AN EMPIRICAL STUDY OF CLASS-ACTION APPEALS

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Federal Rule of Civil Procedure 23(f) allows parties in a class action to seek immediate appellate review of class-certification decisions. Criticisms of the rule abound. Some see Rule 23(f) as a tool defendants use to drag out litigation and avoid class certification. Others contend that the rule is inconsistently applied among the circuits and should be replaced with a right to appeal.

Yet there is little reliable data that might back up these criticisms. This article brings some hard data to this discussion. I created an original dataset of all Rule 23(f) petitions to appeal filed from 2013 through 2017. The data alone is revealing—it has been hard to come by reliable data on the number of petitions, the rate at which different courts grant them, and what those courts do (affirm or reverse) after granting a petition. The data also does not support common criticisms of 23(f). And—perhaps surprisingly—the data unveils one corner of the class-action universe in which plaintiffs are not predominantly losing: in the Rule 23(f) context, the courts of appeals reached a plaintiff-favorable outcome over 50% of the time.

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I. INTRODUCTION

A district court's class-certification decision is a key—if not *the* key—decision in any case brought as a class action.[1] If the district court certifies a class, the defendant can face thousands or even millions of individual claims—worth millions or even billions in potential damages—rather than just those of the named plaintiffs. Given the sharp increase in the case's stakes, most defendants will settle instead of risking a monumental damages award. A decision denying class certification, in contrast, means the case involves only the claims of the named plaintiffs. And these claims are often so small that pursuing the case makes no economic sense; the plaintiffs will either abandon their claims or settle for a relatively small amount. So the class-certification decision—not a decision on the merits of the plaintiffs' claims—can dictate who prevails in any case brought as a class action. A certified class is essentially a victory for the plaintiffs. The denial of class certification is essentially a plaintiff loss.

To ensure some appellate review of class-certification decisions, the Supreme Court added Rule 23(f) to the

1. *E.g.*, 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3931.1 (3d ed. 2012) ("The determination whether to certify a class can effectively conclude the action, one way or the other."); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1262 (2002) ("Over the years since 1966, the certification decision has taken on great strategic importance."); Richard D. Freer, *Preclusion and the Denial of Class Certification: Avoiding the "Death by a Thousand Cuts,"* 99 IOWA L. REV. BULLETIN 85, 97 (2014) [hereinafter Freer, *Preclusion*] ("[T]he class certification ruling is the watershed event in the litigation . . . ."); 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, 1546 (2000); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 442 (2013) ("The class certification decision is one of the most hard-fought battles in civil litigation."). Despite this conventional wisdom, there is some indication that a fair number of class actions—even damages class actions—proceed past class certification to a final judgment. *See* Stephen B. Burbank & Sean Farhang, *Class Certification in the U.S. Courts of Appeals: A Longitudinal Study*, 84 L. & CONTEMP. PROBS. 73, 81, 90 (2021); Robert H. Klonoff, *Class Actions Part II: A Respite From the Decline*, 92 N.Y.U. L. REV. 971, 981 (2017).

Federal Rules of Civil Procedure in 1998.[2] That rule gives appellate courts discretion to hear an immediate appeal from a district court's class-certification decision. Rule 23(f) is unique among the statutes, rules, and judicial doctrines that govern appellate jurisdiction. It is one of the few instances in which the courts of appeals have discretion over whether to hear an appeal.[3] And it is the only instance in which the Supreme Court has used its relatively new power under the Rules Enabling Act to craft a rule of appellate jurisdiction.[4]

The rule has also been a persistent target of criticism. A few observers have suggested that the rule is working well, providing sufficient opportunities for appellate review and developing the law of class actions.[5] But most observers are unhappy with it.[6] Academics are almost unanimous in viewing Rule 23(f) as a tool that benefits defendants and limits the availability of class actions.[7] Defense-side interests contend that the courts

2. *See* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 35 (1996) [hereinafter Cooper, *Rule 23*]; Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 KAN. L. REV. 1027, 1027 (2010) [hereinafter Hines, *Mirroring*]; Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 865 (2018).

3. Other discretionary appeals include certified appeals under 28 U.S.C. § 1292(b), bankruptcy appeals under 28 U.S.C. § 158(d)(2), and appeals from Class Action Fairness Act remands under 28 U.S.C. § 1453(c). Courts also effectively wield some discretion in whether to hear an appeal under Federal Rule of Civil Procedure 54(b), as the court of appeals can hold that a district court abused its discretion in entering a Rule 54(b) judgment. My thanks to Andrew Pollis for pointing this out.

4. *See* 28 U.S.C. §§ 1292(e), 2072(c); *see also* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993).

5. *See, e.g.*, Edward H. Cooper, *Federal Class Action Reform in the United States: Past and Future and Where Next?*, 69 DEF. COUNSEL J. 432, 434 (2002) [hereinafter Cooper, *Past and Future*] ("This rule appears to be working well."); Hines, *Mirroring*, *supra* note 2, at 1035 ("The rule now seems to enjoy a happy (if dull) reputation as a paragon of sound rulemaking, plugging a sorely-needed gap in appellate oversight and fostering the development of a body of appellate jurisprudence on important class action issues.").

6. *See infra* Part II.C.

7. *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 741 (2013) [hereinafter Klonoff, *Decline*] ("In fact, however, in terms of sheer numbers, Rule 23(f) has served primarily as a device to protect defendants. . . . In short, with respect to appellate court review pursuant to Rule 23(f),

are inconsistent in applying Rule 23(f) and that the rule insufficiently protects defendants from the pressure to settle.[8]

But like so much of the universe of class actions, we know little about how Rule 23(f) actually operates in the courts.[9] Most denials of Rule 23(f) petitions are available only on the courts' dockets and thus fly under the radar. When Rule 23(f) petitions are granted, they normally receive only passing mention in the opinion that reviews the merits of class certification. And little reliable data on Rule 23(f) exists.[10] Without that data, it's difficult to show that Rule 23(f) is good, bad, or a bit of both.[11] But criticisms of the rule persist.

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defendants have benefited more from Rule 23(f) than have plaintiffs."); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. FORUM 56, 59 (2017) [hereinafter Malveaux, *National Injunction*] (noting "the significant hurdles erected over the last fifty years," including "interlocutory appellate review of certification determinations"); David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1595 (2017) [hereinafter Marcus, *Mass Tort Class Action*] ("[(Rule 23(f)] has developed to constrain district court power to certify classes.").

8. *See* LAWS. FOR CIV. JUST., AMENDING RULE 23: A CALL FOR MUCH-NEEDED REFORM OF CLASS ACTION PROCEDURE (2016) [hereinafter Lawyers for Civil Justice, *Amending Rule 23*], http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_public_comment_on_rule_23_proposals_final_10-1-16.pdf (arguing that Rule 23(f) has not sufficiently protected defendants and proposing a right to appeal class-certification decisions); DEF. RSCH. INST., COMMENT TO THE RULE 23 SUBCOMMITTEE (2015), https://www.uscourts.gov/sites/default/files/15-cv-dd-suggestion_dri_0.pdf (same); LAWS. FOR CIV. JUST. ET AL., TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23 (2013) [hereinafter Lawyers for Civil Justice et al., *Restore a Relationship*], https://www.uscourts.gov/sites/default/files/fr_import/13-CV-G-suggestion.pdf (same).

9. *See generally* Burbank & Farhang, *supra* note 1, at 74; Deborah R. Hensler, *Happy 50th Anniversary, Rule 23! Shouldn't We Know You Better After All This Time?*, 165 U. PA. L. REV. 1599 (2017). *See also* Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. UNIV. L. REV. 13, 15 (2007) [hereinafter Freer, *Interlocutory Review*]; Jonah B. Gelbach & Deborah R. Hensler, *What We Don't Know About Class Actions but Hope to Know Soon*, 87 FORDHAM L. REV. 65, 65 (2018).

10. *See infra* Part II.D (reviewing prior studies of Rule 23(f)).

11. *Cf.* Gelbach & Hensler, *supra* note 9, at 65 ("Notwithstanding the fierceness of the class action debate and the apparent confidence of opponents and proponents in their factual assertions, there is a lot we do not know about federal court class actions, and we have no data that can be used to reliably determine whether class actions are good, bad, or some of each.").

To bring some hard data to this discussion, I created an original dataset of petitions to appeal under Rule 23(f) that were filed from 2013 through 2017. The numbers alone are illuminating. The data also provides little support for the common criticisms of Rule 23(f), at least during the period studied.[12] There is little evidence of "party effects"—*i.e.*, that a relationship exists between the petitioning party (plaintiff or defendant) and the court's decision. I also found little evidence that the circuits are inconsistent in granting Rule 23(f) petitions or in reversing class-certification decisions in the Rule 23(f) context—what I call "circuit effects." And what evidence there is comes with some serious caveats.

On top of this empirical analysis, my data also sheds some light on class actions generally. Although Rule 23(f) petitions offer only a glimpse into one corner of the class-action universe—and are almost certainly not representative of that entire universe—these petitions offer at least some evidence that class actions are still a viable means for plaintiffs to obtain relief. The class-action literature regularly diagnoses the class action as dead (or at least dying) insofar as it could be used to redress collective injuries. Five years of Rule 23(f) petitions show that plaintiffs are still filing class actions. These plaintiffs sometimes win at class certification—the dataset contains hundreds of plaintiff victories on this issue. And if class certification is really the whole game in cases brought as a class action, that means hundreds of successful class actions. Granted, these victories might be a small part of the larger class-action universe, as we do not know how representative Rule 23(f) petitions are of that universe.[13] But the data shows at least one corner

12. As Stephen Burbank and Sean Farhang show, appeal outcomes in the class-action context can vary across time. *See* Burbank & Farhang, *supra* note 1, at 95.

13. Although class certification might be the whole game when a case seeking damages reaches a contested class-action-certification decision, there are other ways in which courts resolve purported class actions. They might, for example, dismiss the claims for failure to state a claim or approve a settlement before the case reaches a contested class-certification decision.

of the class-action universe in which plaintiffs are not predominantly losing.

I proceed as follows. Part II explains the law governing interlocutory class-action appeals, both before and after Rule 23(f), as well as common criticisms of that rule and prior empirical or semi-empirical studies. Part III presents my findings. I start with the basic numbers and then explore whether those numbers support the party-effects and circuit-effects criticisms. I end Part III with suggestions for future empirical research. And in Part IV, I discuss what light my study might shed on the larger class-action universe. Part V briefly concludes.

II. CLASS-CERTIFICATION APPEALS

District court judges often decide a number of issues in the course of federal litigation.[14] Nearly all of these decisions are "interlocutory"—they are made at some point before the end of district court proceedings and leave other issues for later resolution. As a general rule, federal litigants must wait until the end of proceedings—when all issues have been decided and all that remains is enforcing the judgment—before appealing any of those interlocutory decisions.[15] This limit on appellate jurisdiction comes from 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction over only "final decisions" of the district courts, and it is commonly called the "final-judgment rule."[16]

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14. I have adapted some of this section's introductory material from Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1814 (2018) [hereinafter Lammon, *Finality*], and Bryan Lammon, *Hall v. Hall: A Lose-Lose Case for Appellate Jurisdiction*, 68 EMORY L.J. ONLINE 1001 (2018).

15. *See* 28 U.S.C. § 1291; Gelboim v. Bank of Am. Corp., 574 U.S. 405, 409 (2015); Catlin v. United States, 324 U.S. 229, 233 (1945); *see also, e.g.,* United States v. Williams, 796 F.3d 815, 817 (7th Cir. 2015) (concluding that a decision was final when it "end[ed] the litigation and [left] nothing but execution of the court's decision, the standard definition of 'final' under § 1291.").

16. *See, e.g.*, Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994); Mitchell v. Forsyth, 472 U.S. 511, 543 (1985) (Brennan, J., concurring in part and dissenting in part); Abney v. United States, 431 U.S. 651, 657 (1977);

But the final-judgment rule is only the general rule. It has lots of exceptions. Some are found in statutes.[17] Other exceptions come from judicial decisions.[18] And still others are found in rules of procedure.[19] My focus here is one of those procedural rules: Federal Rule of Civil Procedure 23(f), which permits discretionary appeals from class-certification decisions.

A. Appeals from Class-Certification Decisions

Federal cases don't begin as class actions. Plaintiffs purporting to represent a class file putative class actions, and class-wide representation comes only after the district court certifies the case as a class action.[20]

When the plaintiffs seek damages, that certification decision can be a major moment in the purported class action.[21] If the district court certifies the class, the named plaintiffs now represent not only themselves but

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see also Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 356–60 (2010) (discussing the final-judgment rule's history).

17. *See, e.g.*, 28 U.S.C. § 1292(a)(1) (granting jurisdiction over appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"); 28 U.S.C. § 1292(b) (allowing district courts to certify interlocutory orders for an immediate appeal in civil cases, which the courts of appeals then have discretion to review).

18. *See generally* Lammon, *Finality*, *supra* note 14; Martineau, *supra* note 4; Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1652–59 (2011).

19. *See* FED. R. CIV. P. 54(b) ("When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."). *See generally* Andrew S. Pollis, *Civil Rule 54(b): Seventy-Five and Ready for Retirement*, 65 FLA. L. REV. 711 (2013).

20. *See* FED. R. CIV. P. 23(a), (c).

21. *See* sources cited *supra*, note 1. As Maureen Carroll has explained, a class-certification decision might not be all that momentous when the plaintiffs seek only injunctive or declaratory relief. *See* Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 877 (2016) [hereinafter Carroll, *Class Action Myopia*]; Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2075–76 (2015) [hereinafter Carroll, *Aggregation for Me*].

also every member of the class.[22] And if the class seeks damages, the defendant's potential liability has accordingly multiplied, sometimes immensely. Class certification can transform potential liability from a few thousand dollars into hundreds of millions or even billions. Defendants' incentive to settle thus increases upon class certification; whatever their chance of prevailing on the merits, the threat of an immense damages award can warrant settling.[23]

If the district court denies class certification, the named plaintiffs have only their own claims. Denial can thus make the stakes of the case quite low and mark the end—or, more dramatically, the "death-knell"—of the action.[24] One of the key reasons to pursue claims on behalf of a class is because individual claims are too small to be worth the costs of litigating. Aggregating lots of small claims can turn a negative-value case into one that makes economic sense. But if class certification is denied, all that remains are the named plaintiffs' small claims. These plaintiffs face an incentive to abandon their negative-value claims or settle them for relatively small amounts, even if they might prevail on the merits.[25]

For these reasons, the class-certification decision is often regarded as the main event in a purported class action, if not the entire game.[26] This creates a problem for appellate review of class-certification decisions. If class certification is denied, the named plaintiffs' decision to abandon or settle their individual claims is not appealable. And appellate review of a class-wide settlement

22. Class actions are not just for plaintiffs; Rule 23 allows for defendant classes, too. *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue *or be sued* as representative parties . . . ." (emphasis added)). But defendant classes are uncommon. *See* Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 120 (1996). And I found no defendant classes in my dataset. I accordingly use plaintiffs and defendants as proxies for parties that seek and oppose class certification, respectively.

23. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).

24. Klonoff, *Decline*, *supra* note 7, at 742.

25. *Id.* at 739.

26. *See* 16 WRIGHT, MILLER & COOPER, *supra* note 1, at § 3931.1; Bone & Evans, *supra* note 1, at 1262; Freer, *Preclusion*, *supra* note 1, at 97.

requires an objector to the settlement.[27] Absent an exception to the final-judgment rule, the only way to obtain appellate review of a class-certification decision is to litigate a case to a decision on the merits.

Before Rule 23(f)'s addition to the civil rules in 1998, the avenues for interlocutory appeals from class-certification decisions were few and narrow.[28] This history has been told elsewhere, so I cover it only briefly.[29] For some time, litigants sought review of those decisions via what was called the "death knell" doctrine.[30] Under this doctrine, plaintiffs could appeal the denial of class certification when that denial spelled the death knell of their case—that is, when the economic incentives required that plaintiffs abandon the case rather than pursue it.[31] Some courts also flirted with the idea of a "reverse death knell" for defendants—allowing appeals when economic

27. *See* Devlin v. Scardelletii, 536 U.S. 1, 14 (2002); *see also* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1632–33 (2009).

28. *See, e.g.*, 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1802 (3d ed. 2012); Bone & Evans, *supra* note 1, at 1256 n.7; Hines, *Mirroring*, *supra* note 2, at 1030; Klonoff, *Decline*, *supra* note 7, at 732; Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L. J. 1569, 1646 (2016); Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 KAN. L. REV. 325, 366 (2017); David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 649 (2013); Marcus, *Mass Tort Class Action*, *supra* note 7, at 1593–94; David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 FORDHAM L. REV. 1785, 1793–94 (2018) [hereinafter Marcus, *Part II*]; Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), a Good Rulemaking*, 69 TENN. L. REV. 97, 100 (2001) [hereinafter Mullenix, *Good Rulemaking*]; Willging et al., *supra* note 22, at 176.

29. *See* 7B WRIGHT ET AL., *supra* note 28, § 1802; Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, 1 J. APP. PRAC. & PROC. 309, 314–18 (1999); Solimine & Hines, *supra* note 1, at 1552–61.

30. *See* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3912 (2d ed. 1992); 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3914.19 (2d ed. 1992); 16 WRIGHT, MILLER & COOPER, *supra* note 1, § 3931.1; Kenneth A. Cohen, *"Not Dead but Only Sleeping": The Rejection of the Death Knell Doctrine and the Survival of Class Actions Denied Certification*, 59 B.U. L. REV. 257, 259–60 (1979); Joyce E. Margulies, Comment, *Appealability of Class Action Determinations*, 44 FORDHAM L. REV. 548 (1975).

31. *See* Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966).

incentives required that defendants settle a case rather than defend it.[32] But in 1978's *Coopers & Lybrand v. Livesay*, the Supreme Court closed that avenue for appellate review.[33]

In the same decision, the Court held that class-certification decisions could not be appealed under the collateral-order doctrine.[34] That doctrine—a judicially created exception to the final-judgment rule—allows appeals from district court decisions that (1) conclusively resolve an issue, (2) present an important issue that is completely separate from the merits, and (3) would be effectively unreviewable in an appeal from a final judgment.[35] *Coopers & Lyrband* held that class-certifications decisions fail all three of these requirements: district courts can revise class-certification decisions in the course of litigation, class determinations can be closely tied to the merits of the plaintiffs' claims, and these decisions can be effectively reviewed after a final judgment—so long as the parties litigate the case to one.[36]

For the next 20 years, litigants' only means of securing immediate review of class-certification decisions were discretionary appeals under § 1292(b) and writs of mandamus. Neither avenue led to frequent appellate review of class-certification decisions.[37] Appeals under § 1292(b) require that the district court first certify its

32. *See* Herbst v. Int'l Tel. & Tel. Corp., 495 F.2d 1308, 1312–13 (2d Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.3d 1005, 1007 n.1 (2d Cir. 1973); Cohen, *supra* note 30, at 261.

33. 437 U.S. 463, 475 (1978).

34. *Id.* at 469.

35. *Id.* at 468; *see also* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009). For in-depth discussions of the collateral-order doctrine, see generally THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 42–45 (2d ed. 2009); Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 64 DRAKE L. REV. 539 (1998); Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L. J. 423, 447–59 (2013); Petty, *supra* note 16, at 377–86; Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237 (2007); Matthew R. Pikor, Note, *The Collateral Order Doctrine in Disorder: Redefining Finality*, 92 CHI.-KENT L. REV. 619 (2017).

36. 437 U.S. at 468–69.

37. *See* Marcus, *Part II*, *supra* note 28, at 1793–94; Solimine & Hines, *supra* note 1, at 1561–62.

decision for an immediate appeal.[38] District court judges can be understandably reluctant to do so.[39] Mandamus allows an appellate court to reverse a district court decision via an extraordinary writ.[40] But conventional wisdom states that a writ of mandamus should issue only in extreme circumstances.[41] And class-certification decisions rarely satisfy mandamus's stringent criteria.[42] A few courts of appeals nevertheless used (or, in some people's opinions, misused) mandamus to occasionally review class-certification decisions.[43] But for the most part, there were few interlocutory appeals of class-certification decisions. This left the courts of appeals relatively uninvolved in the creation of class-action law.[44]

38. *See* 28 U.S.C. § 1292(b). For more on § 1292(b), see generally 16 WRIGHT, MILLER & COOPER, *supra* note 1, § 3929; Alexandra B. Hess, Stephanie L. Parker & Tala K. Toufanian, *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995–2010)*, 60 AM. U. L. REV. 757 (2011); Bryan Lammon, *Three Ideas for Discretionary Appeals*, 53 AKRON L. REV. 639, 644–49 (2019); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEORGE WASH. L. REV. 1165 (1990); Tory Weigland, *Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review*, 19 ROGER WILLIAMS U. L. REV. 183 (2014); Mackenzie M. Horton, Note, *Mandamus, Stop in the Name of Discretion: The Judicial "Myth" of the District Court's Absolute and Unreviewable Discretion in Section 1292(b) Certification*, 64 BAYLOR L. REV. 976 (2012); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975); Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1959).

39. *But see* 16 WRIGHT, MILLER & COOPER, *supra* note 1, § 3931.1 ("In keeping [its flexible] spirit, § 1292(b) appeals were used for a wide variety of class-action rulings. Of course appeals also were denied." (footnote omitted)).

40. *See generally* Steinman, *supra* note 35, at 1257–66.

41. For contrary views on the conditions in which courts should use mandamus, see Bryan Lammon, *Appellate Jurisdiction in Sanchez-Gomez: A Hard Case that Should Be Easy*, 96 WASH. U. L. REV. Online 1, 7–9 (2018); Steinman, *supra* note 35, at 1278–86.

42. *See* Solimine & Hines, *supra* note 1, at 1562.

43. *See* Freer, *Interlocutory Review*, *supra* note 9; Daniel Klerman, *Posner and Class Actions*, 86 U. CHI. L. REV. 1097 (2019); Solimine & Hines, *supra* note 1, at 1557–61.

44. Marcus, *Part II*, *supra* note 28, at 1793–94 (noting that little appellate-level class-action case law was produced between *Coopers & Lybrand* and the 1990s).

In 1998, the Supreme Court added subsection (f) to Rule 23.[45] The new rule allowed parties to petition the courts of appeals for permission to appeal class-certification decisions, which the court of appeals had discretion to allow.[46] The Committee Notes explained that the courts of appeals had "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari."[47] The Committee also explained the purpose of the new provision. Many class-certification decisions, the committee noted, "present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings."[48] But the Committee saw two reasons for providing some opportunity for interlocutory review.

First was the death-knell/reverse death-knell concern that absent an immediate appeal, many class-certification decisions might never result in an appealable order. Plaintiffs might obtain review of a certification denial only by litigating to a final judgment a claim that, standing alone, is worth less than the cost of litigation.[49]

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45. For an overview of the rule's history, see Solimine & Hines, *supra* note 1, at 1562–67.

46. FED. R. CIV. P. 23(f).

47. FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment. On the standards for granting review, see generally, e.g., 7B WRIGHT ET AL., *supra* note 28, § 1802.2; 16 WRIGHT, MILLER & COOPER, *supra* note 1, § 3931.1; Solimine & Hines, *supra* note 1; Carey M. Erhard, Note, *A Discussion of the Interlocutory Review of Class Certification Orders Under Federal Rule of Civil Procedure 23(f)*, 51 DRAKE L. REV. 151 (2002); Charles R. Flores, Note, *Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f)*, 4 SETON HALL CIR. REV. 27 (2007); Tanner Franklin, Comment, *Rule 23(f): On the Way to Achieving Laudable Goals, Despite Multiple Interpretations*, 67 BAYLOR L. REV. 412 (2015); Christopher A. Kitchen, Note, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal for a New Guideline*, 2004 COL. BUS. L. REV. 231 (2004); Aimee G. Mackay, Comment, *Appealability of Class Certification Orders under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW. U. L. REV. 755 (2002). *See also* Lori Irish Bauman, *Class Certification and Interlocutory Review: Rule 23(f) in the Courts*, 9 J. APP. PRAC. & PROC. 205 (2007) (criticizing the drafters' decision to leave the development of standards to the courts).

48. FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment.

49. *See id.* ("An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final

And defendants might settle rather than bear the costs of litigating a class claim and risk an immense judgment.[50] The Committee accordingly thought that some interlocutory appellate review was necessary for there to be a realistic chance of any appellate review.[51]

Second, the Committee recognized that immediate appeals might be important for developing the law of class actions.[52] The Committee noted that courts of appeals could grant or deny permission to appeal for any reason.[53] But it also said that permission is particularly warranted when the class-certification decision presents novel or unsettled issues of law.[54]

B. Rule 23(f) Procedure

Under the new Rule 23(f), a party seeking permission to appeal a class-certification decision must file a petition to appeal with appellate court.[55] Federal Rule of Appellate Procedure 5 governs the content of these petitions.[56] They are shorter than normal appellate briefs.[57] And parties must file them within 14 days of the class-

judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation.").

50. *Id.* ("An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

51. For criticism of this rationale, see Bauman, *supra* note 47, at 216 (criticizing the death-knell/reverse-death-knell rationale and observing that "Rule 23(f) requires the courts of appeals to predict the future of particular cases despite having access in each to little or no factual record on which to base the prediction"); Klonoff, *Decline*, *supra* note 7, at 742 ("[T]he appellate courts, in the context of Rule 23(f), are in no position to engage in the case-specific fact-finding necessary to gauge the true pressure on the defendant.").

52. *See also* Klerman, *supra* note 43, at 1108 ("Appellate review is necessary not only to correct errors and prevent injustice . . . , but also to generate a body of precedents that could guide district courts in the future.").

53. FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment.

54. *Id.* ("Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law . . . .").

55. FED. R. CIV. P. 23(f).

56. *See* FED. R. APP. P. 5.

57. *Compare id.* at 5(c) (setting the page limit for petitions to appeal at 20 pages), *with id.* at 32(a)(7)(A) (setting the page limit for briefs at 30 pages).

certification decision (rather than the normal 30 or 60 days for civil litigation).[58] The opposing party then has 10 days to file a response, and the court of appeals decides the petition without oral argument.[59]

Petitions to appeal are normally decided by a motions panel and, if granted, assigned to another panel for the decision on the merits of class certification.[60] Interestingly, in the Ninth Circuit, most petitions to appeal were decided by panels of two judges.[61] Courts occasionally grant the petition to appeal and review the merits of class certification in a single decision, meaning that a single panel decides both permission to appeal and the class certification.[62] But that's the exception; normally a different panel reviews the class-certification decision.[63]

If the appellate court grants permission to appeal, the appellant must pay the filing fee, after which the case is separately docketed.[64] Except in the few instances in which courts decided the petition to appeal and the merits of class certification together, the case then proceeds as a normal appeal.

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58. *See* FED. R. CIV. P. 23(f); *cf.* FED. R. APP. P. 4(a)(1) (setting the appeal deadlines for civil cases); *see also* Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 713 (2019) (holding that courts cannot equitably toll Rule 23(f)'s 14-day deadline).

59. *See* FED. R. APP. P. 5(b)(2)–(3).

60. Solimine & Hines, *supra* note 1, at 1589 n.294.

61. *See, e.g.*, Membreno v. Cal. Serv. Bureau, Inc., 2018 WL 1604629, at *1 (9th Cir. Mar. 27, 2018) (denying permission to appeal, decided by Judges Christen and Friedland).

62. *See In re* BancorpSouth, Inc., 2016 WL 5714755, *1 (6th Cir. Sep. 6, 2016); McMahon v. LVNV Funding, LLC, 807 F.3d 872, 873 (7th Cir. 2015); Parko v. Shell Oil Co., 739 F.3d 1083, 1084 (7th Cir. 2014); *In re* Sandusky Wellness Ctr., LLC, 570 F. App'x 437, 437 (6th Cir. 2014); Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 674 (7th Cir. 2013); *see also* EQT Production Co. v. Adair, 764 F.3d 347, 352 (4th Cir. 2014) (deferring ruling on permission to appeal until after full briefing and then granting permission to appeal alongside review of the class-certification decision).

63. *Compare, e.g.*, *In re* Sandusky Wellness Ctr., LLC, 2016 WL 4627428 (6th Cir. June 30, 2016) (granting permission to appeal, decided by Judges Norris, Cook, and Griffin), *with* Sandusky Wellness Ctr., LLC v. ASD Specialty Care, Inc., 863 F.3d 460 (6th Cir. 2017) (reviewing class certification, decided by Judges Suhrheinrich, Sutton, and McKeague).

64. *See* FED. R. APP. P. 5(d).

C. Assessments of Rule 23(f)

Opinions on Rule 23(f) were mixed even before it was added to the rules. Rule 23(f) was part of a package of potential changes to Rule 23 that were to address mass-tort class actions.[65] The new subsection (f) was the only change that made it into the rules; the other potential amendments and additions were eventually abandoned.[66] The Rules Committee considered these potential changes for years and received many comments on them.[67] The new interlocutory-appeals provision provoked both support and criticism.[68]

Most critics were affiliated with plaintiffs' interests.[69] They raised concerns that the new interlocutory-appeal provision would be a tool that favored defendants.[70] In some cases, they worried, Rule 23(f) petitions would merely delay the action, and delay often inures to the benefit of better-resourced defendants. But some critics were also concerned that courts of appeals would use Rule 23(f) predominantly to reverse grants of class certification.[71]

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65. *See* Marcus, *Part II*, *supra* note 28, at 1824; Marcus, *Mass Tort Class Action*, *supra* note 7, at 1594 ("[T]he mass tort class action prompted a round of rulemaking in the 1990s that ultimately led to Rule 23(f)," which is "itself importantly connected to the circuit-level mass tort decisions.").

66. *See* Scott Dodson, *A Negative Retrospective on Rule 23*, 92 N.Y.U. L. REV. 917, 921–25 (2017).

67. *See* 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at 407–19 (1997) (collecting and summarizing comments on the proposed Rule 23(f)); *see also* Solimine & Hines, *supra* note 1, at 1565–66 (summarizing supporters' and opponents' arguments).

68. *See* Cooper, *Rule 23*, *supra* note 2, at 35 ("[Rule 23(f)] has drawn strong support but also, although less often, vigorous disagreement.").

69. *See* Hines, *Mirroring*, *supra* note 2, at 1074 ("[S]upporters and opponents of Rule 23(f) divided largely along interest group lines: defendant-oriented interest groups championed it, while plaintiff-oriented interest groups testified against it."); Mullenix, *Good Rulemaking*, *supra* note 28, at 104 ("Almost all of the critical commentary regarding proposed 23(f) emanated from the plaintiffs' bar.").

70. Solimine & Hines, *supra* note 1, at 1565–66.

71. Freer, *Interlocutory Review*, *supra* note 9, at 14.

Supporters were primarily affiliated with defense interests.[72] Relying on the conventional wisdom that class certification effectively resolved the lawsuit—the case would be either settled or abandoned—supporters argued that appellate review must be immediate if it is to happen at all.[73] Supporters also argued that existing avenues for appellate review—§ 1292(b) and mandamus—were inadequate.[74]

No one knew exactly how Rule 23(f) would work.[75] And we still don't. Despite two decades of experience, views remain mixed.

Some suggest that the rule is "working well."[76] Shortly after Rule 23(f)'s addition, one commentator said that it "has been a relatively successful rule amendment."[77] Another suggested that the new rule was leading to increased appellate review of class-certification decisions, which, in turn, was clarifying the doctrine and producing more uniform results.[78] A more recent comment observed that "[t]he rule now seems to enjoy a happy (if dull) reputation as a paragon of sound rulemaking, plugging a sorely needed gap in appellate oversight and fostering the development of a body of appellate jurisprudence on important class action issues."[79]

But most opinions are negative. And those negative opinions are split on what exactly is wrong.

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72. *See* Hines, *Mirroring*, *supra* note 2, at 1074.

73. Solimine & Hines, *supra* note 1, at 1565.

74. *Id.*

75. Gould, *supra* note 29, at 338 ("[O]nly experience over time will tell whether the rule will achieve its laudable goals on the one hand, carve out an unbounded exception to the final judgment rule on the other, or simply become another seldom-used, ineffectual relic of the appellate process not unlike its interlocutory appeal procedure model, 28 U.S.C. § 1292(b).").

76. Cooper, *Past and Future*, *supra* note 5, at 434.

77. Mullenix, *Good Rulemaking*, *supra* note 28, at 100.

78. Cooper, *Past and Future*, *supra* note 5, at 434; *see also* 16 WRIGHT, MILLER & COOPER, *supra* note 1, § 3931.1 ("The early years [of Rule 23(f)], at least, have been a success.").

79. Hines, *Mirroring*, *supra* note 2, at 1035; *see also* Daniel B. Rogers, *Rule 23(f) after 16 Years*, 34 APP. PRAC. 12, 17 (Fall 2014) (Rule 23(f) "has liberalized the right to immediate appeals of certification decisions, dispensing with the restrictive mandamus procedure. It has also created a better body of law on the propriety of certification under Rule 23.").

One side consisting mostly of academics contends that Rule 23(f) favors defendants.[80] They argue that the rule operates to protect defendants, who use it to seek and obtain appellate reversal of district court decisions to certify a class.[81] They also contend that courts have used the rule to restrict the availability of class certification by not only reversing grants of class certification but also by moving class-action law to be more favorable to defendants.[82]

On the other side, defense-advocacy groups have argued that Rule 23(f) does not protect defendants enough. These groups criticize what they see as courts' inconsistent application of Rule 23(f).[83] Those inconsistencies exist, they argue, both between circuits and in parties' success rates.[84] And these inconsistencies, defense groups argue, can be remedied only by amending Rule 23(f) to provide for a *right* to appeal class-certification decisions rather than the current discretionary regime.[85]

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80. *See* Hines, *Mirroring*, *supra* note 2, at 1074 ("[T]he substantive effect of the [rule] appears to favor defendants opposed to class certification.").

81. *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 855–86 (2017) ("There are contemporary risks to a class certification ruling today that were not present in the classic era: Since 2003, Rule 23(f) has provided an avenue for bringing an interlocutory appellate challenge to class certification determinations."); Klonoff, *Decline*, *supra* note 7, at 741 (noting that "in terms of sheer numbers, Rule 23(f) has served primarily as a device to protect defendants" and "defendants have benefited more from Rule 23(f) than have plaintiffs"); Malveaux, *National Injunction*, *supra* note 7, at 59 (noting "the significant hurdles erected over the last fifty years," including "interlocutory appellate review of certification determinations"); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1358 (2003) ("Circuit courts began protecting defendants as soon as [Rule 23(f)] took effect," such that "[a] plaintiff who prevails on a certification motion in a trial court must expect to lose on appeal.").

82. *See* Marcus, *Mass Tort Class Action*, *supra* note 7, at 1595 (stating that Rule 23(f) "has developed to constrain district court power to certify classes"); *id.* ("For most of Rule 23(f)'s existence, conservatives have dominated the courts of appeals, with predictable results for class action doctrine.").

83. Lawyers for Civil Justice et al., *Restore a Relationship*, *supra* note 8, at 17.

84. *Id.*; *see also* Lawyers for Civil Justice, *Amending Rule 23*, *supra* note 8, at 3.

85. *See* Lawyers for Civil Justice, *Amending Rule 23*, *supra* note 8; DEF. RSCH. INST., *supra* note 8; Lawyers for Civil Justice et al., *Restore a Relationship*, *supra* note 8; *see also* Douglas P. Baumstein & Andrew A. Spievack, *Class*

D. Prior Empirical Work

Despite the variety of opinions on Rule 23(f), little reliable information exists on how courts have applied it. There have been some studies of Rule 23(f). But those studies have been either limited in their design—looking only to published decisions and not to the universe of petitions—or have uncertain reliability. And no one has put the available data to rigorous empirical analysis.

Two studies—one by Richard Freer and another by Robert Klonoff—looked to merits decisions after courts grant Rule 23(f) petitions to appeal.[86] Both found that most decisions reviewed district court orders that certified a class.[87] That is, the courts of appeals granted more defendant-filed petitions to appeal than they did plaintiff-filed petitions. Both also found a high reversal rate, with most reversals coming when district courts certified a class and defendants appealed.[88] And both saw some favoritism towards defendants. "The net effect" of Rule 23(f), Freer concluded, "has undoubtedly been to reduce class litigation in the federal system," which "suggests that those who thought Rule 23(f) would have an overall beneficial effect for defendants understood how seemingly neutral procedural devices may affect outcomes in particular ways."[89] Klonoff concluded that "with respect to appellate court review pursuant to Rule 23(f),

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Certification Appeals Under Federal Rule of Civil Procedure 23(f): Delivering on the Promise of Expanded Class Action Review, BNA CLASS ACTION LITIG. REP. (March 17, 2014).

86. I use the term "merits decisions" to refer to appellate opinions evaluating the merits of class certification.

87. Freer, *Interlocutory Review*, *supra* note 9, at 19 (finding that 72.5% of merits decisions were appeals from district court orders certifying a class, which were almost entirely brought by defendants; 27.5% reviewed orders denying certification); Klonoff, *Decline*, *supra* note 7, at 741 (finding that 69% of merits decisions were appeals from district court orders certifying a class). Freer looked at decisions through 2007, while Klonoff looked at decisions through 2012.

88. Freer, *Interlocutory Review*, *supra* note 9, at 19–20; Klonoff, *Decline*, *supra* note 7, at 741.

89. Freer, *Interlocutory Review*, *supra* note 9, at 21.

defendants have benefited more from Rule 23(f) than have plaintiffs."[90]

By design, Freer and Klonoff looked only at decisions on the merits of class certification after a Rule 23(f) petition to appeal was granted. They did not look to the petitions to appeal themselves. So their studies address only one aspect of Rule 23(f). And that one aspect might not tell the whole story. Most Rule 23(f) petitions are denied in brief orders that never make it into Westlaw or Lexis.[91] Docket studies are thus required to get a full picture of Rule 23(f).

There have been two docket studies to date, one by Barry Sullivan and Amy Kobelski Trueblood—of petitions filed from Rule 23(f)'s addition through October 2006—and another by a team of attorneys at the Skadden law firm—of petitions filed where Sullivan and Trueblood left off through December 2013.[92] Sullivan and Trueblood found that only 36% of petitions were granted.[93] But those grants, they determined, favored defendants; defendants' petitions were granted at a higher rate (45%) than those of plaintiffs (22%).[94] The Skadden study concluded that the grant rate had dropped in the subsequent seven years from 36% to 25%.[95] It framed this drop as disproportionately affecting defendants; the grant rate for defendants had dropped from 45% to 24.8%, while the grant rate for plaintiffs had dropped only from 22% to 20.5%.[96] Although the merits decisions still favored defendants, the Skadden study

90. Klonoff, *Decline*, *supra* note 7, at 741.

91. Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 284 (2008) (finding that only 10% of decisions accepting or rejecting a Rule 23(f) petition were available by searching published or electronically available opinions).

92. *Id.* at 283; John H. Beisner, Jessica D. Miller, Geoffrey M. Wyatt & Milton P. Wilkins, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* (April 29, 2014), *available at* https://files.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%2Fstudy_reveals_us_courts_of%20appeal_are_less_receptive_to_reviewing_class_certification_rulings.pdf.

93. Sullivan & Trueblood, *supra* note 91, at 284.

94. *Id.* at 286, 290.

95. Beisner et al., *supra* note 92.

96. *Id.*

also found that plaintiffs were prevailing more than they were in the period studied by Sullivan and Trueblood.[97]

These docket studies are valuable in that they look to the universe of Rule 23(f) decisions, not just post-petition appellate decisions on the propriety of class certification. But they, too, have their limits. One unknown is the comprehensiveness of the data studied. Sullivan and Trueblood searched dockets for variations on "23(f)."[98] But as I explain in the Appendix, running that search today would not capture all Rule 23(f) petitions since not every circuit includes a variation on that term in its dockets. And the Skadden study does not explain its data-collection method.[99] So we simply don't know how reliable this study is.

III. RULE 23(F), 2013–17

To learn about Rule 23(f), I built a dataset of Rule 23(f) petitions. I leave many of the details of my collection and coding to the Appendix. Briefly, I attempted to collect every Rule 23(f) petition to appeal that was filed in the five years from 2013 through the end of 2017. I used this data both to get a sense of how Rule 23(f) has operated in the courts of appeals in those years and to see if the data supported the rule's criticisms.

I present both my findings and my analysis in this Part. I begin with some basic numbers. I then analyze the data to look for evidence supporting two criticisms of Rule 23(f). I first looked for "party effects"—evidence that courts favor defendants over plaintiffs in the Rule 23(f) context. I then looked for "circuit effects"—evidence of a connection between the circuit in which a petition is filed and the court's decision. I save for the next Part what the data on Rule 23(f) can tell us about class actions generally.

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97. *Id.*

98. The specific docket search was for the terms "23(f)," "p.23(f)," and "p23(f)." Sullivan & Trueblood, *supra* note 91, at 283.

99. I emailed Beisner, Miller, and Wyatt on July 2, 2019, and July 29, 2019, but I received no response. I could not find contact information for Wilkins.

A. Some Basics

Overall, courts granted about 25% of Rule 23(f) petitions to appeal. In the five years I studied, parties filed 856 Rule 23(f) petitions to appeal. But the courts of appeals did not decide every one of those petitions. Some were abandoned or withdrawn, and some were decided on grounds other than whether an interlocutory appeal was appropriate (e.g., the case was not a class action and so Rule 23(f) did not apply). The courts of appeals granted or denied 771 (about 90%) of these petitions. I often refer to the decisions to grant or deny a petition to appeal as "grant decisions." Of the 771 decided petitions, 190 were granted for an overall grant rate of 25%.

Table 1. Grant Rate

	Denied	Granted	Total	Grant Rate
Total	581	190	771	25%

In the 190 appeals that came after courts granted a Rule 23(f) petition to appeal, courts reviewed the merits of the district court's class-certification decision in 137 (72%). Most of the remaining 53 appeals were abandoned, withdrawn, or decided on grounds other than the propriety of class certification. A few remained pending at the close of my study period. In the 137 merits decisions, courts affirmed the district court 63 times and reversed or vacated (in whole or in part) 74 times. For simplicity's sake, I hereafter refer to all decisions that modify the district court's decision—reversed or vacated, in whole or in part—as reversals. So the overall reversal rate was about 54%.

Table 2. Reversal Rate

	Affirmed	Reversed	Total	Reversal Rate
Total	63	74	137	54%

B. Party Effects

Rule 23(f) could favor defendants in a variety of ways. I focus here on outcomes in the Rule 23(f) context. The Rule 23(f) context includes two potentially relevant stages and outcomes. First is the grant decision: the appellate court's decision to grant or deny the Rule 23(f) petition to appeal. Second—if that petition to appeal is granted—is the merits decision: the appellate court's decision to affirm or reverse the district court's class-certification decision. If courts favor defendants in the Rule 23(f) context, then we would expect defendants to prevail at both stages more often than plaintiffs do.

Outcomes are, of course, not the only way in which Rule 23(f) might favor defendants. I discuss some of the other ways it might do so below. But outcomes are an important measure, as the result of Rule 23(f) proceedings can determine who prevails in the suit. Recall that the class-certification decision is often thought to be the entire game in a case brought as a class action.[100] If a class is certified, the defendant will likely settle. That's a victory for the class. But if no class is certified, the plaintiff will probably abandon its claims (or settle for a relatively small amount). That's a loss for the class.[101]

Rule 23(f) is thus a key stage in the class-certification decision. At the end of any Rule 23(f) proceeding, a class is either certified or it is not. And if we assume that the appellate court's decision is the last word on the propriety of class certification, then the appellate court's decision determines who wins. Excluding petitions and appeals that are abandoned, withdrawn, dismissed, or decided on some other, irrelevant ground, there are six possible paths to a class victory or loss. Three of those paths result in a class victory:

100. *But see* Burbank & Farhang, *supra* note 1, at 81, 90.

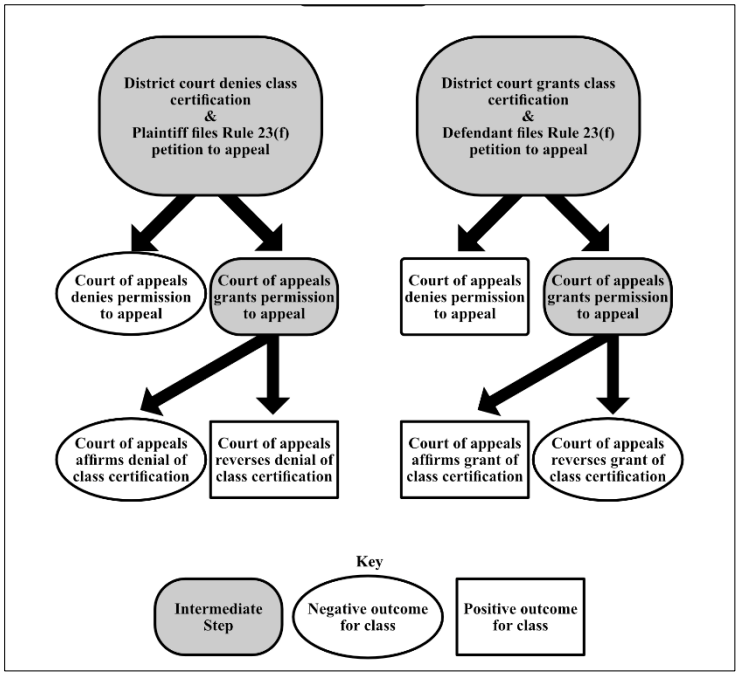
101. When class certification is denied, there is technically no class that can lose. But as a practical matter, the members of the class will not recover via that class action.

- The district court certifies a class, and the appellate court denies the defendant's petition for permission to appeal.
- The district court certifies a class, the appellate court grants the defendant's petition for permission to appeal, and the appellate court then affirms the district court's grant of class certification.
- The district court denies class certification, the appellate court grants the plaintiff's petition for permission to appeal, and the appellate court then reverses the district court's denial of class certification.

Three paths result in a class defeat:

- The district court denies class certification, and the appellate court denies the plaintiff's petition for permission to appeal.
- The district court denies class certification, the appellate court grants the plaintiff's petition for permission to appeal, and the appellate court then affirms the district court's denial of class certification.
- The district court certifies a class, the appellate court grants the defendant's petition for permission to appeal, and the appellate court then reverses the district court's grant of class certification.

The following figure illustrates these paths:



Granted, appellate courts probably do not always have the last say on class certification. A court of appeals might reverse a district court's decision to certify a class and, on remand, that district court might again certify the class. The same could occur with a district court's decision to deny class certification. But outcomes are still a relevant and important way in which courts might favor defendants in the Rule 23(f) context.

So what does the data tell us?

1. Grant Decisions

As shown in Table 3, the courts of appeals granted defendants' Rule 23(f) petitions to appeal at a higher rate than plaintiffs' petitions. Plaintiffs filed 341 petitions, and courts granted or denied 302 of them. Of those 302 decided petitions, courts granted 64, for an overall grant rate of 21%. Defendants filed 515 petitions—about 50% more than plaintiffs did—and courts decided 469 of

them. Of those 469 decided petitions, courts granted 126, for an overall grant rate of 27%. The grant rate was thus different for plaintiffs and defendants across the five years studied.

Table 3. Party/Grants

	Denied	Granted	Total	Grant Rate
Plaintiffs	238	64	302	21%
Defendants	343	126	469	27%
Total	581	190	771	25%

But the difference—21% versus 27%—isn't huge. And the difference alone does not mean that that courts are favoring defendants in the Rule 23(f) context. The differences could be due to a variety of factors, such as case types (*e.g.*, consumer, employment, civil rights), class types (*e.g.*, injunctive relief, damages), class size, and the amount of damages (if any) the class seeks. Or they could be due to chance. The data requires some analysis to determine whether it supports Rule 23(f)'s critics.[102]

One way of assessing this difference is a chi-square test of independence. This test determines whether a relationship exists between two nominal variables.[103] Performing the test first requires formulating two hypotheses: the null hypothesis and the alternative hypothesis. The null hypothesis suggests that no relationship exists, while the alternative suggests that one does. A chi-

102. Although I am working with close to an entire population and not a sample, statistical analysis is still valid to evaluate the data as a subset of a super population: all past and future Rule 23(f) decisions. *Cf.* John R. Allison & Mark A. Lemley, *How Federal Circuit Judges Vote in Patent Validity Cases*, 27 FLA. ST. U. L. REV. 745, 748 (2000) (using an entire population to both describe the population and—treating the population "population as a subset of an indeterminate" super population "consisting of final reported Federal Circuit patent validity decisions across a range of time . . . apply[ing] the techniques of statistical inference to the population to test a number of hypotheses about the relationship between various factors in the super population"); *see also* Christian A. Chu, *Empirical Analysis of the Federal Circuit's Claim Construction Trends*, 16 BERKELEY TECH. L.J. 1075, 1094 (2001) (using an entire population to both "generate descriptive data statistics and perform statistical testing"); Lee Petherbridge, *On the Decline of the Doctrine of Equivalents*, 31 CARDOZO L. REV. 1371, 1380 n.42 (2010) (same).

103. *See* TILMAN M. DAVIES, THE BOOK OF R 415 (2016).

square test produces a p-value, which gives the probability of obtaining the observed difference (or a more extreme difference) even if the null hypothesis is true, *i.e.*, no relationship exists between the variables.[104]

I accordingly ran a Pearson's chi-square test of independence to test the hypothesis that courts favor defendants in the outcome of Rule 23(f) petitions to appeal. Two nominal variables exist: the petitioning party (plaintiff or defendant) and the decision on the Rule 23(f) petition to appeal (grant or deny). The null hypothesis is that the petitioning party does not affect the decision to grant a petition. The alternative hypothesis is that it does.

I found little evidence that courts favor defendants in granting Rule 23(f) petitions for permission to appeal. The test produced a p-value of 0.074.[105] This value borders on that normally thought to be significant: $p < 0.05$. But the selection of a minimum p-value and a declaration of significance is somewhat arbitrary.[106] Rather than say whether the difference is significant or not, it's better to understand what this p-value of 0.074 means.

Again, the p-value is the likelihood of obtaining these (or more extreme) results even if the null hypothesis is true. So in the context of grant rates for Rule 23(f) petitions, if the null hypothesis is true—courts don't favor either side in Rule 23(f) grant decisions—we would still get these differences in grant rates (or more extreme differences) 7.4% of the time. The data thus provides only weak evidence for rejecting the null hypothesis. And, as discussed below, even this tepid conclusion comes with some caveats.[107]

2. Merits Decisions

As shown in Table 4, virtually no difference exists in merits decisions. When a court of appeals granted a

104. *See* ALEX REINHART, STATISTICS DONE WRONG 8 (2015).

105. All tests were performed using R statistical software. An R Markdown notebook of my calculations is available on the same GitHub page as my data.

106. *See* REINHART, *supra* note 104, at 56.

107. *See infra* Part III.B.4.

plaintiff's petition to appeal an order denying class certification, the court reversed 24 out of 45 times for an overall reversal rate of 53%. When a court of appeals granted a defendant's petition to appeal an order granting class certification, the court reversed 50 out of 92 times for an overall reversal rate of 54%.[108] The reversals rates were thus almost identical.

Table 4. Party/Reversals

	Affirmed	Reversed	Total	Reversal Rate
Plaintiffs	21	24	45	53%
Defendants	42	50	92	54%
Total	63	74	137	54%

Looking for evidence that this slight difference was due to the petitioning party, I again ran a Pearson's chi-squared test of independence to assess whether the petitioning party (plaintiff or defendant) affected the court's decision (affirm or reverse). The null hypothesis is that the petitioning party does not affect the decision. The alternative hypothesis is that it does.

The test produced a p-value of 0.911. In other words, if the null hypothesis is true—courts don't favor either side in Rule 23(f) merits decisions—we would still get these differences (or more extreme ones) 91.1% of the time. The numbers thus provide essentially no evidence that courts favor defendants over plaintiffs in the Rule 23(f) context when it comes to reviewing the district court's class-certification decision.

3. Party Effects by Circuit

The two analyses above looked at national numbers and found little evidence of party effects. But perhaps some circuits treat plaintiffs and defendants differently. To assess this, I compared the grants and reversals for plaintiffs and defendants in each circuit.

108. Recall that of the 190 petitions to appeal in my dataset that courts granted, 53 were abandoned, withdrawn, decided on non-class-certification grounds, or were still pending when I closed my dataset.

Like the national numbers, some differences existed in the rate at which each circuit granted plaintiffs' and defendants' Rule 23(f) petitions to appeal and, when those petitions were granted, reversed on the merits of class certification.

Table 5. Party/Grants, by Circuit

	Plaintiffs				Defendants			
	Denied	Granted	Total	Grant Rate	Denied	Granted	Total	Grant Rate
1st Cir.	7	0	7	0%	8	4	12	33%
2d Cir.	21	6	27	22%	45	24	69	35%
3d Cir.	25	10	35	29%	17	9	26	35%
4th Cir.	4	1	5	20%	20	8	28	29%
5th Cir.	7	2	9	22%	6	11	17	65%
6th Cir.	13	2	15	13%	27	7	34	21%
7th Cir.	27	12	39	31%	31	11	42	26%
8th Cir.	12	2	14	14%	35	9	44	20%
9th Cir.	100	23	123	19%	118	24	142	17%
10th Cir.	7	0	7	0%	14	11	25	44%
11th Cir.	12	5	17	29%	19	8	27	30%
D.C. Cir.	3	1	4	25%	3	0	3	0%
Total	238	64	302	21%	343	126	469	27%

Table 6. Party/Reversals, by Circuit

	Plaintiffs				Defendants			
	Affirmed	Reversed	Total	Reversal Rate	Affirmed	Reversed	Total	Reversal Rate
1st Cir.	0	0	0	-	2	1	3	33%
2d Cir.	3	1	4	25%	6	14	20	70%
3d Cir.	2	6	8	75%	3	4	7	57%
4th Cir.	0	1	1	100%	0	6	6	100%
5th Cir.	2	0	2	0%	4	3	7	43%
6th Cir.	1	1	2	50%	3	1	4	25%
7th Cir.	2	8	10	80%	6	5	11	45%
8th Cir.	1	0	1	0%	2	5	7	71%
9th Cir.	8	5	13	38%	11	6	17	35%
10th Cir.	0	0	0	-	2	3	5	60%
11th Cir.	2	2	4	50%	3	2	5	40%
D.C. Cir.	0	0	0	-	0	0	0	-
Total	21	24	45	53%	42	50	92	54%

But the numbers again provided little evidence of party effects. The analysis was similar to that for national differences; the null hypothesis was that party identity and the court's decision were independent, while the alternative hypothesis was that they were not.[109]

109. Because some circuits had low numbers of Rule 23(f) petitions, I computed p-values via a Monte Carlo simulation. A chi-squared test normally requires expected values of at least 5. A few of the comparisons did not meet this threshold. But I accounted for that using simulated p-values via a Monte Carlo simulation, which analyzes multiple (in my case, 2,000) random samples from the data. I alternatively could have tested for independence using a Fisher exact test.

Looking first at grants, the test produced the following p-values for each circuit.

Table 7. Party/Grants p-values, by Circuit

Circuit	p-value
1st Cir.	0.239
2d Cir.	0.322
3d Cir.	0.770
4th Cir.	1.000
5th Cir.	0.103
6th Cir.	0.692
7th Cir.	0.805
8th Cir.	0.702
9th Cir.	0.751
10th Cir.	0.061
11th Cir.	1.000
D.C. Cir.	1.000

At first glance, only the Tenth Circuit has p-value (0.061) below anything that might be considered marginally significant. And the Fifth Circuit (0.103) just misses the normal cutoff for marginal significance. But again, it's better to understand what these values mean. Even if the null hypothesis is true—party identity and the court's decision are independent—there's still a 6.1% chance of finding the same (or a more extreme) difference in the Tenth Circuit and a 10.3% chance of finding the same (or a more extreme) difference in the Fifth Circuit.

Further, these comparisons require some caution. By running 12 different comparisons, I've increased the likelihood of a false positive.[110] Each comparison comes with a likelihood of a false positive. Multiple comparisons thus mean multiple chances for a false positive, with each comparison increasing the chances of a false positive.

I could account for the increased likelihood of a false positive by correcting for multiple comparisons. Statisticians have developed various ways for doing so.[111] But

110. *See* REINHART, *supra* note 104, at 49. If looking for significance at a $p < 0.05$ level, running 12 comparisons to test 12 independent hypotheses comes with a false-positive probability of about 46% $(1-(1-0.05)^{12})$.

111. *See* REINHART, *supra* note 104, at 50–53.

corrections can also produce a very low threshold p-value. Both a Bonferroni correction and a Benjamini-Hochberg correction would require a p-value < 0.004 for the results to be significant at a $p < 0.05$ level. Such a low threshold p-value increases the risk of a false negative.

The ultimate interpretation of these numbers is thus up to the reader. At most, however, the numbers provide only weak evidence of party effects in the Tenth Circuit, and essentially no evidence of party effects elsewhere.

What about reversals? The test produced the following p-values for each circuit.[112]

Table 8. Party/Reversals p-values, by Circuit

Circuit	p-value
1st Cir.	NA
2d Cir.	0.255
3d Cir.	0.610
4th Cir.	NA
5th Cir.	0.496
6th Cir.	1.000
7th Cir.	0.186
8th Cir.	0.370
9th Cir.	1.000
10th Cir.	NA
11th Cir.	1.000

Even without any correction, none of these results provide much evidence of party effects.

The data thus provides little evidence that any individual circuit treats plaintiffs and defendants differently when it comes to reviewing the merits of class certification in the Rule 23(f) context.

4. Caveats

Even the little evidence that I found comes with some caveats. Rule 23(f) petitions might favor defendants by adding cost and delay to litigation, and Rule 23(f) appeals might create opportunities to create defendant-favorable precedent. And dividing up Rule 23(f) petitions

112. I excluded the D.C. Circuit from reversal analyses because it granted only one petition to appeal in the study period and the petition had not yet been decided at the close of my study period. The First, Fourth, and Tenth Circuits also did not have enough decisions to calculate a p-value.

by other variables—such as case type or class type—might produce different results.

As mentioned above, outcomes are not the only way in which Rule 23(f) might favor defendants. Allowing parties to petition for review of class-certification decisions can add to the cost, delay, and difficulty in adjudicating class actions. Briefing and responding to the petition to appeal requires work, and that work increases if the appellate court grants the petition and hears the full appeal. If district court proceedings are not stayed, the parties face the inconvenience of simultaneously litigating in two forums. And if district court proceedings are stayed, that can grind the litigation to a halt while the petition to appeal and perhaps even the full appeal are decided.[113] Conventional wisdom is that increased cost, delay, and difficulty inure to the benefit of well-resourced defendants.[114] So the mere existence of Rule 23(f) might favor defendants in that it can add delay, expense, and difficulty.

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113. Stays *should* be infrequent at the petition stage, as Rule 23(f) specifies that a petition should not automatically stay district court proceedings without an order from the district court or court of appeals. *See* 16 WRIGHT, MILLER & COOPER, *supra* note 1, § 3931.1 ("This provision means that an interlocutory appeal is less likely than a § 1292(b) appeal to interfere with the steady progress of the case."). *But see* Carroll, *Aggregation for Me*, *supra* note 21, at 2034 n.90 ("[A] district court concerned with managing its docket will think twice before devoting significant time and attention to a case in which its certification decision might be reversed."); Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, at 19 (2019 draft), *available at* https://ssrn.com/abstract=3403834 (suggesting that Rule 23(f) appeals "grind[] everything to a halt for years").

114. As Joanna Schwartz has explained in the context of interlocutory qualified-immunity appeals, interlocutory appeals are at best an inconvenience for the appellee, but they can also damage a case. Attorneys have:

> [T]he uncomfortable choice of either continuing to prepare for an uncertain trial while the case is on interlocutory appeal, or growing unfamiliar with the case in the year or more that it is on appeal and relearning its details again later in preparation for trial. Witnesses' recollections of critical facts may fade over the months or years that qualified immunity motions are litigated and appealed. And interlocutory appeals require attorneys to brief and argue their cases in a court of appeals—a setting that may be less familiar and less comfortable than a district court for some attorneys.

Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. U. L. REV. 1101, 1122 (2020) (footnotes omitted).

My data sheds some light on delay. I recorded the time to decision for both the petition-to-appeal and—when that petition was granted—decision-on-the-merits stages. Petitions, it seems, are often decided relatively quickly. But the time between granting a petition to appeal and a decision on the merits of class certification is much longer. Combined, Rule 23(f) proceedings can add a significant chunk of time to some cases.

As for grant decisions, courts took an average of 80 days to decide a Rule 23(f) petition.[115] But the average doesn't tell the whole story. Some petitions took an extremely long time to decide; the longest in my dataset took 828 days.[116] A more helpful data point is the percentage of petitions decided within a certain amount of time. As can be seen in Table 9, 87% of petitions were decided within 120 days of being filed. Ninety-four percent were decided within 150 days. So almost all Rule 23(f) petitions were decided within five months.

115. This analysis excludes cases in which the court did not decide whether to grant the petition to appeal, e.g., when the parties withdrew or abandoned their petition.

116. *See* Richardson v. Kane, No. 13-8046 (3d Cir.). According to the docket, the Third Circuit held the petition in abeyance for almost two years pending its decision in *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015). Three months after *Shelton*, the Third Circuit directed the parties in *Richardson* to file letter briefs addressing the decision's impact on their case. The Third Circuit then granted the petition about four months later.

Table 9. Time to Decision, Petitions

Days	# Decided	Cumulative % Total
0–30	107	14%
31–60	210	41%
61–90	232	71%
91–120	122	87%
121–150	55	94%
151–180	17	96%
181–210	4	97%
211–240	4	97%
241–270	1	98%
271–300	2	98%
301–330	9	99%
331–360	0	99%
361+	8	100%
Total	771	-

In comparison to the average civil appeal, these decisions on Rule 23(f) petitions to appeal happen relatively quickly. The average non-prisoner civil appeal takes somewhere between 10 and 12 months to decide.[117] Nearly all Rule 23(f) petitions are thus decided in half the time (or less) that it takes to decide other non-prisoner civil appeals. This is not a perfect comparison; Rule 23(f) petitions are briefed on a much shorter schedule, and this different schedule must account for part of the

117. These numbers come from the data on "Other (non-prisoner) civil appeals, Notice to last opinion/order" in Table B-4A, *Median Time Intervals in Months for Merit Terminations of Appeals Arising From the U.S. District Courts, by Circuit, During the 12-Month Period Ending September 3*, of the annual Federal Judicial Caseload Statistics. *See, e.g.*, Table B-4A 2018, https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2018.pdf (11.4 months) (last visited Feb. 20, 2022); Table B-4A 2017, https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2017.pdf (12.1 months) (last visited Feb. 20, 2022); Table B-4A, https://www.uscourts.gov/sites/default/files/data_tables/B04ASep15.pdf (10.8 months) (last visited Feb. 20, 2022).

disparity. It still appears, however, that Rule 23(f) petition decisions are made relatively rapidly.

But when courts grant a Rule 23(f) petition, the merits decision can add significant time. On average, 457 days passed between the grant of a Rule 23(f) petition and a decision on the merits of class certification. Again, there was a range; the quickest merits decision took 22 days, while the longest took 999.[118] Table 10 shows the number of merits decisions within several time periods and the cumulative percentage of cases decided by the end of those spans.

Table 10. Time to Decision, Merits

Days	# Decided	Cumulative % Total
0–90	5	4%
91–180	9	10%
181–270	8	16%
271–360	30	38%
361–450	35	64%
451–540	15	74%
541–630	12	83%
631–720	8	89%
721–810	7	94%
811–900	2	96%
900+	6	100%
All	137	-

So deciding the merits of class certification can take a substantial amount of time. When you add the time it

118. I excluded from this analysis cases in which the court simultaneously granted the Rule 23(f) petition and decided the merits of class certification. Also excluded were the six consolidated petitions resolved in *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014). The *EQT Production* court deferred ruling on the Rule 23(f) petitions, opened a merits docket, and directed the parties to brief the merits. So these petitions were filed in October 2013, the merits docket was opened in November 2013, and both the petitions and the merits were simultaneously resolved in August 2014.

took the court to decide the Rule 23(f) petition, the potential for delay is even greater. When courts granted the Rule 23(f) petition and reviewed the merits of class certification, an average of 506 days—over 16 months—passed between the petition and the merits decision. Granted, this circumstance describes only 137 petitions in my dataset; in most cases, the court of appeals denied permission to appeal in a relatively short amount of time. But in those 137 instances, the potential for delay is significant.

A similar caveat concerns defendant-favorable precedent, which my study does not address. Rule 23(f) might indirectly favor defendants by producing more defendant-favorable precedent. The rule creates new opportunities for the courts of appeals to develop the law of class actions. And that law might predominantly favor one side. Decisions holding that a class action is not appropriate might set out new or changed rules that make future class adjudication more difficult, while decisions holding that a class action is appropriate might involve only the application of the law to the specific facts of a plaintiff's suit with little precedential effect.[119] Regardless of how often defendants or plaintiffs win, the body of precedent could shift in favor of one side. That shift would influence future decisions and could even discourage potential plaintiffs from pursuing a class action.

My study says nothing about defendant-favoring precedent because it does not look to the content of decisions. A qualitative study of the merits decisions would provide insight on how decisions after Rule 23(f) petitions have affected the class-action landscape.

Further, even the marginal evidence of party effects comes with a caveat. Other variables might affect courts' decisions in this context, such as the case type, class type, class size, and (in damages class actions) the size of the potential damages. For example, courts might favor plaintiffs in some kinds of cases (e.g., consumer torts) but

119. *See, e.g.*, Wal-Mart Stores v. Dukes, 564 U.S. 338 (2011) (reviewing Dukes v. Wal-Mart Stores, 603 F.3d 571, 578 (9th Cir. 2010) (reviewing class certification after granting a Rule 23(f) petition to appeal)).

defendants in others (e.g., employment). Or courts might be more willing to certify injunctive-relief class actions than they are damages class actions.[120] It's entirely possible that different tendencies in different case or class types offset to create an appearance of only marginal differences. Future research in this area could more granularly code petitions to appeal to account for these other variables and gauge their possible effects on court's decisions.

Finally, these tests say nothing about the practical (as opposed to statistical) significance of any differences. Consider the difference in grant rates—27% for defendants, 21% for plaintiffs. That's a difference. But it's debatable whether that disparity is large enough to support the criticism that Rule 23(f) favors defendants enough that Rule 23(f) should be changed.

C. Circuit Effects

Critics of Rule 23(f) also contend that the circuits are inconsistent in their application of Rule 23(f).[121] Like party effects, circuit effects might manifest in different ways. One way in is different grant and reversal rates in the circuits. That is, some circuits might be more generous in granting Rule 23(f) petitions to appeal while others are less so. And when they grant these petitions, some circuits might reverse district courts' class-certification decisions at a higher rate than others.

1. Grants

Let's again look at grants first. Differences existed in the number of petitions each circuit decided and the rate at which they granted those petitions. The number of petitions decided ranged from a high of 265 in the Ninth Circuit to a low of 7 in the D.C. Circuit. The grant

120. *See generally* Carroll, *Class Action Myopia*, *supra* note 21 (explaining the need to differentiate the various kinds of class actions).

121. *See supra* Part II.C.

rate also varied, with a high of 50% in the Fifth Circuit and a low of 14% in the D.C. Circuit.

Table 11. Grant Rate, by Circuit

Circuit	Denied	Granted	Total	Grant Rate
1st Cir.	15	4	19	21%
2d Cir.	66	30	96	31%
3d Cir.	42	19	61	31%
4th Cir.	24	9	33	27%
5th Cir.	13	13	26	50%
6th Cir.	40	9	49	18%
7th Cir.	58	23	81	28%
8th Cir.	47	11	58	19%
9th Cir.	218	47	265	18%
10th Cir.	21	11	32	34%
11th Cir.	31	13	44	30%
D.C. Cir.	6	1	7	14%
Total	581	190	771	25%

The criticism of circuit inconsistencies suggests a relationship between the circuit and the decision to grant or deny a Rule 23(f) petition to appeal, with some circuits granting petitions at significantly different rates from the national average. I ran two kinds of tests to dig into the differences.

First was an exact binomial test. The exact binomial test looks for meaningful deviations from an expected mean.[122] Like the chi-square test of independence, it involves two hypotheses: a null hypothesis that two events are equally likely to occur and an alternative hypothesis that they are not.[123] Also like the chi-square test, the binomial exact test produces a p-value, which gives the probability of obtaining the observed difference (or a more extreme difference) even if the null hypothesis is true, *i.e.*, the events are equally likely to occur.[124]

I used an exact binomial test to compare each circuit's grant rate to the national rate.

122. *Binomial test and 96% confidence interval (CI) using SPSS Statistics* , LÆRD STATISTICS, https://statistics.laerd.com/spss-tutorials/binomial-test-using-spss-statistics.php.

123. *Id.*

124. *See supra* Part III.B.1.

Table 12. Circuit/Grants versus National p-values

Circuit	p-value
1st Cir.	1.000
2d Cir.	0.154
3d Cir.	0.237
4th Cir.	0.690
5th Cir.	0.005
6th Cir.	0.407
7th Cir.	0.440
8th Cir.	0.363
9th Cir.	0.008
10th Cir.	0.218
11th Cir.	0.484
D.C. Cir.	1.000

The test produced two circuits with potentially significant p-values: the Fifth ($p = 0.005$) and Ninth ($p = 0.008$). But the multiple comparisons increase the risk of a false positive, suggesting that some correction is necessary. With 12 comparisons, a Bonferroni correction requires a p-value < 0.004 for the results to be significant at the $p < 0.05$ level, and a Benjamini-Hochberg correction requires a p-value < 0.0083 for the results to be significant at the $p < 0.05$ level. Depending on the correction used, the Fifth and Ninth circuits are close to or below the 0.05 level. The ultimate interpretation is left to the reader.

I then compared each pairing of circuits—66 in total—to assess the differences in grant rates. That is, I compared each circuit against all the other circuits (e.g., First versus Second, First versus Third, First versus Fourth, Second versus Third). I tested each pair with a Pearson's chi-squared test.[125]

125. I again computed p-values via a Monte Carlo simulation due to occasionally low expected values. *See supra* note 109.

Table 13. Circuit/Grants Pairwise Comparison

	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	D.C.
1st	NA											
2d	0.438	NA										
3d	0.572	1.000	NA									
4th	0.752	0.827	0.818	NA								
5th	0.071	0.099	0.134	0.105	NA							
6th	1.000	0.112	0.185	0.428	0.009	NA						
7th	0.593	0.727	0.863	1.000	0.062	0.219	NA					
8th	1.000	0.126	0.155	0.414	0.005	1.000	0.235	NA				
9th	0.737	0.005	0.022	0.228	0.000	1.000	0.038	0.842	NA			
10th	0.384	0.823	0.825	0.588	0.284	0.128	0.632	0.126	0.041	NA		
11th	0.573	0.836	1.000	1.000	0.116	0.231	1.000	0.240	0.105	0.803	NA	
D.C.	1.000	0.450	0.452	0.639	0.208	1.000	0.683	1.000	1.000	0.418	0.654	NA

The test produced some potential evidence of circuit effects. Looking to uncorrected p-values, there appears to be some pretty strong evidence that differences in grant rates are due to the court that decides the petitions to appeal. Comparing the Fifth Circuit's grant rate (50%) with the Sixth's (18%), Eighth's (19%), and Ninth's (18%) produces p-values < 0.05. Comparing that same grant rate with the First's (21%), Second's (31%), and Seventh's (28%) produces p-values < 0.1. And comparing the Ninth Circuit's grant rate (18%) with the Second's (31%), Third's (31%), Fifth's (50%), Seventh's (28%), and Tenth's (34%) produces p-values < 0.05.

But these results come with an immense caveat. In calculating these p-values, I performed 66 comparisons. This number of comparisons substantially increases the chance of false positives; performing 66 comparisons while looking for p-values < 0.05 produces a 97% chance of a false positive.[126] Both a Bonferroni correction and a Benjamini-Hochberg correction require that $p < 0.0008$ to be significant at a $p < 0.05$ level. Under either correction, only one difference—that between the Fifth and Ninth Circuits—is significant at the $p < 0.05$ level.

126. The math is $1-(1-0.05)^{66}$. *See* REINHART, *supra* note 104, at 49.

2. Reversals

What about reversals? Differences existed in the number of cases decided and the rate of reversals.[127]

Table 14. Reversal Rate, by Circuit

Circuit	Affirmed	Reversed	Total	Reversal Rate
1st Cir.	2	1	3	33%
2d Cir.	9	15	24	63%
3d Cir.	5	10	15	67%
4th Cir.	0	7	7	100%
5th Cir.	6	3	9	33%
6th Cir.	4	2	6	33%
7th Cir.	8	13	21	62%
8th Cir.	3	5	8	63%
9th Cir.	19	11	30	37%
10th Cir.	2	3	5	60%
11th Cir.	5	4	9	44%
Total	63	74	137	54%

The number of decisions ranged from 3 in the First Circuit to 30 in the Ninth. The rate of reversal also ranged from 33% in several circuits to a high of 100% in the Fourth Circuit.

The criticism of circuit inconsistencies suggests a relationship between the circuit and the decision to reverse the district court's class-certification decision in the Rule 23(f) context. I again ran two kinds of tests to dig into any differences. First, I ran exact binomial tests for each circuit to compare its reversal rate to the national average.

127. I again excluded the D.C. Circuit from the reversal rate comparison, as that court did not review the merits of class certification after granting a Rule 23(f) petition during my study period.

Table 15. Circuit/Reversals versus National p-values

Circuit	p-value
1st Cir.	0.598
2d Cir.	0.423
3d Cir.	0.439
4th Cir.	0.018
5th Cir.	0.318
6th Cir.	0.423
7th Cir.	0.518
8th Cir.	0.734
9th Cir.	0.067
10th Cir.	1.000
11th Cir.	0.741

Exact binomial tests produce one potentially significant result: The Fourth Circuit had an uncorrected p-value of 0.018. With 11 comparisons, both a Bonferroni correction and a Benjamini-Hochberg correction would require a p-value < 0.005 for a result to be significant at a $p < 0.05$ level. Applying that correction would accordingly mean that none of the differences were significant.

I then ran a pairwise comparison of each possible combination of circuits, testing each pair with a Pearson's chi-squared test.[128]

Table 16. Circuit/Reversal Pairwise Comparison

	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th
1st	NA										
2d	0.551	NA									
3d	0.531	1.000	NA								
4th	0.063	0.078	0.138	NA							
5th	1.000	0.245	0.213	0.010	NA						
6th	1.000	0.352	0.320	0.021	1.000	NA					
7th	0.559	1.000	1.000	0.146	0.231	0.356	NA				
8th	0.535	1.000	1.000	0.208	0.347	0.589	1.000	NA			
9th	1.000	0.101	0.100	0.003	1.000	1.000	0.094	0.256	NA		
10th	1.000	1.000	1.000	0.161	0.580	0.569	1.000	1.000	0.625	NA	
11th	1.000	0.425	0.399	0.036	1.000	1.000	0.440	0.631	0.725	1.000	NA

The test produced some potentially significant differences, all involving the Fourth Circuit.

128. I again computed p-values via a Monte Carlo simulation due to occasionally low expected values. *See supra* note 109.

But that result might be due to my study method. As described further in the Appendix, I counted each Rule 23(f) petition separately. So even if parties filed multiple petitions from a single district court decision and the court of appeals decided those petitions together, I counted them as separate petitions. Six of the seven reversals in the Fourth Circuit were from the same case and decided together. So a different counting method might count the Fourth Circuit as having two—not seven—reversals. That lower number of reversals would likely eliminate any potential significance.

And, again, we must consider the number comparisons. Performing 55 comparisons while looking for p-values < 0.05 produces a 94% chance of a false positive.[129] Both a Bonferroni correction and a Benjamini-Hochberg correction would require a p-value < 0.001 for a result to be significant at a $p < 0.05$ level. Under that correction, none of the comparisons was significant at the $p < 0.05$ level.

3. Caveats

Given the number of comparisons necessary to test circuit effects, false positives are a significant concern. But overly conservative corrections risk producing false negatives. The ultimate interpretation of the circuit-effects data must be left to the reader, taking into consideration the meaning of the given p-values and the potential for error in correcting (or not correcting) for multiple comparisons.

Further, any evidence of circuit effects necessarily comes with caveats similar to those for party effects.[130] The analysis again does not account for differences in case types, class types, class sizes, or (in a damages class) the amount of potential damages. It's entirely possible that different kinds of cases, classes, etc., end up in different circuits. And differences in those variables might

129. The math is $1-(1-0.05)^{55}$. *See* REINHART, *supra* note 104, at 49.

130. *See supra* Part III.B.4.

account for what first appears to be differences due to the circuit.

* * *

The data on Rule 23(f) petitions filed between 2013 and 2017 thus provide little or no support for the popular criticisms of Rule 23(f)—that it favors defendants, or that the courts of appeals are inconsistent in applying it. There is some evidence that the Fifth and Ninth Circuits behave differently in the context of granting Rule 23(f) petitions—the Fifth Circuit grants more than other courts, and the Ninth Circuit grants fewer. But whether those differences are due to the judges deciding the petitions—and not, for example, different case types, class types, class sizes, etc.—is not yet clear.

Also worth mentioning is that my data looks at only one slice of time. The petitions filed from 2013 through 2017 offer little support for common criticisms of Rule 23(f). But data from before and after that period might lend some support to the criticisms—changes in class-action doctrine, court personnel, and the claims that plaintiffs pursue (among many other things) could all affect behavior in the Rule 23(f) context.[131]

Indeed, all the results in this article carry a necessary caveat: more research needs to be done on these other variables, as well as on different time periods, before concluding that it is actually the petitioning party or the court deciding the case that is driving any differences.

IV. INSIGHTS ON CLASS ACTIONS

The data includes one additional point of particular interest: in terms of raw numbers, plaintiffs are prevailing in the Rule 23(f) context more frequently than defendants. Recall that the rate at which courts grant Rule 23(f) petitions for plaintiffs and defendants are similar, and the rate of reversal is more or less the same. Given that defendants file about 50% more petitions than

131. *See* Burbank & Farhang, *supra* note 1, at 95–96.

plaintiffs do, that means that plaintiffs have more total victories in the Rule 23(f) context than defendants do.

My dataset contained 717 Rule 23(f) petitions that were either (1) denied or (2) granted and then affirmed or reversed on the merits of class certification.[132] Of these 717 cases, 408 (57%) resulted in a plaintiff-favorable outcome:

- The district court certifies a class, and the appellate court denies the defendant's petition for permission to appeal: **343**.
- The district court certifies a class, the appellate court grants the defendant's petition for permission to appeal, and the appellate court then affirms the district court's grant of class certification: **41**.
- The district court denies class certification, the appellate court grants the plaintiff's petition for permission to appeal, and the appellate court then reverses the district court's denial of class certification: **24**.

The remaining 309 (43%) resulted in a defendant-favorable outcome:

- The district court denies class certification, and the appellate court denies the plaintiff's petition for permission to appeal: **238**.
- The district court denies class certification, the appellate court grants the plaintiff's petition for permission to appeal, and the appellate court then affirms the district court's denial of class certification: **21**.
- The district court certifies a class, the appellate court grants the defendant's petition for permission to appeal, and the appellate court then reverses the district court's grant of class certification: **50**.

132. The courts of appeals denied 581 petitions to appeal and granted 190. Of those 190 granted petitions, 136 were resolved on the merits of class certification. In the other 54, the appeal was abandoned, withdrawn, otherwise not decided on the merits of class certification, or still pending at the close of the study. *See supra* Part III.A.

So plaintiff-favorable outcomes outnumber defendant-favorable outcomes.

To some, this might be shocking. For one thing, it's contrary to the general research on who wins on appeal, which shows that defendants prevail more often than plaintiffs do.[133] For another, the data suggests at least part of the class-action universe in which plaintiffs are winning. This success might surprise those who suspect that class actions are no longer useful means for plaintiffs to seek redress.

A persistent debate exists as to whether the class action is dead or dying—that is, whether plaintiffs can still use the class action to vindicate their rights.[134] The data on Rule 23(f) shows that plaintiffs are still filing class

133. *See* Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1973–74 (2009); *see also* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 949.

134. *Compare, e.g.*, Albert H. Choi & Kathryn E. Spier, Class Actions and Private Antitrust Litigation, at 2 (draft 2019), *available at* https://ssrn.com/abstract=3329316 ("The class action has been in decline in recent years . . . ."), *and* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411, 418 (2018) (discussing procedural retrenchment in the class-action context), *and* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) ("[I]n the ongoing and ever-mutating battle between plaintiffs' lawyers and the protectors of corporate interests, the corporate guys are winning. . . . In fact, I believe it is likely that, with a handful of exceptions, class actions will soon be virtually extinct."), *and* Margaret S. Thomas, *Constitutionalizing Class Certification*, 95 NEB. L. REV. 1024, 1025 (2017) ("Many scholars, including myself, have observed the slow demise of class actions in federal court in the wake of the Class Action Fairness Act of 2005 (CAFA), and the Supreme Court decisions that followed." (footnote omitted)), *with* Klonoff, *Decline*, *supra* note 7, at 832 ("It would be a mistake to conclude, even with all of the case law trends discussed . . . , that class actions are dead."), *and* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 403 (2014) ("[C]ontrary to naysayers and skeptics, federal class litigation remains vibrant and thriving."), *and* Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 536 (2013) ("[T]here is plentiful evidence that class actions are alive, well, and flourishing."), *and* Jay Tidmarsh, Building a Better Mousetrap, JOTWELL (February 12, 2019) (reviewing Christopher Hodges & Stefaan Voet, Delivering Collective Redress: New Technologies (2018)) (expressing skepticism about the decline of class actions). *See also* Georgene Vairo, *Is the Class Action Really Dead? Is that Good or Bad for Class Members?*, 64 EMORY L.J. 477, 482 (2014) ("My review of the Court's cases sets the stage for arguing that class actions are not dead but that their utility as a litigation prosecution device has been curtailed.").

actions. And they sometimes win at class-certification—the dataset includes hundreds of plaintiff victories on class certification. Granted, these victories might be a small part of the larger class-action universe; the data might not counter the narrative that the class action is dying. And this is not to say that class actions are alive and well. The data on Rule 23(f) petitions says nothing of those class actions that are brought in state court or the class actions that are never brought due to adverse class-action law. But the data shows at least one corner of the class-action universe in which plaintiffs are not predominantly losing.

Beyond that, it's difficult to draw any other conclusions about class actions from Rule 23(f) petitions because we don't know whether (or to what extent) Rule 23(f) proceedings reflect the larger universe of class actions. Rule 23(f) proceedings are almost certainly not representative of federal class actions generally (or, if they are, only by coincidence). Many cases brought as class actions are dismissed before reaching class certification. And many class actions settle without a contested determination on the propriety of class certification. There's no reason to think that cases that produce Rule 23(f) petitions represent all federal class actions.

Rule 23(f) cases *might*, however, be representative of cases that make it to a contested class-certification decision (that is, a district court class-certification decision that is not made as part of a settlement). It's possible that parties will almost always file a Rule 23(f) petition after losing at the class-certification stage. After all, the petition itself is not terribly costly, and the potential upside is large. I accordingly suspect that defendants facing a damages class will almost always seek appellate review of an order certifying the class.

But plaintiffs (or, more accurately, plaintiffs' lawyers) might not have the same incentives. Class actions are often lawyer driven, and the named parties exercise

little control or oversight.[135] If a district court denies class certification, it might not always be in a plaintiff-side class-action attorney's interest to pursue a Rule 23(f) appeal. That appeal could create adverse circuit precedent that would affect other cases that the lawyer is pursuing or might plan on filing.[136] And plaintiff-side lawyers have alternatives to trying to save a class via an appeal. The denial of class certification would not preclude trying again in a different court and with a different judge and a different named plaintiff. So the plaintiff-side attorney might forego a Rule 23(f) appeal and instead find another plaintiff to pursue the same class action.

V. CONCLUSION

My study of Rule 23(f) petitions filed from 2013 through 2017 provided little support for popular criticisms of Rule 23(f). This finding is important. But it shouldn't be overstated. The study looked at only a five-year slice of Rule 23(f)'s history. Further research could expand the dataset to see if courts' treatment of Rule 23(f) changed across time. And the findings necessarily come with caveats that could be explored in future research. For example, more granular coding of Rule 23(f) petitions—such as coding by case type (e.g., employment discrimination, products liability), class type, and relief sought—might reveal differences that are hidden by looking at Rule 23(f) petitions as a whole.

135. *See* Sergio J. Campos, *The Class Action as Trust*, 91 WASH. L. REV. 1461 (2016); Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 IOWA L. REV. 1659 (2014).

136. *See* Marcus, *Mass Tort Class Action*, *supra* note 7, at 1595 n.273.

APPENDIX: COLLECTION AND CODING

A. Data Collection Method

1. Goal

I set out to assemble every Rule 23(f) petition filed in the courts of appeals in 2013–17.

I chose the start date due to Westlaw's docket coverage. I relied primarily on Westlaw's U.S. Courts of Appeals Dockets database. According to the description of that database, full functionality—including docket updating— for all courts of appeals begins March 1, 2012 (when coverage of the Federal Circuit begins).[137] I skipped ahead to the calendar year that began January 1, 2013.

Given that the Federal Circuit produced no Rule 23(f) petitions in this period, I could have started even earlier; full functionality for the regional courts of appeals begins on January 1, 2010. Future work could expand this dataset to 2010–12 without missing much (if any) data.

I chose the end date to maximize the dataset but also maximize the odds that all Rule 23(f) petitions in the dataset will have been decided by the time I finish the project.

2. Searches

I assembled petitions via searches of Bloomberg Law, Lexis, and Westlaw. I began with Westlaw, but I supplemented Westlaw with searches from the other platforms. My dataset was ultimately assembled from five searches—one each of Lexis and Westlaw, and three of Bloomberg Law (Bloomberg required three separate searches due to limitations in its searching capabilities). Details on the searches are below.

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137. *See United States Courts of Appeals Dockets,* WESTLAW, https://1.next.westlaw.com/Browse/Home/Dockets/FederalDockets/USCourtsofAppealsDockets (last visited Feb. 20, 2022).

As for search terms, I discovered that most dockets could be caught by searching for "23(f)," "23F," or "class action certification." In most circuits, the docket for a Rule 23(f) petition usually contains an early entry that includes one or more of those terms:

- **First Circuit:** Docket entry "Petition for Permission to Appeal filed pursuant to Fed. R. Civ. P. 23(f) filed by [petitioner].")
- **Second Circuit:** Docket entry "Motion, for leave to appeal (FRCP23(f)), on behalf of [petitioner]."
- **Third Circuit:** Docket entry "Petition for leave to appeal pursuant to [Fed. R. Civ. P. or F.R.Civ.P.] 23(f) by [petitioner]."
- **Fifth Circuit:** Docket entry "Motion filed by Petitioner(s) [names] for permission to appeal . . . pursuant to class action certification" (or some variation on "class action certification," e.g., "class action 23(f) certification"; one said "pursuant to 23(f)")).
- **Seventh Circuit:** Docket entry "Petition for Permission to appeal pursuant to F.R.C.P. 23(f) docketed."
- **Eighth Circuit:** Docket entry "Petition for permission to appeal under FRCvP 23(f)."
- **Ninth Circuit:** Docket entry "Petition for permission to appeal pursuant to 23(f)."
- **Tenth Circuit:** Docket entry "Petition for permission to appeal under 23(f) filed."
- **Eleventh Circuit:** Docket entry "Petition for permission to appeal pursuant to 23(f) filed by [petitioner]" or "Petition for Permission to Appeal - 23(f)."
- **D.C. Circuit:** Docket entry "for leave to file an interlocutory appeal pursuant to Fed. R. Civ. P. 23(f)" or "23 f Miscellaneous case docketed" and "for leave to file an interlocutory petition pursuant to 28 U.S.C. 23(f)."

Westlaw's dockets also include notations on case types that are written by West's editors. Those notations

could also include one of the above terms. Again, I did not find any Rule 23(f) petitions filed in the Federal Circuit.

Two courts—the Fourth and Sixth Circuits—required additional searching, as neither reliably included any Rule 23(f)-specific terms in their docket entries. Dockets in the Fourth Circuit contained a docket entry that use the phrase "permission to appeal." Dockets in the Sixth Circuit contained an entry that used the phrase "permission for leave to appeal." These terms appeared not just in dockets for Rule 23(f) petitions, but also in dockets for other kinds of discretionary appeals, such as petitions under 28 U.S.C. § 1292(b), bankruptcy appeals under 28 U.S.C. § 158(d), review of class-action remand orders under 28 U.S.C. § 1453(c), applications for certificates of appealability in habeas cases, and pre-filing review petitions (i.e., petitions by a litigant who is subject to an order that all filings be reviewed before they are entered).

These searches produced 1,312 unique results. I immediately discarded all appeals from bankruptcy cases and any that included the phrase "pre-filing review" in the docket, which eliminated a substantial number of irrelevant results. I then evaluated each docket for relevance, discarding any that were not Rule 23(f) petitions.

I had to decide what to do with multiple petitions from the same district court decision as well as what to do with cross-petitions. A case involving multiple plaintiffs or defendants can result in multiple Rule 23(f) petitions that seek review of the same district court decision. Some of these petitions overlap in their arguments. But I decided to count them as separate petitions. I concluded that doing so was better than trying to determine whether the petitions were sufficiently distinct from one another to be treated separately.

Cross-petitions came in two forms. Sometimes a cross-petition was filed in a separate appellate court docket. Other times it was filed in the same docket as the original petition. I decided to base my data entries on unique docket numbers. So a cross-petition filed in a

separate docket was counted as its own entry. One filed in the same docket as the original petition was not.

The dataset ultimately contained 856 unique petitions.

3. Search Details

All searches were last run on February 25, 2019.

Bloomberg 1
Details

- Keywords: "'23(f)" OR "23F" OR "Class Action Certification"'
- Apply To: Dockets Only
- Courts: U.S. Circuit Courts of Appeals Dockets
- Date: Date range 01/01/2013–12/31/2017

880 Results

Bloomberg 2
Details

- Keywords: "'permission to appeal"'
- Apply To: Dockets Only
- Courts: U.S. Court of Appeals for the Fourth Circuit Dockets
- Date: Date range 01/01/2013–12/31/2017

121 Results

Bloomberg 3
Details

- Keywords: "'permission for leave to appeal" OR "permission to appeal"'
- Apply To: Dockets Only
- Courts: U.S. Court of Appeals for the Sixth Circuit Dockets
- Date: Date range 01/01/2013–12/31/2017

173 Results

Lexis
Details

- Terms: '("23(f)" OR "23F" OR "Class Action Certification") OR ("permission to appeal" AND court (Fourth)) OR (("permission for leave to appeal" OR "permission to appeal") AND court (Sixth))'
- Date Range: 01/01/2013–12/31/2017
- Database: Dockets United States Court of Appeals

898 Results

Westlaw
Details

- Terms: 'adv: (("23(f)" OR "23F" OR "Class Action Certification") OR ("permission to appeal" AND CO(Fourth)) OR (("permission for leave to appeal" OR "permission to appeal") AND CO(Sixth))) AND DA(aft 12/31/2012 & bef 1/1/2018)'
- Database: U.S. Courts of Appeals Dockets

1,292 Results

B. Coding

I coded all cases based on both their docket entries and the filings themselves, which I acquired via Bloomberg Law.

For the most part, docket entries were reliable descriptions of the underlying documents—but not always. For example, in *Cromeans v. Morgan, Keegan & Co.*, No. 14-08024 (8th Cir.), the docket says that the Rule 23(f) petition was granted (judgment "Granting petition for 23(f) appeal"). The petition was actually denied, and the docket likely refers to the motion to file a reply brief, which was granted.

Most of the coding was straightforward. One wrinkle had to do with coding merits decisions, which can be affirmed, reversed, or vacated (in whole or in part). If the

class-certification decision was in any way altered, I coded it as a reversal.

All cases were coded through July 1, 2019.

C. A Note on Coverage

I relied primarily on Westlaw's dockets database in assembling this dataset. I supplemented it with searches of Bloomberg Law and Lexis. I also discovered that although no commercial service is perfect, Westlaw's appeared to be the most comprehensive. I ran effectively the same search on Bloomberg Law, Lexis, and Westlaw. I then compared the results to determine the relative coverage of each platform. I located 20 decisions that were not on Westlaw. Ten were on Bloomberg Law, and 17 were on Lexis (obviously there was some overlap among those two).

Overall, Westlaw was pretty comprehensive. It had 1,292 of the total 1,312 results (99%). Bloomberg had 1,148 of the results (88%), while Lexis had 898 (68%). All three platforms had 881 results. Three were only on Bloomberg Law, while ten were only on Lexis. There were no dockets that appeared only on Westlaw except for what appears to be an error in Westlaw's database: a docket for a Fourth Circuit case, *In Re: Solodyn Antitrust Litigation*, No. 17-08036, that doesn't exist and instead appears to be a duplicate of a First Circuit case with the same name and docket number.

PACER data would have been ideal, but I could not reasonably obtain petitions through PACER due to limits on the platform and its costs. As for the platform, PACER does not allow for full-text searching of dockets. To search through those, I would have had to create a separate database of all docket entries for all appellate cases, which I could then search.[138] Creating this separate database was beyond my capabilities. It also would have been immensely expensive. I obtained PACER fee waivers from several, but not all, courts of appeals.

138. *Cf.* Gelbach & Hensler, *supra* note 9.

PACER's technological and cost limits thus precluded assembling an ideal dataset.