

Daily Journal

www.dailyjournal.com

FRIDAY, JUNE 15, 2017

PERSPECTIVE

Ruling limits ability to appeal class cert denial

By Jeffrey A. LeVee
and Jason C. Wright

Certifying a class can force a defendant to settle and mitigate the potential loss at trial, regardless of the validity of the claims. Denying class certification of a class can be the end of the case if the individual damages do not justify the cost of litigation. As a result, the ability to appeal the order on class certification can greatly affect the bargaining position of parties, and the U.S. Supreme Court's ruling in *Microsoft Corp. v. Baker*, 2017 DJDAR 5505 (June 12, 2017), ensures that class representatives and defendants maintain an equal footing in federal courts.

Under 28 U.S.C. Section 1291, a party may only appeal a final judgment. Because orders granting or denying class certification are interlocutory, they are not final and not automatically subject to review. Instead, Federal Rule of Civil Procedure 23(f) provides that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification."

In light of the fact that an appeal of a denial of certification is not guaranteed, class representatives often have attempted to force appellate review by dismissing claims after a court denies class certification and arguing the dismissal constitutes a "final judgment" under Section 1291. For example, in *Microsoft*, class representatives filed a class action claiming Microsoft's Xbox scratched game discs during use of the Xbox. This was the second class action with the same allegations, and the district court had denied certification in the first case. Accordingly, in the second case, the district court struck the class allegations, holding the class claims were barred as a matter of comity. Because an order striking class claims is treated the same as an order denying certification, the class representative sought appellate review under the discretionary standard under Rule 23(f), but the 9th U.S. Circuit Court of Appeals denied review.

The class representative then sought to engineer an appeal by dismissing his claims with prejudice but preserving his right to appeal the order striking the class allegations.

The 9th Circuit ruled the dismissal constituted a final decision, and then held the district court misapplied the comity doctrine and reversed and remanded to require the district court to address class certification after the class representatives moved for certification. The Supreme Court reversed the 9th Circuit in an opinion by Justice Ruth Bader Ginsburg (Justice Neil Gorsuch did not participate).

In holding that voluntary dismissal of claims is not a final, appealable decision under Section 1291, the Supreme Court cited extensively *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). There, the court rejected the "death knell" doctrine, under which other courts have held that denying class certification is often the death knell of a class claim because the individual damages are insufficient to justify continuing the case, and thus the ruling should be immediately appealable. The court specifically found that certification rulings are interlocutory in nature and that adopting the death knell doctrine could lead to endless appeals of any ruling adverse to certification of a class.

Building on *Coopers & Lybrand*, the court found that, if a class representative could engineer an appeal by simply dismissing his claims, he could engineer an appeal every time he obtained an adverse ruling on class certification, which could lead to serial appeals. For example, the 9th Circuit held that the district court improperly applied "comity," and it remanded to the district court to decide whether the class should be certified under Rule 23. But after remand, the district court could have denied class certification on another ground, and under the class representatives' theory, the plaintiff could appeal again. The Supreme Court disagreed with this potential outcome and held that Rule 23(f) specifically allowed for the appropriate discretionary review, whereas the class representative's interpretation of the law would vitiate Rule 23(f) and allow for numerous and inefficient appeals. The court further noted that the issue of appealability was left to Congress, which delegated the issue to rulemakers. Those rulemakers created a "careful calibration" in Rule 23(f), and the "prerogative of litigants

or federal courts" should not disturb that settlement.

The court also found the one-sidedness of the class representatives' argument was unworkable. Only the class representative would be able to file serial appeals by dismissing claims after any adverse ruling. Meanwhile, whenever a district court certified a class, a defendant would not be able to engineer a mandatory appeal and could only request discretionary review.

The Supreme Court's decision is not surprising. But its relevance is in stark contrast to California law. The California Supreme Court adopted the death knell doctrine, holding that a denial of class certification effectively ends the case, and thus such orders are immediately appealable. In contrast, the defendant in state court must use the (infrequently granted) petition for mandamus to obtain review of an order granting class certification.

The result of the above is that defendants should, as always, carefully examine the ability to remove a class action to federal court. There, a defendant stands in parity with the class representative as to the appealability of adverse rulings on class certification.

Jeffrey A. LeVee is a partner in Jones Day's *Antitrust & Competition Law* group. **Jason C. Wright** is an associate in Jones Day's *Business & Tort Litigation* group, concentrating in consumer class actions.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect opinions of the law firm.

