INTERLOCUTORY APPEAL OF CLASS ACTION CERTIFICATION DECISIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f): A PROPOSAL FOR A NEW GUIDELINE

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I. INTRODUCTION

The class action is an "invention in equity," created to allow large groups of plaintiffs to enforce their equitable rights.[1] Over the past decade, it has assumed a prominent and important role in American civil litigation.[2] A uniquely complex form of litigation, the class action presents many special risks and challenges.[3] A court's decision whether to certify a class is often the decisive moment in a class action,[4] as it can turn a relatively inconsequential case into one with hundreds, even thousands, of claimants and carry with it damages upwards of one billion dollars.[5] As the Supreme Court stated: "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense."[6] Similarly, from the plaintiffs' point of view, denial of certification of a class can doom the litigation if the representative plaintiffs' individual claims are insufficient to make individual litigation economically feasible.[7]

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[1] John Starnes, *Class Certification in Mass Product Liability Litigation: Argument for a Pragmatic Approach*, 31 U. MEM. L. REV. 175, 180 (2000).

[2] Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1543 (2000).

[3] Markham R. Leventhal, *Class Actions: Fundamentals of Certification Analysis*, FLA. B.J., May 1998, at 10.

[4] Recent Cases, *Civil Procedure–Class Actions–Eleventh Circuit Reverses Certification of Plaintiff Class on Interlocutory Appeal Under Rule 23(f)*, 114 HARV. L. REV. 1793 (2001).

[5] Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 FED. RULES DECISIONS 366, 370 (1996).

[6] Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).

[7] Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999).

Historically, however, there have been few options for parties to appeal a certification decision.[8] Congress, with the guidance of the Advisory Committee on the Federal Rules of Civil Procedure, sought to remedy this situation with the adoption of Federal Rule of Civil Procedure 23(f) in 1998,[9] which provides for interlocutory appeal of class certification decisions.[10] Rule 23(f) gives the federal circuit courts discretion to grant such an appeal, and the Advisory Committee's notes direct the courts of appeals to "develop standards for granting review."[11] Most of the circuits have chimed in with their version of the appropriate standards and the result is a body of guidelines that, while possessing a similar core, also greatly diverge.

This Note will argue that the current body of appellate court guidelines under Rule 23(f) is too restrictive. Specifically, because the cost of an erroneous denial of appeal is so high, and because the ways the circuits deal with an erroneous district court decision vary greatly, forum-shopping opportunities are created. Therefore, the courts of appeals should each adopt a guideline that allows for appeal when it can be shown that the district court's decision is "likely erroneous." Part II of this Note will outline the history of interlocutory appeals of class action certification decisions and the adoption of Rule 23(f). Part III will discuss the different courts of appeals decisions that set forth guidelines under Rule 23(f). Part IV will outline why the current regime is too restrictive and will propose a single new category for allowing appeals of class action certification decisions when the district court's decision is "likely erroneous."

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[8] Solimine & Hines, *supra* note 2, at 1535.

[9] *See* Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 102 (2001).

[10] *See* FED. R. CIV. P. 23(f).

[11] *Id.* advisory committee's note.

II. HISTORY OF INTERLOCUTORY APPEALS OF CLASS ACTION CERTIFICATION DECISIONS

Federal Rule of Civil Procedure 23, the rule governing class actions, originally adopted in 1938, was completely overhauled in 1966, resulting in what is substantially the current rule.[12] While Rule 23 did not mention certification of a class prior to 1966, the changes then made established the certification procedure and focused attention squarely upon it.[13] The drafters of the revised rule made clear that the class action was intended to adjudicate all individual claims in one proceeding and to have full binding effect on each class member.[14] With the certification decision of such obvious importance, the drafters also provided for a formal certification procedure, in which the judge was to determine if the class was a valid one "as soon as practicable after commencement of an action brought as a class action."[15] The certification decision took on tremendous strategic and practical importance beyond its res judicata effect. A certified class can mean both greater litigating power and more settlement leverage to a plaintiff.[16] A denied certification, on the other hand, can mean the end of litigation, for it may no longer be economically feasible to continue to individually litigate the claims.[17] For a defendant, the certification decision can mean the difference between either the end of the action or, if economically feasible, individually litigating small claims, and facing a potentially ruinous damages claim that can essentially force settlement.[18] Thus, the availability of an immediate appeal from the certification decision is extremely important.

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[12] Solimine & Hines, *supra* note 2, at 1538; Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1259 (2002).

[13] Bone & Evans, *supra* note 12, at 1261.

[14] *Id.* at 1262.

[15] *Id.*; FED. R. CIV. P. 23(c)(1).

[16] Bone & Evans, *supra* note 12, at 1262.

[17] Solimine & Hines, *supra* note 2, at 1546.

[18] *Id.*; Bone & Evans, *supra* note 12, at 1262.

A. The Final Judgment Rule

The "final judgment rule," under which appeals of right are only permitted if the decision appealed from is "final," posed a significant barrier to the availability of an immediate appeal from a certification decision, because the Supreme Court held orders granting or denying certification of a class to be interlocutory, not final.[19]

The "final judgment rule" dates back to the English common law, and was statutorily adopted in the Judiciary Act of 1789.[20] In its current form, it gives jurisdiction to the federal courts of appeals over "appeals from all final decisions of the district courts of the United States."[21] In turn, the Supreme Court defines a "final judgment" as a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[22] One of the main justifications for the final judgment rule is to prevent the "debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy."[23] In addition to efficiency, a mootness rationale exists; a victory in the case by the would-be interlocutory appellant would render such earlier appeal moot.[24] Weighing against these justifications in the class action context are the potential hardships mentioned above: the possibility that the economic considerations for the plaintiffs proceeding with individual litigation or for the defendants facing an enormous certified

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[19] Coopers & Lybrand v. Livesay, 437 U.S. 463, 464-65 (1978).

[20] John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence With Discretionary Review*, 44 DUKE L.J. 200, 202 (1994).

[21] 28 U.S.C. § 1291 (2000) (stating, in relevant part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States").

[22] Catlin v. United States, 324 U.S. 229, 233 (1945).

[23] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).

[24] Jordon L. Kruse, *Appealability of Class Certification Orders: The 'Mandamus Appeal' and a Proposal to Amend Rule 23*, 91 NW. U. L. REV. 704, 711 (1997).

class render continuing litigation unreasonable. Because of considerations such as these, both the courts and Congress have created exceptions to the final judgment rule that permit interlocutory appeal in cases where the finality requirement has not been met.[25]

B. Exceptions to the Final Judgment Rule

1. The Collateral Order Doctrine

The collateral order doctrine is the result of the Supreme Court's opinion in *Cohen v. Beneficial Industrial Loan Corp.*[26] *Cohen* was a stockholder derivative suit in which a New Jersey statute, if applicable, would have required the plaintiffs to post a security bond that would be used to cover defendant's litigation costs, should the plaintiffs not win on the merits.[27] The district court held that the state statue was not applicable in federal court.[28] The threshold question for the Supreme Court, then, was whether such a holding was appealable under the final judgment rule.[29] In interpreting § 1291 of the Judicial Code,[30] the Court noted that this holding would not be appealable "if Congress had allowed appeals only from those final judgments which terminate an action."[31] It then went on to give the statute what it called a "practical rather than technical construction,"[32] and in holding this order appealable, observed both that the order did not affect the merits of the case, and that it would likely be too late for effective appeal to be undertaken at the end of the case.[33] The Court stated:

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[25] *Id.* at 712.
[26] 337 U.S. 541 (1949).
[27] *Id.* at 543.
[28] *Id.* at 545.
[29] *Id.*
[30] 28 U.S.C. § 1291 (2000).
[31] 337 U.S. at 545.
[32] *Id.* at 546.
[33] *Id.*

> This 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.[34]

Subsequent decisions clarified the three-part *Cohen* test for the collateral order doctrine: For the order to be appealable, it must (1) "conclusively determine the disputed question;" (2) "resolve an important issue completely separate from the merits of the action;" and (3) "be effectively unreviewable on appeal from final judgment."[35] For a time, there was speculation that the collateral order doctrine would ultimately erode the final judgment rule, but these fears never materialized.[36] In *Coopers & Lybrand v. Livesay*, the Supreme Court held that an order denying class certification was not immediately appealable under the collateral order doctrine.[37] Class certifications, the Court stated, did not meet any of the factors in the *Cohen* test: they are subject to revision in the district court, they are "enmeshed in the factual and legal issues comprising the plaintiff's cause of action," and they are subject to review after final judgment "at the behest of the named plaintiff or intervening class members."[38] Thus, the collateral order doctrine was foreclosed as a route for interlocutory appeal of class certification decisions.

2. The "Death-Knell" Doctrine

Along with the collateral order doctrine, the death-knell doctrine was employed for a time to provide relief from the rigors of the final judgment rule. The death-knell doctrine

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[34] *Id.*

[35] Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

[36] *See* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1170 (1990).

[37] 437 U.S. at 468-69.

[38] *Id.* at 469.

was established in the Second Circuit's decision in *Eisen v. Carlisle & Jacquelin*.[39] In that case, the plaintiff sought appeal of a district court denial of class certification.[40] In applying § 1291, the court recognized that the certification order was not "final," but again chose to give the statute a "practical rather than a technical" construction.[41] Because Eisen's individual claim was so small, the court held that if appeal were denied now, it would put an end to the lawsuit for all practical purposes: "We can safely assume that no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eisen."[42] Thus, the court established the death-knell exception to the final judgment rule: "Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed."[43]

The death-knell doctrine was not without its problems, however.[44] Application of the doctrine required a comparison of the amounts of the plaintiffs' individual claims to their financial resources.[45] If the court determined that the disparity between the two was such that the plaintiff would be unable to maintain the action alone, this would terminate the litigation for practical purposes, and under the death-knell doctrine, appeal would be allowed.[46] This comparison, however, was a source of difficulty. Making such a determination would often require extensive development of the facts and this raised questions as to how much of a record had to be developed at the trial court level for future use.[47] To further complicate matters, the courts never indicated how to make such a comparison.[48] Recognizing

[39] 370 F.2d 119 (2d Cir. 1966).
[40] *Id.*
[41] *Id.* at 120.
[42] *Id.*
[43] *Id.* at 121.
[44] *See* Solimine & Hines, *supra* note 2, at 1553.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*

these problems, and noting the inherent arbitrariness in a court attempting to precisely define when an action was economically unsustainable, the Supreme Court, again in *Coopers & Lybrand v. Livesay*, held the death-knell doctrine an impermissible interpretation of § 1291.[49] In addition to the considerations above, the Court observed that it was an inequitable doctrine, for it only applied to plaintiffs whose cases would be foreclosed by denial of certification: the courts of appeals had held that grants of class certification were interlocutory orders and thus not appealable, even though a defendant faced with such a grant may well feel serious economic pressure to settle, thus ending the litigation.[50] What the Court called the "principal vice" of the death-knell doctrine, however, was the fact that it authorized indiscriminate interlocutory review of trial judges' decisions.[51] This, the Court said, ran directly counter to the intention of Congress, which, when it passed § 1292(b) of the Judicial Code,[52] also known as the Interlocutory Appeals Act of 1958, provided that interlocutory review was only

[49] 437 U.S. 463, 470-77 (1978).

[50] *Id.* at 476. The situation in which a defendant is forced to settle after a certification decision is referred to as a "reverse death-knell" situation.

[51] *Id.* at 474.

[52] 28 U.S.C. § 1292(b) (2000) 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.

available in certain situations upon the approval of both the district court and the appeals court.[53] Thus, the death-knell doctrine was also foreclosed as an avenue to gain appeal of class certification.

3. 28 U.S.C. § 1292(b)

In *Coopers & Lybrand*, the Court praised the provision for interlocutory appeal found in § 1292(b) of the Judicial Code, stating that by requiring that both the district court certify the matter for appeal, and that the appeals court accept review at its discretion, this statute stayed faithful to the tenor of the final judgment rule.[54] However, § 1292(b) is very restrictive; as one commentator put it, "by its terms [§ 1292(b)] is the most limited exception to the final judgment rule, statutory or otherwise."[55] In addition to the dual approval provision, § 1292(b) puts forth three requirements that must be fulfilled prior to the courts allowing appeal: (1) the order must involve "a controlling question of law"; (2) "there is substantial ground for difference of opinion" as to such question; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."[56] These criteria can prove difficult for class actions to meet.[57] For example, the second criterion requires a contestable issue of law, but class certifications frequently turn on complex issues of fact.[58] As one court declared, "appellate review of class

[53] 437 U.S. at 474-75.

[54] *See id.* The court noted that the "screening" of appeals by the district court helped to assure that review would be confined to appropriate cases, and avoided time consuming jurisdictional determinations by the court of appeals.

[55] Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 733 (1993).

[56] 28 U.S.C. § 1292(b) (2000).

[57] Solimine & Hines, *supra* note 2, at 1556.

[58] *Id.*

certification decisions under § 1292(b) is and will be rare,"[59] and this does, in fact, seem to be the case.[60]

4. The Writ of Mandamus

An alternative possibility for a party who wishes to secure appeal of an adverse certification decision is the writ of mandamus. Authorized by the All Writs Act,[61] the writ of mandamus is something of a last resort for parties wishing to appeal a certification,[62] as the standard by which courts will grant such an appeal is exceedingly high.[63] Courts will generally only grant a writ of mandamus in "extraordinary" situations, such as where a district judge has clearly exceeded her authority and there is no other route to appeal.[64] As the Supreme Court stated, the writ of mandamus "is not to be used as a substitute for appeal . . . even though hardship may result from delay and perhaps unnecessary trial."[65] Despite these admonitions, some circuits have taken a slightly less restrictive view toward allowing mandamus appeal.[66] As one commentator notes, however, it is unlikely that, given the adoption of Rule 23(f),

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

[60] Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 201-02 (2001); *see also* Solimine & Hines, *supra* note 2, at 1557.

[61] 28 U.S.C. § 1651(a) (2000) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

[62] Kruse, *supra* note 24, at 712.

[63] Solimine & Hines, *supra* note 2, at 1557.

[64] *Id.* at 1551; *see also* Will v. United States, 389 U.S. 90, 95-97 (1967).

[65] Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964) (citations omitted); Will v. United States, 389 U.S. 90, 97 (1967) (stating that mandamus may never be used as a substitute for appeal).

[66] *See, e.g.*, *In re* American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995); *In re* Bendectin Products Liab. Litig., 749 F.2d 300 (6th Cir. 1984).

courts will continue to expand the use of the writ of mandamus.[67]

C. Rule 23(f)

Against this rather restrictive background for interlocutory review of class action certifications, the Standing Committee on Practice and Procedure promulgated Rule 23(f). The Rule was adopted by the Supreme Court and it became effective December 1, 1998.[68] In addition to providing a means of appellate review for certification orders that would otherwise go unaddressed, Rule 23(f) was intended to encourage courts of appeals to develop standards for certification, and also to afford them more regular participation in the certification process. The Rule states:

> 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.[69]

The Advisory Committee's notes to Rule 23(f) point out the analogy to § 1292(b) of the Judicial Code but highlight

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[67] Solimine & Hines, *supra* note 2, at 1561; *but see* Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era,* 80 N.C. L. REV. 527, 571 (2002) (arguing that the actual use of mandamus as a route to appeal is more flexible than Supreme Court jurisprudence would suggest).

[68] 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1753 (2d ed. Supp. 2001). Creation of a federal appellate procedure via rule as opposed to statute is unusual, but Congress provided for an amendment just such as this. *See* Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions,* 1 J. APP. PRAC. & PROCESS 309 (1999). Congress passed the Federal Courts Administration Act of 1992, § 101 of which added § 1292(e) to the Judicial Code to allow the Supreme Court by rule to "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" under § 1292. *Id.*

[69] FED. R. CIV. P. 23(f).

two significant differences: (1) it does not require the district court to certify the matter for appeal, and (2) it does not include the three "limiting" requirements of § 1292(b)—that the district court order "involve a controlling issue 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."[70] The Rule was thus clearly meant to be a significant relaxation of the standards for appellate review of class action certification. At the same time, the Rule addresses one of the primary rationales for the final judgment rule, that appeals delay and disrupt litigation, by providing a short window of ten days in which an appellant must file her appeal.[71] Of greater interest to this discussion, however, is the guidance that the Advisory Committee's notes provided to the circuits to direct the use of their newly created discretion:

> 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.[72]

Thus, Rule 23(f) was intended to re-enact the death-knell doctrine (as well as allow appeal in "reverse death-knell"[73] situations)[74] and provided for a similar route to what was previously the "controlling issue of law" requirement under § 1292(b). While this provides some initial direction for the

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[70] *Id.* advisory committee's note.

[71] FED. R. CIV. P. 23(f).

[72] *Id.* advisory committee's note.

[73] This is the death-knell for the defendant: where, because a class claiming significant damages is certified, a defendant will likely be forced to settle rather than take the risk of an adverse judgment on the merits.

[74] The Rule thus addressed concerns with the inequitability of the death-knell doctrine expressed by the *Coopers & Lybrand* Court. *See supra* note 50 and accompanying text.

courts of appeals, given their wide discretion, a pressing issue is how they actually apply Rule 23(f).

III. GUIDELINES SET FORTH BY THE COURTS OF APPEALS

As previously mentioned, most of the circuits have now put forth standards for granting appeal under Rule 23(f).[75] This section will briefly review those decisions and discuss the important differences between them.

A. Seventh Circuit: *Blair v. Equifax Check Services*

The Seventh Circuit's decision in *Blair v. Equifax Check Services*[76] was the first decision under the new Rule 23(f), and it has been influential in subsequent decisions by the other circuits.[77] Judge Easterbrook, writing for the court in *Blair*, identified three situations in which the grant of appeal under Rule 23(f) would be appropriate. The first category is the familiar death-knell situation: where certification has been denied, and because the representative plaintiff's claim is too small to be economically viable by itself, the litigation is effectively terminated.[78] Here, however, the court noted that it should "be wary lest the mind hear a bell that is not tolling"; many wealthy plaintiffs' firms exist that can and

[75] The First, Second, Third, Fourth, Sixth, Seventh, Eleventh, and D.C. Circuits have all put forth such standards. *See* Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000); Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266 (11th Cir. 2000); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001); Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134 (2d Cir. 2001); Newton v. Merrill Lynch, 259 F.3d 154 (3d Cir. 2001); *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98 (D.C. Cir. 2002); *In re* Delta Air Lines, 310 F.3d 953 (6th Cir. 2002) (per curiam).

[76] 181 F.3d 832 (7th Cir. 1999).

[77] *See Mowbray*, 208 F.3d at 288; *Prado-Steiman*, 221 F.3d at 1266; *Lienhart*, 255 F.3d at 138; *Sumitomo*, 262 F.3d at 134; *Newton*, 259 F.3d at 154; *In re Lorazepam*, 289 F.3d at 98; *In re Delta Air Lines*, 310 F.3d at 953.

[78] 181 F.3d at 834.

will afford to maintain an action for an individual plaintiff in hopes of winning certification for the class, and the associated fees, upon later appeal.[79]

The second is the so-called "reverse death-knell" situation.[80] In both of these first two categories, the court added a slight qualification that the district court's decision should also be "questionable."[81]

The third category in which appeal would be appropriate is where such appeal would assist the development of a "fundamental issue" in the law.[82] Judge Easterbrook cited several justifications for this category. Because many class actions are settled or resolved in a way that precludes decision on procedural matters, "some fundamental issues about class actions are poorly developed."[83] This echoes one of the primary motivations given by the Advisory Committee for the promulgation of Rule 23(f).[84] In addition, he cited the historically restrictive approach of the courts of appeals to accepting interlocutory appeals of certifications under § 1292(b).[85] In this third category, the court held that it is less important that the district court opinion be questionable, as "[l]aw may develop through affirmances as well as reversals."[86]

As a caveat to these categories, however, the court emphasized its continuing discretion in refining its Rule 23(f) jurisprudence: "Neither a bright-line approach nor a catalog of factors would serve well—especially at the outset, when courts necessarily must experiment with the new class of appeals."[87]

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[79] *Id.*

[80] *See supra* note 73.

[81] 181 F.3d at 835.

[82] *Id.*

[83] *Id.*

[84] FED. R. CIV. P. 23(f) advisory committee's note.

[85] 181 F.3d at 835.

[86] *Id.*

[87] *Id.* at 834.

B. First Circuit: *Waste Management Holdings, Inc. v. Mowbray*

The next court to consider the matter was the First Circuit in *Waste Management Holdings, Inc. v. Mowbray*.[88] The *Mowbray* court examined the *Blair* categories and adopted them, largely unchanged.[89] It left the first two categories untouched, but added a restriction to the third. Observing that crafty attorneys can make many issues of law seem "fundamental," and stating that "interlocutory appeals should be the exception, not the rule," it held that the third *Blair* category[90] should be limited to cases in which an appeal would allow for the "resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case."[91]

As did the Seventh Circuit, the First Circuit made it clear that the categories provided were neither precise nor exhaustive.[92] Unlike the Seventh Circuit, however, the *Mowbray* court took a restrictive stance on permitting interlocutory appeals, stating that because of their "disruptive, time-consuming, and expensive" nature, the court would exercise its discretion "judiciously."[93]

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[88] 208 F.3d 288 (1st Cir. 2000).

[89] *Id.* at 293-94.

[90] The third *Blair* category occurs when an appeal would assist the development of a "fundamental issue" in the law. *See Blair*, 181 F.3d at 835.

[91] 208 F.3d at 294.

[92] The First Circuit stated:

> While we hope that these general comments will be helpful to parties deciding whether to pursue applications under Rule 23(f), we do not foreclose the possibility that special circumstances may lead us either to deny leave to appeal in cases that seem superficially to fit into one of these three pigeonholes, or conversely, to grant leave to appeal in cases that do not match any of the three described categories.

Id.

[93] *Id.*

C. Eleventh Circuit: *Prado-Steiman ex rel. Prado v. Bush*

The Eleventh Circuit, in *Prado-Steiman ex rel. Prado v. Bush*, significantly expanded the considerations outlined by the First and Seventh Circuits, putting forth five "guideposts" that should all be taken into account in deciding whether to grant appeal.[94] The court began by adopting the first and second categories from *Blair*, covering death-knell and reverse death-knell situations, as one general death-knell category.[95] The *Prado-Steiman* court's second category was an innovation: "whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion."[96] This factor is to function as a sliding scale, such that the more questionable the district court's decision is, the less the other categories need to be weighed. If the decision is clearly erroneous, this factor is sufficient in and of itself.[97] The third *Prado-Steiman* category approximates the third *Mowbray* category: "whether appeal will permit the resolution of an 'unsettled legal issue that is important to the particular litigation as well as important in itself.'"[98] The change from *Mowbray* was the dropping of the requirement that the issue be "likely to escape effective review if left hanging until the end of the case."[99] Fourth, a court should take into account the posture of the litigation in the district court:[100] factors such as status of discovery, pendency of motions and the

[94] 221 F.3d 1266 (11th Cir. 2000).

[95] *Id.* at 1274.

[96] *Id.*

[97] *Id.* at 1274-75; while the Court didn't state explicitly that this factor, if satisfied, was independently sufficient to warrant review of the matter, it did strongly imply so: "In that situation, interlocutory review may be warranted even if none of the other factors supports granting the Rule 23(f) petition."

[98] *Id.* At 1275.

[99] *Id.*

[100] *Id.* at 1276.

length of time the case has been before the district court.[101] The fifth and final consideration for a court should be "the likelihood that future events may make immediate appellate review more or less appropriate."[102] Here, the court should look at factors such as whether settlement negotiations are being attempted by some of the parties, or whether an impending change in financial status, such as a bankruptcy, of one of the parties may make litigation moot.[103] Similar to the courts before it, the *Prado-Steiman* court shied away from creating any "bright line rules" and emphasized its continuing discretion to modify the considerations.[104] It also restated *Mowbray's* stance that because of the disruptive nature of interlocutory appeals, they are generally disfavored.[105] Thus, the Eleventh Circuit both expanded and complicated the analysis, turning the considerations into a long "laundry list" of factors.[106] While it added a "substantial weakness" category that could independently justify review, it simultaneously took a restrictive view of the availability of appeal, both in its gloss on the matter and in calling for consideration of all the factors together, thus adding qualifications to each category.[107]

D. Fourth Circuit: *Lienhart v. Dryvit Systems, Inc.*

The remaining circuits to consider Rule 23(f) appeal essentially adopted some portion of the decisions of the above courts, with each adding their own gloss. The Fourth Circuit, in *Lienhart v. Dryvit Systems, Inc.*, could be seen as both the least and the most innovative of the courts.[108] It adopted, unchanged, all of the Eleventh Circuit's "laundry list," possibly placing a bit more emphasis on the fact that a

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[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See* Mullenix, *supra* note 9, at 109.

[107] 221 F.3d at 1275-76.

[108] 255 F.3d 138 (4th Cir. 2001).

"substantial weakness" in a district court's opinion was enough, by itself, to make appeal proper.[109] However, it took a different stance on the nature of these factors. While the Eleventh Circuit introduced them as restrictive considerations, raising the bar on what constitutes an allowable appeal, the Fourth Circuit added a permissive spin. It stated that stringent standards for review are inappropriate as "Rule 23(f)'s purpose was to eliminate the unduly restrictive review practices which obtained when mandamus was the only available means to review a class certification prior to final judgment in the absence of a district court's decision to voluntarily certify the issue for immediate review . . . ."[110] While acknowledging that routine interlocutory review is not feasible, the court went on to say that in addition to the first three *Blair* categories (both types of death-knell standards and the novel question of law standard), "a careful and sparing use of Rule 23(f) may promote judicial economy by enabling the correction of certain manifestly flawed class certification petitions prior to trial and final judgment."[111] This stance seems to comport closely with the desires of the Advisory Committee on Rule 23(f).[112]

E. Second Circuit: *Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*

Perhaps the most restrictive approach can be seen in the Second Circuit's opinion. The categories outlined by the Second Circuit Court of Appeals in *Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*[113] are twofold: the petitioner must either show that (1) a death-knell situation exists and there is a "substantial showing that the district court's decision is questionable" or (2) the district court's order "implicates a legal question about which there is a

[109] *Id.* at 144-45.

[110] *Id.* at 145.

[111] *Id.*

[112] FED. R. CIV. P. 23(f) advisory committee's note.

[113] 262 F.3d 134 (2d Cir. 2001).

compelling need for immediate resolution."[114] Elaborating on this second group, the court noted that it included the "novel legal question" category outlined by prior courts, but only if it is "likely to escape effective review after entry of final judgment."[115] Most striking, though, was the court's declaration that "the standards of Rule 23(f) will rarely be met."[116]

F. Third Circuit: *Newton v. Merrill Lynch*

In *Newton v. Merrill Lynch*,[117] the Third Circuit very succinctly stated the categories for which it deemed appeal appropriate. It adopted the three categories from *Blair*, without modification, and the Fourth and Eleventh Circuits' "likely erroneous certification decision" standard, although it did not include the word "likely" in its formulation.[118] Worthy of note is the court's disagreement with the restrictive position that the Eleventh Circuit took. After discussing the five categories (the "laundry list") in *Prado-Steiman*, it argued for a more expansive approach, stating that interlocutory review should not be "cabined by these circumstances."[119]

G. D.C. Circuit: *In re Lorazepam & Clorazepate Antitrust Litigation*

The D.C. Circuit took a similar tack in *In re Lorazepam & Clorazepate Antitrust Litigation*.[120] It adopted the death-knell categories from *Blair/Mowbray* and the "unsettled and fundamental issue of law"[121] category from *Mowbray*. For

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[114] *Id.* at 139.

[115] *Id.* at 140.

[116] *Id.* This is directly counter to the purposes for enactment of Rule 23(f) and will be discussed further *infra*.

[117] 259 F.3d 154 (3d Cir. 2001).

[118] *Id.* at 164.

[119] *Id.*

[120] 289 F.3d 98 (D.C. Cir. 2002).

[121] "When the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the

this second category, it emphasized that whether the district court's decision was questionable was unimportant, quoting Judge Easterbrook from *Blair*: "issues of law can be advanced through affirmances as well as reversals."[122]

The D.C. Circuit also adopted the erroneous certification decision standard from the Fourth and Eleventh Circuits' guidelines, formulating it as "manifestly erroneous."[123] Although the court phrased the category similarly, it seemed to take a more relaxed approach here, noting that if the decision were "manifestly erroneous," review would be appropriate "if for no other reason than to avoid a lengthy and costly trial that is for naught once the final judgment is appealed."[124] Lastly, after reserving its discretion to modify this formula in the future, the court put a constraining gloss on its analysis, stating that "review should be granted rarely where a case does not fall within one of these three categories."[125] This, however, is notably less constraining, at least rhetorically, than the Second Circuit's statement that "the standards of Rule 23(f) will rarely be met."[126]

H. Sixth Circuit: *In re Delta Air Lines*

The most recent exposition of the factors to consider in a Rule 23(f) appeal is found in the Sixth Circuit's per curiam opinion in *In re Delta Air Lines*.[127] The *Delta* court created a new, yet similar, formulation. It adopted a flexible multi-factored approach akin to that of the Eleventh Circuit,[128] using most of the same standards, but treating them

specific litigation and generally, that is likely to evade end-of-the-case review." *Id.* at 105.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 140 (2d Cir. 2001).

[127] *In re* Delta Air Lines, 310 F.3d 953 (6th Cir. 2002).

[128] *See* Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266 (11th Cir. 2000).

differently.[129] The death-knell and "posture of the case" standards remain essentially the same as those of the Eleventh Circuit.[130] With regard to its novel question of law standard, the Sixth Circuit does not require that the issue be both of importance to the litigation and in general, as did the Eleventh Circuit, but rather says that this would add weight.[131] The most noteworthy of the changes, however, is the Sixth Circuit's approach to the Eleventh Circuit's second category. The Eleventh Circuit would allow a "substantial weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion" to be a sufficient reason by itself to permit appeal.[132] The Sixth Circuit, in contrast, phrased this category as "the weakness of the district court's decision or . . . likelihood of the petitioner's success on the merits" and did not feel that this factor alone would justify an appeal.[133]

IV. PROPOSALS

Rule 23(f) was adopted to expand the opportunities for appeal of class action certification decisions.[134] However, several circuit courts have taken a restrictive view on what qualifies for appeal under this new rule.[135] Most striking in this regard is the Second Circuit's statement that "the standards of Rule 23(f) will rarely be met."[136] This statement harkens back to the way courts treated interlocutory appeals

[129] 310 F.3d at 960.

[130] *Id.*

[131] *Id.*

[132] 221 F.3d at 1274.

[133] 310 F.3d at 960.

[134] FED. R. CIV. P. 23(f) advisory committee's notes.

[135] *See* Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000); Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266 (11th Cir. 2000); Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134 (2d Cir. 2001); *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98 (D.C. Cir. 2002); *In re* Delta Air Lines, 310 F.3d 953 (6th Cir. 2002) (per curiam).

[136] 262 F.3d at 140.

of class action certification decisions under § 1292(b)[137] and is not in accordance with the intent of Rule 23(f).[138] Moreover, the assortment of different approaches to the question of when to allow such appeal has grown increasingly disparate with each decision.[139]

A proposal to unify the divergent categories and make the standards converge is beyond the scope of this note. It also would arguably be against the intent of the drafters of the Rule, as one of the Rule's purposes is to enable the courts of appeals to develop certification standards.[140] To the extent that independent experimentation by the courts helps development of effective rules,[141] a uniform group of categories applied by all courts would be counterproductive. However, one category in particular is worthy of discussion, as all the circuits address it, though frequently in quite different manners. The category is that dealing with a questionable or erroneous decision by the district court.

This section will argue that, for economic reasons as well as for reasons of history and legislative intent, the courts should end the current restrictive trend and take a more permissive approach to appeals under Rule 23(f). Specifically, the courts should allow appeal, independent of other categories, when there has been a "likely erroneous certification decision" by the district court. Converging on at least this category will help to make this small body of law

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[137] See *Armstrong v. Martin Marietta Corp.*, in which the court stated that "appellate review of class certification decisions under § 1292(b) is and will be rare." 138 F.3d 1374, 1387 (11th Cir. 1998). *See also* Solimine & Hines, *supra* note 2, at 1551.

[138] See the advisory committee's notes to Federal Rule of Civil Procedure 23(f), stating that Rule 23(f) was intended to expand present opportunities to appeal, and that it was not intended to include the "potentially limiting requirements of § 1292(b)." FED. R. CIV. P. 23(f) advisory committee's note.

[139] *Compare* Blair v. Equifax Check Servs., 181 F.3d 832 (7th Cir. 1999), *with In re* Delta Air Lines, 310 F.3d 953 (6th Cir. 2002).

[140] Gould, *supra* note 68, at 309.

[141] *See* Recent Cases, *Civil Procedure–Class Actions–Eleventh Circuit Reverses Certification of Plaintiff Class on Interlocutory Appeal Under Rule 23(f)*, *supra* note 4, at 1796.

more coherent from the outset, and will prevent forum shopping opportunities from growing.

The choice of the "erroneous district court decision" category may not be immediately apparent, but upon closer analysis it becomes clear that this is the one category where the courts should move toward common ground. First, the other two categories used by all the courts are those of the death-knell and the "novel or unsettled question of law."[142] Both of these categories are explicitly recommended in the Advisory Committee's note to Rule 23(f).[143] Moreover, they are treated similarly by all the circuits; the death-knell is defined uniformly and generally has a "questionable certification decision requirement" associated with it,[144] and the "novel question of law" category suffers from only minor differences in treatment, such as a requirement that the question be both "important to the particular litigation as well as important in itself."[145] The other categories put forth, the "posture of the case" and "impending events" categories, have been adopted by only a small minority of the circuits[146] and, more importantly, their favorability to a party is much more difficult to predict *ex ante* than that of the aforementioned categories. In addition, leaving aside for the moment differences in word choice ("questionable" or "clearly erroneous"), there is a wide difference in how the "erroneous district court decision" category is treated: the First, Second and Seventh Circuits do not treat it as an independent category, they only address it in association with the death-

[142] *See supra* note 75.

[143] FED. R. CIV. P. 23(f) advisory committee's note.

[144] *See supra* note 75.

[145] Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 294 (1st Cir. 2000); *See also* Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266, 1275 (11th Cir. 2000); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 144-45 (4th Cir. 2001); *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002).

[146] *See* Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266, 1276 (11th Cir. 2000); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 146 (4th Cir. 2001); *see also In re* Delta Air Lines, 310 F.3d 953, 960 (6th Cir. 2002) (adopting only the "posture of the case" category).

knell category;[147] the Fourth, Eleventh and Sixth Circuits factor it in on a "sliding scale" with other categories, with the Fourth and Eleventh Circuits saying that an erroneous certification decision, if it were sufficiently egregious, would by itself make appropriate an appeal, while the Sixth Circuit does not so state;[148] and the D.C. Circuit and Third Circuit treat an "erroneous district court decision" as an independent category.[149] These differences, coupled with the predictable benefit that the ability to appeal an erroneous circuit court decision would provide, present an opportunity for forum shopping, and as such, the difference should be addressed.

Two questions emerge. First, should there be some form of "erroneous district court decision" standard? Second, if there should be, what is the desired standard? Although this category was not explicitly present in previous interlocutory appeal regimes,[150] many commentators have argued that it should be taken into account in interlocutory appeals of class action certifications.[151] An appropriate starting point for discussion of this proposition is an "error-cost analysis."[152] Error cost analysis seeks to minimize the cost of a possible

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[147] *See* Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834-35 (7th Cir. 1999); Waste Mgmt. Holdings, 208 F.3d at 293-94; Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 139-40 (2d Cir. 2001).

[148] *See* Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d at 1275; Lienhart v. Dryvit Sys., Inc., 255 F.3d at 145; *In re* Delta Air Lines, 310 F.3d at 960.

[149] *See* Newton v. Merrill Lynch, Pierce, Fenner & Smith, 259 F.3d 154, 165 (3d Cir. 2001); *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002).

[150] *See supra* notes 26-67 and accompanying text. There was consideration of district court error in a writ of mandamus, but this was only in extreme situations, where the judge had obviously exceeded her discretion. *See* Solimine & Hines, *supra* note 2, at 1551.

[151] *See* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 104-105 (1975); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997); Solimine & Hines, *supra* note 2, at 1580; Kruse, *supra* note 24, at 735.

[152] Bone & Evans, *supra* note 12, at 1286.

erroneous judicial decision by comparing probability of error and the resultant cost of two opposite decisions.[153] Such analysis is deeply embedded in our system, as it is one of the foundations for the choice of the "beyond a reasonable doubt" standard of proof in criminal cases and the "preponderance of the evidence" rule in civil cases.[154] It is also the philosophy behind the widely used formula, first articulated by Judge Posner in *American Hospital Supply Corp. v. Hospital Products Ltd.*, for determining whether to grant a preliminary injunction.[155] Moreover, such balancing has been advocated by the Third Circuit in the context of class certification orders.[156] In the context of a decision whether to grant an appeal from a district court's class action certification decision, the comparison could take two forms.[157]

First, where there is a grant of certification below, the court of appeals, in deciding whether to grant appeal, would consider the harm to the plaintiff class if the court were to grant the appeal in error and multiply this by the probability that granting the appeal would be error.[158] This result would then be compared to the harm caused the defendant if the

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[153] *Id.* at 1287.

[154] *Id.* at 1287-88.

[155] 780 F.2d 589 (7th Cir. 1985).

[156] *See* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 635 (3d Cir. 1996).

[157] These equations, of course, cannot be reduced to any precise figures, and they are not suggested with the intention, as Judge Posner stated in *American Hospital Supply*, of forcing "analysis into a quantitative straightjacket." Am. Hosp. Supply Corp. v. Hosp. Products Ltd., 780 F.2d 589, 593 (7th Cir. 1985). Rather, these equations are used to bring attention to the tremendous costs that can result from a certification decision.

[158] See *American Hospital Supply Corp. v. Hospital Products Ltd.*, in which Judge Posner stated the analysis with regard to preliminary injunctions as "grant the preliminary injunction if but only if . . . the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error." 780 F.2d at 593.

court were to deny the appeal erroneously multiplied by the probability that such a denial would be erroneous.[159] In this context, the harm that would result to the plaintiff class if the appeal were granted erroneously would be the cost of the appeal litigation itself.[160] The harm to the defendant if the appeal were denied erroneously would be the cost of a full trial, for the next chance that the defendant would get to correct the district court's certification decision would be after a final judgment on the merits.[161] It can be assumed that in the vast majority of cases the cost to conduct a full class action trial will be greater than an appeal of a certification decision. This puts the balance in the above equation in favor of granting appeal.

There is, however, an additional twist, especially acute in the context of class action litigation. Because most class actions settle,[162] the result of a grant of certification will generally be the end of the litigation. Therefore, instead of the cost of a full trial, the harm to the defendant of an erroneous denial of appeal will be the cost of settlement.[163] This will, of course, be far greater than the plaintiff's cost to litigate the appeal of certification. An important note should be made here. Because the death-knell category will be used in conjunction with any possible "erroneous district court decision" category, those cases where a court would have found that the certification decision spelled the end of the litigation must be excluded from this equation. While this will eliminate some of the cases in which certification spurs settlement, it will not eliminate all of them.[164] This cost of

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[159] *Id.*

[160] The underlying assumption here is that the correct result is reached in the end—that the court of appeals does not overturn the district court's decision.

[161] This, again, assumes that the appellate court will reach the proper result in the final appeal and thus that there will not be further proceedings.

[162] Bone & Evans, *supra* note 12, at 1301.

[163] *See id.*

[164] *Id. See also* Glynn, *supra* note 60, at 256, noting that due to the very small number grants of review under Rule 23(f), and the near

settlement must therefore be considered, and this further shifts the balance to the side of the defendant. Thus, without yet considering probabilities of error, which must be done by the court in each case, the granting of appeal is strongly favored.

Second, where there is a denial of certification below, the court of appeals would consider the harm to the defendant if the court were to grant the appeal erroneously and multiply this by the probability that granting the appeal would be erroneous.[165] The court would then compare this to the harm the plaintiff class would suffer if the court were to deny the appeal erroneously multiplied by the probability that such a denial would be erroneous.[166] Here, the harm to the defendant would be the cost of going through the appeal litigation.[167] The harm to the plaintiff class if the appeal were denied erroneously would be the cost difference between each plaintiff pursuing its claims individually and pursuing them in the single class action.[168] While the cost to conduct a class action suit is likely higher than the cost of an identical individual suit, because each individual plaintiff will have to conduct discovery, the cost of all the individual suits combined will almost invariably be greater than a single class action suit.[169] One must again consider additional factors, however. As noted above, although this category will be employed in conjunction with the death-knell category, and that category will presumably filter out some of the cases in which the denial of certification spells the end of litigation, there are still likely to be many that the courts do not consider fitting the death-knell mold, but that

certainty that a party that considers itself in a death-knell situation will appeal, it is very likely that many true death-knell cases are not being granted appeal.

[165] *See Am. Hosp. Supply Corp.*, 780 F.2d at 593.

[166] *Id.*

[167] *See* Bone & Evans, *supra* note 12, at 1301.

[168] *Id.*

[169] *See* Donald C. Arbitblit & William Bernstein, *Effective Use of Class Action Procedures in California Toxic Tort Litigation*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 435, 448 (1996).

nonetheless terminate due to lack of certification.[170] This loss of an opportunity to get relief, a significant cost to the plaintiff, shifts the balance even further in the direction of allowing review of the district court's decision. Thus, the costs associated with an erroneous grant or denial of appeal strongly favor a more permissive standard for appeal.

The second question that must be answered is "what is the appropriate level of error that the court of appeals should require in order to grant appeal?" In the analysis above, it was determined that, without looking at the probability of an erroneous grant or denial of appeal by the appellate court, the costs involved greatly favored a relatively lenient standard for appeal. When dealing with the category in question, an erroneous district court decision, a court of appeals will be examining the record developed in the court below to determine whether the district court's decision was, in some way, erroneous. In doing so, it is lessening the probability that its own decision on whether to grant or deny appeal will be erroneous. So, in the above error-cost equations, the probability of an erroneous court of appeals decision will now also be lowered. For example, in the case of a granted certification below,[171] the probability that the grant of appeal is erroneous is now lowered, and at the same time the probability that the denial of appeal is erroneous is raised.[172] The higher the court's level of certainty, the more

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[170] Bone & Evans, *supra* note 12, at 1301; *See also* Glynn, *supra* note 60, at 256.

[171] In this case, as noted above, the court of appeals, in deciding whether to grant appeal, would consider the harm to the plaintiff class if the court were to grant the appeal in error and multiply this by the probability that granting the appeal would be error. This would then be compared to the harm to the defendant that would result if the court were to deny the appeal erroneously multiplied by the probability that such a denial would be erroneous.

[172] This inherently follows from the fact that, because there are only two possibilities—the denial of appeal or the grant of appeal—there is a 100% chance that one of the two will occur, and so the probability that one is erroneous is equal to one minus the probability that the other is erroneous. *See Am. Hosp. Supply Corp.*, 780 F.2d at 593.

this weighs in favor of granting the appeal.[173] If the court can determine that the district court's decision is "likely" erroneous, meaning greater than a fifty-percent chance, this will further shift the balance toward the granting of appeal. Therefore, as an added guarantee that the court is making the proper decision, a standard such as "where the district court's decision is likely erroneous" is appropriate. This is a bit more lenient than the current standard stated by the majority of the courts that employ this category.[174] At the same time, it maintains a level of fidelity to the final judgment rule and the justifications for it, as it provides a barrier to appeal, effectively requiring a "more likely than not" judgment by the courts of appeals.

The standard just stated can be justified on several other, non-cost-based grounds. As mentioned above, the Advisory Committee's note to Rule 23(f) explicitly advocates both the death-knell and novel question of law categories as appropriate in the determination of whether to grant appeal.[175] At the same time, they established a background principle that the courts of appeals retain absolute discretion in determining what justifies allowing review.[176] This implies that the drafters intended for the courts to develop standards in addition to the two outlined, and militates against a restrictive approach such as that of the Second Circuit.[177] With a more flexible standard for appeals, however, it could be argued that the burden on the courts of

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[173] The same is true in the case of a denial of certification by the court below. *See supra* text and accompanying notes 157-62.

[174] *See* Newton v. Merrill Lynch 259 F.3d 154 (3d Cir. 2001) ("erroneous"); *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98 (D.C. Cir. 2002) ("manifestly erroneous"); Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266 (11th Cir. 2000) ("clearly erroneous"); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001) ("clearly erroneous").

[175] FED. R. CIV. P. 23(f) advisory committee's note.

[176] *Id.*

[177] See *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, in which the Court outlines only the death-knell and novel question of law categories, and states that appeals are "disfavored." 262 F.3d 134 (2d Cir. 2001).

appeals will increase significantly. While this stands to reason, there is evidence to the contrary; since Rule 23(f), a more flexible standard than the previous appeal regime, was enacted, interlocutory appeals of class action certification decisions have actually dropped.[178] Moreover, some commentators argue that a more permissive standard for interlocutory appeals will lead to a lower overall federal court burden by expediting and shortening cases at the trial court level and increasing the frequency of settlement due to a more defined body of law.[179] To go further than the proposed category, however, and advocate standardization by all the courts of appeals on a well defined set of guidelines would, as noted above,[180] run counter to the development of the law of class actions, which was one of the goals for Rule 23(f).[181] Many commentators have argued that flexibility and restraint from stating specific guidelines is necessary in the early stages of a new rule's existence, and helps to foster a well-developed body of law.[182] The proposed category, therefore, furthers the important goals of reducing the cost of judicial errors and eliminates opportunities for forum shopping, while at the same time honoring the principles behind the final judgment rule, and retaining flexibility to allow for development of the law.

V. CONCLUSION

Interlocutory appeals of class action certification decisions have historically been hard to come by. Rule 23(f) reflects a judgment that the opportunities for such appeals need to be expanded. While the courts of appeals have announced guidelines for the exercise of the discretion

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[178] *See* Mullenix, *supra* note 9, at 100.

[179] *See* Solimine, *supra* note 36, at 1178.

[180] *See supra* text accompanying notes 133-42.

[181] *See* FED. R. CIV. P. 23(f) advisory committee's note.

[182] *See* Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 587 (2002); Solimine & Hines, *supra* note 2, at 1585; Gould, *supra* note 68, at 338.

granted them under Rule 23(f), the restrictive approach that some have taken is not in accordance with the intent of the drafters of the rule. In addition, these guidelines vary significantly from one circuit to the next, and do not sufficiently take into account the tremendous costs associated with class action certification. For these reasons, the courts of appeals should undertake to uniformly grant appeal where it is shown that the "district court certification decision is likely erroneous." At this point, however, there should not be a movement toward across-the-board standardization on a single set of guidelines. As the Seventh Circuit stated in *Blair*, "neither a bright-line approach nor a catalog of factors would serve well—especially at the outset, when courts necessarily must experiment with the new class of appeals."[183]

[183] 181 F.3d 832, 834 (7th Cir. 1999).