



# The Race to File Rule 23(f) Petitions: Not All Changes to the Class Certification Order Will Extend Your Deadline

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## Key Takeaway

In its recent decision in *Wolff v. Aetna Life Insurance Co., et al.*, the U.S. Court of Appeals for the Third Circuit adopted a materiality standard to determine whether modifications to a class certification order trigger a renewed fourteen-day period within which a party may seek interlocutory review.

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In August 2023, the Third Circuit held that modifications to a class certification order will trigger a new Rule 23(f) petition deadline only when such modifications amount to material alterations to the original certification order.<sup>[1]</sup> The court analyzed whether Aetna's 23(f) petition was timely when it was filed within fourteen days of the revised class certification order, but 195 days after the original order.<sup>[2]</sup>

Plaintiff Wolff filed a class action against Aetna, alleging that Aetna's clawbacks from insureds' personal injury settlements violate the terms of their disability plans.<sup>[3]</sup> Almost three months after the district court certified the class, Aetna filed a motion for reconsideration based on intervening Third Circuit authority.<sup>[4]</sup> The district court disagreed that the intervening authority required the court to reconsider its class certification order, but the district court agreed to modify the class definition to comply with the parties' agreed revisions to the class definition in the class notice.<sup>[5]</sup> Aetna filed its 23(f) petition fourteen days later.<sup>[6]</sup>

The Third Circuit clarified the standard for determining when to begin the 23(f) countdown where a class certification order is revised.<sup>[7]</sup> The court cited its earlier ruling in *Gutierrez, et al. v. Johnson & Johnson* that a revised class certification order "will not revive" 23(f)'s time limit unless the revision "change[s] the status quo."<sup>[8]</sup> Building on *Gutierrez* and decisions in other circuits, the court explained that only a "material change" to "the original order granting or denying class certification" will trigger a new 23(f) filing period.<sup>[9]</sup> The court emphasized the importance of a materiality standard to prevent frequent appellate intervention over subtle changes to the class certification order.

<sup>[10]</sup>

The Third Circuit provided a few examples of material changes, such as “when a district court changes the class definition to account for a new theory of liability or decertifies a broad segment of the class.”<sup>[11]</sup> On the other hand, if a district court “merely reaffirms” the substance of its prior ruling, “or makes changes for clarity,” these are not material.<sup>[12]</sup> The “practical effect on the class” is the lodestar, and “substance is more important than form.”<sup>[13]</sup>

The Third Circuit concluded that the district court’s changes to the class definition were “more akin to minor clarifications,” rather than material alterations.<sup>[14]</sup> The court also expressed concern about what it called “incomprehensible tactical maneuvers,” noting that it was Aetna “that suggested the definitional change that it now claims is the basis for a new 23(f) time limit.”<sup>[15]</sup> Because the district court’s revisions to the original class certification order were immaterial, “the proper reference point for assessing the timeliness of Aetna’s 23(f) petition” is the date of the original class certification order.<sup>[16]</sup> The Third Circuit held that Aetna’s 23(f) petition was untimely and denied it, because Aetna did not file it within fourteen days of the original class certification order.<sup>[17]</sup>

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<sup>[11]</sup> *Wolff v. Aetna Life Ins. Co.*, 77 F.4th 164, 167 (3d Cir. 2023).

<sup>[12]</sup> *Id.* at 171.

<sup>[13]</sup> *Id.* at 168–69.

<sup>[14]</sup> *Id.* at 170.

<sup>[15]</sup> *Id.* at 170–71.

<sup>[16]</sup> *Id.* at 171.

<sup>[17]</sup> It is important to note that the Third Circuit explained that the filing of the motion for reconsideration did not toll the Rule 23(f) filing period because the motion for reconsideration was not filed within fourteen days of the original class certification order. *Id.* at 172 n.7.

<sup>[18]</sup> *Id.* at 172 (citing 523 F.3d 193 (3d Cir. 2008)).

<sup>[19]</sup> *Id.* (referencing *Driver v. Applellinois, LLC*, 739 F.3d 1073, 1076 (7th Cir. 2014), in which the Seventh Circuit expressly endorsed a materiality standard and highlighted that other circuit courts have implied one).

<sup>[110]</sup> *Id.* at 173 (citing *Driver*, 739 F.3d at 1076, where the court recognized the importance of a materiality standard when analyzing modifications to class certification orders).

<sup>[111]</sup> *Id.* at 172.

<sup>[112]</sup> *Id.* (quoting *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005)).

<sup>[113]</sup> *Id.* (quoting *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 636 (9th Cir. 2020)).

<sup>[114]</sup> *Id.* at 173.

<sup>[115]</sup> *Id.* at 173 n.10.

<sup>[116]</sup> *Id.* at 174.

<sup>[117]</sup> *Id.*

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