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### **Appeal of Class Action Certification Orders Under Fed. R. Civ. P. 23(f)**

Rule 23(f) of the Federal Rules provides for the interlocutory appeal of orders granting or denying class action certification, stating: “A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”

On May 8, 2006, the United States Court of Appeals for the Second Circuit had its first opportunity to consider whether Rule 23(f)’s ten day filing provision is a jurisdictional requirement or a claim-processing rule. *See Coco v. Incorporated Village of Belle Terre*, No 05-9996-mv (2d Cir. May 8, 2006).

In *Coco*, the Court of Appeals denied a petition seeking leave to appeal an order certifying a class because petitioners failed to file their application within the ten day time limitation of Rule 23(f) and respondent objected to the untimely filing. The Court of Appeals noted that the Fifth, Seventh and Eleventh Circuits have all treated the ten day filing requirement as jurisdictional, *see MacNamara v. Felderhof*, 410 F.3d 277, 279-81 (5th Cir. 2005); *Shin v. Cobb County Board of Education*, 248 F.3d 1061 (11th Cir. 2001); *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999), but that the correctness of those holdings had been called into question by the Supreme Court’s recent decision in *Eberhart v. United States*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 403 (2005) (holding that the time limitation for filing a motion for a new trial under Fed. R. Crim. P. 33, previously held to be jurisdictional, is actually a non-jurisdictional “claim processing” rule).

The Second Circuit had no occasion to decide the issue because whether the ten day filing requirement of Rule 23(f) is a jurisdictional or claim-processing rule, “it is quite clearly an ‘inflexible’ one” (slip op. at 3) and respondent objected to the untimely filing.

The distinction between the ten day filing requirement being jurisdictional or claim-processing rule is, however, important. Claim-processing rules “assure relief to a party properly raising them, but do not compel the same result if the party forfeits them.” *Eberhart*, 126 S. Ct. at 407. Because respondent in *Coco* objected to the untimely filing, the Court of Appeals was compelled to deny the petition.

Litigants risk forfeiting the protection afforded by the ten day filing requirement of Rule 23(f) if an untimely Rule 23(f) application proceeds without objection.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Charles A. Gilman at (212) 701-3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Jonathan I. Mark at (212) 701-3100 or [jmark@cahill.com](mailto:jmark@cahill.com) or John Schuster at (212) 701-3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com).