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In This Issue



## Co-Chair's Corner

### California Dreamin'

*by Scott L. Nelson*

As the thermometer brushes the 100 mark, it is definitely not winter in Washington, DC. Even so, with apologies to the Mamas and the Papas, I'm California dreamin' on such a summer day. Why? Three of the season's most interesting class action issues have come from federal and state courts in California, and I thought I'd briefly share my reflections on them in my final column in this space.

The first case on my radar screen poses the question: When is a class action "hellhole" not a hellhole? Perhaps the answer is when a defendant wants to settle a case.

The case is called *America Online Spin-Off Accounts Litigation*, No. 04-1581 (C.D. Cal.), an MDL proceeding involving an as-yet uncertified class action against America Online (AOL) involving allegedly wrongful billing practices. This spring, after discussions with the MDL plaintiffs had failed to lead to a settlement, AOL announced that it was resolving the claims of all the MDL plaintiffs via a settlement with a nationwide class in a separate action in St. Clair County, Illinois — one of the jurisdictions that was frequently cited by proponents of the Class Action Fairness Act (CAFA) as a state-court "hellhole" from which defendants needed to be able to remove cases in order to receive fairer treatment by a federal court.

Until the St. Clair County settlement was announced, AOL had appeared to be a proponent of the MDL as the proper forum for resolving the claims at issue. Once the settlement was announced, however, AOL not surprisingly wanted the St. Clair County action to take precedence over the MDL, even though the St. Clair action had not previously involved the claims asserted in the MDL, and the complaint in the case apparently had to be amended so that the MDL claims could be included in the settlement.

U.S. District Judge Ronald Lew, however, saw matters differently from AOL: He issued an All Writs Act injunction forbidding AOL to proceed with the St. Clair County settlement. Judge Lew stated that the injunction was necessary in aid of the federal court's jurisdiction because the St. Clair County settlement "has the likelihood of eviscerating the Court's MDL jurisdiction ...."

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toward allowing more diverse, nation-wide employment discrimination class actions. Of course, the decision may be reversed by the Ninth Circuit or may signal only a further split in the standards applied across the various circuits. If history teaches us anything, it is that only with hindsight will we be able to determine if the *Wal-Mart Action* signals a new trend or proves to be an interesting footnote in the evolving law in this arena.

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1 The Ninth Circuit heard oral argument in *Dukes v. Wal-Mart Stores, Inc.*, (Nos. 04-16688 & 04-16720) on August 8, 2005.

## CLASS ACTION APPEALS: RULE 23(f) AND ITS JURISPRUDENCE

*by James P. Muehlberger, Nicolas P. Mizell Pamela Macer**

Federal Rule of Civil Procedure 23(f) provides a mechanism for the federal circuit courts to clarify fundamental issues about class actions that had previously remained unresolved due to the relatively small number of class action suits that actually proceed to a final litigated result. In order to accomplish this goal, Rule 23(f) eliminates restrictive requirements found in other interlocutory appeal vehicles and provides the circuit courts with "unfettered discretion" in granting or denying reviews. 1998 Advisory Committee Notes to Rule 23(f). Nine federal circuit courts have now rendered opinions delineating the types of cases that are appeal-worthy.

This article will first briefly review the vehicles for appellate review of class actions that existed prior to the enactment of Rule 23(f). The purposes underlying the enactment of Rule 23(f) will then be discussed, and the federal circuit court cases interpreting the Rule will be surveyed. Finally, this article concludes that Rule 23(f) provides fertile grounds for appeal from many class certification orders.

### Appellate Review of Class Certification Orders Prior to Enactment of Rule 23(f)

Prior to enactment of Rule 23(f), parties faced with a questionable ruling on class certification were forced to resort to an interlocutory appeal under 28 U.S.C. § 1292, a finding that the certification order was a final judgment under Rule 54(b), or a writ of mandamus under 28 U.S.C. § 1651. None of these options provided ready access to the appellate process.

Under 28 U.S.C. § 1292, three requirements had to be met before an appeal of a class certification order would be permitted: 1) the order had to "involve a controlling question of law"; 2) there must have been "substantial ground for differences of opinion"; and, 3) it had to be shown that the interlocutory appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (2000). Further, the district court had to issue a written opinion that these requirements were met, at which time the appellate court would, in its discretion, hear the appeal.

The Advisory Committee Notes specifically point out that 23(f) is distinguished from § 1292(b) in two "significant" ways: 1) "It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal"; and, 2) "[I]t does not include the potentially limiting requirements of § 1292(b) that the district court order 'involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" 1998 Advisory Committee Notes.

A special finding that the certification order was a final judgment under Rule 54(b) also required approval by the district court. Rule 54(b) states that the "court may direct the entry of a final judgment...only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b).

The final option involved petitioning the appellate court for a writ of mandamus, which provided additional hurdles to overcome. The

Supreme Court recently affirmed that the writ of mandamus must be used "sparingly and only in the most critical and exigent circumstances." *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 125 S.Ct. 2 (2004). The Court has also directed that, "[T]he writ is not to be used as a substitute for appeal...even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf v. Holder,* 379 U.S. 104, 110 (1964).

This historical bias against interlocutory appeals generally springs from a concern that they interrupt the flow of litigation.[1] Rule 23(f) was designed to avoid delay. "The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings." 1998 Advisory Committee Notes. Further, the Committee Notes specifically indicate that quick action is expected from the appellate courts in making their preliminary decision on whether to permit appeal. *Id.*

Under the onerous burdens imposed by § 1292(b), Rule 54(b), and writs of mandamus, relatively few class action interlocutory appeal petitions were granted a review. Aimee G. Mackay, *Appealability of Class Certification Orders Under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW.U.L.REV. 755, 767 (2002). By eliminating the unduly restrictive elements that made appeals difficult in the past, and by specifically attempting to minimize the disruptive nature of an interlocutory appeal, Rule 23(f) calls for increased access to the appellate review process.[2]

Implicitly discouraging the use of these old standards for granting interlocutory review, the Advisory Committee Notes suggest: "The courts of appeal *will develop* standards for granting review that reflect the changing areas of uncertainty in class litigation." *Id.* (emphasis added). To date, nine circuits have complied with the directive and provided standards for granting review under Rule 23(f). With one exception, each of these circuits has expressly indicated that the court retains the discretion to review any lower court decision, regardless of whether it fits within a previously identified category of appropriate cases for review.[3] *See Waste Mgmt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 294 (1st Cir. 2000) ("We emphasize, however, the discretionary nature of the authority ceded to us by the rule."); *Sumitomo Copper Lit. v. Credit Lyonnais Rouse, LTD.,* 262 F.3d 134, 140 (2d Cir. 2001) ("In so holding, we leave open the possibility that a petition failing to satisfy either of the foregoing requirements may nevertheless be granted where it presents special circumstances that mitigate in favor of an immediate appeal."); *Newton v. Merrill Lynch,* 259 F.3d 154, 165 (3d Cir. 2001) ("But these instances should not circumscribe our discretion; there may also be other valid reasons for the exercise of interlocutory review."); *In re Delta Air Lines,* 310 F.3d 953, 959 (6th Cir. 2002) ("Like the courts that have spoken on the issue, we eschew any hard-and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor of or against an interlocutory appeal."); *Blair v. Equifax Check Services,* 181 F.3d 832, 834 (7th Cir. 1999) ("Neither a bright-line approach nor a catalog of factors would serve well--especially at the outset, when courts necessarily must experiment with the new class of appeals."); *Chamberlan v. Ford Motor Co.*, 2005 WL 730192, *5 (9th Cir. 2005) ("The three categories we outline do not constitute an exhaustive list of factors and are not intended to circumscribe the broad discretion granted the court of appeals by Rule 23(f)."); *Prado-Steiman v. Bush,* 221 F.3d 1266, 1276 (11th Cir. 2000) ("Our authority to accept Rule 23(f) petitions is highly discretionary, and the foregoing list of factors is not intended to be exhaustive; there 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."); and *In re: Lorazepam & Clorazepate Antitrust Lit.,* 289 F.3d 98, 105 (D.C. Cir. 2002) ("Nonetheless, the circuit courts addressing Rule 23(f) are in agreement that restrictions on review should not preclude review in special circumstances...").[4]

An argument in favor of a lenient approach to appellant review of class certification decisions derives from the 2003 amendment to Rule 23. With the 2003 amendment, conditional certification is no longer permissible under Rule 23. As a result, class certification decisions more closely resemble final judgments. This new development may warrant reconsideration of the guidelines that were established in most circuits prior to the 2003 amendment.[5]

**Rule 23(f) Was Intended to Provide More Opportunities For Appellate Review of Class Certification Decisions**

As Judge Easterbrook noted in the seminal case addressing Rule 23(f), there are certain fundamental issues about class actions that remain poorly developed because the cases frequently settle or are resolved in some other manner prior to a final adjudication. *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). "Recent proposals to amend Rule 23 were designed in part to clear up some of these questions. Instead, the Advisory Committee and the Standing Committee elected to wait, anticipating that appeals under Rule 23(f) would resolve some questions and illuminate others." *Id. See also Waste Mgmt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 293 (1st Cir. 2000) (noting the purpose of the rule is to provide an avenue whereby the court can take "earlier-than-usual cognizance of important, unsettled legal questions thus contributing to...the orderly development of the law."); and *Newton v. Merrill Lynch,* 259 F.3d 154, 162 (3d Cir. 2001) ("[T]he Rule acknowledges the extraordinary nature of class actions and permits the appellate courts to develop a coherent body of jurisprudence in this area.").

***The wide discretion afforded the circuit courts under Rule 23(f) is unmatched by any other interlocutory appeal process.***

Other authorities, while not indicating that the overall purpose of the Rule is to establish a body of law on class certification, do indicate that the rule is intended to provide more opportunities for appellate review. The Committee Notes acknowledge, "[S]everal concerns justify *expansion of present opportunities to appeal.*" 1998 Advisory Committee Notes (emphasis added). The Fourth Circuit has stated that the purpose of Rule 23(f) is to "eliminate the unduly restrictive review practices" where mandamus was the only option available in the absence of consent from the district court. *Lienhart v. Dryvit Systems, Inc.,* 255 F.3d 138, 145 (4th Cir. 2001).

Although the Committee Notes focus heavily on the discretionary nature of Rule 23(f), it also provides some guidance to the courts on what types of cases would be appropriate for appeal: "Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation." 1998 Advisory Committee Notes.[6] The Committee Notes expand on the dispositive nature of a class certification ruling by noting situations where a denial of certification "may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of the litigation." *Id.* The Committee Notes also point to situations where granting certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *Id.*

**Rule 23(f) Jurisprudence**

***Blair v. Equifax Check Services, Inc.***

In the first case to address Rule 23(f), the Seventh Circuit borrowed heavily from the Committee Notes to establish three distinct categories of cases that would warrant review. *Blair v. Equifax Check Services, Inc.,* 181 F.3d 832 (7th Cir. 1999). The first two categories are mirror images of the "death-knell" rationales discussed in the Committee Notes. "For some cases the denial of class status sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation." *Id.* at 834. In other cases, "the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial." *Id.* at 835. In both situations, the Seventh Circuit agreed that these types of cases would merit review but only if the claimant could also show that the certification decision was "questionable." *Id.* at 834-35. Finally, the court found that an appeal was appropriate where it might "facilitate the development of the law." *Id.* at 835. With this type of case, the court concluded that it was "less important to show that the district judge's decision is shaky." *Id.*

The defendant's failure to advise debtors of their right to demand verification of the debt. *Id.* On the same day that a class action was certified in one case, plaintiffs and defendants reached a

settlement in the other case. *Id.* The agreement, in part, forbids prosecution of any other case as a class action. *Id.* Based on the language of the settlement, Equifax filed a Motion for Reconsideration of the Class Certification decision in the smaller Blair litigation. *Id.* The judge refused and plaintiffs filed a Rule 23(b) appeal. *Id.*

The Seventh Circuit accepted the case under its third category of appropriate interlocutory appeals – facilitation of the development of law - and noted that neither party had been able to provide any precedent to support its position. *Id.* at 837-8. Further, the court pointed out that "questions concerning the relation among multiple suits may evade review at the end of the case, for by then the issue will be the relation among (potentially inconsistent) judgments, and not the management of pending litigation." *Id.* at 838.

Ultimately, the Court acknowledged that a final judgment in one related case controls the other case through claim preclusion. *Id.* However, the Blair Judge was entitled to proceed with his case because the settlement in the related conflict had not been approved and therefore lacked the controlling authority of a final resolution. *Id.*

***Waste Management Holdings, Inc. v. Mowbray***

The First Circuit was the second court to provide guidelines for Rule 23(f) and, in doing so, the court relied heavily on *Blair*, a case that it termed "the seminal opinion dealing with standards applicable to Rule 23(f) applications." *Waste Management Holdings, Inc. v. Mowbray,* 208 F.3d 288, 293 (1st Cir. 2000). In *Mowbray*, the seller of a business brought suit against the buyer, which had used its stock as payment, alleging breach of a contractual warranty that specified that the buyer's financial statements fairly represented the condition of the buyer. The seller sought for class certification and, at the district court's suggestion, moved for partial summary judgment prior to a judicial determination on the class certification issue. *Id.* at 291.

The district court granted partial summary judgment in the seller's favor, holding that Illinois law did not require reliance on an express warranty in order to recover for its breach. *Id.* at 291-92. The seller then moved for class certification of a class consisting of all persons who had lately sold assets to the buyer in exchange for shares of the buyer's common stock. The district court granted class certification of a class of individuals who had sold assets pursuant to contracts in which the buyer had warranted the accuracy of its financial statements. *Id.* at 292. Pursuant to Rule 23(f), the buyer timely petitioned for permission to appeal the class certification order.

The First Circuit reasoned that Rule 23(f) has two goals: first, to create a "mechanism through which appellate courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial"; and second, to "furnish[] an avenue, if the need is sufficiently acute, whereby the court of appeals can take earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of the law." *Id.*

The court then charted a "middling course" that neither permits an appeal in any case where an error was merely suspected, nor requires compelling evidence of a clear error. *Id.* at 292-93. Instead, the court identified three circumstances under which an appeal would be appropriate and provided guidance on the "evidence" that an appellant would need to support his appeal. *Id.* at 293-94.

The first category of cases that warrants "the exercise of discretionary appellate jurisdiction" is a case where the denial of class certification effectively ends the case. *Id.* at 293. The court noted, however, that some cases deserve to die so it is not sufficient to argue this point – the applicant must also show that the district court's ruling on class certification was "questionable." *Id.* In arguing the questionable nature of the decision, the applicant must keep in mind "the discretion the district judge has in implementing Rule 23, and the correspondingly deferential standard of appellate review." *Id.*

The second category of cases that warrants appellate review is the case where granting class certification creates an overwhelming incentive to settle. *Id.* As with the first category, the court noted that this outcome might be appropriate, so the applicant must not only show that the decision

effectively forces a settlement, but also that the decision was questionable. *Id.* Again, the court will consider the discretionary nature of Rule 23 and the deferential standard of review. *Id.*

The third category of cases involving unsettled legal issues provides the only point at which *Mowbray* departed from *Blair.* Concerned that creative lawyers could always find a "fundamental issue" that needed clarification, the First Circuit restricted this category to cases where the issue was not only important in the instant case but also important in itself and "likely to escape effective review if left hanging until the end of the case." *Id.* at 294.

Finally, the court noted that its "general comments" as to the application of Rule 23(f) did not "foreclose the possibility that special circumstances may lead us 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." *Id.* at 294. For instance, the court found that the case at issue did "not fit snugly into any of the described categories," but exercised its discretion to hear the appeal (largely because the merits had already been fully briefed) to "clarify some imprecision in the case law, while at the same time providing the parties . . . a better sense as to which aspects of the class certification decision might reasonably be open to subsequent reconsideration." *Id.* at 295.

**Later Circuit Court Cases Interpreting Rule 23(f)**

Every other circuit that has subsequently established Rule 23(f) guidelines has similarly followed the lead of the *Blair* court in adopting the "death knell" suggestion from the Committee Notes with the added caveat that there must be some degree of error in the district court's certification ruling. *See, e.g., Newton v. Merrill Lynch,* 259 F.3d 154, 165 (3d Cir. 2001) (listing for review the "possible case-ending effect of an imprudent class certification decision."); and *In re Delta Air Lines,* 310 F.3d 953, 959 (6th Cir. 2002) (holding that in addition to showing that the ruling is essentially dispositive, petitioner must also show a likelihood of success in overturning the decision.). Several courts have listed "factors" that must be considered which include whether the certification decision is dispositive and whether there is a substantial weakness in the decision. *See, e.g., Prado-Steiman v. Bush,* 221 F.3d 1266 (11th Cir. 2000); and *Lienhart v. Dryvit Systems, Inc.,* 255 F.3d 138 (4th Cir. 2001).

Although each of the other circuits also follows the Committee Notes and the Seventh Circuit by holding that cases involving novel or unsettled areas of law are appropriate for review, most circuits have followed the lead of the First Circuit and placed restrictions on this category. *See Sumitomo Copper Lit. v. Credit Lyonnais Rouse, LTD.,* 262 F.3d 134, 139 (2d Cir. 2001) ("[T]he certification order implicates a legal question about which there is a compelling need for immediate resolution."); *In re: Lorazepam & Clorazepate Antitrust Lit.,* 289 F.3d 98, 99-100 (D.C. Cir. 2002) (requiring a generally important fundamental issue that is "likely to evade end-of-the-case review."); and *Chamberlan v. Ford Motor Co.*, 2005 WL 730192, *4 (9th Cir. 2005) (accepting an issue that is "important both to the specific litigation and generally, that is likely to evade end-of-the-case review."). Other circuits require only that the novel issue be of general interest or important in itself rather than merely relevant to the instant litigation. *See Lienhart v. Dryvit Systems, Inc.,* 255 F.3d 138 (4th Cir. 2001); *In re Delta Air Lines,* 310 F.3d 953, 959 (6th Cir. 2002); and *Prado-Steiman v. Bush,* 221 F.3d 1266, 1276 (11th Cir. 2000). Finally, the Third Circuit does not place a specific restriction on the "novel issue" category but the Court does note that interlocutory appeal "will generally prove unnecessary" where "allowing the litigation to follow its natural course would provide the moving party with an adequate remedy." *Newton v. Merrill Lynch,* 259 F.3d 154, 164-65 (3d Cir. 2001).

Although, as noted above, the circuit courts have almost universally acknowledged their discretion to identify additional types of cases that merit a review, several of the courts stopped short of identifying any categories beyond those suggested in the Committee Notes to Rule 23(f).[7] Others, however, have provided additional categories or factors that should be considered. The first circuit to expand beyond the types of cases mentioned in the Committee Notes was the Eleventh Circuit. Rather than listing types of cases, the court established five guideposts that should be considered when deciding whether to grant review:

1) whether the district court's ruling is dispositive; 2) whether there is a substantial weakness in the district court's decision such that it constitutes an abuse of discretion; 3) whether the appeal will resolve an unsettled legal issue of general importance; 4) the nature and status of the litigation; and 5) the likelihood that future events will affect the appropriateness of the appeal.[8] *Prado-Steiman v. Bush,* 221 F.3d at 1274-76.

The Fourth Circuit adopted the *Prado-Steiman* factors but added a "sliding scale" to the "substantial weakness" factor. *Lienhart v. Dryvit Systems, Inc.,* 255 F.3d at 145-46. The more erroneous the decision, the less important it is to make a showing of the remaining factors. *Id.* In extreme cases, the weakness of the District Court's decision alone may be sufficient to warrant an appeal. *Id.*

As each circuit reviewed decisions from other circuits in an effort to develop their own review standards, the "erroneous decision" factor became increasingly important until it finally became a category for review in itself. As noted above, a number of circuits held that, in certain categories of reviewable cases, the petitioner had the added burden of showing that the underlying certification decision was flawed. In the Seventh and First Circuits, this was the only context in which the courts considered the correctness of the district court's decision.[9] It was an additional requirement to consider but not a stand-alone justification for review. The Eleventh Circuit expanded this requirement into a stand-alone factor to be considered in every determination of whether to grant a review. *Prado-Steiman v. Bush*, 221 F.3d at 1274-76. The Fourth Circuit then expanded this factor further by noting that, in extreme cases, an erroneous certification decision by the lower court might be sufficient on its own to warrant a review. *Lienhart v. Dryvit Systems Inc.*, 255 F.3d at 146.

Finally, the Third Circuit, after considering the decisions from the Seventh, First, Eleventh, and Fourth Circuits, concluded that an erroneous certification decision was a stand-alone category that warranted an appeal without any further justification or consideration of other factors. *Newton v. Merrill Lynch,* 259 F.3d at 165. Similarly, the D.C. Circuit has held that an appeal was warranted in those cases where "the district court's class certification decision is manifestly erroneous." *In re: Lorazepam & Clorazepate Antitrust Lit.,* 289 F.3d at 99-100. Most recently, the Ninth Circuit has adopted the "manifestly erroneous" category and noted "The kind of error most likely to warrant interlocutory review will be one of law, as opposed to an incorrect application of law to facts." *Chamberlan v. Ford Motor Co.*, 2005 WL 730192 at *5.

**Conclusion**

Because Rule 23(f) is relatively new, its application is continuing to evolve but there is no question that Rule 23(f) is designed to render greater access to appeals of class certification rulings. The wide discretion afforded the circuit courts under Rule 23(f) is unmatched by any other interlocutory appeal process. The discretion is so broad that it can be argued that Rule 23(f) is designed to *encourage* appeals particularly if, as Judge Easterbrook concludes, the appeals process under Rule 23(f) is expected to develop fundamental issues on class actions that might never be resolved through the trial process.

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1 The Eleventh Circuit includes this issue as a consideration that weighs against accepting an appeal under Rule 23(f). *Prado-Steiman v. Bush,* 221 F.3d 1266, 1276 (11th Cir. 2000).

2 Another feature of Rule 23(f) that argues in favor of review of class certification orders is its highly discretionary nature. "[T]he 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... Permission to appeal may be granted or denied on the basis of *any consideration* that the court of appeals finds persuasive." 1998 Advisory Committee Notes (emphasis added).

3 The Fourth Circuit did not expressly state that it retained discretion to review cases not covered by its guidelines, but neither did it indicate that the guidelines were exclusive. *Leinhart v. Dryvit Systems, Inc.,* 255 F.3d 138 (4th Cir. 2001).

4 It should be noted that because the judicial discretion afforded by Rule 23(f) is so broad, several circuits have attempted to reconcile the tension between the general disfavor of interlocutory review and the unfettered discretion they now have to grant review. Where this has occurred, the court typically urges restraint in granting an

appeal. *See, e.g., Waste Management Holdings, Inc. v. Mowbray,* 208 F.3d 288, 294 (1st Cir. 2000) ("But interlocutory appeals should be the exception, not the rule; after all, many (if not most) class certification decisions turn on 'familiar and almost routine issues.'") (citing Committee Note to Rule 23(f)); *Sumitomo Copper Lit. v. Credit Lyonnais Rouse, LTD.,* 262 F.3d 134, 140 (2d Cir. 2001) ("We anticipate, therefore, that the standards of Rule 23(f) will rarely be met. This approach will prevent the needless erosion of the final judgment rule and the policy values it ensures, including efficiency and deference."); *In re Delta Air Lines,* 310 F.3d 953, 959 (6th Cir. 2002) ("[T]he rule 23(f) appeal is never to be routine."); and *Chamberlan v. Ford Motor Co.*, 2005 WL 730192, *1 (9th Cir. 2005) ("We begin with the premise that Rule 23(f) review should be a rare occurrence.").

5 In considering limitations on the appropriateness of granting a Rule 23(f) appeal, several circuits factored in the ability of the district court to alter or modify the class, create subclasses and decertify a class. *See, e.g., Sumitomo Copper Lit. v. Credit Lyonnais Rouse, LTD.,* 262 F.3d 134, 139 (2d Cir. 2001); and *Prado-Steiman v. Bush,* 221 F.3d 1266, 1273 (11th Cir. 2000).

6 Prior to the adoption of Rule 23(f), the Supreme Court had rejected this "death knell" exception to the final judgment rule because it would have to apply to all forms of litigation. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

7 *See Waste Management Holdings, Inc. v. Mowbray,* 208 F.3d 288, 293 (1st Cir. 2000); *Sumitomo Copper Lit. v. Credit Lyonnais Rouse, LTD.,* 262 F.3d 134, 140 (2d Cir. 2001); and *Blair v. Equifax Check Services, Inc.,* 181 F.3d 832 (7th Cir. 1999).

8 This decision provides a useful in-depth discussion of specific issues to consider with a Rule 23(f) appeal. *See, e.g.,* "[I]f the case is likely to be one of a series of related actions raising substantially the same issues and involving substantially the same parties, then early resolution of a dispute about the propriety of certifying a class may facilitate the disposition of future claims." *Prado-Steiman v. Bush,* 221 F.3d at 1276.

9 By including the new language "avoiding manifest injustice" in a 2003 decision on a Rule 23(f) appeal, the First Circuit could be indicating a willingness to consider appeals solely on the basis that the lower court's decision was manifestly erroneous. In *Tilley v. TJX Companies, Inc.,* 345 F.3d 34 (1st Cir. 2003), the court established guidelines for hearing appeals involving certification of *defendant* classes. They include cases where denial of certification would effectively dispose of the litigation, where the appeal would clarify "an important and unsettled legal issue that would likely escape effective end-of-case review," and where there are "special circumstances or for avoiding manifest injustice." *Id.* at 39.