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A CALL FOR STRICTER APPELLATE REVIEW OF DECISIONS ON *FORUM NON CONVENIENS*

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ABSTRACT

Forum non conveniens *has been criticized as anachronistic and unfair. Critics say that it amounts to little more than economic protectionism, serving as a pretext for the dismissal of suits brought against domestic corporate defendants. Even if one does not view the doctrine as inherently flawed, it is undeniable that its application has been extremely uneven owing to the broad discretion exercised by district courts' ruling on the issue. Troubling in any circumstances, the misapplication of* forum non conveniens *is all the more so because of the high stakes at issue in such matters. When a case is dismissed for* forum non conveniens, *it usually goes away for good.*

Against this background, I argue that the appellate courts should adopt a stricter standard of review for decisions on forum non conveniens. *The basic rubric (abuse of discretion) should remain, but appellate courts should apply this standard with heightened scrutiny in light of the serious consequences of the underlying decision. The courts have done so in the analogous context of rulings on class certification. Doing so in the context of* forum non conveniens *would significantly curb abuse, all the while demonstrating to litigants and the broader community that the judiciary understands the importance of these decisions in today's world.*

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INTRODUCTION

We live in a shrinking world. With rapid economic globalization and technology that defies geography, national boundaries become less significant every day. This is all the more true for U.S.-based companies,

which find themselves at the vanguard of globalization, making moves in all corners of the earth.[1]

But it is not all profit and progress. As U.S. companies expand their international presence,[2] they frequently cause injuries to foreign citizens. Argentines contract HIV through the reckless distribution of blood products;[3] a Ford-owning Mexican is injured in a rollover;[4] and the list goes on. And so with the ascendancy of international commerce, we see a corresponding ascendancy in international litigation—with the United States as the venue of choice.[5]

For a number of reasons, foreign plaintiffs want their cases heard in U.S. courts and, perhaps counter-intuitively, U.S. defendants prefer to resolve matters elsewhere.[6] In fact, the draw to litigate in the United States is so powerful, and the consequences so high, that the issue of location frequently overshadows the merits. In legal terms, it all comes down to the doctrine of *forum non conveniens* ("FNC"). This doctrine permits U.S. courts to dismiss lawsuits brought by foreign plaintiffs when the deference normally paid to the plaintiff's choice of forum is vastly outweighed by considerations of convenience.[7] In theory, FNC dismissals are the

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1. *See* AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 131 (2006) (observing that "the United States, as a country, dominates, drives, perpetuates, and disproportionately prospers from the spread of global capitalism around the world"). "[I]t is barely exaggerating to say that the United States is responsible for the worldwide spread of free markets." *Id.* at 231–32. Of course, I do not mean to suggest that the United States is alone in this. While the United States may have dominated the world economy for most of the twentieth century, India and China have emerged as strong competitors. The United States will not become irrelevant in the global economy—so *forum non conveniens* will continue to be a hot issue in the courts—but it will likely share the top spot with its neighbors to the east. *See A New World Economy: The Balance of Power Will Shift to the East as China and India Evolve*, BLOOMBERG BUSINESSWEEK (Aug. 22, 2005), http://www.businessweek.com/magazine/content/05_34/b3948401.htm.

2. John P. Doprovich, Jr., *Dismissal Under* Forum Non Conveniens*: Should the Availability Requirement be a Threshold Issue When Applied to Nonessential Defendants*, 12 WIDENER L. REV. 561, 562 (2006) (noting that many U.S. companies do more business with companies based in China than they do with their counterparts based in the United States).

3. *See* Abad v. Bayer Corp., 563 F.3d 663 (7th Cir. 2009).

4. *See In re* Ford Motor Co., 580 F.3d 308 (5th Cir. 2009).

5. *See* Daniel J. Dorward, Comment, *The* Forum Non Conveniens *Doctrine and the Judicial Protection of Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141, 142 (1998); *see also* Lory Barsdate Easton, *Getting Out of Dodge: Defense Pointers on Jurisdictional Issues in Aviation Torts Litigation*, 20 AIR & SPACE L. 9, 9 (2006) ("One very clear trend in U.S. products liability litigation over the past several years has been an increase in litigation brought by overseas plaintiffs arising from overseas incidents and injuries.").

6. *See* discussion *infra* Part. I.B.2.b.

7. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000).

exception; in practice, however, FNC dismissals seem to have become more like the rule.[8]

One of the reasons for this, the reason I explore in this article, is the standard of appellate review. When a federal district court dismisses a case on FNC grounds, a federal appellate court reviews that decision for an abuse of discretion.[9] A deferential standard of review in most contexts, it is all the more so in FNC cases.[10] But with so much riding on the outcome—an FNC dismissal is usually case-dispositive appellate review should be more rigorous. The standard should still be abuse of discretion, but it should be more like the abuse of discretion analysis applied in the review of class certification decisions. Call it "abuse-of-discretion-plus."

To make this argument, I devote Part I to discussing the origins of FNC, the governing analytical framework, and the doctrine's underlying principles. In Part II, I discuss the practical effects of FNC decisions by drawing a parallel to decisions on class certification. In Part III, I discuss the standard of appellate review for FNC decisions. I observe that while the stakes are similar to class certification rulings and the standard of review is ostensibly the same (abuse of discretion), appellate courts actually give much more deference to district court decisions concerning FNC. I substantiate the point through an empirical analysis. Finally, in Part IV, I press my central thesis: Appellate courts should apply the same rigorous version of abuse of discretion review to decisions on FNC that they apply to rulings on class certification. This would be in better harmony with the driving principles of the FNC doctrine and the high stakes of the issue.

I. A PRIMER ON *FORUM NON CONVENIENS*

In this part, I discuss the history and evolution of FNC, the test as it currently stands, the doctrine's driving principles, and problems in practice. Through this discussion, we come to see that while FNC was designed to prevent abuses in venue selection, it has become a tool that

8. *Compare* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996) ("[The] doctrine of *forum non conveniens* proceed[s] from [the] premise [that]: [i]n rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum."), *with* Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of* Forum Non Conveniens, 8 RICH. J. GLOBAL L. & BUS. 513, 526 (2009) (finding that courts have granted more than 50% of these motions since 1982).

9. Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994).

10. *See* Michael Greenberg, *The* Forum Non Conveniens *Motion and the Death of the Moth: A Defense Perspective in the Post*-Sinochem *Era*, 72 ALB. L. REV. 321, 334 (2009).

courts aggressively use to dismiss cases that plaintiffs have legitimately filed in the United States. In practice, FNC does its job too well.

A. History and Evolution

Like so many judicial doctrines, it is difficult to pin down the exact time and place of FNC's origin. The general consensus, however, is that Scottish courts first developed the doctrine in the nineteenth century.[11] Then, as now, courts used FNC to prevent abuses in venue selection—where the alternative forum was in a different country and the plaintiff chose Scotland simply to harass the defendant through a distant and inconvenient forum.[12] As the doctrine gained permanence in the British Isles, American state courts picked it up as well. Though they rarely used the term *forum non conveniens*, that was, in substance, exactly the doctrine they were applying.[13] By the early 1900s, the concept (if not the term) was an accepted feature of common law in most state courts.[14]

In the federal courts though, a definitive statement on FNC would not come until 1947. That year saw the Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*,[15] still one of the two most important cases in FNC jurisprudence. In *Gilbert*, the Court held that a district court has the inherent power to dismiss an action for FNC despite proper jurisdiction.[16] I will set forth the modern FNC test in a moment, but for now it suffices to note that *Gilbert* made a pair of lasting contributions: (1) the initial presumption that a plaintiff's choice of forum is entitled to deference;[17] and (2) the need to weigh both "public" and "private" factors in determining whether that presumption is overcome by practical inconvenience.[18]

But *Gilbert* was still a step removed from the scenario we are concerned with in this article—that of international litigation. The plaintiff

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11. *See Am. Dredging Co.*, 510 U.S. at 449; Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981); Thomas R. Anderson, American Dredging Co. v. Miller*: Clouding the Waters of Maritime Litigation*, 59 ALB. L. REV. 1519, 1529 (1996).

12. Edward Greer Hardwicke, *Federal Courts—Application of* Forum Non Conveniens *Rule*, 26 TEX. L. REV. 218, 218–19 (1947).

13. *See* J. Stanton Hill, Note, *Towards Global Convenience, Fairness, and Judicial Economy: An Argument in Support of Conditional* Forum Non Conveniens *Dismissals Before Determining Jurisdiction in United States Federal District Courts*, 41 VAND. J. TRANSNAT'L L. 1177, 1183 (2008).

14. Hardwicke, *supra* note 12, at 219.

15. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

16. *Id.* at 502–09, 512.

17. *See id.* at 508 ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

18. *Id.* at 508–09.

in *Gilbert* was a Virginia citizen who sued a Pennsylvania corporation in the Southern District of New York.[19] It was not until 1981, in *Piper Aircraft Co. v. Reyno*, that the Supreme Court would speak on FNC in cases involving foreign plaintiffs.[20]

The core set of facts in *Piper*—a foreign citizen injured abroad by a product designed and manufactured in the United States[21]—is one we see over and over in modern FNC cases. Along with *Gilbert*, it is the other giant of FNC jurisprudence. But the *Piper* Court did not merely apply the principles of *Gilbert* to an international case. Rather, it adjusted the doctrine in two important ways. First, the Court added a preliminary test to protect a plaintiff whose home nation lacks any meaningful system of justice.[22] If the alternative forum is not "available" and "adequate," the analysis stops right there and the case stays with the U.S. court.[23] But as we shall see, this is scant protection in most cases; unless the alternative forum is truly horrendous, it will clear this hurdle.[24] And, if the Court's first adjustment nevertheless seems pro-plaintiff, the second adjustment tips the scale in favor of defendants. After announcing the "available and adequate" threshold test, the Court held that a foreign plaintiff's choice of forum may be accorded less deference by U.S. courts than that enjoyed by domestic plaintiffs.[25] Even if the Court did not intend it, this skews the whole analysis going forward, coloring each of the public and private factors in defendants' favor.[26]

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19. *Id.* at 502–03.

20. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

21. *Id.* at 238. With the decline in U.S. manufacturing over the last few decades, however, today's FNC cases are less likely to hinge on that factor. *See* Jeffrey D. Sachs & Howard J. Shatz, *Trade and Jobs in U.S. Manufacturing*, 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1, 2 (1994) (describing "the sharp decline of overall employment in manufacturing"). The jurisdictional "hook" is more likely to be a U.S.-based design, in the case of a product, or, in the case of a service, a U.S.-based service team.

22. *Piper*, 454 U.S. at 254 n.22.

23. *Id.*; *In re* Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1164 (5th Cir. 1987).

24. *See* Walter W. Heiser, Forum Non Conveniens *and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1169 (2005) ("The 'adequate alternative forum' prerequisite rarely prevents a United States court from granting a *forum non conveniens* motion."); Finity E. Jernigan, Note, Forum Non Conveniens*: Whose Convenience and Justice?*, 86 TEX. L. REV. 1079, 1080–81 (2008) ("By failing to consider what realistically will or will not occur in an alternative forum, courts misapply the *forum non conveniens* test and in so doing neglect their unflagging obligation to exercise the jurisdiction with which they are entrusted.").

25. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) ("[T]he presumption applies with less force when the plaintiff or real parties in interest are foreign.").

26. These are not the only important contributions of *Piper*. *See In re* Factor VIII or IX Concentrate Blood Products Litig., 484 F.3d 951, 956 (7th Cir. 2007) ("The other important point *Piper Aircraft* made was that a dismissal based on *forum non conveniens* that is otherwise appropriate should not ordinarily be rejected just because it would lead to a change in applicable law unfavorable

B. The Basic Test, Underlying Principles, and Practical Problems

In this part, I describe the basic test and underlying principles of FNC. Then I discuss the problems of FNC in practice, including the presumption against foreign plaintiffs, practical and procedural considerations that enable early dismissal, and the lenient standard of appellate review.

1. The Test and Underlying Principles

As the Court recently confirmed in *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*,[27] the *Piper* and *Gilbert* decisions set the basic rules for courts deciding motions to dismiss on FNC. On paper, the test is simple enough. A court starts with the presumption that the chosen forum is appropriate, and the defendant therefore bears a "heavy burden" in moving for dismissal on FNC.[28] But the defendant's burden is not that heavy when it faces off against a foreign plaintiff, as the presumption in the plaintiff's favor applies "with less force" when the plaintiff sues away from her home country.[29] More on this later.

Nonetheless, to achieve dismissal, the defendant must show the existence of an alternative forum that is both "available" and "adequate."[30] "An alternative forum is 'available' if all of the parties are amenable to process and within the forum's jurisdiction."[31] Adequacy is met "when the parties will not be deprived of all remedies or treated unfairly, even though they might not enjoy the same benefits as they might receive in an American court."[32]

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to the plaintiff. Only if 'the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all' should the unfavorable change be given substantial—or even dispositive—weight." (internal citation omitted) (quoting *Piper*, 454 U.S. at 254)).

27. Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp., 549 U.S. 422 (2007).

28. *Sinochem*, 549 U.S. at 423; Iragorri v. United Techs. Corp., 274 F.3d 65, 70–71 (2d Cir. 2001).

29. *Sinochem*, 549 U.S. at 423 (quoting *Piper*, 454 U.S. at 255–56) (internal quotation marks omitted).

30. Stroitelstvo Bulg. Ltd. v. Bulgarian-American Enter. Fund, 589 F.3d 417, 421 (7th Cir. 2009).

31. *Stroitelstvo*, 589 F.3d at 421.

32. Saqui v. Pride Cent. Am., LLC, 595 F.3d 206, 212 (5th Cir. 2010) (internal quotation marks omitted); Galustian v. Peter, 591 F.3d 724, 731 (4th Cir. 2010); *see also In re* Factor VIII or IX Concentrate Blood Products Litig., 484 F.3d 951, 957 (7th Cir. 2007) ("An alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly." (internal quotation marks omitted)); Reid-Walen v. Hansen, 933 F.2d 1390, 1393 (8th Cir. 1991) (same); *cf.* Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002) ("A foreign forum is adequate when it provides the plaintiff with a sufficient remedy for his wrong.").

If an adequate alternative forum exists, the district court then considers whether an FNC dismissal "would serve the private interests of the parties and the public interests of the alternative forums."[33] The private-interest factors include

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[34]

A court may also consider the enforceability of the judgment if one is obtained.[35] The public-interest factors, in contrast, include the administrative difficulties stemming from court congestion, the local interest in having localized disputes decided at home, the interest in having the trial of a diversity case in a forum that is comfortable with the law that must govern the action, the avoidance of unnecessary problems in conflicts of laws or in the application of foreign law, and the unfairness of burdening citizens in an unrelated forum with jury duty.[36]

True to its name, then, FNC is all about convenience. Though "[d]ismissal for *forum non conveniens* reflects a court's assessment of a range of considerations," the "most notabl[e]" among them is "the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality."[37] As it was for the Scottish

33. *Stroitelstvo*, 589 F.3d at 424.

34. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

35. *Id.*

36. *Gilbert*, 330 U.S. at 508–09. The issue of a U.S. court applying foreign law is a complicated one. On the one hand, the Court in *Piper* held that it is legitimate for a plaintiff to choose a U.S. forum to avoid unfavorable law if the foreign law deprives the plaintiff of all remedies or treats her unfairly. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254–55 (1981). On the other hand, courts may properly consider the application of foreign law as a factor favoring dismissal. In the end though, the jurisprudence is clear that this should not be seen as dispositive. *See, e.g.*, Hoffman v. Goberman, 420 F.2d 423, 427 (3d Cir. 1970) ("[T]he mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court."); Carlenstolpe v. Merck & Co., Inc., 638 F. Supp. 901, 910 (S.D.N.Y. 1986) ("[E]ven were the choice of law analysis to favor application of [foreign] law, this would not suffice to mandate *forum non conveniens* dismissal.").

37. Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 423 (2007) (citations omitted) (quoting another source); *see also* UNC Lear Services, Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210, 222 (5th Cir. 2009) ("The focus of the analysis is on convenience, and the district court did not abuse its discretion in determining that Texas was a more convenient forum."); Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 428–29 (1st Cir. 1991) (explaining that decisions on FNC should "serve the norms of increased convenience and efficiency underlying the *forum non conveniens* doctrine"); Perry S. Granof, Richard F. Hans, Samaa A.F. Haridi & Jennifer S. Kozar, *Ebb and Flow:*

courts that founded the doctrine, U.S. courts applying FNC dismiss cases not for want of jurisdiction but to promote efficient litigation.[38] If the case could be more conveniently—more efficiently—tried in another forum, the doctrine should facilitate that. On paper, it does.

2. Problems in Practice

In practice, FNC fails to promote consistently efficient outcomes.[39] If we measure efficiency in the administration of justice by the speed, cost, and fairness of case *resolution*, FNC often comes up short. The fact of the matter is that forums labeled "alternative" and "adequate" rarely exist in reality. Cases dismissed on FNC seem to just disappear.[40] They may *go away* efficiently, but they are not *resolved* efficiently—at least not through adjudication or settlement on reasonable terms.

Why is it, then, that application of FNC often gives way to inefficient results? Why does it fail to serve the ends of convenience and justice as supposedly intended? There are three related reasons: (1) an approach by district courts tending to give *negative* deference to a foreign plaintiff's choice of forum (i.e., the assumption is not that the forum was chosen for a legitimate reason, but that it was in fact chosen for an illegitimate reason); (2) practical considerations and a procedural rule that encourage early FNC decisions; and (3) a lenient brand of abuse of discretion review that tends to uphold questionable FNC dismissals on appeal. These dynamics create a vicious circle wherein district courts render suspect decisions,

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The Changing Jurisdictional Tides of Global Litigation, 21 N.Y. INT'L L. REV. 53, 63 (2008) ("[A] court may dismiss . . . claims under the doctrine of *forum non conveniens*, even where certain or all benefits unique to the U.S. legal system will no longer be available to the plaintiff or the plaintiff may otherwise be harmed by a change in applicable law, so long as an adequate alternative forum exists and dismissal would promote both convenience and justice.").

38. *See* Brown v. Cartwright, 20 SCOT. L.R. 818 (1883); Societe du Gaz de Paris v. Societe Anonyme du Navigation "Les Armateurs Francais," 1925 Sess. Cas. 332, *aff'd*, 1926 Sess. Cas. (H.L.) 13; Am. Dredging Co. v. Miller, 510 U.S. 443, 448 (1994); Joel H. Samuels, *When is an Alternative Forum Available? Rethinking the* Forum Non Conveniens *Analysis*, 85 IND. L.J. 1059, 1060 (2010) ("When applied properly, *forum non conveniens* can be useful in ensuring that private and public resources are efficiently managed in the context of litigation involving foreign parties on one or both sides of a case."); Greg Vanden-Eykel, *Convenience for Whom? When Does Appellate Discretion Supersede a Plaintiff's Choice of Forum*?, 15 SUFFOLK J. TRIAL & APP. ADVOC. 307, 310 (2010) ("The doctrine of *forum non conveniens* originated as a common law method to improve judicial efficiency and effectiveness by providing justices with the discretionary power to decline jurisdiction where they reasonably believe that another forum is more appropriate.").

39. *See* Samuels, *supra* note 38, at 1060 ("[T]he present test for *forum non conveniens*—as set forth by the Supreme Court in *Piper* and as interpreted by lower courts—creates confusion and uncertainty in application. That confusion, which results from an unclear test that is unevenly enforced, undermines the legitimacy and accountability of the federal courts.").

40. *See infra* Part II.

appellate courts uphold them without or despite questioning them, and, because the decisions are upheld, district courts have no real incentive to change course.

Before diving into specifics, however, let's keep in mind the big picture. District court judges and their staffs are overworked.[41] They want to do a good job with every case assigned, but without a fairly aggressive approach to dismissing cases that *can* be dismissed, the numbers often do not permit it.[42] Judges have a very real and legitimate incentive to manage their docket—to keep their caseload at a reasonable level—because (a) they want to give the cases they *do* adjudicate the attention they deserve, and (b) they do not have the time or resources available to timely adjudicate every case that is filed. The end result is a bias towards dismissal.[43] This bias may be subconscious, but it exists nonetheless.[44]

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41. *See* Nicola Faith Sharpe, *Corporate Cooperation Through Cost-Sharing*, 16 MICH. TELECOMM. & TECH. L. REV. 109, 130 (2009) ("District court dockets are more overburdened than ever. Between 1997 and 2006, U.S. district courts experienced an 11% increase in the number of pending cases." (citation omitted)); Tal Kedeem, *Secondary Liability for Actively Inducing Patent Infringement: Which Inventions Pave the Road?*, 48 WM. & MARY L. REV. 1465, 1477 (2007) ("District courts are generally overworked . . . .").

42. *See* Michael M. Karayanni, *The Myth and Reality of a Controversy: "Public Factors" and the* Forum Non Conveniens *Doctrine*, 21 WIS. INT'L L.J. 327, 341 (2003) ("If the judiciary, a system with limited resources, [did] not discriminate between disputes so that only those issues that are properly connected to the local interests are litigated before the local courts, justice might not be done in any [case].").

43. *See* David W. Robertson, *The Federal Doctrine of* Forum Non Conveniens*: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 357 (1994) ("[J]udges are quite likely to proclaim their fearsome workloads as a principal basis for granting *forum non conveniens* dismissals."); Emily J. Derr, *Striking a Better Public-Private Balance in* Forum Non Conveniens, 93 CORNELL L. REV. 819, 827 (2008) ("District court judges are also subject to the 'understandable temptation' to grant dismissals to reduce docket congestion. . . . Refusing to adjudicate only because a given case would be difficult or time consuming is plainly illegitimate. . . . Unfortunately, the doctrine [of FNC] as currently formulated and applied provides and, indeed, promotes inappropriate justifications for dismissal." (internal citations omitted)). *But see* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 337 (3d ed. 1996) ("In general, the forum's docket has not played a decisive role in *forum non conveniens* analysis.").

This bias towards dismissal plays out in many contexts, including motions to dismiss under Rule 12(b)(6). This is all the more true after *Twombly* and *Iqbal*. As one commentator noted, "in cases where the new standard can make a difference, it almost certainly will, with district courts severely overburdened and often operating without a full complement of judges." Rakesh N. Kilaru, *The New Rule 12(b)(6):* Twombly, Iqbal*, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 920 n.101 (2010). Or, as Professor Robert Bone put it:

> The major impact of *Twombly*—and I believe the reason critics are so concerned—is not so much what it says about the pleading standard, but rather what it says about discovery costs and settlement leverage as well as the ineffectiveness of case management more generally. This portion of the opinion, coupled with the Court's explicit endorsement of case screening as an appropriate pleading function, might be interpreted by overburdened district judges as an invitation to use the vague "plausibility" standard aggressively, notwithstanding language in *Twombly* and later in *Erickson* to the contrary. In other words, critics fear that *Twombly*

Although choice of law is not supposed to be a dispositive factor in the analysis, the prospect of applying foreign law understandably gives overworked courts even more reason to apply FNC vigorously.[45]

a. A Presumption Against Foreign Plaintiffs

The Supreme Court in *Piper* held that, although a plaintiff's choice of forum is normally entitled to a "strong presumption" of legitimacy, that "presumption applies with less force when the plaintiff or real parties in interest are foreign."[46] On its face, this language suggests that a foreign plaintiff's choice still deserves *some* deference, just less deference than that accorded to the choice made by a domestic plaintiff. With domestic plaintiffs, in other words, it is fair for courts to assume that the forum has been chosen for reasons of convenience.[47] "When the plaintiff is foreign, however, this assumption is much less reasonable."[48]

Fair enough. The district court entertaining a suit by a foreign plaintiff should not assume that the plaintiff filed in the United States for reasons of convenience, but it should question that election through a more rigorous application of the FNC analysis.[49] But because the choice of forum is still

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gives too much latitude to district judges, who are eager to screen cases and likely to read the opinion as granting permission to do so.

Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 889 (2009) (citations omitted).

44. Another problem worth mentioning is the fact that a district court may raise FNC *sua sponte*. Though this rarely happens in practice since defendants can be counted on to raise the issue where colorable, it is a troubling facet of the law. Emily J. Derr, *Striking a Better Public-Private Balance in* Forum Non Conveniens, 93 CORNELL L. REV. 819, 837–38 (2008).

45. *See* Walter W. Heiser, Forum Non Conveniens *and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1178 (2005) ("From the trial court's perspective, the fact that it will face a choice-of-law determination and that the court may end up applying foreign law, makes granting the defendant's *forum non conveniens* motion an attractive option."); Derr, *supra* note 43, at 826–27 ("For a variety of reasons, *forum non conveniens* dismissals are uniquely attractive to judges. For example, *forum non conveniens* issues arise in federal court almost exclusively in cases involving a foreign party. Judges can therefore often avoid complex conflict-of-laws questions and the burdens of applying foreign law by granting *forum non conveniens* dismissals." (citations omitted)).

46. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981).

47. *Id* at 255–56.

48. *Id.* at 256.

49. The Seventh Circuit has explained the theory quite well:

> [W]hen the plaintiff has sued in his or her home forum, there is a strong presumption in favor of that choice. *See Piper Aircraft*, 454 U.S. at 255–56 (citing Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)). Under those circumstances, "A defendant invoking *forum non conveniens* . . . bears a heavy burden in opposing the plaintiff's chosen forum." Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 423 (2007). Conversely, if the plaintiff is suing far from home, it is less reasonable to assume that the

entitled to *some* deference, the suit should stay in the United States if the FNC factors balance evenly. That is, the choice of forum should at least serve as a tie-breaker in favor of the plaintiff where the other factors balance.[50] This does not happen.

Instead, failing to recognize that "this reduced weight 'is not an invitation to accord a foreign plaintiff's selection of an American forum no deference since dismissal for *forum non conveniens* is the exception rather than the rule,'"[51] many courts automatically apply this diminished or negative deference any time a suit is brought by a foreign citizen.[52] The Seventh Circuit's 2008 decision in *Clerides v. Boeing Co.* illustrates the point.[53] The plaintiffs in that case were the representatives of passengers who died in a flight from Cyprus to Greece.[54] Although the plane was operated by a Cyprian corporation, a government investigation faulted both the airline crew and the manufacturer of the plane, U.S. defendant Boeing.[55] As the plaintiffs sued Boeing on a theory of products liability, much of the evidence relevant to the claim was admittedly in Boeing's

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> forum is a convenient one and therefore "the presumption in the plaintiff's favor 'applies with less force . . . .'" *Id.* (quoting *Piper Aircraft*, 454 U.S. at 266). Put the other way, the risk that the chosen forum really has little connection to the litigation is greater. We do not understand this as any kind of bias against foreign plaintiffs. That would be inconsistent with many treaties the United States has signed as well as with the general principle that our courts are open to all who seek legitimately to use them. It is instead a practical observation about convenience. A citizen of Texas who decided to sue in the federal court in Alaska might face an equally skeptical court, which might conclude that convenience requires a change in venue under the federal statutory counterpart to *forum non conveniens*, 28 U.S.C. § 1404(a).

In re Factor VIII or IX Concentrate Blood Products Litig., 484 F.3d 951, 955–56 (7th Cir. 2007). This makes perfect sense. Unfortunately, it does not appear to shake out this way in practice. A Texan suing in federal court in Alaska will face a judge accustomed to applying the law of another state. The judge may still transfer the case to another venue, but the prospect of applying another state's law is less likely to inspire action than the thought of applying the law of a foreign country; the notion that the plaintiff is engaging in improper forum shopping is less likely to crop up in the Texan-in-Alaska case, and so forth.

50. *Gilbert* reiterated, after all, that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).

51. R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164, 168 (2d Cir. 1991) (quoting Lacey v. Cessna Aircraft Co., 862 F.2d 38, 45–46 (3d Cir. 1988)) (emphasis omitted) (internal quotation marks omitted); *see also* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996) ("[The]doctrine of *forum non conveniens* proceed[s] from [the] premise [that]: [i]n rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum.").

52. *See* Samuels, *supra* note 38, at 1071; *see also* Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d. Cir. 2001) ("In our recent cases, we vacated dismissals for *forum non conveniens* because we believed that the district courts had misapplied the basic rules, apparently assuming that deference is given to the plaintiff's choice of forum only when the plaintiff sues in the plaintiff's home district.").

53. Clerides v. Boeing Co., 534 F.3d 623 (7th Cir. 2008).

54. *Id.* at 625–26.

55. *Id.* at 626–27, 629.

possession and located in the United States.[56] That notwithstanding, the Seventh Circuit affirmed the decision to dismiss because Boeing agreed to make the evidence available in Cyprus or Greece.[57] Although the court ostensibly acknowledged the "deference that is due to the plaintiffs' choice of forum,"[58] the opinion shows that, in fact, it gave no deference at all to that choice. The court used the statement from *Piper*—that the presumption in favor of the plaintiff's chosen forum applies with less force when the plaintiff is foreign—to erode any deference to the vanishing point.[59] Even when the foreign plaintiff sues in the very district where the defendant resides or much of the evidence is located, as was the case in *Clerides*, courts have shown themselves willing to second-guess that judgment in their FNC analysis.[60] We do not see this treatment in cases involving domestic plaintiffs.[61]

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56. *Id.* at 629.

57. *See id.* at 629–30.

58. *Id.* at 630.

59. *See* Clerides v. Boeing Co., 534 F.3d 623, 628–29 (7th Cir. 2008).

60. Many commentators have expressed frustration with this phenomenon. Diminished deference to the forum choice of foreign plaintiffs may be justified, but a complete lack of deference—or negative deference—is illogical at best and biased at worst.

> When an American party sues another American party in a federal court, at least one thing is certain: so long as some court in the United States has jurisdiction (personal and subject matter) over the case, the case will be heard here. By contrast, when foreign parties are involved in litigation in a federal court, whether as plaintiffs, defendants, or both, there is no such guarantee, even where the federal court is properly seized of jurisdiction (personal and subject matter). While this result may at first appear intuitively obvious, the impact of this result on litigation in the United States—and the resulting policy making role of courts in this process—raises substantial concerns. If a court is properly seized of jurisdiction, why should the parties' nationality matter? And, if it does matter, why should the courts be making decisions on this issue when Congress has demonstrated its capacity and willingness to legislate in this arena? More narrowly, if a foreign plaintiff sues an American defendant in the district where the defendant resides, should there not be a presumption that the case should be heard there?

See Samuels, *supra* note 38, at 1059–60.

61. *See* Keeton v. Hustler Mag. Inc., 465 U.S. 770, 779 (1984) (stating that a domestic plaintiff's "successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations"); *see also* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 38 (1996) ("Subtle bias against foreigners in the adjudicatory process can be seen even in some rather mundane procedural law. For example, in the law of venue, although citizens are afforded very specific protections with respect to where they can be sued, Congress specifically provided that '[a]n alien may be sued in any district' in the United States." (quoting 28 U.S.C. § 1391(d) (1988))). Note, however, that the statute cited by Professor Johnson has since been amended. *See* 28 U.S.C. § 1391(c)(1) ("[A] natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled.").

Presumptions are just that: presumptions, or rules of thumb, based on experience that generally guide us in the right direction. If the purpose of FNC is to screen out cases where proceeding "in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,"[62] then this rule of thumb makes some sense. In the run of cases, it is more likely that a domestic jurisdiction has less of a connection to a controversy when it is brought by a foreign plaintiff as opposed to a resident of the United States. When in doubt, then, it makes sense to rely on the presumption. The problem arises when district courts use the presumption not as a rule of thumb—taken with a grain of salt and doubled-checked to ensure that it makes sense in a given case—but as a crutch to avoid deeper analysis. In modern practice, many view FNC as nothing more than protectionism by another name.[63]

It is also worth noting that, even if the *Piper* court *did* contemplate automatically diminished deference for the forum choice of a foreign plaintiff, the rationale may be obsolete. *Piper* was decided in 1982. Since then, the global economy has dramatically changed the contact and interaction foreign citizens have with the United States and U.S. companies. Although it may still be more convenient for a foreign plaintiff to sue in his home country, courts should be less ready to assume that a foreign plaintiff has chosen the United States for illegitimate reasons (whatever those may be).

Apart from the question of how strongly the presumption in favor of the chosen forum applies even when it applies with full force, moreover, there is also the issue of when to take it down a notch. Does a Floridian suing in U.S. District Court in California get the full presumption, the same as, say, a Montanan suing in Montana's federal court? Trickier still, does the presumption "apply with less force" in equal measure to a Russian suing in federal court in Texas as opposed to a Mexican doing the same? In many cases—think about foreign plaintiffs living in border towns, to name just one example—the foreign plaintiff and her litigation will have a stronger connection to the jurisdiction of choice than many cases brought by domestic plaintiffs. The presumption should probably take the form of a sliding scale, but that is not what we see. Instead, courts place all domestic plaintiffs in one hopper and all foreign plaintiffs in another. *But see In re* Factor VIII or IX Concentrate Blood Products Litig., 484 F.3d 951, 956 (7th Cir. 2007) ("A citizen of Texas who decided to sue in the federal court in Alaska might face an equally skeptical court, which might conclude that convenience requires a change in venue under the federal statutory counterpart to *forum non conveniens*, 28 U.S.C. § 1404(a)."). This one-size-fits-all-approach is not in keeping with the underlying policy of FNC and the reality of globalization; the earth is shrinking, yes, but citizens of some nations tend to have a closer connection and more interaction with the United States than others.

62. Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 429 (2007).

63. *See, e.g.*, Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 680–81 (Tex. 1990) (Doggett, J., concurring). In his concurrence, Justice Doggett lambasted his dissenting colleagues for refusing to recognize FNC for what it really is—economic protectionism of U.S.-based companies. Doggett wrote as follows:

> To accomplish the desired social engineering, [the dissenters] must invoke yet another legal fiction with a fancy name to shield alleged wrongdoers, the so-called doctrine of *forum non conveniens*. The refusal of a Texas corporation to confront a Texas judge and jury is to be labeled "inconvenient" when what is really involved is not convenience but connivance to avoid corporate accountability.
>
> The dissenters are insistent that a jury of Texans be denied the opportunity to evaluate the conduct of a Texas corporation concerning decisions it made in Texas because the only ones allegedly hurt are foreigners. Fortunately Texans are not so provincial and narrow-minded as

"Critics of the *forum non conveniens* doctrine charge that it is used by U.S. corporations as a tool to escape liability when they are sued in U.S. courts for injuries caused [abroad]."[64] After looking past all of the legal jargon, it is hard to disagree.[65]

b. Practical and Procedural Considerations that Enable Early Dismissal

Apart from the tendency of district courts to give less than due weight to a foreign plaintiff's choice of forum, practical and a recent procedural development encourage courts to address FNC right out of the gate. In turn, early assessment of FNC tends to encourage dismissal because district courts are more likely to toss a case in which they have invested little time or effort.[66]

When an attorney contemplates filing a motion, she must consider three main factors: (1) the likelihood of success;[67] (2) the magnitude of the

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> these dissenters presume. Our citizenry recognizes that a wrong does not fade away because its immediate consequences are first felt far away rather than close to home. Never have we been required to forfeit our membership in the human race in order to maintain our proud heritage as citizens of Texas.
>
> The dissenters argue that it is *inconvenient* and *unfair* for farmworkers allegedly suffering permanent physical and mental injuries, including irreversible sterility, to seek redress by suing a multinational corporation in a court three blocks away from its world headquarters and another corporation, which operates in Texas this country's largest chemical plant. Because the "doctrine" they advocate has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad, I write separately.

Id. (citation omitted). *See also* Walter W. Heiser, Forum Non Conveniens *and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1161 (2005) ("Those who favor the doctrine argue that *forum non conveniens* dismissals are necessary to protect United States companies doing business overseas from ruinous damage awards, particularly in products liability and mass tort actions.").

64. RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS*: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 129 (2007).

65. To be clear, I am not suggesting that the courts are in cahoots with domestic corporate defendants. Few would argue that the courts *intend* to apply FNC in such a way that corporate defendants are immunized from serious damage awards (assuming a legitimate case). Economic protectionism is not the intent; too often, however, it is the result. *See id.* Similarly, I do not believe the courts *intend* to discriminate against foreign plaintiffs. This is simply the result of FNC being applied too liberally—the courts appear to be favoring domestic litigants, and appearances count.

66. *See* Bradley Scott Shannon, *Action is an Action is an Action is an Action*, 77 WASH. L. REV. 65, 127 (2002) (explaining that motions to dismiss are usually addressed in the early stages of litigation and "even though a motion for voluntary dismissal apparently may be made at any time, it is more likely to be granted if made 'at an early stage of the case, before much has happened and only limited resources have been invested'" (internal quotation marks omitted)).

67. *See* Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of* Forum Non Conveniens, 8 RICH. J. GLOBAL L. & BUS. 513, 523 (2009) ("[A] defendant

outcome in the event of a favorable ruling;[68] and (3) the cost of filing the motion.[69] In the case of a motion to dismiss on FNC grounds, all three of these factors play into defense counsel's hands. As the statistics show, FNC dismissal motions reflect a high rate of success: since 1982, approximately 52% of these motions have been granted.[70] And when these motions are granted, the result is usually a complete knockout.[71] Unlike motions to dismiss for failure to state a claim, which often produce only superficial victories due to ready opportunities to amend, victory on FNC yields a complete dismissal.[72] The case is out of the original forum for good and, as I discuss below, usually will not be heard in *any* forum.[73]

So the benefits of filing an FNC motion are substantial. But what about the costs? Do FNC motions require mounds of discovery, prompting defense attorneys to think twice? Not at all.[74] In comparison to other motions achieving similar results, such as motions for summary judgment and motions for class certification, preparing an FNC motion is relatively cheap. Although "[e]xtensive discovery *may* be necessary to adjudicate the question of convenience properly,"[75] the limited nature of the inquiry means that the discovery will be small in comparison to the discovery necessary for summary judgment or class certification in a similarly sized case.[76] Again, an FNC motion stand out as a very attractive alternative.

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may seek a *forum non conveniens* dismissal only if he or she thinks that the probability of success is high enough.").

68. A risk-neutral actor will always consider magnitude when making a decision under uncertainty. *See* David Rosenberg & Steven Shavell, *A Simple Proposal to Halve Litigation Costs*, 91 VA. L. REV. 1721, 1724 n.4 ("Risk neutrality is a standard assumption to make about decisionmaking under uncertainty. The assumption captures in a very tractable form the notion that both the probability and the magnitude of outcomes matter to decisions.").

69. Lii, *supra* note 8, at 523–24 (discussing the effects of uncertainty and information asymmetry with regard to the adequacy of an alternative forum as these factors relate to the costs and likelihood of settlement or FNC motion filing).

70. *Id.* at 526.

71. *See infra* Part II. The importance of forum is underscored by the fact that almost all international commercial contracts contain a forum-selection clause.

72. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) ("A *forum non conveniens* dismissal usually will end the litigation altogether, effectively excusing any liability of the defendant.").

73. *See infra* Part II. For a good overview of the case-dispositive nature of FNC, see generally David W. Robertson, Forum Non Conveniens *in America and England: "A Rather Fantastic Fiction"*, 103 L.Q. REV. 398, 420 (1987).

74. *See* Greenberg, *supra* note 10, at 335 (comparing the discovery necessary for a FNC motion to dismiss to that necessary for a motion to dismiss for lack of personal jurisdiction).

75. Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of* Forum Non Conveniens *and the International Plaintiff*, 77 CORNELL L. REV. 650, 676 (1992) (emphasis added).

76. *See, e.g.*, Vivendi, S.A. v. T-Mobile, U.S.A., Inc., 2007 U.S. Dist. LEXIS 28710, at *6 (W.D. Wash. Apr. 18, 2007) ("A motion to dismiss for *forum non conveniens* does not generally warrant detailed development of the case through discovery," and holding that the objecting plaintiff could

This is all the more true after the decision in *Sinochem*. In *Sinochem*, the Supreme Court held that a district court need not determine jurisdiction (either personal or subject-matter) if it determines that the case should be dismissed on FNC grounds.[77] "With such a directive at hand, preliminary discovery for determining non-merits dismissals has greatly been reduced."[78] Although the need for factual investigation may not be eliminated entirely, "discovery can be initiated and limited solely to the *forum non conveniens* issue . . . ."[79] For courts and defendants alike, an FNC motion is a quick and easy way to dismiss a case.[80]

c. Lenient Appellate Review

If misunderstanding of *Piper* has increased the likelihood that a court will grant a motion to dismiss on FNC grounds—and if practical considerations and the *Sinochem* rule have encouraged defendants to file motions early and often—then lenient appellate review completes the circle by increasing the likelihood that questionable FNC decisions will survive on appeal. I explain the nature of this review in more detail below.

II. FNC AND CLASS CERTIFICATION: PROCEDURAL ISSUES THAT OVERSHADOW THE MERITS

Like many trial courts, the federal district court for the Eastern District of Michigan has a local rule that applies only to "dispositive" motions.[81] Because these motions are more important than non-dispositive motions, like motions to compel discovery, parties opposing them are given more time to prepare a response.[82] This is not particularly remarkable; what is interesting, however, is the list of motions that qualify as dispositive.

"pursue discovery . . . narrowly tailored to the question of *forum non conveniens*—i.e. the events and evidence in the United States implicated by this dispute.").

77. Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 435–36 (2007).

78. Greenberg, *supra* note 10, at 333.

79. *Id.*

80. This is true in most but not all cases. A number of Latin American countries maintain "blocking statutes." These statutes are rooted in civil law principles and provide that once a plaintiff sues in a court with jurisdiction, all other courts *lose* jurisdiction. Thus, if the proposed "alternative" forum maintains a blocking statute, it ceases to be available and adequate as a matter of law. *See* Henry Saint Dahl, Forum Non Conveniens, *Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 27 (2004); Dante Figueroa, *Are There Ways Out of the Current* Forum Non Conveniens *Impasse Between the United States and Latin America?*, 1 BUS. L. BRIEF (AM. U.) 42, 44 (2005).

81. *See* E.D. MICH. LR 7.1(e)(1).

82. *Id.*

Apart from those expected, such as motions for summary judgment and motions for judgment on the pleadings, the list includes motions for class certification.[83]

Under any literal interpretation of the word, these motions cannot be considered dispositive. Although a decision one way or the other does not technically end the case, labeling them dispositive makes perfect sense from a real-world perspective because a decision denying certification is often the death knell for a plaintiff, the suit becoming financially untenable, and a decision granting certification is the same for a defendant, forcing a settlement.[84] Either way, "the fight over class certification is often the whole ball game."[85] As explained further in Part III, appellate courts have responded to the high stakes of certification decisions by reviewing those decisions with heightened scrutiny (albeit under the guise of the normally tame abuse of discretion standard).

Appellate courts have not done this in the context of FNC decisions. Yet these decisions are just as case-dispositive as class certification rulings.[86] According to Professor David Robertson, "[p]retending that such dismissals are not outcome-determinative 'is a rather fantastic fiction.'"[87] Conducting a postal survey of eighty-five plaintiffs' lawyers whose cases

83. *Id.*

84. Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834–35 (7th Cir. 1999); *see also* Ian Gallacher, *Representative Litigation in Maryland: The Past, Present and Future of the Class Action Rule in State Court*, 58 MD. L. REV. 1510, 1620–21 (1999) ("The class certification decision is virtually case dispositive. The denial of class certification, at least of a class certified under provision (b)(3), means that many class members will not know that litigation is even possible because class notice will not have been sent, and because these members will not have the desire or economic means to pursue litigation. . . . . If, on the other hand, the class is certified, then this decision can also have negative consequences. The certification order can be used to coerce a defendant into settling litigation that may be objectively meritless." (citations omitted)); Gail E. Lees et al., *Analysis & Perspective: 2009: First-Quarter Update on Class Action Trends*, 10 CLASS ACTION LITIG. REP. (BNA) 399, 401 (Apr. 24, 2009) (reporting that 89% of certified class actions settle); FED. R. CIV. P. 23(f) Advisory Committee's Notes accompanying 1998 amendments ("An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation . . . [while] . . . [a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); Jordan L. Kruse, *Appealability of Class Certification Orders: The "Mandamus Appeal" and a Proposal to Amend Rule 23*, 91 NW. U. L. REV. 704, 704 (1997) ("The decision whether to certify a class action, resting with the sound discretion of the district court judge and made early in the litigation, is of paramount importance to the parties to a cause of action." (citations omitted)).

85. Hartford Accident & Indem. Co. v. Beaver, 466 F.3d 1289, 1294 (11th Cir. 2006).

86. *See* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases:* Forum Non Conveniens *and Antisuit Injunctions*, 68 TEX. L. REV. 937, 938 (1990) ("The battle over where the litigation occurs is typically the hardest fought and most important issue in a transnational case; if the defendant wins this battle, the case is often effectively over.").

87. Robertson, Forum Non Conveniens *in America and England*, *supra* note 73, at 420.

had been dismissed on FNC grounds, Robertson found that the majority decided not to file suit abroad or settled for less than 10% of the claim's estimated value.[88] "Thus, the fact is that the *forum non conveniens* dismissal is, in most instances, a dispositive dismissal of the litigation."[89] As commentators have explained, attorneys prosecuting cases on behalf of foreign plaintiffs place so much emphasis on the chosen U.S. forum that a dismissal on FNC grounds, although not on the merits and therefore without prejudice to refiling the case in another jurisdiction, usually "end[s] any further litigation either domestic or abroad."[90] Certainly, the attorneys bringing FNC motions view them as case-dispositive.[91]

From the relative ease of discovery in the United States[92] to the availability of jury trials and punitive damages,[93] attorneys have identified a number of factors that compel them to favor litigation in the United

88. *Id.* at 418–20. Robertson's research centered on fifty-five personal injury and thirty commercial cases dismissed on FNC grounds between 1947 and 1984. In approximately 49% of the personal injury cases and 27% of the commercial cases, the plaintiffs abandoned their cases altogether after the FNC dismissal. Merely 18% of the personal injury plaintiffs and 20% of the commercial plaintiffs subsequently filed foreign suits. Of the cases actually filed abroad, most were still pending as of 1987 and not one plaintiff had won her case. The rest of the cases (i.e., those neither abandoned nor filed abroad) were settled, with the defendant generally winning favorable terms at the negotiating table. *Id.*; *see also* Russell J. Weintraub, *International Litigation and* Forum Non Conveniens, 29 TEX. INT'L L.J. 321, 335 (1994) (stating that Robertson's results are "unsurprising," given "higher costs and lower returns abroad"). Some commentators have suggested that the rate of post-dismissal "disappearance" may be even higher. *See, e.g.*, Victor Manuel Diaz, Jr., *Litigation in U.S. Courts of Product Liability Cases Arising in Latin America, Panel Talk Before the Miami Conference, Key Concepts in Product Liability Law in Latin America Today*, *in* 20 ARIZ. J. INT'L & COMP. L. 47, 93 (2003) (John F. Molloy ed.) (referencing a study by an Italian law professor who allegedly found that "ninety-nine percent of cases dismissed on *forum non conveniens* grounds in the United States, are, for one reason or another, never refiled").

89. Victor Manuel Diaz, Jr., *supra* note 88, at 93 (internal quotations omitted).

90. Greenberg, *supra* note 10, at 332.

91. *See* John Fellas, *Strategy in International Litigation*, 14 ILSA J. INT'L & COMP. L. 317, 320–21 (2007) (discussing perceived advantages for plaintiffs, and perceived disadvantages for defendants, of litigation a case in the United States); *see also* James Shomper & Gardner Courson, *Alternative Fees for Litigation: Improved Control and Higher Value*, 18 ACCA DOCKET FEATURE 5 (May 2000), *available at* http://www.dupontlegalmodel.com/alternative-fees-for-litigation-improved-control-and-higher-value/ (identifying a dismissal on FNC grounds as a "dispositive ruling" for purposes of billing arrangements).

92. *See* Douglas Seitz, *Litigation in U.S. Courts of Product Liability Cases Arising in Latin America, Panel Talk before the Miami Conference, Key Concepts in Product Liability Law in Latin America Today*, 20 ARIZ. J. INT'L & COMP. L. 47, 93 (2003) (John F. Molloy ed.).

> One of the choice-of-law factors that I take into account in considering whether it would be better to litigate in the United States versus in the Latin American country is the part that discovery will play in the case. Inspection by the defendant of the allegedly offending product is usually very easy in the United States and sometimes not as easy in Latin America.

Id. at 86 (internal quotations omitted).

93. John Fellas, *Strategy in International Litigation*, 14 ILSA J. INT'L & COMP. L. 317, 320 (2007).

States.[94] The advantage is so great that, as Professor Robertson's study shows, an FNC dismissal will usually end the case.[95] To put it differently, the FNC dismissal rings the death knell just as loudly and clearly as does an unfavorable decision on class certification.[96] And although the courts have recognized the practically dispositive nature of FNC decisions as well,[97] the appellate courts have refrained from reviewing such decisions for anything beyond normal abuse of discretion.[98]

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94. *See* RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS*: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 129 (2007) ("In many cases, it is not *forum non conveniens* itself that is found offensive so much as the fact that its operation denies plaintiffs access to U.S. courts and their liberal discovery rules; proximity to the assets of U.S. corporate defendants; perceived higher damage awards; punitive damages; jury trials; favorable products liability laws; the contingent fee system; and the lack of a loser-pays rule for attorney fees.").

95. Beyond the empirical evidence, Robertson finds it "intuitively obvious" that a plaintiff suffering an FNC dismissal would "simply surrender" rather than "embark . . . . on an arduous journey" to litigate in another forum. Robertson, Forum Non Conveniens *in America and England*, *supra* note 73, at 418.

96. *See* Elizabeth T. Lear, *Congress, The Federal Courts, and* Forum Non Conveniens*: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1183 (2006) ("A *forum non conveniens* dismissal has a significant impact on the outcome of the dispute, in most cases sounding a death knell to the plaintiff's case."); Julius Jurianto, Forum Non Conveniens*: Another Look at Conditional Dismissals*, 83 U. DET. MERCY L. REV. 369, 388 (2006) ("[I]n international cases, the harsh consequence of the doctrine usually serves as a 'death knell' for the plaintiffs' whole action against defendants because of the inability of the plaintiffs to go to the hypothesized alternative forum.") (quoting Megan Waples, *The Adequate Alternative Forum Analysis in* Forum Non Conveniens: *A Case for Reform*, 36 CONN. L. REV. 1475, 1476 (2004)); William L. Reynolds, *The Proper Forum for a Suit:* Forum Non Conveniens *and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1690 (1992) ("[A] careful, written opinion is especially important in *forum non conveniens* cases where the death knell of dismissal will sound even though no trial has been held and no decision rendered on the merits.").

97. Vivendi, S.A. v. T-Mobile USA, Inc., No. C06-1524JLR, 2007 WL 1168819 at *2 (W.D. Wash. 2007) ("Because it may be dispositive in this case, the court intends to address the issue of *forum non conveniens* before reaching any alterative ground for dismissal."); Hill v. Citicorp, 1992 U.S. Dist. LEXIS 12605 (S.D.N.Y.) (holding an FNC motion to dismiss to be potentially dispositive—due to the plaintiffs' concession that their allegations failed to state a claim under the laws of the alternate available forum—and the equivalent of a "trial" for purposes of 12 U.S.C. § 632); Irish Nat'l Ins. Co. v. Aer Lingus Teoranta, 739 F.2d 90, 91 (2d Cir. 1984) (dismissal on *forum non conveniens* grounds inappropriate where trial in alternate forum will not realistically occur); *In re* Assicurazioni Generali, S.P.A., 228 F. Supp. 2d 348, 366 (S.D.N.Y. 2002) ("[P]laintiffs' contention that being forced to litigate in Europe would be the death knell for their claims may not be an exaggeration."); Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) ("A *forum non conveniens* dismissal usually will end the litigation altogether, effectively excusing any liability of the defendant.").

98. *See infra* Parts III.B–C.

III. STANDARD OF APPELLATE REVIEW AND WHY IT MATTERS

So where does the standard of appellate review fit into all of this? As suggested above, the standard of appellate review determines the degree to which mistakes by trial courts are tolerated.[99] There are a number of reasons why appellate courts grant deference to trial courts—judicial economy and stability chief among them[100]—but the fact is that appellate courts, whenever they apply anything less than *de novo* review, are potentially allowing a mistake of some sort to go uncorrected.[101] This is usually justified by the positive benefits conferred by a deferential standard of review. All else being equal, however, the standard of review should bear a direct relationship with the importance of the issue on appeal. Critical decisions deserve rigorous review; smaller, truly discretionary decisions merit something less. The appellate courts have applied this understanding in review of class certification decisions. The same cannot be said for decisions on FNC.

A. Abuse of Discretion Review in FNC and Class Certification Appeals

Abuse of discretion review, the standard that applies in both class certification and FNC appeals, comes in different shades.[102] It is "flexible," meaning different things in different contexts.[103] For instance, although both class certification and FNC appeals are reviewed for abuse of discretion, appellate review of a decision to deny a continuance will be far more deferential than appellate review of a decision granting class

99. Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 235 (2009).

100. *See* Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 241 (1991) ("Judicial economy requires an appellate court to 'sign off on a large proportion of the decisions a trial court makes, for otherwise it would never be able to get its work done.'" (quoting Rosenberg, *Appellate Review of Trial Court Decisions*, 79 F.R.D. 173, 181 (1959))).

101. *See* Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. ILL. U. L.J. 73, 73–74 (2009) ("The standard is sometimes said to [measure] 'how wrong' the lower court's decision must be to warrant reversal. . . . In other words, application of a standard that is highly deferential to the lower court's decision may dictate affirmance of a decision that would have been reversed under a less deferential standard.").

102. Although abuse of discretion is the predominant standard of review in FNC appeals, this is not always the case. The Sixth and Second Circuits have held that *de novo* review applies when the district court decides the FNC motion "on the purely legal basis that there was no 'available and adequate alternative forum.'" DRFP L.L.C. v. Venezuela, 622 F.3d 513, 518 (6th Cir. 2010); *see also* Murray v. British Broad. Corp., 81 F.3d 287, 292 (2d Cir. 1996).

103. Abrams v. Interco, Inc., 719 F.2d 23, 28 (2d Cir. 1983); *see also* Tardiff v. Knox Cnty., 365 F.3d 1, 4 (1st Cir. 2004) ("Nominally, review of decisions granting or denying class certification is for 'abuse of discretion,' but this chameleon phrase is misleading." (internal citation omitted)).

certification.[104] As argued in Part II, a more searching review makes sense in certification appeals because so much rides on the outcome.[105] In contrast, denial of a continuance is usually not a pivotal issue and, unlike class certification, truly is discretionary, hinging on the court's inherent power to manage the docket and control proceedings.[106] Unfortunately, from a standard-of-review perspective, appeals of dismissal on FNC are treated more like denials of continuances than decisions on class certification.[107]

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104. *Abrams*, 719 F.2d at 28. In *Abrams*, the Second Circuit described this phenomenon at some length:

> It is not inconsistent with the discretion standard for an appellate court to decline to honor a purported exercise of discretion which was infected by an error of law. Once cases of this sort are eliminated, it does no particular harm to say that the district court's denial or grant of class action status will be reversed only for "abuse of discretion" so long as we understand that this standard itself is flexible. *See also* United States v. Criden, 648 F.2d 814, 817–19 (3 Cir. 1981); . . . . Abuse of discretion can be found far more readily on appeals from the denial or grant of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance. The courts have built a body of case law with respect to class action status. *See* 6 Newberg, CLASS ACTIONS 7–139 (1977 & 1983 Supp.) (class action decisions checklist). While no two cases will be exactly alike, a court of appeals can no more tolerate divergence by a district judge from the principles it has developed on this subject than it would under a standard of full review-and this even though the district judge has adduced what would be plausible grounds for his ruling if the issue were arising for the first time. Except to the extent that the ruling is based on determinations of fact and is thus protected by Fed. R. Civ. P. 52(a) or where the trial judge's experience in the instant case or in similar cases has given him a degree of knowledge superior to that of appellate judges, as often occurs, review of class action determinations for "abuse of discretion" does not differ greatly from review for error. As the Fourth Circuit has stated in another area said to be governed by an abuse of discretion standard, "[a] judge's discretion is not boundless and must be exercised within the applicable rules of law or equity." Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 193 (4 Cir. 1977) (Craven, J.); *see also* Doran v. Salem Inn, Inc., 422 U.S. 922, 931–32 (1975); Gulf Oil Co. v. Bernhard, 452 U.S. 89, 100–01 (1981).

Abrams, 719 F.2d at 30 (internal citations omitted).

105. In addition to the high stakes, abuse of discretion review takes on a different form in the class certification context because the courts recognize that legal questions inform the analysis. Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330, 334 (5th Cir. 2010) ("We review the district court's certification decision for an abuse of discretion, but we review de novo the legal standards employed by the district court."). Again, we have not seen this recognition in FNC appeals.

106. *But see* Fener v. Operating Eng'r Pension Fund, 579 F.3d 401, 406 (5th Cir. 2009) ("We review class certification decisions for abuse of discretion in recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation.").

107. *Compare* Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 628, 631 (3d Cir. 1989) ("Our scope of review in this matter is limited. The motion to grant or deny a forum non conveniens motion lies within the sound discretion of the district court."), *with* Holder v. United Parcel Service, Inc., 574 F.3d 169, 175–76, 202 (3d Cir. 2009) (describing district court's duty to conduct a "rigorous analysis," a "thorough examination," and a "searching inquiry" when determining class certification (internal quotation marks omitted)).

Courts have recognized the importance of class certification decisions and adjusted the standard of review accordingly.[108] Noting the "awesome power" wielded by a district court passing on certification, the circuit courts have effectively heightened the standard of review to "abuse-of-discretion-plus."[109] The appellate courts instruct the district courts to conduct a "rigorous analysis" of the Rule 23 elements,[110] and then they follow up with an equally rigorous review of the decision below.[111]

In contrast, the standard of review of FNC dismissals is quite deferential.[112] The statistics below tell the story more powerfully than words, but the bottom line is that a district court's decision to dismiss a case on FNC will only be reversed in the event of an exceedingly "clear abuse of discretion."[113] In the end, FNC dismissal motions lead to "virtually insulate[d] district court determinations."[114]

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108. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) ("Careful application of Rule 23 accords with the pivotal status of class certification in large-scale litigation, because 'denying or granting class certification is often the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of plaintiffs, or create unwarranted pressure to settle non-meritorious claims on the part of defendants) . . . .'" (internal citation omitted)). Although courts have occasionally articulated the standard as highly deferential, those rulings are few and far between. *See, e.g.*, Devai v. Deutsche Bank Sec. Ltd., 573 F.3d 931, 937 (9th Cir. 2009) ("A ruling on class certification 'is subject to a very limited review and will be reversed only upon a strong showing that the district court's decision was a clear abuse of discretion.'" (citing *In re* Mego Fin. Corp. Sec. Litig. 213 F.3d 454, 461 (9th Cir. 2000)).

109. Vega v. T-Mobile, U.S.A., Inc., 564 F.3d 1256, 1264 (11th Cir. 2009) (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1251 (11th Cir. 2004)) (internal quotation marks omitted).

110. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982); Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 644 (6th Cir. 2006); Chamberlain v. Ford Motor Co., 402 F.3d 952, 961 (9th Cir. 2005).

111. *See, e.g.*, *In re* Schering Plough Corp. ERISA Litig., 589 F.3d 585, 596 (3d Cir. 2009) ("Thus, in reviewing the District Court's decision to certify the class, we must assess whether an adequately 'rigorous analysis' was conducted to determine that each of the Rule 23 requirements was satisfied."); Robinson v. Texas Auto Dealers Ass'n, 387 F.3d 416, 420–21 (5th Cir. 2004) ("To make a determination on class certification, a district court must conduct an intense factual investigation. . . . Although we review the certification decision using a deferential standard, '[a] district court must conduct a rigorous analysis of the rule 23 prerequisites before certifying a class.'" (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996))).

112. Rajeev Muttreja, Note, *How to Fix the Inconsistent Application of* Forum Non Conveniens *to Latin American Jurisdiction—And Why Consistency May Not Be Enough*, 83 N.Y.U. L. REV. 1607, 1608–09 (2008) (noting that FNC is "highly discretionary" and appellate review "very deferential"); Paul Santoyo, *Bananas of Wrath: How Nicaragua May Have Dealt* Forum Non Conveniens *a Fatal Blow Removing the Doctrine as an Obstacle to Achieving Corporate Accountability*, 27 HOUS. J. INT'L L. 703, 718 (2005) ("The highly deferential abuse of discretion standard of review, coupled with the fact that a *forum non conveniens* determination is decided by the judge who will ultimately hear the case if it is not dismissed, makes a foreign plaintiff hard-pressed to find a court receptive to the idea that another forum has greater administrative burdens."); Greenberg, *supra* note 10, at 334.

113. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).

114. Greenberg, *supra* note 10, at 334 (quoting Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of* Forum Non Conveniens *and the International Plaintiff*, 77 CORNELL L. REV. 650, 682–83 (1992)) (internal quotation marks omitted).

B. An Empirical Analysis

The claim that abuse of discretion review means one thing for FNC decisions and another for decisions on class certification is supported by empirical evidence. To test my hypothesis, I reviewed nearly 500 federal appellate decisions dating back to 1958 and determined average reversal rates for the two types of appeals. The results confirm that, statistically speaking, appellate panels are considerably more deferential to decisions on FNC than they are to decisions on class certification. Whereas district court decisions on FNC were affirmed over 74.4% of the time, class certification decisions were affirmed at a rate of only 62.7%. Furthermore, while the trend in appellate review of class certification decisions is decidedly becoming more aggressive—approaching a 50% reversal rate since 2007—we see no similar trend in the context of FNC.

1. The Samples and Results

a. Decisions on Class Certification

i. Methodology

To gather a comprehensive data pool, I searched Westlaw for all circuit court cases, published and unpublished, that included the word "certify" (or some variation thereof) within one sentence of "review" (or some variation thereof) and within one sentence of "abuse of discretion."[115] This yielded a total of 567 cases. Of these 567 cases, I identified and excluded 299 false positives, leaving a total of 268 cases for further analysis.

In discerning whether to exclude a case, the ultimate question was "did the court actually review a decision on class certification for abuse of discretion?" If the answer was "yes," the case was included. If the answer was "no," the case was excluded. I therefore eliminated cases from the study where, for instance, the lower court had denied the certification motion as moot after dismissing the suit on the merits (and the appellate court's reversal on the merits made the certification question ripe); where the appellate court affirmed the lower court's decision denying class certification on the grounds that the plaintiff failed to state a claim; where the appellate court affirmed or reversed the district court's certification decision on grounds of standing; where the issue on appeal was a petition

115. The full search was as follows: "certif! /s review /s 'abuse of discretion.'" I ran the search on January 8, 2010.

for interlocutory review of a decision on class certification (a step removed from the Rule 23 abuse of discretion analysis); and where the appellate court reviewed the lower court's decision to deny a motion for class certification as untimely.[116]

I also excluded cases that, while they may have involved abuse of discretion review, did not arise under Rule 23 (e.g., collective action cases under the Fair Labor Standards Act and the Americans with Disabilities Act). Naturally, I also ignored truly irrelevant cases (e.g., review of a decision to certify election results or review of a lower court's decision to certify a question of law). In the few cases that presented close calls as to inclusion versus exclusion, I erred on the side of exclusion.

ii. Results

As the below chart shows, appellate panels affirmed decisions on class certification approximately 63% of the time.[117] For every two cases affirmed, at least one was reversed.[118]

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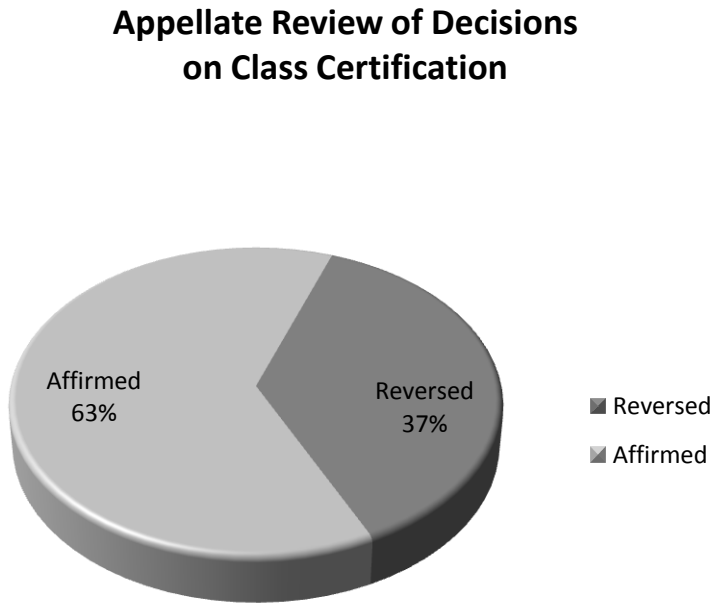
116. The review in this final scenario, as in the others, does not qualify as the sort of appellate review with which we are concerned. We are concerned with review of decisions on the *merits* of class certification—whether the lower court properly considered the Rule 23 factors—not with decisions on whether a motion was timely filed.

117. "Reversals" include partial reversals (i.e., where certain aspects of the certification decision were affirmed but others reversed). In addition, some of the rulings were reversed because the lower court got the law wrong. Arguably, I should have excluded these opinions because legal issues are reviewed *de novo*. *See* Tardiff v. Knox Cnty., 365 F.3d 1, 4 (1st Cir. 2004) ("Nominally, review of decisions granting or denying class certification is for 'abuse of discretion,' but this chameleon phrase is misleading. Express standards for certification are contained in Rule 23, so an appeal can pose pure issues of law reviewed *de novo* or occasionally raw fact findings that are rarely disturbed." (internal citation omitted)). Even though the overall standard of review for a Rule 23 decision is abuse of discretion, such an abuse was only identified in these cases by virtue of the lower court's incorrect description or application of the law. If we took out these opinions, the Rule 23 appellate jurisprudence would appear even more deferential.

118. The reversed cases are as follows: *United Steel v. Conoco Philips Co.*, 2010 WL 22701 (9th Cir. 2010); *In re Schering Plough Corp. ERISA Litigation*, 589 F.3d 585 (3d Cir. 2009); *Mims v. Stewart Title Guarantee Co.*, 2009 WL 4642631 (5th Cir. 2009); *Harper v. Sheriff of Cook Cnty.*, 581 F.3d 511 (7th Cir. 2009); *Rodriguez v. Hayes*, 578 F.3d 1032 (9th Cir. 2009); *Brown v. Nucor Corp.*, 576 F.3d 149 (4th Cir. 2009); *Nafar v. Hollywood Tanning Sys., Inc.*, 339 F. App'x 216 (3d Cir. 2009); *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169 (3d Cir. 2009); *In re Flag Telecom Holdings, Ltd.*, 574 F.3d 29 (2d Cir. 2009); *In re Wells Fargo Home Mtg. Overtime Pay Litig.*, 571 F.3d 953 (9th Cir. 2009); *Hagan v. Rogers*, 570 F.3d 146 (3d Cir. 2009); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009); *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350 (11th Cir. 2009); *Vega v. T-Mobile, U.S.A., Inc.*, 564 F.3d 1256 (11th Cir. 2009); *Powers v. Lycoming Engines*, 328 F. App'x 121 (3d Cir. 2009); *Huberman v. Tag-It Pac., Inc.*, 314 F. App'x 59 (9th Cir. 2009); *Atwell v. Gabow*, 2009 WL 294366 (10th Cir. 2009); *Vallario v. Vandehey*, 554 F.3d 1259 (10th Cir. 2009); *Romberio v. Unumprovident Corp.*, 2009 WL 87510 (6th Cir. 2009); *Anderson v. HUD*, 554 F.3d 525 (5th Cir. 2008); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Andrews v. Chevy Chase*, 545 F.3d 570 (7th Cir. 2008); *Danvers Motor Co., Inc. v. Ford Motor Co.*, 543 F.3d 141

(3d Cir. 2008); *Gene and Gene LLC v. Biopay LLC*, 541 F.3d 318 (5th Cir. 2008); *Para v. Bashas, Inc.*, 536 F.3d 975 (9th Cir. 2008); *Robertson v. Monsanto Co.*, 287 F. App'x 354 (5th Cir. July 18, 2008); *Sisley v. Sprint Commc'n Co., LP*, 284 Fed. Appx. 463 (9th Cir. 2008); *Doiron v. Conseco Health Ins. Co.*, 279 Fed. Appx. 313 (5th Cir. 2008); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *In re New Motor Vehicles*, 522 F.3d 6 (1st Cir. 2008); *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314 (11th Cir. 2008); *Gooden v. Crain*, 255 F. App'x 858 (5th Cir. 2007); *Cent. States Se. & Sw. Areas Pension Fund v. Merck-Medco.*, 504 F.3d 229 (2d Cir. 2007); *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718 (9th Cir. 2007); *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91 (2d Cir. 2007); *Cole v. Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007); *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007); *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299 (5th Cir. 2007); *United Steelworkers of Amer. v. Cooper Tire & Rubber Co.*, 474 F.3d 271 (6th Cir. 2007); *In re IPO Secs. Litig.*, 471 F.3d 24 (2d Cir. 2006); *In re Nassau Cty Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006); *Beck v. Maximus, Inc.*, 457 F.3d 291 (3d Cir. 2006); *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179 (3d Cir. 2006); *Heffner v. Blue Cross and Blue Shield of Ala., Inc.*, 443 F.3d 1330 (11th Cir. 2006); *Gregory v. Finova Capital Corp.*, 442 F.3d 188 (4th Cir. 2006); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1 (1st Cir. 2005); *In re St. Jude Med., Inc.*, 425 F.3d 1116 (8th Cir. 2005); *In re Comm. Bank of N. Va.*, 418 F.3d 277 (3d Cir. 2005); *In re Simon II Litig.*, 407 F.3d 125 (2d Cir. 2005); *Kern v. Siemens Corp.*, 393 F.3d 120 (2d Cir. 2004); *Chiang v. Veneman*, 385 F.3d 256 (3d Cir. 2004); *Robinson v. Texas Auto Dealers Assn.*, 387 F.3d 416 (5th Cir. 2004); *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004); *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004); *Birmingham Steel Corp. v. Tenn. Valley Auth.*, 353 F.3d 1331 (11th Cir. 2003); *Bell v. City of Dallas*, 81 F. App'x 490 (5th Cir. 2003); *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181 (11th Cir. 2003); *Tilley v. TJX Co., Inc.*, 345 F.3d 34 (1st Cir. 2003); *In re Monumental Life Ins. Co.*, 343 F.3d 331 (5th Cir. 2003); *Parker v. Time Warner*, 331 F.3d 13 (2d Cir. 2003); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32 (1st Cir. 2003); *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545 (5th Cir. 2003); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732 (5th Cir. 2003); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003); *Sandwich Chef of Tex., Inc. v. Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205 (5th Cir. 2003); *Molski v. Gleich*, 307 F.3d 1155 (9th Cir. 2002); *Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257 (11th Cir. 2002); *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443 (6th Cir. 2002); *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002); *Drayton v. W. Auto Supply Co.*, 2002 WL 32508918 (11th Cir. 2002); *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002); *Stirman v. Exxon Corp.*, 280 F.3d 554 (5th Cir. 2002); *Piazzo v. Ebsco Indus., Inc.*, 273 F.3d 1341 (11th Cir. 2001); *Berger v. Compaq Comp. Corp.*, 257 F.3d 475 (5th Cir. 2001); *Linehart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001); *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152 (9th Cir. 2001); *Murray v. Auslander*, 244 F.3d 807 (11th Cir. 2001); *In re LifeUSA Holding, Inc.*, 242 F.3d 136 (3d Cir. 2001); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417 (5th Cir. 2001); *Consol. Edison Co. v. Richardson*, 233 F.3d 1376 (Fed. Cir. 2000); *Spence v. Glock*, 227 F.3d 308 (5th Cir. 2000); *Prado Steiman ex rel. Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000); *Pederson v. LSU*, 213 F.3d 858 (5th Cir. 2000); *Rutstein v. Avis Rent-a-Car Sys., Inc.*, 211 F.3d 1228 (11th Cir. 2000); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000); *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748 (7th Cir. 2000); *Pederson v. LSU*, 201 F.3d 388 (5th Cir. 2000); *Washington v. CSC Credit Servs., Inc.*, 199 F.3d 263 (5th Cir. 2000); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999); *Hodgers-Durgin v. De la Vina*, 165 F.3d 667 (9th Cir. 1999); *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207 (6th Cir. 1997); *Valentino v. Carter Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Andrews v. AT&T*, 95 F.3d 1014 (11th Cir. 1996); *Alpern v. UtiliCorp. United, Inc.*, 84 F.3d 1525 (8th Cir. 1996); *Epstein v. MCA, Inc.*, 50 F.3d 644 (9th Cir. 1995); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994); and *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994).



b. Decisions on Forum Non Conveniens

i. Methodology

To gather the relevant decisions on FNC, I searched Westlaw for all circuit court cases, published and unpublished, that contained the phrase "*forum non conveniens*" within one sentence of "review" (or any variation thereof).[119] This search yielded 248 cases, less than half the number of cases initially identified through the class certification search, though about what you would expect given the relative frequency of the two issues in appellate practice. From these 248 cases, I subtracted 60 as false positives, leaving a denominator of 188.[120]

119. The full search was "'forum non conveniens' /s review!" I performed the search on March 8, 2011.

120. In addition to the fact that motions for class certification are more common than motions to

As with the analysis pertaining to the class certification cases, the decision to exclude a case was driven by asking whether the case was actually a member of the relevant family. If the appellate court did not rule on a district court's decision to grant or deny a motion to dismiss for FNC under the rubric of abuse of discretion, the case was excluded. I therefore excluded cases reviewing the question of an "available and adequate alternative forum" to the extent that question was reviewed *de novo*.[121] Also excluded were cases where the court reversed for want of jurisdiction (and therefore never reached the FNC issue); where the issue on appeal was the enforceability of a forum-selection clause; and other false positives. As with the other data set, I erred on the side of exclusion in the few cases that presented truly close calls.

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dismiss under FNC, we likely see fewer appellate decisions on the latter topic because denials of FNC motions, unlike orders granting them, are not immediately appealable. William L. Reynolds, *The Proper Forum for a Suit: Transnational* Forum Non Conveniens *and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1685 (1992); *see also* Rosenstein v. Merrell Dow Pharms., Inc., 769 F.2d 352, 353 (6th Cir. 1985). Although class certification decisions are likewise not immediately appealable under Rule 23(f), the Rule at least invites petitions and draws no distinction between review of orders granting certification and orders denying certification. *See* FED. R. CIV. P. 23(f) ("[The] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."); *see also* Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005) ("Review of class certification decisions will be most appropriate when . . . there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable . . . .").

Others have argued, and I would agree, that all FNC decisions should be entitled to immediate appellate review. *See generally* Christina Melady Morin, Note, *Review and Appeal of* Forum Non Conveniens *and Venue Transfer Orders*, 59 GEO. WASH. L. REV. 715 (1991). At the very least, the courts should identify "death-knell" cases and grant immediate review in those situations, as they do in the context of class certification appeals. *See Chamberlan*, 402 F.3d at 959. Professor William Reynolds has explained the problems with the status quo as follows:

> A dismissal on *forum non conveniens* grounds is a final judgment and therefore an immediately appealable order. Denial of a motion to dismiss, in contrast, is not immediately appealable because it is not a final order. Pretrial review of that denial, therefore, can only be done by the trial court certifying an interlocutory appeal or by petitioning the circuit court for a writ of mandamus. Nor is appeal of the denial possible under the collateral order doctrine. It is quite possible, therefore, that initial appellate review of a denial of a motion to dismiss for *forum non conveniens* may sometimes follow a trial on the merits. The fact that a trial on the merits has already occurred obviously will be relevant on appeal; inconvenience will be much harder to demonstrate once the trial has been held. One court ruled that the trial bolsters the denial, and that the defendant must show that she was greatly prejudiced by having had her day in court in the plaintiff's forum.

Reynolds, *supra* note 96, at 1685 (footnotes and internal quotation marks omitted).

121. *See, e.g.*, DRFP L.L.C. v. Republica Bolivariana de Venez., 622 F.3d 513, 518 (6th Cir. 2010). The courts have been inconsistent on this point by sometimes using the abuse of discretion standard and other times reviewing *de novo*. *Compare id.*, *with* Overseas Media, Inc. v. Skvortsov, 277 F. App'x 92, 96 (2d Cir. 2008) (abuse of discretion review), *and* Kinney v. Occidental Oil & Gas Corp., 109 F. App'x 135 (9th Cir. 2004) (same).

On the other hand, I did *not* exclude—and indeed counted in the affirmative—cases where the only error identified by the appellate court was failure to include a return-jurisdiction clause.[122] In these instances, the appellate panel found no abuse of discretion, and therefore upheld the dismissal itself, but simply remanded for inclusion of a return-jurisdiction clause.

ii. Results

In contrast to the rate of affirmance we see in the context of class certification (approximately 63%), circuit courts affirmed decisions on FNC some 74% of the time. For every three FNC cases they affirmed, appellate panels reversed only one.[123]

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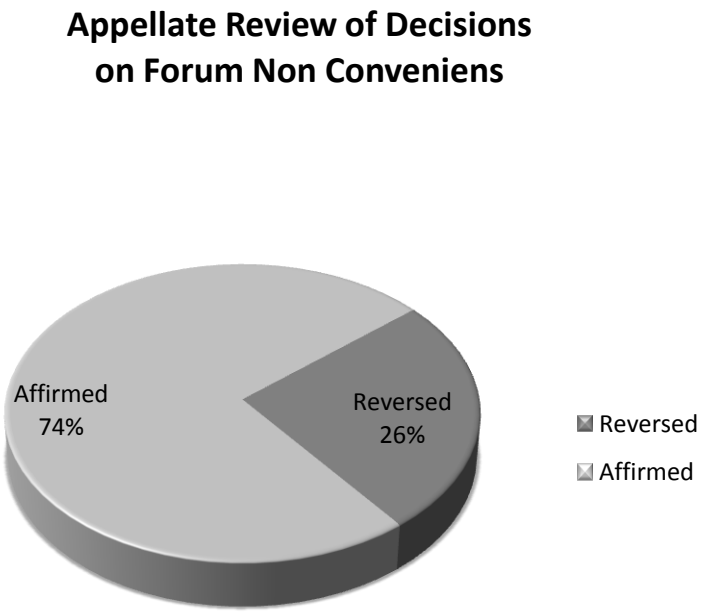
122. *See, e.g.*, Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665 (5th Cir. 2003); Crystal Co. v. Inchcape Shipping Servs., Inc., 216 F.3d 1082 (9th Cir. 1999). A return-jurisdiction clause is a tool used by U.S. courts to protect against the possibility that the foreign court will not accept the case or that the defendant will refuse to cooperate in the alternative forum. In that instance, the return-jurisdiction clause—a clause added by the U.S. court to its order of dismissal—allows the plaintiff to re-file the case in the original U.S. forum. *See* Robinson v. TCI/US West Communications, Inc., 117 F.3d 900, 907–08 (5th Cir. 1997).

123. The reversed cases are as follows: *Zions First Nat. Bank v. Moto Diesel Mexicana, S.A. de C.V.*, 629 F.3d 520 (6th Cir. 2010); *Cariajano v. Occidental Petroleum Corp.*, 626 F.3d 1137 (9th Cir. 2010); *Galustian v. Peter*, 591 F.3d 724 (4th Cir. 2010); *Wilson v. Island Seas Invs., Ltd.*, 590 F.3d 126 (11th Cir. 2009); *Boston Telecomm. Grp., Inc. v. Wood*, 588 F.3d 1201 (9th Cir. 2009); *Zelaya v. De Zelaya*, 250 F. App'x 943 (11th Cir. 2007); *Fid. Bank PLC v. N. Fox Shipping N.V.*, 242 F. App'x 84 (4th Cir. 2007); *Duha v. Agrium, Inc.*, 448 F.3d 867 (6th Cir. 2006); *Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2d Cir. 2006); *Tech. Dev. Co., Ltd. v. Onischenko*, 174 F. App'x 117 (3d Cir. 2006); *In re Bridgestone/Firestone, Inc.*, 420 F.3d 702 (7th Cir. 2005); *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146 (2d Cir. 2005); *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097 (11th Cir. 2004); *Abdullahi v. Pfizer, Inc.*, 77 F. App'x 48 (2d Cir. 2003); Ford v. Brown, 319 F.3d 1302 (11th Cir. 2003); *Nemariam v. Fed. Democratic Republic of Eth.*, 315 F.3d 390 (D.C. Cir. 2003); *Triflo Med., Inc. v. Lapeyre*, 44 F. App'x 266 (9th Cir. 2002); *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21 (2d Cir. 2002); *Alnwick v. European Micro Holdings, Inc.*, 29 F. App'x 781 (2d Cir. 2002); *Iragorri v. United Tech. Corp.*, 274 F.3d 65 (2d Cir. 2001); *Bank of Credit & Commerce Int'l Ltd. v. State Bank of Pak.*, 273 F.3d 241 (2d Cir. 2001); *DiRienzo v. Philip Servs. Corp.*, 232 F.3d 49 (2d Cir. 2000); *Guidi v. Inter-Continental Hotels Corp.*, 203 F.3d 180 (2d Cir. 2000); *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078 (9th Cir. 1999); *Rankine v. Rankine*, 166 F.3d 333 (4th Cir. 1998) (Table); *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481 (2d Cir. 1998); *Raytheon Eng'rs & Constructors, Inc. v. H L H & Assocs. Inc.*, 142 F.3d 1279 (5th Cir. 1998); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668 (D.C. Cir. 1996); *CTF Cent. Corp. v. Inter-Continental Hotels Corp.*, 71 F.3d 877 (5th Cir. 1995); *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990 (10th Cir. 1993); *Ceramic Corp. of America v. Inka Maritime Corp. Inc.*, 1 F.3d 947 (9th Cir. 1993); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir. 1991); *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604 (3d Cir. 1991); *Reid-Walen v. Hansen*, 933 F.2d 1390 (8th Cir. 1991); *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170 (3d Cir. 1991); *Hotvedt v. Schlumberger Ltd.*, 914 F.2d 79 (5th Cir. 1990); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628 (3d Cir. 1989); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38 (3d Cir. 1988); *Schexnider v. McDermott Intern., Inc.*, 817 F.2d 1159 (5th Cir. 1987); *McClelland Eng'rs, Inc. v. Munusamy*, 784 F.2d 1313 (5th Cir. 1986); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289 (5th Cir. 1985); *Gates Learjet Corp. v.*



2. Conclusions Drawn and Other Observations

Based on statistical analysis of the jurisprudence—going back to 1994 in the case of class certification decisions and 1958 in the context of decisions on FNC, it is apparent that circuit courts afford more deference to decisions on FNC than they do to decisions on class certification. This would not be remarkable in other circumstances, but it is when we consider that the two types of decisions are effectively outcome-determinative and that they are both ostensibly reviewed for abuse of discretion.

Jensen, 743 F.2d 1325 (9th Cir. 1984); *Irish Nat. Ins. Co., Ltd. v. Aer Lingus Teoranta*, 739 F.2d 90 (2d Cir. 1984); *DeShane v. Deere & Co.*, 726 F.2d 443 (8th Cir. 1984); *De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843 (5th Cir. 1983); *Reyno v. Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1980); *Menendez Rodriguez v. Pan Am. Life Ins. Co.*, 311 F.2d 429 (5th Cir. 1962); and *Caspar v. Devine*, 257 F.2d 197 (D.C. Cir. 1958).

Beyond the sheer numbers, the content and shape of the decisions show that the statistical divergence is not mere happenstance. First, several of the decisions affirming district court rulings on FNC come in the form of "summary orders" or short *per curiam* orders.[124] This is not the case when it comes to class certification appeals. Those opinions are generally lengthier, with the court spelling out its reasoning in some detail. I do not suggest that the length of an opinion necessarily reflects the amount of thought that went into it or the legitimacy of the ultimate decision, but rather the number and tone of the summary and *per curiam* orders does suggest that the courts are less willing to expend judicial resources on FNC disputes.[125] Abuse of discretion review is a handy tool to avoid in-depth analysis, or at least the articulation of such analysis. Rather than indicating exactly how the lower court got it right or wrong, the reviewing court can simply state, "we find no abuse of discretion."

Second, although both types of rulings are ostensibly reviewed for "abuse of discretion," the appellate courts occasionally hint at differing standards through modifying language. It does not occur with enough frequency to conclude that the judiciary, as an institution, has officially recognized the distinction. (In fact, I haven't seen a single opinion that explicitly recognizes, let alone endorses, the differing standards of review that I believe we see in practice.) Yet the modifying language does imply that some appellate panels are aware that they apply a more deferential standard in the case of decisions on FNC. For instance, many of the FNC cases say the discretion afforded to district courts is "substantial."[126] We also see courts defining the standard as review not just for any abuse of

124. *See, e.g.*, Seales v. Panamanian Aviation Co. 356 F. App'x 461 (2d Cir. 2009); Moss v. Tiberon Minerals Ltd., 334 F. App'x 116 (9th Cir. 2009); DTEX, LLC v. BBVA Bancomer, S.A., 508 F.3d 785 (5th Cir. 2007); Lisa, S.A. v. Gutierrez Mayorga, 240 F. App'x 822, *1 (11th Cir. 2007); ICC Indus. Inc. v. Isr. Discount Bank, Ltd., 170 F. App'x 766 (2d Cir. 2006); Moskovits v. Moskovits, 150 F. App'x 101 (2d Cir. 2005); Kinney v. Occidental Oil & Gas Corp., 109 F. App'x 135 (9th Cir. 2004); Base Metal Trading Ltd. v. Russian Aluminum, 98 F. App'x 47 (2d Cir. 2004); Rivera v. Hewlett Packard Corp., 95 F. App'x 241 (9th Cir. 2004) (only nine sentences); Dattner v. Conagra Foods, Inc., 91 F. App'x 179 (2d Cir. 2004); Entercolor Tech. Corp. v. Kabushiki Kaisha, 41 F. App'x 976 (9th Cir. 2002) (only five sentences).

125. *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 799 (2012) (discussing the relative weight of published versus unpublished opinions and the fact that, through publication, the "original panel . . . decides the precedential weight of its opinion . . . ."); Fonseca v. Consol. Rail Corp., 246 F.3d 585, 591 (6th Cir. 2001) ("[U]npublished opinions are never controlling authority."). Although Federal Rule of Appellate Procedure 32.1 now prohibits courts from limiting citation to unpublished opinions, the rule has no effect on the prudential value of such decisions. *See* F.R.A.P. 32.1 Advisory Committee Note; *see also, e.g.*, United States v. Harris, 416 F. App'x 768 (10th Cir. 2011).

126. *See, e.g.*, Lisa, S.A. v. Gutierrez Mayorga, 240 F. App'x 822, 823 (11th Cir. 2007).

discretion, but for a "*clear* abuse of discretion."[127] Significantly, we don't see this sort of language in the class certification precedent.

On the flip side of the coin, appellate courts have frequently suggested that the standard of review pertaining to certification decisions is more demanding than normal. First, class certification is taken more seriously from the beginning, with district courts conducting a "rigorous" analysis of the Rule 23 factors.[128] Because the stakes are so high, district courts are instructed to be especially careful in applying the law.[129] If the lower court fails to approach the dispute with adequate rigor, the appellate court may reverse on that basis alone. And the appellate courts have made it quite clear that they are on the lookout for error; this is not a passive review.

> The practical effect of Rule 23's requirements is a type of review that borders on de novo, and certainly, if an appellate court believes that certification has been improvidently granted, it generally will have no difficulty finding that a trial court has abused its discretion or departed from the essential requirements of law.[130]

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127. *See, e.g.*, Venture Global Eng'g, L.L.C. v. Satyam Computer Servs., Ltd., 233 F. App'x 517, 520 (6th Cir. 2007) (emphasis added); Duha v. Agrium, Inc., 448 F.3d 867, 873 (6th Cir. 2006); Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 70 (2d Cir. 2003); SSI Corp. v. Matsuda, 175 F. App'x 168, 169 (9th Cir. 2006) ("We review the district court's dismissal narrowly for a clear abuse of discretion."); Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr., 311 F.3d 488, 498 (2d Cir. 2002). A district court's "decision to dismiss a case on the ground of *forum non conveniens* 'lies wholly within the broad discretion of the district court and may be overturned only when we believe that discretion has been *clearly abused.*'" Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d Cir. 2001) (quoting Scottish Air Int'l, Inc. v. British Caledonian Group, PLC, 81 F.3d 1224, 1232 (2d Cir. 1996)). The court's review of a district court's decision to dismiss an action pursuant to *forum non conveniens* is "extremely limited." Peregrine Myan. Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir. 1996). It may reverse "only when there has been a clear abuse of discretion." *See* Borden, Inc. v. Meiji Milk Prods. Co., 919 F.2d 822, 827 (2d Cir.1990) (citation omitted). "There can be a clear abuse of discretion only if a court fails to carefully consider the Gilbert factors." *Peregrine*, 89 F.3d at 46 (internal quotation marks omitted); Mobil Sales & Supply Corp. v. JSC Lieutuvos Energija, 166 F.3d 1201, *1 (2d Cir. 1998) (table case).

128. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982); Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 644 (6th Cir. 2006); Chamberlain v. Ford Motor Co., 402 F.3d 952, 961 (9th Cir. 2005).

129. *See, e.g.*, *In re* Schering Plough Corp. ERISA Litigation, 589 F.3d 585, 596 (3d Cir. 2009) ("Thus, in reviewing the District Court's decision to certify the class, we must assess whether an adequately 'rigorous analysis' was conducted to determine that each of the Rule 23 requirements was satisfied."); Robinson v. Tex. Auto Dealers Ass'n, 387 F.3d 416, 420–21 (5th Cir. 2004) ("To make a determination on class certification, a district court must conduct an intense factual investigation. . . . Although we review the certification decision using a deferential standard, '[a] district court must conduct a rigorous analysis of the rule 23 prerequisites before certifying a class.'" (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996))).

130. Markham R. Leventhal, *Class Actions: Fundamentals of Certification Analysis*, 72 FLA. BAR J. 10, 16 (May 1998).

In the instance of a settlement class, the jurisprudence is even more explicit. As the Supreme Court stated in *Amchem Products, Inc. v. Windsor*, aspects of Rule 23 "demand undiluted, even heightened, attention in the settlement context."[131]

In sum, the statistics confirm what the substance of the jurisprudence implies: although both categories of decisions are reviewed for abuse of discretion, appellate courts are significantly more deferential in the context of FNC rulings than they are in the context of class certification decisions.

IV. THE NEED FOR CONSISTENT APPELLATE REVIEW OF FNC AND CLASS CERTIFICATION RULINGS

Because FNC analysis involves a stew of factors,[132] abuse of discretion review is, if not clearly appropriate, in keeping with standard-of-review jurisprudence.[133] When lower courts are asked to balance factors, appellate courts generally extend some degree of deference to the manner in which the lower courts strike that balance. But if abuse of discretion review is to be meaningful, appellate courts must avoid using it as a "rubber stamp" to affirm lower courts and instead perform their review in a manner that truly tests or challenges the discretion the lower court used, especially for case-dispositive rulings. Courts have recognized a need for this level of review when it comes to class certification. They should do the same with respect to FNC.

As things currently stand, the broad discretion inherent in FNC and the lenient standard of appellate review work to invite shaky rulings by district courts and improvident affirmances by their appellate counterparts.[134] It bears repeating that FNC dismissals are supposed to be the exception, not the rule.[135] The statistics, unfortunately, show that this is not the case in

131. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997); *see also* Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1238 (9th Cir. 1998) (citing the *Amchem* language in support of stricter standard of review).

132. Abad v. Bayer Corp., 563 F.3d 663, 668 (7th Cir. 2009).

133. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) ("The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.").

134. Leah B. Moon, Comment, *Should They Stay or Should They Go: Applying the* Forum Non Conveniens *Doctrine to Foreign Plaintiffs Injured Abroad* in Abad v. Bayer Corporation, 5 SEVENTH CIRCUIT REV. 1, 2 (2009).

135. The "doctrine of *forum non conveniens* proceed[s] from [the] premise [that] . . . [i]n *rare* circumstances, federal courts can relinquish their jurisdiction in favor of another forum." Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996) (emphasis added).

practice.[136] When district courts are granting it over 50% of FNC motions to dismiss[137] and appellate panels are affirming district court decisions on these motions at a clip of nearly 75%,[138] something is wrong. Certainly, the terms of the doctrine itself need some revision. As Justice Scalia put it, "[t]he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible."[139] But that is not all that is wrong—nor is that the focus of this Article.

Rather than calling for a rewriting of the doctrine, I make the modest proposal that the appellate courts recognize the high stakes of the issue and apply an appropriate standard of review. There is no need to change the standard itself—at least not in any radical way—but reviewing courts must apply it with more vigor by searching out and correcting error where reasonable minds could not differ.

The courts have shown that the abuse of discretion standard is equal to the task. In the context of class certification appeals, appellate courts have not let the standard of review stop them from examining the lower courts' decisions with meaningful scrutiny.[140] They do, in fact, *review* for an abuse of discretion—re-examining the record and the lower court's analysis in light thereof—and do not hesitate to reverse when they perceive an error.[141] It is the difference between skimming a novel and saying it seems well written, and actually reading every line and *then* drawing a conclusion. The ultimate question may be the same, but the study and thought that goes into it makes all the difference.

The status quo for FNC appeals—overbroad discretion coupled with lenient appellate review—is not acceptable. Perhaps there was a time when we could claim ignorance, when we could pretend that an FNC dismissal was not effectively case-dispositive. That time has long since passed.[142] It is a well-known fact that when a foreign plaintiff decides to sue in U.S. court, she usually has no fall-back option.[143] Unless we are

136. *See* Lii, *supra* note 67, at 526 (2009); *see also supra* Part III.B.

137. Lii, *supra* note 67, at 526.

138. *Supra* Part III.B.2.

139. Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994) (internal reference omitted).

140. *See In re* Schering Plough Corp. ERISA Litigation, 589 F.3d 585, 596 (3d Cir. 2009); Robinson v. Tex. Auto Dealers Ass'n, 387 F.3d 416, 421 (5th Cir. 2004); Abrams v. Interco, Inc., 719 F.2d 23, 30 (2d Cir. 1983).

141. *See* Leventhal, *supra* note 130, at 16.

142. *See generally* Robertson, Forum Non Conveniens *in America and England*, *supra* note 73, at 420; Robertson & Speck, *supra* note 86, at 938; Greenberg, *supra* note 10, at 334.

143. *See* Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) ("A *forum non conveniens* dismissal usually will end the litigation altogether, effectively

prepared to say that these cases categorically lack merit, we must acknowledge the gravity of FNC decisions and the consequences they bear for foreign plaintiffs. One way to make such an acknowledgement is through an appropriate standard of appellate review. By ratcheting up the standard to something like "abuse-of-discretion-plus," the judiciary would send the message, to lower courts, litigants, and the population at large, that it understands the seriousness of FNC in today's world.[144]

So why not do this? Why shouldn't FNC rulings be treated like class certification rulings when they come up for appellate review? Some will say that the reason for the disparate reversal rates are not due to a difference in the standard of review, but due to the nature of the predicate law; FNC doctrine, they might argue, clearly favors dismissal in most cases.[145] Class certification law is much more equivocal—sometimes it suggests certification, sometimes it does not. District courts just follow the trends, and it is no surprise that we see more reversals in an area of law that is more equivocal (class certification) than in an area of law that predominantly points to but one conclusion (FNC).

I would offer two rejoinders. First, FNC, in its fundamental contours, does *not* favor dismissal in the vast majority of cases. As the Supreme Court has held, the "doctrine of *forum non conveniens* proceed[s] from [the] premise [that] . . . [i]n *rare* circumstances, federal courts can relinquish their jurisdiction in favor of another forum."[146] The fact that the Supreme Court has also instructed trial courts to grant less deference to a foreign plaintiff's forum choice does not mean that courts should approach these situations with a presumption of dismissal. "[T]his reduced weight is not an invitation to accord a foreign plaintiff's selection of an American

excusing any liability of the defendant.").

144. In addition to the injustice suffered by parties as a result of the mismatch between the gravity of FNC decisions and the standard of appellate review, the current situation casts the U.S. judiciary in an unfavorable light upon the world stage. FNC too often produces results that smack of nativism and economic protectionism. *See* RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS*: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 129 (2007) ("Such results have spurred a deeper criticism: that application of the *forum non conveniens* doctrine is used to protect U.S. corporations from liability for harm caused in Latin America."). Even if the underlying goal of FNC—dismissing suits from U.S. court when they could be litigated elsewhere more efficiently—is laudable, it is too often misapplied. Stricter appellate review is one tool that can curb abuse and ensure that FNC is not simply an instrument of prejudice against foreign plaintiffs.

145. *See* Lii, *supra* note 67, at 526 (observing that courts have granted the majority of FNC motions filed since 1982). Of course, citing the statistics in this instance simply begs the question.

146. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996).

forum *no* deference since dismissal for *forum non conveniens* is the exception rather than the rule."[147]

Second, if the first point is not convincing—if FNC *should* favor dismissal so frequently—what harm will come from a more rigorous review? The only downside is the expenditure of appellate resources. This is not a cost that can be lightly dismissed, but it is a cost that is justified when one considers the serious consequences of decisions on FNC.[148]

Finally, the movement towards heightened review should cut both ways.[149] Although most of the literature on the gravity of FNC decisions deals with the impact on the plaintiff, these rulings are also tremendously important to defendants. All litigants in U.S. court, no matter their resources, deserve appellate review commensurate with the weight of the issue.

CONCLUSION

It is a basic tenet of judicial fairness that similar cases ought to receive similar treatment.[150] Although the substantive issues at play in FNC and class certification disputes are admittedly different, the two categories of cases are strikingly similar in terms of the attributes that should inform the standard of appellate review. Whether ruling on a motion to dismiss for FNC or a motion to certify a class under Rule 23, a district court must consider a number of factors, including considerations of judicial economy, fairness, and efficiency for the parties. The doctrine of FNC and

147. R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164, 168 (2d Cir. 1991) (quoting Lacey v. Cessna Aircraft Co., 862 F.2d 38, 45–46 (3d Cir. 1988) (internal quotation marks omitted)).

148. Critics of my proposal might also argue that FNC dismissals can be made contingent on acceptance of litigation by a foreign court (i.e., through inclusion of a "return-jurisdiction clause"). *See, e.g.*, USHA (India), Ltd. v. Honeywell Int'l, Inc., 421 F.3d 129 (2d Cir. 2005); Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665 (5th Cir. 2003). This practice presents problems. On the one hand, it is a helpful development because it tries to ensure that the case will be heard somewhere. On the other hand, courts can use it as a crutch for dismissals in borderline cases. It becomes another (improperly placed) thumb on the scale favoring dismissal. A court that does not wish to engage in a full analysis of the available-and-adequate-forum question can comfort itself with the thought that the litigants can return to U.S. court if it does not work out abroad. Thus, the return-jurisdiction clause becomes something of a moral hazard.

149. This should also be the case with respect to appellate review of class certification decisions, i.e., the standard of review should be the same whether certification was granted or denied. Most courts seem to follow through on this idea. The Second Circuit has stated, however, that its review of a denial of class certification is "noticeably less deferential . . . when [the district] court has denied class status than when it has certified a class." Parker v. Time Warner Ent. Co., 331 F.3d 13, 18 (2d Cir. 2003) (quoting Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999)) (omissions in original) (internal quotation marks omitted). This approach is troubling, especially because the Second Circuit has offered little in the way of explanation for this disparate treatment.

150. Plyler v. Doe, 457 U.S. 202, 216 (1982).

the terms of Rule 23 both aim to achieve efficiency and fairness in litigation—whether that means litigating the case in another country or consolidating numerous individual claims in a single class action—and it is the trial court's job to discern how best that might be achieved. Although debatable, abuse of discretion review is probably the appropriate standard in both instances.

But, as we have seen, review for abuse of discretion can mean different things in different contexts. The chameleon-like nature of this standard is perhaps one of its strengths. If resolution of the underlying dispute requires more or less discretion on the part of the district judge, such as granting a trial continuance versus applying the specific language of a codified rule,[151] the standard of appellate review should vary accordingly.

By the same token, however, the standard of review should *not* vary when the disputes, for purposes of appellate review, are more alike than different. The judiciary has recognized that the abuse of discretion standard should bear teeth in the context of class certification appeals. The stakes demand it; whether the lower court rules in favor of or against class certification, the ruling is frequently case-dispositive. Appellate review must therefore be searching and aggressive to correct erroneous decisions.

The very same rationale applies in the case of decisions on FNC. If a foreign plaintiff is denied access to a U.S. court, the show is often over. The economics does not make sense, and the case simply disappears or settles for a pittance. And if a U.S. defendant loses on a motion to dismiss for FNC, it comes to the bargaining table with its main ammunition spent. The plaintiff can then force a settlement or otherwise push the litigation further than it merits. In other words, granted or denied, the outcome of an FNC motion is usually case-dispositive to the same extent as a motion for class certification.

The doctrine of FNC has been criticized—at times, rightly so—as anachronistic. However, I am not prepared to take the position that it should be abolished altogether. When FNC achieves its end—directing cases to the fairest and most convenient forum—it is a doctrine to be lauded. Unfortunately, it is also a doctrine subject to abuse, and when district courts make the wrong call, the consequences can be grave. In the worst cases, victims of international torts by U.S. companies are effectively denied access to justice. Even if some cases should be screened from U.S. courts, a faulty choice in the FNC context can paint the court as lazy or, worse, as improperly siding with domestic defendants. Appellate

151. The discretion inherent in the balancing under Federal Rule of Evidence 403 comes to mind.

review may not be a panacea, but it can go a long way in correcting this trend. Because the stakes are so high, abuse of discretion review should be applied with heightened scrutiny, just as it is for class certifications.