



Appellate News

Spring 2013

Welcome to the First Issue of *Appellate News*!

[Jeffrey J. White, Chair](#)

The goal of this newsletter is to keep our clients, colleagues, and others in the business community apprised of recent developments on both a state and national level. Robinson & Cole's Appellate Practice Group has a long history of success in appellate courts throughout the country. As shown by our representative matters, our Appellate Group handles appeals nationally, including high-profile cases involving issues with broad implications. Members of the Appellate Practice Group have handled appeals in eleven of the twelve Circuit Courts of Appeals, the Court of Appeals for the Federal Circuit, the Circuit Court of Appeals for the Armed Forces, and appellate courts in eleven different states. As noted below, our Appellate Group prevailed in the United States Supreme Court in *The Standard Fire Insurance Company v. Knowles*, No. 11-1450. This is the first case that the Supreme Court has reviewed involving the Class Action Fairness Act of 2005 (CAFA).



Many of our appellate lawyers are listed in *Chambers USA*, *The Best Lawyers in America*, *Super Lawyers*, and *Benchmark Appellate*. In fact, Robinson & Cole's Appellate Group was named in the 2013 publication *Benchmark Appellate* as a "highly recommended" Second Circuit litigation firm in Connecticut. Wystan M. Ackerman, Linda L. Morkan, and Jeffrey J. White were named Second Circuit Litigation Stars in Connecticut. Robinson & Cole was one of only two firms in Connecticut to have three appellate attorneys achieve this prestigious ranking. Presently, Linda Morkan co-chairs the Connecticut Bar Association's Appellate Practice Section, and Tom Donlon co-chairs the ABA's Appellate Practice Committee of the Litigation Section. In 2012, Jeff and Linda co-authored the Connecticut chapter and Tom authored the Second Circuit chapter in *The Appellate Practice Compendium*, published by the American Bar Association.

Please feel free to contact any of our team members with comments, questions, or suggestions for future topics.

ROBINSON & COLE WINS AT THE U.S. SUPREME COURT

[Wystan M. Ackerman](#)

Our Appellate Team recently prevailed in the United States Supreme Court in *The Standard Fire Insurance*



WHAT IS A "FINAL" DECISION FOR APPEAL

[Thomas D. Donlon](#)

You cannot immediately appeal every ruling or decision by a court. In the federal courts and Connecticut state courts,



Company v. Knowles, No. 11-1450. This is the first case that the U.S. Supreme Court has reviewed involving the Class Action Fairness Act of 2005 (CAFA).

In a unanimous opinion authored by Justice Breyer issued on March 19, 2013, the Court overturned the district court's decision remanding a putative class action to state court. The Court held that a stipulation filed by the named plaintiff together with the complaint, concerning the amount in controversy under CAFA, must be ignored. The Court explained, among other things, that the named plaintiff had no right to bind the absent members of the proposed class at the time suit was filed, and jurisdiction must be determined as of the time of filing.

In *Knowles*, the federal district court had found the plaintiff's stipulation was enforceable and remanded the case to state court. The U.S. Court of Appeals for the Eighth Circuit denied our petition for permission to appeal under CAFA and denied rehearing *en banc*. In August of 2012, the Supreme Court granted our petition for *certiorari*. Stephen E. Goldman and Wytan M. Ackerman of Robinson & Cole were lead counsel on the successful petition for *certiorari* and co-counsel on the merits.

DISCLAIMER: Please understand that every case is different and the result achieved in the case described above may differ from the result in some other case, which may involve different facts, different applicable law, or a different jurisdiction. Past results do not guarantee future results, and you should always consult your own lawyer about your case.

CHANGE AT THE TOP [Linda L. Morkan](#)

Governor Dannel P. Malloy has been busy filling empty chairs, not at his dinner table or in a lecture hall, but on Connecticut's two highest courts. Due to the mandatory retirement of two Supreme Court justices in 2012, the governor had two appointments to make to that august body, one close on the heels of the other.



generally only a "final" decision can be appealed (New York and Massachusetts courts follow different rules). Many court orders either before or during trial are clearly not final. Other orders, however, may look final on the surface but lack the true "finality" that courts require for appeal. Knowing the difference is of vital importance to a client.

Robinson & Cole recently handled a case on behalf of the appellee in the U.S. Court of Appeals for the Second Circuit, where the intricacies of the final judgment rule came into play. Our experience allowed the client to follow a strategy that resulted in getting an untimely appeal dismissed, long before the expense of briefs and oral argument was incurred. In the trial court, we moved to dismiss a complaint against our client as barred by the statute of limitations. The U.S. District Court for the District of Connecticut ruled in our favor, dismissing three counts of a complaint with prejudice. The fourth count was dismissed, but with leave to replead. The plaintiff filed an amended complaint repleading the fourth count, then the plaintiff filed a notice of appeal of the dismissal of the other three counts.

An order dismissing all the counts of a complaint may appear final at first. However, a special rule applies when the court dismisses a claim with leave to replead. If the losing party decides to avail itself of the opportunity to replead, the case will continue. Thus, the judgment is not really "final." Recognizing that plaintiff's attempt to replead the fourth count, before filing a notice of appeal, raised a lack of finality, we moved to dismiss the appeal. Early this year, the Second Circuit granted our motion, saving our clients considerable expense.

The Second Circuit's order highlighted the complexity of the rules concerning dismissal with leave to replead. The order cites a prior decision, *Slayton v. American Express*, 460 F.3d 215 (2d Cir. 2006), which recognizes that an order permitting a party to replead may be "final" in certain other circumstances. An order dismissing with leave to replead is final and appealable if (a) the party expressly disclaims any intent to replead (preferably in writing) or (b)

First nominated was Andrew J. McDonald (43), no stranger to the governor or the people of Connecticut. A Democratic member of the State Senate since 2003, McDonald resigned in 2011 to become the governor's chief legal counsel, a position he was serving when nominated to the Supreme Court. A Connecticut native and UCONN Law grad, McDonald was approved by the legislature on January 23, 2013, and is the state's first openly gay justice (and reportedly one of only seven gay Supreme Court justices nationwide).

Governor Malloy's choice to fill the second open seat was Appellate Court Judge Carmen Espinosa (63). Judge Espinosa was the first Hispanic appointed to the Connecticut bench, back in 1992, and was the first Hispanic appointed to the Connecticut Appellate Court when she was promoted to that court in 2011. A graduate of Brown University and The George Washington University School of Law, Judge Espinosa was a well-respected federal prosecutor before being put on the bench. She was approved as a Supreme Court Justice on March 6, 2013, and is the state's first Hispanic Supreme Court justice.

Finally, because of the elevation of Judge Espinosa, Governor Malloy now had a new empty seat to fill at the Connecticut Appellate Court. That seat has been filled by Judge Christine E. Keller, a judge of the Superior Court since 1993 and the wife of the former House Speaker Tom Ritter. Before her judgeship, Judge Keller worked as a staff attorney with Neighborhood Legal Services in Hartford and then as assistant corporate counsel to the City of Hartford. She received her B.A. from Smith and her J.D. from UCONN Law. Judge Keller had particular expertise in the areas of family and juvenile law while on the Superior Court bench. She was approved for the Appellate Court seat on March 6, 2013.

the party files a notice of appeal after the time set by the district court to replead has expired without taking any action to replead. As the plaintiff in our case did neither of these, its appeal was dismissed.

Lack of attention to the special rules of appellate jurisdiction can be costly. All of the attorney time and filing fees, plus the costs of responding to a motion to dismiss, are lost when the Court of Appeals rules there is no final judgment. Further, an important tactical choice between making another attempt to convince the trial judge or taking an immediate appeal may be forfeited by failing to consider how the finality rules apply. Some practitioners grumble about overly "technical" rules, but appellate courts are extremely careful not to exceed their jurisdiction. Thus, knowledge of their procedural rules is critical to success. The Appellate Practice Team at Robinson & Cole takes pride in applying its knowledge of appellate law to achieve the best outcome for its client in a cost-efficient manner.

FOR MORE INFORMATION

If you have questions about any of these topics, please contact one of the following attorneys:

Jeffrey J. White, Chair
(860) 275-8252
jwhite@rc.com

Bradford S. Babbitt
(860) 275-8209
bbabbitt@rc.com

Danielle Andrews Long
(617) 557-5934
dlong@rc.com

Wystan M. Ackerman
(860) 275-8388
wackerman@rc.com

Thomas J. Donlon
(203) 462-7549
tdonlon@rc.com

Linda L. Morkan
(860) 275-8219
lmorkan@rc.com

© 2013 Robinson & Cole LLP. All rights reserved. No part of this document may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without prior written permission. This document should not be considered legal advice and does not create an attorney-client relationship between Robinson & Cole and you. Consult your attorney before acting on anything contained herein. The views expressed herein are those of the authors and not necessarily those of Robinson & Cole or any other individual attorney of Robinson & Cole. The contents of this communication may contain attorney advertising under the laws of various states. Prior results do not guarantee a similar outcome.