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## Rule 23(f) Class Certification Appeals: 10 Days Means 10 Days

A new opinion from the U.S. Court of Appeals for the Third Circuit is a reminder of the rigor with which courts apply Rule 23(f)'s requirement that a petition for permission to appeal an order granting or denying class action certification be filed with the circuit clerk within 10 days after the order is entered.

The case is *Gutierrez v. Johnson & Johnson*, \_\_\_ F.3d \_\_\_, 2008 WL 1792260 (3d Cir. April 22, 2008) in which the court dismissed the Fed. R. Civ. P. 23(f) petition of a putative class of employees for failing to meet the 10-day deadline. The Third Circuit joined other circuits in recognizing that the 10-day period within which to file a Rule 23(f) petition is tolled by the filing of a *timely* motion to reconsider the grant or denial of class certification. A timely motion to reconsider, the court held, is "one that is filed within the 10-day period set forth in Rule 23(f)." The court characterized the 10-day time limit as "strict and mandatory." The would-be appellants in *Gutierrez* had sought to appeal the district court's denial of class certification. Two days after the court entered the order denying certification, the employees filed a letter with the district court explaining that they and Johnson & Johnson had reached an agreement for an extension of time to file a motion for reconsideration. This was the only submission to the district court within the 10 days after denial of class certification. The district court granted the extension, the employees filed the motion, and the district court denied it. The employees then filed a Rule 23(f) petition within 10 days of the denial of the motion to reconsider.

The Third Circuit pointed out that a motion to reconsider a class certification order must be filed within 10 days after the order is entered, or it will be untimely under Rule 23(f), notwithstanding any local rule governing motions to reconsider generally. The employees argued that because they filed their Rule 23(f) petition within 10 days of the district court's denial of their motion to reconsider, the petition was timely. The court rejected that argument, holding that the denial of a motion to reconsider does not qualify as an order granting or denying class action certification and, because the motion for reconsideration was not filed within 10 days of the original class certification decision, the petition was untimely. The court also rejected the petitioners' argument that their motion to reconsider was timely because it was filed within the time period agreed to by the parties and approved by the district court.

Among the cases cited by the Third Circuit in support of the proposition that the 10-day time period is "strict and mandatory" was *Jenkins v. BellSouth Corp.*, 491 F.3d 1288 (11th Cir. 2007), which held that a district court cannot revive a lapsed right to seek an interlocutory appeal under Rule 23(f) by vacating a class certification order and reentering it. The case was a race discrimination action by BellSouth employees. The district court entered an order denying class certification, and the employees filed a motion for reconsideration that also was denied. The employees filed a Rule 23(f) petition for permission to appeal the order, but the filing was after expiration of the 10-day period for filing such petitions. The Eleventh Circuit dismissed the petition as untimely. Next, the employees moved the district court to vacate and reenter its order denying their motion to reconsider, citing excusable neglect due to an alleged mistake by a courier service. The court granted the motion and reentered the order. The employees subsequently filed a second Rule 23(f) petition.

In dismissing the second petition, the Eleventh Circuit noted that the 10-day window under Rule 23(f) "closes quickly to promote judicial economy." The employees pointed to the statutory process for interlocutory appeals generally, in 28 U.S.C. § 1292(b), and argued that the district court had authority to renew their opportunity to appeal after the original deadline expired. The court rejected that analogy, noting that Rule 23(f) departed from the § 1292(b) model in two significant ways. First, unlike § 1292(b),

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Rule 23(f) does not require that the district court certify the class action ruling for appeal; under Rule 23(f), only the court of appeals makes the call. Second, while § 1292(b) prescribes limited criteria for interlocutory appeals, Rule 23(f) does not. The court also noted that the Seventh Circuit had held that appellants may not use § 1292(b) to circumvent Rule 23(f)'s 10-day deadline.

As a practical matter, the strict 10-day time limit for filing a Rule 23(f) petition for permission to appeal means that counsel should take steps to prepare a potential petition even before the district court's order deciding a motion for class certification is entered.



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