

# Using Rule 23(f) To Review Class Certification Orders

By **Wesley Prichard, David Fine and Robert Sparkes** (April 22, 2024)

The number of class actions filed has continued to climb with time. And, for those class actions that survive to see a ruling on a motion for class certification, plaintiffs on average are prevailing in certifying a class more often than not. A class action defendant, therefore, is more likely to see a class certification decision now than ever, and potentially a decision certifying a class.

The class certification decision presents a watershed moment. If certification is granted, the risk of a classwide verdict may pressure the defendant into settling even unmeritorious claims. If certification is denied, the prospective expense of individualized litigation may prompt the plaintiff to abandon the case.

Win or lose, class action defendants must therefore be familiar with the rules and standards under Federal Rule of Civil Procedure 23(f), which allows the losing party to petition the appeals court to grant review of class certification orders on an interlocutory basis.

The best-positioned class action defendants are prepared to pursue relief under Rule 23(f) well before the district court issues its class certification decision, given that Rule 23(f) allows for only 14 days to file a petition for review, and the appeals courts apply different, albeit overlapping, standards and procedures in evaluating and ruling on Rule 23(f) petitions.

In furtherance of that pursuit, this article provides an overview of the frameworks used by appeals courts, tips for a successful Rule 23(f) petition, and statistics on the rate Rule 23(f) petitions are granted and the time the appeals courts take to grant them.

## Standards for Evaluating Rule 23(f) Petitions

As described by the Advisory Committee's notes on Rule 23(f), the "court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari."<sup>[1]</sup> Since Rule 23(f)'s enactment, appeals courts have established different guideposts for when it is appropriate to grant a Rule 23(f) petition.

Nearly all appeals courts agree that interlocutory review of a class certification order is appropriate when the class certification decision turned on a novel or unsettled question of law (or the appeal might facilitate development of the law on class certification), or the class certification order may bring the end of the litigation because the defendant may be forced to settle rather than to incur the costs of defending a class action.<sup>[2]</sup>

The U.S. Courts of Appeals for the Third, Fourth, Sixth, Ninth, Tenth, Eleventh and D.C. Circuits have also expressly endorsed granting a petition for review under Rule 23(f) when the district court's class certification order was erroneous or substantially weak.<sup>[3]</sup>



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Even those appeals courts that have not weighed in on whether district court error provides a basis for review will have granted review under Rule 23(f) to reverse a class certification order for that reason.[4]

Some appeals courts have endorsed additional factors to consider, such as the nature and status of the litigation before the district court — e.g., the presence of outstanding dispositive motions and the status of discovery — and the likelihood that future events will make appellate review more or less appropriate.[5]

For example, the Eleventh Circuit in evaluating a Rule 23(f) petition will consider whether "a limited or insufficient record may adversely affect the appellate court's ability to evaluate fully and fairly the class certification decision," and whether "the prospect of an imminent change in the financial status of a party — such as a bankruptcy filing — may caution against hearing an interlocutory appeal," as established in the 2000 case *Prado-Steiman v. Bush*. [6]

### **Considerations for Success at the Rule 23(f) Stage**

While many considerations are necessary for a strong Rule 23(f) petition or opposition, and a significant number of those are case-specific, the following general points should apply to most Rule 23(f) petitions or oppositions.

#### ***If appealing, file within 14 days of the class certification order, no matter what.***

It is worth emphasizing the need to adhere strictly to the 14-day deadline. The U.S. Supreme Court held in *Nutraceutical Corp. v. Lambert* in 2019 that Rule 23(f) is not subject to tolling, "even where good cause for equitable tolling might otherwise exist." [7] And appeals courts have interpreted Rule 23(f)'s deadline as rigid and inflexible. [8]

#### ***Check the local rules.***

Each appeals court has its own local rules, and attention to the local rules can be the difference between an appeal being accepted or rejected. For example, some appeals courts require filings to be made by 5:00 p.m. local time on the deadline to be considered timely.

The appeals courts have their own rules regarding page or word limitations, and the content that a petition must contain. Not formatting a petition in compliance with the local rules sets a petition for appeal up for failure by starting off on the wrong foot. A petitioner's right, if any, to file a reply brief, and deadline for so doing, is another critical factor that should be assessed in formulating strategy.

#### ***Write to your audience.***

Many appeals courts have an established or rotating motions panel that decides Rule 23(f) petitions. Research the identity of the circuit judges likely assigned to the panel and whether any recent trends exist in disposing of Rule 23(f) petitions.

And, while the relevant criteria for evaluating the appropriateness of granting a Rule 23(f) petition overlap among the appeals courts, as set forth above, there is nuance among the circuits. Write a Rule 23(f) petition directly to the guideposts established by the relevant circuit to speak in the reader's language.

#### ***Argue the merits of the 23(f) appeal.***

Some appeals courts will grant a Rule 23(f) petition and allow for additional briefing on the merits. Other courts, however, will combine the decisions of whether to grant the petition and whether to reverse the district court's decision.[9]

So, do not file a Rule 23(f) petition counting on arguing the merits in subsequent briefing. While space in a Rule 23(f) petition is precious, write to the merits of the appeal in the framework of the standard of review applicable on the merits, and favor framing issues in the least deferential standard possible.

### ***Include a hook.***

Explain to the appeals court why granting review offers the opportunity for clarification to the broader body of class action law within the circuit.

Such hooks include, to name a few:

- Whether Federal Rule of Evidence 702 applies in full to expert opinions relevant to the certification question;
- Whether fact evidence offered in support of class certification must be admissible;
- Whether a class should be certified where a classwide trial would be unworkable;
- The impact of the absent class members' lack of standing and/or injury on the certification question; and
- The extent to which issues classes are permissible, particularly those that seek to sever the liability determination.

These issues and others come routinely before the district courts, where the binding circuit precedent can be murky, at best.

### ***Develop the record before the district court.***

Spot potential issues for appeal throughout the class certification stage, including before discovery has begun.

Briefing, arguing and developing the record for class certification before the district court with an eye toward potential appellate issues from the outset can bolster class certification defense strategy by ensuring that a well-developed record with the factual underpinnings for an appeal is developed and presented to the district court at the certification stage.

### ***Position for district court stay as needed.***

Rule 23(f) provides that proceedings before the district court are not automatically stayed by virtue of a Rule 23(f) petition. Consider negotiating a stipulated stay of the district court proceedings to allow the parties and the court to focus resources on the appeal.

If an agreed-upon stay cannot be reached, our experience is that an appellate court is likely to defer to the district court's discretion in managing its docket, absent exceptional

circumstances — such as an onerous cost and scope of discovery or an impending trial pending the appeal — so crafting the petition to support an interim stay pending its resolution should be considered.

### ***The odds of a successful Rule 23(f) petition and time frame for a ruling.***

While it can be difficult to collect reliable data on Rule 23(f) petitions, a 2022 law review article called "An Empirical Study of Class-Action Appeals" provided an empirical evaluation.[10]

The article found that approximately 25% of Rule 23(f) petitions were granted from 2013 to 2017, with defendants' petitions being slightly more likely — 21% to 27% — to be granted than those of plaintiffs.[11]

The U.S. Court of Appeals for the D.C. Circuit was the least likely to grant a Rule 23(f) petition, granting only 14% — but receiving only seven applications total — while the U.S. Court of Appeals for the Fifth Circuit was the most likely to grant review, allowing 50% of appeals on 26 petitions.[12]

A granted Rule 23(f) petition does not necessarily mean the appeals court will reverse the district court's class certification order. On average, the appeals courts reversed the district court approximately 54% of the time a Rule 23(f) petition was granted, with the reversal rate being roughly even between Rule 23(f) petitions filed by plaintiffs and defendants.[13]

The U.S. Courts of Appeals for the First, Fifth and Sixth Circuits were the least likely over the studied period to reverse the district court, doing so in only 33% of the permitted Rule 23(f) appeals, while the Fourth Circuit reversed the district court in all seven of the Rule 23(f) appeals that it allowed.[14]

In terms of time to decision, the vast majority of Rule 23(f) petitions — 94% — were decided within 150 days of the filing of the petition.[15]

But appeals courts take considerably longer to rule on the merits if a Rule 23(f) petition is granted: Only 38% of Rule 23(f) appeals studied were decided within 360 days of the petition being granted, with the average appeal taking more than 16 months for a decision after the petition is granted.[16]

### **Takeaways**

Defendants facing a certified class have a short time to request permission to appeal, and successfully appealing a class certification order can come with long odds and an even longer time to decision.

Appeals courts remain receptive, however, to Rule 23(f) petitions that present the opportunity to develop the broader class action jurisprudence within the jurisdiction, and to weigh in on the trending areas of class action law that are consistently evolving.

Further, even though a Rule 23(f) petition will likely pick up on many of the themes of the class certification opposition as filed before the district court, a Rule 23(f) petition is presented to a different audience for a different purpose than an opposition to class certification.

Among other things, the petition must do more than argue that the certification was wrong;

it must demonstrate that an immediate appeal is appropriate or even necessary.

To best position for success, class action defendants should identify potential issues for appeal and develop the applicable framework and record below to support a petition if certification is granted, or to demonstrate that the denial of certification was well within the district court's discretion.

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[1] Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment.

[2] *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293–94 (1st Cir. 2000); *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 76 (2d Cir. 2004); *Laudato v. EQT Corp.*, 23 F.4th 256, 259–60 (3d Cir. 2022); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001); *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007); *In re Delta Air Lines*, 310 F.3d 953, 959–60 (6th Cir. 2002); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915–16 (7th Cir. 2011); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *Vallario v. Vandehey*, 554 F.3d 1259, 1263–64 (10th Cir. 2009); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274–77 (11th Cir. 2000); *Harris v. Med. Transp. Mgmt., Inc.*, 77 F.4th 746, 755–56 (D.C. Cir. 2023).

[3] See *Laudato*, 23 F.4th at 259–60; *Lienhart*, 255 F.3d at 144; *In re Delta Air Lines*, 310 F.3d at 959–60; *Chamberlan*, 402 F.3d at 959; *Vallario*, 554 F.3d at 1263–64; *Bush*, 221 F.3d at 1274–77; *Harris*, 77 F.4th at 755–56.

[4] See, e.g., *Ahmad v. Old Republic Nat'l Title Ins. Co.*, 690 F.3d 698, 703–04 (5th Cir. 2012).

[5] See, e.g., *Lienhart*, 255 F.3d at 144; *In re Delta Air Lines*, 310 F.3d at 959–60; *Bush*, 221 F.3d at 1274–77.

[6] *Bush*, 221 F.3d at 1276.

[7] *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 715 (2019).

[8] See, e.g., *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1190 n.1 (10th Cir. 2006).

[9] See, e.g., *CE Design Ltd. v. King Arch. Metals, Inc.*, 637 F.3d 721 (7th Cir. 2011).

[10] Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. App. Prac. & Process 283 (2022).

[11] Id. at 307.

[12] Id. at 320.

[13] Id. at 309.

[14] Id. at 323.

[15] Id. at 316.

[16] Id. at 317–18.