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US Supreme Court will consider class certification appellate jurisdiction

By Sonya D. Winner

Showing once again its increased interest in class action issues, the U.S. Supreme Court has agreed to address an issue of major practical significance to class action litigants in federal court: May a plaintiff whose effort to obtain class action treatment is rejected obtain immediate appellate review of that decision simply by entering a conditional voluntary dismissal of her own claim? Several circuits have answered this question resoundingly in the negative. The 9th U.S. Circuit Court of Appeals has held otherwise, and the Supreme Court will resolve the conflict next term in *Microsoft v. Baker*, 15-457.

In *Baker*, Microsoft successfully moved to strike class allegations related to an alleged defect in Xbox consoles, citing the denial of class certification in a prior case involving the same putative class. The plaintiffs filed a petition seeking permissive review under Federal Rule of Civil Procedure 23(f), asserting, among other things, that the decision sounded a "death knell" for their case, as it would be prohibitively expensive to pursue their claims on a non-class basis. The 9th Circuit denied the petition. The plaintiffs then filed a voluntary dismissal of their individual claims, with the announced purpose of appealing from the resulting "final" judgment to obtain review of the class issue. The plaintiffs filed an appeal pursuant to 28 U.S.C. Section 1291. The 9th Circuit found mandatory appellate jurisdiction to exist and reversed the district court. The Supreme Court granted certiorari on the issue of appellate jurisdiction.

The appealability of decisions granting or denying class certification has long been a subject of controversy. Such decisions are not final orders and thus, absent a basis for interlocutory review, they are subject to appeal only at the end of a case. Several decades ago, some appellate courts recognized an exception to this rule for situations in which the gap between the size of an individual claim and cost of litigating it was so great that a denial of class action status effectively sounded the "death knell" for the case. But in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Supreme Court unanimously rejected this approach, holding that — death knell or not — a decision on class certification is not an appealable final order.

Following *Livesay*, the avenues for appeal of class certification decisions were extremely limited. With pressure mounting to permit at least some interlocutory appeals, Rule 23 was amended in 1998 to add subsection (f), which grants courts of appeals discretion to accept appeals of class certification orders. This provision was carefully crafted to balance the interests of plaintiffs, defendants, and the courts to promote both efficiency in the courts and fairness to all involved.

As the Advisory Committee Note to Rule 23(f) states — and as every circuit to address the question has confirmed — an appellate court's discretion to accept or reject an appeal under that rule is "unfettered." No standard is specified, although the note suggests that appellate courts will likely consider whether "the individual claim, standing alone, is far smaller than the costs of litigation." Significantly, however, the note also flags situations in which an order granting certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Also important, the note states, is whether an appeal presents a "novel or unsettled question of law."

Appellate courts have consistently stressed that petitions for review under Rule 23(f) are to be granted sparingly, citing the burdens and inefficiencies associated with interlocutory review of decisions that, under Rule 23(c)(1)(C), may be altered at any time before final judgment. *See, e.g., Prado-Steiman v. Bush*, 221 F.3d 1266, 1273-74 (11th Cir. 2000). They have emphasized, further, that many class certification decisions involve application of well-settled law to case-specific facts and thus will not warrant special review, especially given the discretion afforded district courts in the class certification determination. *Id.* The 9th Circuit has been in the mainstream in these views, stressing that "Rule 23(f) review should be a rare occurrence" and should be granted only when the petitioner can demonstrate that interlocutory review is truly warranted. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955-60 (2005).

The 9th Circuit decision in *Baker* recognizes an enormous loophole — for plaintiffs only — in the carefully crafted scheme of Rule 23(f). Indeed, unlike the old death knell doctrine, *Baker* does not even require a death knell showing. Whether such a showing can genuinely be made in any but the rarest case is debatable in any event. As the 7th Circuit has pointed out, one "must be wary lest the mind hear a bell that is not tolling," especially given that class actions are typically prosecuted by law firms that have "portfolios" of such cases and can readily support the litigation until appeal is available following a genuine final judgment. *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

Bypassing this question, *Baker* would allow a plaintiff to appeal a class certification denial as a matter of right simply by dismissing his individual claim, with a right to resurrect it if his ensuing appeal succeeds. Even leaving aside whether a judgment can be "final" when it is, by its own terms, not final at all — or whether a party may properly appeal from a judgment that he voluntarily brings about — this is clearly inconsistent with the standard and approach embodied in Rule 23(f). It is not surprising that the majority of circuits to have considered this question have decided it differently. *See, e.g., Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239 (3d Cir. 2013). Nor will it be surprising if the Supreme Court does the same. But should the Supreme Court accept the 9th Circuit's minority interpretation, considerable pressure will doubtless arise to restore the balance of fairness and, to the extent possible, judicial economy — either through a legislative solution that restores appellate jurisdiction to the confines of Rule 23(f) or an expansion of Rule 23(f) itself to afford an automatic right of appeal to both parties on an equal basis.

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