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Client Alert

National Class Action & Securities Litigation Practice Groups

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Supreme Court Confirms Plaintiffs Cannot Manufacture Appellate Jurisdiction Over Class Certification Denials

On June 12, 2017, the Supreme Court issued its decision in *Microsoft Corp. v. Baker*.[1] *Baker* resolves a Circuit split concerning whether a plaintiff, after losing a class certification battle, can effectively manufacture appellate jurisdiction without going to summary judgment or trial by voluntarily dismissing her case and seeking review of the adverse class certification ruling. Continuing the Supreme Court's recent trend of ruling in favor of defendants in class actions, the Court rejected the Ninth Circuit's approach in *Baker* and held that a plaintiff may not obtain appellate review of a class certification denial in these circumstances. According to the Court, stipulating to a voluntary dismissal with prejudice is not a "final decision" triggering appellate jurisdiction under 28 U.S.C. § 1291, and a plaintiff should not be afforded an end-run around the limited nature of appellate review of interlocutory class certification orders allowed under Federal Rule of Civil Procedure 23(f).

Background

Decisions granting or denying class certification are often pivotal in class actions. Certifying a class significantly ratchets up the defendant's potential exposure. By the same token, denying class certification can be an effective end to the litigation, because named plaintiffs (and their counsel) often do not have the financial incentive or wherewithal to litigate an individual claim to final judgment. Considering how important class certification decisions can be, it is no surprise that aggrieved litigants often seek appellate review of those decisions.[2]

Obtaining appellate review can prove difficult, however, because a party is only permitted an appeal as of right from a final judgment, rather than from non-final, "interlocutory" orders like class certification rulings.[3] Indeed, despite the significance of class certification decisions, Congress and the Supreme Court have limited the circumstances under which a litigant can seek interlocutory appellate review. Rule 23(f) permits parties to request appellate review of class certification decisions, but grants appeals courts "unfettered" discretion whether to allow such appeals.[4]

To get around the final-judgment rule and Rule 23(f)'s limitations, enterprising plaintiffs pursued a new maneuver: following a class certification

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denial, the plaintiff stipulates to a voluntary dismissal with prejudice, and then appeals the (invited) judgment of dismissal and challenges the order denying class certification. The circuits had split on the question whether plaintiffs could obtain appellate review of class certification denials this way.[5] The Supreme Court thus took up the question to resolve the circuit split.

The Supreme Court's Opinion

In *Baker*, the Supreme Court ruled that a class action plaintiff may not manufacture appellate review of an adverse class certification decision by stipulating to a voluntary dismissal of her claims with prejudice. Treating such a voluntary dismissal as a final, appealable order, the Court held, would undercut the balance the Rules Committee struck in Rule 23(f), which gives the court of appeals—*not* a class action plaintiff—the authority to decide whether to allow an appeal from a class certification decision. It would also lead to "piecemeal appeals" and "delays" in the resolution of class actions, potentially letting plaintiffs "stop[] and start[] the district court proceedings with repeated interlocutory appeals."[6] The Court was further troubled by the "one-sidedness of [the plaintiffs'] voluntary dismissal device," because if accepted it would "permit[] plaintiffs only, never defendants, to force an immediate appeal of an adverse certification ruling."[7]

Finally, the Court rejected plaintiffs' argument that an adverse class certification ruling should be viewed as final and appealable because it is frequently an effective end to the litigation: "'The fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering [the order] a 'final decision.'"[8]

Notably, Justice Thomas wrote a concurring opinion that two other Justices joined.[9] According to Justice Thomas, the problem with plaintiffs' voluntary-dismissal device was not that it failed to produce a "'final decision.'"[10] The problem, instead, was that a court of appeals lacks Article III jurisdiction to entertain an appeal from a stipulated judgment of dismissal.[11] Article III, Justice Thomas explained, "limits the jurisdiction of the federal courts to issues presented 'in an adversary context.'" And once plaintiffs "consented to the judgment of dismissal," the parties "were no longer adverse to each other on any claims," defeating Article III jurisdiction.[12] Justice Thomas rejected plaintiffs' contention that their interest in reversing the class certification denial was "sufficient to satisfy Article III's" adversity requirement. Justice Thomas concluded that plaintiffs had misunderstood "the status of putative class actions. Class actions, without an underlying individual claim, do not give rise to a 'case' or 'controversy.'"[13]

Conclusion

Baker marks an important clarification for appellate review over class certification decisions. It eliminates an avenue for gamesmanship by named plaintiffs and limits appellate review to the circumstances envisioned by Congress and the Supreme Court in the Federal Rules: (1) petitioning the appeals court for permission to appeal under Rule 23(f); (2) seeking appellate review under the Interlocutory Appeals Act (which permits a party to appeal a nonfinal order only if both the district court and the appeals court allow it); and (3) litigating their claims to a final judgment and then appealing.[14]

From a broader perspective, *Baker* continues the Supreme Court's trend of recent decisions curbing expansion of the class action device in federal court. The 8-0 decision (Justice Gorsuch did not participate) follows up on earlier decisions restricting the availability of class treatment in various legal contexts. Consider, for example, *Wal-Mart Stores, Inc. v. Dukes* (2011) (rejecting class certification decision in employment discrimination case),[15] *AT&T Mobility LLC v. Concepcion* (2011) (upholding validity of consumer class action waivers),[16] *American Express Co. v. Italian Colors Restaurant* (2013) (same, regarding business-to-business class waivers),[17] and *Comcast Corp. v. Behrend* (2013)

(rejecting class certification ruling in antitrust case where plaintiffs failed to establish that damages could be measured on a class-wide basis).[18]

The continuation of this defense-friendly trend in *Baker* could signal favorable rulings for corporate defendants in other class action cases now pending before the high court. In *California Public Employee's Retirement System v. ANZ Securities, Inc.*,[19] for example, the Court will consider in the securities context whether an "opt out" plaintiff's claim is considered filed—for statute of repose purposes—when the class complaint is filed or when the opt-out plaintiff files her own complaint. And in *Epic Systems Corp. v. Lewis*, the Court will address the enforceability of an agreement requiring an employer and employee to resolve employment-related disputes through individual arbitration and waive class proceedings.[20]

We will continue to monitor and report on developments in this arena.

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[1] *Microsoft Corp. v. Baker*, Slip Op., No. 15-457 (U.S. June 12, 2017). We have separately analyzed the extent to which appellate courts appear reluctant to grant review under Rule 23(f). *See* Interlocutory Appeal of Class Certification Decisions under Rule 23(f): An Untapped Resource, published in the Bloomberg BNA Class Action Litigation Report.
[2] *Baker*, Slip. Op. at 4.
[3] *Id.* at 2.
[4] *Id.* at 6.
[5] *Id.* at 11 n.8 (collecting cases on both sides of the issue).
[6] *Id.* at 12-13.
[7] *Id.* at 17.
[8] *Id.* at 4 (citation omitted).
[9] *Id.* at 2 (Thomas, J., concurring in the judgment). Chief Justice Roberts and Justice Alito joined Justice Thomas's concurrence.
[10] *Id.* at 2 (Thomas, J., concurring in the judgment).
[11] *Id.* at 2-3 (Thomas, J., concurring in the judgment).
[12] *Id.* at 3 (Thomas, J., concurring in the judgment).
[13] *Id.* at 4 (Thomas, J., concurring in the judgment).
[14] *See id.* at 9 (majority op.).
[15] 131 S. Ct. 2541 (2011).
[16] 131 S. Ct. 1740 (2011).
[17] 133 S. Ct. 2304 (2013).
[18] 133 S. Ct. 1426 (2013).
[19] No. 16-373 (U.S. 2017).
[20] No. 16-285 (U.S. 2017).