Appeal This: Under What Circumstances Can a District Court Include Attorneys' Fees in an Appellate Bond Under FRAP 7?

By Daniel Girard and Dena Connolly

Introduction

Let's face it: utter the phrase "appellate procedure" and even the most committed litigator gets drowsy-eyed. When it comes to class action appeals, however, everyone has an opinion. An appeal can tie up a settlement and jeopardize a recovery which may have taken years to achieve.[1] At the other extreme, an appeal may be the only way to protect consumers from an unfair settlement or an excessive fee.[2] Many class action lawyers have at one time or another served as both class counsel and objectors' counsel (sometimes in the same case), and know the economic and personal stakes involved when class action settlements and fee awards are appealed.[3]

Since it costs almost nothing to appeal a class action settlement, one way for class counsel to ensure that appellants have some skin in the game is to move for a cost bond. An order to post a substantial cost bond often will mean the end of the appeal. The issue that inevitably arises when a court considers a motion for a cost bond is whether attorneys' fees should be included in calculating the bond amount. The party seeking to impose the bond argues that any attorneys' fees the appellant could be required to pay if the appeal is unsuccessful should be included as recoverable "costs" on appeal.

This article looks at the legal principles that apply when a federal court considers whether a cost bond should include an attorneys' fee component when an objecting class member appeals a settlement or fee award. Here's our bottom line: if the litigation arises under (1) a fee-shifting statute that defines attorneys' fees as "costs," and (2) the policies underlying that fee-shifting statute would support an award of fees in favor of one class member over another following an unsuccessful appeal, a persuasive argument can be made that attorneys' fees should be included in determining the amount of the bond. Unless these conditions are met, we think those who argue that attorneys' fees should not be considered in calculating the bond amount have the better argument, despite appellate decisions to the contrary.

How a FRAP 7 Bond Works

When a settlement or fee award is appealed, a suggestion is often made that a motion for an appeal bond should be made, but no one is quite sure what rules apply in determining the amount of the bond. It's especially confusing because while cost bonds are the subject of Federal Rule of Appellate Procedure 7, a separate rule, FRAP 8, applies to supersedeas bonds, which are rarely involved in class action appeals (and are beyond the scope of this article). Before you move for an appellate bond though, be sure you understand the difference between the two.[4]

FRAP 7 provides: "In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. ..." After an appeal is taken, the district court retains jurisdiction to consider the appellee's motion for an order requiring the appellant to post a bond to "ensure payment of costs on appeal."[5] Every circuit but one interprets FRAP 7 as limiting the amount of the bond to "costs on appeal." (The law in the First Circuit is that prospective sanctions can be included in determining costs on appeal).[6] The problem is that FRAP 7 does not define what is meant by "costs" or offer any guidance as to when attorneys' fees are included in determining costs. Several circuits have considered the questions and reached different results.

Overview of Case Law Interpreting the Rule

In recent years, a circuit split on the issue has slanted toward permitting attorneys' fees to be included in the FRAP 7 bond. The Supreme Court's reasoning in *Marek v. Chesny* has been influential on both sides of the split.[7] *Marek* holds that attorneys' fees are "costs" under FRCP 68[8] if the underlying statute "defines 'costs' to include attorney's fees."[9] Even though FRCP 68 does not define "costs," the Supreme Court explained that since FRCP 68's drafters were aware of the existence of cost-shifting statutes, it is reasonable to infer that FRCP 68's reference to "costs" "was intended to refer to all costs properly awardable under the relevant substantive statute or other authority."[10]

The D.C. and Third Circuits were among the first to weigh in on the FRAP 7 question. Both analyzed the definition of "costs" by reference to FRAP 39.[11] FRAP 39 governs procedures for taxing costs.[12] Attorneys' fees are not among the costs described in FRAP 39, and the rule does not define the term "costs."[13] The D.C. Circuit, without addressing *Marek*, concluded in *In re American President Lines, Inc.* that FRAP 7 "costs" are those costs that may be taxed against an unsuccessful litigant under FRAP 39.[14] As attorneys' fees are not identified as "costs" in FRAP 39, the *American President Lines* court held attorneys' fees could not be counted in setting a FRAP 7 bond.[15] In *Hirschensohn v. Lawyers Title Insurance Corporation*, the Third Circuit accepted the D.C

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Circuit's rationale in *American President Lines*, while attempting to distinguish *Marek*.[16]

Since 1997, the Second, Sixth, Ninth and Eleventh Circuits have come down the other way, concluding that attorneys' fees are includable in a FRAP 7 bond.[17] These decisions take *Marek's* reasoning to heart. The Second Circuit in *Adsani v. Miller*, for example, held that "the drafters of Rule 7—like the drafters of Rule 68, discussed in *Marek*—were equally aware of the Copyright Act's provision for the statutory award of attorney's fees 'as part of the costs' when drafting Rule 7 and not defining costs therein."[18] *Adsani* rejected *American President Line*'s reading of the interaction between FRAP 39 and FRAP 7.[19]

In *Pedraza v. United Guaranty,* the Eleventh Circuit also followed *Marek* and held that attorneys' fees may be included in an appellate cost bond.[20] The court nevertheless excluded attorneys' fees from the FRAP 7 bond in *Pedraza*, because the underlying RESPA fee-shifting provision refers to costs "together with" attorneys' fees, rather than as "part of" the costs. The *Pedraza* court read that semantic distinction as meaning that fees were an item separate from costs, rather than a subset of costs.[21] The Sixth Circuit has also allowed fees to be included in a FRAP 7 bond, but *In re Cardizem CD Antitrust Litigation* rejects *Pedraza*'s focus on fine distinctions in statutory phrasing, instead holding that *Marek* requires a more general inquiry "to determine which sums are 'properly awardable' under the underlying statute."[22]

These circuit level decisions include both class and non-class cases, and FRAP 7 applies equally to both. The analysis in class cases differs from non-class cases in at least one important respect, however. The Ninth Circuit's recent *Azizian* decision illustrates the point. In *Azizian,* the substantive statute was the Clayton Act, which bans certain anticompetitive conduct.[23] The Clayton Act's fee-shifting provision is asymmetric; only a losing defendant found to have violated antitrust laws can be ordered to pay attorneys' fees.[24] *Azizian* concluded that the class member-appellees were not entitled to include attorneys' fees in a FRAP 7 bond because "[o]rdering one class member to pay other class members' appellate attorney's fees because of a disagreement about the propriety of settlement" wouldn't further the purposes of the Clayton Act's fee-shifting provision, which include encouraging enforcement of the antitrust laws.[25]

The point of *Azizian* is that attorneys' fees are not automatically includable in a cost bond just because the underlying litigation involves a fee-shifting statute. The key question is whether the statute allows the appellee to recover attorneys' fees in the context of the appeal in question.[26] In other words, *Azizian* recognizes that it makes no sense to impose a bond just because a statute provides for fee-shifting, if the appellee could not expect to recover fees incurred in defending the appeal.

The First Circuit's position lies at the other extreme: it allows district courts to include attorneys' fees in its bond calculation where the district court finds that "the appeal might be frivolous and that an award of sanctions against plaintiff on appeal was a real possibility."[27] Other circuits have rejected the First Circuit's prospective sanctions approach, believing that appellate courts are better situated than district courts to decide when an appeal is sanctionable.[28]

The Advisory Committee on Appellate Rules has been tracking the issue, and in 2003 considered a proposed amendment to exclude attorneys' fees from FRAP 7 "costs." The Advisory Committee is reconsidering its position in light of the tilt in the circuit split in favor of allowing attorneys' fees as costs, but has not reached any conclusions.

Strategy Corner: Suggestions for Dealing with the Issue of Attorneys' Fees Under FRAP 7

Until the rule is settled, either by the Appellate Rules Committee or the Supreme Court, a party moving to impose a bond should first understand whether fee-shifting is allowed under any of the underlying claims. The moving party can argue that a fee-shifting provision contained in *any* settled claim could provide a basis for an award of fees in favor of appellee, not just the claims that were the focus of the litigation. If none of the claims allow for fee-shifting, however, there is no basis for requiring a cost bond that includes a fee component.

For attorneys' fees to qualify as "costs" under FRAP 7, they must also be defined as costs under a relevant statute. If the statute provides for recovery of attorneys' fees "together with" costs of suit, "costs and a reasonable attorney's fee" or makes no mention of costs at all, the court is likely to conclude that attorneys' fees do not qualify as costs under the underlying statute.[29] The answer will probably be the same under the *Cardizem* formulation, which analyzes whether the fees are "properly awardable" under the fee-shifting statute. [30]

Finally, the moving party should also consider whether the fee-shifting statute would apply in the context of a disagreement among class members over the fairness of a settlement or an attorneys' fee award. As *Azizian* observed, many fee-shifting statutes will not support an award of attorneys' fees where the appellant is a member of the same class as the appellee. We find *Azizian* persuasive: if the policies underlying the fee-shifting statute would not be furthered by an award of attorneys' fees in favor of one class member at the

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expense of another, there is little justification for including attorneys' fees in the cost bond.

An appellant met with a motion for a cost bond should consider each of these factors in responding. In particular, in opposing the motion one should examine whether an award of attorneys' fees in favor of the appellee would conflict with the text or policies underlying the fee-shifting statute. Does the underlying fee-shifting provision say that fees are "part of costs" or are attorneys' fees addressed separately from costs? Would shifting fees in the context of this appeal further the purpose of the statute? Is there any case law construing the fee-shifting provision?

The upshot of all this is that attorneys' fees should be considered costs under FRAP 7 when (1) there is a fee-shifting statute among the settled claims, (2) the fee-shifting provision defines attorneys' fees as "costs," and (3) the appellee would be eligible to recover attorneys' fees under the fee-shifting provision. Other courts may not give these issues the same thoughtful consideration as the *Azizian* court. Because of that, a party opposing a bond motion should focus the court on the language and purpose of the fee-shifting provision, and explain why they don't allow the appellee to recover fees under the law of the circuit.

While FRAP 7 is of limited value as a tool to police frivolous class action appeals, the good news is that it is equally unlikely to be misused to dissuade legitimate appeals.

Endnotes

1. *See, e.g., N.Y. Times Co. v. Tasini*, 533 U.S. 483 (2001); *Tasini v. N.Y. Times Co.*, 206 F.3d 161 (2d Cir. 1999); *Tasini v. N.Y. Times Co.*, 972 F. Supp. 804 (S.D.N.Y. 1997).

2. *See, e.g., In re Ford Motor Co. Bronco II Product Liab. Litig.*, 981 F. Supp. 969 (E.D. La. 1997).

3. *See, e.g., Linney v. Cellular Alaska Pshp.*, 151 F.3d 1234 (9th Cir. 1998).

4. For a succinct explanation of the difference between the two types of bonds, *see Adsani v. Miller,* 139 F.3d 67, 70 n.2 (2d Cir. 1998).

5. *See, e.g., Securities Industry Assoc. v Board of Governors of Federal Reserve System,* 628 F Supp 1438, 1440 n.1 (D.D.C. 1996).

6. *Cf. Sckolnick v. Harlow,* 820 F.2d 13, 15 (1st Cir. 1987) (holding that it is proper for a district court to consider the possibility that an appeal may result in the award of attorney fees in determining the appeal bond amount).

7. *Marek v. Chesny,* 473 U.S. 1 (1985).

8. Fed. R. Civ. P. 68 provides, among other things, that "the offeree must pay the costs incurred after the making of the offer," where a FRCP 68 settlement is rejected and the judgment ultimately obtained by the offeree is "not more favorable than the offer."

9. *Marek,* 473 U.S. at 9.

10. *Id.*

11. *In re American President Lines, Inc.,* 779 F.2d 714, 716-719 (D.C. Cir 1985); *Hirschensohn v. Lawyers Title Ins. Corp.,* 1997 U.S. App. LEXIS 13793, *6 (3rd Cir. 1997).

12. Fed. R. App. Proc. 39 discusses specific costs in the context of how, procedurally, those costs should be taxed, but does not provide any definition of "costs."

13. *See* FRAP 39.

14. *American President Lines,* 779 F.2d at 716.

15. *Id.*

16. *Hirschensohn,* 1997 U.S. App. LEXIS 13793, at *6.

17. *Adsani,* 139 F.3d at 76-78; *Pedraza v. United Guaranty Corp.,* 313 F.3d 1323, 1336-1337 (11th Cir. 2002); *In re Cardizem CD Antitrust Litigation,* 391 F.3d 812, 817(6th Cir. 2004); *Azizian v. Federated Dep't Stores, Inc.,* 499 F.3d 950, 959 (9th Cir. 2007).

18. *Adsani,* 139 F.3d at 73.

19. *Id.* at 74.

20. *Pedraza*, 313 F.3d at 1332 (FRAP 7 "does not differ from Federal Rule of Civil Procedure 68 in any way that would lead us to adopt a different interpretive approach in this case than was embraced by the Supreme Court in *Marek*.")

21. *Id.* at 1334.

22. *Cardizem*, 391 F.3d at 817 n.4.

23. *Azizian,* 499 F.3d. at 960.

24. *Id.*

25. *Id.* at 959-960.

26. *See also Young v. New Process Steel, LP,* 419 F.3d 1201, 1204-1205 (11th Cir. 2005) (following *Pedraza* but reversing a FRAP 7 bond securing attorneys' fees ordered against non-class plaintiffs-appellants in a civil rights case under 42 U.S.C. § 1988(b), because even though "the language of § 1988 is itself party-neutral," the Supreme Court has restricted the award of attorneys' fees to defendants under the statute to exceptional cases where "the plaintiff's action was frivolous, unreasonable or without foundation.")

27. *Sckolnick,* 820 F.2d at 15.

28. *See, e.g., Azizian*, 499 F.3d at 954 (noting that *Sckolnick* fails to "examin[e] the language, purpose or history of Rule 7" and concluding that a district court may not include in a Rule 7 bond fees that might be awarded by the appellate court under Rule 38); *Vaughn v. American Honda Motor Company,*

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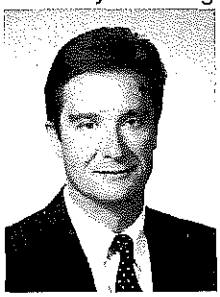
Inc., 507 F.3d 295, 299 (5th Cir. October 31, 2007) (concluding that district court abused its discretion in citing *Sckolnick* for the proposition that there was the probability that any appeal would be "summarily denied" and finding that attorneys' fees should be included in bond); *In re Heritage Bond Litig.*, 2007 U.S. App. LEXIS 11252, *8 (9th Cir. 2007) (holding that district court abused its discretion by including anticipated attorney fees in the Rule 7 bond).



29. Pedraza, 313 F.3d at 1333-34 (citations omitted); see also Marek, 473 U.S. at 23.

30. Cardizem, 391 F.3d at 817 n.4.■

Bio

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victims (and sometimes, the corporation itself) are devastated. By opening up the potential for personal liability of top management, this decision could significantly enhance corporate accountability for systematic misconduct.

Way to go Kris!! It is increasingly rare for a court to understand that pleading is not the same thing as proving. A great victory for New York consumers. This is also a good illustration how NACA members can expand their practices to represent small businesses who are abused by big corporations. In this way, they are simply consumers themselves, and completely deserving of our help. Plus, you can bill hourly in some cases! ■

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