FEDERAL RULE OF CIVIL PROCEDURE 23(f): INTERLOCUTORY APPEALS OF CLASS ACTION CERTIFICATION DECISIONS

Kenneth S. Gould*

I. INTRODUCTION

Effective December 1, 1998, rule 23 of the Federal Rules of Civil Procedure, the class action rule, was amended to allow discretionary interlocutory appeals of class certification decisions.[1] The amendment, subdivision (f) of the rule, is striking for its economy of language:

> 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.[2]

Creation of a federal court appeal procedure by rule, rather than statute, is unique. The authority to address interlocutory appeals of class actions by rule flows from 28 U.S.C. § 1292. That section creates a number of narrowly drawn interlocutory

---

* Professor of Law, University of Arkansas at Little Rock School of Law.

1. Although the process that leads to adoption of a federal rule of civil procedure is quite elaborate, the essential steps involve publication of the proposed rule change for public comment and successive considerations and recommendations by the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States and the Supreme Court. Following the Supreme Court's formal adoption of the rule, the rule is transmitted to Congress and becomes effective generally on December 1 in the year in which it is proposed by the Court, unless Congress by statute modifies or rejects the rule prior to that date. The federal rule process is outlined in 28 U.S.C. §§ 2072-74 and in the procedures of the Judicial Conference.

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

appeal exceptions to the final judgment rule, including in subsection (b) a general exception for discretionary interlocutory appeals.[3] In addition to prescribing those exceptions, subsection (e) of section 1292 gives the Supreme Court authority to "prescribe rules, in accordance with [the Rules Enabling Act] to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for."[4] The interlocutory appeal procedure of rule 23(f) was promulgated by the authority granted the Supreme Court by that subsection. Rule 23(f) is the only federal rule of civil procedure created through the section 1292(e) process.

The purposes of the new rule are severalfold: to provide a mechanism for needed appellate review of class certification orders that as a practical matter are unlikely to receive review; to afford a more regular means of appellate involvement in the class certification process; and to enable the courts of appeals to develop certification standards.[5] Although the amendment may

---

3. For a discussion of the limitations of 28 U.S.C. § 1292(b) as an interlocutory appeal procedure, *see infra* Part III.

4. 28 U.S.C. § 1292(e). The genesis of section 1292(e) was explained by the United States Court of Appeals of the Seventh Circuit in *Blair v. Equifax Check Services, Inc.*:

> In 1992, at the suggestion of the Federal Courts Study Committee, Congress authorized the Supreme Court to issue rules that expand the set of allowable interlocutory appeals. 28 U.S.C. § 1292(e). An earlier grant of jurisdictional rulemaking power—28 U.S.C. § 2072(c), which permits the Court to "define when a ruling of a district court is final for the purposes of appeal under section 1291"—had gone unused, in part because it invites the question whether a particular rule truly "defines" or instead expands appellate jurisdiction. Section 1292(e) expressly authorizes expansions.

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

5. *See generally* FED. R. CIV. P. 23(f) committee note; Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of February 16-17, 1995*, 1995 WL 870909; Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of November 9-10, 1995*, 1995 WL 870908; Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of April 18-19, 1996*, 1996 WL 936787; Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of March 20-21, 1997*, 1997 WL 1056240; Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of May 1-2, 1997*, 1997 WL 1056241; Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of September 4-6, 1997*, 1997 WL 1056731; Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of October 6-7, 1997*, 1997 WL 1056239; Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes of June 19-20, 1997*, 1997 WL 1056244 and 1997 WL 936792; Judicial Conference of the United States, Advisory Committee on Appellate Rules, *Minutes of April 15, 1996*, 1996 WL 936781; and Judicial Conference of the United States, Advisory Committee on Appellate Rules, *Minutes of Telephone Conference of May 1, 1996*, 1996

not appear of great consequence to those unfamiliar with class action litigation in the federal courts, the Chair of the Standing Committee on Rules of Practice and Procedure declared that rule 23(f) "alone . . . might well prove to be the most effective solution to many of the problems with class actions."[6] If so, rule 23(f) will operate as an agent of change indirectly and gradually as the courts of appeals further develop the law applicable to certification of class action decisions.

This article will review the new rule and related issues, considering: (1) the importance of the class certification decision and appellate review of that decision; (2) the historical limitations on appellate review of certification decisions; (3) the rationale for allowing appeal of interlocutory certification decisions but not other interlocutory decisions; (4) the operation of rule 23(f); (5) the first application of the rule in the Seventh Circuit's decision of *Blair v. Equifax Check Services, Inc.*; and (6) the prospects for rule 23(f) achieving its goals.

II. THE IMPORTANCE OF THE CERTIFICATION DECISION AND APPELLATE REVIEW

Rule 23(c)(1) directs that the district court make an early decision whether a case should proceed as a class action. In the language of the rule, the decision is to be made "as soon as practicable after the commencement of an action brought as a class action."[7] On a litigation timeline, the certification decision will normally be made after the pleadings are closed but before extensive discovery going to the merits of the case has begun.[8]

WL 936782. *See also* the Seventh Circuit's explanation of "the reasons Rule 23(f) came into being" in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (1999), the first court of appeals decision under the rule.

6. Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes of June 19-20, 1997, Report of the Advisory Committee on Civil Rules*, 1997 WL 1056244, at *13.

7. FED. R. CIV. P. 23(c)(1).

8. Parkinson v. April Indus., 520 F.2d 650, 655 (2d Cir. 1975). Many federal district courts have promulgated local rules requiring that a rule 23(c)(1) motion be made within a specific time, for instance, 90 days after the filing of the complaint. *See, e.g.*, E.D. & W.D. ARK. R. 23.1. However, a trend is developing toward greater flexibility in the timing of the certification decision. For instance, pre-certification rulings on motions to dismiss and summary judgment are now common practice. *See, e.g.*, Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615

The decision is often crucial. If the class is certified, defendants frequently pursue settlement rather than incur extensive discovery and trial expenses and risk the prospect of an overwhelming judgment in favor of the class.[9] When certification is denied, the representative plaintiffs often dismiss the action, concluding that continuance of the litigation on an individual basis is not economically worthwhile.[10]

Because the certification decision can have a life or death impact on the course of class action litigation, appellate review of that decision is often of major importance to the litigants.[11] Appellate review of certification decisions is also critical to the development of class certification standards established through the decisions of the courts of appeals.[12] Prior to adoption of rule 23(f), the opportunity for appellate review of certification decisions was limited or effectively nonexistent in most class actions. Appellate review turned in large measure on

---

app. A at G (1997)(Advisory Committee Note to proposed amendment of rule 23(c)(1)). The proposed amendment has not been adopted. *See* Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of October 6-7, 1997*, 1997 WL 1056239, at *2; Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes of June 19-20, 1997*, 1997 WL 1056244, at *14.

Despite the "as soon as practicable" language of rule 23(c)(1), there is no hard and fast rule regarding the timing of the certification decision. The timing of the certification decision runs from several months to several years after the filing of the complaint. 2 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 7.14 (3d ed. 1992). A proposal to change the "as soon as practicable" standard of rule 23(c)(1) to "when practicable" was defeated at the June 1997 meeting of the Committee on Rules of Practice and Procedure. The proposed change was to give district courts "needed flexibility to deal with the various categories and conditions of class action." Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes of June 19-20, 1997*, 1997 WL 1056244, at *14.

9. Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of February 16-17, 1995*, 1995 WL 870909, at *9.

10. *Id.*

11. *See, e.g.*, 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.19, at 55-56 (2d ed. 1992); Jordon L. Kruse, Comment, *Appealability of Class Certification Orders: The "Mandamus Appeal" and a Proposal to Amend Rule 23*, 91 NW. U. L. REV. 704, 704 (1997); Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes of June 19-20, 1997*, 1996 WL 936792, at *21 (comments of Judge Patrick E. Higginbotham).

12. *See, e.g.*, Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1790 (1997); Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes of June 19-20, 1997, Report of the Advisory Committee on Civil Rules*, 1997 WL 1056244, at *13.

whether the certification order could be considered a final decision for purposes of 28 U.S.C. § 1291, the federal court version of the final judgment rule.[13] Under the final judgment rule, appeals can normally be taken only from final decisions of the district courts, that is, decisions that "end the litigation on the merits and leave nothing for the court to do but execute the judgment."[14] Because many class actions are resolved through settlement or voluntary dismissal precipitated by the certification decision, relatively few lead to final decisions satisfying the requirements of the final judgment rule.[15] As a practical matter, prior to adoption of rule 23(f), the final judgment rule imposed a nearly insurmountable barrier to effective review of many class certification decisions.

---

13. Section 1291 gives the circuit courts jurisdiction of appeals "from all final decisions of the district courts of the United States." As a matter of federal law, the final judgment rule dates from the Judiciary Act of 1789 and to this day admits of few exceptions. See discussion of exceptions to final judgment rule *infra* Part III.

14. *See, e.g.*, Catlin v. United States, 324 U.S. 229 (1945). As explained by the United States Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974), the policy underlying the final judgment rule "prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." In *Cobbledick v. United States*, 309 U.S. 323, 325 (1940), Mr. Justice Frankfurter offered a more elaborate explanation of the policy underlying the final judgment rule:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Because the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause.

Id. at 324-25 (footnotes omitted).

15. *See generally* WRIGHT ET AL., *supra* note 11, at 69–71, 77–80.

III. THE HISTORICAL LIMITATIONS ON APPELLATE REVIEW OF CERTIFICATION DECISIONS

Prior to the Supreme Court's 1978 decision in *Coopers & Lybrand v. Livesay*,[16] several circuit courts of appeals had held certain trial court orders denying class action certification to be appealable final orders under 28 U.S.C. § 1291.[17] In those circuits the denial of certification was appealable because the decision was regarded as sounding the "death knell" of the case. That is, the court viewed the decision as effectively bringing an end to the litigation for final judgment rule purposes.

The "death knell doctrine" required that the district court first consider the dollar amount of the representative plaintiffs' individual claims in relation to their financial resources and probable cost of the litigation.[18] The court then conducted a rough cost-benefit analysis to determine whether the plaintiffs would be likely to pursue their claims to a final judgment and seek appellate review of an adverse class determination.[19] If the court concluded that the individual claims would not be pursued because the value of the possible recovery was an insufficient incentive to proceed, the death knell doctrine regarded denial of certification as a final decision from which appeal could be taken.[20]

The *Livesay* decision rejected the death knell doctrine. In *Livesay* the Court did not question the basic death knell assumption that denial of certification often ends the litigation through voluntary dismissal.[21] Nevertheless, the court found that under death knell doctrine circumstances, a decision denying certification does not satisfy the requirement of finality for final judgment rule purposes. According to *Livesay*, denial of certification even in death knell cases did not end the litigation for final judgment rule purposes because the representative

16. 437 U.S. 463 (1978).

17. *See, e.g.*, Hooley v. Red Carpet Corp., 549 F.2d 643 (9th Cir. 1977); Ott v. Speedwriting Publ'g Co., 518 F.2d 1143 (6th Cir. 1975); Graci v. United States, 472 F.2d 124 (5th Cir. 1973); Hartmann v. Scott, 488 F.2d 1215 (8th Cir. 1973); Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966).

18. *Livesay*, 437 U.S. at 471-73.

19. *Id.*

20. *Id.*

21. *Id.* at 469-70.

plaintiffs were technically still free to proceed on their individual claims.[22] To the Supreme Court, characterizing an adverse certification decision that results in abandonment of the representative plaintiffs' individual claims as an appealable final order "would run 'directly contrary to the policy of the final judgment rule embodied in 28 U.S.C. § 1291 and the sound reasons for it.'"[23]

The *Livesay* court was especially concerned that recognizing the death knell doctrine would be antithetical to the congressional objective of carefully confining the availability of interlocutory review.[24] That concern was particularly acute because in the Court's view the death knell doctrine allowed appeal of nonfinal orders as a matter of right, not discretion as provided in the general interlocutory appeal statute, 28 U.S.C. § 1292(b).[25] Additional factors considered by the Court in rejecting the death knell doctrine were that the doctrine limited the appeal right to plaintiffs and interfered with the appropriate relationship between trial and appellate courts by involving "appellate courts indiscriminately into the trial process."[26]

Although prior to rule 23(f) several exceptions to the final judgment rule had been recognized both by statute and case law, none was really a close fit for interlocutory review of certification decisions. The *Livesay* court found that the death knell doctrine and certification decisions in general failed each aspect of the three-part test for the collateral order exception, recognized by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corporation.*[27] First, because under rule 23(c)(1) a certification order is subject to revision by the district court, the order does not "conclusively determine the disputed question."[28] Second, because certification decisions almost

22. *Id.* at 467.

23. *Id.* at 471 (quoting Korn v. Franchard Corp., 443 F.2d 1301, 1305 (2d Cir. 1971)).

24. *Id.* at 474-75.

25. *Id.*

26. *Id.* at 476.

27. 337 U.S. 541 (1949). From one perspective the collateral final order rule is not an exception but an instance of application of the final decision rule. In *Cohen* the Court found the interlocutory order appealable "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Id.* at 546-47.

28. *Livesay*, 437 U.S. at 468-69.

invariably involve consideration of factual and legal issues that also go to the merits of the plaintiff's case, they do not "resolve an important issue completely separate from the merits of the action."[29] Finally, because the named plaintiff or intervening class members can raise the correctness of the certification decision on appeal after final judgment, the order is not "effectively unreviewable on appeal from a final judgment."[30]

A few certification decisions[31] have been held appealable under the final judgment rule exception created by 28 U.S.C. § 1292(b), the Discretionary Interlocutory Appeals Act of 1958.[32] However, two provisions of the Act militate against its effectiveness in general and particularly for appeal of certification decisions: First, both the district court judge and the court of appeals are given absolute discretion whether to allow the appeal;[33] and second, approval of the appeal requires a determination that the certification order "involves a controlling question of law as to which there is substantial ground for difference of opinion."[34] In practice the two provisions have

---

29. *Id*

30. *Id.*

31. *See, e.g.*, Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594 (4th Cir. 1976); Susman v. Lincoln American Corp., 561 F.2d 86 (7th Cir. 1977); *see also* 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1802, at n.50 (2d ed. 1986).

32. Section 1292(b) provides:

> 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 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 proceeding in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

33. In *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), the United States Supreme Court commented on district court and court of appeals discretion under section 1292(b):

> We recognize that § 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 . . . .

Id. at 883 n.9 (citing *Livesay*, 437 U.S. at 475, and noting parenthetically that serious docket congestion may be an adequate reason to affirm denial of appeal).

34. 28 U.S.C. § 1292(b).

proved to significantly limit the effectiveness of § 1292(b).[35] Especially in class action cases section 1292(b) requests to appeal are likely to receive a reluctant, if not hostile, reception from the district judge, the court may fail to find the controlling question of law standard satisfied, and many courts suggest that the requirement that the appeal "materially advance" the termination of the litigation means that the order must involve a critical issue in the case and have a significant impact on the court's adjudication of the merits.[36] The result is that section 1292(b) has seen limited use in the class action appellate context.[37]

Prior to adoption of rule 23(f) another significant route for interlocutory appellate court consideration of class action certification decisions was by writ of mandamus, theoretically not an appeal procedure.[38] However, a number of circuit courts of appeals used mandamus to review certification decisions.[39] Those courts found the stringent standards of mandamus satisfied. The standards are twofold: First, the challenged order

---

35. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 732-33 (1993); *see also* Rebecca A. Cochran, *Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 MERCER L. REV. 979, 994-95 (1997); Amy Schmidt Jones, Note, *The Use of Mandumus to Vacate Mass Exposure Tort Class Certification Orders*, 72 N.Y.U. L. REV. 232, 235-36 (1997); Kruse, *supra* note 11, at 717-18.

36. WRIGHT ET AL., *supra* note 31, at 478-79.

37. Regarding the frequency of appeals under section 1292(b) generally, one well-known group of commentators reports:

> In the early years of the statute, the Annual Reports of the Director of the Administrative Office of the United States Courts included statistics on district court orders certifying § 1292(b) appeals and court of appeals orders granting or denying permission to appeal. A comprehensive survey of the reports suggested that application to the courts of appeals for permission were made in few more than 100 cases a year, and that only about half of the applications were granted. Although more recent statistics are not available, it is clear that § 1292(b) has not made serious inroads on the final judgment rule.

16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3929, at 363 (2d ed. 1996).

38. *See generally* WRIGHT ET AL., *supra* note 36, § 1802, at 481-83. *But see* Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (addressing the use of mandamus, the Court said, "It is, of course, well settled, that the writ is not to be used as a substitute for appeal . . . even though hardship may result from delay and perhaps unnecessary trial").

39. *See, e.g.*, Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1385 (11th Cir. 1998); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1295 (7th Cir. 1995); *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 307 (6th Cir. 1984).

must not be effectively reviewable at the end of the case, that is, it must inflict irreparable harm.[40] Second, "the order must so far exceed the proper bounds of judicial discretion as to be . . . considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous."[41] Even the courts of appeals that have employed mandamus for review of class certification decisions have recognized that few certification orders will meet those tests, and perhaps more importantly, have acknowledged the Supreme Court's warning that mandamus is a drastic remedy to be employed only in the most extraordinary cases because it effectively circumvents the final judgment rule.[42]

In sum, on the eve of rule 23(f)'s adoption, interlocutory review of class certification decisions was not possible save (1) through the rare successful discretionary interlocutory appeal under 28 U.S.C. § 1292(b); (2) through the even more narrow "collateral final order" doctrine; or (3) by stretching, if not perverting, the mandamus criteria.[43] If change was to come, it would have to be, as suggested by the Supreme Court in *Livesay*, through legislative or rule revision rather than judicial decision.

IV. THE RATIONALE FOR ALLOWING APPEAL OF INTERLOCUTORY CERTIFICATION DECISIONS BUT NOT OTHER INTERLOCUTORY DECISIONS

To create a discreet interlocutory appeal procedure for class certification decisions, the Advisory and Standing Committees had to distinguish certification decisions from a number of other significant interlocutory decisions, such as denials of summary judgment and new trial motions. The latter interlocutory decisions are generally not appealable but can have an impact on

40. *See, e.g., Rhone-Poulenc Rorer*, 51 F.3d at 1295.

41. *Id.*

42. *Id.* at 1305-06 (Rovner, J. dissenting); *see also* In re Catawba Indian Tribe, 973 F.2d 1133, 1137 (4th Cir. 1992); DeMasi v. Weiss, 669 F.2d 114, 118-19 (3d Cir. 1982).

43. Professors Wright, Miller, and Kane discuss three additional interlocutory appeal procedures possibly available for appeal of certification decisions. WRIGHT ET AL., *supra* note 31, at 474-77, 483-84. However, those procedures either apply in limited circumstances (for instance, in connection with appeals of preliminary injunctions under 28 U.S.C. § 1292(a)(1)) or have not been successful. *Id.*

the course of litigation at least equivalent to that of the certification decision. A number of courts, commentators, and members of the two committees viewed class certification decisions as no more worthy of an exception to the final judgment rule than those other interlocutory decisions.[44] Their overriding concern was that allowing interlocutory appeal of certification decisions would seriously undermine the underlying values of the final judgment rule.[45] A catalogue of other arguments against recognition of a broad interlocutory appeal mechanism for certification decisions included a number of undesirable outcomes:

1. The interlocutory appeal may result in inappropriate intrusion into the proper domain of the trial judge. In the words of the Second Circuit, "The line between helpful guidance and noxious interference is a narrow one, and one goal of the final judgment rule is that of maintaining the appropriate relationship between the respective courts";[46]

2. Trial judges are frequently confronted with interlocutory decisions, which, if found erroneous on appeal, may result in unnecessary and time-consuming consequences;[47]

3. Because certification decisions are reviewed on an abuse of discretion basis, the latitude of that standard would provide significant appellate guidance only in appeals of the most egregiously erroneous decisions;[48]

4. Because the class action determination is to be made "as soon as practicable" following commencement of the class action litigation, the certification decision may come before the case has been sufficiently developed to provide an adequate

---

44. *See* FED. R. CIV. P. 23(f) committee note: "The Federal Judicial Center Study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings"; *see also* Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of February 16-17, 1995*, 1995 WL 870909, at *13 (comments of Judge William W. Schwarzer); Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of June 19, 1996*, 1996 WL 936792, at *21 (comments of Sol Schreiber).

45. Parkinson v. April Indus., 520 F.2d 650, 652-55 (2d Cir. 1975); *see also id.* at 658-60 (Friendly, J., concurring).

46. *Id.* at 654.

47. *Id.*

48. *Id.* at 655.

appellate record for review of all factors appropriate to the decision;[49]

5. Other avenues of review exist for the relatively few certification decisions for which supervisory appellate guidance is warranted. The other avenues of review include the collateral order doctrine, mandamus, and discretionary interlocutory appeals under 28 U.S.C. § 1292(b);[50]

6. Because by the terms of rule 23(c)(1) a class certification order "may be altered or amended before the decision on the merits," post-certification order discovery or other developments could require revision of the original order, presenting the specter of possible successive interlocutory appeals of the certification order;[51] and

7. Interlocutory appellate intervention should be limited to large, complex class actions. Only in those cases are defendants likely to incur the substantial litigation expenses and run the risk of a large judgment if found liable that justify an exception to the final judgment rule.[52]

Although those arguments presented a substantial case for viewing the need for interlocutory review of certification decisions as being no greater than that for many other interlocutory decisions, the Advisory and Standing Committees thought a distinction was justified, for several reasons:

1. The certification decision involves issues fundamental to the further conduct of the case that should be resolved early in the litigation;[53]

2. A defendant who expends substantial amounts of time and money defending a class action later reversed on appeal from a final judgment on a determination that the certification decision was in error is harmed irreparably;[54]

---

49. *Id.*

50. *Id.*

51. *Id.* at 653.

52. *Id.* at 654 n.2.

53. Herbst v. International Tel. & Tel. Corp., 495 F.2d 1308, 1312-13 (2d Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *rev'd on other grounds*, 417 U.S. 156 (1974); Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes of June 19-20, 1997*, 1997 WL 1056244, at *14.

54. *Herbst*, 495 F.2d at 1312; *Eisen*, 479 F.2d at 1007 n.1; *see also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1295 (7th Cir. 1995).

3. Supervising a class action after a certification decision is likely to be significantly more demanding of a district court's resources than following other interlocutory decisions;[55]

4. Appellate courts are more reluctant to hold certification improper after the district court and the parties have expended substantial resources in the conduct of the proceedings following the certification decision. Deferring review until after entry of final judgment may in some cases thwart any effective review of the class action designation;[56]

5. Judicial efficiency dictates appellate review of the certification decision before the district court and the parties have expended the extensive resources normally associated with class action preparation and trial;[57]

6. Interlocutory review would lessen the *in terrorem* effect of certification decisions that force class action plaintiffs to abandon valid but financially unworthy claims and pressure defendants into settling with diminished regard for their potential liability on the merits;[58]

---

55. *Herbst*, 495 F.2d at 1313; *see also Parkinson*, 520 F.2d at 654.

56. *Parkinson*, 520 F.2d at 653; *Herbst*, 495 F.2d at 1313.

57. *Parkinson*, 520 F.2d at 654; *Herbst*, 495 F.2d at 1313.

58. Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of February 16-17, 1995*, 1995 WL 870909, at *18. The committee note to rule 23(f) explains:

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

See also the Seventh Circuit's opinion in *Rhone-Poulenc Rorer*, 51 F.3d at 1299, which spoke of concern with forcing the defendants in that case "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability"; and the Second Circuit's assessment in *Parkinson* that:

> Admittedly the impact of large plaintiff class actions upon defendants is great. The expense of defense increases with the introduction of the enlarged class, with the broadening of the substantive issues, and with the preliminary pretrial skirmishing. Of perhaps greater importance in realistic terms is the increase in potential liability which could force the defendant to settle plaintiffs' claims regardless of the merits of the plaintiffs' cases.

Parkinson, 520 F.2d at 654.

7. Because class action defendants often settle rather than risk the prospect of an overwhelming judgment to the class, and because plaintiffs frequently dismiss following an adverse certification decision, the propriety of the certification decision in those cases is not subject to appellate review;[59]

8. Sound judicial administration is promoted through immediate review of class designation orders by lessening the burdens imposed on district judges and enhancing the proper role of the circuit courts in giving guidance through development of class action doctrine;[60] and

9. Development of standards is more feasible for class action certification decisions than for other less focused interlocutory decisions.[61]

Likely no single argument was decisive with the committee members for drawing a distinction that allows appeal of interlocutory certification decisions but not other interlocutory decisions. However, the cumulative effect of the arguments proved persuasive to the Advisory and Standing Committees.[62]

V. THE OPERATION OF RULE 23(f)

From the early stages of its active consideration of the interlocutory appeal procedure for class actions, the Advisory Committee focused on creating a rule that would accommodate the need for appellate review of class certification decisions in

---

59. *Herbst*, 495 F.2d at 1313.

60. *Parkinson*, 520 F.2d at 654.

61. *See* Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes of June 19-20, 1997*, 1997 WL 1056244, at *13. The Advisory Committee speculated that

> the new interlocutory appeal provision could reap significant benefits, and [will be] easy to implement. Appellate courts have strained to take a more active role in class-action law in recent years, with good results. Affording a more regular means of involvement, increasing the opportunities for appellate review, may do much to simplify current law and make practice more nearly uniform.

Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of May 1-2, 1997*, 1997 WL 1056241, at *6; *see also* General Motors Corp. v. City of New York, 501 F.2d 639, 659-60 (2d Cir. 1974); *Parkinson*, 520 F.2d at 654.

62. The rule 23(f) proposal was approved by the Advisory Committee on Civil Rules at its May 1 and 2, 1997 meeting, 1997 WL 1056241, at *6, and by the Standing Committee on Rules of Practice and Procedure at its June 19 and 20 meeting, 1997 WL 1056244, at *3.

appropriate cases while not substantially undermining the general policies of the final judgment rule.[63] Working from 28 U.S.C. § 1292(b), the general interlocutory appeal statute, "in an effort to invoke familiar concepts that will ease application of a new rule,"[64] the Committee nevertheless sought to avoid that statute's perceived limitations. Two provisions of the statute were identified as primary deficiencies: (1) placing the initial decision to allow the appeal in the absolute discretion of the district court judge; and (2) requiring that the appeal satisfy the "controlling question of law" standard.[65] The way rule 23(f) addresses those deficiencies and other issues related to the operation of the rule in practice will be considered below.

A. Allowing the Appeal: Who Decides?

Rule 23(f) shifts the decision whether to allow the appeal from the district court to the court of appeals. The prevailing view within the Advisory Committee was that removing the power of the district judge to defeat any opportunity to appeal was significant.[66] The change was thought to be significant for the obvious reason that a grant or denial of certification can determine the outcome of the litigation and for the perception that the need for review may be greatest in situations that are least likely to receive approval to appeal from the district court.[67] According to comments in the committee minutes, eliminating the formal role of the district court in the appellate process was intended to make appeals more readily available.[68] In addition, because the opportunity for appellate guidance during the early years of any new class action provision was thought to be invaluable, the greater flexibility in the appellate process that

63. *See, e.g.*, Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of February 16-17, 1995*, 1995 WL 870909, at *17 (comments of Robert C. Heim). Mr. Heim stated, "Draft Rule 23(f) strikes the right balance on appeal rights. The opportunity to appeal grant or denial of class certification may impede pressure for settlement, but that is a good thing." *Id.*

64. Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of November 9-10, 1995*, 1995 WL 870908, at *3.

65. *Id.*

66. *Id.* at *4.

67. *Id.*

68. *Id.* at *3.

would come as a result of bypassing the district court was believed important for future substantial changes to rule 23.[69] Concern was also expressed that appeals might be inappropriately denied by a judge determined to effect settlement following a grant of class certification calculated to encourage settlement or by a judge with a dislike for the plaintiff's underlying claim.[70] However, a number of substantial arguments were advanced within the Committee for retaining the district court as gatekeeper of the appellate process:

1. District court judges who have reached a reasonably firm decision as to certification will welcome appellate review, particularly in cases presenting uncertain questions of law;[71]

2. There is little reason to fear that district court intransigence will thwart necessary appeals;[72]

3. If the district court judge has no voice in the appeal decision, the judge may defer certification decisions;[73]

4. District court involvement is particularly important in cases that have generated lengthy records;[74] and

5. The district court's greater familiarity with the record will support a better evaluation of the value of the appeal.[75]

Although the arguments in favor of retaining direct district court participation in the appeal decision did not carry the day, the desirability of district court involvement received some recognition in the committee note to the rule. After first acknowledging that the rule departs from the section 1292(b) model by removing the district court from formal participation in the appeal decision,[76] the note suggests an informal role for the district court:

> [T]he district court often can assist the parties and court of appeals by offering advice on the desirability of appeal . . . . The district court, having worked through the certification decision, often will be able to provide cogent advice on the

69. *Id.*
70. *Id.* at *5.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. FED. R. CIV. P. 23(f) committee note.

> factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, 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.[77]

The suggestion by way of a committee note that a court act informally without specific direction from the rule itself is unusual, if not unique. Having made the suggestion, the note offers no guidance to the district court as to the mechanism by which it is to make its voice heard. Is the advice to be included as part of the certification order or by separate order or memorandum? May or must the parties and court of appeals request the advice? If so, how? Is the advice to be given routinely as part of every certification decision? Because the note speaks of the district court's advice assisting the court of appeals in its decision, communication of that advice to the court of appeals by some mechanism is obviously contemplated.

B. Allowing the Appeal: What is the Standard?

In addition to departing from the 1292(b) model by excluding the district judge from the formal appeal process, the language of rule 23(f) does not include the "controlling question of law" standard for acting on the appeal request or, for that matter, any standard at all. As a result, allowance of the appeal is at the "sole discretion of the court of appeals."[78] Although neither the committee minutes nor the committee note offer much illumination as to the reason for the omission, the note and minutes do refer to the "controlling question of law" provision as a "limiting requirement" and comment that the rule aims at "expansion of present opportunities to appeal," presumably by omitting the limiting language.[79]

---

77. *Id.*

78. *Id.*

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

There was some apprehension within the Advisory Committee that lack of a stated standard for allowing appeals would result in too many appeals, and that appeals would be attempted in the overwhelming majority of cases.[80] The response was that experience indicated appeals of certification decisions are most likely in more complex and contentious class actions.[81] Apparently the Committee considered certification decision appeals not as likely in the more typical class action. The view was also expressed that most certification decisions depend on specific case circumstances for which the circuit court of appeals would be unlikely to grant the appeal, and that most cases for which appeal will be granted will involve unsettled questions of law.[82]

In contrast to the discussion in the Advisory Committee, the debate in the Standing Committee did not directly address the "too many appeals" concern. Apparently basing their response on experience under 28 U.S.C. § 1292(b), the appellate judge members of the Standing Committee simply predicted that even if rule 23(f) generates more appeals than expected, the courts of appeals will make prompt decisions both as to accepting rule 23(f) appeals and in regard to the merits of appeals accepted.[83]

The committee note attempts to clarify the standard for acting on appeals by emphasizing the absolute nature of the discretion to be exercised by the court of appeals:

> 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. This discretion suggests an analogy to the provision in 28 U.S.C. § 1292(b) for permissive appeal on certification by a district court.[84]

If the court of appeals' discretion is to be "unfettered" and similar to that exercised by the Supreme Court in certiorari

---

80. *Id.* at *5.

81. *Id.*

82. *Id.*

83. Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes of June 19-20, 1997*, 1997 WL 1056244, at *14.

84. FED. R. CIV. P. 23(f) committee note.

decisions,[85] the rule contemplates that appeals will infrequently be allowed.[86] The original committee note had been drafted to reflect that sentiment: Permission to appeal "almost always will be denied when the certification decision turns on case-specific matter of fact and district court discretion."[87] Following publication of the proposed note, the negative "almost always

---

85. Rule 10 of the Rules of the Supreme Court of the United States establishes the considerations governing the Court's review of decisions on writ of certiorari. Although much of the rule addresses concerns peculiar to the Supreme Court's review of federal and state decisions, review of the rule is useful for developing a sense of the discretion contemplated by the committee note to rule 23(f):

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

SUP. CT. R. 10.

86. For comparison, the United States Supreme Court grants approximately one percent of applications for certiorari. At the opposite end of the spectrum from the arguments for allowing certification decision appeals only at the discretion of the court of appeals was the position that all certification decisions should be subject to an absolute right of appeal. The discretionary appeal was thought to be illusory because the draft of rule 23(f) offered no assurance that appeals would be granted. The frequent failure of courts of appeals to grant interlocutory appeals under section 1292(b) was cited in support. The response was that a right to appeal could lead to abuse. A Federal Judicial Center study determined that many certification decisions are "routine" and without appealable issues. However, a right to appeal would serve as a strong temptation, particularly to defendants, to appeal certification decisions whenever possible. A right to appeal could also encourage contests of certification decisions rather than agreement to certification through stipulation. *See* Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of November 9-10, 1995*, 1995 WL 870908, at *4.

87. 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, app. C, at 300 (2d ed. 1999).

will be denied" language was transformed into the more positive-sounding:

> Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. 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.[88]

In *Blair v. Equifax Check Services, Inc.*,[89] the first decision in a rule 23(f) appeal, the Seventh Circuit Court of Appeals struggled to develop more specific standards for accepting appeals under the rule. After considering the ambiguous suggestions of the committee note, the court eschewed "inventing standards" and focused instead on "the reasons rule 23(f) came into being."[90] This approach cabins acceptable rule 23(f) appeals into the three categories of class action cases that the court perceives the rule was designed to address: (1) death knell type cases in which an adverse certification decision would cause the representative plaintiffs to dismiss their individual claims because continuance of the litigation would not be financially worthwhile;[91] (2) forced settlement type cases where class certification pressures the defendant to settle with diminished regard for liability on the merits;[92] and (3) cases that will further the development of class action law.[93] The *Blair* decision and the Seventh Circuit's approach to the standards for granting permission to appeal are considered further in Part V.

Closely related to the concern that rule 23(f) appeals will overwhelm the courts of appeals is the fear that the new interlocutory appeal procedure will delay and disrupt the processing of class actions.[94] The committee note responds to that concern by citing the relatively short timeframe for making application to appeal: within ten days of the certification order.[95]

---

88. FED. R. CIV. P. 23(f) committee note.
89. 181 F.3d 832 (7th Cir. 1999).
90. *Id.* at 834.
91. *Id.*
92. *Id.*
93. *Id.* at 835.
94. *Id.*
95. FED. R. CIV. P. 23(f) committee note.

The ten-day limit is "designed to reduce the risk that attempted appeals will disrupt continuing proceedings."[96] The note also expresses the "expectation" that "the courts of appeals will act quickly in making the preliminary determination whether to permit the appeal."[97]

C. Appellate Procedures

Rule 5 of the Federal Rules of Appellate Procedure, "Appeals by Permission," addresses the procedures to be followed in the court of appeals for a rule 23(f) appeal.[98] Rule 5

---

96. *Id.*

97. *Id.* The "expectation," of course, is nothing more than an expression of hope, for there is no formal mechanism that will compel early decisions. A statement in the advisory committee minutes is even more specific, expressing the likelihood that the courts of appeals will generally act within 30 days in making the decision whether to allow the appeal. Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of November 9-10, 1995*, 1995 WL 870908, at *4. In addition, many members of the Committee, including the Committee's appellate judges, cited experience with discretionary interlocutory appeals under § 1292(b):

> [T]he courts of appeals make prompt decisions—usually within a matter of days—on whether to accept an interlocutory appeal. And once they accept an interlocutory appeal, they normally decide it on the merits with dispatch. Several members emphasized that the courts of appeals simply will not take cases that do not appear to have merit. Some judges added that class action decisions were an important area of jurisprudence that could be helped by having more appellate decisions, especially at early stages of litigation before the parties incur great costs and delays.

Minutes, Committee on Rules of Practice and Procedure, 1997 WL 1056244, at *14 (Meeting of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, June 19-20, 1997).

98. The text of Federal Rule of Appellate Procedure 5 follows:

RULE 5. APPEAL BY PERMISSION

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

was also revised effective December 1, 1998, partly in anticipation of the adoption of rule 23(f).[99] Under rule 5 the appeal process is initiated by filing a "petition for permission to appeal." As with the time period for filing the petition to appeal, the time set by rule 5 for responding to the petition is relatively short: seven days after the petition for permission to appeal is served.[100] The petition and response are to be submitted without oral argument unless the court of appeals orders otherwise.[101]

(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within 7 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) Form of Papers; Number of Copies. All papers must conform to Rule 32(a)(1). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(d) Grant of Permission; Fees; Cost Bond; Filing the Record.

(1) Within 10 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

99. Judicial Conference of the United States, Advisory Committee on Appellate Rules, *Minutes of April 15, 1996*, 1996 WL 936781, at *10-*11. The primary purpose in revising rule 5 was to expand its scope to govern all interlocutory appeals in the federal court system, both existing and future. *Id.*

100. FED. R. APP. P. 5. Although there was some support within the Appellate Rules Advisory Committee for ten-day or fourteen-day periods, the seven-day response period prevailed. One cited reason supporting the shorter period was that because the petition

Several more technical aspects of the rule 5 procedures are worth noting. Under rule 5, the petition for permission to appeal is filed with the circuit clerk, rather than with the district clerk.[102] The rule does not require the filing of a notice of appeal.[103] The date of the order granting permission to appeal is substituted for the notice of appeal for purposes of calculating time under the appellate rules.[104] The fees for the appeal are to be paid to the district clerk, however, and any bond required must be filed with the district clerk, not the circuit clerk.[105]

Neither the application for permission to appeal nor the allowance of the appeal automatically stays any proceedings, including discovery, in the district court.[106] However, both the district court and the court of appeals may grant stay orders.[107] The committee note indicates that the stay order should be sought first from the district court.[108] Moreover, the note contemplates court of appeals deference to district court decisions denying requests for stays, stating that the trial court's "action and any explanation of its views should weigh heavily with the court of appeals."[109] In the *Blair* case, discussed below, the Seventh Circuit also addressed the question of the standard for staying proceedings during pendency of requests for appeal.

---

itself must be filed within ten days after entry of the order, it would be anomalous to require a longer response period. Minutes, Advisory Committee on Appellate Rules, 1996 WL 936781, at *10-*11 (Meeting of the Advisory Committee on Appellate Rules, April 15, 1996).

101. FED. R. APP. P. 5.

102. *Id.*; *cf.* FED. R. APP. P. 4, which requires filing of the notice of appeal with the district clerk.

103. *See* FED. R. APP. P. 5.

104. *Id.*

105. *Id.* The fees are to be paid and the bond filed within ten days after entry of the order granting permission to appeal. *Id.*

106. FED. R. CIV. P. 23(f); *see also* Judicial Conference of the United States, Advisory Committee on Civil Rules, *Minutes of November 9-10, 1995*, 1995 WL 870908, at *4.

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

108. FED. R. CIV. P. 23(f) committee note.

109. *Id.*

VI. THE FIRST COURT OF APPEALS DECISION OF A RULE 23(f) APPLICATION TO APPEAL: *BLAIR V. EQUIFAX CHECK SERVICES, INC.*[110]

The first ruling on a request for permission to appeal under rule 23(f) was made in *Blair v. Equifax Check Services, Inc.*[111] The parties were directed to file briefs discussing the standard to be employed in deciding whether to grant appeals under the rule, apparently because, as the court noted, the application to appeal in *Blair* was the first in the nation to be considered.[112] The result is an opinion quite obviously crafted to serve as a guide for other rule 23(f) appeal requests.

Undertaking the task of developing standards for acting on rule 23(f) requests for permission to appeal, the *Blair* court began by citing the language of the committee note that "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive" and that the discretion to be exercised by the court of appeals is "akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari."[113] The opinion then sets the analytical platform from which to develop the rule 23(f) standards:

> Although rule 10 of the Supreme Court's Rules identifies some of the considerations that inform the grant of certiorari, they are "neither controlling nor fully measuring the Court's discretion." Likewise it would be a mistake for us to draw up a list that determines how the power under rule 23(f) will be exercised. Neither a bright-line approach nor a catalog of factors would serve well—especially at the outset, when courts necessarily must experiment with the new class of appeals.[114]

After discounting both the guidelines from the Supreme Court's certiorari standards and the need to develop specific 23(f) standards, the court looked for guidance from "the reasons

110. 181 F.3d 832 (7th Cir. 1999).

111. *Id.* at 833.

112. *Id.*

113. *Id.*

114. *Id.* at 833-34 (quoting the introductory paragraph to SUP. CT. R. 10).

rule 23(f) came into being."[115] Three were found: (1) to provide interlocutory review of certification decisions in death knell type cases;[116] (2) to review certification decisions that impose substantial pressure on the defendant to settle on a basis not reflective of the merits of the plaintiffs' claim;[117] and (3) to facilitate the development of legal doctrine in class action litigation.[118]

In considering interlocutory appeals of certification decisions in death knell type cases where the representative plaintiffs' claim is too small to justify the expense of continuing the litigation to a final appealable judgment, Judge Easterbrook, author of the *Blair* opinion, cautioned that "we must be wary lest the mind hear a bell that is not tolling."[119] By that he meant that rule 23(f) should not be invoked for class actions that may superficially appear to involve death knell situations but will actually be litigated to a final judgment because the litigation is financed by the representative plaintiffs' law firm or other interests.[120] The court found justification for death knell type appeals only "when denial of class status seems likely to be fatal, and when the plaintiff has a solid argument in opposition to the district court's decision."[121]

Under the Seventh Circuit's standards, interlocutory appeals are allowed in the second category of class actions,

---

115. *Id.* at 834.

116. *Id.*

117. *Id.* As the court explained,

> Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), observes not only that class actions can have this effect on risk-averse corporate executives (and corporate counsel) but also that some plaintiffs or even some district judges may be tempted to use the class device to wring settlements from defendants whose legal positions are justified but unpopular. Empirical studies of securities class actions imply that this is common. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Reinier Kraakman, Hyun Park & Steven Shavell, *When are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733 (1994); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55 (1991).

Id.

118. *Id.* at 835.

119. *Id.* at 834.

120. *Id.*

121. *Id.*

those in which a defendant may be forced into non-merits based settlement as a result of the decision to certify, "when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial."[122] A secondary justification offered by the court for allowing appeals in this category is that class certification decisions have induced some judges to alter substantive doctrine to make the litigation more manageable.[123] The particular concern here was apparently with the impact of class action litigation on the development of federal securities law.[124]

The third ground for allowing rule 23(f) appeals under the *Blair* criteria is facilitating the development of class action doctrine. As Judge Easterbrook noted, "Because a large proportion of class actions settles or is resolved in a way that overtakes procedural matters, some fundamental issues about class actions are poorly developed."[125] Although the court noted that if the district court's certification decision is clearly sound, interlocutory appeals should generally not be allowed in death knell and forced settlement type cases, it concluded that demonstrating foundational infirmity of the lower court decision is less important when the appeal is likely to contribute to class action doctrinal development.[126]

After announcing the standards to be applied generally to requests for rule 23(f) review, the Seventh Circuit's decision whether to allow the appeal itself was almost anticlimactic. The class action issue at stake on the merits of the appeal was whether a settlement in one Fair Debt Collection Practices Act class action[127] brought against defendant Equifax bound class

122. *Id.* at 835.

123. *Id.* at 834 (citing Hal S. Scott, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337 (1971)). According to the court, "[t]his interaction of procedure with the merits justifies an earlier appellate look. By the end of the case it will be too late—if indeed the case has an ending that is subject to appellate review." *Id.*

124. *See id.*

125. *Id.* at 835 ("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.").

126. *Id.* ("But the more fundamental the question and the greater the likelihood that it will escape effective disposition at the end of the case, the more appropriate is an appeal under Rule 23(f). More than this it is impossible to say.").

127. Crawford v. Equifax Payment Servs., Inc., No 97-4240, 1998 WL 704050 (N.D. Ill.

members in a second class action also against Equifax on the same grounds,[128] both filed in the Northern District of Illinois. Equifax argued that the *Blair* class members were also members of the *Crawford* action and thus bound by the terms of the settlement.[129] Among the terms of the *Crawford* settlement was a prohibition against any class member prosecuting any other case against Equifax as a class action.[130] The court allowed the appeal, finding that the case fell within the last of its three categories of appropriate interlocutory appeals, that the appeal raised a significant issue of class action law.[131] The court also noted that the issue of the relation among multiple class actions was unsettled and might not otherwise be subject to appellate review.[132]

Having decided to accept the appeal, the Seventh Circuit proceeded in the same opinion to consider the merits of the appeal. The court found that because the *Crawford* class action had not reached final judgment, the trial court judge in *Blair* did not abuse his discretion by certifying the case as a class action.[133]

The *Blair* court also dealt with two other issues that, although secondary in importance to the issue of the standards applicable to rule 23(f) requests to appeal, are nevertheless of

---

Sept. 30, 1998).

128. Blair v. Equifax Check Servs., Inc., No. 97 C 8913, 1999 WL 116225 (N.D. Ill. Feb. 26, 1999).

129. *Blair*, 181 F.3d at 836.

130. *Id.* Judge Easterbrook wrote critically of the settlement:

> A peculiar settlement it is. Equifax agreed to change the letters it sends in the future. Crawford personally receives $2,000. Members of the *Crawford* class get no relief for the letters sent to them, though Equifax agreed to donate $5,500 to Northwestern Law School's Legal Aid Clinic and (natch) the lawyers for the class receive fees for their work. According to the settlement, none of the class members will receive individual notice, and none will be offered the opportunity to opt out. The theory behind this is that the class was certified under Fed. R. Civ. P. 23(b)(2), even though it began as an action seeking damages. Finally, the settlement provides that all class members' claims for compensatory or statutory damages pass through the litigation unaffected and may be asserted elsewhere—but only in individual suits. The settlement forbids prosecution of any other case as a class action. It is this final feature of the *Crawford* settlement that Equifax contends should have led Judge Plunkett to decertify the Blair-Wilbon class. Maintaining *Blair* as a class action creates at least a possibility of inconsistent outcomes.

Id.

131. *Id.* at 837-38.

132. *Id.*

133. *Id.* at 838.

significance to the development of rule 23(f) doctrine. The first of these issues concerns the circumstances under which district court proceedings should be stayed pending the interlocutory appeal. Rule 23(f) begs the question by directing that "[a]n appeal . . . not stay proceedings in the district court unless the district judge or the court of appeals so orders."[134]

Addressing the standard for granting stays pending appeal, Judge Easterbrook noted that appeals under the general interlocutory appeal statute, 28 U.S.C. § 1292(b), have been infrequent in part because of a judicial perception that "[section 1292(b)] procedure interrupts the progress of a case and prolongs its disposition."[135] Although the no-automatic-stay provision is found in both rule 23(f) and section 1292(b), Judge Easterbrook concluded that rule 23(f), as distinguished from § 1292(b), is drafted to avoid delay.[136] In support of that conclusion, he cited the no-automatic-stay language of rule 23(f).[137]

The Seventh Circuit's standard in *Blair* for granting a stay turns on whether "the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the costs of waiting."[138] According to Judge Easterbrook, stays under this standard "will be infrequent" and, as a result, "interlocutory appeals under Rule 23(f) should not unduly retard the pace of litigation."[139]

The other secondary issue considered in *Blair* was the effect of a motion for reconsideration on the ten-day period for making a rule 23(f) application to appeal. The language of the rule requires filing the application to appeal to the court of appeals "within ten days after entry of the order."[140] The position of the plaintiffs in *Blair* was that the "order" referred to in the rule was limited by the language of the rule itself to the

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

135. *Blair*, 181 F.3d at 835.

136. *Id.*

137. *Id.*

138. *Id.* Judge Easterbrook notes that "[t]his is the same kind of question that a court asks when deciding whether to issue a preliminary injunction or a stay of an administrative decision." *Id.*

139. *Id.*

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

"order granting or denying class certification under this rule."[141] The court's response was that under accepted practice federal courts have long held that a motion for reconsideration tolls the time for appeal if the motion is made within the time for appeal.[142] The underlying purpose for the practice is to allow district courts the opportunity promptly to correct their own alleged errors.[143] As a result, the Seventh Circuit held that a motion for reconsideration filed within ten days of a certification order defers the time for appeal until after the district judge has disposed of the motion.[144]

VII. WILL RULE 23(f) ACHIEVE ITS GOALS?

The good news for interlocutory appeal of class certification decisions resulting from adoption of rule 23(f) is that possible district court intransigence and the limiting controlling question of law standard of 28 U.S.C. § 1292(b) have been replaced by the "unfettered discretion" of the courts of appeals whether to allow the appeals. At least potentially, the bad news inheres in the same absolute discretion given the courts of appeals.

By exercising prompt but careful judgment as to appeals allowed and by deciding with dispatch the merits of the certification issues appealed, the courts of appeals may demonstrate that the Advisory Committee's assessment that rule 23(f) "might well prove to be the most effective solution to many of the problems with class actions" was prescient.[145] The rule may realize its objectives of: (a) providing a mechanism for needed appellate review of both death knell and forced settlement class certification orders; (b) affording a more regular means of appellate involvement in the class certification

141. *Blair*, 181 F.3d at 837.

142. *Id.* (citing United States v. Dieter, 429 U.S. 6 (1976); United States v. Healy, 376 U.S. 75 (1964); *In re* X-Cel, Inc., 823 F.2d 192 (7th Cir. 1987)). As the court explained, "The practice is independent of Rule 4(a)(4), or any other rule." *Id.*

143. *Id.* (quoting United States v. Dieter, 429 U.S. 6, 8 (1976)).

144. *Id.*

145. *See supra* text accompanying notes 5-6.

process; and (c) enabling the courts of appeals to develop certification standards.[146]

The same absolute discretion that may free the courts of appeals from the limitations associated with 28 U.S.C. § 1292(b) carries the potential for abuse of the authority granted by the rule and, in particular, for significant erosion of the values of the final judgment rule. The line between helpful guidance and noxious interference by an appellate court in the proper sphere of the trial court is indeed a narrow one.[147]

Because the courts of appeals' discretion under rule 23(f) is absolute and without guidelines, only experience over time will tell whether the rule will achieve its laudable goals on the one hand, carve out an unbounded exception to the final judgment rule on the other, or simply become another seldom-used, ineffectual relic of the appellate process not unlike its interlocutory appeal procedure model, 28 U.S.C. § 1292(b). The Seventh Circuit's attempt in *Blair* to set the standard—by setting no standards but instead focusing on the underlying purposes of rule 23(f) to provide relief in death knell and forced settlement type cases and developing certification decision standards—is at once promising and cause for concern. The decision properly identifies the appropriate focus of appellate court concern under rule 23(f). However, it offers little guidance for separating the wheat of death knell and forced settlement cases from the chaff, or for identifying "fundamental issues about class actions" that call for further development.[148] In the Seventh Circuit's view "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."[149] That approach may initially be sufficient, but if rule 23(f) is to realize

146. *See supra* text accompanying note 5 and notes 91-94.

147. *See supra* text accompanying note 47.

148. The only standard offered by the Seventh Circuit for granting appeal of death knell type cases would apply "when denial of class status seems likely to be fatal, and when the plaintiff has a solid argument in opposition to the district court's decision." *Blair*, 181 F.3d at 834. For allowing appeals of forced settlement type cases, the Seventh Circuit's guidance is that "when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under rule 23(f) is in order." *Id.* at 835. The court suggests that for appeals that "may facilitate the development of the law," appeal of "fundamental issues about class actions" should be allowed. *Id.*

149. *Id.* at 834.

its promise, future courts of appeals' decisions must articulate more specific appellate guidelines.