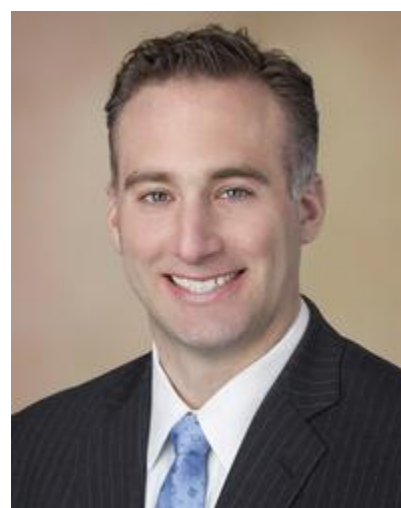


Settling After Class Denial — If Only It Were That Easy

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You represent a defendant in a putative class action in federal court. The lead plaintiff's potential damages are de minimis, although lead plaintiff's counsel is seeking millions on behalf of the putative class. You believe that if you can defeat the lead plaintiff's motion for class certification, the (soon-to-be former) lead plaintiff will lose settlement leverage and quickly settle its claim for a trivial amount. After all, you think, now that class certification has been denied, your client no longer has to worry about classwide damages, right? If only it were that easy.

As a threshold matter, the former lead plaintiff could appeal the district court's order denying class certification. While that interlocutory order is not immediately appealable as of right, the former lead plaintiff could move for leave to appeal under Federal Rule of Civil Procedure 23(f). Or, the former lead plaintiff could settle its individual case with your client and then appeal the denial of class certification after the court enters the final judgment in the former lead plaintiff's individual case.[1]



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On appeal, the circuit court then could reverse the denial of class certification and either certify the class or remand the case to the district court, which could certify the class. Either way, by settling with the former lead plaintiff, your client might inadvertently bankroll the former lead plaintiff's appeal on the putative class' behalf. And if the denial of class certification is reversed, the action will proceed as a certified class action, and plaintiff's counsel will have substantially more settlement leverage.

To prevent the lead plaintiff from appealing the class certification denial, you ask the former lead plaintiff to waive its right to appeal as a condition to settling its individual case. But the former lead plaintiff can agree to waive the right to appeal only on its own behalf; it may not agree to waive the right to appeal on the absent class members' behalf.[2] Indeed, even after final judgment is entered in the former lead plaintiff's individual case, an absent class member still may intervene to appeal the denial of class certification.[3] And the circuit court could still reverse, which would leave your client no better off than before it settled the former lead plaintiff's individual case.

Determined to obtain a quick settlement for your client without risking an appeal of the order denying class certification, you have another idea: wait out the putative class. You recall that under the Supreme

Court's American Pipe ruling, the filing of a putative class action tolls the running of the statute of limitations for absent class members, and the limitations period begins to run again when the court denies class certification.[4] You calculate the amount of time that elapsed on the former lead plaintiff's claims before the action was filed, and simply wait until the remaining time passes (following the denial of class certification) before settling with the former lead plaintiff. That way, you believe, the absent class members no longer have a timely class claim to appeal. Again, if only it were that easy.

In *United Airlines Inc. v. McDonald*, the U.S. Supreme Court held that absent class members may intervene to appeal the denial of class certification, regardless of the statute of limitations period, provided that they intervene within the time to notice an appeal from the final judgment in the former lead plaintiff's individual case.[5] In that case, the district court denied the former lead plaintiffs' motion for class certification and the action proceeded as an individual action.[6]

After the parties settled and the district court entered a final judgment in the individual case, an absent class member moved to intervene to challenge the district court's denial of class certification. *United Airlines*, the defendant, opposed the motion as untimely. It argued that the statute of limitations started running again after class certification was denied and expired before the absent class member moved to intervene. The district court agreed and denied the absent class member's motion to intervene.[7] The Seventh Circuit reversed.[8] The Supreme Court affirmed the Seventh Circuit.

The Supreme Court held that an absent class member who appeals the denial of class certification stands in the shoes of the former lead plaintiff. Accordingly, as long as the former lead plaintiff commenced a timely action (which she had), the absent class member may intervene to appeal the denial of class certification if the motion to intervene is timely. To illustrate the point, the Supreme Court distinguished between the case before it, in which an absent class member sought to intervene after class certification was denied to prosecute the class appeal, and a case in which an absent class member seeks to intervene after the denial of class certification to prosecute its own individual action.

In the former case, the absent class member steps into the timely filed shoes of the former lead plaintiff: "To be sure, the case was stripped of its character as a class action upon denial of certification by the District Court. But it does not follow that the case must be treated as if there never was an action brought on behalf of absent class members." [9]

Addressing the timeliness of the absent class member's motion to intervene, the Supreme Court held that "[t]he critical inquiry ... is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." [10] Because the absent class member moved to intervene "within the time period in which the named [former lead] plaintiffs could have taken an appeal" of the final judgment, the court concluded that the Seventh Circuit "was correct in ruling the respondent's motion to intervene was timely and should have been granted." [11]

So where does this leave your client, who wants to settle with the former lead plaintiff after defeating class certification without the risk of defending a class action if the order denying class certification is reversed? After all, if the class issue can always reappear, what is the incentive for a defendant to settle with a former lead plaintiff, even after class certification is denied?

Several courts have acknowledged the tension between the policy of promoting settlement and the policy behind class actions, ultimately favoring the latter. In one action, a district court granted an absent class member's motion to intervene to challenge the denial of class certification after the former lead plaintiff settled with the defendant and waived its right to appeal the denial of class

certification.[12] The court observed that “a sophisticated defendant ... will quickly realize the evanescent value of its settlement here and act accordingly in the future.”[13]

In a similar case, a different district court noted that it was “not unmindful of the lessened incentive to settle the claims of the named plaintiffs in suits filed as class actions, due to the possibility of an appeal by ‘strangers’ [that is, absent class members] to the litigation.”[14] Still, the court held that “the rights of putative class members should not be shunted aside simply because the named plaintiffs are poorly prepared or desirous of an end to the litigation.”[15]

Given the protections afforded absent class members, even when class certification has been denied, defendants’ counsel should be mindful of several practical considerations when attempting to settle with a former lead plaintiff after successfully opposing class certification.

First, consider the strength of the order denying class certification and the likelihood that the former lead plaintiff or an absent class member could appeal the order successfully. If you determine that it is likely that the circuit court would reverse or vacate the order, settling with the former lead plaintiff might not be worth the risk. After all, your client would be financing the appeal, would be out of pocket the payment to the former lead plaintiff, and would be facing the possibility of defending against a revived class action. On the other hand, if you determine that it is likely that the circuit court would affirm the order, settling with the former lead plaintiff might be worth the risks.

Second, consider the publicity surrounding the case and the amount of potential damages at issue. In a highly publicized case or one with significant potential damages, the plaintiffs’ bar and absent class members are more likely to be aware of the denial of class certification, and are more likely to seek to intervene to appeal the denial once the defendant settles with the former lead plaintiff.

Third, consider whether, in lieu of settling with the former lead plaintiff, your client could successfully move for summary judgment on grounds the circuit court would affirm. A complete dismissal upon summary judgment makes the barrier to appealing the class certification denial that much more difficult because the former lead plaintiff or absent class member must appeal both issues, and the circuit court could affirm the summary judgment order, thereby mooting the appeal of the class certification order.[16]

In short, the denial of class certification, while significant, does not conclusively dispatch the class claim. The class claim might reappear, even after the defendant settles with the former lead plaintiff and the final judgment is entered. Consequently, counsel should carefully consider the pros and cons of settling with the former lead plaintiff.

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[1] See Robert L. Wise and William F. Auther, Nothing’s Over Until We Decide It Is: How Settling with Class Representatives Impacts Class-Certification Denial Appeals, In-House Defense Quarterly, Summer

2010, at 25 (discussing a lead plaintiff's ability to appeal the denial of class certification after settling with the defendant).

[2] As the Fifth Circuit has recognized, class representatives "assume responsibilities to members of the class ... [and] may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. The court itself has special responsibilities to ensure that the dismissal does not prejudice putative members." *Roper v. Conserve Inc.*, 578 F.2d 1106 (5th Cir. 1978), *aff'd* on other grounds, 445 U.S. 326 (1980); see also *Koike v. Starbucks Corp.*, 602 F. Supp. 2d 1158, 1162 (N.D. Cal. 2009) (holding that although the named plaintiffs who consented to judgment waived their right to appeal, the "unnamed members of the putative class who did not consent to the entry of judgment did not waive their right to appeal the class certification decision").

[3] See *United Airlines Inc. v. McDonald*, 432 U.S. 385, 396 (1977) (holding that an absent class member may intervene after a final judgment to challenge an order denying class certification).

[4] *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). *American Pipe* addressed only the tolling of the statute of limitations for absent class members; it did not address the tolling of statutes of repose. That issue is pending before the Supreme Court, and is scheduled to be argued on Oct. 6, 2014. *Pub. Emp. Ret. Sys. of Mississippi v. IndyMac MBS Inc.*, 134 S.Ct. 1515 (2014) (cert. pet. granted).

[5] *United Airlines*, 432 U.S. at 396.

[6] *Romasanta v. United Air Lines Inc.*, No. 70-cv-1157, 1972 WL 270 (N.D. Ill. Dec. 6, 1972).

[7] Although the district court judge did not expressly refer to the statute of limitations, he stated that "in my judgment ... this is five years now this has been in litigation, and [the absent class member] has not seen fit to come in here and seek relief from this Court in any way during that period of time, and litigation must end." *Romasanta*, 537 F.2d at 920 (quoting from the hearing transcript on the putative class member's motion to intervene).

[8] *Romasanta*, 537 F.2d at 920.

[9] *United Airlines*, 432 U.S. at 393.

[10] *Id.* at 395-396.

[11] *Id.* at 396.

[12] *Koike*, 602 F. Supp. 2d at 1163.

[13] *Id.*

[14] *Lane v. Bethlehem Steel Corp.*, 93 F.R.D. 611, 619 (D. Md. 1982) (granting an absent class member's motion to intervene to challenge the denial of class certification after the lead plaintiff settled with the defendant).

[15] *Id.*

[16] A defendant could prevail on a summary judgment motion on a ground that is dispositive of an

individual plaintiff's claim, but not of a class' claim. Consider a federal securities fraud case in which a court denied class certification because the lead plaintiff failed to prove classwide reliance based on the fraud-on-the-market theory. The defendant might successfully move for summary judgment in the former lead plaintiff's individual case on the ground that the former lead plaintiff did not directly rely on the alleged misstatements (so-called, "eyeball reliance"). But a court order dismissing the former lead plaintiff's individual case on that ground would not create a threshold, merits issue on appeal for the circuit court to address before reaching the putative class' appeal of the class certification order because the putative class would not be seeking to prove eyeball reliance; instead, it would be seeking to invoke the fraud-on-the-market presumption of reliance that was the subject of the adverse class certification order in the district court. In other words, the defendant's merits victory in the district court does not make more weight for the putative class on appeal.
