In Xbox 360 class action, justices reject fast-track appeal tactic

(June 13, 2017) - Plaintiffs who fail to win class certification cannot obtain immediate appellate review of the certification denial by dropping their individual claims, a unanimous U.S. Supreme Court has decided, rejecting a proposed class action that alleged defects in Microsoft's Xbox 360 gaming system.

Microsoft Corp. v. Baker et al., No. 15-479, 2017 WL 2507341 (U.S. June 12, 2017).

In an 8-0 ruling June 12, the high court refused to revive the proposed nationwide class action by Xbox users who claimed it routinely scratched game discs beyond repair.

The lead plaintiffs had voluntarily dismissed their claims with prejudice, seeking to avoid the limits of Federal Rule of Civil Procedure 23(f), which gives appeals courts the discretion to review certification decisions right away or wait until the case has concluded.

The gambit worked, persuading the 9th U.S. Circuit Court of Appeals that it no longer had the authority to refuse the case under 28 U.S.C.A. § 1291, which gives litigants the right to appeal all "final orders." *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274 (9th Cir. 2015).

Reversing, the Supreme Court reached a unanimous conclusion based on divided reasoning.

Writing for herself and four other justices, Justice Ruth Bader Ginsburg said the 9th Circuit's ruling would gut Section 1291.

"The tactic would undermine Section 1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders," she wrote.

Justices Stephen Breyer, Elena Kagan, Anthony Kennedy and Sonia Sotomayor joined Justice Ginsburg's opinion.

Justice Clarence Thomas penned a separate concurring opinion reaching the same result.

He relied on Article III of the U.S. Constitution, which limits federal jurisdiction to live "cases or controversies," rather than on statutory analyses of Rule 23(f) and Section 1291.

When the plaintiffs voluntarily dropped their individual claims, they effectively accepted the judgment against them, meaning the case no longer involved an active, concrete dispute, Justice Thomas said.

Chief Justice John Roberts and Justice Samuel Alito joined the concurrence. Justice Neil Gorsuch did not participate in the decision.

'Heads-I-win, tails-I-appeal'

Reacting to the ruling, Mayer Brown LLP partner Archis Parasharami, a class-action defense lawyer who was not involved in the case, praised the court for reining in the excesses of plaintiffs willing to gamble their "weak merits claims" on the chance of leveraging class certification into a settlement.

"The court's unanimous result is welcome news because it eliminates the 'heads-I-win, tails-I-appeal' approach to class certification that afforded plaintiffs in the 9th Circuit an unfair advantage," Parasharami said via email.

Claudia Vetesi, of counsel at Morrison & Foerster and editor of the firm's Class Dismissed blog, sounded a similar note, agreeing that the decision was legally correct and saying it would be a boon to class-action defendants.

"The ruling will have an immediate impact on a number of cases pending appeal, particularly in the food misbranding arena," she said via email. "It also removes a quiver from plaintiff's counsel's arsenal — they will no longer be able to force piecemeal litigation through long delays from class certification to appeal."

Winding path to the Supreme Court

The case is the second putative class action filed over the Xbox 360's alleged design defect.

The previous suit fell apart after U.S. District Judge John C. Coughenour of the Western District of Washington denied class certification in 2009. *In re Microsoft Xbox 360 Scratched Disc Litig.*, No. 07-cv-1121, 2009 WL 10219350 (W.D. Wash. Oct. 5, 2009).

The plaintiffs in that case subsequently settled their individual claims.

A second group of Xbox 360 customers filed a proposed class action in Seattle federal court 2011, arguing that a subsequent 9th Circuit decision — *Wolin v. Jaguar Land Rover North America LLC*, 617 F.3d 1168 (2010) — should change the class certification analysis.

U.S. District Judge Ricardo S. Martinez disagreed in March 2012, striking the suit's class allegations — the functional equivalent of denying class certification. *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274 (W.D. Wash. 2012).

The Xbox plaintiffs sought interlocutory, or immediate, review of Judge Martinez's decision, but the 9th Circuit rejected the request.

To force an immediate appeal, the lead plaintiffs voluntarily dismissed their claims with prejudice and returned to the 9th Circuit, arguing that Judge Martinez's rulings were now final under Section 1291.

A 9th Circuit panel agreed in 2015, remanding the case and ordering the trial judge to perform his class certification analysis from scratch. The en banc appeals court later denied rehearing. *Baker v. Microsoft Corp.*, 785 F.3d 315 (9th Cir. 2015), *reh'g denied*, 797 F.3d 607 (9th Cir. 2015).

Microsoft petitioned the Supreme Court for certiorari.

Death-knell revival

Siding with the company, Justice Ginsburg said the dismiss-and-appeal approach would revive many of the problems associated with the discredited "death knell" doctrine, which the Supreme Court struck down in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

Under the death-knell rule, orders that would effectively end a case, even if they did not technically end it — like class-certification denials — counted as appealable final orders under Section 1291.

"Respondents' voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals," Justice Ginsburg wrote.

She noted that Rule 23(f), which gives intermediate federal appeals court the discretion to review class certification rulings, sought to strike a "careful balance" in response to concerns that the pendulum swung too far after the *Coopers & Lybrand* decision.

But the dismiss-and-appeal tactic would eviscerate Rule 23(f), Justice Ginsburg said.

"Contrary to respondents' argument, Section 1291's firm final-judgment rule is not satisfied whenever a litigant persuades a district court to issue an order purporting to end the litigation," she wrote.

Concurrence: No live controversy

The concurring justices joined the judgment, but they said Justice Ginsburg's opinion had overthought the finality doctrine.

"I agree with the court that the plaintiffs are trying to avoid the requirements for interlocutory appeals under Rule 23(f), but our view of the balance struck in that rule should not warp our understanding of finality under Section 1291," Justice Thomas wrote.

According to the concurrence, the plaintiffs' decision to drop their claims with prejudice did indeed result in a final judgment.

But it was one they could not appeal, Justice Thomas said, since there was no longer any controversy for an appellate court to adjudicate.

Without a concrete stake in the case, the plaintiffs had no basis for seeking class certification, even if other members of the proposed class might have suffered actual harm, he said.

'Broader implications'

Although the two opinions converged on the same result, the differences in reasoning pointed to a split among the justices that could have "broader implications for class-action litigation," according to Mayer Brown's Parasharami.

The concurrence did not address whether Justice Thomas' strict view of Article III and "literal" reading of finality would cover absent class members the same way he applied them to named plaintiffs, Parasharami noted.

But if the court ultimately took that position, it would call into question many class actions that now proceed as a matter of routine, he said.

"There are a lot of class actions that might be improper [under that rule] because the proposed class contains large numbers of uninjured class members," Parasharami said. "Such class actions are meritless, at least as to class members who are undisputedly uninjured."

(Additional reporting by Melissa J. Sachs)

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