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How Gelboim V. BofA Affects Pending MDL Matters

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On Jan. 21, 2015, in a unanimous opinion authored by Justice Ruth Bader Ginsburg, the U.S. Supreme Court issued its decision in Gelboim v. Bank of America Corp.,[1] clarifying the rules regarding finality and appealability for litigants whose cases have been consolidated for pretrial purposes within a multidistrict litigation under 28 U.S.C. § 1407.

As the Gelboim petitioners highlighted, the federal circuits have differed in whether they allowed appeals by litigants whose entire complaints have been dismissed where those complaints were consolidated in an MDL.[2] Before Gelboim, the Sixth and First Circuits held that cases that have been centralized under § 1407 remained separate actions, and thus that a litigant could appeal upon dismissal of all their claims without needing a Rule 54(b) certification. In contrast, the Federal Circuit, Second, Ninth and Tenth Circuits treated consolidated cases as a single action, and held that no appellate jurisdiction existed under 28 U.S.C. § 1291 until all claims in the consolidated action were ruled upon, unless a Rule 54(b) certification was issued.[3] Occupying a middle ground, the remaining circuits "appl[ied] no hard and fast rule, but focus[ed] on the reasons for the consolidation to determine whether the actions are one or separate."[4]

Gelboim resolved this split, holding that where a litigant's case has been consolidated into an MDL for pretrial purposes under § 1407, and the district court issues an order dismissing that litigant's case in its entirety, that order is a final and appealable order under 28 U.S.C. § 1291, because the dismissal effectively removes that litigant from the consolidated proceedings.[5] What is less clear after Gelboim, however, is what happens for litigants whose claims were dismissed in their entirety prior to this decision, like the petitioners in Gelboim. In light of the court's holding, the dismissal order became appealable at the time it was made. Will federal courts apply Gelboim retroactively, and, if so, what will the implications be for litigants with pending cases?

The Gelboim Decision

The Gelboim petitioners, Ellen Gelboim and Linda Zacher, filed their case in the United States District Court for the Southern District of New York, as a class action alleging a single antitrust violation under § 1 of the Sherman Act, 15 U.S.C. § 1. Petitioners alleged that the defendants, a number of major Wall

Street banks, violated federal antitrust law in setting the Libor interest rate. Petitioners' case was consolidated into an MDL for pretrial proceedings, along with more than 60 other actions commenced all over the country.[6] Some plaintiffs in the other Libor cases consolidated within the MDL also raised the same antitrust claim that Gelboim and Zacher did, but in addition, raised other claims which Gelboim and Zacher did not allege in their action.

The district court granted the defendants' motion to dismiss Gelboim and Zacher's antitrust claim, thus disposing of their claims entirely. Despite the fact that other consolidated cases with other claims remained pending, the district court assumed that petitioners were entitled to an appeal of right under 28 U.S.C. § 1291, and granted Rule 54(b) certifications to other plaintiffs in the Libor MDL (but not Gelboim and Zacher) who had brought identical antitrust claims so all could appeal the same issue of the dismissed antitrust claims despite any pending additional claims.[7] The Second Circuit, sua sponte, dismissed the Gelboim-Zacher appeal on the theory that the order appealed from did not dispose of all of the claims in the consolidated MDL proceeding.[8]

The Supreme Court reversed, holding that in this context, the Gelboim-Zacher decision was final and appealable. Justice Ginsburg wrote that "[c]ases consolidated for MDL pretrial proceedings ordinarily retain their separate identities, so an order disposing of one of the discrete cases in its entirety should qualify under § 1291 as an appealable final decision."[9] The dismissal with prejudice as to Gelboim and Zacher's only claim was final because it "had the hallmarks of a final decision. Ruling on the merits of the case, the District Court completed its adjudication of petitioners' complaint and terminated their action. Nothing about the initial consolidating of their civil action with other cases in the LIBOR MDL renders the dismissal of their complaint in any way tentative or incomplete."[10]

The court found unsettling the respondents' argument that Gelboim and Zacher would have no appeal as of right until the consolidated litigation itself ends. Justice Ginsburg wrote, this "would leave plaintiffs like Gelboim and Zacher in a quandary about the proper timing of their appeals … If plaintiffs whose actions have been dismissed with prejudice by a district court must await the termination of pretrial proceedings in all consolidated cases, what event or order would start the 30-day clock?"[11] The "sensibile solution to the appeal-clock trigger is evident"[12] — when the district court overseeing the MDL grants a dispositive motion "on all issues in some transferred cases, [those cases] become immediately appealable … while cases where other issues remain would not be appealable at that time."[13]

Moving Forward From Gelboim: Practical and Strategic Considerations

The Gelboim decision creates some new strategic considerations for both plaintiffs and defendants. The question of whether to consolidate cases for pretrial purposes only, or whether to consolidate through trial, now has the added wrinkle that after Gelboim, cases consolidated only for pretrial purposes may be disrupted by early appeals from some but not all plaintiffs. Often, a stay of the remaining claims is the most efficient course of action for the trial court, however that could significantly delay the pace at which the MDL proceeds to trial.

District courts and the parties before them still have options for preventing what can seem like piecemeal appeals in MDL proceedings. Parties may still consent to consolidate MDL litigation for all purposes, including trial, and district courts may consider staying entry of judgment on dismissed actions until all consolidated actions have been acted upon. These too can be imperfect remedies, and result in complicated issues such as whether dismissed parties would be excluded from discovery entirely, or allowed to participate along with remaining parties in case they were to prevail on appeal.

One thing is clear after Gelboim — it is more critical than ever to thoroughly consider potential appellate implications of consolidation decisions prior to making them. But the strategic implications of Gelboim begin even before a case is filed. As with Gelboim itself, putative class counsel hoping to preserve an appellate "fast track" on a pivotal legal issue have an opportunity to do so by packaging that issue in a single-claim complaint on behalf of one proposed class representative, with other class representatives asserting other claims in a separate lawsuit.

Looking Backwards in Light of Gelboim: Possibilities for Retroactive Application?

Litigants in the circuits that prior to Gelboim did not recognize that an order disposing of one of the consolidated cases in an MDL in its entirety was an appealable final decision under § 1291 may find they have not appealed from an order that the Supreme Court has now stated is final and appealable. Can those plaintiffs appeal now? Or does Gelboim apply retroactively, and thus their opportunity for appellate review has passed? The Supreme Court's opinion did not provide guidance about whether and how Gelboim would impact such litigants.

Harper v. Va. Dep't Taxation[14] provides some guidance about retroactivity in civil cases regarding a new rule of federal law. Harper stated that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[15] Harper therefore suggests that Gelboim's clarified rule of finality would apply to pending MDLs, and any previously unappealed orders issued within them. Thus the opportunity for appellate review may for some ill-timed parties, have come and gone.

The federal courts of appeals will soon begin deciding how to apply Gelboim as it relates to litigants with pending cases. In any event, such issues underscore the importance of filing prophylactic appeals when appellate jurisdiction is in doubt. As goes the famous quote, "tis better to have appealed and lost than never to have appealed as all." While Gelboim provides clarity for the road ahead, the recent past is much less certain.

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[1] Gelboim et al. v. Bank of America Corp. et al., 135 S. Ct. 897 (2015). The Slip Opinion is available at http://www.supremecourt.gov/opinions/14pdf/13-1174_5468.pdf.

[2] United States ex rel. Hampton v. Columbia/Hca Healthcare Corp., 318 F.3d 214, 216 (D.C. Cir. 2003) (citing Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 551 (6th Cir. 1994); Albert v. Maine Cent. R.R., 898 F.2d 5, 6-7 (1st Cir. 1990)).

[3] United States ex rel. Hampton, 318 F.3d at 216 (citing Spraytex, Inc. v. DJS&T & Homax Corp., 96 F.3d

1377, 1382 (Fed. Cir. 1996); Huene v. United States, 743 F.2d 703, 705 (9th Cir. 1984); Trinity Broad. Corp. v. Eller, 827 F.2d 673, 675 (10th Cir. 1987); Hageman v. City Investing Co., 851 F.2d 69, 71 (2d Cir. 1988)).

[4] United States ex rel. Hampton, 318 F.3d at 216.

[5] Gelboim, Slip Op. at 6-9.

[6] Id. at 4.

[7] Id. at 5.

[8] Id.

[9] Id. at 6-7.

[10] Id. at 7-8.

[11] Id. at 8.

[12] Id. at 9.

[13] Id. (quoting David Herr, Multidistrict Litigation Manual § 9:21, p. 212 (2014)).

[14] 509 U.S. 86 (1993).

[15] Id. at 97.
