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Class Certification Appeals Under Federal Rule of Civil Procedure 23(f): Delivering On the Promise of Expanded Class Action Review

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A district court's decision whether or not to certify a class is typically the seminal moment in modern class litigation: if certification is denied, prosecuting an action is unappealing for individual plaintiffs with small claims, and if it is granted, continued litigation is often unacceptable for defendants facing a large class and potentially crippling financial liability.[1]

With few class actions proceeding to trial,[2] and the difficulty in obtaining classwide summary judgment, the certification decision typically represents a defendant's last best chance to avoid material liability.

Nonetheless, as a technical matter, the class certification decision is an interlocutory order that neither party can appeal as a matter of right prior to the end of litigation. This disconnect between procedure and practice often leads a class action to be abandoned or settled before the district court reaches the merits of the underlying claims or an appellate court reviews the certification decision.

In 1998, the Federal Rules of Civil Procedure were amended to bridge the gap between the interlocutory nature of a class certification ruling, and the need for appellate review of such decisions, by providing a dedicated avenue of interlocutory review for class certification decisions.[3] Federal Rule of Civil Procedure 23(f) gave the circuit courts broad discretion to scrutinize

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[1] *See, e.g., In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (noting the pressure certification places on defendants to settle, as well as that ''[i]n most class actions . . . individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation'').

[2] Emery G. Lee III & Thomas E. Willging, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* 16, Federal Judicial Center (2008) (finding that in a sample set of 254 diversity class actions filed in the two years preceding the effective date of the Class Action Fairness Act of 2005, all of those cases in which a class was certified ''ended with class settlements.'').

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certification decisions without concurrently swelling their dockets.[4] Yet after over 15 years with Rule 23(f) on the books, the promise of expanded review has not been fully realized. Moreover, the circuit courts typically rule on Rule 23(f) petitions with unpublished summary orders that offer little to no insight into the courts' reasoning for hearing a case.

It is time for the courts of appeals to recast their approach to Rule 23(f) petitions. Optimization of the class action device requires increased appellate review of class certification decisions, as well as transparent explanations of the bases for accepting and denying review. The proposed new approach will, of course, require circuit courts to expend comparatively more resources in the short term. Nonetheless, the long term systemic efficiencies gained should justify that investment.

Drafters' Intent

In calling upon the circuits to ''recast'' their approach, this article is actually advocating an approach aligned with the original intent behind Rule 23(f). During the rulemaking process, the Advisory Committee was clear that its intention was ''to make appeals more readily available.''[5] At the same time, the Committee contemplated whether a review mechanism would lead to abuse due to the ''strong temptation to appeal certification decisions.''[6] The abuse concern was moderated, however, by the understanding that any such provision would have an ''explicit invocation of court of appeals discretion,'' which provides ''a significant safeguard against feckless attempts to appeal.''[7]

Moreover, the concern was overshadowed by the potential gains of expanded appellate review of class certification.[8] As recounted in the Advisory Committee Meeting Minutes, ''[a]ffording a more regular means of involvement, increasing the opportunities for appellate review, may do much to simplify current law and make practice more nearly uniform.''[9] After due consideration, Federal Rule of Civil Procedure 23(f) was adopted by the Supreme Court April 24, 1998, and went into effect Dec. 1, 1998.

The Advisory Committee note to Rule 23(f) confirms the drafters' intent to facilitate an ''expansion of present opportunities to appeal,'' that is moderated by the circuit courts' ''discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.''[10] The discretion is labeled as ''unfettered,'' but the circuit courts were nonetheless called upon to ''develop standards for granting review.''[11] Additionally, the note explains the ''concerns . . . justify[ing]'' expanded review, which, as discussed below, have influenced most of the circuit courts in formulating their standards.[12]

The first concern is ''death knell'' cases, in which denial of certification makes ''the only sure path to appellate review . . . proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation.''[13] The second, commonly referred to as ''reverse death knell,'' is the converse—a grant of certification ''force[s] a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.''[14] Finally, the note provides that ''[p]ermission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision is likely dispositive of the litigation.''[15]

Circuit Court Standards

The drafters did not intend for interlocutory review to be exhaustively governed by the text of Rule 23(f) and specifically decided not to explicate a standard. The expectation was that circuit courts would develop standards that would lead to an expansion of appellate review. With the exception of the Eighth Circuit, all of the circuits have issued seminal opinions setting forth a general framework for considering Rule 23(f) petitions.[16]

The Seventh Circuit was the first court to propound a standard in *Blair v. Equifax Check Servs., Inc.*, 181 F.3d

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[3] Prior to enactment of Rule 23(f), parties had to seek interlocutory review through 28 U.S.C. § 1292(b) certification or the courts of appeals' mandamus power. *See* 28 U.S.C. § 1292(b) (providing for interlocutory review of non-final orders where the district judge certifies ''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,'' and the Court of Appeals, in its discretion, accepts the application for review).

[4] Rule 23(f) currently provides that:

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.

Fed. R. Civ. P 23(f). Rule 23(f) was amended in 2007 to omit explicit reference to discretion, but the amendment did ''not in any way limit the unfettered discretion established by the original rule.'' *Id.* committee note. It was again amended in 2009 to change the time frame for filing a petition from 10 to 14 days. *Id.*

[5] Minutes of the Advisory Committee on Civil Rules, Nov. 9 and 10, 1995.

[6] *Id.*; *see also* Minutes of the Advisory Committee on Civil Rules, Apr. 18 and 19, 1996 (''No lawyer worthy of pursuing a class action will let pass an opportunity to appeal.'').

[7] Minutes of the Advisory Committee on Civil Rules, Nov. 9 and 10, 1995. Indeed, the Advisory Committee considered, and rejected, the prospect of appeal as a matter of right. *See id.*

[8] *See* Minutes of the Judicial Conference on Rules of Practice and Procedure, June 19 and 20, 1997 (recounting ''a strong consensus within the Advisory Committee and among the commentators in favor of permitting a court of appeals—in its sole discretion—to take an appeal from a district court order granting or denying class action certification'').

[9] Minutes of the Advisory Committee on Civil Rules, May 1 and 2, 1997.

[10] Fed. R. Civ. P. 23(f) committee note.

[11] *Id.*

[12] *Id.*; *see infra* pp. 4-7.

[13] Fed. R. Civ. P. 23(f) committee note.

[14] *Id.*

[15] *Id.*

[16] The Eighth Circuit issued an opinion regarding a Rule 23(f) petition in *Liles v. Del Campo*, 350 F.3d 742 (8th Cir. 2003), but explicitly declined to formulate a test, noting merely that ''[t]he facts in this case do not favor an interlocutory appeal under any of the[circuits'] formulations.'' 350 F.3d at 746 n.5.

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832 (7th Cir. 1999). The *Blair* court adopted the Advisory Committee note approach, identifying three categories of cases that are appropriate for review—death knell, reverse death knell, and cases presenting fundamental issues that ''are poorly developed''—while still recognizing the court is not limited by any bright-line approach. The court cautioned that death knell review would only be merited when ''the district court's ruling on class certification is questionable.''[17] On the other hand, ''it is less important to show that the district judge's decision is shaky,'' when the petition is predicated on development of the law review because ''[l]aw may develop through affirmances as well as through reversals.''[18] In such petitions, the court considers how ''fundamental the question,'' as well as ''the likelihood that it will escape effective disposition at the end of the case.''[19] Of course, given the likelihood that a certified class action will settle, the likelihood that an order certifying a class would escape review is high.

The First Circuit followed *Blair*, but restricted the development of the law category to ''those instances in which 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.''[20] The Second[21] and Fifth[22] Circuits are the only other circuits to adopt the Advisory Committee note approach without substantial alteration, though the Second Circuit constricted that approach by requiring a ''substantial showing'' that the certification decision was questionable.[23]

The other circuits adopted varying standards that are still influenced by the Advisory Committee note approach and which also recognize their ''unfettered'' discretion to grant or deny review ''on the basis of any consideration that the courts of appeals finds persuasive.''[24] In *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000), the Eleventh Circuit formulated a balancing approach in which ''each relevant factor should be balanced against the other, taking into account any unique facts and circumstances.''[25] In addition to death knell and development of law ''guideposts,''[26] ''a court should consider whether the petitioner has shown a substantial weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion,'' ''the nature and status of the litigation before the district court,'' and ''the likelihood that future events may make immediate appellate review more or less appropriate.''[27]

The Fourth and Sixth Circuits[28] adopted substantially identical standards, though the Fourth Circuit refined the substantial weakness guidepost to make it a ''prong operat[ing] on a sliding scale to determine the strength of the necessary showing regarding the other *Prado-Steiman* factors.''[29]

The Third Circuit sampled from the *Blair* and *Prado-Steiman* approaches in formulating its own ''useful template.''[30] The Third Circuit adopted the Advisory Committee note approach of focusing on ''the possible case ending effect of an imprudent class certification decision,'' and whether review would ''facilitate development of the law on class certification.''[31] It also added *Prado-Steiman*'s substantial weakness factor as an additional stand-alone category of cases that are appropriate for review, a move the Ninth Circuit called ''the most notable modification of the *Blair* trilogy.''[32] Specifically, the court found that review would be appropriate ''[i]f granting the appeal . . . would permit us to address . . . an erroneous ruling.''[33] The Ninth, Tenth and D.C. Circuits generally followed this approach,[34] except these courts (like the First Circuit) restrict the development of law category to instances in which ''an unsettled and fundamental issue of law relating to class actions[is] important both to the specific litigation and generally, [and] is likely to evade end-of-the-case review.''[35]

Rule 23(F) Today . . . and Tomorrow

Summary Orders

Although the circuit courts have provided general guidance regarding the types of considerations that factor into their Rule 23(f) decisions, since first enunciating their respective standards, they have issued few additional opinions developing those standards through application to different fact patterns. The Seventh Circuit has issued the most published opinions,[36] but the

[17] *Blair*, 181 F.3d at 834–35.
[18] *Id.* at 835.
[19] *Id.*
[20] *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) (emphasis added).
[21] *In re Sumitomo Copper Litig.*, 262 F.3d 134 (2d Cir. 2001).
[22] *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007).
[23] *Sumitomo*, 262 F.3d at 139.
[24] Fed. R. Civ. P. 23(f) committee note.
[25] *Prado-Steiman*, 221 F.3d at 1276.
[26] The Eleventh Circuit adopted the development of the law guidepost as formulated by the First Circuit. *See id.* at 1275 (noting that courts ''should consider whether the appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself'' (internal quotation marks and citations omitted)).
[27] *Id.* at 1274–76.
[28] *In re Delta Air Lines*, 310 F.3d 953 (6th Cir. 2002).
[29] *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 145–46 (4th Cir. 2001). The Fourth Circuit noted that ''[i]n extreme cases, where decertification is a functional certainty, the weakness of the certification order may alone suffice to permit the Court of Appeals to grant review.'' *Id.* at 145.
[30] *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 165 (3d Cir. 2001).
[31] *Id.*
[32] *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 958 (9th Cir. 2005) (per curiam).
[33] *Newton*, 402 F.3d at 165.
[34] *Chamberlan*, 402 F.3d at 959; *Vallario v. Vandehey*, 554 F.3d 1259, 1263-64 (10th Cir. 2009); *In re: Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98 (D.C. Cir. 2002); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 250 (D.C. Cir. 2013).
[35] *Chamberlan*, 402 F.3d at 959; *see In re: Lorazepam*, 289 F.3d at 100; *Vallario*, 554 F.3d at 1263.
[36] *E.g.*, *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1074 (7th Cir. 2014) (''We denied the first petition, and we are denying this second one as well, but we think it may be helpful to future litigants contemplating Rule 23(f) appeals to spell out our reasons for this second denial.''); *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010); *Am. Honda Motors Co., Inc. v. Allen*, 600 F.3d 813 (7th Cir. 2010); *Allen v. Int'l Truck & En-*

overwhelming practice among the circuits is to summarily rule on petitions with conclusory explanations to the effect of ''upon due consideration, review is warranted [or is unwarranted].''[37] Sometimes unpublished orders that grant review indicate which issues the court wants the parties to address in their briefs.[38] Such guidance helps those litigants focus their appellate briefing, but it does not aid potential petitioners in understanding how the court determines which cases it is willing to hear.

Absent opinions that illuminate the circuits' application of their respective standards, parties on the losing end of certification decisions must weigh whether to seek interlocutory review based on little more than their own sense of injustice.[39] If the circuit courts provided more reasoned opinions, practitioners would better be able to present targeted arguments seeking Rule 23(f) review, and the circuit courts will be in a position to better evaluate the merits of such applications. By contrast, the current state of affairs serves neither the interests of litigants nor the courts of appeal by creating confused litigants and encouraging unsupported Rule 23(f) petitions.

Although the Advisory Committee likened the circuit courts' discretion ''to the discretion exercised by the Supreme Court in acting on a petition for certiorari,'' and thus it is unreasonable to expect courts to treat Rule 23(f) petitions exactly like appeals,[40] the Committee did not suggest the rationale for granting or denying a petition should be as hidden as the Supreme Court's certiorari deliberations.

The Committee explicitly stated that the courts ''will *develop* standards that *reflect the changing areas* of uncertainty in class litigation.''[41] It is doubtful that the Committee envisioned the circuit courts quietly developing their respective standards, with practitioners left to divine some semblance of guidance from unpublished summary orders that are only discoverable through difficult-to-search electronic databases.

Rate of Review

There can be little debate that Rule 23(f) was intended to meaningfully expand the opportunities for appellate review of class certification decisions beyond those afforded under 28 U.S.C. § 1292(b) and the courts' mandamus power.[42] The real debate is whether the circuit courts are achieving that goal by permitting review at a sufficiently higher rate than when those other devices were the only mechanisms available. A precise before-and-after comparison is difficult, as the Federal Judiciary does not keep such statistics.

One independent study concluded that in the first five years following enactment of Rule 23(f), the circuit courts clearly expanded review.[43] Although encouraging, the conclusion was derived ''primarily from a review of published federal court of appeals decisions,'' and, as noted above, a majority of petitions are decided by unpublished summary orders. There is simply no empirical indication that Rule 23(f) materially liberalized the granting of interlocutory review. Instead, it appears that courts are rejecting most of the petitions. Indeed, one study that looked at published and unpub-

gine Corp., 358 F.3d 469 (7th Cir. 2004); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001); *Richardson Elecs., Ltd. v. Panache Broad. Of Pa., Inc.*, 202 F.3d 957 (7th Cir. 2000); *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999). Although it has issued the most published opinions, the Seventh Circuit does not purport to have developed a transparent standard. Seventh Circuit Judge Diane Wood once shared that, ''[t]he vast majority of our rulings on 23(f) motions are not published. It just happens quietly in the chambers . . . so you're going to have a distorted view of what's going on if you're looking only at the published opinions.'' Hon. Diane P. Wood, FTC Workshop—Protecting Consumer Interests In Class Actions, Sept. 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'').

[37] *See, e.g., U.S. Foodservice, Inc. v. Catholic Healthcare West*, No. 11-5193 (2d Cir. Apr. 3, 2012); (''Upon due consideration, it is hereby ORDERED that: (1) the Rule 23(f) petition is GRANTED . . . .''); *Barrett v. Option One Mortg. Corp.*, No. 12-8033 (1st Cir. Feb. 7, 2013) (''The requirements for interlocutory review of class action determinations are stringent, and, in our view, they have not been met here.''); *Gelder v. Coxcom Inc.*, No. 12-706 (10th Cir. Aug. 8, 2012) (''Upon a careful review of the materials filed with this court and the applicable law, we conclude that this matter is not appropriate for immediate review.''); *Cardona v. Worldwide Techservices LLC*, No. 12-80112 (9th Cir. July 11, 2012) (''The court, in its discretion, grants the petition . . . .''); *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 270 F.3d 984, 984 (2d Cir. 2001) (''Upon due consideration, it is ORDERED that the motion is denied because petitioners have failed to satisfy the standard enunciated in *Sumitomo* . . . .''); *Wang v. Chinese Daily News, Inc.*, 159 F. App'x 750, 750 (9th Cir. 2005) (''The court, in its discretion, denies these consolidated petitions for permission to appeal.''); *In re Allstate Ins. Co.*, No. 02-8010 (D.C. Cir. Nov. 14, 2002).

[38] *See, e.g., Smentek v. Dart*, 683 F.3d 373, 375 (7th Cir. 2012) (''We have granted the Rule 23(f) petition, limited to the question of when a district court, in deciding whether to certify a class, should 'defer based on the principles of comity, to a sister court's ruling on a motion for certification of a similar class.' ''); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 31 (2d Cir. 2006) (noting that ''[t]he order granting permission to appeal directed the parties to address the following issues: (1) Whether the Second Circuit's 'some showing' standard . . . is consistent with the 2003 amendments to Fed. R. Civ. P. 23; and (2) Whether the presumption of reliance established in *Basic [Inc.]* v. *Levinson*, 485 U.S. 224 [108 S. Ct. 978, 99 L.Ed.2d 194] (1988), was properly extended to plaintiffs' claims against non-issuer defendants and to the market manipulation claims'').

[39] Indeed, a 2009 article compared grant rates ''of Circuits purporting to share the same standard, [and found] that any correlation between a Circuit's grant rate and its articulated standard for granting Rule 23(f) review seems weak, at best.'' Julian W. Poon, Blaine H. Evanson, & William K. Pao, *Interlocutory Appellate Review of Class-Certification Rulings Under Rule 23(f): Do Articulated Standards Matter?*, *Certworthy* (DRI Appellate Advocacy Committee, Chicago, Ill.) Winter 2009, at 11. Accordingly, the circuits' general standards are not very useful guides for litigants seeking to determine whether their matter merits petitioning for appeal.

[40] Fed. R. Civ. P. 23(f) committee note.

[41] *Id.* (emphasis added).

[42] *See id.* (describing the difference between the language of Rule 23(f) and the ''potentially limiting requirements of § 1292(b)'').

[43] Brian Anderson & Patrick McLain, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeals*, Legal Backgrounder (Wash. Legal Found.), Mar. 19, 2004.

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lished orders found that the average grant rate was only 36%.[44]

Anecdotally, Judge Diane Wood of the Seventh Circuit candidly remarked that ''we normally don't take them,'' referring to class certification appeals, and the question is ''[i]n which instances should we deviate from the rule that we normally don't want to hear an interlocutory appeal?''[45] Although her comments are confined to the Seventh Circuit, that attitude appears to be shared.[46]

For instance, the First Circuit stated that it ''intend[s] to exercise [its] discretion judiciously,'' as ''interlocutory appeals are disruptive, time-consuming, and expensive,''[47] and the Eleventh Circuit agreed, noting that ''interlocutory appeals . . . consequently are generally disfavored''[48] and ''[a]ppellate review of a class certification order should be an avenue of last resort.''[49] The Second Circuit has come out with the strongest statement against review, ''anticipat[ing] . . . that the standards of Rule 23(f) will rarely be met,'' which ''will prevent the needless erosion of the final judgment rule.''[50]

Prescription

Petitions do not need to be accepted as a matter of right, but neither should they be routinely denied out of a concern that Rule 23(f) appeals may swamp the circuit courts and erode the final judgment rule. Considering certification's impact on a case, the decision whether to certify a class is often, for all intents and purposes, a final judgment.

In light of the real world impact on plaintiffs and defendants alike, circuit courts should treat orders concerning certification as dispositive and, accordingly, review all questionable certification decisions.[51] This approach will certainly benefit the immediate litigation, but it will also develop class action law, thereby providing district courts and litigants with a clearer roadmap for resolving and evaluating future certification motions.

Indeed, the Supreme Court appears to be responding to the current lack of guidance, having recently granted certiorari in several matters involving certification issues.[52] As most cases do not reach the Supreme Court, though, circuit courts must grant more Rule 23(f) petitions so that they can develop the certification mechanism.[53] Having more cases in the courts of appeals will provide an additional benefit by giving the Supreme Court better test cases for when it does speak on certification issues.

In addition to granting more petitions, the courts of appeals should scale back the practice of ruling on petitions via unpublished summary orders, and instead offer insight into their decisions with published opinions. There is no need to maintain secrecy out of a concern that revealing the court's reasoning might cabin its discretion to decline future petitions, and thereby lead to abuse. Foremost, it is well established that the courts have absolute discretion to deny petitions for any reason, notwithstanding any enunciated standards.

Furthermore, future published opinions will develop the circuits' respective Rule 23(f) standards, which will allow parties to better forecast the worthiness of pursuing an appeal. This should minimize the amount of petitions filed over time and reduce concerns that Rule 23(f) will be abused. On a similar note, transparent standards would help parties to better focus their arguments in petitions, and thereby minimize the burden on courts in considering whether an appeal is merited.

Conclusion

In practice, interlocutory review is the principal means by which the circuit courts can review class certification decisions. Accordingly, if one accepts that appellate courts must provide more guidance on class certification issues, then it is clear that they should grant more interlocutory review.

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[44] Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 290 (2008); *see also id.* at 86 (noting that ''the circuits with the most petitions . . . allowed, respectively, 39%, 26%, 31%, and 54% of the petitions not otherwise withdrawn or procedurally dismissed'').

[45] FTC Workshop, 18 Geo. J. Legal Ethics at 1212–13.

[46] Outliers include the Fourth Circuit, which stated that:

''Standards certainly must reflect the limited capacity of appellate courts to consider interlocutory appeals, as well as the institutional advantage possessed by district courts in managing the course of litigation and the judicial diseconomy of permitting routine interlocutory appeals. . . . *However, we must remain cognizant that Rule 23(f) was enacted by the Supreme Court to permit such appeals, pursuant to an express grant of authority by Congress to create appellate jurisdiction over non-final judgments*.''

Lienhart, 255 F.3d at 145 (emphasis added). The D.C. Circuit recently made similarly positive comments: ''Discretionary does not mean arbitrary. Choosing whether to exercise jurisdiction over an interlocutory appeal from a certification decision turns on more than what we had for breakfast.'' *In re Rail Freight*, 725 F.3d at 250.

[47] *Mowbray*, 208 F.3d at 294.

[48] *Prado-Steiman*, 221 F.3d at 1276.

[49] *Shin v. Cobb Cnty. Bd. of Educ.*, 248 F.3d 1061, 1064 (11th Cir. 2001). The Tenth Circuit takes a similar position. *See Family Dollar Stores Inc. v. Farley*, No. 13-704 (10th Cir. Apr. 25, 2013) (''We are ever mindful that 'interlocutory appeals are traditionally disfavored' '' and ''[a]s a result, 'the grant of a petition . . . constitutes the exception rather than the rule.' '' (citations omitted)).

[50] *Sumitomo*, 262 F.3d at 140.

[51] For example, the Seventh Circuit granted review in a case ''because the district court had not completed its analysis of the commonality requirement in Rule 23(a)(2),'' and then granted review in the same case once more because the district court, on remand, ''did not cite or discuss [*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)], and we have since issued a new decision discussing *Wal-Mart*'s proper application.'' *Vang v. Kohler Co.*, No. 12-8029 (7th Cir. Aug. 28, 2012). Compare this perspective to the Tenth Circuit in *Family Dollar*, No. 13-704 (10th Cir. Apr. 25, 2013), a case in which the court denied a petition despite finding that ''the district court's oral ruling [was] sparse and not[ing] that the lack of a written order, with the legal citation and thorough analysis such usually engenders, inhibits our ability to assess the propriety of the district court's decision.''

[52] *E.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Amgen v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Wal-Mart*, 131 S. Ct. 2541; *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011); *Erica P. John Fund, Inc. Halliburton*, 718 F.3d 423 (5th Cir. 2013), *cert. granted*, 134 S. Ct. 636 (2013).

[53] *See, e.g.*, *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084 (7th Cir. 2014) (''We have decided to grant [the petition] in order to clarify class action law . . . .''); *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 377 (3d Cir. 2013) (''Permitting this appeal facilitates the development of the law on class certification . . . .'').

The Advisory Committee on the Civil Rules grasped that imperative when they drafted Rule 23(f). Unfortunately, the circuit courts have not adequately responded. Rather, they hold onto a mindset that ''the same policy considerations [that elevated the threshold for discretionary interlocutory review pursuant to writs of mandamus and § 1292(b) applications] counsel in favor of some restraint'' on Rule 23(f) petitions.[54]

[54] *Mowbray*, 208 F.3d at 294.

It is time for the courts of appeals to affirmatively commit to providing a more robust analysis of class actions by granting more Rule 23(f) petitions and explaining their reasons for doing so. If they truly embrace the promise behind Rule 23(f) as originally contemplated, they ''may do much to simplify current law and make practice more nearly uniform.''[55]

[55] Minutes of the Advisory Committee on Civil Rules, May 1 and 2, 1997.

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