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Strategies for Pursuing Appellate Review Under FRCP 26(f)… …Or Not

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The #1 Strategy for a Successful Class Certification Appeal

Win in the Trial Court

Strategy #1 Didn't Work so Well? Try Strategy #2: Take Your Medicine and Move On

- Pros
  - Do you really want to make the situation worse?
  - Let's look on the bright side, you can get a preclusive effect if you get a summary judgment or win at trial!
  - If you don't appeal, you don't risk emboldening the other side if review is denied.
  - Is the record well-developed enough? Maybe you can get the class decertified later.
- Cons
  - Your client, of course, demands that you appeal.

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On to the Inevitable Strategy #3: Actually File a Rule 23(f) Petition

- Know your jurisdiction
  - What is the state of the law on Rule 23(f)?
  - What is the state of the law on class certification issues more generally
- State courts
  - Is there a right to interlocutory appeal at all? *Millett v. Atlantic Richfield Co.*, 760 A.2d 250 (Me. 2000) (surveying various states' approaches to interlocutory appeal of class cert decisions); *Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002) (adopting an amalgam of federal court factors as standard for permissive appeal).
  - Consider Extraordinary Writs
- What are the novel legal issues that are likely to "evade review"
  - Consider threshold issues
  - Consider merits issues that impact class certification
- How bad is the trial court's order, really?

You've Got Ten Days To Dazzle the Court of Appeals

- And that really means 10 days.
- You can't get an extension. *Delta Airlines v. Butler*, 383 F.3d 1143 (10th Cir. 2004).
- You might move for reconsideration in the district court, but you'd better do it within 10 days. *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006)
- You get three days for mailing, right? Nope. See FRAP 5 and FRCP 6(d).
- Are you being defeatist if you start drafting the appeal *before* the trial court's order? Maybe not, consider that:
  - You get more time to prepare a Petition worth granting
  - Trial court guidance might be relevant to the decision. See Adv. Comm. notes to 1998 Amendments adding Rule 23(f).

What's the Best Briefing Strategy?

- Don't trust anyone trying to sell you a Rule 23(f) Petition form.
- Look to your own jurisdiction first
  - Is it primarily a "death knell" jurisdiction? *E.g.*, *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000)
  - Could the petition be granted due to errors by the trial court even without creating a "death knell" situation, *E.g.*, *In re Lorazepam & Clorazepate Antitrust Litigation*, 289 F.3d 98 (D.C. Cir. 2002)
  - Is it a "sliding scale" jurisdiction? *E.g.*, *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000)
- Why is this case truly worthy of review?
  - Novel issue - Should work well in the 10th Circuit!
  - But creativity in spinning your issue as novel isn't enough. *See Mowbray*, 208 F.3d at 294.
  - Don't forget threshold issues, like standing, *Burtulli v. Independent Assoc. of Continental Pilots*, 242 F.3d 290, 294 (5th Cir. 2001), subject matter jurisdiction, *Samuel-Bassett v. Kia Motors America Inc.*, 357 F.3d 392 (3d Cir. 2004), and standard of review, *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), unless your circuit has already addressed them.
- Other Arguments
  - The record is fully developed. *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002)
  - Only trial court authority. *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672 (7th Cir. 2001).
- What about factual support?
  - Make sure that the record below has what you need to satisfy the "death knell" standard.

Details, details, details

- If there is any question, seek review under BOTH Rule 23(f) AND 28 U.S.C. § 1292(b). *Richardson Electronics, Ltd. v. Panache*, 202 F.3d 957 (7th Cir. 2000).
- Make sure that you include appropriate substance as required by FRAP 5.
- Don't forget what you're trying to appeal - Attach a copy of the class certification order and memorandum or opinion.
- Filing a Petition for Review does not stay trial court proceedings. FRCP 23, 1998 Adv. Comm. Notes.
- Don't wait for the Reply or oral argument – you'll probably never get a chance. FRAP 5.

Strategy #4: You Haven't Lost Yet

- If the Petition is denied, you'll get another chance… *United Airlines, Inc. v. McDonalds*, 432 U.S. 385, 393 (1977)
- …if you can resist the "intense pressure to settle." Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.)

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