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APPELLATE ALERT

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Upcoming Supreme Court Case Highlights Appealability Pitfalls When Cases Are Consolidated

By Christopher A. Reese

Consolidation of cases in federal courts can take many forms. Sometimes cases are consolidated for all purposes. Sometimes, they are consolidated only for limited purposes of discovery or pretrial proceedings. A case in which the U.S. Supreme Court recently granted certiorari raises the troublesome question of when a decision in a case that has been consolidated is appealable, and whether the form of consolidation that was ordered in the case determines the answer to that question.

Ellen Gelboim sued several banks, alleging that they violated the antitrust laws by manipulating interest rates. For pretrial purposes only, the Judicial Panel on Multidistrict Litigation consolidated her case with several similar ones in the United States District Court for the Southern District of New York. The district court granted the defendants' motion to dismiss the antitrust claims alleged in many of the complaints, finding that the plaintiffs could not prove antitrust injury. Because Gelboim's complaint contained only one count alleging violation of the antitrust laws, the court dismissed her complaint in its entirety. Gelboim then appealed, but the Court of Appeals for the Second Circuit dismissed the appeal *sua sponte*, holding that the dismissal of Gelboim's case was not a final order because the cases with which it had been consolidated had other counts that were not dismissed and thus were still pending.

In her petition for certiorari, *Gelboim v. Credit Suisse Group AG*, No. 13-1174, Gelboim pointed to a split in the circuits regarding whether a dispositive order in one of several cases that have been consolidated only for pre-trial purposes is appealable. Like the Second Circuit, the Federal, Ninth, and Tenth Circuits all hold that such a dismissal is not immediately appealable. The First and Sixth Circuits have held to the contrary. The D.C., Third, Fifth, Seventh, Eighth, and Eleventh Circuits permit an immediate appeal if, as in *Gelboim*, the dismissed case was consolidated with others only for pretrial purposes, but not if the consolidation was for all purposes. The Fourth Circuit has not yet decided this issue. Although the Supreme Court granted certiorari to resolve this circuit split in 1990, it subsequently dismissed that case without rendering a decision.

The *Gelboim* petition highlights an important question of federal appellate law. Filing an appeal from a non-final order wastes resources and can complicate the litigation. More important, failure to file an appeal if the order is deemed final can waive the right to appellate review. Litigants need to know whether and when an order dismissing one of multiple consolidated cases is appealable so that they can properly protect their appellate rights.

How the courts decide this issue can have important additional practical consequences. A holding that dismissal of a case consolidated only for pretrial purposes is not a final order can require that case to be held hostage for a protracted pe-

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riod while all other issues in the other consolidated cases are resolved. Because consolidation for pre-trial purposes is merely a procedural device designed to facilitate judicial economy, preventing an immediate appeal when one of those cases is dismissed seems wasteful. On the other hand, there is a longstanding policy in the federal courts of preventing multiple appeals, and those who argue in favor of the Second Circuit's approach point out that Rule 54(b) of the Rules of Civil Procedure, which allows a district court to enter partial final judgment in any case in which "there is no just reason for delay," provides a mechanism to prevent any hardship.

Now that the Supreme Court has granted certiorari, knowledgeable appellate practitioners will watch what the Court does with keen interest. ◆

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