New life for the death knell? SCOTUS accepts Microsoft Corp. v. Baker

April 21, 2016

On January 15, 2016, the U.S. Supreme Court granted certiorari to review the decision of the Ninth Circuit in Baker v. Microsoft Corporation, 797 F.3d 607 (9th Cir. 2015). See Microsoft Corp. v. Baker, Supreme Court Case No. 15-457.

The question presented is: "Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. § 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice."

Here's what happened.

Case History

In 2007, seven disappointed Xbox 360 users filed five lawsuits complaining that their game discs had been irreparably scratched as a result of moving the gaming console during use — just as Microsoft had warned them not to do. The cases were consolidated in the U.S. District Court in the Western District of Washington and, after discovery, the plaintiffs moved for class certification. The district court denied their motion, reasoning that individual questions of both causation and damages precluded certification. The plaintiffs filed a petition for interlocutory review under Fed. R. Civ. P. 23(f), and the Ninth Circuit declined to exercise jurisdiction. The plaintiffs settled their individual claims, and the

cases were dismissed.

In 2011, the same lawyers filed a new lawsuit in the same court, this time arguing that intervening case law from the Ninth Circuit would yield a different result on class certification. But the district court was not persuaded and, on the basis of comity, granted Microsoft's motion to strike class allegations. Baker v. Microsoft Corp., 851 F. Supp. 2d 1274. 1280 (W.D. Wash. 2012).

The plaintiffs again sought interlocutory review and, again, the Ninth Circuit declined to hear the appeal. But this time, rather than settling the individual claims, the plaintiffs filed a notice of dismissal with prejudice under Fed. R. Civ. P. 41 and then filed a notice of appeal.

The Ninth Circuit exercised appellate jurisdiction under 28 U.S.C. § 1291 — the final appealable order statute — and reversed the district court's decision. The court did not directly address Microsoft's jurisdictional arguments but, instead, relied on its previous decision in Berger v. Home Depot Corp. USA, Inc., 741 F.3d 1061, 1065 (9th Cir. 2014), holding: "'dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse — and thus appealable — final decision.'" Baker, 797 F.3d at 612, quoting Berger, 741 F.3d at 1065.

So, despite the Ninth Circuit's rejection of discretionary review, the plaintiffs used a voluntary dismissal to force appellate review of an interlocutory order striking class allegations. The result is obviously unfair — it's a one-way ratchet available only to plaintiffs. And it encourages piecemeal litigation, since the manufacture of appellate jurisdiction can occur time and again in the same case, as this case demonstrates.

The "Death Knell" Doctrine

But the problems run much deeper. Class plaintiffs have long sought immediate appeals of adverse class certification decisions. But 28 USC § 1291 suggested that immediate appeal was not available. The statute provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .

(Emphasis added.) Denial of class certification is not a "final decision."

To address this issue, prior to 1978, federal courts sometimes accepted jurisdiction under § 1291 if denial of certification would "end the lawsuit for all practical purposes." Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2nd Cir. 1966). Known as the "death knell" doctrine, these orders were deemed to be "final" for purposes of § 1291, despite the fact that they were not final decisions in the traditional sense.

But in 1978, the bell tolled for the death knell doctrine. In Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), the U.S. Supreme Court unanimously held that plaintiffs may not manufacture appellate jurisdiction by the artifice of the death knell doctrine. The Court said that "orders relating to class certification are not independently appealable under § 1291 prior to judgment," even if it is the death knell of the case. "[T]he fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." Id. at 476. The Court also recognized the inherent inequity of a doctrine that favored plaintiffs to the exclusion of defendants: "[T]he doctrine operates only in favor of plaintiffs even though the class issue . . . will often be of critical importance to defendants as well." Id. at 476.

The Court was also mindful that any choices concerning whether to extend or reduce appellate jurisdiction falls in "the legislative domain." Id.

Congress responded after Livesay by passing 28 USC § 1292(e), which authorized the Supreme Court to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for . . ." in § 1291.

In 1998, the U.S. Supreme Court adopted Rule 23(f), which authorizes a court of appeals to permit a timely "appeal from an order granting or denying class-action certification[.]" The Rules Advisory Committee emphasized the breadth of appellate discretion, which may be based on "any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23 Advisory Committee Notes to 1998 Amendments, Subdivision (f).

The historical background to Rule 23(f) reveals just how astonishing the Baker decision really is. The Ninth Circuit completely ignored decades of judicial and legislative development. And it reflects a fundamental misunderstanding of the nature of a dismissal with prejudice. Once a plaintiff dismisses claims with prejudice, they "are gone forever" and "not reviewable" by the appellate court and not to be "recaptured at the district court level." Camesi v. Univ. of Pittsburgh Med, Ctr., 729 F.3d 239, 247 (3rd Cir. 2013).

Circuit Split

There is currently a split in the circuit courts.

- Cases forbidding voluntary dismissal as vehicle for appellate review:
  - Camesi v. Univ. of Pittsburgh Med, Ctr., 729 F.3d 239, 247 (3rd Cir. 2013)
  - Rhodes v. E.I. DuPont de Nemours Care & Co., 636 F.3d 88, 100 (4th Cir.), cert. denied, 132 S. Ct. 499 (2011)
  - Chavez v. Illinois State Police, 251 F.3d 612, 629 (7th Cir. 2001)
  - Druhan v. Am. Mut. Life, 166 F.3d 1324, 1325-26 (11th Cir. 1999)
  - Bowe v. First of Denver Mortg. Investors, 613 F.2d 798, 801 (10th Cir. 1980)
- Cases permitting voluntary dismissal as vehicle for review:
  - Baker v. Microsoft Corporation, 797 F.3d 607 (9th Cir. 2015)
  - Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 178-79 (2nd Cir. 1990), cert. denied, 498 U.S. 1025 (1991)

It is difficult to see how Microsoft could be decided any differently from Coopers & Lybrand v. Livesay, or by less than a unanimous Court. Time will tell. The respondent's brief is due May 16, 2016.

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