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THIRD CIRCUIT STRICTLY CONSTRUES DEADLINE TO FILE RULE 23(f) PETITION TO APPEAL CLASS CERTIFICATION ORDER

Eastman v. First Data Corp., 736 F.3d 675 (3d Cir. 2013)

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Ignorance is *not* always bliss—especially when it comes to calculating filing deadlines under the federal rules. This principle was on full display in the Third Circuit's recent precedential decision in *Eastman v. First Data Corp.*, 736 F.3d 675 (3d Cir. 2013), available here. There the Court held that counsel's mistake or ignorance of the rules cannot excuse the untimely filing of a petition under Federal Rule of Civil Procedure 23(f) to appeal an order denying class certification.

In *Eastman*, plaintiffs-petitioners are merchants who contracted with defendants-respondents for credit or debit point-of-sale terminal services. Plaintiffs filed a class action complaint against defendants in the District of New Jersey alleging, among other things, that defendants improperly charged certain costs and fees. The district court denied the plaintiffs' motion to certify the class. Seventeen days after the district court entered its order—three days later than the 14-day deadline provided under Rule 23(f)—plaintiffs filed with the Third Circuit a petition for permission to appeal the district court's denial of class certification.

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SOME NEEDED CLARITY ON FINALITY IN FEE AWARD CASES

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Knowing when you have a final order in the trial court is critical to determining when to file your notice of appeal. Miss that deadline and your appeal will be jurisdictionally barred. In most cases, there's no magic to determining when you have a final order. When a judge enters a judgment that resolves all claims with respect to all parties – whether as a result of a dispositive motion or a trial verdict – you can usually be sure you have a final order and the appeal clock is ticking.

But what happens when the trial judge enters judgment on the "merits" claims and leaves for a later time a decision on attorneys' fees – whether made available by statute or contract? Is the merits judgment final and appealable or must the aggrieved party wait for a decision on fees and risk a later holding that the notice of appeal should have been filed earlier?

In *Ray Haluch Gravel Co. v. Central Pension Fund*, No. 12-902 (Jan. 15, 2014), available here, the Supreme Court offered a practical answer to those questions: regardless of the basis for the fee request, the judgment on the merits is final and the time for filing a notice of appeal is running.

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IN MEMORIAM: WENDELL G. FREELAND

Death of Prominent African-American Member of the Pittsburgh Bar Prompts Recollections of A Life Dedicated to Justice

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Wendell G. Freeland, a Pittsburgh attorney and civil rights leader, passed away in Pittsburgh on January 24. He was a towering figure in the community and the legal profession, a mentor for the generation of lawyers who followed him, and a powerful participant in the most important struggles of his time.

Wendell was born in Baltimore, Maryland in 1925. Although nothing in his countenance suggested his African American heritage, he attended the colored schools of Baltimore and graduated from Frederick Douglass High School in 1941. He won a scholarship to Howard University. After service as a Tuskegee Airman in World War II, he graduated cum laude in 1947. In 1946, while still at Howard, Wendell married the love of his life, Jane Young, with whom he would share 67 years.

Wendell earned his law degree from the University of Maryland School of Law in 1950, and graduated with honors. He was the first Negro at Maryland elected to the Order of the Coif, an honorary legal fraternity.

He was particularly proud of his service as a bombardier with the 477th Bombardment Group, a component of the Tuskegee Airmen, and his part in what is now called "The Freeman Field Mutiny," a precursor to, and model for, the sit-ins of the civil rights movement. Wendell and others were arrested for asserting their right to enter an all-white officers' club. The actions of the Tuskegee Airmen were instrumental in leading President Harry S. Truman to ban discrimination in the military.

Wendell was admitted to the Pennsylvania Bar in 1951, and the family took shape – first with son Michael and later with daughter Lisa, who today is the Federal Public Defender for the Western District of Pennsylvania and President of the Third Circuit Bar Association. Wendell had an active legal career, appearing in state and federal courts at both the trial and appellate levels. One of the first matters he took on was the Highland Park Swimming Pool case, in which he, Richard F. Jones, and Henry R. Smith sued the City of Pittsburgh to assure the safety of Negroes who wished to swim there.

Later in his career, he led a team of lawyers in a precedent setting-case, *Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1979), regarding whether a municipality (the City of Pittsburgh) could be held accountable for deprivation of citizens' constitutional rights through the misuse of governmental authority by municipal police. The Third Circuit reversed the district court's dismissal of the case, ruling that the plaintiffs—African American citizens who were pulled over without probable cause, arrested for a supposed traffic violation, and subjected to racial epithets and physical abuse—had stated a cause of action under 42 U.S.C. § 1981. In that case, Wendell displayed the full range of his skills and compassion. Besides winning an important precedent-setting case (that is still good law), he represented his clients with great sensitivity and helped them, in the fullest sense, through the aftermath of the violation of their rights.

Wendell's passion for justice and just causes never diminished. Indeed, one of the achievements of which he was most proud came toward the end of his career. In 2010, Wendell (together with Leslie Carter and Nolan Atkinson) convinced the Supreme Court of Pennsylvania to admit George B. Vashon posthumously to the Pennsylvania Bar. Vashon had been denied admission to the Allegheny County Bar in 1847 and again in 1868 because he was a Negro.

Wendell served the bar and his clients, one of which was the nationally prominent black newspaper, the *Pittsburgh Courier*, when Mrs. Robert L. Vann was its CEO. Wendell was the first President of Pittsburgh's Neighborhood Legal Services; a President of the African American bar association (the Homer S. Brown Law Association); a Member of the House of Delegates of the Pennsylvania Bar Association; and a member of the Judicial Conduct Board of Pennsylvania.

His community activities included service as Chair of the Urban League of Pittsburgh Board of Directors; Senior Vice President of the National Urban League Board of Trustees; Chairman of the Board of Governors of the Joint Center for Political and Economic Studies; and membership on the Board of Trustees of the University of Pittsburgh, Westminster College, the University of Pittsburgh Medical Center, and the Board of Visitors of the University of Pittsburgh School of Social Work. He also was a founder of the Hill House Association, a settlement house serving residents of the Hill District, a historically black Pittsburgh neighborhood.

Wendell was a king maker with no desire to be king, and a powerful part of his times. Wendell's lifetime of selfless reckoning and action reflect the exhortation of Oliver Wendell Holmes, Jr., who observed: "I think that, as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived." By any measure that matters, Wendell lived!

In addition to his wife, son, and daughter, Wendell leaves behind his beloved grandchildren, Kristen and Michael; a sister, Doris Freeland Cole of Baltimore; nieces Susan Hill, Harriette Cole, and Stephanie Cole Hill; a host of cousins, great-nieces and nephews; and countless others whose lives he touched.

THIRD CIRCUIT STRICTLY CONSTRUES DEADLINE TO FILE RULE 23(f) PETITION TO APPEAL CLASS CERTIFICATION ORDER

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On appeal, plaintiffs conceded that they filed the Rule 23(f) petition beyond the 14-day deadline, but argued that either the lateness should be excused because it was due to "excusable neglect," or in the alternative, the Court should simply permit an out-of-time filing. The Court rejected plaintiffs' arguments and dismissed the Rule 23(f) petition.

In explaining its reasoning, the Court began by noting that a petition for permission to appeal a class certification order must meet the requirements of Federal Rule of Appellate Procedure 5 and be filed by the deadline specified by the statute or rule authorizing the appeal. In this instance, Rule 23(f) is the authorizing rule, and it states that the appellate court may permit an appeal as long as the petition is filed "within 14 days after the order is *entered*." Because Rule 23(f) is a rule of civil procedure, Rule of Civil Procedure 6(a) governs the calculation of time to file the petition, and under that rule, plaintiffs had 14 calendar days to file. Plaintiffs filed their Rule 23(f) petition late because their counsel mistakenly believed that the extra three days provided by Rule 6(d) applied to a class certification order. However, Rule 6(d), by its terms, applies to calculating time when the trigger is the *service* of a document. Rule 6(d)'s three extra days did not apply because the time to file a Rule 23(f) petition runs from the date of the entry of an order, not service of a document.

Strictly applying the time limit set forth in Rule 23(f), the Court rejected plaintiffs' petition on the basis of "excusable neglect," stating that "[c]ounsel'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." Further, the Court rejected plaintiffs' argument that the petition should be permitted as an out-of-time filing because, according to the Court, the time limit is "strict and mandatory." Finally, the Court noted that although it had earlier carved out a limited exception under which the time to file a Rule 23(f) petition is "reset" by a timely motion to reconsider, *see Gutierrez v. Johnson & Johnson*, 523 F.3d 187 (3d Cir. 2008), that rule did not apply because no such motion to reconsider had been filed.

There are two critical takeaways from *Eastman*. **First**, a Rule 23(f) petition to appeal a class certification order must be filed within 14 days of the entry of the district court's order unless **(1)** Rule 6(a)'s provisions (regarding Saturdays, Sundays, holidays, and days when the clerk's office is inaccessible) otherwise extend the time; or **(2)** there is a *timely* motion for reconsideration of the district court's class certification order. Although a district court's ruling on class certification can still be reviewed on appeal regardless of whether a Rule 23(f) petition is filed, missing an opportunity to file a Rule 23(f) petition generally has significant strategic and practical consequences in class action litigation. **Second**, *Eastman* is yet another Third Circuit case strictly construing the various deadlines provided under the federal rules.

THIRD CIRCUIT JUDICIAL CONFERENCE PROMISES EXCEPTIONAL LEARNING AND NETWORKING OPPORTUNITIES

As part of its goal of improving appellate advocacy in the Third Circuit, the Third Circuit Bar Association will be making significant contributions to the 71st Judicial Conference of the Third Circuit, May 7-9, 2014, at the Hershey Lodge in Hershey, Pennsylvania. Registration is open, and the 3CBA encourages all members to attend and benefit from this one-of-a-kind experience.

The Conference will be highlighted by presentations from the Hon. Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court, and Donald B. Verrilli, Jr., Solicitor General of the United States. In addition, the Conference will feature programs of interest to both private sector and public interest attorneys, including an ethics panel sponsored by the 3CBA as well as sessions on class actions, electronic discovery, municipal bankruptcy, the intersection of antitrust and patent law, federal sentencing, and the challenges faced by former prisoners. The 3CBA also will sponsor one of the conference's unique networking events—the opening bench-bar reception. The reception will offer an opportunity to recognize Judges Barry, Scirica, and Sloviter, who have taken senior status this year.

For more information and to register, click here. The Early Bird Conference Registration fee for attorneys is $395 before March 1, 2014. The registration fee includes eligibility for 12 CLE credits (including 2 ethics credits) and attendance at the following bench and bar events: conference opening dinner, three receptions, two breakfasts, a luncheon, and refreshments throughout. For those who register between March 1st and April 18th, the fee will be $480. After April 18th, the fee will be $535. The 3CBA hopes that many members can attend what is sure to be an enriching, educational, and enjoyable event.

SOME NEEDED CLARITY ON FINALITY IN FEE AWARD CASES

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The *Ray Haluch* decision resolves a question that had split the federal courts of appeals since *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). In *Budinich*, the plaintiff sued under a Colorado statute that provided for a fee award to the prevailing party. The district court entered judgment on the merits for the plaintiff and left unresolved the issue of fees. The Supreme Court held that the merits judgment was final and appealable. Since then, there was disagreement among the circuits about whether the *Budinich* rule applied where the right to fees arose from a contract such that they could be said to resemble a form of damages.

The Third Circuit was among the circuits that distinguished among different sources for the right to fees. In *Ragan v. Tri-County Excavating, Inc.*, 62 F.3d 501 (3d Cir. 1995), the district court granted judgment to the plaintiff in a contract case and agreed that the contract allowed the plaintiff to recover its attorneys' fees. However, because the district court put off quantifying the fees, the Third Circuit held that the merits judgment was not final and a notice of appeal filed after the fees were quantified served to bring both the substantive judgment and the fee award within the court's appellate jurisdiction. According to *Ragan*, then, the *Budinich* rule that a judgment on the merits is final and immediately appealable did not extend to situations where the fees are "part of contractual damages."

The court of appeals later refined its approach to the issue. In *Gleason v. Norwest Mortgage, Inc.*, 243 F.3d 130 (3d Cir. 2001), the court considered the finality issue in a case in which the contract allowed an award of fees to the "prevailing party." After setting out the holdings in *Budinich* and *Ragan*, the Third Circuit held that, for all practical purposes, a contractual prevailing-party fee provision was no different than the statutory prevailing-party fee provision at issue in *Budinich*. Thus, in *Gleason*, the court held that the substantive judgment was final and appealable notwithstanding an unresolved fee issue where the entitlement to fees arose from a contractual prevailing-party fee provision.

Some courts of appeals agreed with the Third Circuit's more nuanced interpretation, some carved out contractual-fee entitlement entirely from the *Budinich* rule and others read *Budinich* as establishing a simple rule that an outstanding fee request, no matter the source, did not prevent the merits judgment from being final such that an appeal would be waived if not promptly filed. The Supreme Court accepted review in *Ray Haluch* to resolve the question, and the Court unanimously agreed with the simplest interpretation: *Budinich* applies to any fee application no matter the basis.

In *Ray Haluch*, the Court reiterated the statement in *Budinich* that "operational consistency and predictability in the overall application of § 1291" would benefit from application of a uniform rule that does not focus on the authority for the fee award.

The implications in the Third Circuit are clear. *Ragan* and the cases relying on it are no longer good law to the extent they carved out an exception to *Budinich* finality for certain contractual fee awards. As a practical matter, counsel confronted with a merits judgment that is final but for resolution of a fee request must file a notice of appeal within 30 days of the merits judgment or face waiver.

The history of the *Ray Haluch* case itself demonstrates the value of such clarity and the risk of uncertainty. Various union-affiliated pension funds sued an employer to collect benefits contributions they alleged were owed under federal law and a collective bargaining agreement. They won some but not all of what they demanded, the district court in Massachusetts entered a merits judgment in their favor and they filed a fee request. At the time, the First Circuit had not weighed in on the applicability of the *Budinich* rule to contract-based fee requests, and the remaining circuits were split. The funds chose to wait to file their notice of appeal. The First Circuit agreed that *Budinich* did not require that they file an immediate notice of appeal after the merits judgment, but the Supreme Court has now held otherwise. The result: dismissal of the merits appeal as untimely.

Scholars are already debating whether the *Ray Haluch* decision was correct as a matter of law, but it would be difficult to interpret the holding as anything but helpful to lawyers and their clients in one important regard: it drew a bright line that should help lawyers avoid having to make nuanced decisions about whether a pending fee application affects the finality of a merits judgment.

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