RULE 23(f):
A NOTE ON LAW AND DISCRETION IN THE COURTS OF APPEALS

by

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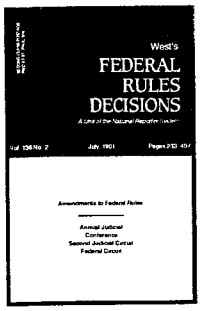

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COMPLIMENTS OF WEST

Rule 23(f): A Note on Law and Discretion in the Courts of Appeals

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and
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"The vast majority of our rulings on 23(f) motions are not published. It just happens quietly in the chambers of the judges and we normally don't take them, so you're going to have a distorted view of what's going on if you're looking only at the published opinions."

Judge Diane P. Wood[1]

I. Introduction

Class actions occupy a prominent, and controversial, place in our nation's legal landscape. The class action device is regularly applauded for its potential to compensate many victims who individually suffer harm on a relatively small scale at the hands of one defendant who would not otherwise be held to account for that multitude of small harms which may, because of their number, translate into large profits.[2] But class actions are just as frequently condemned as litigations in which the real plaintiffs are lawyers who seek to profit from bringing such suits, and who care little for those who actually suffered from injuries which are being "vindicated."[3] Whatever may be the motives of the lawyers involved, the very nature of the class action device makes it more efficient at punishment than compensation, in part because there is little to be compensated in any particular class member's case.

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** Associate, Jenner & Block LLP, Chicago, Illinois. The authors would like to thank Jeff Boerger, Shahid Haque, John Joyce, Daniel Shim, William Wallenstein, and Melissa Wills, whose research over several years contributed in various ways to this essay. Finally, the authors would like to thank Michael Brody, Emery Lee, Doug Rendleman, Jay Tidmarsh, and Tom Willging, who made useful comments on an earlier draft of this essay.

1. Diane P. Wood, FTC Workshop - Protecting Consumer Interests In Class Actions, September 13-14, 2004: Workshop Transcript: Panel 2: Tools for Ensuring that Settlements Are "Fair, Reasonable, and Adequate," 18 Geo. J. Legal Ethics 1197, 1213 (2005) ("FTC Workshop").

2. *See* Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. Cal. L. Rev. 842, 857-58, 860 (1974); 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, 1534 (2000).

3. *See* John H. Beisner, Matthew Shors, & Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1442 (2005); *see also* Jean W. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 Hastings L.J. 165, 190-96 (1990) (discussing the differences between class actions and traditional litigation, and noting that the class attorney has a greater financial stake in the outcome than does the class representative).

The views expressed are those of the authors and do not necessarily reflect the views of the publisher. January 2008.

Arguably, the most critical stage in a class action is the point at which the court decides whether to certify the class. In 1995, the lack of appellate recourse from orders granting class certification caused Judge Richard A. Posner of the Seventh Circuit to observe that even a "small probability of an immense judgment" would create "intense pressure to settle."[4] Judge Posner thus expressed a "legitimate" judicial concern regarding the possibility of "blackmail settlements," which would prevent judicial review of the class certification decision.[5]

Indeed, the law, since 1998, has specifically recognized the critical importance of that decision point; it was in that year that Rule 23(f) of the Federal Rules of Civil Procedure was adopted to authorize appeals of decisions granting or denying class certification. But Rule 23(f) is discretionary. Moreover, it is discretionary in a particularly aggressive way: The Rule does not articulate any standard to guide the courts, let alone cabin their discretion. And the Rule's Committee Note reinforces that sense of wide, uncanalized discretion by specifically stating the intention that the "court of appeals [be] given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for [a writ of] certiorari."[6]

As a result, many questions surrounding the application of Rule 23(f) remain undecided. What standards, if any, are the courts applying? How often do the courts of appeals exercise their discretion in favor of hearing these appeals? What traces do the courts of appeals leave with respect to their exercise of discretion, and what lessons are to be gleaned therefrom?

Some previous commentators have sought to answer those questions, but they have attempted to do so by looking only at the universe of reported decisions that are available in the books and on electronic databases. Judge Diane P. Wood of the Seventh Circuit, however, has suggested that most of that court's Rule 23(f) jurisprudence is not available in the books or in electronic databases, but "happens quietly in the chambers of the judges."[7] Judge Wood also notes that her court normally does not take these discretionary appeals, "so you're going to have a distorted view of what's going on if you're looking only at the published opinions."[8] Perhaps that is to be expected when courts are offered "unfettered discretion," and it may be that what Judge Wood observes about her own court is true of other courts as well.

In a sense, Judge Wood's observation provides a starting point for our inquiry. Our aim in this note is to look beyond the law that is available in the books and the electronic databases. Instead, we have looked at each circuit's docket sheets to see what evidence they yield as to how the courts of appeals dispose of Rule 23(f) petitions. When we do that, we see that earlier commentators have missed the vast majority of Rule 23(f) petitions.

4. *Matter of Rhone–Poulenc Rorer Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995).

5. *Id.*

6. F.R.C.P. 23(f), comm. note.

7. FTC Workshop at 1213.

8. *Id.*

We begin by discussing what Rule 23(f) is; we then briefly discuss the origins of Rule 23(f), describe current perceptions of Rule 23(f), and analyze the results of our circuit-by-circuit docket search for Rule 23(f) petitions. Finally, we raise the question whether a "certiorari model"—at least one understood as an "unfettered discretion" model—is wholly appropriate for the courts of appeals to use in considering whether to grant Rule 23(f) petitions. We conclude that the rule of law requires that matters of such importance be treated with more transparency and with greater assurances of consistency and conformity.

A. What is Rule 23(f)?

The purpose of class actions is to resolve the rights of many potential claimants by litigating the claims of a smaller number of "named plaintiffs" who have substantially the same claims or grievances. Those named plaintiffs, usually early on in the litigation, ask that the trial judge certify a class. In federal court, that means satisfying the requirements of Rule 23 of the Federal Rules of Civil Procedure. Even if the plaintiffs' motion is denied, however, the named plaintiffs are still free to litigate the matter as the sole plaintiff stakeholders—which means that the court's order denying certification does not qualify for immediate appellate review pursuant to the "final judgment rule."[9] Other putative class members are free to bring their own actions.

There are few exceptions to the final judgment rule, so interlocutory appeals are relatively rare.[10] More so than with most interlocutory orders, however, class certification decisions may make or break a case: Where a class is not certified, the plaintiffs (and their lawyer) may not have the will—or the resources—to continue with a litigation that might in the end yield only a small recovery and little basis for an award of substantial attorneys' fees. Where a class is certified, the potential value of the case may be so drastically increased that the defendants may become eager to settle, regardless of the merits of the claims.[11] In 1998, Rule 23 was amended to provide for interlocutory appeal, and that new provision, Rule 23(f), permits the losing party to petition the court of appeals for leave to appeal from a class certification order.

Rule 23's Committee Note explains that Rule 23(f) is modeled after § 1292(b), which permits the courts of appeals to consider appeals of interlocutory orders certified by a district judge, where the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and...an immediate appeal from the order may materially advance the ultimate termination of the litigation."[12]

As the Note explains, Rule 23(f) relies "in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals."[13] But the Note explains that Rule 23(f) differs from

9. *See Flanagan v. United States*, 465 U.S. 259, 263 (1984); 28 U.S.C. § 1291.

10. *See* Solimine & Hines at 1547–52.

11. *See Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1298–99.

12. 28 U.S.C. § 1292(b).

13. F.R.C.P. 23(f), comm. note.

§ 1292(b) in "two significant ways."[14] First, the Rule does not require the district court to certify the appropriateness of the order for interlocutory appeal.[15] Leave to appeal may be sought in the court of appeals without permission of the trial court. Second, the Rule does not include the "potentially limiting requirements of § 1292(b)"—that there be a controlling question of law and that an immediate appeal would advance the ultimate termination of the litigation.[16]

The Committee Note provides limited guidance for the courts of appeals. The Note explicitly states that the courts of appeals have "unfettered discretion" in determining whether to take a Rule 23(f) appeal, and the Note likens that discretion to the discretion exercised by the Supreme Court in considering petitions for certiorari. Further, the Note suggests two considerations: (1) whether the certification decision turns on a novel or unsettled issue of law, and (2) the "death knell" factor, that is, whether the certification decision is likely to end the litigation. But the Note also states that "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive."

B. Why study how the Courts of Appeals have treated Rule 23(f) petitions?

Rule 23(f) is an important innovation in appellate practice because it makes it easier to appeal a class certification decision. But why study the Rule and its application by the courts of appeals? First, class actions are generally of interest because they resolve questions about the rights of many—and sometimes staggering numbers of—individuals. Interlocutory appeals may be particularly crucial to these cases given the stakes—that is, if the court determines that the certification of a class would be appropriate, it creates substantial leverage for the "winning" side, creating a "death knell" or "reverse death knell" situation. An order denying class certification may sound the "death knell" for a case if the potential individual recoveries are too small to bother prosecuting as individual claims. A reverse death knell situation is created where, by virtue of a class certification order, a defendant is faced with so much potential liability that a settlement appears the only prudent option, regardless of the merits of the case. As the Committee Note makes clear, where a class certification decision is particularly likely to end the case before further inquiry into the merits, that fact alone is a good reason for an appeal to be allowed.

Second, an important issue is raised as to the advisability of the Committee's basic approach to appealability, that is, should these decisions really be treated by the courts of appeals as being analogous to petitions for certiorari, so that the courts will be given free rein over the decision to accept or reject a Rule 23(f) appeal? Will the results be consistent across the circuits? Is that important? As discussed below, other commentators have shown an intense interest in getting to the bottom of how the courts are handling Rule 23(f) petitions. But between the courts' "unfettered discretion" and their opaque decision-making processes, what happens

14. *Id.*

15. *Id.*

16. *Id.*

behind the courts' closed doors has been something of a mystery—even if commentators generally have not recognized it.

II. Legislative History: What Did Congress and the Committee Intend?

Various groups contemplated the possibility of immediate review of class certification orders in the 1980s,[17] and Congress finally acted in 1992, when it amended the statute setting forth appellate jurisdiction, 28 U.S.C. § 1292, by adding that the "Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)."[18] The Supreme Court's Civil Rules Advisory Committee began seriously considering adding a provision for interlocutory appellate review of class certification orders to Rule 23 in 1995.

The Advisory Committee's meeting minutes are terse, but illuminating. The minutes show that the Committee's early concerns and intentions included making appeals more readily available, the possibility of more frequent and early review of any substantial changes for Rule 23, and the somewhat paradoxical idea that appeals (though more frequent) would be allowed "rarely."[19] The Committee also expressed concern that defendants in particular would seek to appeal adverse decisions.[20]

Later Committee concerns were consistent with those early reservations. The Committee observed that mandamus review already provided a safety valve, that every certification order would generate an attempted appeal (thus burdening the courts), and that an appeal provision would impose delays and additional costs on all parties.[21] But the Committee also considered the counter-arguments to those points: that mandamus should remain "special," that the burden for permissive appeals under § 1292(b) was not unduly heavy, that motions for leave to appeal would be handled like any other motions, and that early review of class certification decisions was itself desirable.[22] The Committee apparently decided that there were too many issues to be addressed cogently in the Rule itself so "[t]hey must be left for development as the Courts of Appeals find best."[23] Rule 23(f) resulted from these deliberations, and it became effective on December 1, 1998.

III. Rule 23(f) Commentary: What Have Others Observed?

Early commentary shows widespread concern regarding Rule 23(f)'s lack of guidance. Michael E. Solimine and Christine Oliver Hines's article—published approximately a year and a half after the Rule went into effect—

17. Solimine & Hines at 1564.

18. 28 U.S.C.A. § 1292(e) (2007).

19. Minutes of the Advisory Committee on the Civil Rules, Nov. 9–10, 1995.

20. *Id.*

21. Minutes of the Advisory Committee on the Civil Rules, Apr. 18–19, 1996.

22. *Id.*

23. Minutes of the Advisory Committee on the Civil Rules, May 1–2, 1997.

was somewhat circumspect, but suggested that Rule 23(f) would benefit from more explicit criteria.[24] In 2002, Aimee Mackay surveyed the courts' varied approaches to 23(f) and observed that "[a]n ad hoc, non-uniform approach has governed appeals under Rule 23(f)."[25] Mackay wrote, "[w]hile some circuits have attempted to build on the approach of other circuits, other courts have chosen to strike out new paths. The result is that the legal landscape is left uncertain for litigants and appellate panels."[26] Christopher Kitchen wrote in 2004 that "the restrictive approach that some [Courts] have taken is not in accordance with the intent of the drafters of the rule. In addition, these guidelines vary significantly from one circuit to the next, and do not sufficiently take into account the tremendous costs associated with class action certification."[27]

Other commentators paint a sunnier picture. Based on their survey, Brian Anderson and Patrick McLain concluded in 2004 that the courts of appeals had "granted most requests for immediate review."[28] Anderson and McLain observed that the courts had "published 44 opinions stemming from 53 requests to entertain interlocutory appeals" from December 1, 1998 through September 2003 and that defendants had "clearly" "fared better under Rule 23(f)."[29]

IV. What The Courts of Appeals Are Really Doing.

In the Seventh Circuit, at least, Rule 23(f) petitions are treated as motions and heard by a motions panel, as the Advisory Committee intended. The panel members vote informally on whether the court will hear the appeal—as Judge Wood suggested, it "just happens quietly in the chambers."[30] Critically, Judge Wood pointed out that the Court does not typically accept Rule 23(f) appeals, and that the published opinions provide only a "distorted view of what's going on" as a result.[31]

With guidance from Judge Wood's comments, we endeavored to build on the useful work of earlier commentators. Certainly, the numbers behind Rule 23(f) petitions are hard to come by. The published opinions deciding the Rule 23(f) appeals mostly skip over *why* the court accepted the appeal in the first place. If the courts are not publishing their decisions on denials of Rule 23(f) petitions, then how do we really know what is happening "quietly in the chambers"? The Administrative Office of U.S. Courts does not keep

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24. Solimine & Hines at 1576.

25. Comment, Aimee Mackay, *Appealability Of Class Certification Orders Under Federal Rule Of Civil Procedure 23(f): Toward A Principled Approach*, 96 Nw. U. L. Rev. 755, 793 (2002).

26. *Id.*

27. Note, 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, 262 (2004).

28. Brian Anderson & Patrick McLain, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals*, Washington Legal Foundation Legal Backgrounder, V. 15, No. 5, p. 1 (March 19, 2004).

29. *Id.* at 3.

30. FTC Workshop at 1212–13.

31. *Id.*

statistics that permit easy accounting of Rule 23(f) petitions, so we must turn to our primary source: docket sheets.

A. Inside Chambers: What the Docket Sheets Show.

In fact, the docket sheets—as viewed on Westlaw—are illuminating, as they reveal a staggering volume of filed Rule 23(f) petitions. Before diving into the analysis, though, we offer a brief account of our methodology and several caveats.

1. Methodology.

We searched each circuit's docket using Westlaw for Rule 23(f) petitions by searching for the term "23(f)" or "p.23(f)" or "p23(f)". We also searched each circuit's database of written decisions on Westlaw using the following terms: "fed. r. civ. p. 23(f)" or "r 23(f)" or "rule 23(f)" or "frcp 23(f)" or "federal rule! of civil procedure 23(f)". Our searches are current through September 30, 2006. From each docket sheet, we gleaned the following information (if available): case name, case number, which party filed the petition, whether the petition was granted or denied, and any reasons for why the petition was granted or denied. We also gathered information regarding the outcome of the appeal for petitions that were granted. Then we compiled the information and created Table 1 at the end of this article. This approach is admittedly non-scientific, and the research is only as good as the data available from the circuits and from Westlaw allow. For example, our analysis assumes that we have gathered the entire universe of filed Rule 23(f) petitions, which is in turn based on the assumptions that (1) the circuits provide Westlaw with all docket sheets, and Westlaw makes them all available,[32] and (2) all filed Rule 23(f) petitions are reflected in a docket sheet. Although we cannot be certain, it seems likely this methodology captured most Rule 23(f) petitions. Table 1 explains further the subjectivity inherent in the data, but the numbers are still powerful indicators of what is—and what is not—being reported "publicly."

2. Results.

In terms of raw numbers, we found that between December 1, 1998 and October 30, 2006, there were 558 Rule 23(f) petitions filed with the courts of appeals. After a petition is filed, one of several things might happen: (1) the petition is withdrawn (presumably due to settlement or some other change in litigation strategy); (2) the petition is dismissed for want of jurisdiction, *e.g.*, the petition was not filed within 10 days of the entry of the certification decision, as required by Rule 23(f); or (3) the court will grant or deny the petition. Of the 558 filed petitions, 476 fell into that third category, in which the court of appeals actually decided whether to accept or deny the petition, presumably based on its substance. Approximately 25 petitions were withdrawn before any decision was made as to whether the appeal should be allowed to proceed, apparently due to settlement or change

32. Unfortunately, we know that Westlaw does not make all docket sheets available for review. For example, the Second Circuit has at least two docket sheets related to *Miles v. Merrill Lynch*: one, 05-3349, is the docket sheet for the appeal, and the other, 04-8026, is the docket sheet for the Rule 23(f) petition. The 04-8026 docket sheet is available on PACER, the "Federal Judiciary's centralized registration, billing, and technical support center for electronic access to U.S. District, Bankruptcy, and Appellate court records," but it does not appear on Westlaw.

in litigation strategy.[33] Even among granted petitions, approximately 14 certification requests were withdrawn before the court reached a decision on the merits of the certification decision. Both of those facts beg the question: might Rule 23(f) have the unintended consequence of encouraging settlement, thereby preventing the appellate review for which the Rule was designed? That question is the subject for another article.

Of the 476 "decided" petitions, 36% were granted. Contrary to the conclusions reached by Anderson and McLain, it does not appear that the courts are accepting most petitions. Moreover, across the circuits, only 10% of the "decisions" accepting or rejecting a Rule 23(f) petition are available by searching published or electronically available opinions.[34] The rest—90%—are reflected only in docket entries, and, even then, the court's reasoning may not be provided in the docket sheet.

Now for the details. At best, the circuits may be described as inconsistent—in terms of petition volume, as to whether the court of appeals adheres to an articulated standard for reviewing petitions, the frequency with which the circuits publish their opinions explaining why they accept or deny Rule 23(f) petitions, and, of course, the frequency with which Rule 23(f) petitions are granted.

Since 1998, the Tenth Circuit has received only 6 petitions. The Eleventh Circuit is at the upper end with 104. Those numbers are roughly consistent with the circuits' relative caseload volume. Between September 1998 and September 2006 (the intervals by which the Administrative Office of the U.S. Courts reports its annual statistics), the Tenth Circuit's total appeal volume—21,724—made it number 10 of the 12 circuits we looked at. The Eleventh Circuit ranked number 3 with 58,437 appeals during that period.[35] Notably, though, the Eleventh Circuit gets quite a few more petitions relative to its overall volume–comparing the Eleventh and Tenth Circuits' volume, the Eleventh gets roughly three times as many appeals as the Tenth, but the Eleventh Circuit gets *17* Rule 23(f) petitions for every one petition the Tenth Circuit gets.

Most circuits have articulated standards for rejecting or accepting Rule 23(f) petitions. Four circuits—the First, Second, Third, and Seventh—have

33. This number is estimated. For purposes of this analysis, we assumed that petitions or appeals withdrawn pursuant to Federal Rule of Appellate Procedure 42(b) were withdrawn due to settlement or a change in litigation strategy. The number may be exaggerated for that reason, but it may also be understated, because docket sheets provide varying degrees of information. *See* Table 2.

34. Some petitions that were denied or dismissed as untimely do have "published" decisions associated with them. For instance, the Second Circuit denied the petition in *Coco v. Inc. Village of Belle Terre*, 448 F.3d 490 (2d Cir. 2006), in a reported decision because the petition was not timely filed. *Coco* is not reflected in the Published number in Table 1 because the case was technically dismissed for non-substantive reasons. But in *Scott v. Dennis Reimer Co.*, 2000 WL 145397, 205 F.3d 1341 (6th Cir. 2000), the Sixth Circuit denied the Rule 23(f) petition both because it was untimely and because it did not merit interlocutory review. *Scott* was counted among "decided" petitions because the court did consider whether to accept the appeal and looked beyond the threshold issue of the timeliness of the petition.

35. In terms of the Tenth Circuit's volume of appeals per three-judge panel, however, the Tenth Circuit's average yearly number of appeals per panel from September 1998 through September 2006 places it at number 11 (ahead of the D.C. Circuit). The Eleventh Circuit's average yearly appeals per-panel rank number 1. We tried to correlate overall appeal volume in a circuit with its willingness to grant Rule 23(f) petitions, but no obvious trends appeared.

adopted (with some adaptation) the three factors listed in the Committee Notes.[36] Two circuits—the Fourth and Eleventh—have adopted a "sliding-scale" five-factor approach, including (1) the death knell or reverse death knell situation, (2) whether the district court certification contains a substantial weakness, (3) resolution of an unsettled legal question of general importance, (4) the nature and status of the litigation before the district court, and (5) the likelihood that future events will make appellate review more or less appropriate.[37] Other circuits have adopted hybrids of those approaches. The Ninth and District of Columbia Circuits each added one criterion–similar to the second factor in the Fourth and Eleventh Circuits' formulation–to the Committee's factors: "manifest error in the district court's certification decision."[38] The Sixth Circuit adds another factor to those employed by the Ninth Circuit: the posture of the case as it is pending before the district court.[39]

But three circuits—the Fifth, Eighth, and Tenth—have no stated rule. In fact, the Eighth Circuit explicitly refused to articulate a circuit rule in its one published case on the subject, *Liles v. Del Campo*.[40] There, the court stated that while other circuits had addressed the question when to accept an appeal under Rule 23(f), the "facts in this case do not favor an interlocutory appeal under any of these formulations, and we need not undertake here the task of refining a circuit standard for review of such petitions."[41]

The frequency with which the courts publish their decisions granting or denying Rule 23(f) petitions—whether in an "unreported" Westlaw decision or in a reported decision in the Federal Reporter Series—varies tremendously. The Tenth Circuit has not published a single decision. Our data show that the Fifth, Eighth, and Eleventh Circuits publish, respectively, 4%, 2%, and 4% of their decisions granting or denying Rule 23(f) petitions.[42] (In this regard, it is interesting to recall that the Eleventh Circuit received the most petitions of any circuit.) The District of Columbia Circuit publishes most of its decisions accepting or rejecting a Rule 23(f) petition—67% are published in some way. Overall, only about 10% of filed Rule 23(f) petitions

36. *In re Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294–95 (1st Cir. 1999) (adding the clarification that a fundamental, unsettled issue of law must also be important to the particular litigation, important in itself, and likely to escape effective review).

37. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 145–46 (4th Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274–76 (11th Cir. 2000).

38. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005); *In re: Lorazepam & Clorazepate Antitrust Litigation*, 289 F.3d 98, 105 (D.C. Cir. 2002).

39. *In re: Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002).

40. 350 F.3d 742, 746 n.5 (8th Cir. 2003).

41. *Id.*

42. Some opinions both decide the Rule 23(f) appeal and explain why the court accepted the appellant's Rule 23(f) petition. We have included those combined opinions in our count of "published" decisions accepting or denying a Rule 23(f) petitions. Other opinions deciding Rule 23(f) appeals are silent as to the court's reason for accepting the initial petition.

were met with an explanation for why the petition was accepted or rejected by the courts: of the 476 petitions that were not dismissed on procedural grounds or withdrawn, the courts of appeals explained in a written opinion why they decided to accept or reject the Rule 23(f) petition 47 times.

On to the heart of the matter: How many Rule 23(f) petitions are accepted? Again, our data suggest that the circuits' allowance rates vary considerably. The Tenth Circuit has not accepted any appeals, while the Fourth Circuit has accepted 100% (that is, 5) of the petitions that were not withdrawn or dismissed for technical procedural non-compliance, and the Third Circuit accepted 86% (12).

The circuits with the most petitions—the Eleventh (104 filed, 89 not withdrawn or procedurally dismissed), Ninth (80 filed, 65 not withdrawn or procedurally dismissed), Seventh (83 filed, 71 not withdrawn or procedurally dismissed), and Fifth Circuits (79 filed, 67 not withdrawn or procedurally dismissed)—allowed, respectively, 39%, 26%, 31%, and 54% of the petitions not otherwise withdrawn or procedurally dismissed.

Although this article is less concerned with whether plaintiffs or defendants fare better in Rule 23(f) petitions, even those data appear inconsistent: In most circuits, our data suggest that the defendants' petitions are granted more often. In the Ninth and D.C. Circuits, however, the trend is reversed: plaintiffs do better, with a 36% success rate in the Ninth Circuit and a 60% success rate in the D.C. Circuit. Defendants' petitions are accepted in only 20% of Ninth Circuit petitions, and no defendant's petition has been granted in the D.C. Circuit. In the Fourth Circuit, both plaintiffs and defendants have a 100% success rate.[43]

Finally, we note that it would be interesting to know whether the circuits vary as to the subject matter distributions of the class certification appeals filed in the several circuits, and whether differences in subject matter correlate to other factors. In other words, do some circuits tend to see more Rule 23(f) petitions in employment cases, while others see more in securities cases? If so, do those differences correlate with data relating to frequency with which Rule 23(f) petitions are granted or denied? Those are important questions. Unfortunately, readily available data make it impossible to know. To explore this further, one would need to search the courts' actual pleadings files, rather than simply the docket sheets, which do not generally provide that level of detail.[44]

43. We also collected information about the outcome of Rule 23(f) petitions that were accepted by the courts. Only 125 of the 169 granted petitions have been ruled upon, as some were still pending when we closed the books on research, and some were withdrawn or the court otherwise did not rule. Of the ruled-upon appeals, defendants filed 94, and plaintiffs filed 31. Though our pool is small indeed, our results indicate that, regardless of whether the defendants or plaintiffs filed the appeal, the outcome was favorable to defendants about 70% of the time. That is, of 94 appeals of decisions granting certification, the courts of appeals reversed the grant of certification in 66, or 71%, of cases. In 31 appeals of decisions denying class certification, the courts of appeals affirmed the denial of certification in 22, or 70.97% of cases. These results should be viewed cautiously. As already discussed, some circuits have decided very few appeals or none at all. In addition, the courts of appeals will sometimes affirm and deny class certification decisions in a single case because multiple classes were at issue; as discussed further below, we counted these decisions as affirmances. Our results are set forth in more detail at Table 3.

44. We considered researching whether the circuits were more likely to grant Rule 23(f) petitions for certain types of class actions (*e.g.*, securities class actions, employment class

B. Can this be what Congress and the Committee Intended?

When Congress enacted 28 U.S.C. § 1292(e), and the Committee promulgated Rule 23(f), is this what they had in mind? Did the Committee expect uniformity when it said that the circuits should have discretion akin to that exercised by the Supreme Court in considering certiorari? If so, what degree of uniformity was expected? More importantly, has certiorari proven itself to be a good model?

With each circuit exercising its own discretion, uniformity seems unlikely. First, as Justice John Marshall Harlan once observed, "the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules."[45] But the Supreme Court does have some explicit criteria which it normally applies in deciding whether to grant certiorari. Supreme Court Rule 10 states that the Supreme Court considers whether the case involves an issue about which there is a lower court split, or whether the lower court has decided an important question of federal law not yet settled by the Supreme Court.[46] The Supreme Court denies certiorari most of the time, but it rarely grants certiorari in a case that fails to meet the description in Rule 10. Second, consistency of result is much more likely when the exercise of discretion is centralized in one body (as it is with the granting or denial of certiorari), rather than spread across twelve circuits (as it is in the case of Rule 23(f) petitions).

Moreover, the nature of the Supreme Court's discretion is quite different from the discretion contemplated by Rule 23(f). The Supreme Court grants certiorari to create consistent national law, but the courts of appeals are not granting or denying Rule 23(f) petitions with consistent rule-making in mind. As Rule 10 makes clear, factual considerations will not influence the decisions of the Justices regarding the grant of certiorari.[47] But the Rule

actions); unfortunately, the circuits' docket sheets were inconsistent in providing this information, sometimes classifying cases for which Rule 23(f) petitions were filed as "Other," or even as a § 1292(b) appeal.

45. John M. Harlan, *Manning the Dikes*, 13 Rec. of the N.Y.C. Bar Ass'n 541, 549 (1958).

46. Supreme Court Rule 10 states as follows:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

S.Ct.R. 10; *see also* Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* §§ 4.3–4.15 (8th ed. 2002).

47. S. Ct. R. 10.

23(f) Committee Note certainly suggests that the courts of appeals should consider the specific circumstances of a particular case, at least enough to judge whether the grant or denial of class certification marks the "death knell" of the case. The very nature of considering whether to accept a Rule 23(f) appeal is therefore dissimilar in important ways from the Supreme Court's consideration of whether to grant certiorari. Moreover, in terms of *legal* considerations, the guidelines for accepting a Rule 23(f) appeal do not rely on concepts like circuit splits—rather, the consideration of whether a "certification decision turns on a novel or unsettled question of law" exists in a vacuum.

How good an analogy is certiorari where (1) the courts of appeals are expected to consider facts, and (2) the courts of appeals do not necessarily have a circuit split to guide them? The complexity of the comparison here stems from the fact that the courts of appeals, even in this context, are at least as much concerned with deciding actual disputes as with clarifying the law, whereas the Supreme Court exercises its certiorari jurisdiction to clarify the law, not to do justice in individual cases.[48] Moreover, the Supreme Court grants or denies certiorari against the backdrop of its own body of jurisprudence: In view of what the Court has held before, would the development of the law be furthered by granting review in this case?[49] That also is a consideration foreign to Rule 23(f) determinations, many of which will remain "secret law" in any event.

V. Conclusion.

Despite the shortcomings of the "cert model," the courts of appeals appear to have taken to heart their prerogative to "grant certiorari" as they see fit. The circuits have not developed consistent standards, nor have they published their decisions—or the reasons therefor—in an easily accessible medium. Anecdotally at least, some circuits appear more willing to grant Rule 23(f) petitions than others, and, the circuits seem to differ procedurally, with some accepting a Rule 23(f) petition and proceeding directly to the merits of the appeal itself, while others permit further briefing on the merits of the appeal.

Eight years have passed since the Federal Rules of Civil Procedure were amended to include Rule 23(f). That rule certainly has served its intended role, at least to the extent that review has been allowed with respect to 169 class certification decisions. Obviously, but for the promulgation of Rule 23(f), review likely would not have occurred in those cases.

But it may now be time for the Committee to revisit its work and reassess its goals in light of what has happened in the field.[50] Is the "black box" in

48. *See, e.g.,* Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution,* 15 J. L. & Pol. 515, 516–17 (1999) (criticizing courts of appeals for their view of their role as "that of making national law as applied to their geographical territories," rather than focusing on their primary role of deciding disputes among litigants).

49. *See* Barry Sullivan, Book Review, 4 CONST. COMMENT. 452, 454 (1987) ("In Supreme Court litigation, as elsewhere, the words of the scriptures ring true: 'For everything there is a season.' New Supreme Court decisions and new legislation beget further unresolved constitutional and legal questions that begin to be litigated in various courts throughout the country, and then work their way up through the system.").

50. It was recently suggested that the Supreme Court might settle the standard to be applied in reviewing Rule 23(f) petitions. Theodore M. Grossman & Todd R. Germia, "That's why

which most—90%—of these decisions are made desirable? Is it appropriate to have such important issues being decided most of the time in chambers, with results (and only results, rather than reasons) ordinarily available and then only on the docket? Did the Committee intend that the courts of appeals should not have to give reasons for their decisions accepting or rejecting Rule 23(f) petitions? The courts of appeals may be treating all Rule 23(f) petitions in exactly the same way, and according to the same standards, whether they result in a published decision or not. But is it desirable to have such a volume of cases in which lawyers and the public do not know and cannot understand how the decision was made? How are we to know whether the same standards are applied within a circuit, let alone across the circuits? Are the courts of appeals taking their "unfettered discretion" so seriously as to render themselves unaccountable for their Rule 23(f) decisions? By not explaining their decisions to accept or reject Rule 23(f) petitions, the courts of appeals avoid a certain amount of scrutiny—and a lot of additional opinion-drafting. Perhaps that is appropriate, and even desirable, given the caseloads of the courts of appeals, but it is certainly an issue for discussion.

Recognizing that requiring explanations for Rule 23(f) determinations would mean more work for the courts of appeals, the Committee should nonetheless ask whether the benefits of greater transparency would outweigh those costs. On the one hand, the bar and the public would undoubtedly benefit from more transparency. Perhaps if the courts of appeals articulated clearer standards and demonstrated application of those standards in more cases, parties would be deterred from filing Rule 23(f) petitions with little or no likelihood of success. On the other hand, the Committee may not have anticipated the actual volume of Rule 23(f) petitions, and providing the courts of appeals with "unfettered discretion" conserves judicial resources.

Whatever the answer may be, we recognize that eight years is a relatively short period in the development of an important procedural rule. But, in our system of law, law generally develops in an open and transparent manner. That is an important aspect of the rule of law, and that, as well as efficiency, should be considered as we move forward. In any event, just as we have built upon the scholarship of earlier commentators, we expect that more will follow. We hope that the data we have collected is useful in demonstrating that the universe of Rule 23(f) appeals is vaster and more complex than some have thought. We also hope that it will be possible for the Committee to consider additional changes to Rule 23(f) in light of even more comprehensive and reliable data, which perhaps could be collected in the future by the Administrative Office of U.S. Courts.

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they're 'Supreme'," *Nat'l L.J.* (May 14, 2007). On the one hand, the Supreme Court is often reluctant to grant certiorari in interlocutory cases, but the Court might grant certiorari in certain circumstances where the order might otherwise escape review. *See* Stern, Gressman at §§ 4.18–4.19. However, because the Advisory Committee's intent, as indicated in the Committee Note to Rule 23(f), appears to have been to allow the courts of appeals autonomy, it seems the best course of action would be for the Committee to revisit the rule.

Table 1. Summary Table of Petitions Filed in Each Circuit.[51]

Circuit	1	2	3	4	5[52]	6	7	8	9	10	11	DC	Total
Petitions filed	41	56	15	7	79	20	83	54	80	6	104	13	558
Number decided	36	46	14	5	67	19	71	50	65	2	89	12	476
Number granted	10	10	12	5	36	11	22	8	17	0	35	3	169
Plaintiff filed/decided	13	21	6	1	33	4	29	29	25	1	31	5	198
Defendant filed/decided	23	25	8	4	34	15	42	21	40	1	58	7	278
Plaintiff granted	2	4	5	1	10	1	3	1	9	0	4	3	43
Defendant granted	8	6	7	4	26	10	19	6	8	0	31	0	125
% granted	28%	22%	86%	100%	54%	58%	31%	16%	26%	0%	39%	25%	36%
% plaintiff granted	15%	19%	83%	100%	30%	25%	10%	3%	36%	0%	13%	60%	22%
% defendant granted	35%	24%	88%	100%	76%	67%	45%	29%	20%	0%	53%	0%	45%
Number published[53]	4	4	3	1	3	4	13	1	2	0	4	8	47
% published	11%	9%	21%	20%	4%	21%	18%	2%	3%	0%	4%	67%	10%

Table 2. Voluntary Dismissals: Before the Court Decides Whether to Grant the Petition or After the Petition is Granted.

Circuit	Withdrawn before petition granted or denied	Voluntarily dismissed after petition granted
1	2	2
2	5	3
3	1	0
4	1	0
5	4	1
6	0	0
7	5	1
8	0	0
9	2	3
10	0	0
11	5	4
DC	0	0
Total	25	14

51. The Federal Circuit is not a significant source of class action cases and was not included in this analysis.

52. The Fifth, Eighth, and Tenth Circuits are shaded to indicate that they do not have published standards by which they allow or deny Rule 23(f) petitions.

53. The "number published" reflects how many Rule 23(f) petition decisions are explained by the courts. That is, of the 558 filed petitions, the courts of appeals explained why they decided to accept or reject the Rule 23(f) petition 47 times.

Table 3. Outcome of the Rule 23(f) Appeals that Were Heard By the Courts.

Circuit	Class Certification Granted Below		Class Certification Denied Below		Pending	No Decision	Total
	Affirmed	Reversed	Affirmed	Reversed			
1	3	2	0	2	1	2	10
2	1	3	1	1	1	3	10
3	2[54]	5	4	1	0	0	12
4	2[55]	2	1	0	0	0	5
5	5[56]	15	6	1	4	5	36
6	3	7	1	0	0	0	11
7	7	11	0	2	1	1	22
8	0	3	1	0	2	2	8
9	1[57]	3	5	0	6	2	17
10	0	0	0	0	0	0	0
11	4[58]	16	1	1	3	10	35
DC	0	0	2	1	0	0	3
Total	28	67	22	9	18	25	169

54. One Third Circuit case includes a partial affirmance of a district court's grant of class certification. That case was counted among affirmed cases. *Chiang v. Veneman*, 385 F.3d 256 (3d Cir. 2004).

55. These two Fourth Circuit cases affirming a grant of class certification affirmed in part and reversed or vacated other parts of the district court decision. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417 (4th Cir. 2003); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004).

56. One Fifth Circuit case affirmed in part and reversed in part the district court's grant of class certification. That case was counted among the affirmed cases. *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545 (5th Cir. 2003).

57. This Ninth Circuit case vacated class certification with respect to punitive damages but otherwise affirmed the district court. *Beck v. Boeing Co.*, 320 F.3d 1021 (9th Cir. 2003).

58. One of these affirmed Eleventh Circuit cases affirmed in part and reversed in part the district court's grant of class certification. *Drayton v. W. Auto Supply Co.*, No. 01-10415, 2002 WL 32508918 (11th Cir. Mar. 11, 2002).