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Interlocutory Appellate Review of Class-Certification Rulings under Rule 23(f): Do Articulated Standards Matter?

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Since Rule 23(f) of the Federal Rules of Civil Procedure came into effect approximately ten years ago, most Circuits have attempted to elaborate upon the guidance provided by the Committee Note as to when Courts of Appeals will exercise the “unfettered discretion” Rule 23(f) affords them to decide whether to grant or deny interlocutory appellate review of class-certification rulings. This article examines the differing standards that have been formulated by the various U.S. Courts of Appeals, and takes a first cut at evaluating whether differences in those published standards actually translate into tangible differences in grant rates across the various Circuits.

Prior to December 1, 1998, when

Rule 23 came into effect, only limited avenues existed for immediate appellate review of a district court’s exercise of its discretion under Rule 23 to certify, or deny certification, of a class action: primarily 28 U.S.C. § 1292(b) and mandamus. Recognizing that a district court’s class-certification decision is not a “final decision within the meaning of [28 U.S.C.] § 1291,” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978) (internal quotation marks omitted), the Supreme Court and the Committee, drawing on the added statutory authority conferred by 28 U.S.C. § 1292(e), sought to “[e]xpan[d] ... opportunities to appeal” by promulgating Rule 23(f), directing the various Courts of Appeals to “develop standards for granting review that reflect the changing areas of uncertainty in class litigation.” Fed. R.

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Civ. P. 23(f) advisory committee's note (1998 amendments).

Consistent with the drafters' expectations, a majority of the Courts of Appeals have since published opinions articulating the general standards that they will use in deciding whether a class-certification decision warrants interlocutory review or not. And although those standards draw upon the Committee Notes to Rule 23 and overlap with each other, there are also some notable differences in the standards formulated by the various Circuits.

Do the differences in these published standards matter, however, to litigants trying to predict the frequency and type of cases in which a given Court of Appeals will grant a petition brought under Rule 23(f)? In other words, how have the various standards the Courts of Appeals have developed affected the rate at which petitions under Rule 23(f) are granted? Is there a correlation between seemingly permissive standards and the grant rates in Circuits with laxer standards? This article begins by summarizing what those standards are and what the Circuits' respective grant rates are, in order to begin to answer this question. From this, we suggest some additional considerations that may assist appellate practitioners in advising their clients whether to seek interlocutory appellate review of an adverse class-certification ruling.

The Standards for Granting 23(f) Petitions in the U.S. Courts of Appeals

Rule 23(f) was adopted in 1998 to expand the discretion of the Courts of Appeals to grant interlocutory review of

class-certification rulings. The Committee made clear that the scope of Rule 23(f) was to be broader than the scope of Section 1292(b) "in two significant ways": (1) "it does not require that the district court certify the certification ruling for appeal"; and (2) "it does not include the potentially limiting requirements of § 1292(b) that the district court order 'involve[] 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.'" Fed. R. Civ. P. 23(f) advisory committee's note (1998 amendments) (quoting from 28 U.S.C. § 1292(b)). Recognizing that class litigation involves "changing areas of uncertainty," the Committee noted that the task of developing explicit standards lies completely with the Courts of Appeals. *Id.* ("The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation."). Thus, the Courts of Appeals have "unfettered discretion . . . akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." *Id.*

To illustrate the purpose of the new subsection, the Committee gave several examples of when interlocutory review may be most appropriate. First, Rule 23(f) interlocutory review may be appropriate to address "death-knell"-type situations for either plaintiffs or defendants: (1) when the denial of class certification makes continuing litigation too costly for individual plaintiffs and (2) when the grant of class certification places insurmountable pressure on defendants to settle. *Id.* Second, "[p]ermission [to appeal] 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 on certification is likely dispositive of the litigation." *Id.*

Relying on the Committee's Notes, most Courts of Appeals (except for the Fifth, Eighth, and Federal Circuits) have published opinions setting forth the standards that they will use in deciding whether to grant interlocutory review under Rule 23(f). And notwithstanding the unfettered discretion of the Courts of Appeals, in formulating these standards, the Courts of Appeals have hewed closely to the factors set forth by the Committee.

The "Core-Committee" Factors

The Seventh Circuit was the first Court of Appeals to construe Rule 23(f) and articulate the standards that it would use in deciding whether to grant Rule 23(f) review. Taking its cue from the Committee's Notes, the Seventh Circuit first held that interlocutory review is appropriate when the denial of class certification sounds the "death knell" for: (1) plaintiffs whose "claim is too small to justify the expense of litigation," or (2) defendants facing claims where "the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999). But even in these "death-knell" scenarios, the "appellant must demonstrate that the district court's ruling on class certification is questionable" because "if the ruling is impervious to revision there's no point to an interlocutory appeal." *Id.* Finally, recognizing that one of the purposes of Rule 23(f) is to further the

development of the law of class actions, the Seventh Circuit held that interlocutory review is proper when an appeal involves a “fundamental issue[]” relating to class actions. *Id.* at 835. In these cases, “it is less important to show that the district court’s decision is shaky” because “[l]aw may develop through affirmances as well as through reversals.” *Id.*

Both the First and the Second Circuits subsequently followed the Seventh Circuit’s example and adopted what this article will refer to as the “Core-Committee-Factors” test. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001). In adopting the Core-Committee-Factors test, the First Circuit, however, made a “small emendation.” *Mowbray*, 208 F.3d at 294. Noting that “a creative lawyer almost always will be able to argue that deciding her case would clarify some ‘fundamental’ issue,” the First Circuit concluded that granting review under Rule 23(f) is appropriate in cases involving a fundamental issue only if it 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.” *Id.*

The “Core-Committee-Plus” Factors

The Third, Ninth, Tenth, and D.C. Circuits have all found that the Core-Committee Factors warrant Rule 23(f) review. *See Newton v. Merrill Lynch Pierce, Fenner & Smith*, 259 F.3d 154, 165 (3d Cir. 2001); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *Vallario v. Vandehey*, 2009 WL 251938, at *3-*4 (10th Cir. Feb. 4, 2009); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002). And the Ninth, Tenth, and

D.C. Circuits adopted the First Circuit’s gloss on the fundamental-issues factor. *See Chamberlan*, 402 F.3d at 959 (finding that Rule 23(f) review is proper when “the certification decision presents an unsettled and fundamental issue of law relating to class actions, *important both to the specific litigation and generally*, that is likely to evade end-of-the-case review” (emphasis added)); *Vallario*, 2009 WL 251938, at *4 (same); *In re Lorazepam*, 289 F.3d at 105 (same).

All these courts have also adopted “manifest error” in the class-certification ruling as an independent and adequate ground for interlocutory review thereof. *See Newton*, 402 F.3d at 165; *Chamberlan*, 402 F.3d at 959; *Vallario*, 2009 WL 251938, at *4; *In re Lorazepam*, 289 F.3d at 105. As discussed above, for those Courts of Appeals adhering to the Core-Committee-Factors standard, whether the district court’s decision is “questionable” is relevant only when it tolls the “death knell” for the case. But for the Third, Ninth, Tenth, and D.C. Circuits, whether the district court committed manifest error is independently important, as the D.C. Circuit noted, “if for no other reason than to avoid a lengthy and costly trial that is for naught once the final judgment is appealed.” *In re Lorazepam*, 289 F.3d at 105.

The “Expansive-Core-Committee” Factors

The Fourth, Sixth, and Eleventh Circuits have not only adopted, but expanded upon, the Core-Committee Factors, in formulating the tests that they will use in guiding their decision whether to grant Rule 23(f) review in a particular case or not. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1274-76 (11th Cir. 2000); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144-46 (4th Cir.

2001) (“We thus adopt the Eleventh Circuit’s five-factor *Prado-Steiman* test for judging the appropriateness of granting a petition for review under Rule 23(f)”); *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002).

Like the Third, Ninth, Tenth and D.C. Circuits, the Fourth, Sixth, and Eleventh Circuits also consider whether the district court erred in deciding whether to grant review. *See Lienhart*, 255 F.3d at 145-46; *In re Delta Air Lines*, 310 F.3d at 960; *Prado-Steiman*, 221 F.3d at 1275. For both the Eleventh and Fourth Circuits, this factor operates as a “sliding-scale.” *See Lienhart*, 255 F.3d at 145-46; *Prado-Steiman*, 221 F.3d at 1275 n.10. In other words, “the stronger the showing of an abuse of discretion, the more this factor weighs in favor of interlocutory review.” *Prado-Steiman*, 221 F.3d at 1275 n.10. Thus, when the district court’s decision is “manifestly erroneous,” “review is appropriate without regard to the other factors.” *Lienhart*, 255 F.3d at 146. Review may not be appropriate, however, when it is less clear whether the district court erred.

The Fourth, Sixth, and Eleventh Circuits have all expanded on the Core-Committee-Plus Factors. All three Circuits consider the status of the litigation in the district court, particularly the progress of discovery. *Lienhart*, 255 F.3d at 144-46; *In re Delta Airlines*, 310 F.3d at 960; *Prado-Steiman*, 221 F.3d at 1276. Moreover, the Fourth and Eleventh Circuits consider whether future events could impact the case, such as pending settlement negotiations or potential bankruptcy filings. *Lienhart*, 255 F.3d at 143, 145-46; *Prado-Steiman*, 221 F.3d at 1276.

Rule 23(f) Standards, Grant Rates, and Their Relationship Across Different Circuits

One might assume that those Courts of Appeals with the most generous standards for granting interlocutory review would grant a greater proportion of the petitions submitted to them. In other words, it seems logical to assume that it should be easier for a litigant to obtain review in the Fourth or Eleventh Circuits than, for example, in the First or Seventh Circuits. One might also assume that courts with similar standards

would have similar “grant rates.” However, it turns out that neither assumption is entirely correct.

As an initial matter, the number of petitions *filed* varies dramatically from Circuit to Circuit. The Eleventh Circuit received the most petitions, 104, between December 1, 1998 and October 30, 2006. The Seventh, Ninth, and Fifth Circuits received 83, 80, and 79 petitions, respectively. And, during the same period, litigants petitioned just 13, 7, and 6 times in the D.C., Fourth, and Tenth Circuits. See 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).

As with the number of Rule 23(f) petitions filed, grant rates also vary significantly across different Courts of Appeals. During the 1998-2006 period, the Fourth Circuit granted 100 percent of the petitions it decided. See *id.* The Third Circuit granted 86 percent, and the Fifth Circuit 58 percent. See *id.* On the low end are the Second Circuit at 22 percent, the Eighth Circuit at 16 percent, and the Tenth Circuit at zero percent. See *id.*

Circuit	1	2	3	4	5	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	196
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	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%

Figure 1. Data available at Sullivan & Trueblood, *supra*, 246 F.R.D. at 290.

From this data, we can detect a slight correlation between a Circuit's grant rate and its articulated standard for granting Rule 23(f) review. The Fourth Circuit has the highest percentage of Rule 23(f) petitions granted—100 percent—and also applies the most permissive standard that has been adopted: the sliding-scale, five-factor approach. The Sixth Circuit has the third highest percentage of Rule 23(f) petitions granted—58 percent—and applies a broader standard than that used by other Circuits, except for the Fourth and Eleventh. Moreover, those Circuits applying the basic Core-Committee Factors standard have some of the lowest grant rates of all.

But when we compare the grant rates of Circuits purporting to share the same standard, we find that any correlation between a Circuit's grant rate and its articulated standard for granting Rule 23(f) review seems weak, at best. For example, both the Fourth and the Eleventh Circuits claim to apply the same Expansive-Core-Committee Factors, but the Fourth Circuit has granted 100 percent of Rule 23(f) petitions (albeit based on a small sample size) while the Eleventh Circuit has granted only 39 percent of petitions. Similarly, the Third, Ninth, and D.C. Circuits all apply the Core-Committee-Plus Factors standard, but the Third Circuit has granted 86 percent of Rule 23(f) petitions while the Ninth and D.C. Circuits have granted 26 and 25 percent of petitions, respectively. (The Tenth Circuit's standard, handed down only recently, has obviously not yet affected the Tenth Circuit's grant rate.)

In sum, the data from Rule 23(f)'s first eight years of existence suggest that the standards articulated by various Circuits for when they will grant Rule 23(f) review do not adequately capture

and account for the discrepancy in grant rates amongst different Circuits. Therefore, to attain a better understanding of when and how frequently different Courts of Appeals will grant Rule 23(f) petitions submitted to them, one should look beyond the courts' stated reasons for granting review.

What Other Considerations Impact Rule 23(f) Petitions?

Most Circuits often summarily rule on Rule 23(f) petitions, publishing only a small percentage of their decisions. As one judge has noted, commenting on the Seventh Circuit's practice, "[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...." Sullivan & Trueblood, *supra*, 246 F.R.D. at 277. Assuming this holds true for most Courts of Appeals, where should appellate practitioners look to obtain further guidance on how to advise their clients on whether to seek interlocutory appellate review of an adverse class-certification ruling?

One avenue that may prove fruitful is to look more closely at the opinions addressing Rule 23(f) and to examine not only the standards that they articulate, but also the language and manner in which those standards are articulated. Doing so may shed more light on different Circuits' differing and not-fully-articulated views of Rule 23(f), and thus on: (1) how strictly they would apply the standards they have articulated; and (2) how likely they would find "special circumstances" that would justify deviating from the standards. For instance, as discussed above, both the Fourth and the Eleventh Circuits have adopted the same Expansive-Core-Committee

Factors, but the Fourth Circuit has a significantly higher grant rate. This disparity, however, makes more sense when we look at the language and tone of the courts' opinions, which suggest that the Fourth and the Eleventh Circuits perceive the role of Rule 23(f) differently. While the Fourth Circuit cautions that "exceptionally stringent standards for review" are inappropriate "[i]n light of Rule 23(f)'s purpose to eliminate the unduly restrictive review practices which obtained when mandamus was the only means to review a class certification," the Eleventh Circuit emphasizes that "interlocutory appeals are inherently disruptive, time-consuming, and expensive" and threatens to "increase[] the workload of the appellate courts, to the detriment of litigants and judges." *Compare Lienhart*, 255 F.3d at 145, with *Prado-Steiman*, 221 F.3d at 1276 (internal quotation marks and citation omitted).

Similarly, the language and tone used by the Third, Ninth, and D.C. Circuits shed light on the divergent grant rates amongst courts applying the Core-Committee-Plus factors. In *Chamberlan*, the Ninth Circuit made clear that it was "of the view that petitions for Rule 23(f) review should be granted sparingly," 402 F.3d at 959, and in *In re Lorazepam*, the D.C. Circuit noted that "[t]he sheer number of class actions, the district court's authority to modify its class certification decision, and the ease with which litigants can characterize legal issues as novel, all militate in favor of narrowing the scope of Rule 23(f) review." 289 F.3d at 105-06. Both Circuits' grant rates are low. On the other hand, the Third Circuit, which has a much higher rate, did not mention that Rule 23(f) review should be rare or sparingly granted but rather emphasized that

“courts of appeals are afforded wide latitude” and repeatedly declared that any persuasive consideration could justify review. *Newton*, 259 F.3d at 164-65.

Another avenue that may deepen appellate practitioners’ understanding of when and how frequently the various Circuits are granting Rule 23(f) petitions is looking at the Circuits’ respective caseloads. As the Eleventh Circuit noted in *Prado-Steiman*, one factor that weighs in favor of the sparing use of Rule 23(f) review is that it may threaten to overburden the courts of appeals. *See Prado-Steiman*, 221 F.3d at 1276. Thus, unsurprisingly, the Ninth and the Second Circuits have two of the lowest grant rates. But a comparison of the caseloads of the various Circuits makes clear that the predictive power of caseloads is limited, at best, given the weak correlation between caseloads and grant rates. For instance, from 1998 to 2006, the Fifth Circuit had a larger caseload (77,703) than the Second Circuit (51,138), yet a dramatically higher grant rate (76 vs. 24 percent). *See* U.S. Court

of Appeals – Judicial Caseload Profile, <http://uscourts.gov/cgi-bin/cmsa2003.pl>; <http://www.uscourts.gov/cgi-bin/cmsa2006.pl>. The Third Circuit’s caseload (34,811) is almost three times as large as the D.C. Circuit’s caseload (12,269). *See id.* The Third Circuit’s grant rate (88 percent), however, is more than three times higher than the D.C. Circuit’s grant rate (25 percent).

These considerations certainly do not resolve the question. Numerous other factors could affect how courts decide whether to grant a Rule 23(f) petition, and discerning the precise weight these factors may have is difficult given the dearth, to date, of readily available data and information pertaining to Rule 23(f). For example, a putative class action’s underlying subject matter may influence the court’s decision whether to grant a Rule 23(f) petition. But because most courts summarily rule on Rule 23(f) petitions, extracting the data to test this hypothesis would require a far more in-depth review than is possible in this article of docket sheets and briefs in

cases in which Rule 23(f) petitions have been filed. *Sullivan & Trueblood, supra*, 246 F.R.D. at 286.

Conclusion

Ten years after its enactment, it remains far from clear when and why the various Courts of Appeals will grant Rule 23(f) interlocutory appellate review of class-certification rulings. And while appellate practitioners should obviously be mindful of the published standards articulated by the Circuit they are petitioning when preparing their Rule 23(f) petitions, they should take those standards with a grain of salt and remember that those standards fall short of telling the whole story, particularly given the Committee’s directive that these factors should evolve to meet the ever-changing needs of courts and litigants in the class-action context.