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A Practical Guide to Settling Class Action Cases on Appeal

by Joe Dowdy and Phillip Harris

This post provides practical guidance concerning the necessary procedures for maintaining a defendant's appeal while seeking approval of a class settlement reached during the pendency of the appeal.

There are commonly two types of appellate filings in federal class action cases: (1) petitions to appeal class certification orders under Federal Rule of Civil Procedure 23(f), and (2) appeals from final judgments. Rule 23(f) petitions are common. The losing party generally petitions for leave to appeal from the district court's certification decision, although appellate courts have granted such petitions less than 25% of the time. David G. Knibb, Fed. Ct. App. Manual § 5:7 (6th ed. 2017). When appellate courts grant Rule 23(f) petitions to appeal, the underlying certification decisions are reversed in more than half of the ensuing appeals. *Id*. Appeals from final judgments in class action cases are far less common, as most defendants will be unwilling to risk a final judgment in favor of a class (which could impose crippling liability).

The procedures involved in settling class action cases during an interlocutory (Rule 23(f)) appeal or an appeal of a final judgment are largely the same, although post-judgment settlements are more complicated. Regardless of the type of appeal, the class action defendant should be mindful of a number of requirements if a class action settles during the appeal.

Seeking a Stay. When taking an appeal, the defendant must ensure that it preserves its negotiating position (and its substantive rights) by seeking a stay. Rule 23(f) expressly provides that a post-certification order appeal "does not stay proceedings in the district court unless the district judge or the court of appeals so orders." Generally, a party must seek a stay in district court first, before seeking such relief in an appellate court. Fed. R. App. P. 8(a)(1). The best practice is to seek a stay in the district court immediately after an appellate court agrees to hear an interlocutory appeal. In an appeal from a final judgment, the defendant may post an appeal bond under Rule 62(d) to stay execution of the judgment.

Finalizing the Settlement. The parties should have a signed settlement agreement along with all necessary attachments (motion for preliminary approval, preliminary approval order, class notice, etc.) before reporting the case settled in the appellate court and seeking to have the case returned to the district court.

Obtaining Limited Remand to the District Court. Once the parties have a signed settlement agreement,

at least one of the parties must file a motion for limited remand in the appellate court (ideally, the motion will be a joint motion). Unlike an individual action (where the appealing party simply dismisses the appeal), settling parties in a class action appeal cannot dismiss the appeal because the district court must retain the jurisdictional authority to approve the settlement – simply dismissing the appeal would end the case and the district court's ability to take further action. Fed. R. Civ. P. 23(e). Then, if the district court were to deny the request to settle the case, then the defendant would need to proceed with its appeal. To the extent the appellate court is inclined to set a time limit for how long the case will remain remanded, it is important to remind the appellate court how long it will take to seek approval of and implement the class settlement. In our experience, an appellate court will require regular status reports to confirm that the parties (and the lower courts) are proceeding in a timely fashion.

Obtaining Approval in the District Court Post-Remand. After obtaining a limited remand, the parties must follow the normal procedures for settlements in the district court, including:

(A) promptly filing a motion for preliminary approval of the settlement demonstrating that the settlement is "fair, reasonable, and adequate" under Rule 23(e)(2). This motion can be complicated if the settlement follows a final judgment entered in the district court, because the parties will be encouraging the district court to award the class members less than the amounts previously determined they were entitled to receive. This motion also can be complicated if the parties are altering the class definition previously adopted by the district court. In either situation, the parties are essentially requesting that the district court reconsider a prior ruling, of which the class members may already have received notice, based on the possible success of an appeal.

(B) proposing appropriate notice to the class members under Rule 23(e)(1). If the proposed settlement will result in the class members receiving a lower settlement amount than prior notices indicated, the basis for the reduction of course needs to be explained. The possibility that objections will be made to the fairness of the proposed settlement is greatly increased in these circumstances.

(C) addressing whether any class members should have the right to seek exclusion from the class based on the settlement under Rule 23(e)(4). In the context of a previously certified class, the district court is not required to afford individual class members a second opportunity to request exclusion. *Moulton v. U.S. Steel Corp*., 581 F.3d 344, 354 (6th Cir. 2009).

(D) providing Class Action Fairness Act ("CAFA") notice to regulators and allowing them 90 days to object to the proposed settlement. 28 U.S.C. § 1715(d) ("An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice.") An appealing defendant must be especially careful not to forget the CAFA notice requirements because, under 28 U.S.C. § 1715(e), a class member may choose not to be bound by a class action settlement for which the defendant did not provide the requisite regulator notice.

(E) addressing any objections to the settlement and the rights of any class members to appeal from the final approval order under Rule 23(e)(5). The defendant should not dismiss its appeal until all class

members' appellate rights regarding the final settlement approval order have expired.

Dismissing the Appeal. Only after the deadline for individual class members to appeal from the final settlement approval order expires should a defendant dismiss its appeal. At this point, the pending appeal is moot and is easily dismissed.

Key Takeaways. It is important for a defendant that received an unfavorable ruling in the trial court to use the proper procedures to ensure that its appeal remains viable while the settlement is subject to district court approval.