

High Court Will End Circuit Split With Libor MDL Case

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On June 30, 2014, the U.S. Supreme Court granted certiorari to resolve a circuit split on whether a plaintiff can immediately appeal the district court's dismissal of a lawsuit that has been consolidated with other suits that are still pending.

The action, *Gelboim v. Bank of America Corp.*, was brought on behalf of a putative class of plaintiffs that had purchased bonds tied to the London interbank offered rate. Libor is the world's leading interest rate benchmark. The so-called "bondholder plaintiffs" initiated the suit against a group of the world's largest banks, who the bondholder plaintiffs allege manipulated Libor, causing them to receive too little interest on their bonds. The bondholder plaintiffs were one of several plaintiff groups who filed similar Libor-manipulation suits against the defendant banks.



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The judicial panel on multidistrict litigation consolidated the Libor suits due to their relatedness. These suits are now part of multidistrict litigation proceedings in the Southern District of New York before Judge Naomi Buchwald. In March 2013, Judge Buchwald dismissed the antitrust claims of the MDL plaintiffs.

As the bondholder plaintiffs had only asserted a single claim for violation of the antitrust laws, Judge Buchwald's decision completely disposed of their suit. When the bondholder plaintiffs sought to appeal as of right to the Second Circuit, the Second Circuit sua sponte dismissed the appeal "because a final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291, and the orders appealed from did not dispose of all claims in the consolidated action." In other words, although Judge Buchwald had dismissed all of the bondholder plaintiffs' claims, the Second Circuit held the order was not appealable until resolution of all claims of all plaintiffs in the MDL.

The question the Supreme Court will resolve on appeal is "whether consolidated cases retain their separate identity or become one case for purposes of appellate jurisdiction." Circuit courts are split on this issue. The First and Sixth Circuits hold that consolidated cases remain separate actions and no Rule 54(b) certification is needed to appeal the dismissal of any one of them. However, the Ninth, Tenth and Federal Circuits treat consolidated cases as a single action, or presume that they are, and permit a party to overcome the presumption only in highly unusual circumstances. Still, other circuit courts avoid any bright-line rule and instead employ a case-by-case approach that focuses on the reasons for the

consolidation to determine whether the actions are one or separate. The U.S. Supreme Court has not granted certiorari on this issue since 1990, in *Erickson v. Maine Central Railroad Co.*, 111 S. Ct. 38 (1990), although that petition was subsequently dismissed, 111 S. Ct. 662 (1990).

At the district court level, Judge Buchwald has expressed no intention to wait for a Supreme Court decision. On July 18, Judge Buchwald issued an order to address “next steps” in the MDL litigation. The judge acknowledged that the Supreme Court has granted cert on the appealability of the antitrust issue but nevertheless decided that “we cannot await the outcome and will proceed on the substantive record as it now stands.”

Judge Buchwald first plans to address which plaintiffs’ claims remain in the pending cases after her rulings in *Libor I*, *II* and *III*. Then, defendants must submit by Aug. 13 pre-motion letters to indicate whether any viable motions to dismiss against plaintiffs exist and have not been the subject of previous court rulings. Plaintiffs must respond by Aug. 20. Judge Buchwald also intends to set dates for submissions to address class certification issues as well as other issues the parties may want to raise. Judge Buchwald will address these issues in the next MDL hearing, set for September or early October.

For the bondholder plaintiffs, the practical impact of the Supreme Court’s ruling is how long they must wait for the Second Circuit review of Judge Buchwald’s dismissal of their antitrust claim. If the Supreme Court holds that Judge Buchwald’s ruling is not appealable until all actions in the MDL are finally resolved, then the bondholder and other plaintiffs in the MDL may have to wait years to have finality on their antitrust claim.

Notably, even if the Supreme Court holds that Judge Buchwald’s order is immediately appealable, this will not in itself revive the bondholder plaintiffs’ antitrust claim. Rather, it will merely hasten Second Circuit review of the order. Thus, while the Supreme Court’s acceptance of the appeal is important for the bondholder plaintiffs, it is merely the first of several steps needed to revive their antitrust claim.

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