Themes in Rule 23(f) Jurisprudence (Appendix A)
Review of Leading Cases

	LEADING CASE	CIRCUMSTANCES THAT JUSTIFY GRANT OF A 23(F) PETITION	NOTES
D.C. Circuit	*In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002)	1) "there is a death-knell situation for either the plaintiff or the defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification" 2) "the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of the case review" or 3) "the district court's class certification decision is manifestly erroneous"	Does not apply a "rigid test" but will "only rarely" grant a petition that does not fit within the three circumstances Appeal can be based on "special circumstances" not falling within the enumerated categories; emphasizes the court's discretion in granting review
First Circuit	*Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000)	Review is appropriate only where "an appeal will permit 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"	Agrees that *Blair* approach captures essence of Rule 23(f) but differs as to appeals raising fundamental or unsettled issues

KILPATRICK STOCKTON LLP
Attorneys at Law

	LEADING CASE	CIRCUMSTANCES THAT JUSTIFY GRANT OF A 23(F) PETITION	NOTES
Second Circuit	*Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134 (2d Cir. 2001)	1) "the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable" or 2) "the certification order implicates a legal question about which there is a compelling need for immediate resolution"	Court has stated that "the standards of Rule 23(f) will rarely be met"
Third Circuit	*Newton v. Merrill Lynch, Pierce, Fenner & Smith*, Inc., 259 F.3d 154 (3d Cir. 2001)	1) "the possible case-ending effect of an imprudent class certification decision" 2) "an erroneous ruling" or 3) "facilitate development of the law on class certification"	Circuit has adopted a flexible standard Note that the court will consider review even where the "error in certification . . . does not implicate novel or unsettled legal questions . . ."

	LEADING CASE	CIRCUMSTANCES THAT JUSTIFY GRANT OF A 23(F) PETITION	NOTES
Fourth Circuit	*Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001)	1) "whether the certification ruling is likely dispositive of the litigation" 2) "whether the district court's certification decision contains a substantial weakness" 3) "whether the appeal will permit the resolution of an unsettled legal question of general importance" 4) "the nature and status of the litigation before the district court" 5) "the likelihood that future events will make appellate review more or less appropriate"	Approach similar to that of Eleventh Circuit Circuit applies the "sliding scale" to the "substantial weakness" factor – a strong district court order requires more weakness across the other factors, whereas a weak district court order may alone suffice to warrant review

	LEADING CASE	CIRCUMSTANCES THAT JUSTIFY GRANT OF A 23(F) PETITION	NOTES
Fifth Circuit	*Arnold v. State Farm Fire and Cas. Co.*, 277 F.3d 772, 777 (5th Cir. 2001)	NONE	Circuit has emphasized that it retains "considerable . . . discretion" but has declined to provide specific standards Petitions for review have had more success where they have sought to decertify classes. *See, e.g.*, *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002) Review has been granted to inquire into an obvious legal error rather than under the "death knell" reasoning popular in many circuits. *See, e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004)

	LEADING CASE	CIRCUMSTANCES THAT JUSTIFY GRANT OF A 23(F) PETITION	NOTES
Sixth Circuit	*In re Delta Air Lines*, 310 F.3d 953 (6th Cir. 2002)	1) the certification decision will make it economically infeasible for either the plaintiff or defendant to not drop or settle the case, respectively, and "a petitioner who convincingly establishes such an impact must further demonstrate some likelihood of success in overturning the class certification decision" 2) the cases implicates "a novel or unsettled question . . . particularly (but not exclusively) if the question is of relevance not only in the litigation before the court, but also to class litigation in general" 3) "the likelihood of the petitioner's success on the merits is a factor . . . that figures most prominently in cases in which the petitioner argues that, without an immediate appeal, the question may evade review" 4) "the posture of the case as it is pending before the district court is of relevance . . ." as where there is "an indication that the district court will reexamine the certification decision following discovery should discourage an interlocutory appeal"	

	LEADING CASE	CIRCUMSTANCES THAT JUSTIFY GRANT OF A 23(F) PETITION	NOTES
Seventh Circuit	*Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999)	1) "when denial of class status seems likely to be fatal, and when the plaintiff has a solid argument in opposition to the district court's decision" but even in such so-called death knell cases courts must be "wary lest the mind hear a bell that is not tolling" 2) review may be warranted where certification exposes a defendant to tremendous liability – particularly where a plaintiff's chance of succeeding on the merits is not high or 3) Review may be appropriate where it might resolve a difficult issue and contribute to the development of class action law	First case to address standards under Rule 23(f) Set forth three instances that justify grant of Rule 23(f) petition

	LEADING CASE	CIRCUMSTANCES THAT JUSTIFY GRANT OF A 23(F) PETITION	NOTES
Eighth Circuit	*Liles v. Del Campo*, 350 F.3d 742 (8th Cir. 2003)	NONE	*Liles* declines to provide guidance as to standards of review under Rule 23(f) "Other circuits have also addressed the question of when to grant an interlocutory appeal under Rule 23(f). The facts in this case do not favor an interlocutory appeal under any of these [circuits'] formulations, and we need not undertake here the task of refining a circuit standard for review of such petitions." *Liles*, 350 F.3d at 746 n.5 (citations omitted)

	LEADING CASE	CIRCUMSTANCES THAT JUSTIFY GRANT OF A 23(F) PETITION	NOTES
Ninth Circuit	*Chamblerlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005)	1) "there is a death-knell situation for either the plaintiff or the defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable" 2) "the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review" or 3) "the district court's class certification decision is manifestly erroneous"	Approach resembles that of D.C. Circuit Rejects the "sliding-scale" approach

	LEADING CASE	CIRCUMSTANCES THAT JUSTIFY GRANT OF A 23(F) PETITION	NOTES
Tenth Circuit	*Carpenter v. Boeing Co.*, 456 F.3d 1183 (10th Cir. 2006)	NONE	Circuit has not provided guidance as to the standards of review under Rule 23(f) Court in *Carpenter* acknowledged the death knell and reverse death knell rationales but did not apply any standard because it deemed the 23(f) petition untimely filed

	LEADING CASE	CIRCUMSTANCES THAT JUSTIFY GRANT OF A 23(F) PETITION	NOTES
Eleventh Circuit	*Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000)	"First, and most important, the court should examine whether the district court's ruling is likely dispositive of the litigation by creating a 'death knell' for either plaintiff or defendant. The prospect of irreparable harm from delaying appellate review of the class certification decision until after final judgment undoubtedly creates a compelling need for immediate review." "Second, a court should consider whether the petitioner has shown a substantial weakness in the class certification decision . . . merely demonstrating that the district court's ruling is questionable generally will be insufficient to support a Rule 23(f) petition in the absence of other factors supporting immediate review." "Third, a court should consider whether the appeal will permit the resolution of an unsettled legal issue that is 'important to the particular litigation as well as important in itself.'" "Fourth, a court should consider the nature and status of the litigation before the district court . . . [such as] the status of discovery, the pendency of relevant motions, and the length of time the matter already has been pending." "Finally, a court should consider the likelihood that future events may make immediate appellate review more or less appropriate," as where, for example, the district court "has indicated that it views its class certification decision as conditional or subject to revision at a later stage in the case."	Multi-factor approach resembles that of Seventh and First Circuits, with some additional considerations – perhaps the broadest approach of all the circuits Review is "highly discretionary" Court "will use restraint in accepting Rule 23(f) petitions, and these interlocutory petitions will not be accepted as a matter of course" Circuit applies the "sliding scale" to the "substantial weakness" factor – a strong district court order requires more weakness across the other factors, whereas a weak district court order may alone suffice to warrant review