Patterson Belknap Webb & Tyler LLP

White Collar Defense & Investigations Alert January 2015

Supreme Court Permits Appeal to Go Forward In LIBOR Antitrust Lawsuit

On January 21, 2015, the Supreme Court decided a narrow but important issue of appellate jurisdiction in cases that have been consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation. A unanimous Court ruled that when a district court in the consolidated action dismisses one plaintiff's claim in its entirety, that plaintiff may immediately take a direct appeal from the order dismissing the complaint, even if other cases remain pending in the consolidated action. This decision written by Justice Ginsburg reversed a ruling by the United States Court of Appeals for the Second Circuit, which ruled previously that no appeal was permitted until all of the claims in the consolidated action were resolved. This decision has the potential to result in more appellate litigation arising out of multidistrict litigation and to some extent reduces the efficiencies that multidistrict litigation (MDL) is meant to create.

The case arises out of an MDL for all cases involving allegations that banks named as defendants understated their borrowing costs, thereby deflating LIBOR and allowing the banks to pay lower interest rates on financial instruments sold to investors. The LIBOR MDL is composed of 60 actions commenced in federal courts throughout the country and consolidated in the Southern District of New York. The MDL included a myriad of different LIBOR-related claims, including some antitrust claims.

One complaint – the Gelboim-Zacher complaint – alleged but a single federal antitrust claim under Section 1 of the Sherman Act. The Gelboim-Zacher complaint, filed on behalf of purchasers of bonds with LIBOR-linked interest rates, alleged that the defendant banks colluded to suppress LIBOR, thereby enabling the defendant banks to pay lower interest rates on financial instruments sold to plaintiff investors. This Sherman Act claim was dismissed by the district court, which concluded that no plaintiff could assert a cognizable antitrust injury. Their only claim having been dismissed, the plaintiffs filed a notice of appeal, and the district court also granted partial final judgment pursuant to Rule 54(b), thereby permitting other plaintiffs to appeal the dismissal of antitrust claims while their other claims remained pending in the district court. The Second Circuit, however, dismissed the Gelboim-Zacher appeal on the grounds that the "orde[r] appealed from did not dispose of all claims in the consolidated action."

Before the Supreme Court, the bank defendants argued that the consolidated cases should be treated as a single unit: until all claims brought by all plaintiffs are dismissed, there is no right to appeal. The plaintiffs contended that once their case was dismissed in its entirety, they had a right to file a direct appeal under Title 28, United States Code, Section 1291, which permits an immediate appeal from a final decision of a district court. This question had divided the Courts of Appeals prior to today's ruling.[1]

The Supreme Court ruled for the plaintiffs. Justice Ginsburg wrote that Section 1407, which permits the consolidation of cases in an MDL, does not create a monolithic multidistrict action. Each case retains its own identity and is not "meld[ed] . . . into a single unit." The decision here ended entirely the plaintiffs' case and therefore "had the hallmarks of a final decision" by "terminat[ing] their action." A contrary rule, the Court explained, would leave plaintiffs "in a quandary about the proper timing of their appeals." Should an appeal be filed immediately upon the order dismissing their action, or must it await the conclusion of consolidated pretrial proceedings? The Court's rule provides certainty to plaintiffs about the timing of their appeal and does not require them to wait until some uncertain point, far into the future.

---

1 *Compare Global NAPs v. Verizon New Eng.*, 396 F.3d 16, 22-23 (1st Cir. 2005) (permitting appeal) *with Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984) (no ruling in a consolidated case may be appealed until there is an ultimate final judgment on all matters).

The Court rejected the other arguments raised by the banks. There is no unfairness to other litigants in having the plaintiffs with the "weakest" cases getting an appeal first, as the district court can always authorize appeals in other MDL cases that raise the same issue. Rule 54(b) does not apply to Gelboim and Zacher because Rule 54(b) addresses only complaints with multiple causes of action. Nor is the ruling in the Gelboim-Zacher case "interlocutory" – permitting a request for certification under Section 1292(b) – given that it disposed of all claims brought by the plaintiff.

The Second Circuit's ruling worked a hardship on the individual plaintiffs involved, as MDL proceedings often take years to resolve. At the same time, the Supreme Court's new ruling may impair the efficiency that MDL proceedings are meant to provide, by permitting piecemeal appellate litigation over individual causes of action as a matter of right. In general, our federal system does not permit such appeals but instead takes a rigorous approach requiring final judgment across the board, except where a district court believes that an immediate appeal of certain issues would aid the resolution of the lawsuit as a whole. The decision today might also change the incentives for plaintiffs who might otherwise entertain settlement after an adverse decision by the district court in the MDL proceeding, as an appeal could be taken more quickly in certain cases. In this case, the Second Circuit will now address the merits of the plaintiffs' antitrust claim that the defendant banks' purported artificial suppression of LIBOR to pay lower interest rates on LIBOR-based financial instruments sold to investors during the class period constituted a *per se* violation of Section 1 of the Sherman Act.

Deirdre A. McEvoy	**212.336.2796**	**dmcevoy@pbwt.com**
Harry Sandick	**212.336.2723**	**hsandick@pbwt.com**
Jennifer A. Dixon	**212.336.2753**	**jdixon@pbwt.com**