# FEDERAL RULE OF CIVIL PROCEDURE 23(F): REFLECTIONS AFTER A QUARTER CENTURY

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ABSTRACT

Federal Rule of Civil Procedure 23(f) was adopted in 1998, just over twenty-five years ago, to permit interlocutory review of decisions granting or denying class certification. Prior to the Rule's adoption, there were few viable avenues for interlocutory appellate review. Defendants complained that, without an immediate appellate avenue, a district court's decision to certify a class put enormous pressure on defendants to settle; accordingly, the defense bar strongly urged the

adoption of Rule 23(f). The plaintiffs' bar, by contrast, opposed the adoption of Rule 23(f), fearing that interlocutory review would primarily favor defendants, even though the proposed rule also allowed interlocutory review of decisions denying class certification.

Early statistical studies (including one conducted by the author) showed that defendants were indeed the primary beneficiaries of Rule 23(f), both in the percentage of Rule 23(f) petitions granted and in the decisions on the merits. And the author, in a 2013 law review article, argued that appellate courts had issued numerous rulings making it substantially more difficult for plaintiffs to obtain class certification. But more recent studies (including one conducted for this article) show that the landscape has changed. Rule 23(f) has been applied in a much more evenhanded fashion, with some studies even suggesting that plaintiffs are more likely than defendants to have a favorable outcome (considering both grant rates and decisions on the merits). Moreover, the Sixth Circuit, which routinely issues opinions explaining denials of Rule 23(f) review, has demonstrated that it is equally rigorous in reviewing petitions filed by plaintiffs and defendants. This article offers several possible reasons for the appellate courts' shift from a pro-defendant approach to a more evenhanded approach.

Rule 23(f) has generated a substantial body of law, thereby providing guidance to district courts on a host of issues. These decisions include not only circuit court decisions but decisions by the Supreme Court (reviewing circuit court decisions issued pursuant to Rule 23(f)). This article discusses the five most frequently cited Supreme Court decisions, and the 12 most frequently cited federal court of appeals cases. Not surprisingly, the most heavily cited court of appeals cases tend to be older cases (from the early 2000s). As the discussion shows, these decisions provide guidance to district courts on a wide variety of topics, including all of the requirements of class certification. The article also discusses a handful of additional, more recent cases that, while not as heavily cited, are nonetheless important to the development of class action jurisprudence. On balance Rule 23(f) has been a beneficial amendment for the bench and the bar by providing essential guidance on the contours of Rule 23.

## INTRODUCTION

I have been invited by the *Syracuse Law Review* to evaluate the impact of Federal Rule of Civil Procedure 23(f), an amendment to the class action rule adopted in 1998. Rule 23(f) provides that "[a] court of appeals may permit an appeal from an order granting or denying

class-action certification under [Rule 23] . . . ."[1] Rule 23(f) provides an exception to the final judgment rule by authorizing interlocutory appeals of class certification rulings at the discretion of the appellate court.[2] As a vehicle for facilitating the development of class action law, Rule 23(f) has been described as a "sea change."[3] Prior to the adoption of Rule 23(f), interlocutory appellate review was permitted "only in rare circumstances."[4] Coupled with the subsequent adoption of the Class Action Fairness Act in 2005,[5] which has shifted most major class actions seeking relief under state law from state to federal court,[6] a vast body of federal appellate law has been created interpreting Rule 23. This law includes not only case law from every federal circuit, but also decisions from the Supreme Court, rendered on appeal from federal appellate rulings issued pursuant to Rule 23(f).

Rule 23(f) was strongly supported by the defense bar, which argued that orders granting class certification put enormous pressure on defendants to settle without the opportunity to challenge the ruling on appeal.[7] The plaintiffs' bar, by contrast, was opposed to Rule 23(f),

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

2. 28 U.S.C. § 1291.

3. Forsythe v. Teva Pharm. Indus. Ltd, 102 F.4th 152, 156 (3d. Cir. 2024) (quoting ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION CASES & MATERIALS 697 (4th ed. 2017).

4. *Id.* Prior to Rule 23(f), there were isolated decisions granting petitions for mandamus and overturning orders granting class certification. *See, e.g.*, *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1304 (7th Cir. 1995); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1089 (6th Cir. 1996). But mandamus requires egregious error, a standard that is rarely satisfied. Review was also sometimes granted under 28 U.S.C. § 1292(b). *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996). Section 1292(b) rarely facilitated review, however, because it requires (1) the express approval of the district court, and (2) "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 129(b); *see* Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 738–39 (2013) (discussing limited appellate options for challenging class certification rulings prior to Rule 23(f)) [hereinafter, *Decline*].

5. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

6. *See Decline*, *supra* note 4, at 744–45 (explaining how CAFA has eased the requirements for federal diversity jurisdiction by, *inter alia*, requiring only minimal diversity and replacing the individual jurisdictional amount of over $75,000 with an aggregate amount of over $5 million). Of course, class actions brought under federal law have always been subject to federal question jurisdiction, and thus defendants could always remove such cases to federal court.

7. *Id.* at 739.

fearing that appellate interlocutory review might lead to reversal of many district court rulings granting class certification.[8]

On its face, Rule 23(f) is neutral: It permits interlocutory review of decisions granting or denying class certification. Moreover, the criteria articulated by the Committee Notes and the circuits in determining whether review is appropriate do not favor either plaintiffs or defendants.[9] The Committee Notes compare the "unfettered discretion" of courts of appeals to that of the Supreme Court in deciding whether to grant certiorari.[10] It cites two considerations: whether the certification decision "turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification [either granting or denying certification] is likely dispositive of the litigation."[11] Both of these situations are neutral and can be invoked in attacking an order granting class certification or an order denying class certification. And while there are some differences among the circuits in articulating the criteria that support Rule 23(f) review, all circuits that have articulated the governing criteria consider review appropriate when the ruling is likely the "death knell," either because a decision denying certification will cause the plaintiff to terminate the litigation (because there is not enough at stake to sue individually) or because a decision granting certification will coerce a defendant to settle. All circuits that have addressed the criteria also agree that review is appropriate if the certification order presents a novel and important issue; and some (but not all) circuits authorize review when the decision is manifestly erroneous, even if the issue is not necessarily important to class action law generally.[12] None of these criteria, on their face, favors either the

8. *Id.*

9. *Id.* at 741.

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

11. *Id.*

12. More specifically, with the exception of the Fifth and Eighth Circuits, all of the circuits have articulated the standards they apply in reviewing Rule 23(f) petitions. The formulations overlap but differ somewhat. In the First Circuit, the death knell for a plaintiff or defendant is a basis for review if the decision is "questionable," and review is also appropriate if a ruling would clarify a "fundamental issue" of law. Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293–94 (1st Cir. 2000). In the Second Circuit, review is appropriate if the district court decision is "questionable" and not granting review would "effectively terminate" the case, and also when there is a "compelling need" to resolve a particular legal question. Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 139 (2d Cir. 2001). The Third Circuit has indicated that review is appropriate if there is a death knell for plaintiff or defendant, when the appeal implicates a "novel or unsettled" legal question, when the district court clearly erred in its certification ruling, and where an appeal would "facilitate development" of class certification law. Rodriguez

plaintiff or the defendant. Yet, as noted, despite the facial neutrality of Rule 23(f), the Rule was opposed by the plaintiffs' bar because of the concern that, as implemented, it would primarily benefit defendants and harm plaintiffs.

The purpose of this article is to reflect on the impact of Rule 23(f) after twenty-five+ years. I address the following issues: First, has Rule 23(f) been applied evenhandedly by the circuits? Or was the plaintiffs' bar correct in predicting that the primary beneficiaries would be defendants? Second, what impact has Rule 23(f) had on the development of class action jurisprudence?

As I explain below, although initial empirical work (including my own) indicated that Rule 23(f) primarily favored defendants, that has not proven to be the case in the last decade or so. In recent years, the

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v. Nat'l City Bank, 726 F.3d 372, 376–77 (3d Cir. 2013) (quoting Newton v. Merill Lynch, 259 F.3d 154, 164–65 (3d Cir. 2001)). Review is not appropriate when the "natural course of litigation" will resolve the petitioner's concerns or where the district court's decision was routine and easily reached. *Id.* at 377. The Fourth Circuit, adopting the Eleventh Circuit's test in Prado-Steiman v. Bush, applies a sliding scale approach. *See* Lienhart v. Dryvit Sys., 255 F.3d 138, 144–46 (4th Cir. 2001) (citing to Prado-Steiman v. Bush, 221 F.3d 1266, 1274–76 (11th Cir. 2000)). For example, if the Rule 23(f) petition makes a strong showing that the opinion is erroneous, then a lesser showing of death knell is required. *Id.* at 145. Conversely, if there is not a strong showing of a substantial weakness, then another factor must be shown with greater strength. *Id.* The Sixth Circuit considers the likelihood of petitioner succeeding on the merits of the appeal, whether the case raises a "novel or unsettled question" of law, a death knell for plaintiff or defendant, and the procedural posture of the case at the district court level (e.g., an indication that the district court will reexamine the certification decision after discovery should discourage interlocutory appeal). *See In re* Delta Air Lines, 310 F.3d 953, 960 (6th Cir. 2002); *In re* Lee, No. 23-0502, 2024 U.S. App. LEXIS 3056, at *4 (6th Cir. Feb. 8, 2024). The Seventh Circuit considers whether there is a death knell for plaintiff or defendant and whether the case raises a fundamental legal issue; for the latter factor, the court looks at whether the issue can be adequately resolved by an appeal at the end of the case. *See* Blair v. Equifax Check Servs., 181 F.3d 832, 834–35 (7th Cir. 1999). The Ninth Circuit looks at the death knell for a plaintiff or defendant, "the presence of an unsettled and fundamental issue of law related to class actions," and whether the district court's certification ruling constitutes "manifest error." Chamberlan v. Ford Motor Co., 402 F.3d 952, 955 (9th Cir. 2005). The Tenth Circuit looks favorably on a Rule 23(f) petition in a death knell situation (for plaintiff or defendant) when granting the petition will facilitate development of the law or where the district court decision is "manifestly" erroneous. Vallario v. Vandehey, 554 F.3d 1259, 1263–64 (10th Cir. 2009) (citing *Chamberlan*, 402 F.3d at 959). The Eleventh Circuit test is set forth above (in connection with the Fourth Circuit, which adopted *Prado-Steiman*). *See Prado-Steiman*, 221 F.3d at 1274–76). Finally, the D.C. Circuit considers Rule 23(f) review appropriate in a death knell situation for a plaintiff or defendant when the class certification decision raises an issue important not just to the litigation but to class action law generally or when the decision is clearly erroneous. *See* Harrington v. Sessions, 863 F.3d 861, 874 (D.C. Cir. 2017); *see also In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 99–100 (D.C. Cir. 2002).

Rule has been applied evenhandedly, and both sides have achieved major victories and losses in cases decided under Rule 23(f). At the end of Section I, I offer thoughts on why the initial trend favoring defendants has subsided.

Moreover, as I explain, Rule 23(f) has resulted in seminal rulings—including opinions by the United States Supreme Court—providing guidance across a broad spectrum of class certification issues. The bench and bar have been well served by the rich appellate jurisprudence that Rule 23(f) has spawned.

## I. EMPIRICAL STUDIES OF RULE 23(F) AND SIXTH CIRCUIT ANECDOTAL EVIDENCE

In this section, I discuss numerous empirical studies, including a study of mine published in 2013 and recent empirical information I collected for this piece.[13] A crucial focus is whether, as the plaintiffs' bar feared, appellate courts have been more willing to grant petitions for review filed by defendants, and whether appellate courts, after granting Rule 23(f) review, are more inclined to rule in favor of defendants or in favor of plaintiffs. Although my initial work (which covered November 1998 through May 2012)—as well as other empirical studies—suggested that Rule 23(f) predominantly benefited defendants,[14] this article, which considers the most recent data, concludes that Rule 23(f) review is no longer disproportionately benefiting or harming either side.

In addition to considering statistics, I consider a unique window into Rule 23(f) review offered by the Sixth Circuit. Unlike other circuits, which typically provide no explanation when they deny Rule 23(f) review, the Sixth Circuit frequently provides detailed opinions explaining its rationale for denying review. In all but a few cases, the opinions are unanimous, across the spectrum of "conservative" and "liberal" judges. I focus on Sixth Circuit opinions for the period from January 2013 to April 2024. These opinions—a rare insight into the minds of the judges who are making decisions whether to grant review—confirm what more recent statistics suggest: the absence of any enduring pro-defense bias in the implementation of Rule 23(f).

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13. In discussing the various studies, I do not take issue with the methodologies used by particular authors. *But cf.* Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. APP. PRAC. & PROCESS 283, 302 (2022) (raising questions about the data collection methods used in the Sullivan/Trueblood and Skadden studies, discussed below).

14. *See Decline*, *supra* note 4, at 741.

### *A. Brian Anderson & Patrick McLain Study*

The first published study of Rule 23(f), by an attorney from O'Melveny & Myers (Anderson) and a then–judicial clerk (McLain),[15] focused on granted cases during the period December 1, 1998, to early September 2003; it found that "defendants won 70 percent of the time . . . ."[16] Thus, "[i]n 31 of the 44 cases in which a Rule 23(f) appeal was heard, the appellate court either reversed an order certifying a class action (26 cases) or affirmed an order denying class treatment (5 cases)."[17] These numbers reveal that the early rulings overwhelmingly favored defendants.

### *B. Barry Sullivan and Amy Kobelski Trueblood Study*

Another early study, by a Jenner & Block partner and associate, focused on the period between December 1, 1998, and October 30, 2006.[18] The study focused on grant rates rather than reversal rates. During that period, 476 Rule 23(f) petitions were filed nationally (excluding petitions subsequently withdrawn and petitions dismissed on procedural grounds). Of those, 36 percent were granted.[19] The authors found that "[i]n most circuits . . . the defendants' petitions [were] granted more often," but that "[i]n the Ninth and D.C. Circuits . . . the trend [was] reversed."[20] In the Ninth Circuit, plaintiffs' petitions were granted 36 percent of the time while defendants' petitions were granted 20 percent of the time; in the D.C. Circuit, plaintiffs' petitions were granted 60 percent of the time while none of defendants' petitions were granted.[21]

### *C. Richard Freer Study*

In 2007, Professor (now Dean) Richard Freer published an empirical study of Rule 23(f), covering all of 1999 through December 1,

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15. Brian Anderson & Patrick McLain, *A Progress Report on Rule 23(f): Five Years of Immediate Class Certification Appeal*, WASH. LEGAL FOUND. BACKGROUNDER, Mar. 19, 2004, at 1 (copy received from Anderson; article is no longer available online).

16. *Id.* at 4–5.

17. *Id.* at 5.

18. Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 277, 283 (2008).

19. *Id.* at 283–84.

20. *Id.* at 286.

21. *Id.* The study also found that both plaintiffs and defendants were successful 100 percent of the time in the Fourth Circuit. *Id.*

2007.[22] Professor Freer focused on the 101 cases during that period in which federal appellate courts granted Rule 23(f) review and rendered decisions on the merits.[23] Most of the cases involved review of decisions granting class certification, as opposed to decisions denying class certification (72.5 percent versus 27.5 percent).[24] Professor Freer's data revealed that courts reversed a clear majority of those appeals—62.5 percent.[25] Moreover, 84 percent of the appellate court reversals involved orders in which the district court had granted class certification.[26] The disparity was especially striking in the early years: in 2000, there were five cases reviewed under Rule 23(f), and in all five the orders granting class certification were reversed.[27] In 2001, there were nine cases reviewed under Rule 23(f), and in all nine the orders granting class certification were reversed.[28] Professor Freer notes that "[i]t is not until 2004 that we see more than one opinion reversing district court denials of certification."[29] Although there were differences among the circuits, the overall data led Professor Freer to conclude that "Rule 23(f) has [as of 2007] brought more good news to defendants than plaintiffs."[30]

### *D. Robert Klonoff 2013 Study*

In my 2013 article, *The Decline of Class Actions,* I examined all Rule 23(f) appeals accepted from November 30, 1998, through May 31, 2012.[31] Out of 209 appeals granted, 144 (about 69 percent) were appeals by defendants, whereas only 65 (about 31 percent) were appeals by plaintiffs.[32] Of the 144 defense appeals, defendants achieved a 70 percent reversal rate.[33] Of the 65 appeals by plaintiffs, plaintiffs received only a 31 percent reversal rate. I thus concluded, as of 2013,

22. 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, 16 (2007).
23. *See id.*
24. *Id.* at 19.
25. *Id.*
26. *Id.* at 20.
27. *See* Freer, *supra* note 21, at 20.
28. *Id.*
29. *Id*.
30. *Id.*
31. *See Decline*, *supra* note 4, at 741.
32. *Id.*
33. *Id.*

that "defendants have benefited more from Rule 23(f) than have plaintiffs."[34]

### *E. Skadden Study*

A 2014 study of Rule 23(f) conducted by Skadden for the U.S. Chamber of Commerce[35]—focusing on October 31, 2006, to December 31, 2013—found that the federal circuits had become "significantly less receptive to interlocutory review of class certification rulings" than in prior years.[36] The study found that "[l]ess than one-quarter of petitions for interlocutory review filed in [those] seven years ha[d] been granted," in contrast to a 36 percent grant rate for the period December 1, 1998, through October 30, 2006.[37] The study concluded that "the decline in 23(f) review ha[d] primarily affected class action defendants" (24.8 percent grant rate versus 45 percent grant rate in the prior period), whereas the decline for plaintiffs was less substantial (20.5 percent versus 22 percent in the prior period). On the merits, defendants (as in the earlier period) benefited more than plaintiffs: the appellate courts "ruled against class certification 60 percent of the time in which the lower court had denied class certification and 70 percent of the time in which the lower court had granted class certification."[38] But the study also found that plaintiffs "h[ad] seen greater success with Rule 23(f) appeals than in previous years."[39] In contrast to the 1998-2006 period—during which "grants of class certification were affirmed and denials were reversed 29 percent of the time"—in the 2006-2013 period, "grants were affirmed 30 percent of the time and denials were reversed 40 percent of the time.""[40]

### *F. Bryan Lammon Study*

The most comprehensive empirical study on Rule 23(f) was conducted by Professor Bryan Lammon, focusing on the period from 2013–2017.[41] He concluded that, during the period studied, appellate

34. *Id.*

35. *See* John H. Beisner et al., *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings*, JD SUPRA (May 1, 2014), https://www.jdsupra.com/legalnews/study-reveals-us-courts-of-appeal-are-l-52418/.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Beisner et al., *supra* note 35.

41. *See* Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. APP. PRAC. & PROCESS 283 (2022).

courts granted Rule 23(f) review about 25 percent of the time—190 times out of a pool of 771 petitions.[42] Of those, some were abandoned or decided on grounds other than class certification, leaving 137 petitions.[43] Out of those, district courts were affirmed in sixty-three cases and reversed (or decisions vacated) in seventy-four cases, for a reversal rate of about 54 percent.[44]

Professor Lammon found that the appellate courts granted Rule 23(f) motions filed by defendants more frequently than those filed by plaintiffs.[45] Out of plaintiffs' 341 petitions, the appellate courts granted review 21 percent of the time; out of defendants' 515 petitions, the appellate courts granted review 27 percent of the time.[46]

On the merits, Professor Lammon found that when plaintiffs' petitions were reviewed, the appellate courts reversed 53 percent of the time; when defendants' petitions were reviewed, the appellate courts reversed 54 percent of the time.[47] He concluded from this data that there was "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."[48] He further concluded, looking at the data circuit-by-circuit, that the data "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."[49]

Professor Lammon did find differences among the circuits in the number of petitions decided (the highest, 265, by the Ninth Circuit; the lowest, seven, by the D.C. Circuit).[50] Also, the grant rate varied (the highest, 50 percent, was in the Fifth Circuit; the lowest, 14 percent, was in the D.C. Circuit).[51] The reversal rates also varied considerably by circuit (33 percent in a number of circuits, up to 100 percent in the Fourth Circuit).[52]

Finally, Professor Lammon concluded that, given that defendants filed about 50 percent more petitions than did plaintiffs, and given that

42. *Id.* at 303.
43. *Id.*
44. *Id.*
45. *Id.* at 306.
46. Lammon, *supra* note 39, at 306–07.
47. *Id.* at 308–09.
48. *Id.* at 309.
49. *Id.* at 313.
50. *Id*. at 319.
51. Lammon, *supra* note 39, at 319–20.
52. *See id.* at 323.

the reversal rate was about the same, "plaintiffs have more total victories in the Rule 23(f) context than defendants do."[53] Professor Lammon analyzed 717 Rule 23(f) petitions that were "either (1) denied or (2) granted and then affirmed or reversed on the merits of class certification."[54] He identified and tabulated three plaintiff-favorable outcomes and three defendant-favorable outcomes;[55] of those 717 Rule 23(f) petitions, 408 (57 percent) resulted in a plaintiff-favorable outcome, broken down as follows:

> 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.[56]

Lammon found that 309 (43 percent) of those 717 Rule 23(f) petitions 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.[57]

To recap, plaintiffs had a favorable outcome 57 percent of the time, whereas defendants had a favorable outcome only 43 percent of

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53. *Id.* at 327.

54. *Id.*

55. It is arguable that in some instances, plaintiffs suffered prejudice even when they ultimately prevailed. Rule 23(f) provides that, "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." FED. R. CIV. P. 23(f). Nonetheless, if the defendant is able to convince either the district court or appellate court to stay proceedings either pending a ruling on whether to grant the petition or during the appeals process (if review is granted), then plaintiff suffers some prejudice because of the delay caused by Rule 23(f). Thus, it is not entirely accurate in those instances to conclude that plaintiffs achieved a complete victory.

56. Lammon, *supra* note 39, at 327.

57. *Id.*

the time. Professor Lammon thus concluded that his study "provided little support" for the position that, during the period studied (2013–2017), Rule 23(f) favored defendants.[58]

### *G. Joseph Palmore and Michael Qian Study*

In June 2022, two attorneys at the law firm of Morrison & Foerster LLP presented the results of a study of Rule 23(f) petitions in the Ninth Circuit.[59] They drew upon the above-discussed study by Professor Lammon as well as on their own supplemental information for 2018–2021.[60] They noted that the Ninth Circuit received more Rule 23(f) petitions than any other Circuit,[61] a result that should not be surprising given that the Ninth Circuit is the largest Circuit in the country (with twenty-nine judgeships covering nine states).[62] The study noted that "[t]he Ninth Circuit is one of the stingiest courts in the country when it comes to permission to appeal under Rule 23(f)," granting just 18 percent of petitions between 2013–2017, 20 percent from 2018–2021, and only 10 percent for 2021.[63] In terms of disparities between plaintiffs and defendants, the study noted that it is more difficult for a defendant to secure review than it is for a plaintiff.[64] For the period 2013–2017, plaintiffs had their petitions granted 19 percent of the time, while defendants had their petitions granted 17 percent of the time; for the period 2018–2021, plaintiffs were successful in securing review 29 percent of the time, while defendants were successful only 13 percent of the time.[65] Moreover, when review was granted, the Ninth Circuit reversed the ruling below less frequently (37 percent for 2013–2017, and 44 percent for the period 2018–2021) than the nationwide reversal rate of about 50 percent.[66] In short, the study concluded that "[i]t's tough to seek Rule 23(f) appeal in the Ninth Circuit, *especially as a defendant*."[67]

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58. *Id.* at 330.

59. *See* Joseph Palmore & Michael Qian, *How Do Rule 23(f) Petitions Fare in the Ninth Circuit?*, JD SUPRA (June 28, 2022), https://www.jdsupra.com/legalnews/how-do-rule-23-f-petitions-fare-in-the-4676814/.

60. *See id.*

61. *See id.*

62. *A Short History of the Ninth Circuit Court of Appeals*, U.S. CTS. FOR THE NINTH CIR., https://www.ca9.uscourts.gov/information/ninth-circuit-history/ (last visited Dec. 3, 2024).

63. Palmore & Qian, *supra* note 57.

64. *See id.*

65. *See id.*

66. *See id.*

67. *Id.* (emphasis omitted).

### *H. Robert Klonoff 2024 Study*

For this article, I updated the Lammon study by collecting data on Rule 23(f) petitions filed from January 1, 2020, through December 31, 2023. I followed the methodology spelled out by Professor Lammon in the text and appendix of his empirical study, relying primarily on Westlaw's dockets database and supplementing that data with information from Lexis and Bloomberg Law's docket databases.[68] During the period studied, the appellate courts granted Rule 23(f) review about 24 percent of the time—141 times out of a pool of 581 Rule 23(f) petitions. Of those 141 granted petitions, eighty-seven were resolved on the merits of class certification; the other fifty-four appeals were either withdrawn or still pending at the close of the study.[69]

Overall, when the appellate courts reached a decision on the merits of class certification, they affirmed the district court's decision twenty-eight times and reversed (or vacated) a district court's decision fifty-nine times, for a reversal rate of about 68 percent. When plaintiffs' petitions were reviewed on the merits, the appellate courts reversed 60 percent of the time; when defendants' petitions were reviewed on the merits, the appellate courts reversed about 72 percent of the time. The appellate courts granted Rule 23(f) petitions filed by defendants more frequently than those filed by plaintiffs. Of the 375 decided petitions filed by defendants, the appellate courts granted review 26 percent of the time; of 206 decided petitions filed by plaintiffs, the appellate courts granted review about 21 percent of the time.[70]

I also replicated Professor Lammon's approach in deciding whether plaintiffs or defendants ultimately were more successful under Rule 23(f). I assembled 527 Rule 23(f) petitions that were either

68. Aside from changing the date ranges, I used Lammon's search terms to find Rule 23(f) petitions in Westlaw, Lexis, and Bloomberg Law. *See* Lammon, *supra* note 39, at 334–35. I also generally followed his methodology for gathering data. *See id.* at 331–37.

69. As of June 23, 2024, the cutoff date for my study, thirty-seven of the 141 granted appeals were still pending, and seventeen granted appeals were withdrawn before a decision on the merits.

70. A few circuit-by-circuit facts are worth noting. The Ninth Circuit unsurprisingly saw the most Rule 23(f) petitions of any circuit, with 205 (about 35 percent) of the total petitions filed nationally. The Ninth Circuit granted review about 20 percent of the time and reversed fourteen out of twenty-four times—a reversal rate of about 58 percent. Among other interesting circuit-by-circuit differences, the First Circuit denied all nine petitions that were filed during the period studied. And with the exception of the Federal Circuit (where no Rule 23(f) petitions were filed during the period studied), the D.C. Circuit had the fewest number of petitions and the highest grant rate. It granted three out of only four petitions that were filed during the period studied.

denied or granted and then affirmed or reversed on the merits of class certification. Using Professor Lammon's criteria for plaintiff-favorable outcomes and defendant-favorable outcomes, I found that 311 (about 59 percent) of those petitions 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[: 277]. 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[: 16]. 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[:18].[71]

The remaining 216 (about 41 percent) of those petitions 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[: 163]. 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[: 12]. 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[: 41].[72]

Although defendants experienced higher grant and reversal rates than plaintiffs, defendants filed about 70 percent more petitions than plaintiffs filed. As a result, plaintiffs achieved more "total victories"[73]—because both a win on the merits and a denial of a defendant's Rule 23(f) petition are counted in favor of plaintiffs. Thus, under Professor Lammon's formulation of "success," plaintiffs have been more successful in the Rule 23(f) process between 2020 and 2023 than defendants—59 percent versus 41 percent—a conclusion consistent with that of Professor Lammon for the period that he studied (2013–2017).[74]

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71. This block quote, and the following one, use Professor Lammon's language verbatim, changing only the data based on the period I studied. *See* Lammon, *supra* note 39, at 305.

72. *Id.*

73. *See id.* at 327.

74. *See id.* (noting that 57 percent of petitions resulted in a plaintiff-favorable outcome whereas only 43 percent resulted in a defendant-favorable outcome).

*1. Sixth Circuit Decisions Denying Review*

As noted, although some circuits occasionally write opinions explaining why they have denied review in a particular case,[75] only the Sixth Circuit regularly issues detailed opinions explaining its rationale for denying Rule 23(f) review in a particular case. The Sixth Circuit thus provides a unique behind-the-scenes view of its approach to Rule 23(f). While this body of case law represents the approach of only one circuit, it is an interesting piece of the puzzle.

Based on a Lexis search, I reviewed fifty-three Sixth Circuit opinions denying Rule 23(f) review rendered between January of 2013 and April of 2024. In my view, the opinions do not reflect any sort of pro-defendant (or anti-plaintiff) bias. In thirty-three of the cases, the court denied defendants' motion for interlocutory review under Fed. R. Civ. P. 23(f), whereas in fifteen of the cases the court denied plaintiffs' motion for interlocutory review under 23(f). These latter numbers do not reflect any bias because a majority of the Sixth Circuit Rule 23(f) petitions during that period were filed by defendants. Importantly, however, the cases apply remarkably similar criteria regardless of whether it is the plaintiff or the defendant who is seeking Rule 23(f) review.[76]

First, the death knell doctrine has been applied rigorously regardless of whether it was asserted by a plaintiff (because the litigation is not feasible except as a class action) or by a defendant (because the high stakes of a certified class will force the defendant to settle). With respect to plaintiffs, the court has emphasized the possibility (or reality) that the named plaintiff could proceed individually.[77] With respect

75. *See, e.g.*, Forsythe v. Teva Pharm. Indus., 102 F.4th 152, 156–58 (3d Cir. 2024) (explaining in detail why the court was denying Rule 23(f) review); *see* Chamberlan v. Ford Motor Co., 402 F.3d 952, 955 (9th Cir. 2005).

76. In almost all of the decisions, the vote was unanimous, even though the active and senior judges during the period studied were appointed by seven different presidents, both Republican and Democratic: Reagan, George H.W. Bush, Clinton, George W. Bush, Obama, Trump, and Biden.

77. *See, e.g., In re* Creech, No. 19-0304, 2019 U.S. App. LEXIS 20388, at *3 (6th Cir. July 9, 2019) ("Although he states that the individual stakes in this action are low compared to the costs of the litigation, Creech does not argue that he will be unable to pursue his claims on an individual basis."); *In re* Kensu, No. 20-0105, 2020 U.S. App. LEXIS 33850, at *6 (6th Cir. Oct. 27, 2020) ("Kensu did not address [death knell] in his petition, and he may pursue his claims individually."); *In re* Doe, Nos. 20-0108/0109, 2021 U.S. App. LEXIS 13726, at *7 (6th Cir. May 7, 2021) ("Petitioners initially brought their complaints without class claims, they have continued to litigate their individual claims, and they are seeking compensatory damages as well as injunctive relief.").

to defendants, the court has required concrete economic proof that defendants would be forced to settle absent interlocutory review.[78]

Second, both for plaintiffs and defendants seeking Rule 23(f) review, the Sixth Circuit is loath to grant review without a showing that the party petitioning for review has a significant likelihood of prevailing on the merits of the appeal.[79] The opinions frequently discuss the merits at length to explain why the chances of success appear low.

Third, in the context of both plaintiff and defendant petitions, the court has emphasized the absence of important or novel questions.[80] These opinions underscore that Rule 23(f) review is not routine and

78. *See, e.g., In re* Cmty. Health Sys., No. 19-0509, 2019 U.S. App. LEXIS 31791, at *4 (6th Cir. Oct. 23, 2019) ("[Community Health System's] potential liability is in the hundreds of millions. But it is undisputed that CHS had annual revenues in the billions of dollars. Thus, without more, its generalized allegations of harm are insufficient and do not establish that the potential liability it may suffer, although enormous, is such that settlement is a foregone conclusion."); *In re* Ascent Res.-Utica, LLC, No. 21-0307, 2022 U.S. App. LEXIS 17437, at *3 (6th Cir. June 23, 2022) ("[A] general assertion" of death knell by a defendant is not sufficient) (quoting *In re* Delta Air Lines, 310 F.3d 953, 960 (6th Cir. 2002); *In re* Unum Grp. Corp., No. 23-0503, 2023 U.S. App. LEXIS 33512, at *10–11 (6th Cir. Dec. 18, 2023) ("Given Unum's size and financial circumstances, it does not appear that certification would be so costly that Unum could not risk going to trial or appeal a negative verdict in the ordinary course after final judgment."); *In re* Sonic Corp., No. 20-0305, 2021 U.S. App. LEXIS 25403, at *9 (6th Cir. Aug. 24, 2021) ("[W]hile there is no estimate of the potential damages that might result if the [class members] ultimately prevail, Sonic makes more than half a billion dollars annually.").

79. *See, e.g.*, *In re* Hardesty, No. 18-0317, 2018 U.S. App. LEXIS 32171, at *2 (6th Cir. Nov. 13, 2018) ("[T]he plaintiffs have not shown a substantial likelihood of success on the merits."); *In re* Siding & Insulation Co., No. 17-0310, 2017 U.S. App. LEXIS 24115, at *2 (6th Cir. Nov. 28, 2017) ("Plaintiff has not shown that it is likely that the district court used an improper legal framework or abused its discretion here."); *In re* Wood Grp. Mustang, Inc., No. 18-0304, 2018 U.S. App. LEXIS 24180, at *2 (6th Cir. Aug. 24, 2018) (finding defendant "has not shown that it is likely to succeed on appeal under [the] deferential [abuse of discretion] standard"); *In re* One Planet Ops, Inc., No. 18-0302, 2018 U.S. App. LEXIS 11716, at *2-3 (6th Cir. May 3, 2018) ("[Defendant] has not shown a strong likelihood of success on its challenges to the district court's certification order."); *In re* Veolia N. Am., LLC, Nos. 21-0103/0104/0105, 2022 U.S. App. LEXIS 2101, at *29 (6th Cir. Jan. 24, 2022) (finding defendants "are unlikely to succeed on the merits of their challenge to the district court's class-certification order").

80. *See, e.g.*, *In re* Schechner, No. 19-0111, 2019 U.S. App. LEXIS 33135, at *3 (6th Cir. Nov. 5, 2019) (plaintiffs do "not present a significant, novel issue of class-certification law"); *In re* Mercy Health, Nos. 20-0301/0302, 2021 U.S. App. LEXIS 9322, at *3 (6th Cir. Mar. 30, 2021) ("Defendants do not claim that this case raises a novel or unsettled question."); *In re* Platinum Rests. Mid-America., LLC, No 19–0511, 2019 U.S. App. LEXIS 37244, at *3 (6th Cir. Dec. 16, 2019) (defendant's "disagreement with [the district court's] conclusion is not a novel issue related to class certification").

that ordinarily, the issues must be important to the parties and to class action jurisprudence generally.

Fourth, in the case of both plaintiffs and defendants, the court has denied Rule 23(f) review based on the district court's broad discretion in ruling on class certification.[81] In many of these opinions, the court described the reasoning of the district court in detail to explain why the ruling was likely not reversible error under this deferential standard of review.[82]

In short, regardless of whether the plaintiff or the defendant is seeking review, the Sixth Circuit applies the relevant criteria in an evenhanded fashion and screens the petitions with skepticism.

### *J. Likely Explanation for the Statistical Trend*

It is not uncommon for a proposed rule to generate extreme predictions of dire consequences. For example, when the 2015 amendments to the discovery rule (Rule 26) made "proportionality" front and center in defining the scope of discovery, there was near hysteria among the plaintiffs' bar. Some argued that "defendants under the new rule will be handed an enormous advantage," that the rule would help institutional defendants and harm individual plaintiffs "more than any previous round of amendments to the [Federal Rules of Civil Procedure]," and that the new rule would "place justice out of the reach of many deserving individuals . . . ."[83] I reviewed more than 100 opinions applying the new rule in the class action context and concluded that "[a]t least in the class action context, the proportionality amendment thus far [did] not appear to have had a major impact."[84] Indeed, I have seen no scholarly work since the 2015 amendment suggesting that the

81. *See, e.g.*, *In re Creech*, 2019 U.S. App. LEXIS 20388, at *2–3 (plaintiff petition); *In re* Auto. Parts Antitrust Litig., No. 19-0101, 2019 U.S. App. LEXIS 9612, at *2–3 (6th Cir. Apr. 1, 2019) (plaintiff petition); *In re Veolia N. Am., LLC*, 2022 U.S. App. LEXIS 2101, at *16 (defendant petition); *In re Unum Grp. Corp.*, 2023 U.S. App. LEXIS 33512, at *1–3 (defendant petition); Arends v. Family Sols. of Ohio, Inc., Nos. 21-0303/3375, 2022 U.S. App. LEXIS 16990, at *2–3 (6th Cir. June 17, 2022) (defendant petition).

82. *See*, *e.g.*, *In re Unum Grp. Corp.*, 23 U.S. App. LEXIS 33512 (referencing the district court's reasoning eight times); *Arends*, 2022 U.S. App. LEXIS 16990, at *5–6 (devoting six paragraphs to analysis of the district court's reasoning); *In re* HCA Holdings, Inc., No. 14-0511, 2015 U.S. App. LEXIS 3015, at *5–6 (6th Cir. Feb. 26, 2015) (extensively describing the district court's reasoning).

83. *See* Robert H. Klonoff, *Application of the New "Proportionality" Discovery Rule in Class Actions: Much Ado About Nothing*, 71 VAND. L. REV. 1949, 1960 (2018) (citations and emphasis omitted).

84. *Id.* at 1991.

amendment had been the disaster many in the plaintiffs' bar had predicted.

The Rule 23(f) context is somewhat different. Unlike amended Rule 26, in the Rule 23(f) context, empirical evidence *did* suggest for a number of years that the new Rule was favoring defendants over plaintiffs, as many in the plaintiffs' bar had feared. By the same token, in a 2013 article, I argued that the appellate jurisprudence spawned by Rule 23(f) had made it significantly more difficult for plaintiffs to achieve class certification.[85]

Yet, as the above statistical discussion—and the discussion of Sixth Circuit rulings—make clear, in the last decade or so, the circuits have applied Rule 23(f) in a largely evenhanded way. Indeed, the Lammon study (and my follow-up data) suggest plaintiffs may have benefited slightly more in recent years than defendants. Correspondingly, in a 2017 article, I recognized that the appellate trend of adding new roadblocks to class certification (which I had written about in 2013) had subsided to a significant extent.[86] Thus, my impressionistic assessments of the case law in 2013 and 2017 are supported, at least to some degree, by the empirical evidence. What has caused this turnaround? It is difficult to know precisely what has transpired, but my best guess is that the following trends have occurred.

*First*, as the Sixth Circuit rulings and the overall statistics suggest, both sides have attempted to use Rule 23(f) to obtain review even in routine grants or denials of class certification; this is true notwithstanding the warning of the Advisory Committee Notes that "many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings."[87] In the early years following the adoption of Rule 23(f), more than a third of Rule 23(f) petitions were granted, whereas in recent years, that number has been reduced to 24–25 percent.[88] Because the majority of Rule 23(f) petitions have been filed by defendants, plaintiffs have disproportionately benefited from this more conservative appellate use of Rule 23(f).[89]

*Second*, and related to the first, the circuits have no doubt learned from experience that the review of class certification rulings can be

85. *See Decline*, *supra* note 4.

86. *See* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline,* 92 N.Y.U. L. REV. 971, 973 (2017) [hereinafter *Respite*].

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

88. *See* discussion *supra* Section I.

89. *See supra* note 53. Again, this does not take into account delay to the plaintiffs' case when a stay is granted.

very complicated and can involve massive records. Already overworked with heavy caseloads, appellate courts are understandably reluctant to increase their caseloads with class certification rulings that are largely routine.[90]

*Third*, an underlying concern leading to Rule 23(f) was that existing devices such as mandamus and 28 U.S.C. § 1292(b) were inadequate to address tenuous decisions by district courts to grant class certification.[91] It is quite possible that the threat of Rule 23(f) review—like the legendary Sword of Damocles—has instilled a level of caution among district courts that did not exist prior to Rule 23(f), when the district court usually had the last word on class certification. Fewer tenuous decisions granting class certification means less need for Rule 23(f) review and reversal.

*Fourth*, as discussed in Section II below, the jurisprudence developed under Rule 23(f) has resulted in a rich body of appellate law to guide the district courts. In the pre-Rule 23(f) days, district courts facing class certification issues were either writing on a clean slate or were relying on decisions of other district courts that had not been tested on appeal. As discussed below, there is now Rule 23(f) case law on all of the requirements for class certification. That body of law gives district courts answers to key legal issues, and it also reduces the number of issues of first impression that appellate courts must consider going forward. It is a Rule 23 feedback loop.

*Finally*, as the Sixth Circuit rulings on Rule 23(f) illustrate, an important aspect on whether to grant review is whether the district court has made appropriate findings of fact and has exercised its discretion properly. Today, in the post-Rule 23(f) world, my experience has been that district courts have generally been careful to issue

90. While it is difficult to document this point because most circuits simply deny review without any reasoning, numerous Sixth Circuit cases have relied on the routine nature of the issue in denying Rule 23(f) review. *See, e.g.*, *In re* Pop, No. 23-0101, 2023 U.S. App. LEXIS 20000, at *3 (6th Cir. Aug. 2, 2023) (denying review, in part, because "this is not a novel issue"); *In re* Ascent Res.-Utica, LLC, No. 21-0307, 2022 U.S. App. LEXIS 17437, at *8 (6th Cir. June 23, 2022) ("[W]hether the district court properly conducted its *Daubert* analysis . . . is not a novel or unsettled question that merits granting [Defendant's] petition to appeal."); *In re* GEICO Cas. Co., No. 21-0309, 2022 U.S. App. LEXIS 13523, at *6 (6th Cir. May 18, 2022) (denying petition to appeal, noting that "this case [does not] present novel legal issues").

91. *See Decline*, *supra* note 4, at 738. The problem of a wayward district judge was especially acute in nationwide class actions because plaintiffs' counsel could lose multiple class certification rulings but ultimately prevail by finding one friendly judge to certify the class; "[a] single positive trumps all the negatives." *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766–67 (7th Cir. 2003).

opinions that make substantial findings of fact and explain in detail the court's exercise of discretion. And, of course, it is also possible that in recent years, appellate courts have become less hostile to class actions.[92]

In sum, an initial flurry of Rule 23(f) rulings favorable to defendants appeared largely designed to rein in isolated district court judges who were too eager to certify classes. However, in more recent years, the circuits have used Rule 23(f) to focus on important legal questions, while eschewing review of routine class certification rulings that are supported by substantial appellate precedent and detailed findings of fact.

## II. JURISPRUDENCE SPAWNED BY RULE 23(F)

This section examines several important Supreme Court and federal circuit court rulings under Rule 23(f). To narrow the list from the hundreds of opinions rendered under Rule 23(f), the article identifies the cases based on the number of citations in federal and state judicial opinions. The data are based on the number of judicial opinions citing a particular case as of May 29, 2024, as reflected in the Westlaw database.[93] It identifies five heavily cited Supreme Court decisions rendered as part of the Rule 23(f) review process, and it also includes the 12 most frequently cited court of appeals cases decided under Rule 23(f). While the number of citations does not necessarily reflect the overall intrinsic importance of a case to the law of class actions, it is a reasonable way to isolate a small number of cases to consider, particularly given the space constraints of an article such as this one.

In addition, because the number of case citations (all other things being equal) favors older cases, this section also identifies some recent

92. *See generally Respite*, *supra* note 84 (discussing pro-plaintiff class certification opinions subsequent to the publication of *Decline*). Moreover, in a couple of circuits, a pro-plaintiff bias is built into the standard of review because "greater deference [is given] when the district court has certified a class than when it has declined to do so." McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 221 (2d Cir. 2008) (quoting Marisol A. by Forbes v. Giuliani, 126 F.3d 372, 375 (2d Cir. 1997); *accord, e.g.*, Walker v. Life Ins. Co. of the Sw., 953 F.3d 624, 633 (9th Cir. 2020).

93. All opinions citing a case are counted, even multiple opinions within a single lawsuit (such as supplemental opinions and orders on rehearing). Although law review citations are not considered, it should be noted that all of the cases discussed herein have been frequently cited in law review articles as well, in some instances in hundreds of articles.

cases that, while not yet setting records in terms of number of citations, are (in the author's view) important rulings.[94]

Finally, the article discusses the fact that, despite the potential availability of Rule 23(f) review, many defendants have chosen to reach classwide settlements without first challenging class certification.

### *A. Most Frequently Cited Supreme Court Cases*

The text of Rule 23(f) is directed at federal courts of appeals. Nonetheless, Rule 23(f) can facilitate review not only by the federal circuits but also by the U.S. Supreme Court, on certiorari from a Rule 23(f) decision rendered by a circuit.[95] The discussion below focuses on five widely cited Supreme Court cases that reached the Court via Rule 23(f).[96]

#### *1. Wal-Mart Stores, Inc. v. Dukes*[97]

By far the most frequently cited case arising through Rule 23(f) is *Wal-Mart*. The case has been cited in 8,840 judicial opinions as of May 29, 2024.

*Wal-Mart*, a putative nationwide class of Wal-Mart female employees who alleged sex discrimination, addresses two important issues: (1) the meaning of commonality under Rule 23(a)(2), and (2) the propriety of bringing an injunctive class under Rule 23(b)(2) that also includes claims for damages. In addition, it includes frequently cited dictum on the applicability of *Daubert*,[98] (and Federal Rule of Evidence 702) at the class certification stage and the appropriateness of using sampling instead of adjudicating individual class members'

94. It is not my purpose to assess whether plaintiffs or defendants have benefited most by the substance of the appellate rulings under Rule 23(f). I have discussed those issues in my *Decline* and *Respite* articles. Here, I am merely showing the wide variety of issues that have been resolved under Rule 23(f) by focusing on frequently cited cases and selected other cases I deem important.

95. Of course, the Supreme Court also occasionally reviews class actions after a final judgment has been entered. *See, e.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413, 421–22 (2021) (deciding Article III standing issue in an appeal from a final judgment after a jury trial in a class action); Devlin v. Scardelletti, 536 U.S. 1, 6 (2002) (appeal after approval of a class settlement).

96. The Supreme Court has rendered seven decisions through the Rule 23(f) process, but two have not been widely cited. *See* Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys., 594 U.S. 113, 119 (2021) (cited eighty times); Nutraceutical Corp. v. Lambert, 586 U.S. 188, 191 (2019) (cited 170 times).

97. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) [hereinafter *Wal-Mart*].

98. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

claims.[99] The district court certified a nationwide class of Wal-Mart female employees alleging sex discrimination; the Ninth Circuit granted interlocutory appeal and upheld certification on Rule 23(f) review; the en banc Ninth Circuit affirmed in part and remanded in part; and the Supreme Court granted Wal-Mart's petition for a writ of certiorari and later reversed.[100]

**Commonality.** Rule 23(a)(2) states that members of a class may sue as representatives only if "there are questions of law or fact common to the class."[101] Prior to the Supreme Court's 2011 opinion in *Wal-Mart*, commonality was rarely an impediment to class certification. Courts were liberal in finding a question of law or fact that qualified, and they repeatedly emphasized the modest burden imposed by commonality, referring to the requirement as one that "is easily met,"[102] and should be "liberal[ly] construe[ed]."[103]

The Supreme Court's *Wal-Mart* decision gave new meaning to commonality. Under the Supreme Court's formulation, the common question "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[104] Thus, it is not enough that the question is common; rather, the question must be essential to the outcome of the case. This exacting standard led four dissenting Justices, in an opinion by Justice Ginsburg, to accuse the majority of "blend[ing] Rule 23(a)(2)'s threshold [commonality] criterion with the more demanding [predominance] criteria of Rule 23(b)(3), and thereby elevating the (a)(2) inquiry so

99. *See generally Wal-Mart*, 564 U.S. at 354 (the Court notes, in summarizing the district court's belief that *Daubert* did not apply at the class certification stage, "[w]e doubt that is so"); *see also id.* at 367 (criticizing, as a violation of the Rules Enabling Act, 28 U.S.C. § 2072(b), the Ninth Circuit's view that, instead of adjudicating each class member's claim, a "trial by formula" sampling approach could be used).

100. *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 143 (N.D. Cal. 2004), *aff'd*, 474 F.3d 1214 (9th Cir. 2007), on reh'g en banc, *aff'd in part and remanded in part*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 564 U.S. 338 (2011).

101. FED. R. CIV. P. 23(a)(2).

102. Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994) (citing to HERBERT NEWBERG & ALBA CONTE, 1 NEWBERG ON CLASS ACTIONS § 3.10, at 3-50 (1992); *see*, *e.g.*, Hochstadt v. Bos. Sci. Corp., 708 F. Supp. 2d 95, 102 (D. Mass. 2010).

103. EEOC v. Detroit Edison Co., 515 F.2d 301, 311 (6th Cir. 1975), *rev'd on other grounds*; *accord, e.g.*, Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5th Cir. 1986) (noting that "[t]he threshold of 'commonality' is not high.").

104. *Wal-Mart*, 564 U.S. at 350.

that it is no longer 'easily satisfied.'"[105] The dissent argued that the majority had, in essence, added a predominance requirement to class actions brought under Rule 23(b)(1) and Rule 23(b)(2).[106]

This new interpretation of commonality does not significantly impact Rule 23(b)(3) classes, which require both commonality and predominance (*i.e.,* that common questions predominate over individual questions).[107] Even if commonality posed a light burden (as it did pre-*Wal-Mart*), courts still had to apply the more exacting predominance test in (b)(3) classes.[108] The *Wal-Mart* decision, however, has had a significant impact on (b)(1) and (b)(2) classes, arguably imposing a predominance requirement where the drafters of Rule 23 chose not to include one. Several courts in (b)(1) and (b)(2) cases have rejected class certification based on *Wal-Mart*'s rigorous commonality standard.[109]

**Rule 23(b)(2).** *Wal-Mart* was a watershed defense victory on Rule 23(b)(2). Unlike the commonality decision, which divided the Court 5–4, the Court's (b)(2) ruling was unanimous. In the long run, the (b)(2) ruling may be even more important than the commonality ruling. [110]

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105. *Id.* at 375 (Ginsburg, J, concurring in part and dissenting in part) (quoting 5 MOORE'S FEDERAL PRACTICE – CIVIL § 23.23[2] (Matthew Bender & Co., Inc., 2024)).

106. *See id.* at 376.

107. *See Decline*, *supra* note 4, at 778.

108. *See id.*

109. *See, e.g.*, M.D. v. Perry, 675 F.3d 832, 839, 854 (5th Cir. 2012) (reversing district court's grant of (b)(2) certification of class alleging systemic constitutional violations in state foster care system; the Fifth Circuit noted that "[a]lthough the district court's analysis may have been a reasonable application of pre-*Wal-Mart* precedent, the *Wal-Mart* decision has heightened the standards for establishing commonality under Rule 23(a)(2), rendering the district court's analysis insufficient"); Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481, 493, 497 (7th Cir. 2012) (vacating district court's grant of (b)(2) certification of class alleging violation of school district's obligation under Individuals with Disabilities Education Act; the Seventh Circuit noted that "the Supreme Court explained in *Wal-Mart* that superficial common questions . . . are not enough") (citing *Wal-Mart*, 564 U.S. at 349).

110. *See, e.g.*, George Rutherglen, Wal-Mart, AT&T Mobility, *and the Decline of the Deterrent Class Action*, 98 VA. L. REV. IN BRIEF 24, 26 (2012) ("The division among the Justices on commonality under (a)(2) has received the most attention, but the unanimous holding on certification under (b)(2) has important implications in its own right."); Randy D. Gordon, *A Question of Taste: Touchstones for Determining the Certifiability of Classwide Claims for Declaratory and Injunctive Relief Under Rule 23 of the Federal Rules of Civil Procedure*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 1, 10 (2012) ("the Court's unanimous holding that the *Dukes* plaintiffs' claims could not be certified under (b)(2) is the more important [ruling]").

The issue in *Wal-Mart* was whether (b)(2)—which applies to situations in which "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"[111]—was proper notwithstanding the female employees' claim for back pay. Prior to *Wal-Mart*, courts took different approaches in analyzing the permissibility of monetary claims under (b)(2), but no circuit had held that back pay was an impermissible remedy under (b)(2).[112] Nonetheless, the Supreme Court rejected all of those approaches, holding that "individualized monetary claims [including claims for back pay] belong in Rule 23(b)(3)."[113] Subsequent to *Wal-Mart*, a number of courts have rejected Rule 23(b)(2) classes seeking various types of monetary relief, relying on the Supreme Court's restrictive view of (b)(2).[114]

*2. Comcast Corp. v. Behrend*[115]

Another frequently cited case is *Comcast* (cited in 2,933 opinions as of May 29, 2024). In *Comcast,* an antitrust case, the district court certified a class, and the Third Circuit affirmed on Rule 23(f) review. However, the Supreme Court granted Comcast's petition for certiorari and subsequently reversed.[116] Plaintiffs offered four theories of liability, but the district court certified a class based on only one theory.[117]

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111. FED. R. CIV. P. 23(b)(2).

112. Most circuits followed the Fifth Circuit's restrictive approach in *Allison v. Citgo Petroleum Corp.*, which allowed monetary claims under (b)(2) only if the claims were "incidental" to the declaratory or injunctive relief. 151 F.3d 402, 415 (5th Cir. 1998); *see also* Reeb v. Ohio Dep't of Rehab. & Corr., Belmont Corr. Inst., 435 F.3d 639, 651 (6th Cir. 2006). Even under *Allison*, back pay was permissible under (b)(2) because the court deemed the remedy to be "equitable" in nature, and therefore akin to declaratory or injunctive relief. *See Allison*, 151 F.3d at 415. The Second Circuit, in Robinson v. Metro-N. Commuter R.R., adopted an even more expansive view of Rule 23(b)(2), holding that a district court should assess the appropriateness of (b)(2) certification in light of "the relative importance of the remedies sought, given all of the facts and circumstances of the case." 267 F.3d 147, 164 (2d Cir. 2001) (quoting Hoffman v. Honda of Am. Mfg., Inc., 191 F.R.D. 530, 536 (S.D. Ohio 1999), *abrogated by Wal-Mart*, 564 U.S. at 338–40 (2011)); *see also* Parker v. Time Warner Ent. Co., 331 F.3d 13, 20–21 (2d Cir. 2003). Under this so-called ad hoc test, back pay could be recovered, but so could other types of potentially significant damages, as well, even if they were more than "incidental." *Robinson*, 267 F.3d at 164.

113. *Wal-Mart*, 564 U.S. at 362.

114. *See, e.g.*, Aziz v. City of Newark, No. 20-10309, 2022 U.S. Dist LEXIS 71448, at *10 (D.N.J. Apr. 19, 2022); Russell v. Kohl's Dep't Stores, Inc, No. ED CV 15-01143, 2015 WL 12748629, at *6 (C.D. Cal. Dec. 4, 2015).

115. Comcast Corp. v. Behrend, 569 U.S. 27 (2013).

116. *See* Behrend v. Comcast Corp., 264 F.R.D. 150, 191 (E.D. Pa. 2010), *aff'd*, 655 F.3d 182, 185 (3d Cir. 2011), *rev'd*, 569 U.S. 27, 38 (2013).

117. *See Comcast*, 569 U.S. at 31–32.

Like *Wal-Mart*, *Comcast* was a win for the defendant, but because of the peculiar facts and concessions in the case, appellate courts have generally read the case narrowly. In *Comcast*, the model offered by the plaintiffs' damages expert generally "failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised."[118] This disconnect was fatal, according to the Supreme Court, because it meant the plaintiffs could not "establish[] that damages are capable of measurement on a classwide basis."[119] Prior to *Comcast*, most courts had recognized that the mere presence of individualized damages issues did not per se defeat class certification.[120] After *Comcast*, defendants contended—generally without success—that this pre-*Comcast* case law was no longer valid and that a damages model was required in every class action.[121] The problem was that the plaintiffs in *Comcast* "never challenged" the "need to prove damages on a classwide basis" to satisfy the predominance requirement.[122] Thus, appellate courts post-*Comcast* have reiterated that a class action can be certified even if individualized questions of damages exist.[123]

In addition, the Ninth Circuit has made clear that *Comcast* does not require "that class action plaintiffs actually prove that classwide

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118. *Id.* at 36.

119. *Id.* at 34.

120. *See Decline*, *supra* note 4, at 792, n.363 (citing cases); *see also Comcast*, 569 U.S. at 42 (Ginsburg, J., dissenting) ("Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.") (citing 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:54, at 205 (5th ed. 2012).

121. *See*, *e.g.*, Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 589 (S.D.N.Y. 2013), *aff'd*, 602 F. App'x 3 at 7 (2d Cir. 2015) (rejecting defendant's argument that "individualized damages calculations defeat predominance" because "*Comcast*'s holding invalidate[d] prior decisions [holding otherwise]"); Healey v. IBEW, Loc. Union No. 134, 296 F.R.D. 587, 595 (N.D. Ill. 2013) (rejecting defendant's position that, post-*Comcast*, "a Rule 23(b)(3) class can be certified only if damages can be determined according to a single formula").

122. *Comcast*, 569 U.S. at 42 (Ginsburg, J. dissenting).

123. *See, e.g.,* Lytle v. Nutramax Lab'ys, Inc., 99 F.4th 557, 573 (9th Cir. 2024) ("[E]ven after *Comcast*, we have repeatedly reaffirmed that class treatment may be appropriate even where damages must be assessed on an individualized basis.") (citing Vaqeuro v. Ashley Furnitures Indus., Inc., 842 F.3d 1150, 1155 (9th Cir. 2016); *In re* Zetia (Ezetimibe) Antitrust Litig., 7 F.4th 227, 238 (4th Cir. 2021) ("[E]ven if some individualized-injury inquiry is ultimately required at trial for some defendants, common issues will still predominate."); Roach v. T.L. Cannon Corp., 778 F.3d 401, 408 (2d Cir. 2015) (holding that *Comcast* "did not foreclose the possibility of class certification under Rule 23(b)(3) in cases involving individualized damages calculations" and collecting cases).

damages exist in order to obtain class certification."[124] Instead, the court noted that it had "repeatedly found class treatment to be appropriate . . . upon a showing that damages *could* be calculated on a class-wide basis, even where such calculations have not yet been performed."[125] In short, as Professor Rick Marcus has noted, *Comcast* "cast something of a pall over class certification decisions," but "it was not a tsunami."[126]

*Comcast* is still important: If plaintiffs want to rely on a damages model, the model must line up with plaintiffs' theory of liability.[127] But *Comcast* did not invalidate the prior case law establishing that individualized damages do not per se defeat class certification.

### *3. Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*[128]

Still another frequently cited case is *Amgen*, a securities fraud case (cited in 2,399 opinions as of May 29. 2024). In *Amgen*, the district court certified a class; the Ninth Circuit affirmed on Rule 23(f) review; and the Supreme Court granted certiorari and subsequently affirmed.[129] The securities fraud case involved whether materiality of the statement or omission must be proven at the class certification stage, as defendants contended.[130] Materiality is an element of the "fraud on the market" principle—which allows a court to presume reliance on publicly available information and thus overcome concerns about individualized reliance issues that would defeat the predominance requirement of Rule 23(b)(3).[131] A ruling in defendant's favor would have made it far more difficult for plaintiffs in securities fraud cases to secure class certification. The Court rejected defendants' argument, explaining that "the focus of Rule 23(b)(3) is on the predominance of common *questions*," not on the merits of answers to those questions.[132]

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124. *Lytle*, 99 F.4th at 571.

125. *Id*.

126. Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 508 (2016).

127. *See*, *e.g.*, Forsythe v. Teva Pharm. Indus., 102 F.4th 152, 158 (3d Cir. 2024) ("[A]t 'the class certification stage . . . any model supporting a plaintiff's damages case must be consistent with its liability case.'" (quoting *Comcast*, 569 U.S. at 35)).

128. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455 (2013).

129. *See* Conn. Ret. Plans & Tr. Funds v. Amgen Inc., No. CV07-2536PSG, 2009 U.S. Dist. LEXIS 71653 (C.D. Cal. Aug. 12, 2009), *aff'd*, 660 F.3d 1170 (9th Cir. 2011), *aff'd*, 568 U.S. 455 (2013).

130. *See Amgen*, 568 U.S. at 466.

131. *Id.* at 460–62.

132. *Id.* at 466.

The Court drew a sharp distinction between the district court's role at the class certification stage and its role at the summary judgment stage.[133] And it cautioned against "put[ting] the cart before the horse,"[134] emphasizing that Rule 23 is not a "license to engage in free-ranging merits inquiries at the certification stage."[135] This approach has clear implications for how the elements of Rule 23 are applied. Thus, the *Amgen* Court, recognizing that plaintiff had sought certification under Rule 23(b)(3), noted that "Rule 23(b)(3) requires a showing that questions common to the class predominate, *not that those questions will be answered, on the merits, in favor of the class*."[136] This is not an esoteric issue limited to securities fraud cases. Rather, because it addresses the relationship between class certification and the merits, it is a victory for plaintiffs in class actions across the board.[137]

*4. Erica P. John Fund, Inc. v. Halliburton Co.*[138]

In *Erica P. John Fund, Inc. v. Halliburton Co.* (cited in 944 opinions as of May 29, 2024), the Court held in a unanimous opinion that a securities fraud plaintiff need not prove, at the class certification stage, that the defendant's misconduct caused the economic loss at issue (a concept known as "loss causation").[139] In so holding, the Court rejected the contrary reasoning of both the district court and the Fifth Circuit—*i.e.,* that securities fraud plaintiffs must prove loss causation as a prerequisite to establishing a presumption of reliance (and thereby satisfying predominance under Rule 23(b)(3).

*5. Halliburton Co. v. Erica P. John Fund, Inc.*[140]

In *Halliburton Co. v. Erica P. John Fund* (cited in 748 opinions as of May 29, 2024), the Court rendered another decision favorable to

133. *See id.* at 482.

134. *Id.* at 460.

135. *Amgen*, 568 U.S. at 466.

136. *Id.* at 459 (emphasis added).

137. *See, e.g.*, Bernadette Bollas Genetin, *Back to Class: Lessons from the Roberts Court Class Action Jurisprudence*, 48 AKRON L. REV. 697, 714–18 (2015) (reviewing multiple law review articles that discuss the practical impact of *Amgen* on class action decisions); Ellen Meriwether, *The Fiftieth Anniversary of the Rule 23 Amendments: Are Class Actions on the Precipice?*, 30 ANTITRUST 23, 24–25 (2016) (analyzing *Amgen* as a victory for plaintiffs).

138. Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011).

139. *Id*. at 807.

140. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) [hereinafter *Halliburton II*].

plaintiffs via the Rule 23(f) process. It addressed the question whether it should overrule the "fraud on the market" principle of *Basic Inc. v. Levinson*.[141] As noted above in the discussion of *Amgen*, that principle presumes that investors rely on public information, including material misrepresentations, when the stock trades on a well-developed market. *Basic* enables plaintiffs in class actions to avoid the argument that individual reliance issues defeat class certification. The Court, in a portion of the opinion in which six Justices joined, refused to overrule *Basic*, rejecting a litany of arguments by Halliburton as to why the case was wrongly decided.[142] This was an important victory for plaintiffs; had the Court come out the other way, plaintiffs would have faced a virtually insurmountable burden of showing predominance in the face of individualized reliance issues for each class member.[143]

To be sure, the Court also held that "defendants must be afforded an opportunity before class certification to defeat the [fraud on the market] presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock."[144] The evidentiary opportunity afforded to defendants prevents the case from being characterized as a complete victory for plaintiffs.[145] But the opportunity to submit evidence afforded by the Supreme Court was not novel or new; rather, it "ha[d] been a common approach to defending security fraud claims in the past."[146]

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141. *See id.* at 264 (citing to Basic Inc. v. Levinson, 485 U.S. 224, 247–48 (1988)).

142. *See Halliburton II*, 573 U.S. at 269–77.

143. *See, e.g.*, Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence*, 48 AKRON L. REV. 721, 722 (2015) (noting how a contrary decision in *Halliburton II* "would have altered the legal landscape in stunning ways").

144. *Halliburton*, 573 U.S. at 284.

145. Some courts have found that defendants have been able to defeat the fraud-on-the-market presumption, while others have found that defendants had failed to do so. *See, e.g.*, *In re* Moody's Corp. Sec. Litig., 274 F.R.D. 480, 493 (S.D.N.Y. 2011); GAMCO Invs. Inc. v. Vivendi, S.A., 927 F. Supp. 2d 88, 101–02 (S.D.N.Y. 2013) (finding that defendant successfully rebutted the *Basic* presumption), *aff'd sub nom.*, GAMCO Invs., Inc. v. Vivendi Universal, S.A., 838 F.3d 214 (2d Cir. 2016); *but see, e.g.*, Plymouth Cty. Ret. Sys. v. Patterson Cos., Inc., No. 18-871 (MJD/HB), 2020 U.S. Dist. LEXIS 177505, at *33–39 (D. Minn. Sept. 28, 2020); Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., No. CV 10-J-2847-S, 2014 U.S. Dist. LEXIS 162403, at *12–30 (N.D. Ala. Nov. 19, 2014) (holding that the defendants failed to rebut the *Basic* presumption at the class certification stage).

146. *Halliburton: Assessing Its Impact on Securities Class Actions*, DORSEY & WHITNEY LLP (June 26, 2014), http://www.dorsey.com/eu-halliburton-impact-on-securities-class-actions/.

### *B. The Dozen Most Frequently Cited Federal Court of Appeals Cases*

#### *1. Zinser v. Accufix Research Institute, Inc. (9th Cir.)*[147]

The most frequently cited federal court of appeals case arising out of Rule 23(f) is *Zinser* (cited in 1,936 opinions as of May 29, 2024). In this case, the district court denied class certification of a putative class of pacemaker implantees.[148] The Ninth Circuit, on Rule 23(f) review, affirmed the denial of class certification on multiple grounds. The case was a product liability suit alleging that pacemakers contained a defective component.[149] The court focused at length on choice-of-law principles and concluded that the district court had correctly rejected plaintiffs' argument that California or Colorado law could be applied to all members of the forty-eight-state class, and correctly found that the application of forty-eight states' laws on multiple claims raised fatal predominance problems.[150] The court further applied the four factors under Rule 23(b)(3) for analyzing whether a class action was superior (Rule 23(b)(3)(A)–(D)), agreeing with the district court that the proposed class action was not superior.[151] In addition to rejecting Rule 23(b)(3) certification, the court found that a class action could not be certified under Rule 23(b)(1)(A), Rule 23(b)(1)(B), or Rule 23(b)(2).[152] In short, the decision provides guidance on all four kinds of classes authorized under Rule 23(b).

#### *2. Myers v. Hertz Corp. (2d. Cir.)*[153]

The second most frequently cited court of appeals decision arising out of Rule 23(f) review is *Myers* (cited in 1,515 opinions as of May 29, 2024). In that case, a wage and hour suit seeking overtime pay, plaintiffs initially sought to pursue a collective action under the Fair Labor Standards Act ("FLSA"), but when that effort was unsuccessful, they pursued a Rule 23 class action raising claims under New York Law.[154] The district court denied class certification, reasoning that the question whether someone is entitled to overtime pay is individualized, thus defeating Rule 23(b)(3)'s predominance requirement.

147. Zinser v. Accufix Rsch. Inst., Inc., 253 F.3d 1180 (9th Cir. 2001).
148. *See Zinser*, 253 F.3d at 1186.
149. *See id.* at 1184–85.
150. *See id.* at 1190.
151. *See id.* at 1190–92.
152. *See id.* at 1193–97.
153. Myers v. Hertz Corp., 624 F.3d 537 (2d Cir. 2010).
154. *See Myers*, 624 F.3d at 542.

Although the Rule 23 issue was the vehicle for the case to reach the Second Circuit, many citations to the case relate to the Second Circuit's explanation of the "two step" approach to litigating collective actions.[155] Thus, Rule 23(f) provided a vehicle for clarifying an important issue separate and apart from a question under Rule 23.

*3. Mazza v. American Honda Motor Co. (9th Cir.)*[156]

*Mazza* is the third most frequently cited federal court of appeals Rule 23(f) decision (cited in 1,465 opinions as of May 29, 2024). The district court certified a class of individuals who purchased or leased certain automobiles and alleged that the defendant misrepresented features of the braking system in the vehicles.[157] On Rule 23(f) review, the court vacated class certification and remanded for further proceedings.[158] After a rigorous analysis of choice-of-law principles, the court held that the laws of multiple jurisdictions applied to the nationwide class.[159] Because those laws differed in material respects, differences in state laws outweighed common issues, thus defeating predominance.[160] Even if the class was limited to California, predominance could not be satisfied because it included individuals who were not exposed to—and thus could not rely on—the allegedly misleading advertising material.[161] Because many class actions involve the laws of multiple states, the guidance of this opinion was very important.

*4. Vega v. T-Mobile USA, Inc. (11th Cir.)*[162]

*Vega* is the fourth most cited federal court of appeals decision arising out of Rule 23(f) (cited in 1,413 opinions as of May 29, 2024). The case involved former sales employees who brought a putative class action against T-Mobile, seeking damages for T-Mobile's

155. Under the first step, the court "mak[es] an initial determination to send notice to potential opt-in plaintiffs who may be 'similarly situated' to the named plaintiffs with respect to whether a FLSA violation has occurred." *Id.* at 555 (citing Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1258–62 (11th Cir. 2008)). At the second step, "the district court will, on a fuller record, determine whether a so-called 'collective action' may go forward by determining whether the plaintiffs who have opted in are in fact 'similarly situated' to the named plaintiffs." *Id.*

156. Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012) (abrogated in part by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC, 31 F.4th 651, 682 n.32 (9th Cir. 2022)).

157. Mazza v. Am. Honda Motor Co., 254 F.R.D. 610, 615 (C.D. Cal. 2008).

158. *Mazza*, 666 F.3d at 596.

159. *See id.* at 589–594.

160. *See id.* at 596.

161. *See id.*

162. Vega v. T-Mobile USA, Inc., 564 F.3d 1256 (11th Cir. 2009).

alleged refusal to pay commissions to its former sales employees on the sale of prepaid cellular telephone accounts.[163] The Eleventh Circuit found that the district court abused its discretion in its analysis of numerosity, commonality (erroneously conflating it with typicality), and predominance.[164] The numerosity analysis is especially surprising: plaintiff obtained evidence from a T-Mobile manager that the number of company retail sales associates was "in the thousands" nationwide, but because the district court certified a Florida-only class, plaintiff failed numerosity because he did not establish the number of retail sales associates in Florida.[165] Clearly, the instruction, at least to district courts in the Eleventh Circuit, was that numerosity was a serious requirement that necessitated careful analysis and evidentiary support.

*5. Samuel-Bassett v. Kia Motors America, Inc. (3d Cir.)*[166]

The fifth most cited Rule 23(f) federal circuit case is *Samuel-Bassett* (cited in 1,185 opinions as of May 29, 2024). This case is another example of a decision that was appealed under Rule 23(f) but ended up resolving issues separate from Rule 23. The case was an automobile defect putative class action brought under Pennsylvania Unfair Trade Practices and Consumer Protection Law and under the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.[167] The court recognized that, while this was a Rule 23(f) case, the court was obligated to establish its own subject matter jurisdiction.[168] The opinion contains a lengthy analysis of diversity jurisdiction and a determination of whether the amount in controversy was over $75,000.[169] Ultimately the court concluded that the amount in controversy had not been adequately established and that a remand for fact-finding by the district court was required.[170] Thus, Rule 23(f) led to an appellate court decision focusing on the amount-in-controversy element of diversity jurisdiction.

163. *See id.* at 1256.
164. *See id.* at 1267–68, 1270.
165. *Id.* at 1267–68.
166. Samuel-Bassett v. Kia Motors Am., Inc. 357 F.3d 392 (3d Cir. 2004).
167. *See id.* at 394, 402.
168. *See id.* at 395.
169. *See id.* at 396–402.
170. *See id.* at 403. Of course, in light of the liberalized diversity requirements under CAFA, *see Decline*, *supra* note 4, at 744–45, this ruling will not be an impediment to most major class actions. *See Decline*, *supra* note 4, at 744–45.

*6. In re Hydrogen Peroxide Antitrust Litigation (3d Cir.)*[171]

In *Hydrogen Peroxide* (cited in 1,058 opinions as of May 29, 2024), the court held that, even if an expert's testimony survives a challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[172] when a class certification issue involves competing expert testimony by the plaintiff's expert and the defendant's expert, the court at class certification must decide which side's expert is more credible.[173] In *Hydrogen Peroxide*, plaintiffs and defendants proffered expert testimony in an antitrust suit on whether the alleged conspiracy could be established at trial through evidence common to the class.[174] Plaintiffs' economist opined that the alleged conspiracy could be established by common proof, but defendant's economist testified to the contrary.[175] The district court held that "[p]laintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class."[176] The Third Circuit reversed, holding that: "[T]he question at class certification stage is whether, if [impact on the entire class from a conspiracy] is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. When the latter issue is genuinely disputed, the district court must resolve it after considering all relevant evidence."[177] The Third Circuit thus rejected the district court's "threshold showing" test; it held instead that "[f]actual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence," and that "to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23."[178] Given that many putative classes involve competing experts, the court's instruction to resolve factual disputes is significant.

171. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

172. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

173. *See Hydrogen Peroxide*, 552 F.3d at 323.

174. *See id.* at 308.

175. *See id.* at 315.

176. *Id.* at 321 (quoting Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 174 (E.D. Pa. 1997)).

177. *Id.* at 325.

178. *Hydrogen Peroxide*, 552 F.3d at 320 (citing Teamsters Local 445 Freight Div. Pension Fund. V. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008)).

*7. Szabo v. Bridgeport Machines, Inc. (7th Cir.)*[179]

*Szabo* (cited in 1,008 opinions as of May 29, 2024) involved a putative nationwide class of persons who purchased machine tools and alleged breach of warranty and fraud.[180] The district court certified the class but the Seventh Circuit remanded for further consideration. The case is cited frequently for the important proposition that in ruling on class certification, a district court need not accept the allegations of a complaint as true.[181] Rather, the court must resolve disputed questions of fact that determine whether class treatment is appropriate.[182] In the specific case, those issues included, for example, whether oral representations by Bridgeport distributors were authorized or ratified by Bridgeport itself.[183] The court also explained the criteria used by the Seventh Circuit in deciding whether to grant Rule 23(f) review.[184]

*8. Vinole v. Countrywide Home Loans, Inc. (9th Cir.)*[185]

In *Vinole* (cited in 972 opinions as of May 29, 2024), which involved a wage-and-hour dispute, the Ninth Circuit addressed whether a defendant can preemptively file a motion to deny class certification, as opposed to waiting until the plaintiff affirmatively moves for class certification.[186] The court held that nothing in Rule 23 or the case law prohibited a defendant from filing a motion to deny class certification before the plaintiff had moved to certify a class.[187] Finding such a procedure to be permissible, the Ninth Circuit went on to affirm the district court's decision to deny class certification, holding that the district court did not abuse its discretion in determining that individual issues predominated over common issues.[188] Establishing that a defendant can preemptively move to deny class certification clarified the availability of an important tactic for defendants to short-circuit a protracted class certification process.

179. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672 (7th Cir. 2001).
180. *See id.* at 673.
181. *See id.* at 675–76.
182. *See id.* at 676.
183. *See id.*
184. *See Szabo*, 249 F.3d at 676,
185. Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir. 2009).
186. *See id.* at 939–40.
187. *See id.*
188. *See id.* at 947–48.

*9. In re Initial Public Offerings Securities Litigation IPO (In re IPO) (2d Cir.)*[189]

*In re IPO* (cited in 956 opinions as of May 29, 2024) involved six consolidated class actions against underwriters under the federal securities laws alleging misrepresentation and market manipulation.[190] The court provided important guidance on the determinations that a district court must make before certifying a class. First, the court held that a district court cannot certify a class without finding that each of the Rule 23 requirements has been satisfied.[191] Second, the district court must resolve factual disputes relevant to each Rule 23 requirement.[192] Third, the district court must resolve Rule 23-related factual disputes even if the issue overlaps with a merits issue.[193] Fourth, a district court should not consider the merits of the case unless the merits overlap with a class certification requirement.[194] Finally, in making the above determinations, the district court has discretion in determining the scope of discovery and the contours of the class certification hearing.[195] Applying these principles, the Second Circuit held that the district court abused its discretion in finding that Rule 23(b)(3)'s predominance requirement was satisfied.[196]

*10. Messner v. Northshore Univ. HealthSystem (7th Cir.)*[197]

In *Messner* (cited in 923 opinions as of May 29, 2024), former patients brought a putative class action against a health care provider, alleging that a merger between another health system violated federal antitrust laws, resulting in higher costs for hospital care.[198] Plaintiffs relied on expert testimony, but the district court held that the proposed methodology could not establish antitrust impact on a classwide basis.

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189. *In re* Initial Pub. Offering Secs. Litig., 471 F.3d 24 (2d Cir. 2006) [hereinafter, *In re IPO*].

190. *See id.* at 27.

191. *See id.*

192. *See id.*

193. *See id.*

194. *See In re IPO*, 471 F.3d at 27.

195. *See id.* at 27, 42 (district court must "assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met"); *see also In re* Visa Check/MasterMoney Antitrust Litig. v. Visa, United States, 280 F.3d 124, 144 (2d Cir. 2001) (the court disavowed the statement in its prior decision discussed *infra* at 36, that an expert's testimony can support class certification as long as the testimony is not "fatally flawed").

196. *See In re IPO*, 471 F.3d at 45.

197. Messner v. Northshore Univ. HealthSystem, 669 F.3d 802 (7th Cir. 2012).

198. *See id.* at 809–10.

The Seventh Circuit reversed, holding that the district court was too stringent in its demand for uniform evidence.[199] The court first found that the district court erred in failing to determine whether the defendant's expert complied with *Daubert*.[200] When an expert's testimony is "critical to class certification," the court must rule on the admissibility of such evidence under *Daubert*.[201] Second, the court agreed with the plaintiff that predominance did not require the absence of individual questions, and that the need to prove individual damages was "not an obstacle to a showing of predominance."[202] This case thus provided useful guidance on plaintiffs' burden with respect to expert testimony and on the relevance of individualized damages under Rule 23(b)(3).

### *11. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (3d Cir.)*[203]

*Newton* (cited in 882 opinions as of May 29, 2024) was a putative class action alleging securities fraud in which the district court had denied class certification.[204] The court held that plaintiffs were entitled to a presumption of reliance under the fraud-on-the-market theory—and also because the complaint alleged a failure to disclose as well as misrepresentations.[205] By contrast, the court held there was no presumption of classwide injury.[206] The court found that the Rule 23(a) requirements—numerosity, commonality, typicality, and adequacy of representation—were satisfied, but that the Rule 23(b)(3) requirements—predominance, and superiority—were not.[207] In its opinion, the court explained the criteria for assessing each of those requirements.[208]

199. *See id.* at 818.

200. *See id.* at 812.

201. *Id.* (quoting American Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010).

202. *Id.* at 815.

203. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001).

204. *See id.* at 162.

205. *See id.* at 177.

206. *See id.* at 187.

207. *See id.* at 190.

208. *See Newton*, 259 F.3d at 182 (discussing numerosity), 182–85 (discussing commonality and typicality), 185–86 (discussing adequacy, 186–90 (discussing predominance), 191–93 (discussing superiority).

*12. In re Visa Check/Mastermoney Antitrust Litigation v. Visa, United States (2d Cir.)*[209]

In *Visa Check* (cited in 875 opinions as of May 29, 2024), the court held that the district court did not abuse its discretion in certifying an antitrust class action against Visa and MasterCard.[210] The court held that in assessing expert testimony relied upon for class certification, "[a] district court must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law."[211] The court found that the expert in question satisfied that standard.[212] The court also addressed predominance and superiority, finding that the district court did not abuse its discretion in finding that injury and causation could be established by classwide proof.[213] The court held that predominance could be satisfied even though the calculation of damages was individualized.[214] The court further rejected defendants' argument that the class was unmanageable and thus violated superiority.[215] The district court had considered how to address individualized issues that might arise, and "recognized its ability to modify its class certification order, sever liability and damages, or even decertify the class if such an action ultimately became necessary."[216] One of the more frequently cited passages in the opinion is that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and 'should be the exception rather than the rule.'"[217] No doubt one reason *Visa Check* has been cited so frequently is that it was authored by then-Circuit Judge Sotomayor, a point numerous courts citing the opinion have made.[218]

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209. Visa Check/Mastermoney Antitrust Litig. v. Visa, United States, 280 F.3d 124 (2d Cir. 2001) [hereinafter *Visa Check*].

210. *See id.* at 129.

211. *Id.* at 135 (citing Cruz v. Coach Stores, Inc., No. 96 Civ. 8099, 1998 U.S. Dist. LEXIS 18051, at *4 n.3 (S.D.N.Y 1998)).

212. *Id.* Subsequently, in *In re IPO*, discussed *supra* in Section III.A.9, the Second Circuit made clear that the "fatally flawed" test is not sufficiently rigorous and thus disavowed it. *In re IPO*, 471 F.3d at 42.

213. *See id.* at 140.

214. *See Visa Check*, 280 F.3d at 140.

215. *See id.* at 142.

216. *Id.* at 141 (citing *In re* Visa Check/Master Money Antitrust Litig., 192 F.R.D. 68, 89 (E.D.N.Y. 2000)).

217. *Id.* at 140 (quoting *In re* S. Cent. States Bakery Prods. Antitrust Litig., 86 F.R.D. 407, 423 (N.D. La. 1980)).

218. *See, e.g.*, Sibley v. Sprint Nextel Corp., 315 F.R.D. 642, 661–62 n.27 (D. Kan. 2016); Kay Co. v. EQT Prod. Co., No. 1:13-CV-151, 2017 U.S. Dist. LEXIS 228275, at *19 (N.D.W. Va. Sept. 6, 2017); Reinig v. RBS Citizens, N.A., No. 2:15-CV-01541, 2017 U.S. Dist. LEXIS 134094, at *63 n.13 (W.D. Pa. Aug. 2, 2017).

### *C. Summary*

Taken together, and looking just at these seventeen opinions, there can be no doubt that Rule 23(f) has facilitated important guidance by federal circuits and the Supreme Court on a host of issues, including: whether a defendant can preemptively move to deny class certification; the determinations a court must make before certifying a class; the contours of each of the four requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy); the requirements of each type of Rule 23(b) class action—(b)(1)(A), (b)(1)(B), (b)(2), (b)(3); the circumstances in which disputed issues should be decided on the merits; the proper treatment of expert testimony in the class certification context; whether allegations in the complaint must be accepted as true; and a number of important issues in securities fraud class actions. The cases also provide guidance on issues outside Rule 23, including application of choice-of-law principles, the determination of amount-in-controversy for diversity purposes, and elements of a collective action under the Fair Labor Standards Act. And all of these issues were addressed in just seventeen of the many cases arising under Rule 23(f).[219]

### *D. Examples of Other Important Federal Appellate Rulings Under Rule 23(f)*

One of the limitations of using the number of citations as a gauge of "importance" is that, all other things being equal, an older case will have generated more citations than a newer case. Indeed, of the twelve most frequently cited circuit court cases, four are from 2001, one is from 2004, and only one is from later than 2010. To reflect this reality, this section also identifies a sample of more recent circuit cases under Rule 23(f) that, in my view, address critical Rule 23 issues beyond those addressed in the top twelve circuit cases.

First, the circuits have debated whether there should be a "heightened ascertainability" standard, even though such a standard is not stated specifically in Rule 23. Under that approach, plaintiffs must demonstrate, at the class certification stage, that there is an

219. This small sample is insufficient to assess whether the most important decisions under Rule 23(f) have on balanced favored defendants. The majority of cases in this group favored defendants, but plaintiffs won several important victories, including three of the five Supreme Court cases. *See Decline*, *supra* note 4, at 741 (my 2013 assessment of the Rule 23(f) case law was that, overall, the decisions made it more difficult for plaintiffs to achieve class certification). *See Respite*, *supra* note 84 (but I also concluded four years later that this trend had subsided).

administratively feasible way of identifying class members.[220] A number of circuit cases under Rule 23(f) have addressed heightened ascertainability.[221]

Second, Rule 23(f) has been a vehicle for a number of circuits to weigh in on the use of "issue" classes under 23(c)(4)—a provision providing that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[222] Courts have issued detailed opinions offering important guidance on when Rule 23(c)(4) classes may be used.[223]

Third, because a class cannot be certified if the case fails to satisfy Article III standing, a number of Rule 23(f) appeals have addressed standing issues.[224]

Fourth, Rule 23(f) has given appellate courts the opportunity to weigh in on the suitability of particular causes of action for class certification. Thus, courts in Rule 23(f) appeals have noted numerous

220. *See* Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015), as amended (Apr. 28, 2015) (citation omitted).

221. *See, e.g.*, Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124 n.4 (9th Cir. 2017) (rejecting heightened ascertainability; with 435 citations); Mullins v. Direct Digital, LLC, 795 F.3d 654, 661–72 (7th Cir. 2015) (same; with 419 citations); EQT Prod. Co. v. Adair, 764 F.3d 347, 359–60 (4th Cir. 2014) (applying heightened ascertainability; with 283 citations); *Byrd*, 784 F.3d at 161–72 (same; with 293 citations).

222. FED. R. CIV. P. 23(c)(4).

223. *See, e.g.*, Black v. Occidental Petroleum Corp., 69 F.4th 1161, 1186–90 (10th Cir. 2023) (with seventeen citations); Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405, 411–17 (6th Cir. 2018) (with seventy citations).

224. *See, e.g.*, Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1277 (11th Cir. 2019) (holding that unnamed class members do not have to establish Article III standing at the class certification stage but that the individualized nature of determining standing of unnamed class members before awarding relief bears on predominance; with 266 citations); C.R. Educ. & Enf't Ctr. v. Hosp. Props. Tr., 867 F.3d 1093, 1099 (9th Cir. 2017) (holding that class representatives properly alleged injury in fact; with 360 citations); Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362 (3d Cir. 2015) (holding that unnamed class members do not need to establish Article III standing at the class certification stage; with 281 citations); *In re* Nexium Antitrust Litig., 777 F.3d 9, 30–31 (1st Cir. 2015) (holding that a class may be certified even if a small percentage of unnamed class members suffered no injury; with 186 citations).

causes of action that are well suited for class certification,[225] and numerous others that are not well suited for class actions.[226]

In short, as common sense would suggest, when one moves beyond a short list of the most frequently cited cases and considers other cases as well, the array of important issues addressed by appellate courts under Rule 23(f) is much broader.

### *E. Heavy Use of the Settlement Class Device*

One other interesting trend should be noted. Because of the difficulty of (1) securing Rule 23(f) review and then (2) succeeding in overturning the district court's class certification ruling, Rule 23(f) by no means guarantees that defendants—on interlocutory review—can obtain reversal of a class certification ruling they deem erroneous. In recent years, many major class actions have been settled, with defendants choosing not to contest class certification at all prior to agreeing

225. *See, e.g.*, DZ Rsrv. v. Meta Platforms, Inc., 96 F.4th 1223, 1234 (9th Cir. 2024) (noting that "[f]raud claims are . . . particularly well suited to class treatment" because they "often involve similar misrepresentations that cause a large number of victims to each suffer a small financial loss . . . ."; with two citations); Tershakovec v. Ford Motor Co., 79 F.4th 1299, 1310–11 (11th Cir. 2023) (noting that false advertising claims under the Florida Deceptive and Unfair Trade Practices Act, New York's consumer-fraud statute, Washington's consumer-fraud statute, and the Missouri Merchandising Practices Act are well-suited for class adjudication because those statutes do not require proof of reliance; with thirteen citations); Simpson v. Dart, 23 F.4th 706, 712 (7th Cir. 2022) (noting that "Title VII disparate impact claims are well suited for classwide adjudication" where plaintiffs theory of discrimination rests on a discrete employment policy because the policy either disparately impacted the plaintiff class or it did not; with sixteen citations); Gillis v. Respond Power, LLC, 677 F. App'x 752, 756 (3d Cir. 2017) (noting that "claims involving the interpretation of standard form contracts are particularly well-suited for class treatment" because form contracts are to be interpreted uniformly as to all signatories; with thirteen citations); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000) (recognizing that "[c]ases alleging fraud on the market may be particularly well-suited for class treatment"; with 433 citations).

226. *See, e.g.*, *Tershakovec*, 79 F.4th at 1313 (noting that claims under the Texas Deceptive Trade Practices Consumer Protection Act are ill-suited for class certification because a plaintiff must prove actual reliance which is inherently individualized; with thirteen citations); Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc., 601 F.3d 1159, 1171 (11th Cir. 2010) (noting that claims for breach of contract are ill-suited for class certification where relevant terms vary in substance among the contracts because the claims are "peculiarly driven by the terms of the parties' agreement"; with 306 citations); Robertson v. Monsanto Co., 287 F. App'x 354, 362 (5th Cir. 2008) (noting that claims involving emotional and other intangible injuries are ill-suited for class certification because "[t]he very nature of these damages . . . necessarily implicates the subjective differences of each plaintiff's circumstances"; with twenty eight citations) (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417 (5th Cir. 1998)).

to the settlement.[227] This so-called settlement class device, embodied in Rule 23 as of 2018,[228] was approved by the Supreme Court in *Amchem Products, Inc. v. Windsor* in 1997, a year before Rule 23(f) was adopted.[229]

From a defendant's standpoint, a settlement class—despite the potential availability of Rule 23(f)—provides a way for both parties to share the risk of whether a class will ultimately be certified and upheld. A defendant that loses a contested class certification and then fails to secure appellate review under Rule 23(f) will have lost substantial bargaining leverage. By contrast, a settlement reached prior to a district court ruling on class certification can leverage the risk to plaintiffs that the district court will decline to certify the class or that a class certified by the district court will be reversed under Rule 23(f). Presumably, at least some defendants view the availability of Rule 23(f) as an inadequate reason to contest class certification and thus choose instead to settle on a classwide basis without first litigating class certification on the merits.[230] No doubt, had Rule 23(f) played out as a device that disproportionately favored defendants, many more defendants would contest class certification. But because there is no longer a bias in

227. *See*, *e.g.*, Holloway v. Kohler Co., No. 23-CV-1242, 2024 U.S. Dist. LEXIS 130463, at *1 (E.D. Wis. July 24, 2024) (noting that "Defendants do not oppose [Plaintiffs'] motion [for preliminary approval of their class action settlement]"); McFadden v. Sprint Commc'ns, LLC, No. 22-2464, 2024 U.S. Dist. LEXIS 64602, at *1 (D. Kan. Apr. 9, 2024) (certifying settlement class without opposition from defendants); *In re* Aqueous Film-Forming Foams Prod. Liab. Litig., No. 2:18-mn-2873, 2024 U.S. Dist. LEXIS 57849, at *25 (D.S.C. Mar. 29, 2024) (same); Fusion Elite All Stars v. Varsity Brands, LLC, No. 2:20-cv-02600, 2023 U.S. Dist. LEXIS 179316, at *6 (W.D. Tenn. Oct. 4, 2023) (certifying settlement class, noting that the "[p]arties reached an agreement to settle shortly before the deadline to file a motion for class certification.").

228. *See* FED. R. CIV. P. 23(e) (setting forth rules applicable both to claims "of a certified class" and claims of "a class proposed to be certified or purposes of settlement").

229. *See* Amchem Prods. v. Windsor, 521 U.S. 591, 620 (1997) (noting that, for Rule 23(b)(3) settlement classes, manageability is not a consideration but the other requirements of Rule 23(a) and Rule 23(b)(3) "demand undiluted, even heightened, attention in the settlement context.").

230. For a small sample of the many instances in which defendants agreed to a class settlement without contesting class certification, *see, e.g.*, Jabbari v. Farmer, 965 F.3d 1001, 1004 (9th Cir. 2020) (approving settlement class and affirming settlement in nationwide fraud litigation against Wells Fargo); *In re* Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 552–53 (9th Cir. 2019) (approving settlement class in automobile false-advertising litigation); *In re* Target Corp. Customer Data Security Breach Litig., 892 F.3d 968, 972 (8th Cir. 2018) (approving settlement class in nationwide data breach litigation); *In re* Nat'l Football League Players Concussion Inj. Litig., 821 F.3d 410, 420 (3d Cir.) (approving settlement class in NFL Concussion mass tort litigation), *cert. denied*, 580 U.S. 1030, 580 U.S. 1030 (2016).

favor of defendants, and because the likelihood of securing review is less than 50 percent, many defendants have chosen to bypass the contested class certification process altogether in favor of agreeing to a settlement class.[231]

Of course, there are other reasons why a defendant may agree to a settlement class having nothing to do with Rule 23(f). For example, a defendant might conclude that contesting class certification under the particular facts would be a losing proposition. Or a defendant might be receptive to a settlement class so that the class can be defined in the broadest possible terms, thereby giving the defendant global peace. Nonetheless, it is likely that a defendant's assessment of its odds under Rule 23(f) is a relevant consideration in many cases.

## CONCLUSION

Although there was an initial period in which defendants were the primary beneficiaries of Rule 23(f), that is no longer the case, as recent empirical studies confirm. With respect to the case law generated by Rule 23(f), the Rule does exactly what the framers envisioned: it provides the opportunity for appellate courts to provide guidance on important class action issues. Overall, while I do not always agree with the appellate rulings issued under Rule 23(f), I believe that the amendment has proven to be an important and positive addition to the Federal Rules of Civil Procedure.

231. *See* authorities cited *supra* note 228.