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Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)

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DECIDING TO DECIDE: CLASS ACTION CERTIFICATION AND INTERLOCUTORY REVIEW BY THE UNITED STATES COURTS OF APPEALS UNDER RULE 23(f)

MICHAEL E. SOLIMINE*
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With regard to the title, we are in debt to H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

We are deeply appreciative of the perceptive and helpful comments by Thomas Baker, Graeme Dinwoodie, Lonny Hoffman, Robert Martineau, Linda Mullenix, Tom Rowe and Pat Schiltz on an earlier draft of this Article and to the comments of the participants in the University of Cincinnati College of Law Summer Scholarship Series, where an earlier draft was presented. None of the above necessarily agrees with the views we express.

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INTRODUCTION

As the twentieth century comes to a close, class actions are hot. Whether reading academic journals or leafing through the lay press, one cannot avoid seeing some reference to a threatened or actual filing of a proposed class action lawsuit. The subjects of these suits range from the profound—against firearms, tobacco, or breast implant manufacturers, and Swiss banks and German employers for actions taken during World War II—to the amusing—against airlines for flight delays.¹ The United States Supreme Court has begun to pay increasing atten-

1. See, e.g., Paul M. Barrett, *Jumping the Gun? Attacks on Firearms Echo Earlier Assaults on Tobacco Industry*, WALL ST. J., Mar. 12, 1999, at A1 (describing class action litigation against firearms industry); Michael Higgins, *Thrown Out of the Game: Disgruntled Fans File Lawsuits But Get No Court Advantage*, A.B.A. J., June 1999, at 30 (reporting on a class action by persons who paid to watch a boxing match between Mike Tyson and Evander Holyfield, in which the former bit off part of the latter's ear); Matthew Leising, *Passenger Suits Rev on Runway*, NAT'L L.J., June 7, 1999, at A4 (describing class action by passengers on Northwest Airlines flight who were kept in a plane on the tarmac for six hours); Randy Lipsitz & Richard L. Moss, *Pre-2000 Y2K Class Actions Not Getting Far*, NAT'L L.J., May 17, 1999, at B5 (discussing class actions involving Y2K compliance issues); Frances A. McMorris, *Milberg Weiss Lawyer Focuses On Cases for Holocaust Survivors*, WALL ST. J., May 19, 1999, at B7 (discussing claims by Holocaust survivors and their families).

tion to the class action device,² and Congress has recently enacted,³ or is considering,⁴ several pieces of legislation that would regulate class actions. Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, has been considered for possible amendment.⁵ All of these developments, and more, have led to a daunting growth of scholarly discussion on class actions.⁶

2. See, e.g., *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999) (outlining conditions that a "limited fund" class action must meet under FED. R. CIV. P. 23(b)(1)(B)); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (holding that a class certified for settlement must still meet the prerequisites of FED. R. CIV. P. 23); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) (addressing circumstances under which a federal court must give preclusive effect to a state court judgment approving a class action settlement).

3. Y2K Act, Pub. L. No. 106-37, 113 Stat. 185 (1999) (placing various limits on class actions brought after January 1, 1999, with respect to Y2K failures); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified at 15 U.S.C. § 78a) (creating a uniform federal law and exclusive federal jurisdiction for certain types of securities fraud class actions); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.) (regulating various aspects of securities fraud litigation, including, but not limited to, class action suits).

4. See, e.g., Class Action Fairness Act of 1999, S. 353, 106th Cong. (curbing a variety of purported "abuses" of class actions by plaintiffs' lawyers); Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (making it easier to bring certain types of class actions in federal court or facilitate removal of such actions from state to federal court). See generally George F. Sanderson III, Note, *Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 315 (1999) (discussing proposed and enacted legislation).

5. See *infra* text accompanying notes 171-99.

6. David Shapiro has observed:

Small wonder then, that the significance of the class action, and its proper bounds, have become the topic du jour for academic and judicial conferences, for a whole range of law school courses, and for legal journals. Is there a law review out there somewhere—aside perhaps from such esoteric publications as the JAG Journal—that has managed to keep the pages unsullied by the controversies that the class action device has generated?

David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 914-16 (1998) (footnote omitted). In what is only a selected bibliography, he lists two books and forty-nine law review articles on class actions. See *id.* at 914 n.2. Contributions to the scholarly literature continue apace. See, e.g., LINDA S. MULLENIX, *CIVIL PROCEDURE: CLASS ACTION PRACTICE AND PROCEDURE* (1999); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 187; Mark C. Weber, *A Content-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. 1155 (1998) (arguing

This attention is not particularly surprising, for a class action is relatively anomalous even in the modern procedural developments of this century. A class action is a lawsuit brought in the name of individual class representatives on behalf of, or against, an entire group of individuals with common issues that make a collective lawsuit more efficient.⁷ As the Eighth Circuit famously noted five decades ago, the class action "was an invention in equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs."⁸ By allowing a case that has ramifications for a great number of people to be resolved in a single proceeding, the class action serves both the needs of justice and judicial economy.⁹ Plaintiffs, who otherwise would be denied their day in court, can find relief through a class action. Furthermore, defendants, who otherwise might face seemingly endless streams of litigation, can have their complete liability established in one proceeding. The class action is an increasingly popular and necessary tool in today's legal system, helping to address the claims of mass tort victims and to abrogate the injustices of civil rights violations.¹⁰ The class action, however, is not without its critics, and calls for changes in its structure abound.¹¹

that preclusive class actions should not be settled without the consent of all class members); Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328 (1999).

7. See CHARLES ALAN WRIGHT ET AL., 7A FEDERAL PRACTICE AND PROCEDURE § 1751, at 7-8 (2d ed. 1986) (defining class actions); see *id.* § 1754, at 49 (noting cost and convenience advantages of class actions).

8. *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948), quoted in 7A WRIGHT ET AL., *supra* note 7, § 1751, at 7. The equitable origins of the class action are addressed further in *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2308-09 (1999).

9. See 7A WRIGHT ET AL., *supra* note 7, § 1751, at 7-15 (noting the purposes for class action lawsuits).

10. See Jack B. Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833, 834 (1997).

11. See, e.g., Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461, 483-95 (1988) (proposing changes to Rule 23 to allow for greater use in the resolution of mass torts).

"In 1985, a Special Committee on Class Action Improvements of the American

At present, Rule 23 requires the trial court to certify, or approve of, the class before a case can proceed as a class action.¹² The rule contains various provisions that instruct the court on which factors to consider in its determination.¹³ The court's decision, which is made as early as possible in the litigation,¹⁴ can control the parties' litigation strategy for the balance of the case, as a practical matter.¹⁵ As a result, the certification orders of the trial court often are targeted for appeal by the parties adversely affected by them.¹⁶ Waiting until the end of the litigation, however, before contesting the court's decision on class certification, is often not a viable option.¹⁷ Unhappy litigants may want to pursue an immediate interlocutory appeal of the class certification decision.¹⁸

Until recently, parties seeking interlocutory relief have had few options.¹⁹ Due to the restraints of the final judgment rule, which permits appeal only at the end of the litigation, courts have not been very receptive to attempts to appeal interlocutory orders.²⁰ Moreover, the exceptions to the final judgment rule that do exist have stringent requirements that restrict their application to a limited set of circumstances.²¹ Thus, it has been extremely difficult for litigants to gain an immediate appeal of a

Bar Association's Section of Litigation" presented to the Civil Rules Advisory Committee a list of recommendations for revisions to Rule 23 that included "collapsing the three categories of class actions into one, expanding judicial discretion to modify the notice requirements, authorizing precertification rulings on motions to dismiss and motions for summary judgment, and permitting discretionary interlocutory appellate review of rulings on class certification." Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 80 (1996). None of the proposals went into effect (except, eventually, for the very last, the subject of this Article). Still more proposals to amend Rule 23 were advanced in the 1990s. See *id.* at 80-81.

12. See FED. R. CIV. P. 23. For a discussion of the mechanics of Rule 23, see *infra* text accompanying notes 29-60.

13. See FED. R. CIV. P. 23 (setting forth the requirements of class actions).

14. See *id.* 23(c)(1).

15. See MANUAL FOR COMPLEX LITIGATION, THIRD § 30.1 (1995).

16. See *infra* note 106 and accompanying text.

17. See *infra* notes 72-75 and accompanying text.

18. See *infra* notes 72-75 and accompanying text.

19. See *infra* text accompanying notes 72-170.

20. See *infra* notes 83-105 and accompanying text.

21. See *infra* notes 83-105 and accompanying text.

class certification order. In response to these constraints, the Advisory Committee on the Federal Rules of Civil Procedure, in 1996, proposed an amendment to Rule 23 that would provide litigants an additional means by which to seek an interlocutory appeal.²² The amendment, a new Rule 23(f), effective December 1, 1998, provides that:

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 it.²³

This provision has the potential to open broad new avenues of interlocutory review of class certification decisions in the federal courts. To date, Rule 23(f) has received little scholarly attention.²⁴ As of the writing of the present Article, only one circuit has rendered a published opinion discussing the application of the rule.²⁵ Indeed, the burgeoning literature on class actions has devoted relatively little discussion to the role of appellate courts in general and, in particular, to interlocutory review.²⁶ This Arti-

22. For a discussion of the legislative history of the amendment, see *infra* text accompanying notes 178-99.

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

24. See, e.g., RICHARD H. FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1655 (4th ed. 1996 & Supp. 1999) [hereinafter HART & WECHSLER] (discussing Rule 23(f) briefly); GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE, STATE AND FEDERAL 1399 (8th ed. 1999) (same); RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 385 (3d ed. 1998) (same); JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 696 (1998) (same); Samuel Estreicher, *Federal Class Actions After 30 Years*, 71 N.Y.U. L. REV. 1, 6-7 (1996) (same); R. Hewitt Pate, *Interlocutory Appeals*, LITIGATION, Winter 1999, at 42, 44 (same); Thomas D. Rowe, Jr., *Beyond the Class Action Rule: An Inventory of Statutory Possibilities to Improve the Federal Class Action*, 71 N.Y.U. L. REV. 186, 198 (1996) (same).

Most recently there has been some lengthier discussion of Rule 23(f). See ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 733-40 (2000); Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. APP. PRAC. & PROCESS 309 (1999), available in WESTLAW, JAPPR Database.

25. See *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999). This case is discussed in further detail below. See *infra* text accompanying notes 307-40.

26. See Amy Schmidt Jones, Note, *The Use of Mandamus to Vacate Mass Expo-*

cle aims to fill in some of the gap by addressing the appellate courts' new power to grant a discretionary appeal of class certification decisions. Under the new rule, appellate judges now must decide how to decide whether to hear such appeals. As the Eleventh Circuit suggested, in its discussion of the then proposed Rule 23(f), much will "depend in large part upon how [courts choose] to exercise the discretion granted" by the amendment.²⁷ This Article focuses on how Rule 23(f) came to be, and how United States Courts of Appeals should exercise the discretion granted to them in the rule.

Part I provides a brief overview of the prerequisites necessary to certify a class under Rule 23. Part I summarizes the reasons for the recent, heightened prominence of class action litigation, including its use in mass tort litigation, the concerns that entrepreneurial plaintiffs will take action to further their own interest, which at times will be adverse to those of the class, and the problems associated with concurrent or sequential class litigation in federal and state courts.

Part II addresses the availability of interlocutory review of trial court decisions on class certification motions before the adoption of Rule 23(f). This Part first addresses the final judgment rule and then considers exceptions to that rule. Part II explains that class certification decisions have been held not to be appealable final judgments, and usually have failed to meet any exception to the final judgment rule. One recent caveat to that generalization is the apparent receptivity of some courts of appeals to review such decisions through the writ of mandamus.²⁸ Part II explains that use of mandamus lacks sturdy jurisprudential roots and has not developed into a broadly available

sure *Tort Class Certification Orders*, 72 N.Y.U. L. REV. 232, 234-35 (1997). More recently there has been greater attention paid to the impact of the availability, or lack thereof, of interlocutory appeal of class certification orders. See, e.g., Burt Neuborne, *Innovation in the Interstices of the Final Judgment Rule: A Demurrer to Professor Burbank*, 97 COLUM. L. REV. 2091 (1997) (discussing interlocutory appeals); 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 (1997) (discussing the concept of mandamus in interlocutory appeals).

27. *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1390 n.35 (11th Cir.) (en banc), cert. denied, 525 U.S. 1019 (1998).

28. See Kruse, *supra* note 26, at 719-34 (providing a detailed discussion of the use and potential efficiency of the mandamus appeal).

exception. Indeed, the adoption of Rule 23(f) may prevent the expansion of mandamus in this regard.

Part III directly addresses Rule 23(f) by analyzing the development of the amendment in the 1990s, the intent of the amendment's framers, and how the rule compares to preexisting exceptions to interlocutory review. Finally, Part III proposes several criteria that the courts of appeals should consider in exercising their discretion under Rule 23(f). Part III concludes by applying these criteria to two prominent class action certification cases in which interlocutory appeal was a contested issue, and examining the first published opinion in which the court of appeals applied Rule 23(f).

I. CLASS ACTIONS AND FEDERAL RULE OF CIVIL PROCEDURE 23

A. *An Overview of Class Action Procedures*

Rule 23, as it stands today, is the result of amendments in 1966 that completely overhauled the original class action rule. The Advisory Committee, with Harvard Professor Benjamin Kaplan as the reporter,²⁹ noted several deficiencies in the original rule and sought to provide a more practical approach to determine when a class action should be maintained and to define the extent to which the suit could bind class members to the results.³⁰ The following discussion provides a brief survey of the requisite characteristics of a Rule 23 class action.

Rule 23(a) sets forth four prerequisites for class certification.³¹ First, the class must be "so numerous that joinder of all mem-

29. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356 (1967).

30. Class action practice before 1966 and the rationale for the amendment to Rule 23 in that year is thoroughly covered in the advisory committee notes to the amendment. See *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 71, 98-107 (1966); 7A WRIGHT ET AL., *supra* note 7, §§ 1751-54, at 7-58 (2d ed. 1986 & Supp. 1999).

31. See FED. R. CIV. P. 23(a). The rule provides that in order to proceed as a class action the following requirements must be satisfied:

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

Id.

bers [would be] impracticable.”³² This “numerosity” requirement focuses on the impracticability of proceeding with all members appearing as joined parties, as opposed to being represented by a class representative.³³ Impracticability is not equated with impossibility and this requirement is fulfilled if joinder would be inconvenient or extremely difficult.³⁴

Rule 23 requires that questions of law or fact exist that are common to all class members.³⁵ This “commonality” requirement does not necessitate that class member claims be identical.³⁶ Instead, this element is satisfied when there are “common elements of law or fact such that the class action would be an economical way of prosecuting and defending claims.”³⁷ The third prerequisite is closely related to the commonality requirement and requires that the class representative’s claims or defenses be typical of the class in general.³⁸ The inquiry here focuses solely on the representative party and not on the class as a whole, and this prerequisite is met when a “class representative [is] a part of the class and ‘possess[es] the same interest and suffer[s] the same injury’ as the class members.”³⁹

The last prerequisite likewise focuses on the class representative and requires that the representative will “fairly and adequately protect the interests of the class.”⁴⁰ The court must determine if the representative has common interests with the unnamed members of the class; specifically, the representative’s interests in the case cannot be antagonistic to the interests of the other class members.⁴¹ Likewise, the court must find that

32. *Id.* 23(a)(1).

33. *See* 7A WRIGHT ET AL., *supra* note 7, § 1762, at 150-96 (discussing the numerosity requirement).

34. *See id.* at 159.

35. *See* FED. R. CIV. P. 23(a)(2).

36. *See* 7A WRIGHT ET AL., *supra* note 7, § 1763, at 196-228 (2d ed. 1986 & Supp. 1999) (discussing the requirements of commonality).

37. *Walker v. Jim Dandy Co.*, 638 F.2d 1330, 1336 (5th Cir. 1981).

38. *See* FED. R. CIV. P. 23(a)(3).

39. *East Tex. Motor Freight v. Rodriguez*, 431 U.S. 395, 403 (1976) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)); *see* 7A WRIGHT ET AL., *supra* note 7, § 1764, at 232 (discussing the requirements of the class representative).

40. FED. R. CIV. P. 23(a)(4).

41. *See* 7A WRIGHT ET AL., *supra* note 7 § 1768, at 326-66 (noting the require-

the representative will prosecute vigorously the interests of the class through qualified counsel.⁴² The latter factor requires the court to examine the competence and quality of the attorney representing the class.⁴³

Once all four elements of 23(a) are met, the class must still fit into one of the three enumerated categories in 23(b).⁴⁴ The first category, 23(b)(1), was designed to prevent any potentially harmful consequences, to either the defendant or the absent class members, that likely would arise in the event each individual class member had to maintain a separate action.⁴⁵ Two clauses

ments of the class representative).

42. See *id.* § 1769, at 366-74 (discussing the importance of qualified counsel).

43. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); 7A WRIGHT ET AL., *supra* note 7, §§ 1765-69, at 262-374.

44. Rule 23(b) reads:

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on the grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b).

45. See 7A WRIGHT ET AL., *supra* note 7, § 1772, at 421; see also *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 71, 100 (1966) ("The difficulties which would be likely to arise if resort were

under 23(b)(1) address this issue more specifically. A class can be maintained under 23(b)(1)(A) when final dispositions in individual actions could impose "incompatible standards of conduct" upon the party opposing the class.⁴⁶ On the other hand, a 23(b)(1)(B) class is appropriate when a judgment in an individual adjudication would practically, though not legally, eliminate or substantially impair the interests of absent class members.⁴⁷ A class under subdivision 23(b)(2) is appropriate when the defendant has acted, or has refused to act, on grounds applicable to the entire class and declaratory or injunctive relief is sought.⁴⁸ In order to proceed under this category, the relief sought must be predominantly equitable and cannot relate primarily to money damages.⁴⁹

The final subdivision, 23(b)(3), permits a class action to proceed in those cases in which "class-action treatment is not as clearly called for as" in 23(b)(1) and 23(b)(2), but is "nevertheless . . . convenient and desirable," and appropriate for "those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision."⁵⁰ Subdivision 23(b)(3) is broad in nature and in its flexible association among members. Accordingly, for a class to qualify under this

had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device.").

46. FED. R. CIV. P. 23(b)(1)(A). In this scenario, the drafters anticipated a situation in which a defendant was ordered to take a particular action in one case and then ordered not to do that very action in a subsequent case. Proceeding as a class action would eliminate this risk. See *Proposed Amendments*, 39 F.R.D. at 100; see also *Amchem Prods.*, 521 U.S. at 614 (describing the parties' requirement under Rule 23(b) to maintain an action).

47. See FED. R. CIV. P. 23(b)(1)(B). The most common example of this scenario is when all members seek to recover from a "limited fund" that is insufficient to cover all of their claims. If one class member should recover in an individual suit, it would prevent the other members from any recovery. See *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2300 (1999); *Amchem Prods.*, 521 U.S. at 614; *Proposed Amendments*, 39 F.R.D. at 101.

48. See *Amchem Prod.*, 521 U.S. at 614.

49. See 7A WRIGHT ET AL., *supra* note 7, §§ 1775-76, at 447-516 (2d ed. 1986 & Supp. 1999). For a recent discussion of the problem of plaintiffs seeking monetary relief in (b)(2) class actions, see *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894 (7th Cir. 1999) (Easterbrook, J.).

50. *Advisory Committee Notes to the Amendment*, 39 F.R.D. 69, 102-03 (1966).

subdivision, it must meet two additional requirements beyond those found in 23(a). First, the questions of law or fact that are common to the entire class must "predominate" over those that would require individual treatment. Second, proceeding as a class action must be "superior" to any other method of resolving the dispute fairly and efficiently.⁵¹ Further, this subdivision provides a nonexhaustive list of factors to aid a court in its determination of the predominance and superiority requirements.⁵²

Because class membership in a (b)(3) class is often fairly broad, the drafters added other provisions, found in 23(c)(2), to protect the interests of the individual members to litigate on their own. First, the rule imposes a procedural requirement on the district court once the class has been certified.⁵³ It instructs the court to provide notice of the class action to the absent class members by the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."⁵⁴ Along with this special notice provision, 23(c)(2) provides individual class members the right to opt out of the class by giving notice to the court.⁵⁵ If the members do not exercise this right, they will be bound by the outcome of the litigation.⁵⁶

Rule 23(c)(1) instructs that the decision to certify a class should be made "[a]s soon as practicable after the commence-

51. See FED. R. CIV. P. 23(b)(3); *Amchem Prods.*, 521 U.S. at 615.

52. For an extensive discussion of the requirements of Rule 23(b)(3), see *Amchem Prods.*, 521 U.S. at 615-17, 622-25.

53. See FED. R. CIV. P. 23(c)(2).

54. *Id.* This language was derived from Justice Jackson's opinion in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20 (1950), and addresses the concerns of the drafters that the individual interests of the class members to litigate their own case should be respected. See *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 71, 104-05 (1966). In a 23(b)(3) class:

[T]he interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. . . .

[T]hus, the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.

Id. Rule 23(d)(2) also provides that a court may order notice to members in a (b)(1) or (b)(2) class. See FED. R. CIV. P. 23(d)(2).

55. See FED. R. CIV. P. 23(c)(2)(A); *Amchem Prods.*, 521 U.S. at 617.

56. See FED. R. CIV. P. 23(c)(2)(B); *Amchem Prods.*, 521 U.S. at 614-15.

ment” of the case; however, it also provides that the court is not bound by its original determination and allows the order to “be altered or amended before the decision on the merits.”⁵⁷ Finally, Rule 23(e) provides that class actions can be “compromised” or settled only with the approval of the trial court.⁵⁸ Class actions certified only for settlement purposes have become a “stock device,”⁵⁹ and the Supreme Court has held that those actions like all others must satisfy the requirements of 23(a) and (b).⁶⁰

B. The Heightened Controversies over Class Actions

As noted above, the prominence of class actions in American civil litigation has greatly increased in the late 1990s.⁶¹ Although reliable statistics are difficult to come by,⁶² it appears that parties—mainly plaintiffs—are increasingly seeking to certify such classes. More than that, the class action device has garnered much attention and a good bit of controversy over the same period.⁶³ We will not stop to survey those developments

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

58. *See id.* 23(e). As the Supreme Court has stated, this “terse final provision” is not elaborated upon by the advisory committee notes. *Amchem Prods.*, 521 U.S. at 617. In that case, the Court had no occasion to directly address the standards that should inform Rule 23(e). *See id.* at 622. For a discussion of the efforts of lower courts to develop criteria to evaluate proposed settlements, see 7B WRIGHT ET AL., *supra* note 7, § 1797.1, at 378-416 (2d ed. 1986 & 1999 Supp.).

59. *Amchem Prods.*, 521 U.S. at 618.

60. *See id.* at 619-22.

61. *See supra* note 1 and accompanying text.

62. The Annual Report of the Administrative Office of the United States Courts does not list specific data on the number of class action cases as such; that is, the numbers of motions to certify class actions or the disposition of such motions by district courts. One leading empirical study of class actions studied the filing and disposition of such motions over a two-year period in four federal district courts. *See Willging et al.*, *supra* note 11.

Other sources of data do suggest that more class action suits are being filed. *See* DEBORAH HENSLER ET AL., PRELIMINARY RESULTS OF THE RAND STUDY OF CLASS ACTION LITIGATION 15 (1997) [hereinafter RAND STUDY] (discussing interviews with attorneys on both the plaintiff and defense sides of class actions that showed “with few exceptions . . . class action activity had grown dramatically over the past 2-3 years”); The Federalist Soc’y, *Class Action Watch* (visited Mar. 28, 2000) <<http://fed-soc.org/classwatchv101.htm>> [hereinafter *Class Action Watch*] (showing a considerable rise in the number of putative class actions filed in federal and state courts from 1988 to 1998, based on a survey of attorneys).

63. Even a summary of the recent scholarly literature criticizing class actions

extensively. Rather, we pause only to highlight some of the issues that, as developed below, are pertinent to the use of Rule 23(f).

One development is the use of class actions in mass tort cases. Although old hat now, though still somewhat controversial, this result was not preordained. Indeed, almost two decades after the 1966 amendment, many courts refused to certify a class of plaintiffs from a mass disaster, or in the less dramatic context of a product used by many people in different locations over different time periods.⁶⁴ Only in the late 1980s did class certification in such situations become more commonplace.⁶⁵ Even now, some courts frown upon such class actions, and their certification is by no means routine.⁶⁶

would fill many pages. For an extensive bibliography of such literature, see Shapiro, *supra* note 6, at 914 n.2. For a more recent survey of commentators praising or decrying class actions, see Weber, *supra* note 6, at 1159-60 nn.17-22. For an excellent survey of the history of Rule 23 and of recent developments, see Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201 (1999). Considerable attention is being paid to class actions in nonscholarly literature as well. See, e.g., MAX BOOT, OUT OF ORDER 168-75 (1998) (criticizing judges who certify class actions that serve mainly the interests of plaintiffs' attorneys).

64. The advisory committee note to the 1966 Amendment famously warned that "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action," and "would degenerate in practice into multiple lawsuits separately tried." *Advisory Committee Notes to the Amendment*, 39 F.R.D. 69, 103 (1966). Some courts, reflecting these concerns, refused to certify classes in mass tort litigation. See, e.g., *In re Northern Dist., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982).

65. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344-45 (1995); R. Joseph Barton, Note, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199, 206-08 (1999) (outlining the approaches taken by courts in certifying mass tort cases).

66. By the mid-1980s courts began to squarely reject the framers' intent of Rule 23 and found that mass tort cases could satisfy the rule's criteria. See, e.g., *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989); *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986). Some recent cases, however, most notably Judge Posner's opinion in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995), have argued that federal courts in fact have been less hospitable to the certification of mass tort class actions. For discussion, see KLONOFF & BILICH, *supra* note 24, at 756-836; LINDA MULLENIX, MASS TORT LITIGATION 104-228 (1997). The federal judiciary continues to study the matter. See, e.g., *Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States*, 187 F.R.D. 293 (1999).

A second development, closely related to the first, is the apparently increasing frequency of class action settlements. Sometimes prospective plaintiffs and defendants negotiate settlements and present them to the court for its approval via a joint motion to certify.⁶⁷ This highlights the crucial role counsel plays in such discussions. In many instances, it appears, counsel seeking to represent a proposed plaintiffs' class becomes an entrepreneur, whose interests might differ from those of her nominal client. As the lawyer's fees in such cases are awarded by the court,⁶⁸ plaintiffs' counsel often has economic incentives to settle early—even if the settlement is significantly less than what might be expected if counsel pursued the case more vigorously. Noticeable examples of this problem are the settlements in which plaintiffs' counsel receive handsome compensation, with the class itself receiving no cash award, but only coupons or other nonmonetary relief.⁶⁹

A final development has been interjurisdictional problems raised by simultaneous class litigation in federal and state courts. A state court, using its own version of Rule 23,⁷⁰ may

67. Justice Ginsburg has observed that large numbers of class action cases settle. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997). For evidence that many such settlements are proposed simultaneously with, or shortly after, class certification, see Willging et al., *supra* note 11, at 143-44.

68. See generally Willging et al., *supra* note 11, at 153-65 (discussing the relationship between fee recovery and class action outcomes).

69. The seminal work on these issues is by John Coffee. See, e.g., Coffee, *supra* note 65; John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987). For more recent discussions of this issue, see Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167 (1997); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998). See generally MARCUS & SHERMAN, *supra* note 24, at 219; MULLENIX, *supra* note 66, at 260-61.

70. For a discussion of class actions in state courts, see Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755 (1995); Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215 (1994). See generally KLONOFF & BLICH, *supra* note 24, at 439; TIDMARSH & TRANGSRUD, *supra* note 24, at 698-701.

enter a judgment approving a class action settlement. A question then arises as to what extent should or must a federal court, when faced with a later class action suit, give the earlier state court judgment preclusive effect under the Full Faith and Credit Clause? Under what circumstances, if at all, should the state court decision be subject to collateral attack in federal court? Should it matter if the federal suit is based on claims that are within the exclusive jurisdiction of the federal courts? To what extent do, or should, litigants and their counsel shop for a favorable forum to certify a class?⁷¹ Answers to these questions will depend in part on how courts and policymakers confront the other developments.

II. APPEALS

Because class certification is judicially determined in the early stages of the case, it has a huge impact on the subsequent course of the litigation.⁷² For plaintiffs, a denial can very well signal the practical end of their claims, as it may not be economically feasible to litigate their individual claims separately.⁷³ Likewise, for defendants, a grant of certification might be an irresistible catalyst to settle the case.⁷⁴ Not surprisingly, the

71. In *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), the Supreme Court held that, under the Full Faith and Credit Act, 28 U.S.C. § 1738 (1994), federal courts generally must give preclusive effect to a judgment from a state court approving a class action settlement—even to claims within the exclusive jurisdiction of federal courts—at least to the same extent as would the courts of the rendering state. See *Matsushita*, 516 U.S. at 386-87. For discussion of *Matsushita* and other issues raised in the text, see Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219; Mollie A. Murphy, *The Intersystem Class Settlement: Of Comity, Consent, and Collusion*, 47 U. KAN. L. REV. 413 (1999). For the latest installment in the *Matsushita* litigation, see *Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.), cert. denied, 120 S. Ct. 497 (1999).

72. The *Manual for Complex Litigation*, Third states:

Whether a class is certified and how its membership is defined can often have a decisive effect not only on the outcome of the litigation but also on its management. It determines the stakes, the structure of trial and methods of proof, the scope and timing of discovery and motion practice, and the length and cost of the litigation.

MANUAL FOR COMPLEX LITIGATION, THIRD, *supra* note 15, § 30.1, at 212.

73. A denial of class certification in this instance is commonly referred to as the "death knell" of the case. See *infra* text accompanying notes 111-16.

74. This notion that defendants would rather settle large class actions than face

party dissatisfied with the certification determination often will want to challenge the decision immediately, leading to questions concerning the appealability of a certification order.⁷⁵ This Part outlines the various rules and doctrines that govern the appeals process in general, and then examines how each of these relate to the appeal of class certification grants or denials.

A. Appeals in General

1. Final Judgment Rule

Section 1291 of the Judicial Code limits the jurisdiction of the federal circuit courts to “appeals from all final decisions of the district courts.”⁷⁶ A final judgment is traditionally defined to be a decision by the district court that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”⁷⁷ Several rationales are advanced to support this long standing principle of American jurisprudence.⁷⁸ The primary impetus behind the final judgment rule is the promotion of judicial efficiency.⁷⁹ Limiting appeals until there has been a final decision on the case “prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of

the risk, even if it be small, of crushing liability from an adverse judgment on the merits is widely recognized. *See, e.g., Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, J.). Some opponents of the class action rule have even described it as “a form of ‘legalized blackmail’ . . . due to the fact that the sheer costs of defending against class actions create nontrivial settlement values irrespective of the underlying merits of the claims.” Estreicher, *supra* note 24, at 2 (quoting Milton Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971)); *see also* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979) (discussing negative and positive aspects of class action practice).

75. *See infra* notes 83-105 and accompanying text.

76. 28 U.S.C. § 1291 (1994).

77. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

78. Justice Frankfurter, writing for a unanimous Court in *Cobbledick v. United States*, 309 U.S. 323 (1940), noted that “[f]inality as a condition of review is an [sic] 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.” *Id.* at 324-25.

79. *See id.* at 325.

what is, in practical consequence, but a single controversy."⁸⁰ The filing of many such appeals could cause considerable disruption to the conduct of the trial proceedings, and flood appellate courts with additional work. Likewise, this rule discourages parties from employing the delay tactics of filing repetitive interlocutory appeals throughout the trial that are aimed at harassing their opponents and, in some instances, trying to force them into settlement.⁸¹ Furthermore, a party who wants to challenge a court's ruling may emerge from the case victorious, thus eliminating the need to appeal. Balanced against these considerations is the error correction function of the court of appeals. Trial judges may err in making rulings at various points in the litigation process, not simply in entering a final judgment.⁸²

Strict adherence to any rule can result in an undue hardship for particular litigants. This, in turn, pressures judges and policymakers to fashion exceptions to the rule. This is no less true for the final judgment rule. This Article briefly surveys some of those exceptions.

2. *Exceptions to the Final Judgment Rule*

The first major qualification to the final judgment rule is the collateral order doctrine. This doctrine was expressed first in *Cohen v. Beneficial Industrial Loan Corp.*,⁸³ a shareholder derivative suit brought in the United States District Court of New Jersey under diversity jurisdiction. There, the defendant sought appeal of the district judge's refusal to enforce a New Jersey state law that required plaintiffs holding less than five percent of a company's total stock to post a security bond as a prerequisite to bringing a derivative action.⁸⁴ Although the trial court's

80. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

81. See *Cunningham v. Hamilton County*, 119 S. Ct. 1915, 1919-20 (1999); Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 726-29 (1993); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 104-05 (1975).

82. See Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 420 & n.78 (1995).

83. 337 U.S. 541 (1949).

84. See *id.* at 544-45.

decision did not fall within the standard definition of "final" for purposes of § 1291, the Supreme Court allowed the appeal, finding that

[t]his decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.⁸⁵

Applying this test in *Cohen*, the Supreme Court found that the district court's decision was a final disposition of a claimed right that was wholly collateral to the merits of the case and effectively unreviewable upon a later appeal because the rights conferred by the statute could be lost by that time.⁸⁶

Subsequently, the Court reformulated the *Cohen* formula into a three-part test: The trial court's order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."⁸⁷

The collateral order doctrine has had a tortured history. Although it was touted initially in *Cohen* as being derived from a "practical rather than a technical construction" of § 1291,⁸⁸ later commentators have questioned whether the doctrine was a legitimate interpretation of the narrow statutory language.⁸⁹ Eventually the Court settled the argument by linking the doctrine to an interpretation of § 1291.⁹⁰ At the same time, the Court has shown fidelity to the virtues of the final judgment rule by only rarely finding that the doctrine's criteria are met.⁹¹

85. *Id.* at 546.

86. *See id.*

87. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This formula has been quoted or closely paraphrased in subsequent cases. *See, e.g.,* *Cunningham v. Hamilton County*, 119 S. Ct. 1915, 1920 (1999); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). The second part of the test telescopes two distinct aspects—importance and separability. Hence, the three-part test might better be described in four parts.

88. *Cohen*, 337 U.S. at 546.

89. *See, e.g.,* *Redish*, *supra* note 81, at 125-26.

90. *See Digital Equip.*, 511 U.S. at 867.

91. The Court has taken care to emphasize that only a "small class" of decisions

Two statutory exceptions to the final judgment rule are relevant to the purposes of this Article. One is the Interlocutory Appeals Act of 1958,⁹² codified in § 1292(b),⁹³ that creates a procedure by which a district court may facilitate an interlocutory appeal of an otherwise nonappealable order to a circuit court. To be able to use this mechanism, the district judge must certify in writing the following: (1) that the order involves a controlling question of law, (2) that there is substantial ground for a difference of opinion on the question, and (3) that an immediate appeal would materially advance the termination of the litigation.⁹⁴ The court of appeals that has jurisdiction over the appeal then has the discretion to decide whether to hear it.

Although the provision is aimed at mitigating some of the harshness of the final judgment rule and expediting the termination of litigation,⁹⁵ application of § 1292(b) has been quite limited.⁹⁶ This is due in part to a general reluctance to expand

[are] excepted from the final-judgment rule by *Cohen*," *Coopers & Lybrand*, 437 U.S. at 468, that the doctrine is a "narrow" exception [that] should stay that way and never be allowed to swallow the general rule," *Digital Equip.*, 511 U.S. at 868, and that only "a small category of orders" satisfy the criteria, *Cunningham*, 119 S. Ct. at 1920. For a discussion of the Court's collateral order jurisprudence, see Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 *DRAKE L. REV.* 539 (1998); Martineau, *supra* note 81, at 739-43.

92. Pub. L. No. 85-919, 72 Stat. 1770 (1958).

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

28 U.S.C. § 1292(b) (1994).

94. See 16 *WRIGHT ET AL.*, *supra* note 7, § 3930, at 415 (2d ed. 1996) (quoting 28 U.S.C. § 1292(b) (1994)).

95. See H.R. REP. NO. 85-1667, at 1 (1958). The purpose of § 1292(b) was "to expedite the ultimate termination of litigation and thereby save unnecessary expense and delay" by allowing appeal of certain nonfinal orders. *Id.*

96. See Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal*

exceptions to the final judgment rule and in part to conflicting judicial interpretations regarding the three requirements.⁹⁷ Moreover, § 1292(b) is restrained severely by its dual certification requirement. The decision to certify is wholly within the discretion of both the district and the appellate courts, respectively, and neither has historically entertained § 1292(b) applications with much enthusiasm.⁹⁸ The Supreme Court has even noted that a court of appeals can deny such an appeal for any reason, including a congested docket.⁹⁹ Also contributing to the infrequent use of § 1292(b) is the narrow interpretation that some courts have adopted of the overall statute, requiring that appeals sought under § 1292(b) should be granted only in "big, exceptional" cases.¹⁰⁰ Courts that adhere to this interpretation point to legislative history that suggests this statute was intended to help the expedition of complex cases that were scheduled to be in trial for months—although courts that reject it do so because no specific language exists in the statute that purports to require such a limitation.¹⁰¹ Nevertheless, the "big case" interpretation has permeated § 1292(b) case law and still continues to have a winnowing influence.¹⁰²

Another statutory exception is the writ of mandamus, derived from the All Writs Act.¹⁰³ The case law interpreting the Act requires that it be used for interlocutory review in only the most "extraordinary" of situations—when the district judge has clearly

Courts, 58 GEO. WASH. L. REV. 1165, 1167 (1990).

97. See *id.* ("Despite the [Supreme] Court's frequent reference to section 1292(b), commentators generally discount its effectiveness as a safety valve for interlocutory appeals, since it has been historically utilized infrequently."). For a discussion of the varying judicial interpretations of the § 1292(b) requirements, see *id.* at 1172-73; 16 WRIGHT ET AL., *supra* note 7, § 3930, at 415-42.

98. See Solimine, *supra* note 96, at 1174.

99. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). Data indicate that during the 1980s the courts of appeals accepted only about 35% of the appeals that the district courts initially certified. See Solimine, *supra* note 96, at 1174.

100. Solimine, *supra* note 96, at 1193.

101. See *id.* at 1193-96 (arguing that utilizing the plain meaning doctrine of statutory interpretation provides no support for the big case limitation).

102. See 16 WRIGHT ET AL., *supra* note 7, § 3929, at 365-69 (2d ed. 1996 & Supp. 1999).

103. 28 U.S.C. § 1651(a) (1994) ("[T]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

violated her authority, and when no alternative avenue of relief exists.¹⁰⁴ As is stated frequently, however, the writ is no substitute for an appeal.¹⁰⁵

B. Appeals in Class Actions

Given the potential significance of an adverse class certification decision by a district judge, litigants have long sought to appeal such orders immediately. Two strategies have been employed. One is to argue that the final judgment rule is satisfied because the order is, as a practical matter in at least some cases, a de facto final resolution of the case. The other strategy utilizes an exception to the final judgment rule. Both avenues are discussed below.¹⁰⁶

1. The Death Knell as a Final Judgment

The seminal case regarding all of these matters is the Supreme Court's 1978 decision in *Coopers & Lybrand v. Livesay*.¹⁰⁷ In this case, the plaintiffs filed a class action securities fraud claim against Coopers & Lybrand and other defendants for misrepresentations in an annual prospectus.¹⁰⁸ The district court originally certified the class and then, after further proceedings, decertified the class.¹⁰⁹ The plaintiffs filed a notice of appeal under § 1291 and the Eighth Circuit agreed to hear the appeal, concluding that it had jurisdiction based on the death knell doctrine.¹¹⁰ On appeal to the Supreme Court, the plaintiffs argued

104. The standard source for these restrictive pronouncements is *Will v. United States*, 389 U.S. 90, 95-97 (1967). For comprehensive discussions of the writ, see Martineau, *supra* note 81, at 746-47; Kruse, *supra* note 26, at 718-21; see also 16 WRIGHT ET AL., *supra* note 7, §§ 3932-3936, at 469-651.

105. See *Will*, 389 U.S. at 97. See generally 16 WRIGHT ET AL., *supra* note 7, § 3932.1 (discussing in detail why a writ is not a substitute for appeal).

106. For general discussions of appeals of class action decisions, see KLONOFF & BILICH, *supra* note 24, at 715-51; MARCUS & SHERMAN, *supra* note 24, at 382-85; 7B WRIGHT ET AL., *supra* note 7, § 1802, at 462-89 (2d ed. 1986 & Supp. 1999).

107. 437 U.S. 463 (1978).

108. See *id.* at 465-66.

109. See *id.* at 466.

110. The Eighth Circuit looked at the amount of the plaintiffs' claims in relation to their financial resources, along with the probable cost of litigation, and found that the individual class members could not pursue their claims separately. See *id.* at

that the death knell doctrine permitted an interlocutory appeal of the decertification order.

This doctrine had long presented the courts of appeals with various problems in its application. In particular, it proved extremely difficult to develop a pragmatic test to determine whether an order denying class certification effectively ended, and hence served as the "death knell" of the litigation.¹¹¹ The key components to any test applying this doctrine were the economic and financial status of the individual plaintiffs and the size of their individual claims.¹¹² The core principle of the death knell doctrine was that if the plaintiffs had sufficient resources, or if their claims were large enough to litigate separately, the appeal would be denied.¹¹³ Thus, it was necessary for the trial courts to develop a sufficient record on these issues for the appellate court to consider.¹¹⁴ The courts, however, failed to create any precise test when using these factors to determine when an appeal was justified.¹¹⁵ Moreover, the necessity of such an extensive inquiry at the appellate level into the nature of the plaintiffs' claims and financial dispositions raised questions regarding the extent to which the trial court needed to hold hearings and make findings pertaining to these issues.¹¹⁶

Cognizant of the difficulties presented by this doctrine, the Court in *Coopers & Lybrand* held the death knell doctrine was an improper interpretation of the final judgment rule.¹¹⁷ The Court held that an appeal from a court's class certification denial, based on an appellate court's perception of the impact the order would have on an individual plaintiff's claim, would be contrary to the legislative intent underlying the final judgment rule.¹¹⁸ The Court was particularly concerned with the propriety of each

466-67 (referring to *Livesay v. Punta Gorda Isles, Inc.*, 550 F.2d 1106, 1109-10 (8th Cir. 1977), *rev'd sub. nom. Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978)).

111. See 7B WRIGHT ET AL., *supra* note 7, § 1802, at 468 (2d ed. 1986 & Supp. 1999).

112. See *id.*

113. See *id.* at 467.

114. See *id.* at 468.

115. See *id.*

116. See *id.* at 468 & n.20.

117. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978).

118. See *id.* at 471.

of the competing analyses that the courts of appeals that had adopted the doctrine had been using in making their determinations.¹¹⁹ The first analysis compared "the claims of the named plaintiff with an arbitrarily selected jurisdictional amount," and the second analysis required the court to undertake a "thorough study of the possible impact of the class order on the fate of the litigation."¹²⁰ The Court found that stating an amount-in-controversy rule was an inherently legislative, not judicial, function and that requiring an appellate court to conduct a thorough examination of the record to determine jurisdiction could result in a waste of judicial resources.¹²¹ The Court reasoned that allowing appeals from nonfinal orders that turned on the facts of a particular case would force the appellate courts into the trial processes, thus defeating a crucial purpose of the finality requirement: "that of maintaining the appropriate relationship between the respective courts."¹²²

The Court, however, identified the "principal vice" of the death knell doctrine to be its allowance of indiscriminate interlocutory appeals, reasoning that it was contrary to the mandate of the Interlocutory Appeals Act of 1958, which carefully limits the availability of such review.¹²³ As discussed above, the Interlocutory Appeals Act provides for immediate review of certain nonfinal orders.¹²⁴ The Court noted, however, that its dual certification process, requiring both the trial and the appellate court to permit the appeal, serves to confine this procedure to appropriate cases and to avoid "time-consuming jurisdictional determinations in the court of appeals."¹²⁵ The gloss of the death knell doctrine on the final judgment rule provided plaintiffs with a means by which they could circumvent the stringent requirements of § 1292(b), which clearly contradicted the legislative intent of limiting interlocutory appeals.¹²⁶

119. *See id.*

120. *Id.* at 472.

121. *See id.* at 472-73.

122. *Id.* at 476 (quoting *Parkinson v. April Indus.*, 520 F.2d 650, 654 (2d Cir. 1975)).

123. *See id.* at 474.

124. *See supra* notes 92-94 and accompanying text.

125. *Coopers & Lybrand*, 437 U.S. at 474-75.

126. For general discussions of *Coopers & Lybrand*, see 7B WRIGHT ET AL., *supra*

2. *The Collateral Order Exception*

The plaintiffs in *Coopers & Lybrand* also argued, in the alternative, that interlocutory review of the denial of class certification was available under the collateral order doctrine.¹²⁷ The Court gave short shrift to this argument, however, finding that none of the criteria for satisfying that doctrine had been met.¹²⁸ In three terse sentences, the Court held that a class certification decision was not conclusive because it was subject to revision, that class determination is enmeshed in the factual and legal issues that compose the plaintiffs' cause of action, and that a denial of class certification was appealable after final judgment by the plaintiff or intervening class members.¹²⁹

3. *The § 1292(b) Exception*

At first blush, § 1292(b) seems to be an ideal vehicle for interlocutory review of class certification decisions. The *Coopers & Lybrand* opinion lavished praise on § 1292(b), comparing it favorably to what it deemed to be the problematic aspects of the death knell doctrine.¹³⁰ The Court noted with seeming approval several lower court opinions that heard such appeals under § 1292(b).¹³¹ Moreover, the guided discretion embodied in

note 7, § 1802, at 472-73; 15B WRIGHT ET AL., *supra* note 7, § 3914.19, at 58-62.

127. See *Coopers & Lybrand*, 437 U.S. at 467-68.

128. See *id.* at 468-69.

129. See *id.* at 469. Although *Coopers & Lybrand* involved the *denial* of class certification, its logic extends to attempted interlocutory review of the *grant* of class certification as well. See 7B WRIGHT ET AL., *supra* note 7, § 1802, at 484-86 (2d ed. 1986 & Supp. 1999) (explaining that appeals from orders granting and denying class certification follow the same general pattern).

130. See *Coopers & Lybrand*, 437 U.S. at 466 & n.5 (quoting § 1292(b) and pointing out that plaintiffs did not seek certification under the provision); see *id.* at 474-75 (arguing that § 1292(b), unlike the death knell doctrine, does not allow "indiscriminate interlocutory review" of class certification decisions).

131. See *id.* at 475 n.27 ("Several Courts of Appeals have heard appeals from discretionary class determinations pursuant to § 1292(b)."). Quoting Judge Friendly, the Court went on to say:

[T]he best solution is to hold that appeals from the grant or denial of class action designation can be taken only under the procedure for interlocutory appeals provided by 28 U.S.C. § 1292(b). . . . Since the need for review of class action orders turns on the facts of the particular case, this procedure is preferable to attempts to formulate standards which are

the § 1292(b) criteria appears to be an attractive middle ground between permitting no interlocutory appeals at all and permitting such appeals with almost unlimited discretion.¹³² The *Coopers & Lybrand* opinion faulted the death knell doctrine in part for going to the latter extreme.¹³³ The "big case" requirement, whatever its faults, would not be a barrier to review of class certifications. Many or most class actions, it would seem, would satisfy that requirement.

The reality did not meet the promise. As one court forthrightly put it, "appellate review of class certification decisions under § 1292(b) is and will be rare."¹³⁴ At least two reasons appear to account for the relatively minor role § 1292(b) has come to play in interlocutory appeals of such decisions. The first problem is the dual certification requirement. Even if a litigant is successful in convincing the district judge to certify the appeal, the barrier of convincing the court of appeals to accept the appeal still exists.¹³⁵ Second, class action certification decisions do not always fit neatly into the § 1292(b) criteria. The statute requires that there be a contestable issue of *law*, but many class certification decisions turn heavily on the particular *facts* of the case.¹³⁶ The other criteria of § 1292(b) may also be difficult to meet.¹³⁷

necessarily so vague as to give rise to undesirable jurisdictional litigation with concomitant expense and delay.

Id. at 475-76 n.27 (quoting *Parkinson v. April Indus., Inc.*, 520 F.2d 650, 660 (2d Cir. 1975) (Friendly, J., concurring)).

132. See 16 WRIGHT ET AL., *supra* note 7, § 3931, at 449-50 (touting use of § 1292(b) in class action determinations).

133. See *Coopers & Lybrand*, 437 U.S. at 476.

134. *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1387 (11th Cir. 1998) (en banc).

135. See *id.* at 1387; Jones, *supra* note 26, at 239-40; Kruse, *supra* note 26, at 717-18. The courts of appeals usually consider § 1292(b) certification requests by way of a standing three-judge motion panel, which will not necessarily be the same panel to hear the case on the merits if certification is accepted. See Solimine, *supra* note 96, at 1200. We have only incomplete data on the disposition of such motions, because both district courts and appellate courts rarely issue published decisions on these matters. See *id.* at 1202. Very little information exists on the rate that district judges accept certification requests. The data that exists on the rate of acceptance by courts of appeals indicate that it runs well below 50%. See *supra* note 99.

136. See *Armstrong*, 138 F.3d at 1386-87; 7B WRIGHT ET AL., *supra* note 7, § 1802, at 477-78 (2d ed. 1986 & Supp. 1999).

137. See 7B WRIGHT ET AL., *supra* note 7, § 1802, at 478-79 (2d ed. 1986 & Supp.

Although some significant class certification decisions have been reviewed under § 1292(b), the consensus is that the statute has not been used widely in that connection.¹³⁸

4. *The Mandamus Exception*

As previously observed, the use of mandamus to obtain interlocutory review of any matter is said to be rare because the standard to obtain the writ is putatively very difficult to satisfy.¹³⁹ The standard sources apply this learning to class certification decisions. Thus, it often is said that mandamus review of such decisions is rare and used only in extraordinary situations.¹⁴⁰

Rare, perhaps, but not unheard of: Over the past two decades, several courts of appeals have issued mandamus to review class certification decisions immediately, usually to order decertification of an improperly certified class.¹⁴¹ The most notorious deci-

1999); Jones, *supra* note 26, at 240.

138. Professor Wright and his colleagues cautiously observe that the use of § 1292(b) to obtain "appellate review of the denial of a motion for class certification appears to have growing acceptance, at least in those instances in which the issue of class status presents a close decision." 7B WRIGHT ET AL., *supra* note 7, § 1802, at 479 (footnote omitted). As they acknowledge, there are many cases in which such certification was refused. See *id.* at 479-81 nn.50-51 (giving examples of both); 16 WRIGHT ET AL., *supra* note 7, § 3931, at 447-49 nn.18-19 (giving examples of both). For examples of cases in which § 1292(b) certification was granted, see *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996) (decertifying class in products liability case); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying a class of all nicotine-dependent persons in the United States); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986) (affirming certification of an asbestos class action of 5000 plaintiffs in Texas). Perhaps it is not surprising that § 1292(b) apparently has been used more often in mass tort class actions. Those types of cases, as opposed to other types of class actions, are apt to raise difficult legal and practical issues on which district judges may welcome appellate guidance.

139. See *supra* notes 103-05 and accompanying text.

140. See, e.g., 7B WRIGHT ET AL., *supra* note 7, § 1802, at 482 (2d ed. 1986 & Supp. 1999) ("[A]s a practical matter, it appears unlikely that mandamus will be made available for reviewing interlocutory orders denying class action status to any significant degree."); 16 WRIGHT ET AL., *supra* note 7, § 3935.6, at 633; see also *Armstrong*, 138 F.3d at 1385-86 (stating that conditions to justify mandamus relief "are rarely met," and mandamus issuing to direct a district court to decertify an improperly certified class, or to direct certification after a district court has denied certification, will be rare).

141. See, e.g., *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Temple*, 851 F.2d 1269 (11th Cir. 1988); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984).

sion in this regard is Chief Judge Richard Posner's opinion in *In re Rhone-Poulenc Rorer, Inc.*¹⁴² The case deserves careful review as the opinion spends considerable time justifying the use of mandamus as a tool of interlocutory review, and it drew a strong dissent on that issue.¹⁴³ The nationwide class action certified by the district judge in the case consisted of about four hundred hemophiliacs, infected by the AIDS virus, who were suing drug companies that manufactured blood solids used by plaintiffs.¹⁴⁴ The defendants sought a writ of mandamus.¹⁴⁵ Judge Posner began the opinion by acknowledging the traditionally narrow role of mandamus, to be used in only extraordinary cases.¹⁴⁶ The writ can be "cabin[ed]:"

By taking seriously the two conditions. . . . The first is that the challenged order not be *effectively* reviewable at the end of the case—in other words, that it inflict *irreparable* harm. . . . Second, the order must so far exceed the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous.¹⁴⁷

The numbers of class certification orders that will meet both conditions would be "small," he conceded,¹⁴⁸ but this case was one of them. The first condition was met, Judge Posner concluded, because the class certification placed intolerable burdens on the defendants to settle.¹⁴⁹ The magnitude of financial risk¹⁵⁰ was so high that defendants would "be under intense pressure to settle," meaning that "class certification—the ruling that will have

142. 51 F.3d 1293 (7th Cir. 1995).

143. See *id.* at 1304-08 (Rovner, J., dissenting). For a summary of the dissent, see *infra* note 159.

144. See *id.* at 1294, 1296.

145. See *id.* at 1294.

146. See *id.* ("Otherwise, interlocutory orders would be appealable routinely, but with 'appeal' renamed 'mandamus.'").

147. *Id.* at 1295 (citations omitted).

148. *Id.*

149. See *id.* at 1297-98.

150. Based on the potential number of members of a plaintiff class, the court found that the defendants "might, therefore, easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy." *Id.* at 1298.

forced them to settle—will never be reviewed.”¹⁵¹ Hence, the harm was irreparable.

For several reasons, the court also concluded that the second condition of mandamus was met. The class certification would force the defendants “to stake their companies on the outcome of a single jury trial.”¹⁵² This scenario was problematic because at the time of certification, the defendants had prevailed in twelve of the thirteen cases that had been litigated to judgment.¹⁵³ Moreover, it would be impossible for a single trial to encompass the differing aspects of tort law in the fifty states.¹⁵⁴ Finally, the court found fault with the district judge’s plan to have the initial jury trial limited to certain issues of liability.¹⁵⁵ Succeeding juries would have then decided remaining liability and all remedial issues for individual plaintiffs.¹⁵⁶ This scenario, the court believed, would permit succeeding juries to revisit issues putatively decided by the first jury.¹⁵⁷ This could work a violation of the Seventh

151. *Id.*

152. *Id.* at 1299.

153. *See id.* at 1299-300.

154. *See id.* at 1300-02.

155. *See id.* at 1302-03.

156. *See id.* at 1303.

157.

The plan of the district judge in this case is inconsistent with the principle that the findings of one jury are not to be reexamined by a second, or third, or *n*th jury. The first jury will not determine liability. It will determine merely whether one or more of the defendants was negligent under one of the two theories. The first jury may go on to decide the additional issues with regard to the named plaintiffs. But it will not decide them with regard to the other class members. Unless the defendants settle, a second (and third, and fourth, and hundredth, and conceivably thousandth) jury will have to decide, in individual follow-on litigation by class members not named as plaintiffs in the *Wadleigh* case, such issues as comparative negligence—did any class members knowingly continue to use unsafe blood solids after they learned or should have learned of the risk of contamination with HIV?—and proximate causation. Both issues overlap the issue of the defendants’ negligence. Comparative negligence entails, as the name implies, a comparison of the degree of negligence of plaintiff and defendant. Proximate causation is found by determining whether the harm to the plaintiff followed in some sense naturally, uninterruptedly, and with reasonable probability from the negligent act of the defendant. It overlaps the issue of the defendants’ negligence even when the state’s law does not (as many states do) make the foreseeability of the risk to which the defendant subjected the plaintiff an

Amendment right to a jury trial and, coincidentally, the court noted that writs of mandamus often had been used to police violations of the Amendment.¹⁵⁸ In granting the writ, the court added, seemingly contrary to the conventional wisdom, that "most federal courts" had refused to certify class action in mass tort cases, a good thing too as "[t]hose courts that have permitted it have been criticized, and alternatives have been suggested which recognize that a sample of trials makes more sense than entrusting the fate of an industry to a single jury."¹⁵⁹

Rhone-Poulenc has provoked considerable commentary. Some critics wondered whether Judge Posner had expanded mandamus to the breaking point in order to quickly review and decertify a poorly conceived class.¹⁶⁰ Other writers praised the decision for

explicit ingredient of negligence. A second or subsequent jury might find that the defendants' failure to take precautions against infection with Hepatitis B could not be thought the *proximate* cause of the plaintiffs' infection with HIV, a different and unknown blood-borne virus. How the resulting inconsistency between juries could be prevented escapes us.

Id. (citations omitted).

158. See *id.* at 1303-04 (referring to, *inter alia*, *Beacon Theaters v. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962)). The court added that, when Seventh Amendment issues are involved, "strict compliance with the stringent conditions on the availability of the writ (including the requirement of proving irreparable harm) is excused." *Id.* at 1303.

159. *Id.* at 1304. Judge Rovner vigorously dissented. See *id.* at 1304-08 (Rovner, J., dissenting). She argued among other things that the majority's analysis logically extended to "virtually every class certification order," because "[c]ertification orders almost always increase the likelihood of settlement." *Id.* at 1305. She also took issue with Judge Posner's "statistical conjecturing," *id.* at 1307, and his several references to plaintiffs' likelihood of success on the merits, see *id.* at 1308.

160. See, e.g., MULLENIX, *supra* note 66, at 227; Neuborne, *supra* note 26, at 2100; Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 500 n.7 (1998) (citing other critical commentary).

Kruse gives a particularly careful critique of the case. Unlike much of the other literature, Kruse reviews similar mandamus cases in other circuits, most predating *Rhone-Poulenc*, see *supra* note 141 (listing some of those cases), and persuasively argues that many of those cases used mandamus too liberally, see Kruse, *supra* note 26, at 721-27. In particular, he contends that those cases had a low threshold for determining what was a "clearly erroneous" class certification decision, and impermissibly used a balancing test. See Kruse, *supra* note 26, at 721-27. Turning to *Rhone-Poulenc*, Kruse applauds Judge Posner's explicit recognition of the narrow role of mandamus, see *id.* at 728, but proceeds to argue that Posner was in effect resurrecting a version of the death knell doctrine banished by *Coopers & Lybrand*, see *id.* at 729-31 (tracking largely Judge Rovner's dissent). Kruse concludes by arguing in favor of a more detailed version of what became Rule 23(f). See *id.* at 734-35.

its realistic appraisal of class action litigation, one that enabled appellate courts to shape class action doctrine usefully in a way that *Coopers & Lybrand* prevented.¹⁶¹ It remains to be seen whether *Rhone-Poulenc* portends a more aggressive use of mandamus in this regard by the court of appeals. As we explain in the balance of the Article, we doubt that *Rhone-Poulenc* will have such a generative capacity after the adoption of Rule 23(f).

C. The Status Quo of Appellate Review of Class Certification Before Rule 23(f)

Recent data indicate that fifteen to thirty percent of final judgments embodying class action certification decisions are appealed.¹⁶² This figure is similar to the appeal rate from all final civil judgments in the federal court system.¹⁶³ A large percentage of the class action decisions were affirmed,¹⁶⁴ which again is similar to the figure for other appeals.¹⁶⁵

Our picture of interlocutory appeals of class certification decisions is much less clear. Doctrinally, as we have seen, a decision on class certification is not an immediately appealable final judgment.¹⁶⁶ The collateral order and § 1292(b) exceptions to the

161. See, e.g., Jones, *supra* note 26, at 257-65. In particular, Jones argued that mandamus review should be restricted to those mass tort class actions with "extraordinary characteristics," in that the district judges have adopted creative innovations which "pushed the procedural and substantive safeguards present in Rule 23 to their outer limits and thereby enhanced the need for immediate appellate review." *Id.* at 246-47 (footnote omitted).

162. See Willging et al., *supra* note 11, at 169 (reporting that the rate of filing an appeal in class actions in four district courts ranged from 15% to 34%).

163. See FEDERAL JUDICIAL CTR., *STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS* 8-9 (1995) (reporting a rate of appeal of about 20%); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 113-21 (1996) (reporting similar data).

164. See Willging et al., *supra* note 11, at 171 (reporting that plaintiffs filed most of the appeals and that about 13% to 26% of those appeals were successful).

165. The affirmance rate of U.S. District Court decisions by the U.S. Courts of Appeals typically ranges from 80% to 90% in any given time period. See Steven Alan Childress, "Clearly Erroneous" *Judicial Review over District Courts in the Eighth Circuit And Beyond*, 51 MO. L. REV. 93, 135 & n.309 (1986).

166. The courts have also shut off other possible methods of interlocutory appeal of class certification decisions that we did not consider at length above. Thus, the Supreme Court in *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (a companion case to *Coopers & Lybrand*), held that 28 U.S.C. § 1292(a)(1) (1994) (per-

final judgment rule have not been fruitful avenues by which to pursue such appeals.¹⁶⁷ Some increased use of the writ of mandamus has occurred, but it is hardly clear that it has been used in enough instances to constitute a trend.¹⁶⁸ Even if it is, it would seem to be limited to high-profile mass tort cases,¹⁶⁹ though as a practical matter, as some critics charge, it may logically extend to many types of class actions.¹⁷⁰ Overall, then, interlocutory review for most class action decisions is at best extremely difficult. The balance of this Article considers whether Rule 23(f) will or should modify this conclusion.

III. THE NEW RULE 23(f)

A. *The Development of Rule 23(f)*

1. *The Rulemaking Process*

The opportunity for litigants to appeal immediately class certification decisions concerned policymakers long before the adoption of Rule 23(f). For example, in the 1980s, the American Bar Association's Section of Litigation recommended that the Federal Judicial Code be amended to permit immediate appeal of class certification decisions, at the discretion of the appeals court.¹⁷¹ The recommendation rested on the adoption, as a mat-

mitting immediate appeals of district court decisions granting or denying injunctive relief), could not be used to review class action decisions. See *Gardner*, 437 U.S., at 478-79. Lower courts also have generally declined to permit FED. R. CIV. P. 54(b) (allowing district court to enter a final judgment on one of several claims) to be used to obtain immediate interlocutory appeal of class certification decisions. See 15B WRIGHT ET AL., *supra* note 7, § 3914.19, at 67-69 (2d ed. 1991).

167. See *id.* at 66, 71-72.

168. See *supra* notes 139-61 and accompanying text.

169. The doctrine, known as the "big case" requirement, was established in *Milbert v. Bisons Laboratories, Inc.*, 260 F.2d 431 (3d Cir. 1958), and limits application of § 1292(b) to big and expensive cases that require large pretrial expenditures and lengthy and costly trials. See Redish, *supra* note 81, at 111.

170. See Redish, *supra* note 8, at 116-20.

171. See American Bar Ass'n Sec. of Litig., *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 210-11 (1986) [hereinafter *ABA Special Committee Report*]. Specifically, the Report recommended that § 1292(b) be amended to permit such appeals "with accompanying safeguards designed to deter vexatious or delaying resort to interlocutory review." *Id.* at 200. The report anticipated that "orders permitting such interlocutory review would be

ter of policy, of the death knell rationale. The denial of a plaintiff's request for class certification effectively may bring the case to an end if an individual action is too costly to pursue. Likewise, an erroneously certified class could place additional burdens of cost and settlement pressure on the defendant.¹⁷² At about the same time, the American Law Institute similarly recommended that class certification decisions be immediately reviewable.¹⁷³ Commentators have also advocated the allowance of such appeals.¹⁷⁴

Driven in part by these concerns and in part by more general concerns about the complex and often confusing nature of the final judgment rule and its exceptions,¹⁷⁵ Congress took action in the 1990s to authorize the advisory committees to promulgate rules of practice and procedure on this subject. In 1990, Congress amended the Rules Enabling Act to permit the promulgation of rules "to define when a ruling of a district court is final for the purposes of appeal under [§ 1291]."¹⁷⁶ Two years later, Congress amended § 1292 to permit the promulgation of rules "to

rare." *Id.* at 211.

172. *See id.* at 210-11. A different project of the ABA, its Commission on Mass Torts, also recommended that given the "profound effects" of such interim orders, interlocutory review at the discretion of the courts of appeals should be available. *See* COMMISSION ON MASS TORTS, AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 73-74 (1989). This was seen as an appropriate balance between allowing no such appeals on one hand, and successive interlocutory appeals on the other. Section 1292(b) and writs of mandamus were not thought to be sufficiently "flexible" to do the job. *See id.* For discussion, see Solimine, *supra* note 96, at 1207-08.

173. The American Law Institute's Complex Litigation Project advanced this idea in the late 1980s. *See* Martineau, *supra* note 81, at 763-64; Solimine, *supra* note 96, at 1206-07. The final report of that Project did not recommend a specific new provision for interlocutory review of class certification decisions, but did laud the use of § 1292(b) to pursue such appeals. *See* A.L.I., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 134-35 (1994) [hereinafter A.L.I., COMPLEX LITIGATION].

174. *See, e.g.,* POSNER, *supra* note 163, at 344 (recommending reforms including the notion that a "class-action certification should be immediately appealable to the court of appeals").

175. The primary impetus was the concerns raised by the Federal Courts Study Committee in 1990 that recommended that the problem be addressed by allowing the creation of exceptions by rulemaking. *See* FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95-96 (1990). For a further discussion of this aspect of the report, see Martineau, *supra* note 81, at 722-24.

176. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089 (codified in 28 U.S.C. § 2072(c) (1994)).

provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [in § 1292]."¹⁷⁷

Not coincidentally, beginning in the early 1990s, the Advisory Committee on the Federal Rules of Civil Procedure considered various proposals to modify the provisions of Rule 23. All of these proposals contained a provision closely resembling the eventual Rule 23(f).¹⁷⁸ A final draft of the proposals to amend Rule 23 was published in 1996.¹⁷⁹ Only Rule 23(f) eventually went into effect on December 1, 1998, because the remaining proposed amendments to the balance of Rule 23 were withdrawn or shelved.¹⁸⁰

177. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506 (codified in 28 U.S.C. § 1292(e) (1994)).

For a discussion of the legislative history of these Acts, see Martineau, *supra* note 81, at 724-26. Martineau concludes that the recommendation contained in the Federal Courts Study Committee report, found in two relatively short paragraphs, was but an "informal suggestion," and that Congress enacted the recommendation in a "casual manner" with very little discussion. *Id.* at 726. It's curious, he says, that such a potentially important change would be accompanied by so little debate. *See id.*

For general discussions of the rulemaking process in the federal courts, see Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323 (1991); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999).

178. The numerous draft proposals are reprinted in full, together with the minutes of the Advisory Committee and summaries of comments by outsiders, in 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (1997) [hereinafter WORKING PAPERS]. For a helpful summary and analysis, see Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996).

179. *See Proposed Amendments to the Federal Rules of Civil Procedure*, 167 F.R.D. 559, 559-60 (1996) (providing the text of the proposed amendments to Rule 23); *id.* at 560-66 (providing the advisory committee note). The text of the proposed amendment and the part of the advisory committee note dealing with Rule 23(f) is reprinted in full in the appendix to this Article. Given its common usage, we will persist in using the term "advisory committee note," even though, strictly speaking, the better term is "committee note." The latter term can be considered more appropriate because it "speaks not only for the responsible advisory committee but also for the Standing Committee on Rules of Practice and Procedure, which coordinates and superintends the several bodies of federal rules." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 833 (7th Cir. 1999).

180. *See Amendments to Federal Rules of Civil Procedure, Criminal Procedure, Evidence and Appellate Procedure*, 177 F.R.D. 530 (1998) (transmitting proposed Rule 23(f) to Congress under the Rules Enabling Act only). Prior to the Court's transmit-

Persons who commented on the proposed rule split predictably into supporters and opponents. Supporters argued that class certification is "the whole ballgame" and is an important issue that deserves an immediate appeal.¹⁸¹ Other supporters contended that § 1292(b) and mandamus have proven inadequate to provide interlocutory review,¹⁸² and that the proposed rule would be a useful safety valve as courts began to implement the other proposed changes to Rule 23.¹⁸³ Still other supporters argued that the presence of a realistic interlocutory appeal opportunity would encourage more careful district court decision making, and deter the use of certification as a tool to coerce settlements of class actions.¹⁸⁴

In contrast, opponents of the proposed rule argued that defendants would abuse it and plaintiffs would rarely use it.¹⁸⁵ They also suggested that § 1292(b) and mandamus have been adequate to provide a route of interlocutory appeal.¹⁸⁶ The text of the proposal, they contended, offered no guidelines for the courts

tal, the Advisory Committee had abandoned or shelved the other proposals to amend Rule 23, in part due to issues resolved by *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). See Silberman, *supra* note 63, at 207 n.28, 210. Coincidentally, at the same time this occurred, Congress was considering legislation that would have, among other things, enacted a provision that closely resembled Rule 23(f). See Judicial Reform Act of 1998, H.R. 1252, 105th Cong. § 3. The legislative history of the provision is sparse and does little more than restate the proposed statutory language. See H.R. REP. NO. 105-478, at 18-19 (1998). The Department of Justice opposed the provision on the basis that rulemaking was the more appropriate place to deal with the issue, as indeed the Judicial Conference of the United States was doing at that point with the then-proposed Rule 23(f). See *id.* at 25-26 (reprinting Letter from Andrew Foiss, Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs, to Henry J. Hyde, Chairman, House Committee on the Judiciary (Mar. 10, 1998)). The bill passed the House of Representatives, but the Senate took no action on it in the 105th Congress.

181. WORKING PAPERS, *supra* note 178, at 409 (summary of comments by William T. Coleman, Jr.).

182. See *id.* at 411 (summary of comments by John L. McGoldrick (Bristol-Meyers Squibb)); *id.* at 410 (summary of comments by Miles N. Ruthberg).

183. See *id.* at 409 (summary of comments by Bartlett H. McGuire).

184. See *id.* (summary of comments by John L. Hill, Jr.); *id.* at 410 (summary of comments by Robert Dale Klein); *id.* at 412 (summary of comments by Richard S. Paul).

185. See *id.* at 408 (summary of comments by Michael D. Donovan); *id.* at 407 (summary of comments by Patricia Sturdevant and Stephen Gardner).

186. See *id.* at 407 (summary of comments by Melvyn I. Weiss); *id.* at 408 (summary of comments by Richard A. Lockridge and Gerald J. Rodos).

and disregarded the views of the trial judge.¹⁸⁷ The upshot, they concluded, would be an increase in litigation expenses and further delays in resolving class actions.¹⁸⁸

Some of the comments focused on the remarks in the Advisory Committee Note that accompanied the proposed rule. The Advisory Committee Note, as eventually adopted,¹⁸⁹ begins by observing that Rule 23(f) "is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals."¹⁹⁰ The Advisory Committee Note then acknowledges that the rule departs from § 1292(b) "in two significant ways."¹⁹¹ First, there is no requirement for district court certification,¹⁹² and second, it "does not include the potentially limiting requirements of § 1292(b)" that there be a controlling question of law on which a substantial ground for a difference of opinion exists, and that an immediate appeal would advance the ultimate termination of the litigation.¹⁹³

187. See *id.* at 407 (summary of comments of Robert J. Reinstein, H. Laddie Montague, Jr. and Melvyn I. Weiss); *id.* at 410 (summary of comments by Arthur R. Miller).

188. See *id.* at 408 (summary of comments by Richard A. Lockridge and Michael D. Donovan); *id.* at 409 (summary of comments by Stanley M. Chesley); *id.* at 413 (summary of comments by Joseph Goldberg).

189. As detailed in the WORKING PAPERS, *supra* note 178, the proposals to amend Rule 23 as a whole went through extensive drafts and changes from 1992 to 1996. The draft of Rule 23(f) and the portion of the advisory committee note pertaining to it, however, underwent relatively little change. See *id.* at 11-12, 15-16 (1992 draft); *id.* at 32, 41-42 (1994 draft); *id.* at 48-49, 53 (1995 draft); *id.* at 63, 81-83 (1996 draft).

190. *Proposed Amendments to the Federal Rules of Civil Procedure*, 167 F.R.D. 559, 565 (1996).

191. *Id.*

192. See *id.* The note, however, adds that "the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal." *Id.* The note later adds:

The district court, having worked through the certification decision, often will be able to provide cogent advice on the 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.

Id. at 566.

193. *Id.* at 565. For a further discussion of these § 1292(b) criteria, see *supra* text

The Advisory Committee Note advises that “[p]ermission to appeal should be granted with restraint.”¹⁹⁴ Although acknowledging that the class action certification decision often presents “familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings,”¹⁹⁵ the Advisory Committee Note justifies the “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.¹⁹⁶

The question remains as to how the court of appeals should exercise the discretion embodied in Rule 23(f). The Advisory Committee Note provides that permission “may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.”¹⁹⁷ More specifically, the Advisory Committee Note suggests that permission “is most likely to be granted” when the class certification decision “turns on a novel or unsettled question of law” or when the decision “is likely dispositive of the litigation.”¹⁹⁸ In contrast, the Advisory Committee Note argues that “[p]ermission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.”¹⁹⁹

accompanying notes 92-102, 130-38.

194. *Proposed Amendments*, 167 F.R.D. at 565.

195. *Id.*

196. *Id.*

197. *Id.* at 566.

198. *Id.*

199. *Id.*

2. Rule 23(f) and the Rulemaking Process

Conventional wisdom holds that plaintiffs desire class action certification and defendants do not. This stereotype has been battered in the recent controversies concerning class actions.²⁰⁰ Desiring to preempt a potentially large number of lawsuits at once on favorable terms, institutional defendants may vigorously support a class action certification.²⁰¹ In contrast, some plaintiffs' lawyers, who feel they may obtain more money via judgment or settlement in an individual lawsuit, may oppose certification.²⁰² Class litigation, like politics, can make strange bedfellows.

A similar debunking of myths attended the adoption of Rule 23(f). Although not mentioned in the Advisory Committee Note, surely the result in *Coopers & Lybrand v. Livesay*²⁰³ was an important driving force behind the new rule. There, the plaintiffs sought immediate appeal of a district court order decertifying the class.²⁰⁴ Although one might think the plaintiffs' bar would applaud a rule that allows the possibility of such an immediate appeal, such is not the case. Melvyn Weiss, the prominent plaintiffs' securities litigation attorney who argued *Coopers & Lybrand* on behalf of the plaintiff,²⁰⁵ opposed the adoption of Rule 23(f) as did other lawyers associated with plaintiffs.²⁰⁶

200. See *supra* text accompanying notes 61-71.

201. See David Crump, *What Really Happens During Class Certification? A Primer for the First-Time Defense Attorney*, 10 REV. LITIG. 1, 8 (1990).

202. See, e.g., *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2305 (1999) (describing a global settlement of a class action agreed to by defendants and named plaintiffs); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 599-606 (1997) (describing parties who supported or opposed the settlement of the class action at the trial level).

203. 437 U.S. 463 (1978).

204. See *id.*

205. See *id.* at 464 (listing counsel). Mr. Weiss, a named member of the New York firm of Milberg Weiss Bershad Hynes & Lerach L.L.P., is the "dean of a coterie of class-action lawyers who sue companies for securities fraud." Karen Donovan, *Squirm Time for Milberg Weiss*, NAT'L L.J., Apr. 5, 1999, at A1.

206. See WORKING PAPERS, *supra* note 178, at 407 (summary of comments by Melvyn I. Weiss); see also *id.* (summary of comments by Patricia Sturdevant, General Council, National Association of Consumer Advocates); *id.* at 408 (summary of comments by Michael Donovan, National Association of Consumer Advocates); *id.* at 404 (summary of comments by Stanley M. Chesley).

Of course, not all plaintiffs' counsel oppose, now or did in the past, a more liberal interlocutory appeals regime with respect to class certification decisions. See, e.g., Solimine, *supra* note 96, at 1208 n.227 (reporting differing positions of plaintiffs'

Many lawyers associated with companies apt to be defendants in a class setting, on the other hand, supported the rule.²⁰⁷ This, of course, is a change of position from the defendants' position in *Coopers & Lybrand*. To be sure, as a formal matter, defendants might object to this characterization. Only whether plaintiffs could seek immediate review of class certification denials was at issue—not defendants' review of grants of class certification. Even so, the logic supporting one sort of review is difficult to cabin from the other, as indeed is reflected in the drafting of Rule 23(f) itself.

Shifting perceptions of the class action device after *Coopers & Lybrand* was decided in 1978 largely account for this change. Two decades ago the conventional wisdom held true: class actions were good for plaintiffs and bad for defendants. The same reaction applied for procedural devices that would or might make it easier for a plaintiff to convince a district judge, or a panel on a court of appeals, to certify a class action. Today, litigation strategy is more complex and as such easy generalizations cannot be made.²⁰⁸ Moreover, the sense that appellate

attorneys on the desirability of interlocutory appeals in mass tort cases in general and on class certification decisions in particular). Perhaps more plaintiffs' attorneys would have supported Rule 23(f) if it were limited to appeal requests by plaintiffs, as some argued. *See, e.g.,* WORKING PAPERS, *supra* note 178, at 407 (summary of comments of Patricia Sturdevant) (characterizing California law as only permitting plaintiffs to appeal the denial of a class certification, at least when a death knell can be shown). Even in its early drafts, Rule 23(f) permitted both plaintiffs and defendants to seek permission to appeal. *See id.* at 11 (1992 draft). It seems quite unlikely that a one-sided Rule 23(f) would have progressed far in the rulemaking process.

207. For example, support came from attorneys identified as being associated with, or speaking on behalf of, such large companies as Chrysler Corp., Bristol-Myers Squibb, Wells Fargo & Co., State Farm Insurance Co., Bank of America, and Nissan North American. *See* WORKING PAPERS, *supra* note 178, at 409-13. Indeed, some commentators were so enthusiastically in favor of the proposal that they criticized the language in the advisory committee note suggesting that the courts of appeals exercise "restraint" in granting permission to hear appeals under the rule. *See, e.g., id.*, at 409 (summary of comments by Lewis H. Goldfarb); *id.* at 409-10 (summary of comments by Sheila L. Birnbaum); *id.* at 410 (summary of comments by Miles N. Ruthberg); *id.* at 412 (summary of comments by Brian C. Anderson).

A survey of reaction by lawyers taken shortly after Rule 23(f) went into effect largely tracks the pre-adoption reaction reported in the text of this Article. *See* Robin L. Lee, *Attorneys Ponder Effects of New Federal Rule Governing Class Actions*, 67 U.S.L.W. 2403 (Jan. 19, 1999).

208. To illustrate, consider the dilemma of a plaintiffs' attorney who regularly liti-

judges are less enthusiastic than district court judges in certifying classes—for example, Judge Posner's decision in *Rhone-Poulenc*—may encourage defendants to support interlocutory appeals.

The adoption of Rule 23(f) also is reflective of a long-standing debate over the content of exceptions to the final judgment rule. Over two decades ago, Martin Redish argued that the doctrinal development of such exceptions was unsatisfactory.²⁰⁹ Rather than rely on highly formalistic notions of a final decision or judgment, he argued that the courts of appeals should undertake to define finality in a pragmatic way.²¹⁰ This would require in each case "an assessment by an appellate court of the practical factors weighing in favor of or against the desirability of direct appellate review of a particular order."²¹¹ The then-existing exceptions to the final judgment rule, he argued, did not sufficiently permit the flexible balancing approach he advocated.²¹²

In a similar vein, Robert Martineau argued that it is difficult *ex ante* to label certain trial court decisions as automatically deserving of an immediate interlocutory appeal.²¹³ He argued that attempts to do so are apt to generate more litigation as

gates class actions. Perhaps the number of class actions that challenge the conventional wisdom (i.e., settlement classes favored by the defendant and by some, but not all, of plaintiffs' counsels) is still relatively small. The plaintiffs' lawyers who opposed Rule 23(f) were perhaps influenced by tactical considerations. They may have calculated that they would gain more from enhanced settlement leverage in cases of possibly erroneous certification, if it remained difficult to immediately appeal, as opposed to what they might gain from easier appeals of possibly erroneous denials of certification. Of course, they could still attempt interlocutory appeals in individual cases (e.g., *Coopers & Lybrand*) when it was to their advantage. Facing an even-handed proposal like Rule 23(f), however, would require a *balance* of the relevant considerations, taking into account the stream of cases likely to be encountered in the future. We are greatly indebted to Tom Rowe for his perceptive comments on this point and on many others in this Article.

209. See *supra* notes 141-61 and accompanying text.

210. See Redish, *supra* note 81, at 92-98.

211. *Id.* at 91 n.14.

212. For example, Redish argued that the dual certification and "big case" requirements of § 1292(b) restricted its utility. See *id.* at 108-10. The use of the collateral order doctrine was limited by its very criteria. Why should it matter, he argued, if the order sought to be appealed *was* related to the merits? See *id.* at 112. Finally, he argued that the criteria for mandamus, if taken seriously, should restrict its use considerably. See *id.* at 113-15.

213. See Martineau, *supra* note 81, at 775.

courts endeavor to determine if certain criteria are met.²¹⁴ The optimal solution, he concluded, is to invest the courts of appeals with discretion to hear interlocutory appeals of any given order, balancing the possibility of irreparable harm if an appeal is not immediately heard with the danger of permitting inroads on the final judgment rule.²¹⁵

The proposals by Redish and Martineau concern the content of legal principles, and thus are informed by the long-standing jurisprudential debate between rules and standards. Rules are meant to be narrow and precise, and in theory yield an answer quickly, and rather mechanically, once applied to the facts of a case. Standards, in contrast, are broad and vague and inevitably require the decision maker to ponder and weigh the facts to reach a result.²¹⁶ The simplest example of a rule with regard to

214. *See id.* at 770-76. He specifically cites the collateral order doctrine as an exception that has generated endless additional litigation. *See id.* at 773-74.

215.

A court of appeals would have the discretion to refuse to hear the appeal if it finds that irreparable harm will not occur or that some important interest will not be served if the appeal is not heard immediately. The discretionary appeal thus provides the relief valve in those cases in which strict adherence to the final judgment rule would not serve the best interests of the parties or the public, but with an individualized balancing of interests made on a case by case basis. Just as important, jurisdiction of the appellate court is never an issue, because the court has discretionary jurisdiction over any interlocutory order. No interlocutory appeal will ever be dismissed as premature, and no interlocutory order will ever be unreviewable on appeal from the final judgment because there was an earlier appeal of right.

Id. at 777 (footnote omitted). For a similar analysis, see Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 285 (1999), available in WESTLAW, JAPPR Database.

216. For more detail on rules and standards, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 592-95 (5th ed. 1998); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66-69 (1992). For an extensive bibliography on the issue, see Shapiro, *supra* note 6, at 945 n.89 (listing four books and over twenty law review articles). According to Judge Posner:

A rule is a statement of the form, if *X*, then *Y*, where *Y* is a particular legal outcome and *X* the constellation of facts that dictates it. I want to use the word "rule" a little more narrowly, however, to describe the case in which *X* is a single, mechanically or at least readily determinable fact, and "standard" to mean a rule in which ascertaining *X* requires weighing several nonquantified factors or otherwise making a judgmental, qualitative assessment. The requirement of a stake of more than \$50,000 in a

interlocutory appeals is the provision for immediate review of decisions granting or denying requests for preliminary injunctions.²¹⁷

The other exceptions canvassed so far are more difficult to classify, demonstrating that at the margins rules and standards begin to merge. The death knell doctrine was mainly a standard, so much so that the *Coopers & Lybrand* Court held that it would require legislative direction for federal courts to adopt it.²¹⁸ Likewise, § 1292(b) and mandamus are also best characterized as standards, as they demand a focus on the particular facts of a case. The collateral order doctrine is something of a hybrid: it is standardlike in determining whether the criteria of the doctrine have been met, but it yields a rule, as a certain class of orders thereafter always becomes appealable.²¹⁹ Finally, Rule 23(f) is a standard. It does not provide for automatic appeals of any class certification decision but rather allows the courts to exercise discretion, depending on the facts and circumstances of each case.

B. Applying Rule 23(f): Theory

1. The Limited Guidance of the Advisory Committee Note

The discretion embodied in Rule 23(f) begs the question of how it should be exercised. Although the text of the Rule pro-

diversity case is a rule; if instead the requirement were that the stake be "substantial," one would have a standard. Negligence is a standard, strict liability a rule.

POSNER, *supra* note 163, at 368-69.

217. See 28 U.S.C. § 1292(a) (1994).

218. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 472-73 (1978).

219. See *supra* text accompanying notes 83-91. Probably the most controversial collateral order case was *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which held that all denials of motions to dismiss on qualified immunity grounds in civil rights cases were immediately appealable. See *id.* at 530. The decision has been subject to considerable criticism. See, e.g., Anderson, *supra* note 91, at 568-76 (questioning whether qualified immunity is collateral to the merits); Solimine, *supra* note 96, at 1188 (comparing qualified immunity to other affirmative defenses that have not been found to be collateral). Since then, the Court has somewhat narrowed the breadth of *Mitchell*. See *Johnson v. Jones*, 515 U.S. 304 (1995) (holding that an immediate appeal is not available if qualified immunity depends on disputed issues of fact). Some commentators have argued that *Mitchell* should be limited or overruled by court rule. See Anderson, *supra* note 91, at 611-13; Solimine, *supra* note 96, at 1212.

vides no guidance, the Advisory Committee Note attempts to provide some guidance.²²⁰ Ultimately, however, the criteria advanced in the Advisory Committee Note are relatively incomplete and unhelpful.

As explained previously, the advisory committee invoked § 1292(b) as a model.²²¹ At first blush, this might seem an excellent source of guidance. Properly applied, § 1292(b) is an appropriate source of guided discretion to permit interlocutory appeals of decisions in general and of class action certification orders in particular.²²² Unfortunately, § 1292(b) has neither lived up to its promise nor been a robust source of interlocutory review of class action certification decisions.²²³ After touting § 1292(b) as a model, the Advisory Committee Note hints at the problematic nature of that model.²²⁴ It explains that the rule has no dual certification requirement and observes, without elaboration, that the rule also “does not include the potentially limiting requirements of

220. In this Part and in the balance of the Article, we, in effect, are engaging in statutory interpretation. See *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989) (“We give the Federal Rules of Civil Procedure their plain meaning . . . and generally [treat] them as . . . a statute.”). Finding no criteria in the text of the Rules itself regarding the exercise of discretion, we look to its legislative history—the advisory committee note. The traditional view is that these advisory committee notes are not conclusive sources of interpretation, but are simply an authoritative source of guidance. See *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986); 4 *WRIGHT ET AL.*, *supra* note 7, § 1029, at 124-25 (2d ed. 1987); Adrian Vermeule, *Judicial History*, 108 *Yale L.J.* 1311, 1329 (1999). For an example of some relevance to the present context, see *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (observing that the text of Rule 23 “does not categorically exclude mass tort cases from class certification,” but the advisory committee note warns that such cases are “ordinarily not appropriate” for class action treatment); see also *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2309-10, 2312-14 (1999) (referring to the advisory committee note frequently to determine whether, and to what extent, a “limited fund” may satisfy Rule 23(b)(1)(B)).

For an analogous discussion of how the Federal Rules of Evidence should be interpreted, see Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 *WM. & MARY L. REV.* 1539 (1999).

221. See *supra* text accompanying notes 189-93.

222. See Solimine, *supra* note 96, at 1193-1205.

223. See *supra* text accompanying notes 134-38.

224. See *Proposed Amendments to the Federal Rules of Civil Procedure*, 167 *F.R.D.* 559, 565 (1996).

§ 1292(b).²²⁵ As a result, the Advisory Committee Note itself seems uncertain as to the ultimate utility of § 1292(b) as a model.

There is an even deeper problem with using § 1292(b) as a model. Assume that the statute had been used more extensively to provide interlocutory review of class action certification decisions. Indeed, perhaps § 1292(b) will be applied in a more expansive manner in this regard in the future. Although an implausible scenario, given the presence of Rule 23(f), it cannot be rejected because § 1292(b) was not amended simultaneous with the adoption of the rule. If that had been or will be the case, why is Rule 23(f) necessary at all? Section 1292(b) would stand ready to provide an avenue of interlocutory appeal. Whether § 1292(b) enjoys a narrow or expansive interpretation, the creation of Rule 23(f) suggests that the latter should be viewed as a supplement to, rather than as a replication of, the former. Rule 23(f) properly is construed to cover those cases that cannot be appealed under § 1292(b).

What criteria should be followed for Rule 23(f) to play this role? A good starting point is found in the balance of the Advisory Committee Note.²²⁶ Recall that the drafters indicated that "appeal-worthy" cases are those in which a denial of certification would force a plaintiff to expend costs far greater than the prospects of a small individual recovery, or those in which the grant of certification would pressure a defendant to settle rather than take the risk of "potentially ruinous liability."²²⁷ In other words, the rulemakers were endorsing the concepts of the death knell

225. *Id.* When Rule 23 was extensively amended in 1966, it was suggested that § 1292(b) appeals would be particularly appropriate and useful to initially guide district courts in their construction of the Rule. *See* 16 WRIGHT ET AL., *supra* note 7, § 3931, at 449-50 (2d ed. 1996). The same idea appears to have, in part, motivated the more recent drafters, as extensive changes to Rule 23 were proposed 30 years after the first wave. *See Proposed Amendments*, 167 F.R.D. at 560. The substantive proposed changes to Rule 23 were eventually withdrawn, but Rule 23(f) was left intact and went into effect. *See supra* text accompanying notes 171-219. More recently, it has been reported that the advisory committees of the U.S. Judicial Conference are no longer contemplating major changes to Rule 23, and instead "the prevailing view is to let the law develop by allowing immediate appeals of certification rulings, which will encourage further ad hoc reforms." *Mass Tort Reforms Held in Abeyance As Committees Eye Evolving Class Law*, 68 U.S.L.W. 2259, 2259 (Nov. 9, 1999).

226. *See Proposed Amendments*, 167 F.R.D. at 565.

227. *Id.*

doctrine (for plaintiffs) and the reverse death knell doctrine (for defendants). Additionally, the Advisory Committee Note cites § 1292(b) to suggest that permission to appeal should be granted when the certification decision “turns on a novel or unsettled question of law,” or when it “is likely dispositive of the litigation.”²²⁸ On the other hand, the Advisory Committee Note counsels that permission typically should be denied when the decision “turns on case-specific matters of fact and district court discretion.”²²⁹

These additional criteria are helpful, as they go beyond a simple rote reference to § 1292(b). Ultimately, however, they are only starting points toward an optimal application of Rule 23(f). The criteria are stated at such a high level of generality that they provide little guidance for specific cases. The Advisory Committee Note does endorse implicitly the death knell concept, although it does not confront the problems raised by the *Coopers & Lybrand* Court on how it should be applied.²³⁰ Moreover, some of the other criteria are somewhat inconsistent. For example, the Advisory Committee Note refers to “novel or unsettled” questions of law, a concept borrowed from the text of § 1292(b).²³¹ Yet some courts have refused to find that aspect of § 1292(b) satisfied in the class action context because in many such cases a construction of the “law”—the criteria of Rule 23—is not, strictly speaking, at issue.²³² So many class action decisions are of necessity relatively fact specific, and in part for that reason are almost always reviewed by the appellate courts under an abuse of discretion standard.²³³ Those factors, however, are the very ones

228. *Id.* at 566. Novel or unsettled issues “are most likely to arise, during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation.” *Id.*

229. *Id.*

230. *See id.* at 565-66.

231. *Id.* at 566.

232. *See* 7B WRIGHT ET AL., *supra* note 7, § 1802, at 479-80; *see also* Redish, *supra* note 81, at 110-11 (discussing the requirements of certification under § 1292(b) and the difficulties faced in meeting them); Jones, *supra* note 26, at 240 (describing difficulties faced in getting certification under § 1292(b)).

233. On the standard of review, *see* *McAuley v. IBM Corp.*, 165 F.3d 1038, 1046 (6th Cir.), *cert. denied*, 525 U.S. 1019 (1999); *Barnes v. American Tobacco Co.*, 161 F.3d 127, 138 (3d Cir. 1998); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1388 & n.30 (11th Cir.) (en banc), *cert. denied*, 525 U.S. 1019 (1998). *See generally* KLONOFF & BILICH, *supra* note 24, at 751.

the Advisory Committee Note suggests should undergird a grant of permission under Rule 23(f).

Many of the commentators (most of whom were practicing attorneys) on the proposed Rule 23(f) decried the lack of criteria to guide the court of appeals' discretion.²³⁴ At the same time, the Advisory Committee Note urges the courts of appeals to grant permission to appeal under Rule 23(f) "with restraint."²³⁵ The framers of Rule 23(f), rightly in our view, recognized the virtues of the final judgment rule and acknowledged that even an express exception should be rarely made.²³⁶ Restraint in this situation is a good thing, or else Rule 23(f) would in effect preempt the other avenues of interlocutory appeal of class certification decisions.²³⁷ Narrowing the availability of interlocutory review of these decisions to one or two options is probably beneficial, given the sometimes confusing and overlapping nature of the current options.²³⁸ Until that time comes, Rule 23(f) would benefit from more explicit criteria.

In general, any allowance of interlocutory appeals must balance the benefits of the final judgment rule—recognizing piecemeal appeals are disruptive to the trial process, and may be unnecessary given the ultimate outcome of the case—with its costs—immediately reviewing and correcting a trial court decision could save the trial judge and litigants time and cost.²³⁹ Accordingly, it would be useful to set out criteria that call for an examination of facts and circumstances relating to the specific litigation at hand, as well as those that relate to more general

234. See *supra* note 187 and accompanying text. There were numerous written comments criticizing the proposal on this point. See WORKING PAPERS, *supra* note 178, at 407, 410, 413 (providing a summary of the comments of H. Laddie Montague, Jr., Melvyn I. Weiss, Arthur R. Miller, James F. Mundy, and Theodore J. Fischkin).

235. *Proposed Amendments to Federal Rules of Civil Procedure Advisory Committee Note*, 167 F.R.D. 559, 565 (1996).

236. See *id.* at 565-66.

237. See *supra* text accompanying notes 106-61.

238. Judge Posner argues that the "present system for interlocutory review is an incredible crazy quilt." POSNER, *supra* note 163, at 345 (footnote omitted). He suggests that there should be a "single standard," under which interlocutory review would be authorized "if and only if the appellant demonstrates substantial and irreparable harm from deferring appellate review of the ruling that he seeks to challenge to the end of the case." *Id.*; see also POSNER, *supra* note 216, at 645 (describing his optimal interlocutory appeals regime in a similar way).

239. See POSNER, *supra* note 216, at 644; *supra* text accompanying notes 76-105.

issues extraneous to the specific case. Next, this Article provides an overview of those factors.²⁴⁰

2. *Relevant Factors*

It is neither necessary nor desirable to formulate an exclusive list of factors informing the courts of appeals' decisions whether to permit, under Rule 23(f), a challenge to a class certification order. Nevertheless, the following important matters are worth consideration: the presence of a death knell or a reverse death knell; the likelihood of reversal; the presence of intraclass conflicts; and the existence of simultaneous, related litigation in other courts.

As observed above, the Advisory Committee Note, in its most persuasive and useful passage, argues that permission to appeal should be granted when a denial of class certification will in effect prevent a plaintiff from litigating the action, or when a grant of certification will force a defendant to settle.²⁴¹ Although the terminology was not used, the Advisory Committee Note practically endorses both the death knell doctrine and the reverse death knell doctrine as criteria for the application of Rule 23(f). This makes good sense. If the class certification decision truly will have a death knell effect, then there can be no better reason to review the decision immediately. Such an approach is not inconsistent with *Coopers & Lybrand*. That case did not condemn the logic of the doctrine as such; importantly, the Court merely held that it was beyond the bounds of statutory interpretation to import the doctrine into the language of § 1291.²⁴²

The death knell doctrine, unfortunately, had a troubled life even before its demise in *Coopers & Lybrand*. The Second Cir-

240. State court systems have also grappled with these issues, and their experience with respect to interlocutory review of class certification decisions could inform the development of Rule 23(f). See, e.g., Eisenberg & Morrison, *supra* note 215, at 297-301 (same); Martineau, *supra* note 81, at 777-87 (discussing interlocutory appeals process in Wisconsin).

241. See *Proposed Amendments*, 167 F.R.D. at 565.

242. Indeed, the Court, referring to the death knell doctrine, repeatedly suggested that it involved issues of "policy" appropriate for legislative formulation. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470, 472, 476 (1978). Congress has in effect responded by its legislation in 1990 and 1992 that authorized the promulgation of Rule 23(f). See *Proposed Amendments*, 167 F.R.D. at 565.

cuit created the doctrine in 1966,²⁴³ but while that court and others developed the doctrine, other circuits rejected its application before 1978.²⁴⁴ This percolation of the doctrine did not yield satisfactory consensus on its application. On the plaintiffs' side, most opinions focused "on the size of the claim of the individual plaintiff as the most important single factor."²⁴⁵ Courts also considered the resources available to the plaintiff, the possibility of an eventual award of statutory fees, the probable costs of litigation, and the plaintiff's determination to pursue the litigation.²⁴⁶ Difficult line-drawing problems attended the objective appraisal and weighing of these factors,²⁴⁷ a problem observed at length in the *Coopers & Lybrand* opinion.²⁴⁸ There, the Court pointed out that lower courts had adopted two approaches to determine the presence of a death knell. One approach "simply compar[ed] the claims of the named plaintiffs with an arbitrarily selected jurisdictional amount."²⁴⁹ The other approach undertook "a thorough study of the possible impact of the class order on the fate of the litigation."²⁵⁰ Neither approach was acceptable: the first set arbitrary, legislative-like thresholds; the second involved the courts of appeals in extensive fact-finding that might be revisited by the district court in any event.²⁵¹

On the defendants' side, the Court stated that the policies underlying the doctrine ought to apply to defendants seeking to

243. See *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966).

244. The Second, Fifth, Sixth, Eighth, Ninth, and D.C. Circuits adopted some version of the doctrine, although it was rejected in the Third and Seventh Circuits. For citations and an excellent history of the doctrine, see 15A WRIGHT ET AL., *supra* note 7, § 3912, at 451-62.

245. 15A *id.* § 3912, at 452 (footnote omitted).

246. See 15A *id.* at 452-54.

247. See 15A *id.* at 458; Redish, *supra* note 81, at 97 n.57. Even within the Second Circuit, some judges found the doctrine nearly unworkable. For example, Judge Henry Friendly wondered whether the doctrine was "workable," and suggested that it might be better "to formulate a rule that will avoid the necessity of making such *ad hoc* judgments as have been required in these and other cases and also will afford equality of treatment as between plaintiffs and defendants." *Korn v. Franchard Corp.*, 443 F.2d 1301, 1307 (2d Cir. 1971) (Friendly, J., concurring).

248. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 472-74 (1978).

249. *Id.* at 472 (footnote omitted).

250. *Id.* at 472.

251. See *id.* at 472-74.

appeal a class certification order, yet they had not.²⁵² This was largely true. Although not mentioned by the Court,²⁵³ the Second Circuit had "flirted"²⁵⁴ with the reverse death knell doctrine by permitting a defendant to appeal a certified class order only if *denial* of that order could have been appealed by the plaintiff.²⁵⁵ Even that narrow avenue was rejected by other courts of appeals.²⁵⁶

Admittedly, the history of the death knell doctrine is not a source of a great deal of optimism. Nonetheless, it would be unfair to label the doctrine a disaster; it is better characterized as an experiment that was not fully developed and needs greater refinement. In the Rule 23(f) era, the courts of appeals should consciously approach the death knell issue from a standards approach. The attempt before *Coopers & Lybrand* to fashion arbitrary rules, particularly dollar amounts, to determine whether to invoke the doctrine, was rightly criticized.²⁵⁷ Instead, courts should consider each appeal on its own terms to determine whether the class certification decision is likely to create a death knell for either plaintiff or defendant. In other words, courts should canvass the same factors used by those courts that utilized the death knell doctrine prior to *Coopers & Lybrand*.²⁵⁸ In addition, the party pressing the Rule 23(f) appeal should have the burden of proof to demonstrate that the death knell is not merely possible, but at the least is more likely than not.²⁵⁹

252. See *id.* at 476.

253. See 15A WRIGHT ET AL., *supra* note 7, § 3912, at 460 & n.62 (2d ed. 1991).

254. 15A *id.* at 456.

255. See 15A *id.* at 456-58 & n.55 (describing various Second Circuit cases). As has been suggested, "that approached denial of any opportunity to appeal," by the defendant because presumably the test did not focus on the pressures on the defendant. 15A *id.* at 457 (footnote omitted). It apparently placed the defendants in the awkward position of making the plaintiff's case that there would be a death knell to the litigation if class certification had been denied.

256. See 15A *id.* at 458 & n.56.

257. See 15A *id.* at 459.

258. See 15A *id.*

259. That is, the burden should be by a preponderance of the evidence, the standard used in most facets of civil litigation. Of course, higher and more difficult standards are also options, such as a "significant possibility" that a death knell will occur. Cf. *Strickler v. Greene*, 119 S. Ct. 1936, 1957-58 & n.3 (1999) (Souter, J., concurring & dissenting) (discussing this and similar formulations in the context of a criminal case). A higher standard of proof, however, is unnecessary at this stage,

Another factor the courts of appeals should consider pertains to the merits of the class certification or, rather, the likelihood of reversal of the class certification decision itself. Although this factor played no explicit role in the death knell doctrine before its demise in 1978, numerous commentators have argued—correctly—that it should be taken into account with any interlocutory appeal regime for class certification decisions.²⁶⁰ Some consideration of the merits of an appeal—in the context of deciding whether the appeal should be heard—is of course not an aberration.²⁶¹ The Supreme Court presumably considers this issue to some degree when deciding whether to grant writs of certiorari.²⁶² It also makes sense to include the factor in other discretionary review regimes, such as Rule 23(f). The less likely the order under consideration will be reversed, the more likely the costs of interlocutory review, such as delay at the trial court level and wasted appellate resources, will be unnecessarily magnified.²⁶³

Certainly, the likelihood of a reversal should not be the sole factor informing the decision to grant permission under Rule 23(f). As previously observed, class certification decisions are not demonstrably incorrect more often than any other interlocutory decision.²⁶⁴ Moreover, the standard of appellate review typically

given the other hurdles a Rule 23(f) petitioner must surmount. *Cf. Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2316 n.26 (1999) (finding it unnecessary to resolve the divergence in lower courts on the appropriate standard of proof in determining whether, in fact, a limited fund exists under Rule 23(b)(1)(B)).

260. See, e.g., POSNER, *supra* note 163, at 344; George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997); Redish, *supra* note 81, at 100; Kruse, *supra* note 26, at 735.

261. See generally Kruse, *supra* note 26, at 735.

262. See Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, LITIGATION, Spring 1998, at 25, 29 (addressing to what extent error below is a factor in the Justices' decision to grant or deny certiorari); see also Gould, *supra* note 24, at 326-27 (comparing Rule 23(f) to certiorari process).

263. See Redish, *supra* note 81, at 100. The burden of proof on this issue should be a preponderance of the evidence. See *supra* note 259 and accompanying text. A more difficult burden to satisfy, such as "a reasonable probability of success on the merits"—which requires a "strong probability that he will be injured" or "a substantial likelihood that [the plaintiff] will ultimately prevail"—typically used to determine whether injunctive relief should issue, see 11A WRIGHT ET AL., *supra* note 7, § 2948.3 (2d ed. 1995), would not be appropriate here, given that the extraordinary nature of injunctive relief is not at issue.

264. See *supra* text accompanying notes 162-70.

will be one of abuse of discretion.²⁶⁵ Taking those points to their logical conclusion, however, would immunize many, if not most, interlocutory orders from immediate review.²⁶⁶ Some have argued that frequent use of Rule 23(f) for this reason would diminish respect for district judges.²⁶⁷ Nonetheless, Article III district judges are unlikely to worry whether their decisions, interlocutory or final, are subject to appellate review and possible reversal.²⁶⁸ Whether the class certification decision is affirmed or reversed under Rule 23(f) review, it could provide further and appropriate guidance to the balance of the litigation, and to other courts and litigants. Even so, a consideration of the merits is one factor, with the possibility of reversal to be given more, but not dispositive, weight than the possibility of affirmance.

Another factor concerning the case itself could be the presence or absence of potential conflicts between class counsel and the class they seek to represent. As described earlier, the possibility of such divergence of interests has attracted particular attention recently in the scholarly literature and case law, especially in the context of settlements.²⁶⁹ Rather than a bright-line rule to measure the existence or scope of such a conflict, at this point, it should be one factor informing Rule 23(f) decisions.²⁷⁰

265. See *supra* note 233 and accompanying text.

266. See Solimine, *supra* note 96, at 1177.

267. One organization critical of the proposed Rule 23(f) commented:

It is difficult to square a proposal for more frequent appeals with the deferential standard of review applied on appeal. There is no empirical support for the implicit view that district courts are prone to err in certification decisions. Indeed, district courts may become less responsible if the locus of responsibility is shifted to appellate courts. "[P]arties opposing class certification will face irresistible client pressure to pursue appeals whenever class certification is granted." When certification is denied, however, there is little likely benefit from appeal because appellate courts are not likely to force certification on an unwilling district court. If the proposal is adopted, the "restraint" language from the Note should be incorporated in the text of the rule.

WORKING PAPERS, *supra* note 178, at 413 (summary of comments of the Federal Courts Committee of the Chicago Council of Lawyers).

268. See Redish, *supra* note 81, at 107; Solimine, *supra* note 96, at 1178-79.

269. See *supra* text accompanying notes 61-71.

270. The presence or absence of class conflicts is apt to be fact-specific, and for that reason a bright-line rule seems particularly difficult to craft or apply. Some factors, such as a proposed fee award that greatly exceeds any monetary relief to

A final factor that could usefully inform the exercise of Rule 23(f) discretion would be the presence or absence of simultaneous litigation in other courts. Judges and academics alike frequently have noted this phenomenon.²⁷¹ In the 1990s, there apparently has been an increase in "forum shopping," that is, attorneys seeking more favorable fora in which to seek class certification.²⁷² Potential class counsel may seek to certify competing classes that cover essentially the same persons and subject matters.²⁷³ Among the complicated problems raised by this race for certification are ones of preclusion and full faith and credit, especially when the classes are nationwide in scope.²⁷⁴ Races to the courthouse are unseemly in any circumstance, but they are especially unsettling in cases, such as class actions, that inevitably affect large groups of people. Interlocutory review potentially will ameliorate some of these problems, by resolving the propriety of class certification earlier and with more clarity.²⁷⁵

the class as a whole, or diverse groupings within the class (e.g., present and future claimants), would signal such a conflict. Of course, that factor could be revisited on the merits if Rule 23(f) permission is granted and the appeal is fully argued on the merits. *Cf. Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2319 n.31 (1999) (explaining that the adequacy requirement is concerned with conflicts between counsel and the class); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.").

Tom Rowe has pointed out to us that in the sort of class actions characterized by conflicts between the named representatives and the balance of the class, there may often be no one to pursue a Rule 23(f) appeal. Both the named parties (and their counsel) and the defendants may be satisfied with the class, especially in the context of a proposed settlement. If so, as is true under pre-Rule 23(f) law, *see* 15B WRIGHT ET AL., *supra* note 7, § 3914.19, at 66-67, members of the putative class should be permitted to file a request to appeal under Rule 23(f). The appropriate procedural vehicle to accomplish this would be a motion to intervene for the purposes of pursuing such an appeal. *See id.*

271. *See supra* text accompanying notes 61-71.

272. *See* Linda S. Mullenix, *Dueling Class Actions*, NAT'L L.J., Apr. 26, 1999, at B18.

273. *See id.*

274. For an overview of these problems, *see id.* The increase of forum shopping in class actions can at least be inferred from data that indicate that more state class actions are being filed. *See, e.g., RAND STUDY, supra* note 62, at 14-15; *Class Action Watch, supra* note 62, at 5.

275. One of the problems raised by dueling class actions is that of collateral attack. After a class action has been certified in one forum, it may be attacked not on direct appeal, but collaterally by a putative class member. This can be accomplished

Although our list is meant to be neither exhaustive nor exclusive, note that it does not include particularly unique or extraordinary decisions on class certification by trial judges. That sort of order is more the province of mandamus review. Likewise, this Article does not discuss those orders that fall within the precise bounds of § 1292(b). Though there always will be some overlap, these factors have been explicitly or implicitly excluded from other modes of interlocutory review. This limited approach ought to be followed in applying Rule 23(f), both to supplement, rather than supplant, the other avenues of interlocutory review, and to pay fidelity to the framers' intent that permission under Rule 23(f) be exercised with restraint. If the factors thought to be relevant to Rule 23(f) are boundless, then there is a danger that neither goal will be realized.

An alternative vision of the scope of Rule 23(f) might suggest that it *should* supplant the other forms of interlocutory review in this context. Under this model, Rule 23(f) would occupy the field of interlocutory review. Section 1292(b) and the writ of mandamus would no longer be operative.²⁷⁶ Such preemption would have the happy result of simplifying the complex nature of multiple interlocutory review options.²⁷⁷ It would make it unnecessary to expand the traditionally narrow scope of mandamus, as some courts have arguably, and controversially done.²⁷⁸

by the putative class member filing her own suit in another forum and arguing that the first class should not be given preclusive effect, as it would violate due process to do so. See generally Murphy, *supra* note 71, at 481-91 (providing a discussion of intersystem tension, manipulation of procedural rules, and collateral attacks). In federal court, at least, Rule 23(f) permits immediate interlocutory review and lessens the need for collateral attacks. See Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller and Morrison*, 73 N.Y.U. L. REV. 1193, 1200-01 & n.46 (1998).

276. See A.L.I., COMPLEX LITIGATION, *supra* note 173, § 307, at nn.1-4 (describing operative bases of § 1292(b) and writs of mandamus); KLONOFF & BILICH, *supra* note 24, at 738 ("[I]t seems likely that Rule 23(f) will significantly curtail, if not eliminate, the need for mandamus review of decisions certifying—or refusing to certify—a class. . . ."); *id.* at 739 ("Presumably a case that qualified under section 1292(b) will qualify *a fortiori* under Rule 23(f).").

277. See POSNER, *supra* note 163, at 345 (describing the present system for interlocutory review as "an incredible crazy quilt").

278. See *id.* at 347-82 (discussing the rule and responsibilities of federal appellate judges); see also A.L.I., COMPLEX LITIGATION, *supra* note 173, § 3.07, at n.3 (discussing how the historic limits on the availability of writs have been relaxed); Kruse, *supra* note 26, at 739 (discussing the "unprincipled" use of the writ).

Moreover, it seems consistent with congressional intent to authorize rulemaking to define appealable orders. If rules like Rule 23(f) can supplement existing options only, then it might accomplish little and lead to more confusion.

This alternative model is attractive, but flawed. As a formal matter, the complete preemption model does not appear to be consistent with the process that led to the creation of Rule 23(f). Neither the rule-authorizing legislation, the Advisory Committee Note, nor Rule 23(f) itself explicitly addresses the point, and, of course, neither § 1292(b) nor the mandamus statute was concurrently amended. The rule does define the "final order" language of § 1291 in the class action context, but § 1292(b) and the mandamus statute remain separate, unamended provisions.²⁷⁹ If, as the Advisory Committee Note says, Rule 23(f) should be exercised with "restraint," then it suggests that complete preemption is uncalled for. A Rule 23(f) used with restraint could still leave some room, if only small, for § 1292(b) and the writ of mandamus to operate.

Still, these are minor points, as the complete preemption model is largely correct. As a formal matter, the complete preemption model could be premised on the inherent discretion found in § 1291(b) and the writ of mandamus. The courts of appeals simply could not exercise their discretion in those instances, or use it in only rare circumstances, while exercising it, albeit with restraint, through Rule 23(f). Even so, neither § 1292(b) nor the writ of mandamus are likely to be used to any great extent. They were not expansively used prior to the adoption of Rule 23(f), nor should they be now. Nonetheless, the other forms of interlocutory review have a limited role to play concurrent with that of Rule 23(f).

The next consideration is the appropriate interaction between the various modes of interlocutory review. Litigants must file

279. The legislative history does not precisely address this preemption issue. See Thomas D. Rowe, Jr., *Defining Finality and Appealability by Court Rule: A Comment on Martineau's "Right Problem, Wrong Solution,"* 54 U. PITT. L. REV. 795 (1993); *supra* note 177. The Court's brief discussions of the legislation have not shed much light on this issue, either. See, e.g., *Cunningham v. Hamilton County*, 119 S. Ct. 1915, 1923 (1999); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 48 (1995). In those cases, the Court interpreted the collateral order doctrine, which has its statutory roots in the "final order" language of § 1291.

writs of mandamus, § 1292(b) appeals, or Rule 23(f) requests within relatively short periods after the district court's class certification order.²⁸⁰ In theory, nothing prevents a litigant from filing these requests simultaneously or sequentially. Given the differing standards of each type of interlocutory review, the court of appeals can of course dispose of them in due course, and rationally deny them all, or grant one while denying others. As a practical matter, though, it may be appropriate in some circumstances to give some weight to the disposition of a related, earlier appeal. As explored further in the next section, it may be particularly appropriate for a court of appeals considering a Rule 23(f) application to acknowledge how the district judge may have ruled on a § 1292(b) request.

3. *Practice Under Rule 23(f)*

The proper disposition of an application for permission to appeal under Rule 23(f) places various, interrelated burdens on the litigants, the courts of appeals, and district judges. First, consider the appellate court. As we have suggested, Rule 23(f) jurisprudentially establishes a standard, not a rule.²⁸¹ Whatever criteria are applied, Rule 23(f) should be developed on a case-by-case basis.²⁸² It seems inappropriate for the court of appeals

280. The texts of § 1292(b) and Rule 23(f) state that requests must be lodged in the court of appeals within 10 days after (1) the § 1292(b) request to the district judge has been granted, and (2) the class certification motion has been decided, respectively. See 28 U.S.C. § 1292(b) (1994); FED. R. CIV. P. 23(f).

281. See Kruse, *supra* note 26, at 738 (describing the discretionary system under 23(f)).

282. This seems to be contemplated by FED. R. APP. P. 5 (Appeal by Permission). The rule does not list any substantive criteria but merely imposes on the appellant the duty to, *inter alia*, brief "the reasons why the appeal . . . be allowed" FED. R. APP. P. 5(b)(1)(D). As the advisory committee note to that amendment states, it was intended to accommodate § 1292(b) appeals and rules promulgated under § 1292(c) concerning interlocutory appeals. See FED. R. APP. P. 5 advisory committee's note; see also Gould, *supra* note 24, at 329-31 (discussing further the interaction between Rule 23(f) and Fed. R. App. P. 5); Warren W. Harris, *The New Federal Rules of Appellate Procedure: Changes in Style and Substance*, 1 J. APP. PRAC. & PROCESS, 415, 417-18 (1999), available in WESTLAW, JAPPR database (providing a general discussion of Rule 5 of the Federal Rules of Appellate Procedure).

Although Rule 23(f) speaks of an "application" for permission to appeal, that is the equivalent of a "petition" to appeal, the language used by FED. R. APP. P. 5, so

itself to promulgate a circuit rule specifically listing the criteria that will guide the exercise of discretion under Rule 23(f). That sort of rule-like specificity, assuming its validity in *some* set of circumstances if ever, is inappropriate when invoked in the early stages of interpreting a new rule.

Precisely because the Rule 23(f) standard should be developed on a common law basis, the courts of appeals should issue opinions when they grant or deny permission under the rule. It has been suggested already that decisions whether to grant review under Rule 23(f) be issued without an explanatory opinion.²⁸³ To be sure, appellate courts typically exercise discretionary jurisdiction without giving reasons.²⁸⁴ Thus, the Supreme Court rarely gives any extended reasons for granting or denying certiorari.²⁸⁵ That analogy, however, is imperfect. Litigants, and presumably the Supreme Court itself, have some sense of when certiorari is likely to be granted or denied.²⁸⁶ No such guidance is found in the text of Rule 23(f) or in the Advisory Committee Note. Even relatively brief orders or opinions explaining the grants or denials of permission can be of use to the court itself and to litigants, and outweigh the expenditure of appellate resources necessary to generate such opinions.²⁸⁷

the latter should apply. *See* 16A WRIGHT ET AL., *supra* note 7, § 3951, at 275 n.4 (2d ed. 1996).

283. *See* Kruse, *supra* note 26, at 738 ("The greatest advantage of the discretionary system [under Rule 23(f)] is that the courts of appeals may simply deny immediate appeal without issuing an opinion, thus saving valuable judicial resources and avoiding the associated delay.").

284. *See* Solimine, *supra* note 96, at 1202.

285. *See* HART & WECHSLER, *supra* note 24, at 1696-99 (discussing, *inter alia*, when reasons for denial of certiorari are or should be given).

286. The Supreme Court has announced criteria that ostensibly limit and guide its certiorari policy. *See* SUP. CT. R. 10.

287. *Cf.* Solimine, *supra* note 96, at 1202-03 (arguing, for similar reasons, that decisions of both district judges and the courts of appeals respecting § 1292(b) appeals should contain reasons and be published). The practice of some courts of appeals to dispose of some cases by one-line orders (e.g., "affirmed"), with no other reasons given, has been the subject of critical commentary. *See, e.g.*, POSNER, *supra* note 163, at 174-75 (arguing that caseload pressures and "sheer laziness" account for the practice); Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157 (1998) (discussing the reasons for one-line orders and unpublished decisions). The practice has even been addressed in the popular press. *See, e.g.*, William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES, Mar. 14, 1999, at A6; William C. Smith, *Big Objections to Brief Deci-*

Consider next the responsibilities of the litigants. The exercise of discretion under Rule 23(f) often will be heavily fact-sensitive.²⁸⁸ Some of the facts can be set out in the briefing of the parties on the application for permission, but that may not be enough to develop an adequate record. Again, the experience of the death knell doctrine provides assistance. A satisfactory consensus on developing a record in that context was not reached. Some courts of appeals required that a record be developed in the district court.²⁸⁹ This makes sense, on one hand, as the trial court is the natural place to develop a record and make evidentiary findings, if necessary. On the other hand, it places the district judge in the awkward position of developing a record in part to determine if she should be reversed.

The Advisory Committee Note was not oblivious to the role of the district court in developing a record. It suggests that the district judge give a "statement of reasons bearing on the probable benefits and costs of immediate appeal."²⁹⁰ The Advisory Committee's recommendation is laudable, but not entirely helpful. No obvious procedural vehicle exists for the district judge to announce her views. The procedure under § 1292(b), touted by the Advisory Committee Note as a model, explicitly provides

sions, A.B.A. J., Aug. 1999, at 34.

Appellate judges, fearing or enduring an avalanche of Rule 23(f) motions, may be sorely tempted to file one-line orders on such requests, especially when they are denied. A better way to discourage frivolous appeals is to use the sanctions process found in FED. R. APP. P. 38.

288. See Kruse, *supra* note 26, at 738-40.

289. See, e.g., *Ott v. Speedwriting Pub. Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975). See generally *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473 (1978); 15A WRIGHT ET AL., *supra* note 7, § 3912, at 455.

290. *Proposed Amendments to the Federal Rules of Civil Procedure*, 167 F.R.D. 559, 566 (1996). For the full quote, see *supra* note 192.

As previously suggested, some of the district judge's discussion (presumably reflected in a written decision) of her decision on class certification will inform the court of appeals' Rule 23(f) analysis. Thus, the analysis of Rule 23(a)(4) may yield insights on the dangers of intraclass antagonisms. Likewise, the district court's analysis may address the issue of reconsidering the class certification decision in light of later developments, an option specifically permitted under Rule 23(c)(1). Recall that the *Coopers & Lybrand* Court specifically alluded to this point in holding that the class certification decision was not conclusive and hence did not fall under the collateral order doctrine. See *supra* note 129. If it were likely that the district court's order was conditional and likely to be revised, this would counsel against granting permission under Rule 23(f).

such an avenue by drawing the district judge into the decision-making process. Perhaps the Advisory Committee Note had in mind the practice under mandamus of permitting district judges to file a brief in the court of appeals.²⁹¹ The sort of criteria we suggest should guide the courts of appeals in applying Rule 23(f) will not necessarily be inherent in the district court's decision on the merits of the certification order, other than the adequacy of counsel factor, which is mirrored in rule 23(a)(4). The district court would presumably then need to issue a separate decision or address the matter in the original order. Another option would be for the trial judge to address the matter if she is asked to stay the proceedings while a Rule 23(f) appeal is being pursued. The rule by its terms does not automatically impose such a stay.

The better approach is to place the burden of developing a record where it belongs: on the party seeking to utilize Rule 23(f). The principal focus should be in the briefing of the parties.²⁹² Should greater detail be desired, the courts of appeals could delegate the task of record development to a special appellate master.²⁹³ Only in the rarest of circumstances should the

291. See FED. R. APP. P. 21(b)(4) ("The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so."). This has not been used with great satisfaction, given the "antipathy to the writs" that appear "to be aimed at the trial judge personally." 16 WRIGHT ET AL., *supra* note 7, § 3932.2, at 522 (2d ed. 1996). This perception can be exacerbated if the judge appears personally. See 16 *id.* at 522-23.

292. Appellants also should make clear in the briefing if they seek review of issues related to the class certification order on the basis of pendent appellate jurisdiction. In the class action context, examples are discovery by or against the class, the content of or costs of notice to the class, and orders disqualifying class counsel. See 15B WRIGHT ET AL., *supra* note 7, § 3914.19, at 73-77 (2d ed. 1995). The Supreme Court has held that pendent appellate jurisdiction is permissible when the pendent issue is "inextricably intertwined" with the appealable order, or when "review of the former decision [is] necessary to ensure meaningful review of the latter." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995). For a thorough discussion, see Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint*, 49 HASTINGS L.J. 1337 (1998). Professor Steinman argues that the promulgation of Rule 23(f) does not impair the ability of federal courts to develop principles of pendent appellate jurisdiction. See *id.* at 1360 & n.83.

293. "The master could be a court employee (e.g., a staff attorney), a respected member of the bar, or a district judge on senior status, who might develop expertise if she regularly referred such matters as needed." FED. R. APP. P. 48 (amended 1994).

matter be remanded to the district judge for further development of the record.²⁹⁴

294. Once the matter is fully briefed and ready for decision, two options are present. One is to have a three-judge panel rule on the motion, and if granted, then proceed to rule on the merits of the class certification order. Briefing in the separate stages could be sequential, or combined in one step. For an example of the latter, see *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) (Easterbrook, J.) ("Thus we grant the petition for leave to appeal. Moreover, because the petition and the response lay out the legal arguments, further briefing is unnecessary."). The other option is to have a standing motions panel of the court of appeals decide the Rule 23(f) request, and, if granted, have a separately assembled three-judge panel rule on the merits. Requests under § 1292(b) usually have been ruled on under the latter method. See *supra* note 135. An advantage of the former model is that the entire process is streamlined, and judges familiar with the Rule 23(f) issues would proceed to address the substantive class action matters, if necessary. A disadvantage is that if the entire matter is briefed all at once, then briefing on the merits of the appeal is wasted if the antecedent Rule 23(f) request is denied. If the briefing takes place in two steps, in contrast, it becomes similar to the second model.

The second model is less streamlined, but can end up being less wasteful, as a second round of briefing on the merits is made only if the motion to appeal via Rule 23(f) is granted. Another possible advantage of the second model is that it could lessen the prospect of strategic voting. In this context, strategic voting is when a judge on a multimember court votes to accept or deny discretionary review of a case, when normally she would do the opposite, for the purpose of guiding the development of the law in a desired manner. One example would be a Supreme Court justice who normally would vote to grant certiorari in a case, but votes not to, only because she fears her colleagues would vote against her preferred position on the merits. See Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 515-16, 534-36 (1998). This sort of explicit or implicit vote trading strikes many writers as odd or improper for judges. See generally Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999) (summarizing and criticizing the normative arguments on this issue).

To be sure, strategic voting is rarely an issue on the courts of appeals, as most cases are appeals as of right, randomly assigned to randomly assembled three-judge panels. See Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1666-67 (1998). The problem, if it is a problem, could arise in ruling upon discretionary interlocutory appeals, such as Rule 23(f). One scenario might be a judge voting against a Rule 23(f) request, even when review seems to be called for because she fears her colleagues on that panel will rule improperly on the merits of an appeal. It is doubtful, however, that most federal appellate judges regularly engage in strategic voting in any context. But see Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 266-70 (1999) (arguing that empirical evidence demonstrates that desire to reverse a three-judge panel accounts, in part, for the decision to grant en banc review). Nonetheless, some consideration of the merits should play a role in the Rule 23(f) determination. Still, it should be noted that the separate panels model considerably ameliorates the problem of strategic voting, as the panel considering the Rule 23(f) request will not know, at that early stage, who will

C. Applying Rule 23(f): Revisiting Coopers & Lybrand and Rhone-Poulenc

The criteria advanced to guide the application of Rule 23(f) are necessarily somewhat tentative and incomplete. For that reason, it would not be particularly helpful as illustrations to apply those criteria to a series of real or hypothetical cases. Nonetheless, it may give the reader some sense of our approach by applying the criteria to two cases that have dominated much of the Article.

The first is the Supreme Court's decision in *Coopers & Lybrand*. There, it will be recalled, the Supreme Court rejected the theory of the death knell doctrine without specifically reviewing how the lower court ruled on the merits, as it were, of the doctrine.²⁹⁵ The Eighth Circuit found that the decertification order was indeed the death knell of the litigation for the plaintiffs. The court found that the two named plaintiffs', and proposed class representatives', claims were \$2650.²⁹⁶ In comparison to their gross income (they were apparently married) of \$26,000 and net worth of \$75,000, but only \$4000 in cash, the court of appeals considered incurred legal expenses of \$1200, an estimate of an additional \$15,000 of such expenses, the need to take "extensive discovery," and the prospect that the securities law aspects of the case would "likely require expert testimony at trial."²⁹⁷ In those circumstances, the court concluded that the plaintiffs had met their burden of proof to demonstrate that they could not pursue their individual claims if the decertification order stood.²⁹⁸

constitute the panel to hear the case on the merits, if review is granted.

295. See *supra* text accompanying note 107-29.

296. See *Livesay v. Punta Gorda Isles, Inc.*, 550 F.2d 1106, 1109 (8th Cir. 1977), *rev'd sub nom. Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). The claim amount was found in the complaint. See *Livesay*, 550 F.2d at 1107. Presumably the other figures were obtained from briefing on appeal. In somewhat ruleslike fashion, the court held that the figure "falls between those cases where the individual claim is clearly not viable and those cases where the individual claim is viable." *Id.* at 1109 (footnote omitted). The court implied that if the claim amount fell clearly into one category or the other, it would not need to engage in further analysis. See *id.* at 1109-10.

297. *Id.*

298. See *id.* at 1110.

If Rule 23(f) had existed at the time, permission to appeal should have been granted. The Eighth Circuit seems to have applied the death knell doctrine reasonably, though the court might have benefitted from additional facts on the prospects for recovery or settlement, and perhaps evidence from practitioners in that field on whether the legal services market would ignore the case. There was no explicit discussion of the likelihood of reversal up front, but it is worth noting that the court in fact reversed the decertification order.²⁹⁹ There also appears to be nothing in the case concerning the other criteria we advanced, such as possible interclass conflicts or forum shopping. True, as the Supreme Court emphasized,³⁰⁰ the plaintiffs did not file a request under § 1292(b), but that failure should not be dispositive of the analytically separate issue of Rule 23(f) appeals.

In *Rhone-Poulenc*, Judge Posner, writing for the Seventh Circuit, concluded that a writ of mandamus should issue to decertify a certification in a mass tort case.³⁰¹ He spent considerable time discussing and ultimately accepting the defendants' reverse death knell argument.³⁰² The strength of that particular analysis suggests that Rule 23(f) could have been used appropriately here as well.³⁰³ With regard to the other factors, Judge Posner ad-

299. See *id.* at 1110-13.

300. See *Coopers & Lybrand*, 437 U.S. at 466. The plaintiffs also filed a writ of mandamus, but that was dismissed when the court of appeals took jurisdiction of the appeal. See *id.* at 466 & n.6.

301. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

302. See *supra* text accompanying notes 142-61.

303. This is not to say that the analysis is unassailable. The dissent charged that the pressure on the defendant to settle was based on "counsel's vague statements at oral argument," and that the "only 'evidence' supporting counsel's assertion has been supplied by the majority's own statistical conjecturing, to which plaintiffs have had no opportunity to respond." *Rhone-Poulenc*, 51 F.3d at 1306-07 (Rovner, J., dissenting). To the extent these characterizations are correct, the problem could have been ameliorated by an evidentiary hearing before a special master under FED. R. APP. P. 48. Perhaps in response, Judge Posner acknowledged that the "defendants did not mention their concern about settlement pressures until the oral argument of this appeal." *Id.* at 1299. This was understandable and did not waive the issue, however, for any such acknowledgment in their briefing "would greatly weaken them in any settlement negotiations. We should be realistic about what is feasible to put in a public brief." *Id.* To deal with this problem, defendants could be required to present competent evidence on this point, to the court or a special master, in camera if necessary.

At least one commentator has asserted that the trial judge in *Rhone-Poulenc*

dressed the merits of the class certification issue, though not in a preliminary fashion as would be appropriate with Rule 23(f).³⁰⁴ Numerous other cases concerning the same product were filed in other state and federal courts, but none of them appeared to be competing class actions as such.³⁰⁵ Nor does there appear to be evidence of intraclass antagonisms.³⁰⁶ On balance, however, a court of appeals in a case such as *Rhone-Poulenc* should grant permission to appeal under Rule 23(f).

D. Applying Rule 23(f): Evaluating Blair v. Equifax Check Services, Inc.

As of the writing of this Article, the Seventh Circuit in *Blair v. Equifax Check Services, Inc.* was the first application of Rule 23(f) in a published opinion.³⁰⁷ At the outset of the opinion, Judge Easterbrook³⁰⁸ canvassed the history of the rule. He argued that it would be a "mistake" to "draw up a list" of considerations to guide the exercise of discretion under the rule, and that "[n]either 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."³⁰⁹ Judge Easterbrook then summarized these principal "reasons Rule 23(f) came into being."³¹⁰ One is that the denial of class certification could sound the death knell for the plaintiff, given that the representative plaintiff's claim may be too small to make the litigation economical.³¹¹ Second, the grant of class certification can put "considerable pressure on the defendant to settle," in a

denied a § 1292(b) request, see Kruse, *supra* note 26, at 728, but we have been unable to find any express reference to that point in the published opinions in the case.

304. See *Rhone-Poulenc*, 51 F.3d at 1299-1304.

305. See *id.* at 1296.

306. See *id.* at 1296, 1298.

307. 181 F.3d 832 (7th Cir. 1999).

308. Chief Judge Posner and Judge Rovner made up the rest of the panel, and silently concurred in Easterbrook's opinion. See *id.* at 833. Coincidentally, Posner and Rovner were on opposite sides of the *Rhone-Poulenc* case, a decision that, in part, drove the adoption of Rule 23(f). See *Rhone-Poulenc*, 51 F.3d at 1293.

309. *Blair*, 181 F.3d at 834.

310. *Id.*

311. See *id.*

"mirror image" of the situation facing the plaintiff in a typical death knell.³¹² Third, an appeal "may facilitate the development of the law," especially given that "some fundamental issues about class actions are poorly developed."³¹³ He added:

Law may develop through affirmances as well as through reversals. Some questions have not received appellate treatment because they are trivial; these are poor candidates for the use of Rule 23(f). 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.³¹⁴

Regarding the mechanics of a Rule 23(f) proceeding, he observed that the rule expressly does not impose a stay on the trial court proceedings while a request is pending.³¹⁵ Those proceedings only stop if either the trial court or the court of appeals issues a stay.³¹⁶ "[A] stay would depend on a demonstration that 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."³¹⁷ He opined that "stays will be infrequent, [so] interlocutory appeals under Rule 23(f) should not unduly retard the pace of litigation."³¹⁸

Blair involved several overlapping class actions brought against a check verification service for alleged violations of federal law regulating debt collection practices.³¹⁹ The district court in *Blair* certified a class action, but another similar and overlapping class action against the same defendant before another judge in the Northern District of Illinois settled on the same day.³²⁰ Among other provisions, the settlement forbade any class members from pursuing litigation, except in individual

312. *Id.* at 834, 835.

313. *Id.* at 835.

314. *Id.*

315. *See id.*

316. *See id.*

317. *Id.*

318. *Id.*

319. *See id.* at 832.

320. *See id.* at 836.

actions.³²¹ The defendant returned to the district judge in *Blair*, who refused to decertify the class before him, in part because he deemed the settlement of the other case "irrelevant."³²² The defendant then sought to appeal under Rule 23(f).³²³

The Seventh Circuit in *Blair* accepted the appeal, determining that it fell within the third category previously outlined.³²⁴ The court briefly noted that issues raised by the relation among overlapping class actions in different courts "may evade review at the end of the case," because by then, the battle will be one among different and possibly inconsistent judgments.³²⁵ The paucity of case law on point "implied[d] that this is one of the issues that has evaded appellate resolution, and the issue is important enough to justify review now."³²⁶ The court went on to affirm the class certification order.³²⁷

The court's application of Rule 23(f), on the whole, is sound. Much of the court's analysis is consistent with the views outlined in this Article.³²⁸ The court was correct to treat Rule 23(f) as a standard, thus eschewing the need to create from a blank slate narrowly defined categories.³²⁹ In effect, the court endorsed a common lawlike, case-by-case approach to developing standards under the rule, a model we endorsed ourselves.³³⁰ As an initial guide to developing those standards, the court gleaned three principal rationales from the Advisory Committee Note. The first two—the death knell for plaintiffs and the reverse death knell for defendants—are well documented in the literature, discussed in the Advisory Committee Note, and admirably summarized by the court.³³¹

The third criterion is more troublesome. The court argued that the need to develop the jurisprudence of class actions was a

321. *See id.*

322. *Id.*

323. For a fuller exposition of the facts, see *id.* at 835-37.

324. *See id.* at 837-38.

325. *Id.* at 837-38.

326. *Id.* at 838.

327. *See id.* at 838-39.

328. *See supra* text accompanying notes 220-94.

329. *See Blair*, 181 F.3d at 834-35.

330. *See supra* text accompanying notes 220-94.

331. *See Blair*, 181 F.3d at 834-35.

reason to allow an early appeal.³³² Due to the final judgment rule, many aspects of Rule 23 litigation may often end up evading appellate review.³³³ Even in those cases that reach a final appealable judgment, through a resolution of the merits, a court-approved settlement, or otherwise, may end up being resolved on appeal largely on matters unrelated to the application of Rule 23.³³⁴ Even when orders are affirmed, there is virtue to providing appellate guidance on issues, particularly to those that often escape review from final judgments.³³⁵ The standard as stated—developing the law—is too broad and vague to do much good. The court correctly found that the problem of simultaneous class action in different courts, or before different judges in the same court, fell under that criterion.³³⁶

Using development of the law as a criterion might work in another, limited way. The Advisory Committee Note does suggest that review of a “novel or unsettled question of law” regarding class actions is appropriate.³³⁷ That language was drafted at a time when proposals were being advanced to amend extensively the balance of Rule 23.³³⁸ Those proposals, however, were not promulgated. Accordingly, the Advisory Committee Note language should be read with caution. Nonetheless, as observed at

332. See *id.* at 835.

333. See Willging et al., *supra* note 11, at 174.

334. See *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999) (explaining that a plaintiff who is denied class certification, but nonetheless proceeds to litigate and loses on the merits, has little or no incentive to appeal the denial of class certification at that point); Willging et al., *supra* note 11, at 174 (suggesting that data showing low rate of appeals from class certification decisions may reflect that “most class action appeals, given that they were nearly always filed after a final judgment, may have excluded certification issues because other issues—such as the merits of the claims—may have superseded the need or feasibility of revisiting the certification issue”).

335. See *Blair*, 181 F.3d at 837-38; Solimine, *supra* note 96, at 1181-83 (advancing similar reasons to justify more expansive interpretation and use of § 1292(b)).

336. See *Blair*, 181 F.3d at 834-35, 838; *supra* notes 325-31 and accompanying text. In a post-*Blair* decision, Judge Easterbrook found that the third criterion was met when the issue of class certification, namely whether and to what extent monetary relief can be sought in a Rule 23(b)(2) class, had been addressed in divergent ways by “a welter of district court decisions.” *Jefferson v. Ingersoll Int’l, Inc.*, 195 F.3d 894, 897 (7th Cir. 1999).

337. See *supra* note 231 and accompanying text.

338. See *supra* note 177 and accompanying text.

the outset of this Article, Congress recently has passed several pieces of legislation that regulate class actions in discrete subject areas (e.g., securities law and Y2K issues).³³⁹ Unsettled class issues under that legislation, or future legislation or amendments to Rule 23, would be appropriate for Rule 23(f) review, especially if one or more of the other factors we outlined are present.

Although the *Blair* court correctly accepted and analyzed the Rule 23(f) appeal, future courts will benefit from a finer delineation of the factors that should be taken into account in exercising Rule 23(f) discretion. Likewise, it should be noted that *Blair* found it unnecessary to address some vexing problems, such as applying the death knell doctrine or determining the relationship between the rule and the other forms of interlocutory review.³⁴⁰ Future cases, no doubt, will need to confront those issues.

CONCLUSION

The certification of class actions raises important and complicated issues of law and policy for trial and appellate judges. The issues are often of sufficient import and difficulty that immediate appellate review of these interlocutory orders is justifiable. The interlocutory appeal regime regarding these orders is hardly a model of clarity. At first blush, adding yet another avenue of interlocutory appeal may seem only to cloud the picture further. Nonetheless, Rule 23(f), properly understood and applied, holds the promise to usefully supplement other avenues of interlocutory review of class certification orders, and advance the interests of judges and litigants alike.

339. See *supra* note 3 and accompanying text.

340. See *Blair*, 181 F.3d at 834-39.

APPENDIX

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

* * * *

(B) **CLASS ACTIONS MAINTAINABLE.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the practical ability of individual class members to pursue their claims without class certification;

~~(AB) the interest of members of the class in individually controlling the prosecution or defense of class members' interests in maintaining or defending~~ separate actions;

~~(BC) the extent, and nature, and maturity of any related litigation concerning the controversy already commenced by or against~~ involving class members of the class;

~~(CD) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;~~

~~(DE) the difficulties likely to be encountered in the management of a class action; and~~

* New material is underlined. Superseded material is struck out.

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation; or

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

(C) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) ~~As seen as~~ When practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

* * * *

(E) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without hearing and the approval of the court, ~~and after~~ notice of the proposed dismissal or compromise ~~shall be~~ has been given to all members of the class in such manner as the court directs.

(F) APPEALS. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

COMMITTEE NOTE

* * * *

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. At the same time, subdivision (f) departs from § 1292(b) in two significant ways. 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 it 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.”

Permission to appeal should be granted with restraint. 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. Yet several 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.

The expansion of appeal opportunities effected by subdivision (f) is modest. Court of appeals discretion is as broad as under § 1292(b). 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. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the 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.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).