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New law boosts defendants' appellate rights

■ JEFF JEFFREY
jeff.jeffrey@nclawyersweekly.com

A new law reducing the number of appeals court judges that Gov. Roy Cooper, a Democrat, can appoint when they retire has garnered intense media coverage as the governor and the Republican-controlled General Assembly have clashed over the legislation. But a provision in the law that has gotten far less attention could have a significant impact on class action litigation in the state.

House Bill 239, which overcame a gubernatorial veto late last month to become law, includes language that expands the appellate rights of class action defendants. The new law is expected to change fundamentally how settlement negotiations are conducted in class action cases.

HB 239 reduces the size of the Court of Appeals from 15 to 12 by not replacing the next three judges who retire during their terms. The three judges who were in line to reach mandatory retirement age during Cooper's term in office were Republicans, meaning that they would have been replaced with appointments made by a Democrat, potentially shifting the balance of the court.

The measure drew fierce criticism as it worked its way through the legislative process, with many opponents arguing that the court needs 15 judges to handle the number of cases that appear before the court. With 15 judges, the court met in five panels of three. Now, the court will have to shuffle judges more frequently to maintain five panels.

Meanwhile, supporters of the measure maintained that with fewer judges, the appeals court could operate more efficiently at a lower cost.

But to ensure the measure made it through the General Assembly, even after Cooper vetoed it, lawmakers added a provision allowing class action defendants to file an immediate appeal of orders certifying a class in civil lawsuits.

Prior to HB 239, plaintiffs could appeal from the denial of class certification but defendants were left having to either file a petition for certiorari or show that a substantial right beyond the certification decision in order to seek immediate review by the North Carolina Court of Appeals.

HB 239 also states that an appeals of class certification decisions will go directly to the state Supreme Court and that proceedings in the trial court will be stayed until the appellate process is exhausted.

Dowdy said many attorneys who represent large companies had been opposed to the idea of shrinking the Court of Appeals because they favor a strong appellate bench that can quickly overturn adverse decisions. He said he views the class action provisions as a "sweetener" designed to get them on board.

Kilpatrick Townsend & Stockton's Joseph Dowdy, who authored an article on the class action implications of HB 239, said the new law provides greater appellate rights than even the federal rules dealing with class action lawsuits.

"This certainly puts class action defendants on an equal footing with plaintiffs," Dowdy said.

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Because the stakes in class action lawsuits can be so high—with some judgements reaching into the billions—Dowdy said that prior to HB 239, defendants "almost had to settle when a class was certified."

But now, he said, defendants will be in a better position to push back because the underlying lawsuit will stop while the state Supreme Court determines whether the class certification was proper.

"It used to be that the whole fight came down to class certification. If the plaintiff won, the settlement got a lot more expensive," Dowdy said. "Now, I expect more defendants to appeal and for the settlements that do occur to be smaller."

Plaintiffs' attorney James Wyatt of Wyatt & Blake in Charlotte said he agreed that HB 239 could affect settlement talks in class actions.

Wyatt said settlement negotiations can hinge on a class certification ruling or in what a party believes a ruling might be. Now that both plaintiffs and defendants can appeal directly to the Supreme Court, "The parties will now probably focus on how the NC Supreme Court will likely rule on class certification issues as a touchstone for settlement negotiations."

Additionally, because HB 239 removes the requirement that cases have to go before the Court of Appeals before the Supreme Court can weigh in, the appeals process will also cost less.

The new law might also affect the venue in which class action litigation takes place.

Now that HB 239 has given class action defendants stronger appellate rights, some might choose to stay in state court, rather than try to have the case removed to federal court, Wyatt said.

That said, the future of HB 239 is far from clear. Cooper is expected to challenge the judicial aspects of the bill in court. But Dowdy said he thinks the class action provisions would remain in place, even if other parts of the law are struck down.

At this point, Dowdy said he is advising clients that receive an adverse class certification decision to consider whether to move for decertification or reconsideration to prompt a ruling that may give rise to a direct appeal to the Supreme Court.

Meanwhile, it's also unclear what HB 239 will mean for existing appeals. The law doesn't explicitly address whether appeals that are already underway can go directly to the Supreme Court.

"It could be that there just aren't that many existing appeals that are going to be affected," Dowdy said. "But what I really anticipate is that more cases are just going to settle because most defendants aren't going to want to put the resources toward testing the new law.

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