

## APPELLATE &amp; CLASS ACTION

## ALERT

DECEMBER  
2013THIRD CIRCUIT ENFORCES STRICT DEADLINE  
TO PETITION FOR PERMISSION TO APPEAL  
CLASS CERTIFICATION RULING*By Arlene Fickler and Scott T. Miccio*

Rule 23(f) of the Federal Rules of Civil Procedure allows a party to petition for permission to appeal a class certification decision within 14 days after entry of an order denying or granting class certification. In *Eastman v. First Data Corp.*, 2013 U.S. App. LEXIS 24106 (Dec. 4, 2013), the Third Circuit strictly enforced this rule and refused to consider the merits of a petition for permission to appeal that was filed three days late. The ruling serves as a stark reminder that the 14-day filing deadline for such petitions is mandatory. The losing party on the class certification motion must meet the strict deadline if it is to take advantage of Rule 23(f)'s procedure for obtaining discretionary interlocutory appellate review.

The plaintiffs in *Eastman* sought to represent a class of nearly 25,000 small businesses that allegedly had been defrauded by First Data, a manufacturer of point-of-sale credit card processing terminals. They contended that they had been charged exorbitant leasing fees and that First Data had concealed material sales information. On July 31, 2013, the U.S. District Court for the District of New Jersey denied the plaintiffs' motion for class certification because it found that the plaintiffs could not prove through common evidence whether each class member had been charged usurious interest, whether the defendant had failed to disclose material information to all class members, and whether the lease prices were unconscionable.

On August 19, 2013, the plaintiffs filed their petition asking the Third Circuit to exercise its discretion to permit an interlocutory appeal from the denial of class certification. Because August 19 was three days past the 14-day deadline in Rule 23(f), the Third Circuit dismissed the petition. The Court noted that Civil Rule 6(d), which allows a party three additional days

to act in response to documents served electronically by another party, was inapplicable because the period for filing a petition under Rule 23(f) runs from the date a district court enters an order on a class certification motion — not from the date of service by another party. The Court rejected the petitioners' request that it allow the petition because of the plaintiffs' excusable neglect in mistakenly believing Rule 6(d) would apply, stating: "Counsel's mistake or ignorance of the rules does not constitute excusable neglect and is not a reason to accept an untimely Rule 23(f) petition." The Court concluded that Civil Rule 23(f) is "strict and mandatory."

Two key lessons can be drawn from the Third Circuit's decision:

***First, although the rules sometimes give courts discretion to extend deadlines, counsel should not depend on a court exercising such discretion in their favor.*** This lesson may seem obvious, but its importance cannot be overstated. Rule 23(f) is just one of many provisions of the civil and appellate rules that set deadlines for the submission of documents. Those rules must be followed. The *Eastman* decision provides clear notice that courts will not be liberal in exercising any discretion to extend Rule 23(f)'s deadline.

***Second, in light of Eastman, parties wishing to challenge a class certification decision must act promptly.*** The ramifications of missing a Rule 23(f) deadline are significant for both plaintiffs and defendants in a class action. Many class action cases are essentially won or lost at the class certification phase. A denial of certification may effectively end the litigation.

*(continued on page 2)*

---

*(continued from page 1)*

tion because it is not feasible for plaintiffs to proceed individually, especially when the individual claims, although potentially meritorious, are far smaller than the costs of litigation. On the other hand, a grant of certification can place increased pressure on a defendant to settle a claim. The increased pressure on a defendant can be unrelated to the merits of the claim if the defendant is facing a certified class claiming significant damages. A class certification decision that is adverse from either side's perspective thus compels the parties to consider more seriously the option of settlement in their respective risk-balancing analyses.

Rule 23(f) provides a mechanism for the losing party to address these potential litigation-ending pressures when they arise from an arguably erroneous class certification ruling. However, the timeframe for seeking interlocutory review was made intentionally short in order not to disrupt unduly proceedings in the trial court. *Eastman* teaches that the losing party must comply with Rule 23(f)'s temporal requirement to take advantage of the Rule's unique procedure for permitting interlocutory appeals of questionable class certification rulings. ♦

*This summary of legal issues is published for informational purposes only. It does not dispense legal*

---

*advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.*

*For more information about Schnader's Appellate and Class Action practice groups or to speak with a member of the Firm, please contact:*

*Arlene Fickler  
215-751-2332  
afickler@schnader.com*

*Ira N. Richards  
Chair, Class Action Practice Group  
215-751-2503  
irichards@schnader.com*

*Carl A. Solano  
Chair, Appellate Practice Group  
215-751-2202  
csolano@schnader.com*

*Scott T. Miccio  
215-751-2493  
smiccio@schnader.com*

[www.schnader.com](http://www.schnader.com)  
©2013 Schnader Harrison Segal & Lewis LLP