Rule 23(f) Class Certification Appeals

Themes in Rule 23(f) Jurisprudence

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Introduction

- 1998 Amendments added Rule 23(f).
- Advisory Committee left development of criteria to the Courts of Appeals.
- Standards for evaluating petitions under Rule 23(f) have developed differently across the circuits, as summarized in Appendix A.

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The Decision Whether to Grant the Petition is Highly Discretionary

- The Advisory Committee Note expressly states that under Rule 23(f) an "[a]ppeal from an order granting or denying class certification is permitted in the *sole discretion* of the court of appeals . . ." and "[t]he court of appeals is given *unfettered discretion* whether to permit the appeal . . . ." (emphasis added).
- The Advisory Committee Note offered little guidance; it suggested that permission is most likely granted "when the certification decision turns on a novel or unsettled question of law" or when "the decision or certification is likely dispositive of the litigation."

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The Decision Whether to Grant the Petition is Highly Discretionary

- Every circuit that has spoken to Rule 23(f)'s application has agreed that the court has broad discretion.
- Even the Fifth Circuit, which has yet to reveal its preferred methodology, has made plain that it exercises "considerable . . . discretion" in granting appellate review. Arnold v. State Farm Fire and Cas. Co., 277 F.3d 772, 777 (5th Cir. 2001) (declining to provide specific standards for applying 23(f)).

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The Decision Whether to Grant the Petition is Highly Discretionary

- A court of appeals may always use its discretion to review a case presenting "special circumstances."
- See, e.g., Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 295 (1st Cir. 2000) ("special circumstances may lead us either to deny leave to appeal in cases that seem superficially to fit into one of these three pigeonholes, or conversely, to grant leave to appeal in cases that do not match any of the three described categories").
- Chamblerlan v. Ford Motor Co., 402 F.3d 952, 960 (9th Cir. 2005) ("We underscore that the decision to permit interlocutory appeal is, at bottom, a discretionary one.").

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The District Court's Views and Plans about Revisiting Certification are Relevant

- The Advisory Committee Note to Rule 23(f) observes that "the district court often can assist the parties and the court of appeals by offering advice on the desirability of appeal."
- The Advisory Committee Note continues that "the district court . . . often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal . . ." and that a "statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless."

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The District Court's Views and Plans about Revisiting Certification are Relevant

- Several circuits take into account the procedural posture of the case in general, and specifically whether the district court has expressed its intention to revisit certification again later in the litigation. See, e.g., In re Delta Air Lines, 310 F.3d 953, 960 (6th Cir. 2002)("an indication that the district court will reexamine the certification decision following discovery should discourage an interlocutory appeal.").

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Review under Rule 23(f) is Not Typical

- No circuit has stated that review will be a regular matter.
- See, e.g., Chamberlan, 402 F.3d at 959 ("petitions for Rule 23(f) review should be granted sparingly.").
- Rather considerations specific to individual cases will influence whether a court of appeals chooses to grant a petition for review under Rule 23(f).

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We Don't Know What We Don't Know

- Our understanding of what leads an appellate court to accept a 23(f) petition remains necessarily limited with so few opinions addressing the standards in each circuit.
- Most petitions are disposed of without any written explanation, and it is difficult to know what informs the decision to accept or reject many petitions.

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We Don't Know What We Don't Know

- "[t]he 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,
  Seventh Circuit Court of Appeals

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Silent Circuits

- The Fifth, Eighth, and Tenth Circuits have not provided criteria for evaluating whether to grant a Rule 23(f) petition.

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Silent Circuits

- The Eighth Circuit, for example, passed on the opportunity to set forth a standard in Liles v. Del Campo, 350 F.3d 742, 746 n.5 (8th Cir. 2003).
- There, the Eighth Circuit stated that "[o]ther circuits have also addressed the question of when to grant an interlocutory appeal under Rule 23(f). The facts in this case do not favor an interlocutory appeal under any of these [circuits'] formulations, and we need not undertake here the task of refining a circuit standard for review of such petitions."

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The Death Knell and Reverse Death Knell

- Every decision since the landmark case of Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (1999), has recognized that Rule 23(f) is appropriate in the case of death knell and reverse death situations.

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The Death Knell and Reverse Death Knell

- The death knell situation occurs when denial of class certification renders the plaintiffs' individually-small claims economically infeasible to pursue, and thus effectively terminates the plaintiffs' claims.
- The reverse death knell scenario occurs when a district court certifies a class that exposes a defendant to what the Advisory Committee Note calls "potentially ruinous liability." The defendant, unwilling to bet the company at trial, must then settle the claim, even if the plaintiff lacked a strong case on the merits.

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The Death Knell and Reverse Death Knell

- But in reverse death knell situations, the circuits require that the defendant must also show that the district court certification order contains error.
- See, e.g., Chamberlan, 402 F.3d at 960; Delta, 310 F.3d at 960; In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 99-100 (D.C. Cir. 2002).

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The Death Knell and Reverse Death Knell

- Additionally, according to at least the First, Sixth, Ninth, and D.C. Circuits, in reverse death knell cases, the killing strike must be significant.
- The Sixth Circuit, for example, remained skeptical in Delta that the prospect of class damages in excess of $1 billion would have left major airline defendants with "no recourse but to settle." 310 F.3d at 961.

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Nuanced Differences Across the Circuits Where a Case Implicates a "Novel or Unsettled Question of Law"

- Consistent with the Advisory Committee Note, the circuits share the view that court of appeals review under 23(f) is appropriate when the case below implicates an unsettled or fundamental legal issue.
- The Blair court explained that "an appeal may facilitate the development of the law . . . [b]ecause a large proportion of class actions settles or is resolved in a way that overtakes procedural matters , some fundamental issues about class actions are poorly developed." 181 F.3d at 835.

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Nuanced Differences Across the Circuits Where a Case Implicates a "Novel or Unsettled Question of Law"

- The First Circuit goes further in requiring that "an appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case." Mowbray, 208 F.3d at 294.
- In a similar vein, the D.C. Circuit and Second Circuit have limited review to instances where novel questions are important to class action law and likely to evade post-judgment review. Lorazepam, 289 F.3d at 105; Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 140 (2d Cir. 2001).

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The Circuits Divide Over Whether Review is Appropriate because a Certification Decision is "Manifestly" or "Clearly" Erroneous

- The circuits have not agreed whether clearly erroneous certification decisions warrant review under Rule 23(f).
- The First Circuit in Mowbray and Seventh Circuit in Blair have not allowed review solely on the basis of manifest error in the certification decision.

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The Circuits Divide Over Whether Review is Appropriate because a Certification Decision is "Manifestly" or "Clearly" Erroneous

- Conversely, the Eleventh Circuit has held that Rule 23(f) review "may be warranted even if none of the other factors supports granting the Rule 23(f) petition . . . " where the certification decision is clearly wrong. Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1275 (11th Cir. 2000).

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The Circuits Divide Over Whether Review is Appropriate because a Certification Decision is "Manifestly" or "Clearly" Erroneous

- Since the Eleventh Circuit set forth this view, the Third, Fourth, Ninth, and D.C. Circuits have concurred, stating that review is appropriate in cases of "manifest" error in the certification decision. See Chamblerlan, 402 F.3d at 959; Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 145 (4th Cir. 2001); Lorazepam, 289 F.3d at 105.

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- The Second Circuit, however, only considers error in the certification decision in connection with a "death knell" or "reverse death knell" scenario. Sumitomo, 262 F.3d at 139-140.

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Multi-factor and "Sliding Scale" Approaches

- The Eleventh Circuit in Prado-Steiman set forth five guidelines as to the propriety of review under 23(f) in a given case.
- Under the Eleventh Circuit's multi-factor approach, (1) death knell and reverse death knell remain the most critical considerations; but the court also takes into account (2) whether the district court's certification decision can be shown to have a substantial weakness; (3) whether the case raises "an unsettled legal issue that is important to the particular litigation as well as important in itself"; (4) the progress of the litigation in the district court, including the status of discovery or the pendency of dispositive motions; and (5) the likelihood that "future events may make immediate appellate review more or less appropriate."

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Multi-factor and "Sliding Scale" Approaches

- The Eleventh Circuit's framework is noteworthy for providing a new, sliding scale approach to the "substantial weakness" factor.
- In other words, a very strong certification decision requires a commensurately stronger showing among the other factors before review is appropriate; by contrast, a weak certification decision may suffice to warrant review "even if none of the other factors supports granting the Rule 23(f) petition."

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Multi-factor and "Sliding Scale" Approaches

- Although the Fourth Circuit has followed the Eleventh Circuit, Lienhart, 255 F.3d 145-146, the Ninth Circuit has rejected the sliding-scale approach. Chamberlan, 402 F.3d at 960.

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Conclusion

- Rule 23(f) is still a relatively new rule and courts of appeals continue to provide guidance – or not provide guidance in some circuits – as to when they will grant a petition for review of a certification order.
- The discussion above and chart attached as appendix A illustrate that although the circuits share key common features, they also have evolved differently, and that ultimately petitioning under rule 23(f) is a highly circuit-specific endeavor.

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