

Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

John H. Beisner

Washington, D.C.
202.371.7410
john.beisner@skadden.com

Jessica D. Miller

Washington, D.C.
202.371.7850
jessica.miller@skadden.com

Geoffrey M. Wyatt

Washington, D.C.
202.371.7008
geoffrey.wyatt@skadden.com

Milton P. Wilkins

Washington, D.C.
202.371.7377
milton.wilkins@skadden.com

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1440 New York Avenue, N.W.
Washington, D.C. 20005
Telephone: 202.371.7000

Four Times Square, New York, NY 10036
Telephone: 212.735.3000

WWW.SKADDEN.COM

Skadden recently conducted a study on behalf of the U.S. Chamber of Commerce Institute for Legal Reform regarding acceptance rates for Rule 23(f) petitions appealing class certification rulings in federal courts. The study has confirmed what practitioners have suspected: Obtaining interlocutory appeal of class certification rulings is getting harder, particularly in certain circuits.

Troubling Signs for Defendants

Skadden's study revealed that U.S. Courts of Appeal are significantly less receptive to interlocutory review of class certification rulings. The study analyzed 23(f) filings between October 31, 2006, and December 31, 2013, and the ultimate outcomes of these petitions.¹

Less than one-quarter of petitions for interlocutory review filed in the last seven years have been granted. The data contrast with those in an earlier report, which found that federal appellate courts granted 36 percent of Rule 23(f) petitions filed between December 1, 1998, when the rule was adopted, and October 30, 2006.²

The study also revealed that the decline in 23(f) review has primarily affected class action defendants. While defendants' petitions were granted far less frequently than during the prior period (24.8 percent, down from 45 percent), the grant rate for plaintiffs' petitions dipped only slightly in recent years (20.5 percent, down from 22 percent).

Circuits Vary in Approaches to Rule 23(f)

In addition, the study revealed stark differences among the U.S. Courts of Appeal with respect to their approaches toward Rule 23(f) petitions:

- The Fifth Circuit was the most receptive to Rule 23(f) jurisdiction in recent years, granting 13 (46.4 percent) of the 28 petitions filed and decided there after October 30, 2006, down from 54 percent in the previous report.
- The second most receptive Rule 23(f) jurisdiction was the Third Circuit, which granted 24 (35.8 percent) of the 67 petitions filed and decided there (down from 86 percent previously).
- Most jurisdictions grant a far higher percentage of appeals from defendants than from plaintiffs. For example, the Fifth Circuit granted 69.2 percent of defendants' petitions versus 28.6 percent of plaintiffs' petitions.
- One of the most receptive jurisdictions for plaintiffs was the Third Circuit, which granted nine (31 percent) of the 29 decided petitions filed there by plaintiffs (down from 83 percent).

1 Data on the cases reviewed were current through March 15, 2014.

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

- The First, Eighth and District of Columbia Circuits were the least friendly to Rule 23(f) petitions, with grant rates ranging from 5.4 percent in the First Circuit to 14.3 percent in the Eighth Circuit.
- The Ninth Circuit had the most Rule 23(f) activity of any circuit and the second-lowest grant rate for defendants. More than one-third of petitions filed in the entire country were in the Ninth Circuit, but only 14.6 percent of the petitions filed by defendants were granted.

Final Dispositions Disfavor Class Certification, But Plaintiffs Are Experiencing More Success

The study also tracked the final dispositions of Rule 23(f) appeals in cases where petitions were filed during the October 31, 2006-December 31, 2013, period and found that it remains more likely for grants of class certification to be reversed on appeal than to be affirmed; and more likely for denials of class certification to be affirmed rather than reversed. In other words, once a court of appeals does grant a 23(f) petition for review, its ultimate outcome generally will disfavor class certification. According to the study:

- U.S. Courts of Appeal have 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.
- In cases where the lower court denied class certification, only the Fourth and Seventh Circuits reversed that ruling more than 50 percent of the time; however, the Fourth Circuit heard only two such cases and the Seventh Circuit heard only eight.
- The Seventh Circuit, which heard the largest number of appeals in which the lower court had granted class certification, reversed class certification 62 percent of the time.
- The Ninth Circuit appears to be one of the jurisdictions most likely to affirm a grant of class certification, with an affirmance rate of 50 percent. In addition, the Ninth Circuit has one of the highest reversal rates for denials of class certification at 39 percent, making it one of the most class-friendly jurisdictions.

Although U.S. Courts of Appeal have tended to side with class action defendants, class action plaintiffs have seen greater success with Rule 23(f) appeals than in previous years. In the previous report, grants of class certification were affirmed and denials were reversed 29 percent of the time, whereas from October 31, 2006, through the present, grants were affirmed 30 percent of the time and denials reversed 40 percent of the time.

These findings are concerning for defendants because low grant rates in certain circuits may signal to district courts that they are unlikely to be reversed or even reviewed in any meaningful sense, which could lead some of these courts to push the boundaries of their discretion in ruling on class certification. This is most notable in the Ninth Circuit, where defendants filed 157 Rule 23(f) petitions and only 23 were granted. The potential for aggressive or novel justifications for class treatment in these circuits is problematic for defendants because rulings granting class certification continue to exert undue settlement pressure. Thus, particular attention must be paid to meritless class actions in these circuits.

Looking Ahead: The Need to Interpret U.S. Supreme Court Jurisprudence

One potential strategy for class action defendants is to focus appellate courts on the need to interpret recent U.S. Supreme Court class action jurisprudence.³ In contrast to the U.S. Courts of Appeal, the Supreme Court has expressed a greater willingness to hear class certification cases in recent years. The last few years have produced a host of Supreme Court rulings on class action issues, including *Wal-Mart Stores v. Dukes*, *Amgen v. Conn. Ret. Plans & Trust Funds* and *Comcast v. Behrend*. The recent Supreme Court decisions may provide an opportunity for class action litigants seeking appellate review to argue that further appellate interpretation is needed, particularly where a trial court relies on pre-*Dukes* and pre-*Comcast* appellate precedents in granting class certification.

The study results are available [here](#).

3 See "Mass Tort and Consumer Class Action Outlook: A Mixed Landscape for Defendants in 2014" (Jan. 16, 2014), available at <http://insights.skadden.com/>.