); *Cole v.*

of accepted appeals, the overwhelming majority of Fourth<sup>79</sup> and Eleventh Circuit<sup>80</sup> decisions do not specifically address why any individual case merited a Rule 23(f) appeal under their frameworks. This practice subsists even in circuits, such as the Seventh, that have developed a significant set of Rule 23(f) acceptance jurisprudence,<sup>81</sup> suggesting that not all judges feel bound to the analytical framework to which their circuit colleagues may adhere.<sup>82</sup> The development of accepted categories

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Gen. Motors Corp., 484 F.3d 717 (5th Cir. 2007); Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 304 (5th Cir. 2006); Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 601 (5th Cir. 2006); Feder v. Elec. Data Sys. Corp., 429 F.3d 125, 127 (5th Cir. 2005); Bell v. Ascendant Solutions, Inc., 422 F.3d 307, 311 (5th Cir. 2005); Krim v. pcOrder.com, Inc., 402 F.3d 489, 493 n.10 (5th Cir. 2005); Unger v. Amedisys Inc., 401 F.3d 316, 319 (5th Cir. 2005); Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416, 419 (5th Cir. 2004); Bratcher v. Nat'l Standard Life Ins. Co. (*In re Monumental Life Ins. Co.*), 365 F.3d 408, 413 (5th Cir. 2004), *cert. denied*, Am. Nat'l Ins. Co. v. Bratcher, 543 U.S. 870 (2004); *In re Monumental Life Ins. Co.*, 343 F.3d 331, 337 (5th Cir. 2003), *withdrawn and reh'g denied and reh'g en banc denied*, 369 F.3d 408, 413 (5th Cir. 2004); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 301 (5th Cir. 2003); Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 215 (5th Cir. 2003); Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315, 318 (5th Cir. 2002); Smith v. Texaco, Inc., 263 F.3d 394, 402 (5th Cir. 2001); Berger v. Compaq Computer Corp., 257 F.3d 475, 478 (5th Cir. 2001); Bertulli v. Indep. Ass'n of Control Pilots, 242 F.3d 290, 293 (5th Cir. 2001); Patterson v. Mobil Oil Corp., 241 F.3d 417, 418 (5th Cir. 2001); Bolin v. Sears Roebuck & Co., 231 F.3d 970, 972 (5th Cir. 2000); Reyna v. Johnson, 176 F. App'x 459, 460 (5th Cir. 2006); Corley v. Orangefield Indep. Sch. Dist., 152 F. App'x 350, 353 (5th Cir. 2005); White v. Imperial Adjustment Corp., 75 F. App'x 972, 973 (5th Cir. 2003).

<sup>79</sup> See Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311 (4th Cir. 2006); Gregory v. Finova Capital Corp., 442 F.3d 188 (4th Cir. 2006); Gariety v. Grant Thornton, LLP, 368 F.3d 356 (4th Cir. 2004); Gunnells v. Healthplan Servs., Inc., 348 F.3d 417 (4th Cir. 2003).

<sup>80</sup> See Heffner v. Blue Cross & Blue Shield of Ala., Inc., 443 F.3d 1330 (11th Cir. 2006); Gilchrist v. State Farm Mut. Auto. Ins. Co., 390 F.3d 1327 (11th Cir. 2004); Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113 (11th Cir. 2004); Valley Drug Co. v. Geneva Pharms. Inc., 350 F.3d 1181 (11th Cir. 2003); London v. Wal-Mart Stores, Inc., 340 F.3d 1246 (11th Cir. 2003); City of Hialeah v. Rojas, 311 F.3d 1096 (11th Cir. 2002); Heimmermann v. First Union Mortgage Corp., 305 F.3d 1257 (11th Cir. 2002); Franze v. Equitable Assurance, 296 F.3d 1250 (11th Cir. 2002); Piazza v. Ebscoe Indus., Inc., 273 F.3d 1341 (11th Cir. 2001); Shin v. Cobb County Bd. of Educ., 248 F.3d 1061 (11th Cir. 2001); Turner v. Beneficial Corp., 236 F.3d 643 (11th Cir. 2000), *rev'd en banc*, 242 F.3d 1023 (11th Cir. 2001); Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228 (11th Cir. 2000); Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1279 (11th Cir. 2000); Grimes v. Fairfield Resorts, Inc., No. 06-14363, 2007 WL 245128 (11th Cir. Jan. 30, 2007); Drayton v. W. Auto Supply Co., No. 01-10415, 2002 WL 32508918 (11th Cir. Mar. 11, 2002).

<sup>81</sup> See Gates v. Towery, 430 F.3d 429 (7th Cir. 2005).

<sup>82</sup> See Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007); Lindsay v. Gov't Employees Ins. Co., 448 F.3d 416 (D.C. Cir. 2006); Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006); Love v. Johanns, 439 F.3d 723 (D.C. Cir. 2006); Miles v. Merrill Lynch & Co., Inc. (*In re Initial Pub. Offerings Sec. Litig.*), 471 F.3d 24 (2d Cir. 2006); Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219 (2d Cir. 2006); Beck v. Maximus, Inc., 457 F.3d 291, 295 (3d Cir. 2006); Wachtel v. Guardian Life Ins. Co. of Am., 453



of appeals takes place only in circuits where courts specifically articulate them in decisions. Often, the leading case in each circuit attempts to identify the most favorable framework, and subsequent decisions make short reference to whatever category is most apposite, with some citation and factual analysis.

By far the most concerning development in Rule 23(f) acceptance jurisprudence is this practice of announcing Rule 23(f) decisions without significant legal or factual analysis. As one commentator noted, “‘hiding the ball’ from litigants by never stating when Rule 23(f) jurisdiction will be exercised is inappropriate: courts must give clear signals to litigants as to when and how the law works, for that is the very essence of what a court does.”<sup>83</sup> Moreover, the absence of articulated reasons for acceptance may discourage deserving appeals, and may also (and probably more commonly) encourage litigants to file undeserving appeals.<sup>84</sup> In contrast, even minimal articulations of Rule 23(f) decisions provide guidance for litigants who wish to determine whether to appeal or not, as well as litigants who wish to tailor their applications to something more than broad categorical analysis. In addition to consistency among circuits, consistency within circuits is also a desirable

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F.3d 179 (3d Cir. 2006); *Daffin v. Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006); *Elizabeth M. v. Montenez*, 458 F.3d 779 (8th Cir. 2006) (citing *Prado-Steiman*, 221 F.3d 1266, 1271-77 (11th Cir. 2000)); *Bowe v. Polymedica Corp.* (*In re Polymedica Corp. Sec. Litig.*), 432 F.3d 1, 4 (1st Cir. 2005); *Stuebler v. Xcelera.com* (*In re Xcelera.com Sec. Litig.*), 430 F.3d 503, 507 (1st Cir. 2005); *Simon II Litig. v. Philip Morris USA Inc.* (*In re Simon II Litig.*), 407 F.3d 125 (2d Cir. 2005); *Carroll v. United Computered Collections, Inc.*, 399 F.3d 620 (6th Cir. 2005); *Gates v. Towery*, 430 F.3d 429 (7th Cir. 2005); *In re Chiang*, 385 F.3d 256, 264 (3d Cir. 2004); *Samuel-Bassett v. Kia Motors Am., Inc.*, 357 F.3d 392 (3d Cir. 2004); *Olden v. LaFarge Corp.*, 383 F.3d 495, 498 (6th Cir. 2004); *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004); *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13 (2d Cir. 2003); *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 305 (3d Cir. 2003); *Lierboe v. State Farm Mut. Auto Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003); *Winoff Indus., Inc. v. Stone Container Corp.*, (*In re Linerboard Antitrust Litig.*), 305 F.3d 145, 150 (3d Cir. 2002); *Colbert v. Dymacol, Inc.*, 302 F.3d 155 (3d Cir. 2002); *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002); *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002); *Nat’l Asbestos Workers Med. Fund v. Phillip Morris, Inc.*, 270 F.3d 984 (2d Cir. 2001); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178 (3d Cir. 2001); *In re LifeUSA Holding Inc.*, 242 F.3d 136, 142 (3d Cir. 2001); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1236 (9th Cir. 2001); *Scott v. Dennis Reimer Co., L.P.A.*, 205 F.3d 1341 (6th Cir. 2000); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1192 (9th Cir. 2000); *Weisfeld v. Sun Chem. Corp.*, 84 F. App’x 257 (3d Cir. 2004); *Monahan v. City of Wilmington*, 49 F. App’x 383, 384 (3d Cir. 2002); *Rodney v. Nw. Airlines, Inc.*, 146 F. App’x 783 (6th Cir. 2005); *Durant v. Servicemaster Co.*, 109 F. App’x 27, 29 (6th Cir. 2004); *Bates v. United Parcel Serv., Inc.*, No. 01-80253, 2002 WL 32615336 (9th Cir. Jan. 17, 2002).

<sup>83</sup> Mackay, *supra* note 3, at 794.

<sup>84</sup> *See id.* at 795.

goal for Rule 23(f) jurisprudence.<sup>85</sup> “Telling litigants what the law is, and telling them the rules for using the law must be at the top of the courts’ priorities.”<sup>86</sup>

#### *B. Accepted Categories of Rule 23(f) Appeals*

The Seventh Circuit was the first to encounter Rule 23(f) in *Blair v. Equifax Check Services*,<sup>87</sup> where the court drew on the “reasons 23(f) came into being” to outline a framework for identifying acceptable Rule 23(f) appeals.<sup>88</sup> Several courts follow this circuit’s jurisprudence closely, while others diverge significantly. Especially in early Rule 23(f) decisions, courts rejected the notion of a “bright-line approach” or “catalog of factors” that would guide Rule 23(f) appeal decisions.<sup>89</sup> The circuits generally “leave open the possibility that a petition failing to satisfy [the enumerated] requirements may nevertheless be granted where it presents special circumstances that militate in favor of an immediate appeal.”<sup>90</sup> Nonetheless, several categories of Rule 23(f) appeals have

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<sup>85</sup> See Mackay, *supra* note 3, at 796 (“When different panels choose whether to accept or deny appeals on different bases, litigants are left to wonder about the importance of the rule of law.”)

<sup>86</sup> *Id.*

<sup>87</sup> *Blair v. Equifax Check Serv.*, 181 F.3d 832 (7th Cir. 1999).

<sup>88</sup> *Blair*, 181 F.3d at 833–34; *accord* *Regents v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) (beginning Rule 23(f) analysis with committee notes); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005) (same); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99–100 (D.C. Cir. 2002) (same); *In re Delta Air Lines*, 310 F.3d 953, 957 (6th Cir. 2002) (same); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 163 (3d Cir. 2001) (same); *In re Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 138 (2d Cir. 2001) (same); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1271–72 (11th Cir. 2000) (same).

<sup>89</sup> See *Blair*, 181 F.3d at 833–34; *accord* *Chamberlan*, 402 F.3d at 960 (“[W]e simply set forth factors for consideration and do not circumscribe the court’s evaluation of the strength of showing required for any individual factor.”); *In re Delta Air Lines*, 310 F.3d at 959 (6th Cir. 2002); *Newton*, 259 F.3d at 164; *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001) (“It is doubtful that the creation of such a list would be a desirable undertaking. . . .”); *Prado-Steiman*, 221 F.3d at 1276 (“[T]here may well be special circumstances that lead us to grant or deny a Rule 23(f) petition even where some or all of the relevant factors point to a different result. Moreover, none of the foregoing factors is necessarily conclusive. . . .”); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) (“[W]e do not foreclose the possibility that special circumstances may lead us either to deny leave to appeal in cases that seem superficially to fit into one of these three pigeonholes, or conversely, to grant leave to appeal in cases that do not match any of the three described categories.”). Nor have courts favored importing the Supreme Court’s standards for granting writs of certiorari. See *Waste Mgmt. Holdings, Inc.*, 208 F.3d at 293 (rejecting an attempt to “transplant the certiorari standard root and branch into the virgin soil of Rule 23(f)”).

<sup>90</sup> *In re Sumitomo Copper Litig.*, 262 F.3d at 140; *accord* *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d at 103 (“We do not foreclose the possibility that special circumstances may lead us either to deny leave to appeal in cases that seem

earned consistent support among particular circuits, as well as the circuits generally. Either as stand alone justifications for accepting an appeal, or as part of a factor driven balancing test,<sup>91</sup> these categories merit independent analysis because of their self-contained justifications. Every circuit requires that the party invoking Rule 23(f) justify the court's exercise of appellate review.<sup>92</sup>

### 1. Plaintiff's Death Knell

The first category of accepted Rule 23(f) appeals includes orders presenting the plaintiff's death knell. Citing *Coopers & Lybrand*,<sup>93</sup> the *Blair* court asserted that it would accept Rule 23(f) appeals of class certifications where the denial of class status would "sound[] the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation."<sup>94</sup> However, *Blair* does not purport to accept appeals where "law firms with portfolios of litigation" may act as "champions for the class even if the representative plaintiff would find it uneconomical to carry on with the case."<sup>95</sup> Several other circuits accept Rule 23(f) appeals in cases of a plaintiff's death knell.<sup>96</sup> As a result of this and other complexities, no decision is more

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superficially to fit into one of these [] pigeonholes, or conversely, to grant leave to appeal in cases that do not match any of the three described categories.") (quoting *Waste Mgmt. Holdings*, 208 F.3d at 294).

<sup>91</sup> See, e.g., *In re Delta Air Lines*, 310 F.3d at 959 ("[A] court of appeals has broad discretion to grant or deny a Rule 23(f) petition, and any pertinent factor may be weighed in the exercise of that discretion."); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 142–46 (4th Cir. 2001); *Prado-Steiman*, 221 F.3d at 1276 ("[O]rdinarily, each relevant factor should be balanced against the others, taking into account any unique facts and circumstances.").

<sup>92</sup> See, e.g., *Blair*, 181 F.3d at 835.

<sup>93</sup> 437 U.S. 463 (1978).

<sup>94</sup> *Blair*, 181 F.3d at 834.

<sup>95</sup> *Blair*, 181 F.3d at 834 (citing *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991)).

<sup>96</sup> See *In re James*, 444 F.3d 643, 645–46 (D.C. Cir. 2006); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *Barabin v. Aramark Corp.*, No. 02-8057, 2003 WL 355417, (3d Cir. Jan. 24, 2003); *Tilley v. TJX Cos.*, 345 F.3d 34 (1st Cir. 2003); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32 (1st Cir. 2003); *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002); *In re Allstate Ins. Co.*, No. 02-8010, 2002 WL 31545753 (D.C. Cir. Nov. 14, 2002); *In re Bioproducts, Inc.*, No. 02-8006, 2002 WL 1997993 (D.C. Cir. Aug. 29, 2002); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 145 (4th Cir. 2001); *In re Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139-40 (2d Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000) (accepting 23(f) appeals "when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial").

problematic than the factual determination of whether a class certification decision presents a death knell for a particular litigant. In addition to the difficulty of identifying the relevant litigation resources, *Blair* and other courts do not fully address how courts should establish thresholds of economic viability. Some circuits suggest that courts analyze the “size of the putative class,” “record evidence regarding the financial resources of the parties,” “the existence and potential impact of related litigation,” the “nature of the remedy sought in the case,” and “in damages cases, the amount of money potentially recoverable.”<sup>97</sup>

Relative to Rule 23(f)’s committee notes’ emphasis on death knells, the number of Rule 23(f) appeals actually granted because of a plaintiff’s death knell is strikingly small. Without precise Rule 23(f) analysis, the First Circuit identified one plaintiff’s death knell in a suit challenging a cellular phone company’s billing practices.<sup>98</sup> While the named plaintiff alleged that the company had erroneously billed only one phone call, the potential class involved the same form of erroneous billing with respect to tens of thousands of customers in Massachusetts and New Hampshire.<sup>99</sup> In comparison to the cases accepting appeal because of a defendant’s death knell, the *Coopers & Lybrand* prediction that death knells would operate to favor plaintiffs<sup>100</sup> has not come to pass.

## 2. Defendant’s Death Knell

Courts also accept appeals from orders creating the defendant’s death knell. *Blair* recognized that class certification sometimes forces defendants with meritorious defenses to settle,<sup>101</sup> and that the procedural pressures of class certifications had spawned unjustified revisions of substantive law.<sup>102</sup> To combat the warping of class certification decisions, this category accepts Rule 23(f) appeals where “the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial.”<sup>103</sup> With some exceptions, this

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<sup>97</sup> *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000).

<sup>98</sup> *Smilow*, 323 F.3d at 32. “This court will normally grant Rule 23(f) review when a class decertification ruling, apparently premised on an abuse of discretion by the district court, would have the practical effect of compelling a party to abandon a potentially meritorious claim. . . . That is the situation here.” *Id.* at 37 n.4.

<sup>99</sup> *Smilow*, 323 F.3d at 34–37.

<sup>100</sup> See *supra* note 33 and accompanying text.

<sup>101</sup> *Blair*, 181 F.3d at 834 (observing that class certification often forces settlements out of two key groups: “risk-averse corporate executives” and “defendants whose legal positions are justified but unpopular”).

<sup>102</sup> *Blair*, 181 F.3d at 834 (citing Hal S. Scott, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337 (1971)).

<sup>103</sup> *Blair*, 181 F.3d at 835; accord *Regents v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007); *In re James*, 444 F.3d 643, 645–46 (D.C. Cir. 2006);

category almost always involves certification of a class of plaintiffs, not defendants.<sup>104</sup> With respect to procedural burdens, courts generally treat defendants' death knells and plaintiffs' death knells similarly. Some circuits require parties claiming a death knell to show, beyond a "general assertion," that the claim or defense would not be pursued,<sup>105</sup> while others require specific "evidence that the damages claimed would force a company of its size to settle without relation to the merits of the class's claims."<sup>106</sup>

The Seventh Circuit argued that review under the defendant's death knell category was justified in a breach of warranty suit that involved \$200,000 without certification, but \$200,000,000 with certification.<sup>107</sup> The court argued that "[s]uch a claim puts a bet-your-company decision to [the company's] managers and may induce a substantial settlement even if the customers' position is weak."<sup>108</sup> In a later case, the Seventh Circuit found that an order allowing unnamed class members "one-way intervention" placed "enormous" pressure on the defendant to settle.<sup>109</sup> The court also accepted review in a product liability case involving sixty million automobile tires because certification created "the risk of a

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Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005); Klay v. Humana, Inc., 382 F.3d 1241, 1275 (11th Cir. 2004) (referring indirectly to the grounds for granting the 23(f) petition as "settlement pressure"); Tardiff v. Knox County, 365 F.3d 1 (1st Cir. 2004); Tilley v. TJX Cos., 345 F.3d 34 (1st Cir. 2003); Barabin v. Aramark Corp., No. 02-8057, 2003 WL 355417, (3d Cir. Jan. 24, 2003); *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002); *In re Allstate Ins. Co.*, No. 02-8010, 2002 WL 31545753 (D.C. Cir. Nov. 14, 2002); *In re Veneman*, 309 F.3d 789 (D.C. Cir. 2002); *In re Bioproducts, Inc.*, No. 02-8006, 2002 WL 1997993 (D.C. Cir. Aug. 29, 2002); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (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, 145 (4th Cir. 2001); *In re Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139-40 (2d Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000); *Waste Mgmt. Holdings, Inc., v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000). The Seventh Circuit also linked the defendant's death knell to "prompt resolution of the issue," arguing that the positive relationship between the two militates in favor of accepting an appeal. *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 658 (7th Cir. 2004).

<sup>104</sup> See *Tilley*, 345 F.3d at 38 (arguing that certification of class of defendants rarely merits an individual defendant's 23(f) appeal). "In the unlikely event that certification places inexorable settlement pressure on a particular class of defendants, the special circumstances/manifest injustice exception is sufficiently flexible to afford relief." *Id.*

<sup>105</sup> *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002).

<sup>106</sup> *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d at 108.

<sup>107</sup> *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001).

<sup>108</sup> *Szabo*, 249 F.3d at 675. The *Szabo* decision did not compartmentalize the *Blair* factors, and referred to multiple justifications for 23(f) review. *Id.*

<sup>109</sup> *Isaacs*, 261 F.3d at 681.

catastrophic judgment,” virtually ensuring the defendant’s settlement.<sup>110</sup> The First Circuit identified a defendant’s death knell where two counties faced damages liability for strip-searching prison inmates over the course of nearly a decade.<sup>111</sup> The Fifth Circuit also identified “particularly acute” settlement pressure where a class of plaintiffs attempted to hold a bank liable for “the entirety of securities losses stemming from the Enron collapse.”<sup>112</sup>

In a rare articulated rejection, the Eleventh Circuit found no defendant’s death knell where an admittedly large plaintiff class sought only declaratory and injunctive relief, such that certification would leave the defendant’s monetary exposure unchanged.<sup>113</sup> Similarly, the D.C. Circuit rejected a defendant’s death knell argument because the class had been certified only with respect to injunctive, not monetary relief.<sup>114</sup> The Ninth Circuit rejected a defendant’s death knell because the litigant “made no showing that it lacks the resources to defend this case to a conclusion and appeal if necessary or that doing so would run the risk of ruinous liability.”<sup>115</sup> Meanwhile, the Sixth Circuit rejected a death knell appeal where class damages for an airline company involved close to one billion dollars.<sup>116</sup>

Because of *Coopers & Lybrand*’s great influence on the development of Rule 23(f),<sup>117</sup> its critiques of the death knell doctrine provide an important starting point for normative evaluations of circuit practice under Rule 23(f). One of *Coopers & Lybrand*’s strongest critiques was that “the ‘death knell’ doctrine . . . authorizes *indiscriminate* interlocutory review of decisions made by the trial judge.”<sup>118</sup> This criticism has proven to be at least partially true in both plaintiffs’ and defendants’ death knells. The large set of decisions accepting Rule 23(f) appeals without explanation does nothing to reduce (and may even contribute to) the appearance of indiscriminate decision-

<sup>110</sup> *In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 288 F.3d at 1015–16.

<sup>111</sup> *Tardiff v. Knox County*, 365 F.3d 1, 3 (1st Cir. 2004) (“Although we thought it quite possible that the certification orders would survive review, the financial and similar information provided by the two counties in this case persuaded us to grant interlocutory review, which we expedited.”).

<sup>112</sup> *Regents v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007).

<sup>113</sup> *Prado-Steiman v. Bush*, 221 F.3d 1266, 1277 (11th Cir. 2000).

<sup>114</sup> *In re Veneman*, 309 F.3d 789, 794 (D.C. Cir. 2002).

<sup>115</sup> *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 960 (9th Cir. 2005) (internal quotations omitted) (“Ford’s claims are conclusory and are not backed up by declarations, documents, or other evidence demonstrating potential liability or financial condition.”).

<sup>116</sup> *In re Delta Air Lines*, 310 F.3d 953, 960–61 (6th Cir. 2002).

<sup>117</sup> *See infra* Part IIIA.

<sup>118</sup> *Coopers & Lybrand*, 437 U.S. at 474.

making in Rule 23(f) acceptances. Meanwhile, the decisions advancing some justification for death knell cases have failed to develop any set of refined principles or standards to guide their decisions. In particular, no circuit has successfully established any threshold of economic viability. Instead, the courts rely on an ad hoc evaluative process characterized by vague procedural burdens and varying substantive requirements, which makes the availability of death knell appeals unpredictable for litigants.

### 3. Legal Development

The Seventh Circuit's decision in *Blair* also led the courts of appeals in accepting Rule 23(f) appeals that "facilitate the development of the law" in important areas that might otherwise evade appellate review.<sup>119</sup> The legal development category places little weight on the "shak[iness]" of district certification decisions,<sup>120</sup> and accepts Rule 23(f) appeals where the order presents an important question of law that is likely to "escape effective disposition at the end of the case," even if the appeal results in a swift affirmation or reversal.<sup>121</sup> Some decisions under this category determine the evasion of review by comparing the number of district court decisions on a given question to the number of appellate decisions on that same question.<sup>122</sup> Other decisions cite subject-matter-

<sup>119</sup> *Blair*, 181 F.3d at 835 (noting that the large proportion of settlements and other non-merits dispositions leaves "some fundamental issues about class actions poorly developed"); *accord* *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) (framing the category to include appeals where "the legal question is important, unresolved, and has managed to escape resolution by appeals from final judgments").

<sup>120</sup> *Blair*, 181 F.3d at 835; *accord* *Jefferson*, 195 F.3d at 897.

<sup>121</sup> *Blair*, 181 F.3d at 835; *accord* *Regents v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007); *In re Household Int'l Tax Reduction Plan*, 441 F.3d 500 (7th Cir. 2006); *In re Allstate Ins. Co.*, 400 F.3d 505 (7th Cir. 2005); *Carnegie v. Household Int'l Inc.*, 376 F.3d 656 (7th Cir. 2004); *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469 (7th Cir. 2004); *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 77 (2d Cir. 2004); *Barabin v. Aramark Corp.*, No. 02-8057, 2003 WL 355417, (3d Cir. Jan. 24, 2003); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d at 1015-16; *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *In re Rand Corp.*, No. 02-8007, 2002 WL 1461810 (D.C. Cir. July 8, 2002); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001); *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 132 n.3 (2d Cir. 2001); *In re Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139-40 (2d Cir. 2001) ("[A] novel legal question will not compel immediate review unless it is of fundamental importance to the development of the law of class actions and it is likely to escape effective review after entry of final judgment."); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 897 (7th Cir. 1999).

<sup>122</sup> *Dechert v. Cadle Co.*, 333 F.3d 801, 802 (7th Cir. 2003) ("There are no appellate cases on the question, although our decision in [an earlier case] bears on it."); *Szabo*, 249 F.3d at 675 ("At critical junctures the district judge cited only decisions by other district

specific phenomenon, such as a tendency for securities class action defendants to be particularly risk averse to settle in the face of weak plaintiffs,<sup>123</sup> while others make no specific argument as to why review is particularly evasive.<sup>124</sup> Conversely, courts reject appeals under this category because they present questions of fact more than law,<sup>125</sup> because review of even a sufficiently important question is available on appeal from the final judgment,<sup>126</sup> and because the law in question is already “well-settled.”<sup>127</sup>

The First Circuit purports to adopt a stricter approach than others, expressing concern that “disappointed litigants” with “creative lawyers almost always will be able to argue that deciding her case would clarify some ‘fundamental’ issue.”<sup>128</sup> Other circuits share similar concerns, finding it “relatively easy for a litigant to identify some question of law implicated by the class certification decision and in good faith

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judges, most in cases later settled and thus not subject to appellate consideration.”); *Jefferson*, 195 F.3d at 897 (“Both sides cite a welter of district court decisions (many in this circuit) addressing the subject, but none has reached this court since the Civil Rights Act of 1991, and only one has reached another court of appeals.”); *Blair*, 181 F.3d at 835 (“That neither side can point to any precedent in support of its position implies that this is one of the issues that has evaded appellate resolution, and the issue is important enough to justify review now.”).

<sup>123</sup> *West*, 282 F.3d at 938. The *West* court provides an unusually specific account of the potential for evasion, citing several specific studies of the issue. *See also* *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004).

<sup>124</sup> *See* *Regents v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007); *In re Household Int’l Tax Reduction Plan*, 441 F.3d 500 (7th Cir. 2006); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006); *In re Allstate Ins. Co.*, 400 F.3d 505 (7th Cir. 2005); *Carnegie v. Household Int’l Inc.*, 376 F.3d 656 (7th Cir. 2004); *Allen v. Int’l Truck & Engine Corp.*, 358 F.3d 469, 470 (7th Cir. 2004) (asserting, without elaboration, that the “questions that have escaped resolution on appeal from final decisions”); *Reeb v. Ohio Dep’t of Rehab. & Corr.*, 81 F. App’x 550, 553 (6th Cir. 2003) (accepting review of “a matter of first impression in this circuit and one concerning which our sister circuits disagree”); *In re Veneman*, 309 F.3d 789, 795 (D.C. Cir. 2002); *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 132 n.3 (2d Cir. 2001); *Mejdrech*, 319 F.3d at 910–11 (observing that “the case law is sparse and divided” on the appealed issue, and citing conflicting out of circuit cases); *In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1015–16.

<sup>125</sup> *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 82 (2d Cir. 2004) (contrasting a “legal decision that we review de novo” with a judge’s “managerial judgment that is entitled to deference”); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 109 (D.C. Cir. 2002) (“Mylan argues that the district court erred in applying the standards of Rule 23 to the facts of this case, but Mylan does not aver that the district court *lacked established law* to guide it in that task.”) (emphasis added).

<sup>126</sup> *In re Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 142 (2d Cir. 2001) (finding that the party seeking review failed to show any evasion, and that “that, alone, establishes an adequate basis to deny the petition”)

<sup>127</sup> *In re Rand Corp.*, No. 02-8007, 2002 WL 1461810 at \*1 (D.C. Cir. July 8, 2002).

<sup>128</sup> *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000).



characterize that question as novel or unsettled.”<sup>129</sup> In order to make Rule 23(f) appeals “the exception, not the rule,” these circuits argue that “*Blair*’s [legal development] 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 particular litigation *as well as* important in itself and likely to escape effective review if left hanging until the end of the case.”<sup>130</sup> Thus, courts reject appeals presenting otherwise important issues when the issue is only remotely related to the actual district court certification decision.<sup>131</sup> Beyond the abstract concept of importance, the Eleventh Circuit argues that appeals are more deserving when they present issues that evade review, when they involve issues presented in similar simultaneous litigation, when they involve governmental entities, and/or when they involve pure questions of law.<sup>132</sup> Other courts take time to explain the importance of a particular substantive issue to a particular set of litigants.<sup>133</sup>

Courts utilizing this category have reviewed myriad class action issues: the relationship between multiple simultaneous class actions;<sup>134</sup> whether certain Title VII suits are more appropriately brought under Rule 23(b)(2) or 23(b)(3),<sup>135</sup> whether judges must accept a complaint’s allegations for the purpose of a certification decision;<sup>136</sup> the reaches of

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<sup>129</sup> *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000).

<sup>130</sup> *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293–94 (1st Cir. 2000) (emphasis added); *accord* *Carnegie v. Household Int’l Inc.*, 376 F.3d 656 (7th Cir. 2004); *Reeb v. Ohio Dep’t of Rehab. & Corr.*, 81 F. App’x 550, 553 (6th Cir. 2003); *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *In re James*, 444 F.3d 643, 645–46 (D.C. Cir. 2006); *In re Sodexo Marriott Servs.*, No. 02-8008, 2003 WL 22299806 (D.C. Cir. Feb. 25, 2003); *In re Allstate Ins. Co.*, No. 02-8010, 2002 WL 31545753 (D.C. Cir. Nov. 14, 2002); *In re Veneman*, 309 F.3d 789 (D.C. Cir. 2002); *In re Bioproducts, Inc.*, No. 02-8006, 2002 WL 1997993 (D.C. Cir. Aug. 29, 2002); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99–100 (D.C. Cir. 2002); *In re Sumitomo Copper Litig.*, 262 F.3d at 142–43; *Prado-Steiman*, 221 F.3d at 1275 (quoting *Waste Mgmt. Holdings*).

<sup>131</sup> *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 84–85 (2d Cir. 2004).

<sup>132</sup> *Prado-Steiman*, 221 F.3d at 1275–76.

<sup>133</sup> *See, e.g., Hevesi v. Citigroup Inc.*, 366 F.3d 70, 77 (2d Cir. 2004) (“The application of the fraud-on-the-market doctrine in a novel context can have a significant effect on the law of class actions because the presumption of reliance created by the doctrine is often essential to class certification in securities suits.”).

<sup>134</sup> *Blair v. Equifax Check Serv., Inc.*, 181 F.3d 832, 837–38 (7th Cir. 1999) (distinguishing conflicting *suits* from conflicting *judgments*, and finding that the former evades review).

<sup>135</sup> *Jefferson v. Ingersoll Int’l, Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) (noting that “a welter of district court decisions (many in this circuit) addressing the subject” had not reached appellate review).

<sup>136</sup> *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

“fraud-on-the-market” securities claims;<sup>137</sup> choice of law;<sup>138</sup> Rule 23(b)(2)’s application to defendant classes;<sup>139</sup> *stare decisis* in class decisions;<sup>140</sup> class action pollution cases;<sup>141</sup> bankruptcy trustees as class representatives;<sup>142</sup> individual litigation of damages claims;<sup>143</sup> conversion of settlement classes into litigation classes;<sup>144</sup> judicial estoppel in class action litigation;<sup>145</sup> the need for individual causation hearings;<sup>146</sup> exhaustion of ERISA plan remedies;<sup>147</sup> expert opinion evaluations;<sup>148</sup> individualized damage issues;<sup>149</sup> and “deceptive act” liability.<sup>150</sup>

#### 4. Substantively Weak Decisions

The relative strength of the district court certification decision plays differing roles in the circuits’ Rule 23(f) jurisprudence. For example, *Blair* suggests that, in order to accept a Rule 23(f) death knell appeal (either defendant’s or plaintiff’s), the moving party would have to present “a solid argument in opposition to the district court’s decision.”<sup>151</sup> The Second Circuit adopts a similar standard, requiring appellants asserting death knells to make “a substantial showing that the district court’s decision is questionable,”<sup>152</sup> and the D.C. Circuit requires a “questionable” certification decision as well.<sup>153</sup> In contrast, the strength

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<sup>137</sup> *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *Hevesi*, 366 F.3d at 77–81.

<sup>138</sup> *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d at 1012, 1015–16 (7th Cir. 2002).

<sup>139</sup> *Tilley v. TJX Cos.*, 345 F.3d 34, 39 (1st Cir. 2003).

<sup>140</sup> *Id.*

<sup>141</sup> *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003).

<sup>142</sup> *Dechert v. Cadle Co.*, 333 F.3d 801 (7th Cir. 2003).

<sup>143</sup> *Allen v. Int’l Truck & Engine Corp.*, 358 F.3d 469 (7th Cir. 2004).

<sup>144</sup> *Carnegie v. Household Int’l Inc.*, 376 F.3d 656 (7th Cir. 2004).

<sup>145</sup> *Id.*

<sup>146</sup> *In re Allstate Ins. Co.*, 400 F.3d 505 (7th Cir. 2005).

<sup>147</sup> *In re Household Int’l Tax Reduction Plan*, 441 F.3d 500 (7th Cir. 2006).

<sup>148</sup> *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.* (*In re Visa Check/Mastermoney Antitrust Litig.*), 280 F.3d 124, 132 n.3 (2d Cir. 2001).

<sup>149</sup> *Id.*

<sup>150</sup> *Regents v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 380 (5th Cir. 2007).

<sup>151</sup> *Blair v. Equifax Check Serv., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

<sup>152</sup> *In re Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001).

<sup>153</sup> *In re James*, 444 F.3d 643, 646 (D.C. Cir. 2006); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99 (D.C. Cir. 2002); *see also In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002) (requiring death knell applicants to show “some likelihood of success in overturning the class certification decision”); *see also Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000); *accord Tilley v. TJX Cos.*, 345 F.3d 34 (1st Cir. 2003) (“[P]etitioners who seek to fit within the contours of this category also must demonstrate some significant weakness in the certification decision.”).

of the certification decision plays less of a factor in these circuits' analyses of the legal development category, where importance of the issue dominates the inquiry.<sup>154</sup> Other circuits use the strength of decision as a sliding factor, requiring a significant weakness showing when factors supporting appeal are absent, and less of a weakness showing when factors supporting appeal are present.<sup>155</sup>

Some circuits argue that a particularly weak certification decision may, even without the presence of other factors, justify accepting appeal, particularly where "the district court expressly applies the incorrect Rule 23 standard or overlooks directly controlling precedent."<sup>156</sup> The D.C. Circuit and Ninth Circuit adopt this principle by purporting to accept review of "manifestly erroneous" decisions.<sup>157</sup> those that are "easily ascertainable from the petition itself,"<sup>158</sup> and "virtually certain to be reversed on appeal from the final judgment."<sup>159</sup> Without this principle, "self-evidently defective classes would proceed through trial to final judgment, only to face certain decertification on appeal and a requirement that the process begin again from square one."<sup>160</sup> In addition to extreme cases where weakness alone justifies appeal, these circuits have determined that substantive weakness should make acceptance of other categories more likely, and vice-versa.<sup>161</sup> In one decision, the Third Circuit proceeded with an interesting order of analysis, deciding "whether the District Court erred or whether, at this time, we should facilitate development of the law on class certification."<sup>162</sup>

Courts adopting strength of decision principles rarely indicate how to measure the "solid[ity]" of a plaintiff's argument or the

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<sup>154</sup> *Blair*, 181 F.3d at 835; *accord In re Delta Air Lines*, 310 F.3d at 960; *In re Lorazepam*, 289 F.3d at 105 ("[I]ssues of law can be advanced through affirmances as well as reversals"); *In re Sumitomo Copper Litig.*, 262 F.3d at 139.

<sup>155</sup> *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002) (referring to the strength of decision as the "likelihood of succeeding on the merits").

<sup>156</sup> *Prado-Steiman v. Bush*, 221 F.3d 1266, 1275 (11th Cir. 2000) (emphasis removed); *accord Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 145 (4th Cir. 2001) ("[A] careful and sparing use of Rule 23(f) may promote judicial economy by enabling the correction of certain manifestly flawed class certifications prior to trial and final judgment.") (emphasis removed).

<sup>157</sup> *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *In re James*, 444 F.3d 643, 645-46 (D.C. Cir. 2006); *In re Allstate Ins. Co.*, No. 02-8010, 2002 WL 31545753 (D.C. Cir. Nov. 14, 2002); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002); *accord In re Bioproducts, Inc.*, No. 02-8006, 2002 WL 1997993 (D.C. Cir. Aug. 29, 2002).

<sup>158</sup> *Chamberlan*, 402 F.3d at 959.

<sup>159</sup> *Id.* at 962.

<sup>160</sup> *Lienhart*, 255 F.3d at 145.

<sup>161</sup> *Prado-Steiman*, 221 F.3d at 1275.

<sup>162</sup> *Barabin v. Aramark Corp.*, No. 02-8057, 2003 WL 355417 (3d Cir. Jan. 24, 2003).

“impervious[ness]” of a district court decision.<sup>163</sup> In one Seventh Circuit decision, a “problematic” district court decision contributed to the acceptance of a Rule 23(f) death-knell appeal.<sup>164</sup> The Seventh Circuit later equated weakness with novelty, arguing that “the case law teaches that the more novel the issue presented by the appeal and so the less likely that the district court’s resolution of it will stand . . . .”<sup>165</sup>

The *Coopers & Lybrand* prediction of arbitrary results is generally true in this area, as well as in the legal development category. In these areas, the circuits’ jurisprudence has yielded results that are amenable to few, if any, principled distinctions. With respect to *Coopers & Lybrand*’s concern for preserving judicial resources,<sup>166</sup> the published opinions themselves do not provide accurate evidence of how much docket pressure is attributable to Rule 23(f) appeals. However, the consideration of substantively weak decisions triggers more significant docket pressure than other categories. Unlike death knell situations, where litigants typically make some brief new showing of hardship, the judicial inquiry involved in the strength of decision analysis requires a higher order of judicial effort. In those cases, circuit judges and their staffs, in order to decide whether or not to accept an appeal, must review the *merits* of the district decision for error and place that error on some comparative scale. Thus, instead of using Rule 23(f) acceptance doctrines as a way of ensuring that review need not take place where it would be unnecessary and wasteful, this category of analysis turns the logic on its head, requiring in-depth consideration of district court decisions for all applications.

### 5. District Court Postures

Under a variety of labels, courts evaluate the status of district court proceedings when considering Rule 23(f) appeals. This category evaluates the procedural posture of a case and “the likelihood that future events may make immediate appellate review more or less appropriate.”<sup>167</sup> Framed as the “nature and status of the litigation,” some courts focus on issues such as the progression of discovery, the completeness of a factual record, “the pendency of relevant motions, and

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<sup>163</sup> Commentators struggle similarly to identify some criteria for the strength of the lower court decision. See Kitchen, *supra* note 3, at 256–57.

<sup>164</sup> Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675 (7th Cir. 2001).

<sup>165</sup> Carnegie v. Household Int’l Inc., 376 F.3d 656, 658 (7th Cir. 2004).

<sup>166</sup> *Coopers & Lybrand*, 437 U.S. at 473–76.

<sup>167</sup> Prado-Steiman v. Bush, 221 F.3d 1266, 1276 (11th Cir. 2000). Although *Prado-Steiman* divides these into two separate factors, the upshot of the enumeration most often produces only a general discussion of lower court proceedings, and not a significantly bifurcated product. The analysis here conforms to that practice as well.

the length of time the matter already has been pending.”<sup>168</sup> Another focus within this rubric is whether hearing an immediate appeal will streamline lower court litigation.<sup>169</sup> For example, the Seventh Circuit accepted an appeal in part because it perceived that the appeal would expedite the resolution of a specific set of overlapping district court suits.<sup>170</sup>

Courts also evaluate ongoing settlement negotiations, imminent changes in financial status, and district court indications of conditional or otherwise changing certifications.<sup>171</sup> In one case, the Eleventh Circuit rejected an appeal concerning the plaintiff’s standing for several of these reasons, including an under-developed factual record, the potential for the plaintiff to remedy an adverse ruling on appeal with little effort, and the ability of the district court to change or amend the class at any time.<sup>172</sup> However, less than one month later, and without elaboration, the same circuit accepted a Rule 23(f) appeal concerning a similar issue of named plaintiff’s standing.<sup>173</sup> Some decisions grant review, at least in

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<sup>168</sup> *Id.*; accord *Cason v. Nissan Motor Acceptance Corp.*, 28 F. App’x 392, 394 (6th Cir. 2002) (rejecting a Rule 23(f) appeal “[i]n view of the changes contemplated by the amended complaint, the expanded record, and the district court’s intention of recommencing class certification proceedings”); *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002); see also *In re Sumitomo Copper Litig., Ltd.*, 262 F.3d at 139–40 (2d Cir. 2001) (“[I]ssues that would result at most in a modification of a certification order or whose ultimate resolution will depend on further factual development will be unlikely candidates for Rule 23(f) appeal.”).

<sup>169</sup> *In re Sumitomo Copper Litig.*, 262 F.3d at 139 (arguing that “interlocutory review is particularly 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 appeal after final judgment’”); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006); *Prado-Steiman*, 221 F.3d at 1276.

<sup>170</sup> *Murray*, 434 F.3d at 951 (citing the fact that “about two score more of these suits” raising the same issue were pending at the district court); see also *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 n.9 (2d Cir. 2004) (“Although it is not central to our decision to grant the petition, we note that several [district] courts are currently grappling with the application of the [issue presented] . . .”).

<sup>171</sup> *In re Delta Air Lines*, 310 F.3d 953, 961 (6th Cir. 2002) (“[T]he certification of subclasses may be revisited at some point in the future, suggesting that interlocutory review is not appropriate.”); see *Cason v. Nissan Motor Acceptance Corp.*, 28 F. App’x 392, 394 (6th Cir. 2002) (“[T]he efficient use of limited judicial resources suggests the district court should complete its class certification proceedings, especially where the initial class certification was conditional and the class was only generally defined.”); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000); see also *Liles v. Del Campo*, 350 F.3d 742, 746 (8th Cir. 2003) (denying appeal because to allow appeal would “unnecessarily delay the resolution of the litigation and further jeopardize the limited assets available for resolving the claims”).

<sup>172</sup> *Prado-Steiman*, 221 F.3d at 1278.

<sup>173</sup> *Carter v. W. Publ’g Co.*, 225 F.3d 1258 (11th Cir. 2000).

part, because briefing has already taken place,<sup>174</sup> while others use a lack of briefing as a reason for denial.<sup>175</sup>

#### 6. Public Interest

At least one circuit also considers the public interest in the resolution of a Rule 23(f) appeal. In its first Rule 23(f) decision,<sup>176</sup> the Eleventh Circuit faced a lawsuit of “tremendous importance to thousands of developmentally-disabled persons in the State of Florida, many of whom have a critical need for prompt delivery of the services and benefits they claim to have been denied by the State.”<sup>177</sup> The *Prado-Steiman* court combined that interest with the public interest in “determining promptly the scope of the State’s administrative and financial obligations” to justify review of specific certification issues.<sup>178</sup>

#### 7. Hybrid Decisions

Courts often accept Rule 23(f) appeals while citing to several categories of justifications.<sup>179</sup> For example, one Seventh Circuit case invoked evidence of a defendant’s death knell, evidence of historical evasion of review, and a problematic district court decision, while omitting any precise decision calculus.<sup>180</sup> Another cited evidence of a defendant’s death knell along with an important legal issue that might evade review.<sup>181</sup> The First Circuit granted review of a homeowners’ class action against a loan corporation seeking damages and rescission of the loans because “of the important and unsettled legal issues involved and the substantial financial impact that the order portended.”<sup>182</sup>

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<sup>174</sup> *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001); *Prado-Steiman*, 221 F.3d at 1278; *Allen v. Int’l Truck & Engine Corp.*, 358 F.3d 469 (7th Cir. 2004); *Tilley v. TJX Cos.*, 345 F.3d 34, 39 (1st Cir. 2003); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 291 (1st Cir. 2000).

<sup>175</sup> *In re Veneman*, 309 F.3d 789, 796 (D.C. Cir. 2002).

<sup>176</sup> The unique nature of a circuit’s first decision may decrease its precedential weight. *See, e.g., Prado-Steiman*, 221 F.3d at 1278 (“Given these considerations, *as well as the fact that we have not previously enunciated Rule 23(f) standards* and the merits of this appeal have already been briefed and oral argument heard, we proceed to address certain aspects of the class certification ruling . . .”) (emphasis added).

<sup>177</sup> *Prado-Steiman*, 221 F.3d at 1278.

<sup>178</sup> *Id.* Soon after the *Prado-Steiman* decision, the Circuit heard a closely related appeal in *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001).

<sup>179</sup> *See, e.g., Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001) (citing concerns for a plaintiff’s death knell, defendant’s death knell, and important legal issues); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001); *Prado-Steiman*, 221 F.3d.

<sup>180</sup> *Szabo*, 249 F.3d at 675.

<sup>181</sup> *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d at 1015–16.

<sup>182</sup> *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418, 421 (1st Cir. 2007).

## VI. CONCLUSION

Commentary on the application of Rule 23(f) in the courts of appeals has been notable, yet disparate. Some suggest that applying strict Rule 23(f) standards in order to grant relatively few appeals disserves Congressional intent, arguing that Rule 23(f) ought not be interpreted to replicate other grants of appellate review such as 1292(b).<sup>183</sup> However, the text of Rule 23(f) displays no favor for restrictive or liberal interpretations, and the analogy within the Committee Notes to the Supreme Court's certiorari frameworks suggests that Rule 23(f), although intended to confer a genuine new power of appellate review, need not necessarily be interpreted to grant review of a relatively large number of class certification orders. Yet despite the facial discretion given to the circuits, the context of Rule 23(f) represents a legislative overruling of the Supreme Court's *Coopers & Lybrand* decision, and probably supports expansive standards of acceptance.<sup>184</sup>

Although Rule 23(f) may have been designed to encourage experimentation,<sup>185</sup> the time has come for superior standards to emerge. Courts wishing to advance Rule 23(f) jurisprudence should focus on two fronts. First, courts should take time to always articulate why a particular appeal is rejected or accepted. Second, courts should clarify the procedural burdens that accompany each category of analysis, particularly for death knells, where courts should make clear what form of hardship showing must be made. Certain substantive categories require improvement as well—the legal development category ought to identify more principled distinctions between important and unimportant issues, and inquiries into the merits of district court decisions need to be circumscribed to include only the most readily identifiable errors. Otherwise, the multiple alternative avenues for appeals may suffice to provide adequate appellate review. With these modifications, the Rule 23(f) jurisprudence can continue to develop around the most effective limiting principles and procedures. Finally, if the disparate Rule 23(f) standards among circuits remain, sophisticated litigants should expect to evaluate Rule 23(f) appealability as part of strategic forum shopping during class action litigation.

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<sup>183</sup> See Kitchen, *supra* note 3, at 253; see also *supra* Part III.B.

<sup>184</sup> See Mackay, *supra* note 3, at 797.

<sup>185</sup> See Kitchen, *supra* note 3, at 261 (arguing against standardization of class certification appeal standards and for continued experimentation).