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The Reality of Class-Action Appeals (reviewing Bryan Lammon, An Empirical Study of Class-Action Appeals (2020))

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Bryan Lammon, *An Empirical Study of Class-Action Appeals* (2020), available at SSRN.

Modern class-action scholarship needs more myth-busting. Class-action narratives—for and against aggregate litigation—have spurred decades of procedural reform, from the 2005 Class Action Fairness Act to amendments to Federal Rule of Civil Procedure 23. Scholarship rarely interrogates whether the reality of class-action practice aligns with these narratives. This leaves a potential gulf between scholarship and practice. Bryan Lammon's *An Empirical Study of Class-Action Appeals* contributes to the growing body of research aimed at bridging this gap.

In this work in progress, Lammon debunks myths about class-action appeals. The function of Rule 23(f) is clear enough: it permits interlocutory review of class-certification decisions, creating a carve out to the final judgment rule. Certification is a pivotal procedural point in the life of a class action. If a case is not certified, its value is limited to the damages sought by the named class representatives. If it is certified, the value of the case jumps to cover all potential class members.

Since its enactment in 1997, however, Rule 23(f) has been somewhat of an enigma. While the rule's function and rationale are straightforward, its potential impact on certification is murkier. As Lammon details, Rule 23 engenders discontent from both plaintiffs and defendants. Plaintiffs fear the rule advantages defendants by increasing the reversal of certification decisions. On the other hand, "[d]efense-side interests contend that the courts are inconsistent in applying Rule 23(f) and that the rule insufficiently protects defendants from the pressure to settle."

To assess the legitimacy of both critiques, Lammon created a new dataset of all federal class-certification appeal petitions from 2013-2017. The article provides foundational information about the volume of appeals and general grant and denial rates. These findings are compelling given the roughly 850 petitions underpinning the article. But Lammon's deeper data dives make the biggest contributions.

He addresses the criticisms against Rule 23(f) under two dimensions: "party effects" and "circuit effects." The findings as to each dimension are surprising—and encourage a degree of hope when many scholars (including me) have lamented the demise of class actions. On circuit effects, the article concludes that appeal results differ minimally by circuit, though not enough to conclude there is any particular circuit bias. As for party effects, the article dissects whether the party seeking the appeal affects the outcome. Lammon finds reversal rates split evenly by party, thus minimizing concerns that interlocutory appeals favor defendants. This finding means there is "at least one corner of the class-action universe in which plaintiffs are not predominately losing."

Instead, the true burden of Rule 23(f) is its bearing on the time and resources necessary to litigate class actions. Lammon explains that "allowing parties to petition for review of class-certification decisions can add to the cost, delay, and difficulty in adjudicating class actions." The appeal process is a protracted one, extending the life of a class action anywhere from 80 to 828 days. Defendants thus are the long-term beneficiaries of interlocutory review—win or lose on appeal.

Empirical work, though necessary to understand procedure in application, is a risky endeavor. It is easy to overstate claims or flirt with unnecessarily complex statistical wordplay to increase the findings' appeal. Lammon avoids both potential pitfalls. Throughout the piece, he encourages readers to draw their own conclusions while subtly spelling out potential deductions. He is also refreshingly willing to acknowledge the limitations of his findings. For example, he

concedes that the party effects results may differ if one considered the particular practice area or remedy sought in each petition.

Further, Lammon is clear—at times delightfully chatty—about some of his decisions in applying statistical models to his work. This transparency helps with the perspicuity and pacing of the piece, which is a fast read despite its depth. The detailed methodology, spelled out in the text and accompanying appendices, allows future scholars to replicate and expand on his findings. This is another notable often unacknowledged contribution that the Article offers class action scholarship.

Lammon's article made me question my own assumptions about the effect of Rule 23(f). It also made me wish, dang it, that I had thought to write the article. Admittedly, it is better that he did. It is a great read, one I will likely return to many times.

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