

Rule 23(f) Petitions in the Ninth Circuit: A Data-Driven Analysis

An analysis of 143 Rule 23(f) petitions at the U.S. Court of Appeals for the Ninth Circuit reveals a "striking" divergence in grant rates for petitions filed by plaintiffs and those filed by defendants, according to Sidley Austin's Jean-Claude André, David Carpenter and Paula Salazar.

By Jean-Claude André, David Carpenter and Paula Salazar

You just lost on the class certification motion. Now what?

People generally know that Federal Rule of Civil Procedure 23(f) allows a party who has lost a motion for class certification to petition the court of appeals for discretionary interlocutory review. Courts have identified three grounds for granting Rule 23(f) review: (1) to resolve a fundamental and unsettled issue of class action procedure; (2) "death knell" situations; and (3) manifest error. But there are certain regularly asked questions about the process:

- How frequently does the court of appeals grant review?
- How long does it take the court of appeals to decide whether to grant or deny?
- And if the petition is granted, does that mean the order likely will be reversed?



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We have taken a data-driven approach to answering these questions as they relate to the Ninth Circuit. Using docket research tools, we identified 143 Rule 23(f) petitions that the Ninth Circuit resolved in the prior three years. Here is what we observed:

A. 22% of Petitions Were Granted, but the Grant Rate Was Much Higher for Plaintiffs

Out of the 145 petitions, 32 were granted, for an overall



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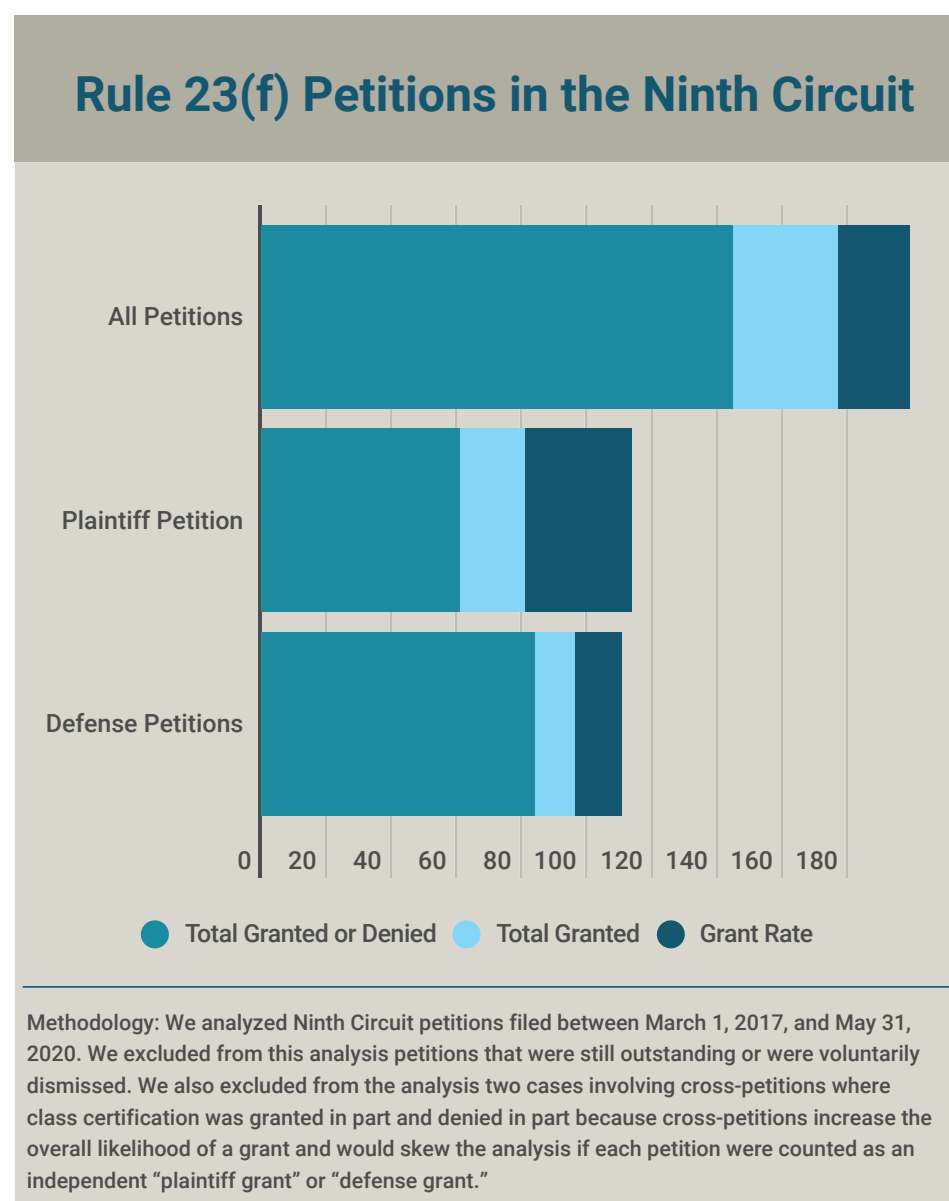
grant rate of 22%. What was striking, however, was the divergence in grant rates for petitions filed by plaintiffs and those filed by defendants. Just 14.3% of defense petitions were granted (12 of 84). Yet 32.8% of plaintiff petitions were granted (20 of 61).

These rates are generally in line with prior analyses, although the tilt toward plaintiff petitions appears more stark than in the past.

There could be multiple factors playing into the discrepancy. For example, in *Microsoft v. Baker*, the Supreme Court held that plaintiffs who are denied class certification cannot manufacture appellate jurisdiction by stipulating to a final judgment, but in doing so, the Court pointed out circuit courts' "unfettered discretion" to accept review over class certification orders. Thus, it is possible that *Baker*, while making it harder for plaintiffs to engineer direct review of class certification denials, may encourage judges to be more lenient toward plaintiffs seeking interlocutory review. It may also be that judges feel less need to act on behalf of defendants—even when a class action seems specious—because defendants may have further opportunities to obtain relief in the trial court, whether on summary judgment or through decertification. Regardless, it seems clear that defendants face more of an uphill battle in seeking review.

B. Petitions Typically Take Around Three Months to Resolve.

Our docket review showed that the time to resolve a Rule 23(f) petition—from filing to disposition—ranged from as quickly as 21 days to as long as 210 days. The average time to disposition



was 86 days. The median time was 85 days.

C. Prevailing on the Petition Does Not Foreshadow Prevailing on the Merits.

Of the 32 petitions granted within our sample, 15 of the ensuing interlocutory merits appeals had been decided as of the time of this article. Of those, five (33%) resulted in vacatur or reversal, while 10 (66%) resulted in the district court's order being affirmed.

For example, in eight of the eleven cases in which plaintiffs obtained review and the appeal was decided on the merits, the Ninth Circuit nonetheless affirmed the denial of certification. Indeed, three of those affirmances were by memorandum disposition, meaning that the appeal did not even merit a published opinion to "clarify [any] law of the circuit." Ninth Cir. Gen. Order 4.3.a.

At first blush, that may seem illogical. Why would the Ninth Circuit bother accepting discretionary review, just to affirm?

If a petition truly presents an unsettled issue (essentially, a district court “split”), then the court of appeals may be accepting review to resolve that issue. But it is also important to recognize that the panel reviewing the petition is not the same as the panel that decides the merits. Petitions are reviewed by a motions panel, which rotates on a monthly basis and may consist of only two judges (if they are in agreement). After a petition is granted, the party must perfect an appeal, which is separately docketed and then goes through the regular protocol for assignment to a merits panel of three judges. Whatever catches the attention of the motions panel may not have the same effect on the merits panel. It may also be that the arguments presented in some petitions simply do not hold up on closer scrutiny after complete briefing and record review.

D. Other Observations

In the course of our review we were on the lookout for other trends.

One procedural curiosity we observed was that replies in support of the petition were filed in 98% of Rule 23(f) proceedings, even though neither the Federal Rules of Appellate Procedure nor the Ninth Circuit’s rules specifically authorize a reply.

Substantively, there was no clear trend in the kinds of cases in which petitions were granted. For example, of 22 cases in which a plaintiff petition was granted, seven were employment/wage-and-hour cases, but a large portion of the petitions filed by plaintiffs were employment/wage-and-hour cases, and the grant rate was not meaningfully higher for those types of cases.

Nor was there any subject matter in which defendants had particular success. Of the 12 defense petitions granted, there were four consumer fraud/breach-of-warranty cases, two employment cases, two privacy cases, two Telephone Consumer Protection Act cases, an antitrust case and a civil rights case.

From the defense perspective, Rule 23(f) is an important tool for responding to an adverse class certification decision, but defendants must realize that obtaining review is an uphill battle. They should take care

to frame the petition in a way that catches the motions panel’s attention by presenting a truly unsettled issue or an error that distinguishes the petition from a mine-run, fact-based challenge to predominance. Defendants should also view Rule 23(f) as just one of the means for undoing a class certification order, along with targeted motions for summary judgment and building a record for decertification.

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