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Collision Course: How Federal Rule of Civil Procedure 23(f) Has Silently Undermined the Prohibition on American Pipe Tolling During Appeals of Class Certification Denials

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INTRODUCTION

At first glance, the Fifth Circuit's decision in *Calderon v. Presidio Valley Farmers Association*[1] is unremarkable. *Calderon*, a class action brought on behalf of a group of Mexican farm workers, arose from numerous alleged violations of the Farm Labor Contractor Act.[2] Although the Western District of Texas initially denied the plaintiffs' motion for class certification, the Fifth Circuit agreed to hear an interlocutory appeal on the question and, phrasing its decision diplomatically, "invited" the district court to reconsider the issue.[3] This victory, however, would be short-lived for a small group of class members.

A group of then unnamed plaintiffs submitted class claim forms following the Western District of Texas's decision to certify a class.[4] Surprisingly, though, the district court held that the unnamed plaintiffs' claims were now time-barred, despite their initial timeliness.[5] Indeed, the unnamed plaintiffs' claims *became* untimely in the period between the initial, erroneous denial of class certification and the subsequent decision to certify the class.[6] The untimeliness of the plaintiffs' claims was a result of the rules on class action tolling, the jurisprudential doctrine which holds that the filing of a class action suspends the running of a claim's statute of limitations against *all* putative members of the class.[7] The Fifth Circuit affirmed that the tolling effect ceased upon the denial of class certification and began again when the class was certified.[8] Because the plaintiffs failed to intervene in the action or file independent actions during the period between the initial class certification denial and its subsequent reversal, the statute of

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1. 863 F.2d 384 (5th Cir. 1989) (per curiam).
2. *Id.* at 386.
3. *Id.* at 389.
4. *Id.* at 390.
5. *Id.*
6. *See id.*
7. *See, e.g.*, Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983). The tolling of a statute of limitations is equivalent to a suspension of prescription under Louisiana law. *Compare id.*, *with* LA. CODE CIV. PROC. art. 596 (2012).
8. *See Calderon*, 863 F.2d at 390.

limitations continued to run and the claims became untimely.[9] Thus, despite the timeliness of the initial action and appropriate notice to the defendants,[10] the unnamed plaintiffs lost the ability to state a claim against the defendant *solely* because the district court initially and erroneously decided against class certification.[11] This situation is undoubtedly a "worst case scenario" under the widely held notion that procedure alone should not, without good reason, foreclose on a party's ability to argue a claim's merits.[12]

The loss that the *Calderon* plaintiffs suffered is the most egregious consequence of the widely followed judicial policy of ending a class action's tolling effect immediately upon a district court's denial of class certification.[13] In the past, some courts have examined the policy and concluded that the realistic costs of tolling beyond the denial of class certification were simply too high—tolling would often extend through final judgment, which may come years after a class certification decision, thereby forcing defendants to defend stale claims.[14] The prospect of multiyear tolling arose from the historical difficulty of achieving interlocutory review of class certification decisions.[15] However, the entire landscape of interlocutory appeals in this area was altered in 1998 by the promulgation of Federal Rule of Civil Procedure 23(f), which provides a special mechanism for nearly immediate appellate review of class certification decisions.[16] To date, federal circuit courts of appeal have not responded to the fact that Rule 23(f) seriously

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9. *See id.*

10. A properly pled class action complaint is commonly understood to give a defendant notice of the type and number of claims that he or she faces. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554–55 (1974).

11. *See Calderon*, 863 F.2d at 390.

12. *See, e.g.*, TCI Grp. Life Ins. Plan v. Knoebber, 244 F.3d 691, 695 (9th Cir. 2001) (noting that there is an "overriding judicial goal of deciding cases correctly, on the basis of their legal and factual merits"); Foman v. Davis, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.").

13. *See, e.g.*, Stone Container Corp. v. United States, 229 F.3d 1345, 1355 (Fed. Cir. 2000); Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1013 (3d Cir. 1995); *Calderon*, 863 F.2d at 390; Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1390 (11th Cir. 1998) (en banc); Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 519–21 (5th Cir. 2008); Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc., No. 98 CV 1492, 2000 WL 1424931, at *1–2 (E.D.N.Y. Sept. 26, 2000); Andrews v. Orr, 851 F.2d 146, 149–50 (6th Cir. 1988).

14. *See Armstrong*, 138 F.3d at 1390.

15. *See infra* Part I.B.1. The interlocutory appeal in *Calderon* was an exception to this general rule.

16. *See infra* Part I.B.3.

undermines the logic of ceasing tolling upon the denial of class certification.[17]

This Comment argues that the policy of ending tolling immediately upon the initial denial of class certification contradicts the very purposes of class action tolling and can lead to prejudicial results, as *Calderon* demonstrates. Part I of this Comment examines the development of class action tolling and the evolution of interlocutory appeals of class certification decisions. Part II explores the interrelationship between class action tolling and interlocutory appeals of class certification rulings by discussing bellwether decisions on the issue, including the opinions that have linked the tolling policy observed in *Calderon* to the historical rarity of interlocutory appeals. Part III challenges the current jurisprudence on the grounds that it incentivizes many behaviors that Rule 23 and class action tolling seek to avoid, fails to recognize the vast changes in interlocutory appellate practice ushered in by Rule 23(f), causes litigants to be treated unequally due to an initial, erroneous certification decision, and fails to protect plaintiffs from *Calderon*-like prejudice. Part IV of this Comment proposes an alternative approach to the issue's current jurisprudential treatment. Specifically, it argues that tolling should continue through the time period available for requesting interlocutory review of a class certification decision under Rule 23(f) and, where a circuit court grants review, through final resolution of the certification issue. This proposal, which is based in part on the approach taken by Louisiana's Code of Civil Procedure, simultaneously protects plaintiffs from unnecessary harm, evens the pretrial playing field, and furthers Rule 23's goals of efficiency and economy in litigation. Finally, Part IV contextualizes the proposed rule by assessing recent scholarship on class action tolling.

I. THE LANDSCAPE

A. The Class Action and Statutes of Limitations

The class action's defining characteristic is representation.[18] Class actions depend on a legal fiction that instructs courts to treat unnamed class members as if they were named parties in the action.[19] Indeed, Rule 23 "both permits and encourages class

17. *See infra* Part II.

18. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550 (1974) ("A federal class action is . . . truly [a] representative suit . . . .").

19. State Farm Mut. Auto Ins. Co. v. Boellstorff, 540 F.3d 1223, 1229 (10th Cir. 2008).

members to rely on the named plaintiffs to press their claims."[20] The class action's representative nature necessarily has consequences for the running of statutes of limitations—because class actions involve, by definition, the vindication of a nonparty's rights, there must be a mechanism to regulate the application of a statute of limitations to unnamed class members' claims. However, the underlying pressures of class actions and limitations periods are often difficult to manage in practice.[21]

1. The Creation of Class Action Tolling: American Pipe & Construction Company v. Utah

The first effort to reconcile the representative nature of the class action and the running of statutes of limitations against unnamed class members came in the 1974 United States Supreme Court decision *American Pipe & Construction Company v. Utah*, which involved claims arising under the Sherman Act.[22] In 1964, members of the steel and concrete pipe industries were indicted by a federal grand jury for conspiring to restrain their market through collusive bidding and business allocation.[23] Four days after the defendants' plea of *nolo contendere* to the criminal charges, the United States brought civil actions in the Central District of California to enjoin further violations of the Sherman Act, the Clayton Act, and the False Claims Act.[24] After extended negotiations, the United States and "the companies consented to a decree enjoining them from engaging in certain specified future violations of the antitrust laws."[25] A final judgment was rendered on May 24, 1968.[26]

On May 13, 1969, the State of Utah commenced a class action against the same defendants for Sherman Act[27] violations. Utah's suit purported to represent "public bodies and agencies of the state and local government in the State of Utah who are end users of pipe acquired from the defendants."[28] The district court found the action timely because 15 U.S.C. § 16(b) then provided that the statute of

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20. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352–53 (1983).

21. *See* Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 535 (1996) ("[C]lass actions and statutes of limitation[s] do not interact harmoniously."). For an example of another area of contention involving the class action and statutes of limitations, see *infra* Part IV.C.

22. 414 U.S. at 541.

23. *Id.* at 540.

24. *Id.*

25. *Id.* at 540–41 (footnote omitted).

26. *Id.*

27. *Id.* at 541. Utah brought its action under 15 U.S.C. § 1.

28. *Id.*

limitations remained "suspended during the pendency [of an action by the United States] and for one year thereafter."[29] The class action was filed with eleven days remaining in the limitations period.[30]

Pursuant to Federal Rule of Civil Procedure 23(c)(1), the defendants moved for a declaration that the suit could not be maintained as a class action.[31] The district court granted the motion, finding that the numerosity requirement of Rule 23(a)(1) was not satisfied.[32] On December 12, 1969, roughly seven months after Utah first filed its action and eight days after the district court rendered its class viability decision, more than 60 governmental entities from Utah moved to intervene under Rule 24(a)(2) (intervention of right) or, in the alternative, Rule 24(b)(2) (permissive intervention).[33] The district court denied the motions to intervene, finding that "the limitations period . . . had run as to all these respondents and had *not been tolled* by the institution of the class action in their behalf."[34] The Ninth Circuit affirmed the intervention denial as a matter of right but reversed the denial of permissive intervention, rejecting the district court's conclusion that the intervening parties were time-barred.[35] The Ninth Circuit predicated its decision on the legal fiction that the intervenors' claims were filed when Utah initially brought the class claim eleven days before the limitations period had run.[36] The defendants appealed, and the Supreme Court granted certiorari to resolve the issue.[37]

The Supreme Court affirmed the Ninth Circuit's decision on the issue of tolling.[38] The Court began its analysis by examining the principal purpose of the 1966 amendments to Rule 23.[39] Prior to 1966, Rule 23 "contained no mechanism for determining . . . any point in advance of final judgment which [alleged class members] were actual [parties that] would be bound by the judgment."[40] According to the Court, "[a] recurrent source of abuse under [pre-1966 Rule 23] lay in the potential that members of the claimed class

29. *Id.* at 541–42 (footnote omitted) (internal quotation marks omitted).
30. *Id.* at 542.
31. *Id.*
32. *Id.* at 543. To have a class certified, the named plaintiff must demonstrate, *inter alia*, that the class device is required because conventional joinder of all similarly situated plaintiffs is impracticable. *See* FED. R. CIV. P. 23(a)(1).
33. *Am. Pipe*, 414 U.S. at 543–44.
34. *Id.* at 544 (emphasis added) (citation omitted).
35. Utah v. Am. Pipe & Constr. Co., 473 F.2d 580, 584 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974).
36. *See Am. Pipe*, 414 U.S. at 545.
37. *See id.*
38. *Id.* at 561.
39. *See id.* at 545–46.
40. *See id.*

could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests."[41] The Court noted that "[t]he 1966 amendments were designed, in part, specifically to mend this perceived defect in [Rule 23] and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments."[42] These 1966 changes to Rule 23, which served as part of an overarching revision,[43] established the "opt-out" nature of Rule 23(b)(3) classes.[44]

Because post-1966 Rule 23 generally binds an unnamed class member to the named plaintiff's action unless and until she chooses to opt out, "the filing of a timely class action complaint commences the action for *all members of the class* as subsequently determined."[45] The legal fiction that a class action serves as an action on behalf of all putative class members is intended to have pragmatic benefits—as the Supreme Court explained, "[a] federal class action is no longer 'an invitation to joinder' but a truly representative suit *designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions*."[46]

After its examination of the nature of the post-1966 federal class action, the Court addressed the issue of whether Utah's initial class action suspended the running of the limitations period for the putative class members that intervened in the action. The Court held that "the commencement of the original class suit tolls the running of the statute for *all purported members of the class* who make timely motions to intervene after the court has found the suit inappropriate for class action status,"[47] even if the unnamed plaintiff was initially unaware of the action.[48] A "contrary rule" would "deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure."[49] The

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41. *Id.* at 547.
42. *Id.* (citation omitted).
43. Robert G. Bone & Davis S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1259 (2002).
44. *See, e.g.*, FED. R. CIV. P. 23(c)(2) ("[Notice to certify Rule 23(b)(3) classes] must clearly and concisely state in plain, easily understood language . . . the binding effect of a class judgment on members . . . ."); Severtson v. Phillips Beverage Co., 137 F.R.D. 264 (D. Minn. 1991) ("Under Rule 23, all persons falling within the class definition are considered members of the class, and therefore bound by the result in the case, unless they affirmatively 'opt-out' of the case." (citation omitted)).
45. *Am. Pipe*, 414 U.S. at 550 (emphasis added) (footnote omitted).
46. *See id.* (emphasis added).
47. *See id.* at 553 (emphasis added).
48. *Id.* at 551.
49. *See id.* at 553.

Court reasoned that the new rule was consistent with the ultimate purposes of statutes of limitations:

> The policies of ensuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights" are satisfied when . . . a named [plaintiff-representative] of a class commences a suit and thereby notifies the defendants *not only of the substantive claims being brought against them*, *but also of the number and generic identities of the potential plaintiffs who may participate in the judgment*.[50]

2. The Modern Tolling Approach: Crown, Cork & Seal Co. v. Parker

Class action tolling, also known as *American Pipe* tolling,[51] reached its current form in the Supreme Court's 1983 decision *Crown, Cork & Seal Company v. Parker*.[52] The case arose out of an employment discrimination dispute between Theodore Parker (Parker) and his former employer Crown, Cork & Seal Company (Crown).[53] In October 1977, Parker filed a racial discrimination charge with the Equal Employment Opportunity Commission (EEOC).[54] The EEOC issued a statement that found no reasonable support for Parker's claim and informed Parker of his right to sue Crown under Title VII of the Civil Rights Act of 1964.[55] The notice to Parker also informed him of a 90-day statute of limitations for the action.[56] Despite the notice, Parker failed to bring a claim against his former employer within the 90-day period.[57]

Two months before the EEOC sent notice to Parker of his right to sue, two former Crown employees initiated a class action against the company for employment discrimination.[58] The class described in that action, *Pendleton v. Crown, Cork & Seal Co.*, included Parker and his claim.[59] In May 1979, the *Pendleton* plaintiffs moved for class certification, but the motion was denied on Rule 23(a)(1)

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50. *See id.* at 554–55 (emphasis added) (citing Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965)).

51. *See, e.g.*, Caleb Brown, *Piped In: The Tenth Circuit Weighs in on Extending* American Pipe *Tolling in* State Farm Mutual Automobile Insurance Co. v. Boellstorff, 62 OKLA. L. REV. 793 (2010).

52. 462 U.S. 345, 347 (1983).

53. *Id.*

54. *Id.*

55. *Id.*

56. *See id.* at 348.

57. *Id.*

58. *Id.* at 347.

59. *Id.*

numerosity grounds.[60] Within 90 days of the denial of class certification in *Pendleton*, but two years after his original notice of his right to sue, Parker filed an individual action in federal court.[61] Crown successfully moved for summary judgment, with the district court reasoning that Parker "had failed to file his action within 90 days of receiving his Notice of Right to Sue, as required by the [act]."[62] The Fourth Circuit reversed, and the Supreme Court granted certiorari to resolve a growing circuit split on whether one must intervene in an action after class certification denial to claim *American Pipe* tolling.[63]

The Supreme Court affirmed the Fourth Circuit, holding that "[w]hile *American Pipe* concerned only intervenors, we conclude that the holding of that case is not to be read so narrowly. The filing of a class action tolls the statute of limitations as to all asserted members of the class, not just as to intervenors."[64] The Court reasoned that many of the "same inefficiencies" identified in the *American Pipe* decision "would ensue if [the] . . . tolling rule were limited to permitting putative class members to intervene after the denial of class certification," as "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations."[65] A failure to extend *American Pipe* to all putative class members would result in the "needless multiplicity of actions" that tolling rules were meant to prevent.[66] Importantly, the *Crown* majority held that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until

60. *See id.* at 347–48.
61. *Id.* at 348.
62. *Id.*
63. *Id. American Pipe*, read narrowly, allows "all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974). The Ninth Circuit and Second Circuit held that intervention is a necessary prerequisite for class action tolling. *See* Pavlak v. Church, 681 F.2d 617, 618 (9th Cir. 1982); Stull v. Bayard, 561 F.2d 429, 433 (2d Cir. 1977). The Fourth Circuit held that "the rule in *American Pipe* is not limited to intervenors but applies to all members of the class." Parker v. Crown, Cork and Seal Co., 677 F.2d 391, 393 (4th Cir. 1982), *aff'd*, 462 U.S. 345 (1983).
64. *Crown*, 462 U.S. at 350 (citation omitted) (internal quotation marks omitted).
65. *Id.* at 350–51.
66. *Id.* at 351; *Am. Pipe*, 414 U.S. at 553–54 ("[A] rule requiring [a putative plaintiff's] successful anticipation of the determination of the viability of the class would breed needless duplication of motions.").

class certification is denied."[67] *Crown*'s approach continues to govern the question of class action tolling.[68]

B. Interlocutory Appeals of Class Certification Decisions and the Promulgation of Rule 23(f)

In the course of a class action, the most crucial pretrial decision that a district court makes is whether to certify the purported class—commentators have described class certification decisions as "the whole ball game"[69] and "the main event."[70] The consequences for victory or defeat on the question of class certification are often momentous. For plaintiffs, "denial of certification of a class can doom the litigation if the representative plaintiffs' individual claims are insufficient to make individual litigation economically feasible."[71] For a defendant, class certification can result in so-called blackmail settlements[72] because successful class certification "can turn a relatively inconsequential case into one with hundreds, even thousands, of claimants and carry with it damages upwards of one billion dollars."[73] Indeed, the pressure to settle after successful class certification can be so great as to cause defendants to "abandon a meritorious defense" to avert potential economic catastrophe.[74]

Despite the class certification decision's clear importance, interlocutory appeals of such decisions were historically difficult to achieve.[75] Parties seeking review of a district court's class

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67. *Crown*, 462 U.S. at 354. *See also infra* Part IV.C.2.i.

68. *See, e.g.*, Symczyk v. Genesis Healthcare Corp., 656 F.3d 189, 200 (3d Cir. 2011); McClelland v. Deluxe Fin. Servs., Inc., 431 F. App'x 718, 721 (10th Cir. 2011).

69. PAUL V. NIEMEYER, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 21 (1997), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1997.pdf (comments of Guy Rounsaville, Jr.).

70. *Id.* at 30 (comments of C.C. Torbert, Jr.).

71. Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal for a New Guideline*, 2004 COLUM. BUS. L. REV. 231, 232 (2004). Such actions are known as "negative value" class actions, which arise when a plaintiff's claim is not large enough to justify proceeding individually. *See In re* Monumental Life Ins. Co., 365 F.3d 408, 411 n.1 (5th Cir. 2004).

72. NIEMEYER, *supra* note 69, at 18 (comments of John W. Stamper).

73. Kitchen, *supra* note 71, at 232.

74. *Id.*; Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978).

75. 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, 1535 (2000) ("Until recently, parties seeking interlocutory relief [from an adverse class certification ruling] have had few options." (citation omitted)); Kitchen, *supra* note 71, at 233 ("Historically, however, there have been few options for parties to appeal a

certification decision were routinely left waiting through trial and final judgment, often a multiyear process, for an opportunity to appeal.[76] Though the landscape for interlocutory, postcertification denial appeals has changed dramatically, the difficulty of achieving such an appeal prior to the promulgation of Rule 23(f) was a key factor in the judicial analysis of postcertification denial tolling.[77]

1. Pre-Rule 23(f) Interlocutory Appeals of Class Certification Jurisprudence

As a general rule, "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."[78] As a means of encouraging "judicial efficiency"[79] and preventing parties from using delay tactics and forcing settlements,[80] only *final decisions* from district courts may be appealed.[81] Exceptions in the context of interlocutory appeals of pre-Rule 23(f) class certification decisions came in three forms: (1) the collateral order doctrine, (2) interlocutory appeals under 28

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certification decision." (citation omitted)); NIEMEYER, *supra* note 69, at 17 (comments of Patrick E. Maloney) ("[Prior to the promulgation of Rule 23(f), there was] no effective means for interlocutory review of class certification rulings."); Carey M. Erhard, *A Discussion of the Interlocutory Review of Class Certification Orders Under Federal Rule of Civil Procedure 23(f)*, 51 DRAKE L. REV. 151, 152 (2002) ("Despite its decisive nature, until recently, class certification determinations were essentially unreviewable until the court ruled on the merits of the case.").

76. *See* Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1390 (11th Cir. 1998) (en banc).

77. *Id.* at 1389.

78. 28 U.S.C. § 1291 (2006).

79. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) ("Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy."); *see also* Erhard, *supra* note 75, at 152.

80. *See, e.g.*, Cunningham v. Hamilton Cnty., 527 U.S. 198, 203 (1999); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); *see also* Erhard, *supra* note 75, at 152–53.

81. A *final decision* or *final judgment* is "traditionally defined to be a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *See* Solimine & Hines, *supra* note 75, at 1547 (internal quotation marks omitted) (citing Catlin v. United States, 324 U.S. 229, 233 (1945)); *see also* Erhard, *supra* note 75, at 152.

U.S.C. § 1292(b), and (3) a writ of mandamus under 28 U.S.C. § 1651(a).[82]

The collateral order doctrine, first articulated in *Cohen v. Beneficial Industrial Loan Corporation*,[83] provided that an interlocutory appeal is available after a class certification decision when a party can demonstrate that the certification order "[(1)] conclusively determine[s] the disputed question, [(2)] resolve[s] an important issue completely separate from the merits of the action, and [(3)] [is] effectively unreviewable on appeal from a final judgment."[84] The collateral order doctrine's viability as a means of attaining interlocutory review of class certification decisions did not last. A subsequent collateral order doctrine case, *Coopers & Lybrand v. Livesay*, effectively prohibited the use of the collateral order doctrine for interlocutory appeals of class certification decisions.[85]

The second method for attaining interlocutory review of pre-Rule 23(f) class certification decisions came through 28 U.S.C. § 1292(b).[86] Notably, § 1292(b) requires "dual certification," as "[t]he

82. Erhard, *supra* note 75, at 153–55; Solimine & Hines, *supra* note 75, at 1552–61. This list does not include the so-called *death-knell* doctrine, discussed *infra* note 85.

83. 337 U.S. 541 (1949). *See also* Erhard, *supra* note 75, at 153 n.9.

84. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (citations omitted) (citing *Cohen*, 337 U.S. at 546).

85. *See* Erhard, *supra* note 75, at 154; Kitchen, *supra* note 71, at 237. *Coopers v. Lybrand* also put an end to the death knell doctrine. Prior to *Coopers & Lybrand*, courts entertained interlocutory appeals of class certification decisions where "a denial of class certification effectively ends the litigation because the plaintiffs' individual stakes in the litigation are too small to litigate their individual claims." Erhard, *supra* note 75, at 153 n.13 (citation omitted). The death knell doctrine was fraught with pragmatic application issues, as "courts . . . failed to create any precise test when using these factors to determine when an appeal was justified." Solimine & Hines, *supra* note 75, at 1553 (citation omitted). Indeed, determining whether an adverse ruling was a "death knell" to a plaintiff's claim required an "extensive" case-by-case analysis. *Id.* "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." Kitchen, *supra* note 71, at 238 (citation omitted).

86. Kitchen, *supra* note 71, at 240; Erhard, *supra* note 75, at 154; Solimine & Hines, *supra* note 75, at 1550. 28 U.S.C. § 1292(b) dictates that

> [w]hen 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*,

decision to certify [the class certification question for appeal] is wholly within the discretion of both the district *and* the appellate courts."[87] The dual certification requirement of § 1292(b) creates a great challenge for parties seeking interlocutory review of a class certification decision because the statute "requires the blessing of the very district court that issued the questionable ruling in the first place."[88] Even when the district court certifies the question for review, the court of appeals retains total discretion for entertaining the appeal.[89] Courts of appeals may refuse to hear § 1292(b) claims even for purely practical reasons.[90] As a result of § 1292(b)'s double-hurdle, such "appeals . . . in fact provide review in only a small fraction of cases."[91]

The final pre-Rule 23(f) approach for attaining interlocutory review of class certification decisions is through mandamus under 28 U.S.C. § 1651(a).[92] Mandamus "is something of a last resort" for interlocutory review because "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."[93] Mandamus proved to be an ineffective means for attaining interlocutory review of class certification decisions.[94]

> 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.

28 U.S.C. § 1292(b) (2006).

87. Solimine & Hines, *supra* note 75, at 1551 (emphasis added).

88. NIEMEYER, *supra* note 69, at 19 (comments of Miles N. Ruthberg).

89. 28 U.S.C. § 1292(b).

90. Solimine & Hines, *supra* note 75, at 1551 ("[A] court of appeals can deny such an appeal for any reason, including a congested docket." (citing Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

91. NIEMEYER, *supra* note 69, at 20 (comments of John L. McGoldrick). For an extensive analysis of jurisprudential attitudes toward interlocutory review under § 1292(b) in general, see Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH L. REV. 1165, 1171–74 (1990).

92. Solimine & Hines, *supra* note 75, at 1551–52; Erhard, *supra* note 75, at 155. 28 U.S.C. § 1651 (2006) dictates that "[t]he 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."

93. Kitchen, *supra* note 71, at 241 (citations omitted) (internal quotation marks omitted). *See also* Will v. United States, 389 U.S. 90, 95 (1967) ("[I]t is clear that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." (citations omitted) (internal quotation marks omitted)).

94. Solimine & Hines, *supra* note 75, at 1551–52 ("As is stated frequently, however, the writ is no substitute for an appeal." (citations omitted)); NIEMEYER, *supra* note 69, at 19 (comments of Miles N. Ruthberg) ("Mandamus is not sufficient.").

Indeed, a mere "[three] mandamus petitions . . . reached the merits" in the decade prior to Rule 23(f)'s promulgation.[95]

2. The Promulgation of Rule 23(f)

Rule 23(f) was promulgated at a time when interlocutory appeals of class certification decisions were rare.[96] The Advisory Committee on Civil Rules' (Advisory Committee) reform efforts in the late 1990s did not, however, arise in a vacuum. In 1986, the Section of Litigation of the American Bar Association (ABA) first proposed that "the Federal Judicial Code be amended to permit immediate appeal of class certification decisions, at the discretion of the appeals court."[97] The American Law Institute and other legal commentators echoed the ABA's proposal.[98] Nevertheless, the Advisory Committee's Rule 23(f), which went into effect on December 1, 1998, was the first successful effort to reform the interlocutory review process for class certification decisions.[99]

Though numerous justifications for Rule 23(f) were given, the rule's supporters tended to identify two primary justifications—the general need for appellate review of class certification decisions and the concern over district court behavior in an essentially appeal-free area.[100] Advocates for plaintiffs and defendants repeatedly stressed the need for an effective avenue for interlocutory appeal.[101] As Irving R. Segal stated for the American Association of Trial Lawyers, "[g]iven the complexity and dynamics of typical class action procedure, appellate review of class certification by a trial court is, as a matter of pragmatic fact, a genuine remedy only if the

95. NIEMEYER, *supra* note 69, at 20 (comments of John L. McGoldrick).

96. *See supra* Part I.B.1; *see also* NIEMEYER, *supra* note 69, at 3–4 (discussing how Rule 23(f) "responds to widespread observations that it is difficult to secure effective appellate review of class certification decisions").

97. Solimine & Hines, *supra* note 75, at 1562 (citing Am. Bar Ass'n Sec. of Litig., *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 210–11 (1986)).

98. *Id.* at 1563.

99. *Id.* at 1564.

100. Though class certification could be appealed upon final judgment, class certification decisions often encourage either the action's settlement or its abandonment. *See infra* Part II.B.

101. *But cf.* NIEMEYER, *supra* note 69, at 22 (comments of Richard A. Koffman) ("Overwhelmingly plaintiffs oppose and defendants support. This is clear proof that this proposal favors defendants. That is because it will occasion delay. Class actions take long enough now. Mandamus and § 1292(b) are protection enough."); *id.* at 14 (comments of Stephen Gardner) ("Defendants almost always will seek to appeal. Plaintiffs almost never will.").

appeal is taken at or shortly after certification."[102] Similarly, Patrick E. Maloney, representing the Defense Research Institute, stated that "[a]ll litigants need a method to obtain timely and meaningful review of class certification orders" because "[t]he certification order often ends the litigation as a practical matter."[103] Discussing the benefits of Rule 23(f) for plaintiffs and defendants alike, commentator Donn P. Pickett noted that "[i]nterlocutory appeal will provide guidance to plaintiffs who fail to win certification, and protection to defendants faced with certification of a class with potential billion dollar damages."[104]

Support for Rule 23(f) also arose from concern over district court behavior when making class certification decisions. Some proponents merely hoped to see class certification decisions treated more carefully. For example, John L. McGoldrick of Bristol-Meyers Squibb urged that "[a] realistic possibility of review . . . may spur district courts to take certification decisions more seriously."[105] Other Rule 23(f) supporters alleged that district courts were using the certification process for wholly inappropriate purposes. In the May 21, 1997, *Report of the Advisory Committee on Civil Rules*, commentator Miles N. Ruthberg claimed that he could "personally confirm that some courts deliberately wield certification power precisely in order to pressure settlement—irrespective of whether the case could ever be fairly tried as a class action."[106]

However, some were critical of Rule 23(f). The Advisory Committee claimed that "[t]he main ground of opposition is that applications for permission to appeal will become a routine strategy for increasing cost and delay."[107] The Federal Bar Association suggested that "[t]he Circuit Courts of Appeals are presently inundated with cases . . . [and that] [a]dding an additional class of appeals (even permissive appeals) under these circumstances seems counterproductive."[108] Nevertheless, Rule 23(f) was successfully adopted.

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102. *Id.* at 16 (internal quotation marks omitted) (comments of Irving R. Segal).

103. *Id.* at 17 (internal quotation marks omitted) (comments of Patrick E. Maloney).

104. *Id.* at 22 (comments of Donn P. Pickett).

105. *Id.* at 20 (internal quotation marks omitted) (comments of John L. McGoldrick). *But cf. id.* at 23 (comments attributed to the Chicago Council of Lawyers) ("Indeed, district courts may become less responsible if the locus of responsibility [for class certification decisions] is shifted to appellate courts.").

106. *Id.* at 19 (comments of Miles N. Ruthberg).

107. *Id.* at 4.

108. *Id.* at 25 (comments attributed to the Federal Bar Association).

3. Rule 23(f)'s Text, Commentary, and Development

Modern Rule 23(f) provides:

> 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.[109]

Rule 23(f) was a direct response to the difficulty of attaining interlocutory review on the important question of class certification.[110] The comments to the 1998 amendments to Rule 23 reflect the belief that class certification review could, through appellate discretion, be achieved efficiently and economically.[111] Indeed, the comments to the 1998 amendments suggest that the appellate courts have "sole discretion" in choosing which, if any, Rule 23(f) appeals to entertain.[112] The district court need not "certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal."[113]

Although its text has been altered since promulgation, Rule 23(f)'s substance has remained constant. In 2007, the text was altered for purely stylistic reasons.[114] The comments to the 2007 amendment reaffirmed the "unfettered discretion" retained by courts of appeals in granting Rule 23(f) appeals.[115] In 2009, the period for appeal was moved from ten days to fourteen.[116]

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109. FED. R. CIV. P. 23(f).

110. NIEMEYER, *supra* note 69, at 4.

111. *See* FED. R. CIV. P. 23 advisory committee's note to 1998 amends., subdiv. (f) (noting that concerns about the de facto unavailability of interlocutory review of class certification decisions "can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues").

112. *Id.*

113. *Id.*

114. *See* FED. R. CIV. P. 23 advisory committee's note to 2007 amend. ("The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.").

115. *Id.*

116. FED. R. CIV. P. 23 advisory committee's note to 2009 amends. ("The time set in the former rule at 10 days has been revised to 14 days.").

4. The Application of Rule 23(f)

Since the rule's promulgation, federal courts and legal scholars have come to numerous conclusions as to when a Rule 23(f) appeal should be heard.[117] Some circuit courts have shown greater willingness to hear Rule 23(f) appeals than others, creating forum-shopping concerns.[118] One of the most notable consequences of Rule 23(f)'s promulgation is the increased rate at which circuit courts entertain interlocutory appeals of class certification decisions.

In 2002, Carey M. Erhard performed an extensive empirical analysis on circuit court behavior in Rule 23(f) appeals.[119] Professor Erhard's data suggest that interlocutory appeals of class certification decisions are *significantly* more likely to be heard due to the enactment of Rule 23(f).[120] Between Rule 23(f)'s promulgation in December of 1998 and July of 2002, a period of roughly three and a half years, the circuit courts published a combined 40 Rule 23(f) opinions.[121] Of the 40 opinions, 33 of them reached the merits of the appeal; the other seven opinions were written reasons for denying a requested appeal.[122] These data do not suggest that circuit courts are entertaining over 75% of the appeals requested because the study did not track unpublished denials of Rule 23(f) requests.[123] The 33 Rule 23(f) appeals that the circuit courts entertained in a three and a half year period signify a nearly twofold increase from the number of appeals (18) entertained in the *decade* before Rule 23(f)'s enactment.[124] Erhard's data also suggest that, in the first three years after Rule 23(f)'s promulgation, the frequency of published Rule 23(f) opinions increased every year.[125]

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117. *See generally* Charles R. Flores, *Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f)*, 4 SETON HALL CIRCUIT REV. 27 (2007); Aimeee G. Mackay, *Appealability of Class Certification Orders Under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW. U. L. REV. 755 (2002); DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.2, at 372 (4th ed. 2008).

118. Erhard, *supra* note 75, at 174.

119. *Id.* at 171–74.

120. *See id.*

121. *Id.* at 173.

122. *See id.* at 184–87 (Table 1).

123. *See id.* at 173 n.210.

124. *Compare id.* at 184 (Table a1), *with* NIEMEYER, *supra* note 69, at 20 (comments of John L. McGoldrick).

125. *See* Erhard, *supra* note 75, at 171–72.

II. TYING THE KNOT: CLASS ACTION TOLLING AFTER A DISTRICT COURT'S DENIAL OF CLASS CERTIFICATION

The relationship between class action tolling and the interlocutory appeals of class certification decisions is not always apparent; the pre-Rule 23(f) decisions of *American Pipe* and *Crown* do not explore the possibility of tolling during interlocutory appeals. Moreover, Rule 23 does not expressly contemplate class action tolling. Yet, the relationship between the two has received attention in jurisprudence and, to a much lesser extent, scholarly literature.[126] The circuit courts have held with practical uniformity that class action tolling ceases upon a district court's denial of class certification, irrespective of an interlocutory appeal or an appeal following final judgment.[127] Only two federal district courts have

126. *See, e.g.*, Stone Container Corp. v. United States, 229 F.3d 1345, 1355 (Fed. Cir. 2000); Nelson v. Cnty. of Allegheny, 60 F.3d 1010, 1013 (3d Cir. 1995); Calderon v. Presidio Valley Farmers Ass'n, 863 F.2d 384, 390 (5th Cir. 1989); Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1390 (11th Cir. 1998) (en banc); Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 519–21 (5th Cir. 2008); Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc., No. 98 CV 1492, 2000 WL 1424931, at *1–2 (E.D.N.Y. Sept. 26, 2000); Andrews v. Orr, 851 F.2d 146, 149–50 (6th Cir. 1988); Bobbitt v. Milberg, LLP, No. CV-09-629-TUC-FRZ, 2010 WL 5345867, at *4–5 (D. Ariz. Nov. 4, 2010); Monahan v. City of Wilmington, No. Civ.A. 00-505 JJF, 2004 WL 758342, at *2 (D. Del. Jan. 30, 2004); *In re* Katrina Canal Breaches Consol. Litig., 601 F. Supp. 2d 809, 827 (E.D. La. 2009); Arivella v. Lucent Technologies, Inc., 623 F. Supp. 2d 164, 174–75 (D. Mass. 2009); Giovanniello v. ALM Media, LLC, 660 F.3d 587, 589 n.1 (2d Cir. 2011). For examples of scholarly coverage on the issue, see 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 3:15 (7th ed. 2011); 3 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 7:38 (4th ed. 2002 & Supp. 2012).

127. *See, e.g.*, *Stone Container*, 229 F.3d at 1355; *Nelson*, 60 F.3d at 1013; *Calderon*, 863 F.2d at 390; *Taylor*, 554 F.3d at 519–21; *Armstrong*, 138 F.3d at 1390; *Andrews*, 851 F.2d at 149–50. *But see* Jimenez v. Weinberger, 523 F.2d 689, 696 (7th Cir. 1975) ("In this case we have no doubt that the filing of the complaint tolled the statute at least until the date of the three-judge district court decision on the merits. If that decision had expressly refused to certify the case as a class action, we think the tolling would have continued if the plaintiffs had appealed from such a ruling, but probably would not have continued if they had acquiesced. Therefore, if the district court's failure to address the class action issue is construed as an adverse ruling, the plaintiffs' failure to raise that issue on appeal to the Supreme Court would defeat the unnamed plaintiffs' claims."). *Jimenez* was decided prior to the Supreme Court's decision in *Crown* and before the promulgation of Rule 23(f). The Seventh Circuit's dicta have not generated support, and its decision was treated negatively by the Eleventh Circuit. *See Armstrong*, 138 F.3d at 1384.

published opinions that partially challenged the appellate courts on this issue.[128]

A. Bellwether Appellate Opinions on Tolling After Certification Denial

As previously noted, numerous circuit courts have addressed the issue of tolling following the denial of class certification.[129] However, two opinions stand out—the Fifth Circuit's opinion in *Taylor v. United Parcel Service, Inc.*,[130] and the Eleventh Circuit's opinion in *Armstrong v. Martin Marietta Corporation.*[131] Both opinions offer more comprehensive analyses of the question than do comparable decisions from other circuit courts. The decisions serve as bellwethers for other reasons as well. *Taylor* is the most recent published appellate decision on this issue. *Armstrong* is relevant because it was handed down months before Rule 23(f)'s promulgation, and the court discussed the manner in which the then proposed rule could change the landscape of tolling postcertification denial.[132]

1. Taylor v. United Parcel Service, Inc.*—The "Representation" Justification*

On March 19, 2003, Elton Taylor (Taylor) brought suit against his employer, United Parcel Service, Inc. (UPS) for employment discrimination under Title VII of the Civil Rights Act and 42 U.S.C. § 1981.[133] Prior to his 2003 action, Taylor was a putative plaintiff in a class action filed on June 17, 1994, *Morgan v. United Parcel Service of America, Inc.*,[134] "alleging race discrimination in employment by UPS."[135] The plaintiffs' claims in *Morgan* were dismissed through summary judgment on June 26, 2000, and the Eighth Circuit affirmed the district court's decision.[136] Taylor's

128. *See Nat'l Asbestos Workers,* 2000 WL 1424931, at *1–2; *Monahan*, 2004 WL 758342, at *2.
129. *See supra* note 126.
130. 554 F.3d 510 (5th Cir. 2008).
131. 138 F.3d 1374, 1390 (11th Cir. 1998) (en banc).
132. *See id.* at 1389 n.35.
133. *Taylor*, 554 F.3d at 513–14.
134. 143 F. Supp. 2d 1143 (E.D. Mo. 2000), *aff'd*, 380 F.3d 459 (8th Cir. 2004).
135. *Taylor*, 554 F.3d at 513.
136. *Id.*

individual claims under federal law largely matched those in the *Morgan* class action.[137]

In April of 2005, UPS moved for summary judgment against Taylor.[138] The Western District of Louisiana granted the motion in part, holding that a number of the statutes of limitations had run for the claims originally made on behalf of Taylor in *Morgan*, including the claims under Title VII.[139] Specifically, the court rejected Taylor's contention that the *Morgan* claims' statutes of limitations were tolled between the June 2000 grant of summary judgment and the Eighth Circuit's August 2004 decision affirming the dismissal.[140]

The Fifth Circuit reversed the Western District of Louisiana on tolling, holding that "Taylor's claims were tolled until August 30, 2004, when the Eighth Circuit affirmed the district court's order in *Morgan*."[141] Notably, though, the court drew a sharp distinction between tolling after an adverse *summary judgment* in a class action and the outright *denial of class certification*.[142] Indeed, the court wrote at length about the impropriety of continued tolling beyond certification denial.[143]

After discussing *American Pipe* and *Crown*, the court held that "it is clear from these cases that if the district court denies class certification under Rule 23, tolling of the statute of limitations ends."[144] For the Fifth Circuit, the central question was one of continued representation; discussing the question of representation after class certification denial, the court held that

> [i]n those cases [of class certification denial], the district court's refusal to certify the class *was tantamount to a declaration that only the named plaintiffs were parties to the suit*. Thus, those cases logically concluded that after the

137. *See id.* at 514. Taylor also alleged that UPS had retaliated against him for participating in the *Morgan* action.

138. *Id.*

139. *See id.*

140. *Id.*

141. *Id.* at 521.

142. *Id.* ("In sum, because the *Morgan* district court did not deny class certification, *American Pipe*, *Crown, Cork & Seal*, and *Calderon* are inapposite. Because Taylor remained a member of a certified class while *Morgan* was on appeal, he was entitled to assume that the class representatives continued to represent him and protect his interests in appealing the order dismissing the class claims on the merits. This is consistent with the general rule that all members of a certified class enjoy the same rights as individually named plaintiffs in the suit.").

143. *Id.* at 517–21.

144. *Id.* at 519. The court also cited *Calderon* for the same proposition. *See id.* ("*Calderon* therefore establishes that the denial of certification ends the tolling period without regard to any appeal from that decision.").

> district court's denial of certification, *the putative class members had no reason to assume that their rights were being protected*. Stated differently, they were notified that they were no longer parties to the suit and they *should have realized that they were obliged to file individual suits or intervene in the class action*.[145]

The court came to the opposite conclusion for tolling after an initial grant of summary judgment in a class action, holding that

> [class members facing adverse summary judgment are] entitled to assume that the class representatives continued to represent [them] and protect [their] interests in appealing the order dismissing the class claims on the merits. This is consistent with the general rule that all members of a certified class enjoy the same rights as individually named plaintiffs in the suit.[146]

Two district courts have echoed the conclusion that putative class members are not entitled to rely on the named plaintiffs following class certification denial.[147]

The Fifth Circuit's reasoning was predicated on the class action's special, representative nature.[148] A district court's denial of class certification is especially significant because the putative plaintiffs "were notified that they were no longer parties to the suit."[149] The court placed the onus to act on the putative plaintiff because she "should have realized that [she was] obliged to file [an] individual suit[] or intervene in the class action;" it was no longer reasonable for a putative plaintiff to rely on the named plaintiff in the action.[150] The Fifth Circuit did not address Rule 23(f) specifically[151] and did not consider a putative plaintiff's reliance on an appeal well founded in general.[152] Moreover, the determinative

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145. *Id.* at 520 (emphasis added).

146. *Id.* at 521.

147. *See* Bobbitt v. Milberg, LLP, No. CV-09-629-TUC-FRZ, 2010 WL 5345867, at *4–5 (D. Ariz. Nov. 4, 2010); *In re* Katrina Canal Breaches Consol. Litig., 601 F. Supp. 2d 809, 827 (E.D. La. 2009).

148. *See Taylor*, 554 F.3d at 520.

149. *See id.*

150. *See id.* (citing Edwards v. Boeing Vertol Co., 717 F.2d 761, 766 (3d Cir. 1983) (suggesting that it is reasonable for a putative plaintiff to rely on the named plaintiff after an adverse ruling on the merits but not after an adverse class certification decision)).

151. As did the Eleventh Circuit in *Armstrong*. *See infra* Part II.A.2.

152. *See Taylor*, 554 F.3d at 520 ("*Calderon* therefore establishes that the denial of certification ends the tolling period without regard to any appeal from that decision.").

factor for disallowing tolling after certification denial is the district court's "declaration" that the named plaintiff only represents herself.[153]

2. Armstrong v. Martin Marietta Corp.*—The Pre-Rule 23(f) "Pragmatic" Justification*

Armstrong arose from a class action filed pursuant to the Age Discrimination in Employment Act[154] by former Martin Marietta employees.[155] As in *Crown*,[156] the plaintiffs attained the right to sue upon the receipt of notice from the EEOC; the relevant statute of limitations began to run against the plaintiffs upon receipt of the notice of their right to sue.[157] On June 4, 1993, nearly every *Armstrong* plaintiff opted in to an already-filed class action against Martin Marietta[158] called *Carmichael v. Martin Marietta Corporation.*[159] On April 7, 1994, the Middle District of Florida held that the *Armstrong* plaintiffs "were not similarly situated to the other *Carmichael* plaintiffs" and excluded them from the class.[160] On October 11, 1994, "more than ninety days after the *Carmichael* court's partial denial of class certification," the plaintiffs in *Armstrong* filed their own class action against their former employer.[161] In its successful motion for summary judgment, Martin Marietta claimed that the plaintiffs' claims were time-barred because more than 90 days had elapsed since the plaintiffs were excluded from the *Carmichael* class.[162]

In the last major appellate opinion on the issue prior to the promulgation of Rule 23(f), the Eleventh Circuit affirmed.[163] After assessing the cases of *American Pipe* and *Crown*, as well as the Supreme Court's decision in *United Airlines, Inc. v. McDonald*,[164]

153. *See id.*
154. 29 U.S.C. § 621–634 (2006 & Supp. V 2011).
155. Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1378 (11th Cir. 1998) (en banc).
156. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 347 (1983).
157. *Armstrong*, 138 F.3d at 1378–79.
158. The plaintiffs had to "opt in" because of the complications arising from requiring an EEOC right-to-sue confirmation. *See id.* at 1392.
159. *Id.* at 1379.
160. *Id.* (internal quotation marks omitted).
161. *Id.*
162. *Id.* at 1379–80.
163. *Id.* at 1394.
164. 432 U.S. 385 (1977). This case dealt with a putative plaintiff who had intervened following class certification denial and a settlement between the named plaintiff and United Airlines for the sole purpose of challenging the class certification decision. *Id.* at 392. The court held that the intervention was proper

and expressing doubt that the Supreme Court intended tolling to continue beyond a district court's denial of class certification,[165] the court rested its conclusion largely on "practical considerations."[166]

The court first discussed the great difficulty of attaining interlocutory review of class certification decisions.[167] Noting that interlocutory appeals of class certification decisions are "relatively uncommon and are very rarely successful," the court held that a putative plaintiff's "reliance on the possibility of reversal [of an adverse class certification decision] upon an interlocutory appeal is unreasonable."[168] Disputing an argument made by a dissenting judge, the court explained that extending class action tolling through the appeals process "would often toll the statute of limitations through a final judgment [and complex, multi-issue appeals], a process that can take years[,] on the off chance that a few filings will be saved by the slim prospect of a successful appeal."[169] The *Armstrong* court also held that a tolling extension through the appeals process is incompatible with the litigation strategies used in modern class actions.[170] For example, the court found the extension of tolling beyond the denial of class certification irreconcilable with the oft-used plaintiff strategy of settling claims quickly after an adverse ruling on class certification.[171] Next, the court noted the difficulty of determining when tolling would cease:

> When, [after class certification is denied], does the statute of limitations resume running? When the stipulation of dismissal or the final judgment is entered? After appeal by the named plaintiffs (who now have little incentive to pursue

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because the motion was made within the "time limitation for lodging an appeal" following a final judgment. *Id.* at 392–95. Further, the defendants were on notice for the appeal because the named plaintiffs had requested interlocutory relief before settling. *Id.* at 393–94.

165. *Armstrong*, 138 F.3d at 1380–84.

166. *See id.* at 1385–91.

167. *Id. See also supra* Part I.B.1–2.

168. *Armstrong*, 138 F.3d at 1389 (footnote omitted).

169. *Id.* at 1389–90 (footnote omitted). In a different portion of the opinion, the court stated that such multiyear tolling during the appeals process "contravene[s] the policies underlying statutes of limitations" because "[s]tatutes of limitations are intended to prevent the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 1388 (quoting Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944)) (internal quotation marks omitted).

170. *See id.* at 1390.

171. *See id.* There is wisdom in this position because it follows that a putative plaintiff cannot reasonably rely on a former named plaintiff that has dismissed his or her claims against the defendant.

> years of appeals)? And what if disappointed putative class members seek to intervene, as in *United Airlines*, for the purpose of appeal? Should they be given the benefit of years of continued tolling, despite the fact that their chances for success on appeal are terribly slim? This is not idle nit-picking.[172]

The court reasoned that ending tolling when the circuit court denied certification struck a reasonable balance between the rights of plaintiffs and defendants:

> The earlier the event that triggers the resumption of the limitations period—say, the joint stipulation of dismissal—the greater the potential for prejudicial surprise of excluded putative class members. The later that event—say, the final failure of an appeal by intervening putative class members—the greater the potential that cases will grow stale.[173]

Finally, the Eleventh Circuit rejected the notion that putative plaintiffs were bereft of protection following an adverse class certification ruling:

> The appellants argue that the rule we adopt will force disappointed putative class members to choose between 1) filing an individual lawsuit within the statute of limitations period or 2) exercising their right to appeal the denial of class certification. This does not have to be the case. A putative class member who wishes to preserve both rights should file her individual suit and immediately seek a stay of the individual suit pending the outcome of an appeal from the denial of class certification. *If, in the judgment of the district (or state) court to whom the application for a stay has been made*, the plaintiff's hopes for reversal of the initial denial of class certification are strong, and if the delay caused by the stay will not be too great, *the court may, in its discretion, grant the stay; if the court believes that the chances of reversal are slim or the delay caused by waiting for the appellate process to conclude will be too long (as will usually be the case), the stay will properly be denied*, and the plaintiff will properly have to proceed individually. This is a just, efficient result.[174]

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172. *Id.*
173. *Id.* (footnote omitted).
174. *Id.* at 1391 (emphasis added) (footnote omitted).

At the time the case was decided, Rule 23(f) had been proposed but not adopted.[175] The court noted that the rule had the potential to alter substantively its pragmatic calculus. Specifically, the court posited:

> *If* the rule passes, and *if* it significantly increases the frequency of interlocutory appeals of class certification orders—a development which would depend in large part upon how this court chooses to exercise the discretion granted to it by the proposed rule—then we may revisit the decision taken today, and might for instance allow continued tolling of statutes of limitations during the pendency of an appeal under the new rule.[176]

The majority expressly refused to "speculate . . . how we might exercise our discretion under the proposed rule and to decide the instant case in reliance upon an as-yet un-enacted rule."[177] The court also suggested that a stay of proceedings did not have the effect of restarting tolling, irrespective of Rule 23(f)'s enactment.[178] Other courts have come to the opposite conclusion on a stay's tolling effect.[179] Whether stays have the effect of recommencing tolling remains an open question.[180]

B. Dissenting Voices

The *Armstrong* court conceded that Rule 23(f) had the potential to affect, if not reverse, the rule that tolling ceases upon class certification denial.[181] Despite the rule's successful promulgation, however, circuit courts of appeals have not wavered from the pre-

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175. *See id.* at 1389 n.35.
176. *Id.* (emphasis added).
177. *Id.*
178. *Id.* ("In the absence of guidance, we do not hold that a stay of a district court's order denying certification would toll the limitations period, either under the proposed rule or under the law controlling our decision today.").
179. *See* Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc., No. 98 CV 1492, 2000 WL 1424931, at *2 (E.D.N.Y. Sept. 26, 2000) ("A stay in the matter of *National Asbestos Workers Medical Fund v. Philip Morris, Inc.* tolling the statute of limitations period pending the outcome of an interlocutory appeal is granted."); Monahan v. City of Wilmington, No. Civ.A. 00-505 JJF, 2004 WL 758342, at *2 (D. Del. Jan. 30, 2004) ("Accordingly, the Court concludes that its stay of the proceedings pending appeal of the denial of class certification continued the tolling of the statute of limitations for the proposed plaintiffs' claims.").
180. Stays in this context are discussed *infra* Part II.B.
181. *Armstrong*, 138 F.3d at 1389 n.35.

Rule 23(f) *Armstrong* rule.[182] Two district courts have, however, questioned the reasoning of cases like *Taylor* and *Armstrong*.

1. National Asbestos Workers Medical Fund v. Philip Morris, Inc.

On September 26, 2000, the Eastern District of New York issued an order that directly discussed the Eleventh Circuit's *Armstrong* opinion and, more generally, the wisdom of ceasing tolling upon a district court's denial of class certification.[183] The September 26 order came on the heels of a class certification denial.[184] The named plaintiff appealed the decision under Rule 23(f).[185] The order was granted due to concerns "about the effect of [then two-year old Rule 23(f) on] the running of the statute of limitations pending [an interlocutory] appeal."[186]

The court issued a stay of proceedings to toll the relevant statute of limitations, holding that "a limited stay is justified" as a means of ensuring "that members of the class and defendants as well as the courts are not unnecessarily burdened by individual suits to protect statute of limitations tolling rights prior to the appellate decision."[187] In granting the stay, the court recognized that "[p]rior to the December 1998 enactment of Rule 23(f), courts followed a reasonableness standard in determining when the statute of limitations would start to run in a class action," and "[t]olling ended when it was no longer reasonable for the putative class members to rely" on the named plaintiffs.[188] Nonetheless, the reasonability of a putative plaintiff's reliance on the named plaintiff was affected by Rule 23(f)'s promulgation, which "signaled a new regime allowing putative class members to more easily obtain interlocutory appeals on the issue of class certification."[189] Thus, the court reasoned that "[t]he policies undergirding the adoption of Rule 23(f) suggest . . .

182. *See, e.g.*, Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 521 (5th Cir. 2008). One post-Rule 23(f) case acknowledged that *Armstrong* may be obsolete; however, the court declined to discuss Rule 23(f)'s effects on tolling because the rule is not allowed in actions in the Court of International Trade. Stone Container Corp. v. United States, 229 F.3d 1345, 1355 (Fed. Cir. 2000).

183. *Nat'l Asbestos Workers*, 2000 WL 1424931, at *1.

184. *Id.*

185. *See id.* at *2.

186. *See id.* at *1.

187. *Id.* (citations omitted). The court qualified its "justification" for the stay by recognizing the lack of post-Rule 23(f) appellate jurisprudence. *See id.* ("[A] limited stay is justified—at least pending clarification of Rule 23(f) practice.").

188. *Id.* (citing Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1390 (11th Cir. 1998) (en banc)).

189. *See id.*

that the statute of limitations should be tolled where a party files an interlocutory appeal *and* the district court grants a stay."[190]

The court justified its limited tolling extension through a stay on two grounds.[191] First, the court noted that a Rule 23(f) appeal could result in the "prompt revival of the class action."[192] Because of the potential for a rapid reversal of a district court's certification decision, a toll-inducing stay should be rendered by a district court when a Rule 23(f) appeal is made to encourage putative plaintiffs to continue to rely on the named plaintiff's action.[193] Second, the court held that equity supports a stay because the harm a defendant would suffer waiting through an "expedited appeals process" is far less than the harm a putative plaintiff would face if her claim became time-barred in the period between a denial of class certification and a Rule 23(f) ruling.[194] It is worth noting that this district court never directly questioned the viability of *Armstrong* post-Rule 23(f). Instead, the court held that tolling should continue only where a Rule 23(f) appeal is perfected *and* a stay is entered by the district court.[195]

2. Monahan v. City of Wilmington

On May 19, 2000, numerous members of the Wilmington Police Department filed a class action against their employer alleging violations of federal law.[196] On July 31, 2001, the District of Delaware denied class certification.[197] The plaintiffs successfully obtained a stay from the district court and appealed under Rule 23(f).[198] The Third Circuit Court of Appeals affirmed the District of Delaware's decision on March 28, 2003.[199] After the plaintiffs

190. *Id.* (emphasis added).

191. The tolling extension is limited insofar as tolling continues *if* a Rule 23(f) appeal is actually filed *and if* the district court grants a stay. *See id.*

192. *Id.* at *2.

193. *See id.* The court's argument is in line with the *American Pipe* Court's goal of fostering reliance by unnamed class members on the named plaintiff. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550–53 (1974).

194. *See Nat'l Asbestos Workers*, 2000 WL 1424931, at *2. A ruling on a Rule 23(f) appeal could come in the form of a decision on the merits of the district court's certification decision or in the form of a denial to entertain the appeal whatsoever. *See generally* FED. R. CIV. P. 23(f).

195. *See Nat'l Asbestos Workers*, 2000 WL 1424931, at *1.

196. Monahan v. City of Wilmington, No. Civ.A. 00-505 JJF, 2004 WL 758342, at *1 (D. Del. Jan. 30, 2004). Plaintiffs stated claims under, *inter alia*, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and 42 U.S.C. § 1985.

197. *Monahan*, 2004 WL 758342, at *1.

198. *Id.* at *1–2.

199. *Id.* at *1.

brought a second action against the city, the Wilmington Police Department claimed that the district court's 2001 denial of class certification ceased the tolling of the relevant statutes of limitations, resulting in time-barred claims.[200]

The District of Delaware, like the Eastern District of New York, held that tolling continues after class certification denial as long as a plaintiff takes a Rule 23(f) appeal and obtains a stay.[201] The court recognized the pre-Rule 23(f) jurisprudence[202] but decided to follow the *National Asbestos Workers* decision.[203] Noting the permissive nature of Rule 23(f) and its purpose of promoting rapid review of district court certification decisions, the court reasoned that the danger of a lengthy, prejudicial tolling period was greatly reduced.[204] Thus, the court reasoned that "Rule 23(f) provides a reasonable basis for putative class plaintiffs to continue to rely upon a filed class action to redress their individual claims pending an appeal of a denial of class certification."[205]

III. CHALLENGING THE CURRENT JURISPRUDENCE

A. The Appellate Courts' Denial of Tolling After Certification Denial

1. The "Representative" Justification of Taylor v. United Parcel Service, Inc.

In holding that a denial of class certification is "tantamount to a declaration that only the named plaintiffs were parties to the suit" and that putative plaintiffs are not entitled to rely on named plaintiffs after a district court's class certification decision,[206] the Fifth Circuit's opinion in *Taylor v. United Parcel Service, Inc.* perpetuates the possibility of a *Calderon*-like ejection from an action, ignores *American Pipe*'s policy goals, and creates an unnecessary Catch-22 for plaintiffs after a class certification denial.

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200. *Id.* at *2.
201. *Id.*
202. The court specifically recognized *Nelson v. Allegheny County*, 60 F.3d 1010 (3d Cir. 1995), and *Armstrong v. Martin Marietta Corporation*, 138 F.3d 1374, 1390 (11th Cir. 1998) (en banc). *Monahan*, 2004 WL 758342, at *2.
203. *Monahan*, 2004 WL 758342, at *2
204. *See id.*
205. *Id.* (citation omitted) (citing Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc., No. 98 CV 1492, 2000 WL 1424931, at *2 (E.D.N.Y. Sept. 26, 2000)).
206. *See* Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 520–21 (5th Cir. 2008).

Moreover, the *Taylor* court completely fails to address Rule 23(f)'s stated purposes. Indeed, the result of the Fifth Circuit's approach undermines the fundamental goals of Rule 23 while prejudicing putative plaintiffs.

Perhaps the central purpose of *American Pipe* tolling is the encouragement of reliance on the named plaintiffs in an action; without putative plaintiff reliance through tolling, Rule 23 would be deprived of "the efficiency and economy of litigation" that its drafters and Congress intended.[207] Yet the Fifth Circuit's *Taylor* holding that a putative plaintiff may not rely on a named plaintiff after an adverse certification ruling encourages litigants to act inefficiently. Under the *Taylor* approach, a putative plaintiff risks being time barred if she simply decides to rely on the named plaintiff to appeal an adverse certification ruling—the ultimate inability of the plaintiffs to pursue their claims in *Calderon v. Presidio Valley Farmers Association* confirms the danger of such reliance. To mitigate the risk of losing litigious rights while monitoring the appeals process, a putative plaintiff has a strong incentive to file an independent action as soon as class certification is denied.[208] Such independent actions could be abandoned en masse when a subsequent decision overturns the initial class certification decision.[209] Indeed, this type of protective filing represents the *exact* behavior that class action tolling was meant to end.[210] As such, the Fifth Circuit's policy of ending tolling upon class certification denial creates an inexorable problem—either plaintiffs must endure the running of statutes of limitations and perhaps lose their claims, or they must flood the courts with "placeholder" actions in contravention of the policies underlying *American Pipe* and Rule 23.[211] Neither result is acceptable.

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207. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).

208. Indeed, this appears to be the Eleventh Circuit's *recommendation*. *See* Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1391 (11th Cir. 1998) (en banc). In a large action, this strategy could result in *thousands* of individual actions. The *Taylor* court made no effort to reconcile this strategy's consequences with the Supreme Court's desire to reduce redundant actions. *See Am. Pipe*, 414 U.S. at 550. The Eleventh Circuit, discussing the issue in a pre-Rule 23(f) context, held that the rule *would* result in some "unnecessarily costly litigation," but tolling through final judgment was an unacceptable means of avoiding such a result. *See Armstrong*, 138 F.3d at 1388. After Rule 23(f), the need for tolling through final judgment no longer exists. *See infra* Part III.A.2.

209. Including, but not limited to, a Rule 23(f) appeal.

210. *See Am. Pipe*, 414 U.S. at 550 (noting that the class action is "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions"); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350–51 (1983).

211. *See Am. Pipe*, 414 U.S. at 550.

More fundamentally, the Fifth Circuit's position that the denial of class certification serves as a declaration[212] that only the named plaintiff remains a party to the action fails to recognize the Advisory Committee's goals in promulgating Rule 23(f). In part, Rule 23(f) was created to achieve early resolution of class certification questions in a convenient manner for litigants and the courts.[213] Despite the Advisory Committee's intention, the Fifth Circuit treats an *initial* denial of class certification as a declaration that putative plaintiffs are "obliged to file individual suits or intervene in the class action."[214] By adopting this position, the Fifth Circuit does more than incentivize redundant actions; the court's policy encourages putative plaintiffs to retain counsel, surely at some cost, simply to file placeholder actions. The class as a whole may expend large sums of money on what may be wholly unnecessary, independent actions simply to avoid a looming time-bar (to say nothing of the additional administrative costs that the district courts will endure in processing the additional claims). This result is prejudicial and unjustifiable.

2. The "Pragmatic" Justification of Armstrong v. Martin Marietta Corporation *Post-Rule 23(f).*

When the Eleventh Circuit decided *Armstrong v. Martin Marietta Corporation* in 1998, the court recognized that Rule 23(f)'s enactment could allow for continued tolling through an interlocutory appeal of class certification.[215] Considering the *Armstrong* court's recognition of the potentially transformative nature of Rule 23(f), the silence among circuit courts on the issue post-*Armstrong* has

212. *See* Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 520 (5th Cir. 2008). Because this case is a bellwether, this Comment has largely avoided discussions of external, Fifth-Circuit-specific decisions that relate in less-than-direct ways to the instant question. However, it is worth noting that the Fifth Circuit has repeatedly held that actual judicial notice of class certification denial is inappropriate. *See* Pearson v. Ecological Sci. Corp., 522 F.2d 171, 176–77 (5th Cir. 1975); Jones v. Caddo Parish Sch. Bd., 735 F.2d 923, 937 n.16 (5th Cir. 1984). The Fifth Circuit's holdings in *Taylor*, *Pearson*, and *Jones* place putative plaintiffs in an especially difficult position because certification denials serve as a "declaration" that they are no longer parties, yet this declaration *must not* be rendered through actual notice. There is serious incongruity in the notion that putative plaintiffs are somehow put on notice that they are not parties to an action when class certification is denied, yet no *actual* notice is to be given. The *Taylor* court made no effort to reconcile these contradictory rulings.

213. *See* FED. R. CIV. P. 23 advisory committee's note to 1998 amends., subdiv. (f).

214. *See Taylor*, 554 F.3d at 520.

215. *See* Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1389 n.35 (11th Cir. 1998) (en banc).

been alarming. The Eleventh Circuit has yet to revisit the question of tolling through a Rule 23(f) appeal, and neither of the two circuit courts that have examined the question since 1998 has considered the issue.[216] Now, 13 years after Rule 23(f)'s enactment, a serious reevaluation of *Armstrong*'s logic is needed.

In a pre-Rule 23(f) context, *Armstrong*'s pragmatic reasoning is sound. Because of the de facto absence of interlocutory review[217] and the practice of appealing class certification decisions after final judgment,[218] extending tolling though a final ruling on class certification would often grant a putative plaintiff *years* of tolling. Thus, putative plaintiffs could prejudice defendants by reviving "claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[219] Though the *Armstrong* court's suggested mechanism for protecting putative plaintiffs could result in some "unnecessarily costly litigation,"[220] the balance struck between protecting plaintiffs and defendants was reasonable.

Armstrong's pragmatic reasoning, though persuasive at the time, is now antiquated. Rule 23(f) was promulgated because of the legal and practical difficulties inherent in waiting until final judgment to appeal class certification decisions.[221] Rule 23(f) was intended to afford litigants "timely and meaningful review of class certification orders."[222] To protect parties from untimely interlocutory attempts to revisit class certification, Rule 23(f) allows only 14 days to appeal, and circuit courts are expected to "act quickly in making the preliminary determination whether to permit appeal."[223] It is safe to say, as a predicate matter, that Rule 23(f) significantly changed the postcertification denial appellate landscape.

The *Armstrong* court was not, however, willing to accept that Rule 23(f) would change its analysis on its face; the court's

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216. *See* Stone Container Corp. v. United States, 229 F.3d 1345, 1355 (Fed. Cir. 2000); *Taylor*, 554 F.3d at 519–21. The *Stone Container* court was, to its credit, presiding over an action in the Court of International Trade, where Rule 23(f) is inapplicable. *Stone Container*, 229 F.3d at 1355.

217. *See supra* Part I.B.2; *Armstrong*, 138 F.3d at 1385–88.

218. *Armstrong*, 138 F.3d at 1388 (citing Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 170 (1996)).

219. *Id.* (quoting Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944)) (internal quotation marks omitted).

220. *Id.*

221. NIEMEYER, *supra* note 69, at 16 (comments of Irving R. Segal); *id.* at 17 (comments of Patrick E. Maloney).

222. *Id.* at 17 (internal quotation marks omitted) (comments of Patrick E. Maloney).

223. FED. R. CIV. P. 23 advisory committee's note to 1998 amends., subdiv. (f).

concession was predicated on an actual increase in the number of interlocutory appeals that the circuit courts entertained.[224] Based on available data, this condition has been met. As the Erhard study on Rule 23(f) has shown, circuit courts are entertaining interlocutory appeals of class certification decisions at a far greater rate.[225] The number of Rule 23(f) appeals that the circuit courts heard in the *three and a half years* after the rule's promulgation is roughly double the combined amount of interlocutory appeals and mandamus petitions entertained in the *decade* prior to Rule 23(f)'s enactment.[226] The data also suggest that the frequency of published Rule 23(f) opinions increased every year for the first three years after Rule 23(f)'s promulgation.[227] The dramatic increase in interlocutory appeals of class certification decisions, coupled with Rule 23(f)'s goals of encouraging and expediting interlocutory appeals, suggests that the need to continue tolling until final judgment to finalize class certification questions, as posited in *Armstrong*, is simply an artifact of the pre-1998 appellate landscape.[228]

3. Appellate Asymmetry

Parts III.A.1 and III.A.2 of this Comment discuss particular issues present in the "representative" and "pragmatic" theories of postcertification denial tolling, respectively. However, as recent jurisprudence shows, an overarching flaw remains in the cases advancing the general rule that tolling ceases upon the denial of class certification. One of the most important recent decisions in Rule 23 jurisprudence came in *Wal-Mart Stores, Inc. v. Dukes*.[229] *Wal-Mart* involved a class action brought under Title VII of the Civil Rights Act of 1964 that purported to represent 1.5 million plaintiffs.[230] The Northern District of California certified the class,[231] and a divided en banc panel of the Ninth Circuit affirmed

224. Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1389 n.35 (11th Cir. 1998) (en banc).

225. *See* Erhard, *supra* note 75, at 184–87 (Table 1); *see also supra* Part I.B.4.

226. *See* Erhard, *supra* note 75, at 184–87 (Table 1); NIEMEYER, *supra* note 69, at 20 (comments of John L. McGoldrick); *see also supra* Part I.B.4.

227. *See* Erhard, *supra* note 75, at 171–72.

228. The *Armstrong* court's discussion of the uncertainty that can result from extending tolling beyond the denial of class certification is discussed *infra* Part II.A.2.

229. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

230. *Id.* at 2547.

231. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 188 (N.D. Cal 2004), *aff'd*, 603 F.3d 571 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011).

after Wal-Mart took a Rule 23(f) appeal.[232] The Supreme Court reversed, denying class certification.[233]

The substance of the Supreme Court's decision is beyond the scope of this Comment. Nevertheless, *Wal-Mart* demonstrates the arbitrary consequence that flows from the *Taylor–Armstrong* cessation of tolling after certification denial. Under *Taylor*, for example, reliance on the named plaintiff is proper unless the district court denies certification.[234] Applying the *Taylor* rule in *Wal-Mart*, tolling continued for all putative plaintiffs through (1) the successful motion for class certification filed with the district court, (2) a Rule 23(f) appeal and hearing at the Ninth Circuit, (3) an en banc rehearing, (4) a certiorari petition, and (5) ultimate defeat at the United States Supreme Court, simply because of the *initial ruling* on class certification. Yet if the certification decisions in *Wal-Mart* were reversed—i.e., class certification was repeatedly denied until the Supreme Court granted certification—then putative plaintiffs would have been forced to file individual actions at untold cost, seek a discretionary stay,[235] or both simply to avoid the running of the relevant statute of limitations.[236] The current model forces putative plaintiffs to expend additional resources simply to monitor the Rule 23(f) proceedings[237] and injects uncertainty into the proceedings due to the district court's initial denial of certification.[238]

B. The Inadequacy of District Court Efforts to Protect Plaintiffs

Recognizing the potential prejudice to plaintiffs that can result when tolling does not continue through a Rule 23(f) appeal, two district courts have suggested extending tolling through the pendency of Rule 23(f) appeals when (1) a Rule 23(f) appeal is sought and (2) a stay is attained.[239] These courts have extended

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232. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011).

233. *Wal-Mart*, 131 S. Ct. at 2556–57.

234. *See* Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 520 (5th Cir. 2008).

235. Or, perhaps, stays. Under the *National Asbestos Workers* model, discussed in Part II.B, there is no clear jurisprudential answer on whether a plaintiff would need to acquire *another* stay after defeat at the appellate level simply to extend the toll.

236. *See infra* Part III.B.

237. Via the need to file independent actions to ensure continued tolling after certification denial.

238. *See infra* Part III.B.

239. *See* Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc., No. 98 CV 1492, 2000 WL 1424931, at *1 (E.D.N.Y. Sept. 26, 2000); Monahan v. City of Wilmington, No. Civ.A. 00-505 JJF, 2004 WL 758342, at *2 (D. Del. Jan. 30, 2004). Of course, not all courts agree that a stay *can* toll statutes of limitations. *See*

greater protections to putative plaintiffs than those afforded by, for example, the Fifth Circuit. However, the *National Asbestos Workers–Monahan* approach for tolling after certification denial contains numerous flaws. Specifically, the solution depends on a "merciful" district court, undermines the class action's efficiency, and fails to address the complexities of class action strategy.

One of the primary defects of the *National Asbestos Workers–Monahan* approach is the reintroduction of a de facto *dual certification* requirement. One of the central problems present in the pre-Rule 23(f) appellate landscape, specifically under 28 U.S.C. § 1292(b), was the need for the very district court that denied class certification to certify the same question for appeal.[240] As supporters of the promulgation of Rule 23(f) noted,[241] the need for the district court to recognize a "close call" to attain an appeal requires a plaintiff to acquire the "blessing of the very district court that issued the questionable ruling in the first place."[242] Yet, the same dynamic is present under the *National Asbestos Workers–Monahan* formulation because plaintiffs must acquire the toll-extending stay from the very district court that has denied class certification.[243] In districts that are typically hostile to class certification, putative plaintiffs near the end of the relevant statute of limitations may seriously risk a time-bar even if a Rule 23(f) appeal is successfully undertaken because the likelihood of a stay could be very low. Further, considering a district court judge's usual aversion to reversal,[244] she may have an incentive to deny the stay, to allow a limitations period to run, and to moot the question of class certification entirely.

Indeed, the need to successfully acquire a stay creates the same problem observed in *Taylor*: the inherent uncertainty involved in a Rule 23(f) appeal and a stay, both of which are out of a putative plaintiff's control, undermines Rule 23's goals of efficiency and

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Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1389 n.35 (11th Cir. 1998) (en banc). There is very little jurisprudence in this area, though district courts following *National Asbestos Workers* and *Monahan* could create to greater clarity on the issue. No circuit court reviewed the *National Asbestos Workers* or *Monahan* decisions on tolling.

240. Solimine & Hines, *supra* note 75, at 1551.

241. Which dispensed with the need for district court certification for appeal. FED. R. CIV. P. 23 advisory committee's note to 1998 amends., subdiv. (f).

242. NIEMEYER, *supra* note 69, at 19 (internal quotation marks omitted) (comments of Miles N. Ruthberg).

243. *Nat'l Asbestos Workers*, 2000 WL 1424931, at *1.

244. *See, e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 78 n.275 (1994).

economy in litigation.[245] A putative plaintiff near the end of the limitations period must consider (1) if and when the named plaintiff will attempt a Rule 23(f) appeal and (2) whether the district court will issue a stay.[246] The only way to guarantee continued tolling is to file an independent action in contravention of the policy goals underlying Rule 23.[247] To the extent that this uncertainty "breed[s the] needless duplication of motions," this effect is unacceptable.[248]

Finally, the *National Asbestos Workers–Monahan* approach fails to respond to the complexities of class-action litigation strategies. For example, what happens under this model when the named plaintiff chooses to settle upon an adverse class certification ruling? This common practice[249] would wholly deprive putative plaintiffs of a continued tolling benefit because the *National Asbestos Workers–Monahan* theory mandates an attempted appeal.[250] Despite the recognition of a new, liberalized nature of appeals under Rule 23(f),[251] tolling would often begin upon a district court's denial of class certification.

IV. A PROPOSAL FOR CHANGE

A. A New Way Forward

The current jurisprudence has simultaneously failed to protect defendants and putative plaintiffs equally while advancing the policies of efficiency and economy of litigation set forth in *American Pipe*. A new approach should be implemented. Tolling beyond class certification denial should be tied to Rule 23(f)'s basic structure, allowing for a clean, consistent analysis and an evenhanded result.

After a denial of class certification, tolling should extend through the full 14-day period allowed by Rule 23(f) for an interlocutory appeal. The toll should continue irrespective of the named plaintiff's behavior.[252] If the circuit court refuses to entertain

245. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350–51 (1983).

246. To wit, plaintiffs within the Eleventh Circuit need to worry about whether a stay will toll the statute of limitations at all. *See* Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1389 n.35 (11th Cir. 1998) (en banc).

247. *See Am. Pipe*, 414 U.S. at 553; *Crown*, 462 U.S. at 350–51.

248. *See Am. Pipe*, 414 U.S. at 553–54.

249. *See Armstrong*, 138 F.3d at 1390.

250. Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc., No. 98 CV 1492, 2000 WL 1424931, at *1 (E.D.N.Y. Sept. 26, 2000).

251. *See id.*; Monahan v. City of Wilmington, No. Civ.A. 00-505 JJF, 2004 WL 758342, at *2 (D. Del. Jan. 30, 2004).

252. That is, settling or electing to proceed individually.

an interlocutory appeal or the named plaintiff settles[253] or elects to proceed individually without appealing the certification, tolling should, nevertheless, cease after the 14th day. If the circuit court elects to entertain the appeal, tolling should continue until final resolution,[254] including writs of certiorari and decisions of the United States Supreme Court. This approach advances the policies of Rule 23 identified in *American Pipe* and eliminates many shortcomings produced under the current jurisprudence without prejudicing defendants.

This proposal is based in part on Louisiana's Code of Civil Procedure article 596. The Louisiana approach to tolling beyond class certification denial is unique; it diverges from any tolling model used by the federal courts or by other state courts. Indeed, states have largely adopted the rule that a trial court's denial of class certification ends a class action's tolling.[255] In a noteworthy

253. In discussing situations wherein a named plaintiff settles yet the action continues in some manner, it is important to address potential "case and controversy" complications. Article III limits the jurisdiction of federal courts to "Cases" and "Controversies." *See* U.S. CONST. art. III, § 2, cl. 1; Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992). Arguably, if every named plaintiff in an action settles after class certification is denied, no case or controversy would remain. As a result, constitutional issues could arise in granting continued tolling to putative plaintiffs—such plaintiffs would retain a tolling benefit from an action without a present, named plaintiff. This argument lacks merit. The Supreme Court's decision in *United Airlines, Inc. v. McDonald*, discussed *supra* note 164, held that a putative class member could intervene in an action for the purpose of appealing a denial of class certification, even *after* all named plaintiffs have settled. *See* United Airlines, Inc. v. McDonald, 432 U.S. 385, 392 (1977). This case confirms that settlement by all named plaintiffs does not end an action for case and controversy purposes because the intervention by a putative plaintiff after settlement by the named plaintiff depends, implicitly, on the fact that there was still a case *in which to intervene*.

254. *Final* in this context could include nonappealed decisions by a court of appeals, nonappealed decisions by a court of appeals sitting en banc, a denied writ of certiorari, and a decision made by the United States Supreme Court.

255. *See, e.g.*, White v. Sims, 470 So. 2d 1191, 1193 (Ala. 1985) (Alabama); Rosenthal v. Dean Witter Reynolds, Inc., 883 P.2d 522, 532 (Colo. App. 1994) (Colorado); Albano v. Shea Homes Ltd. P'ship, 254 P.3d 360, 362 (Ariz. 2011) (en banc) (The Arizona Supreme Court "assume[d] without deciding" that tolling ceases upon certification denial by a trial court.); Staub v. Eastman Kodak Co., 762 A.2d 955, 967 (N.J. Super. Ct. App. 1999) (New Jersey); Walker v. Polyscience Corp., No. C14-89-00678-CV, 1990 WL 79838, at *2 (Tex. App. June 14, 1990) (Texas); Hill v. City of Warren, 740 N.W.2d 706, 718 (Mich. Ct. App. 2007) (Michigan); Columbia Gorge Audubon Society v. Klickitat Cnty., 989 P.2d 1260, 1264 (Wash. Ct. App. 1999) (Washington); Sproul v. Oakland Raiders, Nos. A104542, A106658, 2005 WL 1941388, at *21 (Cal. Ct. App. Aug. 15, 2005) (California).

The Supreme Court of Alaska recognized some of the efficiency concerns discussed in this Comment and held that tolling could continue (1) where class

departure from the federal and typical state approaches, article 596(A)(3) extends tolling for a full 30 days after a "mailing or other delivery or publication of a notice to the class" of, *inter alia*, dismissal by the named plaintiff, a denial of a motion for certification, or an appeal that vacates a previous certification.[256] The 30-day period begins after the time allowed for an appeal has passed or when an appeal becomes "final and definitive."[257] Thus, it is impossible for a claim to prescribe in the period between a district court's denial of class certification and an appellate court's reversal on the question. This Comment's proposal is *significantly* narrower than the Louisiana approach. First, the automatic tolling period is much shorter.[258] Second, this Comment's proposal does not require notice to putative plaintiffs of an adverse class certification ruling.[259] Third, automatic tolling is not "stacked" on top of the period for appeal; rather, automatic tolling ends with the passage of Rule 23(f)'s window for appeal.[260]

B. A Proposal in Jurisprudential Action

The automatic extension of tolling through Rule 23(f)'s 14-day period rectifies the inefficiencies that the *Taylor* and *National*

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certification had been denied and (2) the denying court expressly has authorized further discovery and another opportunity to seek class certification. Fred Meyer of Alaska, Inc. v. Adams, 963 P.2d 1025, 1028–29 (Alaska 1998). Notably, the *Fred Meyer* decision did not involve an interlocutory appeal, and it is unclear whether the Alaska Supreme Court would apply the reasoning in a case where class certification had been definitively denied.

The Ohio General Assembly has adopted a savings statute that extends an action's statute of limitations for one year when a plaintiff's action fails without consideration on the merits. *See* OHIO REV. CODE ANN. § 2305.19(A) (Westlaw 2013). This savings period applies in the case of class certification denial. *See* Vaccariello v. Smith & Nephew Richards, Inc., 763 N.E.2d 160, 171 (Ohio 2002). Ohio's omnibus savings statute, which applies well beyond the class action context, can hardly be viewed as a response to the specific inefficiency issues identified in this context.

256. LA. CODE CIV. PROC. art. 596(A)(3) (2012).

257. *Id.* art. 596(B).

258. Fourteen days compared to 30 days.

259. By not requiring that notice be given to putative class members upon the denial of class certification, this Comment's proposal avoids a distinct controversy in federal jurisprudence. Federal courts across the country have come to very different conclusions on the propriety of court-rendered notice to putative plaintiffs where class certification has been denied. *Compare* Rineheart v. Ciba-Geigy Corp., 190 F.R.D. 197, 201-02 (M.D. La. 1999), *with* Pearson v. Ecological Sci. Corp., 522 F.2d 171, 176-77 (5th Cir.), *and* Tosti v. City of L.A., 754 F.2d 1485, 1488 (9th Cir. 1985).

260. *See* LA. CODE CIV. PROC. art. 596(B); *id.* art. 596 cmt. d.

Asbestos Workers–Monahan models cause and ends the risk of a plaintiff losing a claim in the period between an adverse class certification decision and a final disposition of the certification question. Under *Taylor*, a putative plaintiff *must* file a placeholder action to avoid the running of the statute of limitations; no other mechanism can suspend the limitations period. Despite the limited extension of tolling granted in *National Asbestos Workers* and *Monahan*, the inherent uncertainty involved in the dual requirement of an attempted appeal and a discretionary stay also encourages placeholder actions. However, if tolling were to continue through the period in which a Rule 23(f) appeal can be made, there is no need for a placeholder action whatsoever, either as a last resort for tolling (*Taylor*) or as a hedge against the named plaintiff and a district court's behavior (*National Asbestos Workers–Monahan*).[261] The 14-day extension of tolling also furthers Rule 23(f)'s goal of achieving a cost-effective resolution of the class certification decision because litigants need not file and courts need not process redundant actions filed for the sole purpose of continuing the toll to observe an appeal.[262]

Because the tolling would cease at the end of the 14-day period where there is neither an appeal by the named plaintiff nor an intervention and appeal by a putative plaintiff, this proposal eliminates the fear of plaintiffs sleeping on claims as expressed in *Armstrong*.[263] The extension of tolling for a minimum of 14 days does not prejudice defendants. A properly pled class action puts defendants on notice of the "number and generic identities of the potential plaintiffs."[264] Because Rule 23(f) provides a definite period for appeal, defendants are aware of the window for challenging a denial of class certification and cannot claim surprise from a timely request for interlocutory relief. Continuing tolling for a minimum of

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261. The Louisiana Legislature established an automatic suspension of prescription for precisely this reason. *See id.* art. 596 cmt. c ("The provision created confusion because Article 592(A)(3)(h) authorizes an appeal from a judgment denying certification and Article 596 does not provide that its thirty-day suspensive periods are subject to further suspension by the articles on appeal. Given this uncertainty, a cautious plaintiff's attorney receiving notice of an adverse ruling on class certification might *needlessly file an individual suit* for his client during the period for taking or completing an appeal *to avoid a possible prescription exception.*" (emphasis added)).

262. *See* FED. R. CIV. P. 23 advisory committee's note to 1998 amends., subdiv. (f).

263. Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1390 (11th Cir. 1998) (en banc).

264. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554–55 (1974).

14 days does not create a cognizable risk of evidence becoming stale.[265]

This proposal also lends itself to practical application. The *Armstrong* court expressed concern over the extension of tolling in light of real-world litigation strategies.[266] However, an automatic stay separates tolling questions from, for example, complications involving the named plaintiff settling after certification denial.[267] A district court's denial of certification begins a set period for parties to consider and execute litigation strategies, and tolling can only continue after a timely Rule 23(f) appeal.

When a Rule 23(f) appeal is entertained, tolling through the ultimate resolution of the question ends the arbitrary asymmetry that can result from a district court's initial decision on class certification.[268] This rule places all plaintiffs and defendants on the same footing and ends the need for putative plaintiffs to take additional steps to participate in the appellate process when a district court denies class certification. Moreover, this approach avoids novel questions of tolling after a circuit court's decision.[269] A defendant is no more prejudiced by continued tolling under this proposal than was the defendant in *Wal-Mart v. Dukes*; if a defendant is not prejudiced when she appeals certification through the Supreme Court, she is equally not prejudiced when a plaintiff does the same.[270]

C. The Proposal's Relationship with Scholarly Literature

1. Scholarly Literature on the Instant Issue

Very little has been written on the relationship between class action tolling and Rule 23(f). This area of the law is still developing; as recently as 2010, one scholar, Joseph M. McLaughlin, recognized that "[t]he intersection of Rule 23(f) and statute of limitations tolling for class members is emerging as an area of controversy."[271] McLaughlin is one of the few scholars to directly discuss this issue. After correctly noting that Rule 23(f) is silent on the issue of tolling

265. As a comparison, article 596 of the Louisiana Code of Civil Procedure extends tolling for a full *30 days* after a notice of a final adverse ruling on class certification. *See* LA. CODE CIV. PROC. art. 596(A)(3).
266. *Armstrong*, 138 F.3d at 1390.
267. *Id.*
268. *See supra* Part III.A.3.
269. *See supra* note 235.
270. *See supra* Part III.A.3.
271. *See* MCLAUGHLIN, *supra* note 126, § 3:15, at 470.

and recognizing many of the cases discussed above, McLaughlin argued that

> [t]he better view is that adopted by courts that have concluded that the highly discretionary nature of Rule 23(f) appeals, and the uncertainty over whether a putative representative will even seek an interlocutory appeal under Rule 23(f), support adherence to the certainty yielded by the rule ending the toll when the district court denies class certification.[272]

McLaughlin's reliance on the "uncertainty" inherent in Rule 23(f) is misplaced. As discussed in Parts III.A.1 and III.B, uncertainty as to the continuation of tolling after a certification denial *creates* an incentive to file redundant placeholder actions, an anathema to the policies of efficiency and economy underlying *American Pipe* and Rule 23.[273] Uncertainty as to a putative plaintiff's tolling status is a *justification* for an automatic extension of tolling, not an argument against it.[274]

Indeed, McLaughlin's presentation of jurisprudential arguments supporting the cessation of tolling when the district court denies certification contains now obsolete justifications. For instance, McLaughlin quotes *Armstrong* for the proposition that "[t]he extended tolling period may be expected to prejudice many defendants because [putative] plaintiffs will be able to choose when to file their suits . . . leav[ing] decisions regarding the tolling period in the hands, not of the court, but of plaintiffs and putative class members."[275]

The *Armstrong* court rendered this opinion at a time when attaining interlocutory review of class certification decisions was not practical, leaving the question until an appeal from final judgment. Yet, neither the proposal outlined in this Comment nor in the cases extending tolling during the pendency of a Rule 23(f) appeal allow a putative plaintiff to ambush a defendant with an untimely claim after final judgment. Even the *National Asbestos Workers* decision, cited by McLaughlin as a case opposed to *Armstrong*'s central

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272. *Id.* at 471.

273. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350–51 (1983).

274. *See* LA. CODE CIV. PROC. art. 596 cmt. c.

275. *See* MCLAUGHLIN, *supra* note 126, § 3:15, at 469 (third and fourth alterations in original) (quoting Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1389 (11th Cir. 1998) (en banc)) (internal quotation marks omitted). To be clear, McLaughlin identified this passage as a *jurisprudential* argument made in favor of ending tolling upon the denial of certification.

reasoning,[276] required a timely Rule 23(f) appeal for continued tolling.[277] Fear of tolling beyond a distant final judgment fails to recognize the possibilities created by Rule 23(f).

2. A Comparative Approach

This Comment's proposed rule is bolstered by the five-part analysis used by the Tenth Circuit in *State Farm Mutual Auto Insurance Company v. Boellstorff*[278] and developed by Caleb Brown on another tolling question.[279] Brown wrote his article after the Tenth Circuit weighed in on a putative plaintiff's ability to claim tolling after she de facto opts out of a class by filing an independent action *before* a ruling on class certification.[280] Many courts have held that a plaintiff retroactively waives a class action's tolling benefit when she initiates an independent action after the filing of a class action but before an initial class certification decision.[281] Other decisions, including the *Boellstorff* opinion that prompted Brown's piece, have held that no waiver of tolling occurs when a plaintiff files an independent action after a class action is filed but before a certification decision.[282] In arguing that the latter position is correct, Brown examined the *Boellstorff* court's reasoning under five analytical prongs: (1) the language of the Supreme Court's decisions of *American Pipe* and *Crown*, (2) the degree to which the Tenth Circuit's rule conforms to the representative nature of the class action, (3) the need to ensure notice to defendants, (4) the need to balance the protection of plaintiffs with protection for defendants, and (5) the effect of the new rule on judicial efficiency.[283] Though this Comment deals with a fundamentally different tolling issue,

276. *See id.* § 3:15, at 470–71.

277. *See* Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc., No. 98 CV 1492, 2000 WL 1424931, at *1 (E.D.N.Y. Sept. 26, 2000); Monahan v. City of Wilmington, No. Civ.A. 00-505 JJF, 2004 WL 758342, at *2 (D. Del. Jan. 30, 2004).

278. 540 F.3d 1223, 1229 (10th Cir. 2008).

279. *See generally* Brown, *supra* note 51.

280. *Id.*

281. *See, e.g.*, Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 568–69 (6th Cir. 2005); Glater v. Eli Lilly & Co., 712 F.2d 735, 739 (1st Cir. 1983); *In re* Enron Co. Sec., Derivative & ERISA Litig., 465 F. Supp. 2d 687, 715 (S.D. Tex. 2006); Rahr v. Grant Thornton LLP, 142 F. Supp. 2d 793, 799 (N.D. Tex. 2000).

282. *See, e.g.*, *Boellstorff*, 540 F.3d at 1229; *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1008 (9th Cir. 2007); *In re* WorldCom Sec. Litig., 496 F.3d 245, 254 (2d Cir. 2007); *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182, 2008 WL 2692674, at *3 (E.D. La. July 2, 2008).

283. *See* Brown, *supra* note 51, at 810–15.

Brown's five-part test for assessing a proposed extension of tolling supports its proposed rule.

a. The Language of the Supreme Court

As Brown noted, a close reading of *American Pipe* and *Crown* can lead to multiple interpretations.[284] The most relevant language comes from *Crown* and states that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied."[285] Read narrowly, this statement can be understood as mandating the cessation of tolling upon a district court's denial of certification insofar as class certification has been denied.[286] The same statement can be broadly read as necessitating a final determination of the question, thereby including appeals. While this language can plausibly support or reject this Comment's proposed rule, it is at least worth noting that the *Crown* opinion does not foreclose on it.

b. The Representative Nature of the Class Action

Brown next examined the *Boellstorff* court's assertion that its rule comports with the class action's representative nature.[287] By granting tolling through the entire 14-day period for a Rule 23(f) appeal, this Comment's proposed rule places the putative plaintiff in a very similar position to the named plaintiff after the denial of certification. Like the named plaintiff, the putative plaintiff may appeal the decision after intervention or approach the defendant for settlement purposes with a more accurate understanding of the class certification question. Most importantly, and again like the named plaintiff, the putative plaintiff need not immediately act to restart the toll. This Comment's proposed rule advances the representative nature of the class action.

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284. *See id.* at 810.

285. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354 (1983).

286. *Id.* The *Armstrong* court argued for such a narrow reading, stating that it was unreasonable to read the word *denied* to mean "denied, appealed, denied again, appealed (perhaps) again, and denied again." Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1382 (11th Cir. 1998) (en banc). The *Armstrong* court then pointed to the *Crown* Court's statement that disappointed putative plaintiffs may "intervene as plaintiffs in the pending action" after class certification has been denied by the *district* court to suggest that the *Crown* court never intended to continue the toll beyond the initial denial of class certification. *Id.* (quoting *Crown*, 462 U.S. at 354) (internal quotation marks omitted). *See also* Wells v. FedEx Ground Package Sys., Inc., No. 4:10CV2080 JCH, 2011 WL 1769665, at *4 (E.D. Mo. May 9, 2011).

287. *See* Brown, *supra* note 51, at 811.

c. Notice to Defendants

Brown also looked at the degree to which the new rule maintained proper notice for defendants.[288] As discussed above and noted in *American Pipe*, a properly pled class action complaint will alert defendants to the "number and generic identities of the potential plaintiffs."[289] Should a defendant prevail at the trial level on the question of class certification, she is on notice that a Rule 23(f) appeal may be made within 14 days. Aware of the number and generic identities of putative plaintiffs and of the window for intervention and appeal, imagining that a putative plaintiff could surprise a defendant is difficult, even if the defendant has settled with the named plaintiff.

d. Balancing "Nontolling" for Plaintiffs and the Risk of Stale Evidence

Brown recognized that the harm that an extension of tolling seeks to correct must not come at the expense of forcing defendants to face stale claims.[290] As *Calderon* shows, the current approach allows the loss of valid claims simply because a class was erroneously and initially denied class certification.[291] To help avert this injustice, as well as promote efficient, cost-effective litigation pursuant to the goals of Rule 23 and the rationale of Rule 23(f), this Comment's proposed rule extends tolling for a minimum of 14 days, creating little, if any, additional risk of stale evidence.[292] While tolling under the proposed rule could continue through a final decision, a defendant is at no more of a disadvantage than she would be if she were the party appealing under Rule 23(f).[293]

e. The Extension of Tolling and Its Effect on Judicial Efficiency

Finally, Brown recognized that any new tolling rule must not inject inefficiency into Rule 23 proceedings.[294] One of the primary reasons for this Comment's proposal is to remove the current

288. *See id.* at 812.
289. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554–55 (1974).
290. *See* Brown, *supra* note 51, at 812; *see also Armstrong*, 138 F.3d at 1388 (citing Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944)).
291. *See supra* Part III.A.1.
292. *See supra* Part IV.B.
293. *See supra* Parts III.A.3, IV.B.
294. *See* Brown, *supra* note 51, at 814.

incentive to file redundant actions after class certification denial.[295] Indeed, every approach presented in this Comment outside the new proposal interjects inefficiency into Rule 23(f) proceedings. This Comment's proposed rule falls well within this Brown criterion.

CONCLUSION

The class action is an important tool in modern American litigation. At times, the class action is the only realistic method by which a group can vindicate a wrong, to say nothing of the class action's value as a tool of judicial efficiency. The rule proposed in this Comment seeks to remedy a defect that has lingered far too long in jurisprudence. That parties can be ejected from an action based merely on a district court's mistaken class certification decision is evidence enough of the need for change. That the rule undermines the policies underlying Rule 23 when many of its initial justifications withered over a decade ago demonstrates the serious need for a new approach. Whether through the application of this Comment's proposed rule or through other means, a correction to the problems inherent in ending tolling after a denial of class certification is long overdue.

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295. *See supra* Parts III.A.1–2, IV.B.

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