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# Rule 23(f) Class Certification Appeals: Pursuing or Challenging Interlocutory Review of Certification Orders

Complying With Strict Procedural Requirements, Developing a Solid Appeal Strategy

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TUESDAY, SEPTEMBER 12, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

S. Stewart Haskins, II, Partner, **King & Spalding**, Atlanta

Peter J. Wozniak, Senior Counsel, **Seyfarth Shaw**, Chicago

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# Rule 23(f) Class Certification Appeals: Pursuing Or Challenging Interlocutory Review Of Certification Orders

Peter J. Wozniak  
S. Stewart Haskins, II

September 12, 2017

# Speakers

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# What We Will Cover

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- 01** Rule 23(f) Elements
- 02** Key Case Law Precedents On Rule 23(f)
- 03** The SCOTUS Ruling In *Baker v. Microsoft*
- 04** Strategic Issues For Crafting Rule 23(f) Appeals
- 05** Strategic Issues For Opposing Rule 23(f) Petitions
- 06** Practice Pointers

## Rule 23(f) -- Class Certification Appeals

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- “**Rule 23(f)-Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”



# Key Rulings On Rule 23 (f) In 2016

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- *Andrews, et al. v. America's Living Center, LLC*, 827 F.3d 306 (4<sup>th</sup> Cir. 2016).
- *Espinoza, et al. v. Galardi South Enterprise, Inc.*, 2016 U.S. Dist. LEXIS 14301 (S.D. Fla. Feb. 5, 2016).
- *Halle, et al. v. West Penn Allegheny Health System Inc.*, 2016 U.S. App. LEXIS 20655 (3d Cir. Nov. 18, 2016).
- *Hanks, et al. v. Briad Restaurant Group, L.L.C.*, 2016 U.S. Dist. LEXIS 28782 (D. Nev. Mar. 7, 2016).
- *Levison, et al. v. Mastec, Inc.*, 2016 U.S. Dist. LEXIS 12937 (M.D. Fla. Feb. 3, 2016).
- *Van Dusen, et al. v. Swift Transportation Co., Inc.*, 2016 U.S. App. LEXIS 13572 (9<sup>th</sup> Cir. July 26, 2016).

# Key Rulings On Rule 23(f) - 2017

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- *Yu, et al. v. Hasaki Restaurants Inc.*, 2017 U.S. Dist. LEXIS 54597 (S.D.N.Y. April 10, 2017).
- *Senne, et al. v. Kansas City Royals Baseball*, 2017 U.S. Dist. LEXIS 69337 (N.D. Cal. May 5, 2017).
- *Ferreras, et al. v. American Airlines, Inc.*, Case No. 16-CV-2427 (D.N.J. May 1, 2017).
- ***Microsoft Corp. v. Baker, et al.*, 2017 U.S. LEXIS 3721 (U.S. June 12, 2017).**
- *Chen-Oster, et al. v. Goldman Sachs & Co.*, 2017 U.S. Dist. LEXIS 106406 (S.D.N.Y. June 14, 2017).
- *Taylor, et al. v. Pilot Corp.*, 2017 U.S. App. LEXIS 11036 (6th Cir. June 19, 2017).

# ***Microsoft v. Baker*, 2017 U.S. LEXIS 3721 (U.S. June 12, 2017)**

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- Facts
  - Plaintiffs claimed damage to gameplay disks due to malefaction by Microsoft product.
  - District court denied certification because only 0.4% of consoles were found to have this defect. Parties agreed to a dismissal with prejudice.
  - The 9<sup>th</sup> District U.S. Court of Appeals then overturned the district court decision to deny class certification.
- Question
  - Does the federal court of appeals have the jurisdiction to rule on a class certification decision after the plaintiffs dismissed their allegations with prejudice?

# *Microsoft v. Baker*, 2017 U.S. LEXIS 3721 (U.S. June 12, 2017)

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- Decision
  - Supreme Court unanimously ruled that the Court of Appeals does not have jurisdiction to review the denial of class certification in a case where the plaintiff voluntarily dismissed their claim with prejudice.
  - Plaintiff's **voluntary** dismissal with prejudice undermined the normal procedures of FRCP 23(f).
- Implications

# Rule 23(f) Petitions

## Complying With Strict Procedural Requirements

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- What types of decisions may be appealed?
- Grounds for granting the petition
  - Who can petition?
  - When can a party petition?
    - 14 day rule
- How to draft the petition
  - Format and content requirements
- Filing the petition
  - Review FRAP, Appellate Court's local rules, etc.

# Rule 23(f) Petitions

## Appellate Standards

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- Appellate review is discretionary.
- There are no limiting standards in the Rule.
- Advisory Committee Notes state that “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.”
- Appellate decisions on Rule 23(f) petitions often fail to provide any discussion of the specific facts or considerations that motivated the courts' decisions on the petitions.

# Rule 23(f) Petitions

## Factors Considered By Courts of Appeals

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- Courts have generally recognized four categories of cases where Rule 23(f) petitions may be granted:
  - (1) death knell decisions for plaintiffs;
  - (2) death knell decisions for defendants;
  - (3) novel legal issues that would benefit from immediate appellate review; and
  - (4) certification decisions that are manifestly erroneous.

# Opposing Rule 23(f) Petitions

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- Rule 23(f) interlocutory review should be sparingly granted - there is already an opportunity for appellate review at the end of every case.
- Rule 23(f) petitions are accepted at generally low rates - on average less than one out of four petitions are granted.
- Petitioners often ignore factors considered by the Court.
  - developed standards are often used to limit the cases that receive interlocutory appellate review.
  - which Court of Appeals reviews petition is significant



# Rule 23(f) Petitions Practice Pointers

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- Motions for Reconsideration
- Amicus Support
- Reply Brief
- Motions to Stay
- Post-Disposition proceedings
  - Potential motions



Questions?