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Appeals Court Decision Creates Circuit Split and Confusion Surrounding Post-Settlement Appeals of Class Certification Denials

By Christian D. Sheehan

If a court denies class certification, may the named plaintiff settle the case while still keeping the class certification issue alive for appeal? The recent decision in *Ruppert v. Principal Life Insurance Company*, No. 11-2554 (8th Cir. Feb. 13, 2013), in which the Eighth Circuit answered No to that question, highlights a Circuit split on the issue.

The plaintiff in *Ruppert* filed a putative class action alleging violations of the Employee Retirement Income Security Act (ERISA). After the district court denied class certification, the parties entered into a settlement agreement and a consent judgment in favor of the plaintiff that explicitly reserved the plaintiff's right to appeal the denial of class certification. The agreement also allowed the plaintiff to seek further relief, including attorneys' fees, costs, and expenses to be paid out of any future recovery awarded to the class, if the court of appeals reversed or vacated the district court's class certification decision. But after the plaintiff filed an appeal, the Eighth Circuit dismissed it for lack of jurisdiction.

Each of the Eighth Circuit's reasons for the dismissal is at odds with decisions of other federal courts of appeals:

Finality. The Eighth Circuit held that the consent judgment was not a "final" appealable order because it "allowed for [the plaintiff's] individual claims to spring back to life" if the district court's class certification decision was reversed on appeal. According to the Eighth Circuit, it did not matter that Ruppert's ability to seek additional relief from the district court was expressly conditioned on obtaining a reversal on appeal because, it said, that conditional language was an improper "attempt to manufacture appellate jurisdiction."

This holding conflicts with the Second Circuit's 2003 decision in *Purdy v. Zeldes*, which held that "where … a plaintiff's ability to reassert a claim is made conditional on obtaining a reversal [of other claims] from [the appellate] court," the district court's judgment should be treated as final because the plaintiff "runs the risk that if his appeal is unsuccessful, his … case comes to an end."

Mootness. Perhaps most significant was the Eighth Circuit's conclusion that the plaintiff's settlement of his individual claims rendered the action moot. As the court acknowledged, the Supreme Court has held that when a class representative's individual claims expire ***involuntarily*** after a denial of class certification, he may still retain a sufficient personal stake in obtaining class certification to maintain a live controversy on appeal. In particular, as the Eighth Circuit noted, the representative retains a viable interest in "shift[ing] a portion of the fees and expenses incurred in the litigation to successful class members." However, the Supreme Court has left open whether a representative who ***voluntarily*** relinquishes his individual claims pursuant to a settlement agreement retains a sufficient stake in the litigation to appeal a denial of class certification.

In *Ruppert*, the Eighth Circuit held that the voluntary settlement mooted any right to appeal, even though the language in the settlement agreement allowed the plaintiff to shift a portion of his attorney's fees and costs to successful class members if the district court's order denying class certification was reversed.

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Because Ruppert voluntarily dismissed his individual claims, he was "no longer a self-interested party advocating for class treatment in the manner necessary to satisfy Article III."

No other Circuit has adopted the Eighth Circuit's view that even where a plaintiff maintains a viable interest in fee-shifting, he nevertheless lacks a sufficient personal stake to challenge a denial of class certification. In two 2009 decisions, the Sixth Circuit (in *Pettrey v. Enterprise Title Agency, Inc.*) and Seventh Circuit (in *Muro v. Target Corp.*) implied otherwise, while at least one Circuit (the D.C. Circuit, in its 2006 decision *Richards v. Delta Air Lines, Inc.*) expressly rejected the voluntary/involuntary distinction.

Furthermore, the Supreme Court's opinion in *Chafin v. Chafin*, No. 11-1347 (Feb. 19, 2013), issued just days after *Ruppert*, suggests that the Eighth Circuit's approach to mootness may have been unduly rigid. In *Chafin*, the Court explained that "a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." The Court held that, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Moreover, even if the relief sought would not be "fully satisfactory, … the availability of a partial remedy is sufficient to prevent a case from being moot."

Chafin arose in a very different factual context than *Ruppert* and its impact on *Ruppert* is unclear. The Court's language in *Chafin* may suggest that a named plaintiff who, while voluntarily settling his individual claim, explicitly retains the right to shift costs to successful class members if a class is certified might possess a sufficient personal stake, "however small," in challenging the district court's denial of class certification.

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The Eighth Circuit's decision in *Ruppert* only adds to the uncertainty regarding a named plaintiff's right to appeal a denial of class certification following settlement of his individual claims. This confusion is unlikely to abate absent guidance from the Supreme Court. Until then, parties in putative class actions must be aware of this split of authority when negotiating a settlement involving the named plaintiff following a denial of class certification. ◆

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