



U. S. Department of Justice

Civil Division

15-CV-PP

*Office of the Assistant Attorney General*

*Washington, D.C. 20530*

December 4, 2015

The Honorable Robert Michael Dow, Jr.  
Chair, Rule 23 Subcommittee  
Advisory Committee on Civil Rules  
c/o United States District Court  
Everett McKinley Dirksen U.S. Courthouse  
219 South Dearborn St., Room 1978  
Chicago, IL 60604

Dear Judge Dow:

As discussed at the November 5, 2015, meeting of the Civil Rules Advisory Committee, the United States Department of Justice is pleased to submit to the Committee's Rule 23 Subcommittee, for consideration and approval for submission to the Committee, a proposal to amend existing Rule 23(f).

Rule 23(f) of the Federal Rules of Civil Procedure authorizes a permissive interlocutory appeal from a district court order granting or denying certification of a class. The rule requires that a petition for permission to appeal such an order must be filed in the court of appeals within 14 days after the certification order is entered. As explained below, the Department of Justice recommends that additional time—specifically, a 45-day deadline—should apply to petitions for permission to appeal under Rule 23(f) in civil cases when the federal government is a party.

Any appeal by the United States government must be authorized by the Solicitor General. 28 C.F.R. § 0.20(b). That deliberative process requires substantial time to consult with components of the Department of Justice and other government agencies with an interest in the issues presented. The consultation process is particularly time consuming and searching because multiple agencies and offices within the government might have different interests implicated by a specific case. Moreover, the role of the United States is not limited to defending particular litigation. The Solicitor General must also take account of the government's interest in enforcing federal law. Those interests are sometimes in tension, particularly in cases involving class actions. Because the government's diverse interests need to be reconciled before the Solicitor General can reach a decision concerning appeal, the need for consultation and deliberation requires additional time.

The current 14-day appeal deadline in Rule 23(f) is particularly challenging because the court of appeals is expressly precluded from granting an extension of time, and it is not clear whether the district court would have the authority to extend the 14-day deadline. See *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004). Moreover, unlike a notice of appeal, a petition under FRCP 23(f) is not a mere placeholder. Instead, the petition for permission to appeal is a substantive filing that must set forth reasons and arguments for reversing the class certification decision; that petition must be drafted by Justice Department attorneys, and authorized by the Solicitor General, in a very short period.

The United States government does not often seek permission to appeal under Rule 23(f), but in the circumstances where an appeal is warranted, the 14-day deadline creates serious problems of practicability and imposes extraordinary burdens on government officials. Fourteen days is not sufficient to permit the consultations and deliberations required to take account of the diverse government interests that often affect the issues and arguments the government might seek to present to the court of appeals.

Because of the time required for the Solicitor General to determine whether to authorize appeal, and to avoid unnecessary protective appellate filings that might later need to be voluntarily dismissed, other provisions of the federal rules provide additional time to appeal in cases where the United States government is a party. For example, Appellate Rule 4(a)(1)(B) provides that any party may file a notice of appeal within 60 days (rather than the usual 30 days) when the United States is a party to a civil case. Similarly, Appellate Rule 40(a)(1) provides that a petition for rehearing or rehearing en banc in a civil case may be filed within 45 days (instead of 14 days) when the United States government is a party.

The example of the deadline for rehearing petitions is closely analogous here. There, as in Rule 23(f), a 14-day period had been prescribed and was retained for non-government cases, but the rules were amended to accommodate the additional time needed for the Solicitor General to determine whether to pursue rehearing en banc when the government is a party. Also, like a rehearing petition, a petition for permission to appeal under Rule 23(f) is a substantive articulation of the government's position, requiring more time for consultation and authorization. Although the additional time may not be necessary for a non-government party that seeks to appeal, the Department of Justice recognizes that the rules should provide parity to all parties in a case where the government is a party, as in the examples of the deadlines to file a notice of appeal or a rehearing petition in civil cases.<sup>1</sup>

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<sup>1</sup> The rules provide different deadlines for the government and non-government parties in criminal cases, see FRAP 4(b)(1), but there is no reason for different treatment in the class-action context.

The Department's proposal to extend the deadline to 45 days represents a compromise resolution of the timing problem—an extension beyond the current 14-day period but less than the full 60 days permitted to file a notice of appeal in a civil case in which the government is a party. The proposal thus reflects the need to avoid undue delay in the class-action certification context, while accommodating the government's need to consider whether an appeal would be appropriate. The final sentence in Rule 23(f), providing that an appeal does not automatically stay proceedings, would also remain unchanged under the Department's proposal.

The Department therefore recommends that Rule 23(f) be amended as follows:

(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, except that any party may file such a petition within 45 days after the order is entered if one of the parties is the United States, a United States agency, a United States officer or employee sued in an official capacity, or a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the order is entered or files the appeal for that person. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

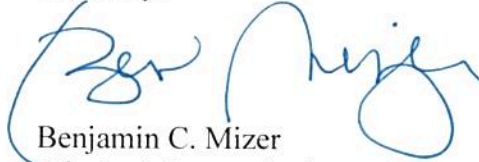
The Department also recommends the following Note to accompany the amended Rule:

**Subdivision (f).** The amendment lengthens the time for filing a petition for permission to appeal from a class-action certification order from 14 to 45 days in civil cases involving the United States or its agencies or officers. The amendment, analogous to the provisions in Federal Rules of Appellate Procedure 4(a)(1)(B) and 40(a)(1), which extend the time for filing a notice of appeal or a petition for rehearing in cases involving the United States government, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of each case and to address the government's diverse interests before authorizing a petition for permission to appeal an order granting or denying class certification.

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We appreciate the Subcommittee's consideration of the Department's proposal, and we will be happy to respond to any questions you have concerning it. Please feel free to contact either me or Ted Hirt of the Civil Division at [Theodore.Hirt@usdoj.gov](mailto:Theodore.Hirt@usdoj.gov) or (202) 514-4785.

Sincerely,



Benjamin C. Mizer  
Principal Deputy Assistant Attorney General

cc. The Honorable John D. Bates  
Chair, Advisory Committee on Civil Rules  
c/o United States District Court  
E. Barrett Prettyman U.S. Courthouse  
333 Constitution Ave. N.W. Room 4114  
Washington, D.C. 20001