

## Justices Level Class Action Playing Field In Xbox Ruling

By Emily Field

*Law360, New York (June 12, 2017, 10:23 PM EDT)* -- The U.S. Supreme Court's decision that a consumer alleging Microsoft Xbox 360 game consoles are defective can't appeal a class certification order by using a tactic only available to plaintiffs levels the playing field between plaintiffs and defendants for class actions, attorneys say.

The high court's ruling stemmed from a proposed class action filed in 2011 by lead plaintiff Seth Baker, who had claimed that the Xbox 360 units scratched game discs. Following the denial of class certification the next year, Baker voluntarily dismissed his individual claims with prejudice and then appealed to the Ninth Circuit.

The Supreme Court's decision, penned by Justice Ruth Bader Ginsburg, struck down the Ninth Circuit's decision to revive the suit based on Baker's assertion that the dismissal of his claims counted as a final decision, taking the view that Baker's tactic would have resulted in drawn-out litigation and disadvantaged defendants in class actions, as only plaintiffs would be able to use this strategy to appeal a ruling on class certification.

"I think there was a real one-sidedness to this theory that really irked the court," said M.C. Sungaila, a partner at Haynes and Boone LLP and chair of the Amicus Curiae Committee of the International Association of Defense Counsel, which submitted an amicus brief. "Only the plaintiff would get this right to direct appeal and a defendant in a class action would not and I don't think this sat well with the court."

Baker had argued that it didn't matter why a judgment had been entered to dismiss claims with prejudice, as long as they were dismissed.

But as Justice Ginsburg noted in her opinion, the issue of whether or not a class is certifiable may be just as important to plaintiffs as it is to defendants.

A court's ruling on class certification marks a pivotal point in a class action suit, Wayne Mack of Duane Morris LLP said, since companies face the time and expense of defending damages claims brought by a class, if the court does decide to certify it. If the court decides otherwise, plaintiffs have to choose whether to litigate their individual claims or press for individual, small settlements.

"Where a defendant is able to convince a court that a case should not be certified as a class, the

plaintiffs will now have to litigate the individual damage claim before filing an appeal unless they can convince an appellate court that the class certification decision is so important and noteworthy that an immediate appeal should be allowed,” Mack said.

Baker’s suit claimed that the Xbox 360 game units had defects that made game discs spin out of control and become scratched while in use. Microsoft, for its part, contended that disc scratches are caused by customer misuse rather than any defect.

A lower court struck down the proposed class claims in 2012, citing a 2009 opinion in another case denying class certification to Xbox gamers with the exact same damaged disc complaints because individual issues overwhelmed the group’s claims.

When Baker appealed in March 2015, the Ninth Circuit rebooted the case by finding that the lower court hadn’t properly applied its 2010 ruling in *Wolin v. Jaguar Land Rover*.

In that ruling, which involved premature tire wear, the appellate panel had found that although “individual factors may affect premature tire wear, they do not affect whether vehicles were sold with an alignment defect.”

Attorneys noted that Baker’s appeal following his own dismissal was an unusual maneuver.

“They threw something of a ‘hail Mary,’” Rusty Perdew of Locke Lord LLP said. “For a while they were doing great, and Microsoft had to throw the ‘hail Mary’ for Supreme Court review.”

Justice Ginsburg’s ruling largely considered the policy implications of allowing Baker to use this tactic, such as its potential to create too many appeals and throw a wrench into the finality of decisions, attorneys said.

Specifically, she wrote that the Ninth Circuit didn’t have the jurisdiction under 28 U. S. C. §1291 — which allows federal courts of appeals to review only district courts’ final decisions— to review an order denying class certification in a case where the named plaintiffs have voluntarily axed their claims with prejudice.

Justice Ginsburg rejected Baker’s argument that Rule 23(f) of the Federal Rules of Civil Procedure, which allows parties to ask a federal appellate court if they can appeal an adverse ruling on class certification wasn’t relevant. He’d argued that rule is about interlocutory order, whereas his case involved an actual final judgment.

“Yet permitting respondents’ voluntary-dismissal tactic to yield an appeal of right would seriously undermine Rule 23(f)’s careful calibration, as well as Congress’ designation of rulemaking ‘as the preferred means for determining whether and when prejudgment orders should be immediately appealable,’” Justice Ginsburg wrote.

In a concurring opinion, Justice Clarence Thomas — who was joined by Justices Samuel Alito and John Roberts — arrived at the same conclusion, but through a different avenue, attorneys noted.

Justice Thomas agreed that the plaintiffs couldn’t appeal in these circumstances, but instead because the appellate court lacked jurisdiction under Article III of the U.S. Constitution, since there was no longer a controversy after the plaintiffs decided to dismiss their claims with prejudice.

Without a controversy, Baker no longer had standing, Kevin McGinty of Mintz Levin Cohn Ferris Glovsky and Popeo PC said, observing that this was an issue that Justice Ginsburg didn't reach in her ruling.

"Without getting into the heads of the justices, it seems that Justice Ginsburg chose a rationale that allowed the court to sidestep putting down another marker that makes standing a more difficult burden for plaintiffs to get over in class action law," McGinty said.

Archis Parasharami of Mayer Brown LLP said that he believes that Justice Thomas' concurring opinion reflects a viewpoint shared by other justices that the ordinary principles of governing standing apply equally to class actions.

Justice Thomas rejected Baker's argument that his interest in reversing the class certification denial was enough to satisfy Article III's case or controversy requirement, saying it was a misunderstanding of the status of proposed class actions.

"Class allegations, without an underlying individual claim, do not give rise to a 'case' or 'controversy,'" Justice Thomas wrote. "Those allegations are simply the means of invoking a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class."

That's important, Parasharami said, as it recognizes that class actions are simply an avenue to litigate individual claims.

"That same type of standing analysis supports the idea that absent class members in a class action must all have standing in order to recover in federal court," Parasharami said. "That issue was one that the supreme court had agreed to consider in [Tyson Foods Inc. v. Bouaphakeo] case last term but ended up not reaching. I think it is still waiting for the right case."

--Editing by Pamela Wilkinson and Breda Lund.