ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7058

In re: Domestic Airline Travel Antitrust

Appeal from the United States District Court
for the District of Columbia, MDL Docket No. 2656; Misc. No. 15-1404 (CKK)
(Hon. Colleen Kollar-Kotelly)

REPLY BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF JURISDICTION

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February 16, 2021

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SUMMARY OF THE ARGUMENT

The settling parties open with a remarkable assertion: that the jurisdictional analysis in this case is "simple." Opp. Br. 1. It decidedly is not. As in *Gelboim v. Bank of America Corp.*, this Court faces a finality question without an obvious answer. *See* 574 U.S. 405, 412–13 (2015). In resolving how § 1291 applies to this issue of first impression, this Court must consider the practical consequences of immediate versus delayed appeal. *See id.* at 414–15. And because Bednarz and Frank face a "quandary" as to when and whether they can appeal if not now, finality under § 1291 is the "sensible solution"—just as it was in *Gelboim*. *Id.*

As an initial matter, the settling parties fundamentally err in asserting that § 1291's "statutory requirements" are divorced from the "consequences" of a finality determination. Opp. Br. 27–28. This distorts the relationship between practical consequences of finality and the finality determination itself. In truth, as *Gelboim* and this Court have recognized, the consequences of finality inform what constitutes a "final decision[]" over which appellate courts have jurisdiction. 28 U.S.C. § 1291; *see Gelboim*, 574 U.S. at 414–15; *U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216–17 (D.C. Cir. 2003).

And contrary to the settling parties' assertions, those practical considerations support immediate appeal. If Bednarz and Frank cannot appeal approval of the American and Southwest settlements now, it is unclear if or when they could. The settling parties' account of possible appeal scenarios, all couched in speculative terms, reveals this uncertainty. *See* Opp. Br. 28–30. If Bednarz and Frank must wait to appeal until all 105 cases in the MDL have been returned to their originating courts and finally decided, it is not clear which, if any, final judgment they could appeal. And the settling parties' other two proposed options—resolution of all claims or Rule 54(b) certification in the MDL court—are wholly speculative. Finally, Bednarz and Frank are situated similarly to the *Gelboim* plaintiffs such that immediate appeal would prevent—rather than lead to—piecemeal appeals. *See* Opp. Br. 34. Accordingly, Bednarz and Frank's appeal is final under § 1291.[1]

[1] Amicus does not address any of the settling parties' arguments about the merits of Bednarz and Frank's appeal. Amicus also does not press in this reply brief the argument that the district court's order denying Bednarz and Frank's settlement objections is appealable as an interlocutory order under § 1292(a)(1). *See* Amicus Br. 34–37.

ARGUMENT

I. Practical Consequences Inform Finality Determinations.

The settling parties contend that *Gelboim*'s holding was based on a single premise: that an individual case does not lose its separate identity when consolidated in an MDL and therefore may be appealed when all of the claims within it have been resolved. *See* Opp. Br. 30–31. Not so. To be sure, the *Gelboim* plaintiffs had a separate case that was consolidated in the MDL. 574 U.S. at 408. That case, when consolidated with others in an MDL, did not lose its "separate identit[y]" from the other cases. *Id.* at 413. So when all of the claims within the plaintiffs' individual case were resolved, there was a final judgment regardless of the pendency of the remaining litigation in the MDL. *Id.* at 413–14. According to the settling parties, because Bednarz and Frank do not seek to appeal an order that finalized an individual, separate case, *Gelboim* precludes jurisdiction. Opp. Br. 30–31.

But it's not "as simple as that." *Id.* at 1. *Gelboim*'s holding was based on more than just the existence of a separate case that was consolidated within the MDL. The Court also found it important that without immediate appeal, the *Gelboim* plaintiffs would face a "quandary

about the proper timing" of appeal. 574 U.S. at 414. Even more problematic, those plaintiffs might have been precluded from *any* appeal if they could not appeal immediately because later orders in the MDL might not have "qualif[ied] as the dispositive ruling" the plaintiffs sought to "overturn on appeal." *Id.* at 415. Considering these practical difficulties of delaying a final judgment, the Court held that the *Gelboim* plaintiffs were entitled to immediate appeal under § 1291. *Id.* at 417.

The settling parties attempt to excise this reasoning from *Gelboim*. On their reading, the practical concerns cited by *Gelboim* "simply explained the consequences" had the Court not found the plaintiffs' case final. Opp. Br. 27–28. The adverse results of delayed appeal, in other words, were just potential outcomes of an improper application of § 1291, rather than factors used by the Court to determine how to apply § 1291 in the first place. *See id.*

The settling parties get the finality analysis backwards. What they view as mere "consequences" of a finality decision, *see* Opp. Br. 28, are instead part of what makes decisions final (or not). Section 1291's sparse text merely provides circuit courts with jurisdiction over "all final

decisions of . . . district courts." 28 U.S.C. § 1291. It says nothing about what constitutes such a final decision.

Indeed, lower courts' confusion prior to *Gelboim* over the appealability of individual cases consolidated in MDLs shows that the text of § 1291 may not fully answer difficult finality questions. Before *Gelboim*, lower courts were fractured over appealability of a case's dismissal after it was consolidated in an MDL. Some courts held that MDL-consolidated cases remain separate and appealable when dismissed. *See, e.g.*, *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994). Others held the opposite—appeal was either always or almost always precluded in such situations. *See, e.g.*, *Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987). Still others, including this Court, split the difference and determined appealability with reference to the extent of and reasons for consolidation. *See, e.g.*, *Hampton*, 318 F.3d at 216–17.

In reaching this conclusion, this Court focused not only on its own precedent but also on the purposes of the final judgment rule and the consequences of its decision. *Id.* This Court, considering complaints consolidated for pretrial proceedings in an MDL and then dismissed,

noted that "[t]reating the consolidated cases as one action . . . would . . . not ensure only a single appeal—one of the objectives of the final judgment rule." *Id.* at 217. That was because the consolidated cases could still be remanded to their originating district courts, which could lead to individual appeals out of those courts. *Id.* at 216–17. Further, requiring a plaintiff whose claims were dismissed to "await the outcome of the remaining cases before appealing would risk needless complications in the event one or more of the pending actions was transferred back to the district where it began." *Id.* at 217. With these consequences in mind, this Court asserted jurisdiction over plaintiff's appeal. *Id.*

The decision in *Hampton* is merely one example of a larger phenomenon: this Court, the Supreme Court, and other courts often use practical considerations to inform difficult finality decisions. For instance, courts rarely view a ruling as final if doing so would create additional piecemeal litigation. *See, e.g.*, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017) (noting that the Court is loath to view a case as final if it would "disserve [the] objectives" of § 1291). By contrast, a case is more likely final if a lack of finality could preclude a later appeal that

a litigant has a right to bring. *See, e.g.*, *Gelboim*, 574 U.S. at 414–15. And because of the lack of specificity in § 1291's text, the statute is applied flexibly to novel jurisdictional situations rather than rigidly using a one-size-fits-all approach. *See id.* at 409 ("[D]ecisions of this Court have accorded § 1291 a 'practical rather than a technical construction.'" (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009))).

This case is no different. Because this Court must consider the consequences of finality, whether Bednarz and Frank have a right to immediate appeal is far from a "straightforward" jurisdictional problem. Opp. Br. 23. This problem is not answered by insisting, as the settling parties do, that the rules of finality are "[u]naltered" in the MDL context. *Id.* at 25. True enough—§ 1291 requires finality in MDL cases, just as it does elsewhere. And Amicus agrees that *Gelboim* does not stand for the proposition that "the normal [jurisdictional] rules do not apply" in MDLs. *Id.*

But *Gelboim* demonstrates that the unique characteristics of the MDL must be considered in *applying* § 1291. "[F]inality is analyzed differently in MDL litigation" because of MDL-specific complexities, not

because of a distinct set of jurisdictional rules. Amicus Br. 16. *Gelboim* represents one MDL-specific situation in which a judgment is final under § 1291: where a plaintiff has a case, that case is merged with others in an MDL, and that case is then finalized. 574 U.S. at 408. But *Gelboim* did not "expressly preclude[]" the possibility of other MDL-related situations where the principles of § 1291 operate to create a final decision—as they do here. Opp. Br. 31.

II. Bednarz and Frank's Status as Objectors to this MDL Settlement Creates the Same Practical Problems that Supported Finality in *Gelboim*.

When the settling parties turn to addressing practical consequences, they assert that "there is no risk that [Bednarz and Frank] will lose their appellate rights absent immediate appeal." Opp. Br. 28. And they argue that allowing appeal now could lead to "piecemeal appeals." *Id.* at 34.

Both claims are erroneous. Time and again, the settling parties fail to recognize how two key elements—(1) the appeal's origination in an MDL and (2) Bednarz and Frank's status as objectors—combine to create finality. Just as in *Gelboim*, Bednarz and Frank face unpredictability and the possibility of permanently being denied appeal if the judgment below is non-final. *See* 574 U.S. at 414–15. And delayed (rather than

immediate) appeal here is more likely to lead to the "piecemeal appeals" the settling parties warn of. Opp. Br. 34. Applying *Gelboim*'s rationale, the judgment of the district court dismissing Bednarz and Frank's settlement objections is therefore final and appealable under § 1291.

The settling parties assert that Bednarz and Frank could appeal the final approval of the American and Southwest settlements after post-remand final judgments in the originating courts or after either a final judgment or Rule 54(b) certification in the MDL court below. Opp. Br. 28–30. Maybe. But maybe not. Remand to the originating courts per § 1407 throws Bednarz and Frank's ability to appeal completely into doubt. And although Bednarz and Frank could appeal following a final judgment or a Rule 54(b) certification in the MDL court below, neither outcome is guaranteed. The settling parties' own account of each possibility admits as much. If Bednarz and Frank cannot appeal now, they may never have that chance.

The settling parties argue that Bednarz and Frank could appeal a final judgment after the 105 underlying cases are returned to their originating courts. *See* Opp. Br. 30. True, § 1407 contemplates that following pretrial proceedings in the MDL, "[e]ach action" will be

remanded to its originating court for trial. 28 U.S.C. § 1407(a). The parties assert that if so, "the interlocutory settlement [from the MDL court] would merge with the final judgment [from the originating court]" and trigger a right to appeal. Opp. Br. 30 (internal citation omitted). Perhaps. But Bednarz and Frank did not file any of the 105 actions now consolidated in the MDL. *See* Amicus Br. 26–27 (discussing Bednarz and Frank's limited party status as objectors). And unlike parties who file cases consolidated in an MDL and remain parties in the subsequent consolidated case, Bednarz and Frank as settlement objectors have no association with—and are not parties to—the ongoing Delta and United litigation. *See* ECF 329; *Molock v. Whole Foods Mkt. Grp.*, 952 F.3d 293, 297 (D.C. Cir. 2020) (emphasizing that putative class members, like Bednarz and Frank, are "*always* treated as nonparties").

As objectors, Bednarz and Frank face a fundamental quandary that the MDL parties do not. Specifically, it is not clear that they could appeal *any* originating court order finally resolving that case. For starters, *Gelboim* calls into question whether this Court can require Bednarz and Frank to wait until all cases are resolved in their originating courts. *See* 574 U.S. at 415 ("[S]urely would-be appellants need not await final

disposition of all cases in their originating districts . . . ."). Beyond that, how (or if) Bednarz and Frank could later appeal is eminently unclear. After all, which case of the 105 would Bednarz and Frank follow back to its originating court? Would they be able to appeal in *any* of the 105 cases? Would they have to appeal in *every* case? From which case would the appeal clock run? *See id.* And even if they could appeal orders of the originating courts finally resolving the originating cases, would any of the originating courts be well-suited to hear Bednarz and Frank's objection to two settlements that had been approved months or years prior by the MDL court? In short, any attempt to appeal after the 105 cases are transferred back raises a host of unanswered questions about the timing and location of an objector's appeal. Accordingly, appeal must happen prior to transfer.

The settling parties also offer two theories about possible appealable resolutions in the MDL court, but by the parties' own admission, both are speculative. The settling parties first assert that following pretrial proceedings, the MDL court might conduct a trial, and Bednarz and Frank could appeal from any final judgment there. Opp. Br. 28–29. Cases consolidated for pretrial proceedings *might* proceed to trial

in the MDL court. *See* David F. Herr, Multidistrict Litigation Manual § 9:24 (2020). But they might not. Parties need not consent to trial in the MDL court, and any number of them may return to their originating districts for trial as § 1407 contemplates. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42 (1998). The MDL court would, meanwhile, "conduct trials of cases that were [originally] filed in the transferee court." Herr, *supra* § 9:24. These varying timelines of disparate trials raise precisely the same question addressed above about when the 30-day appeal clock starts for Bednarz and Frank: after a final judgment following a trial in the MDL court or following one (or all?) of the remanded trials? *See supra* at 11. Here as in *Gelboim*, the "sensible solution" to this uncertainty is immediate appeal. 574 U.S. at 415.

Nor does the fact that the named plaintiffs filed a Consolidated Amended Complaint which "superseded their original complaints and pleaded proper venue" in the MDL court provide certainty for Bednarz and Frank's appeal. Opp. Br. 29 n.7. It is true that other circuits have held that once plaintiffs in an MDL file a consolidated complaint, a plaintiff cannot appeal the transferee court's dismissal of her claims until all claims in the MDL are resolved. *See, e.g.*, *In re Refrigerant*

Compressors Antitrust Litig., 731 F.3d 586, 591 (6th Cir. 2013). But even if the *In re Refrigerant* rule forbids immediate appeal by *plaintiffs* in a consolidated MDL, that should not impact the rights of Bednarz and Frank because as *objectors*, they played no part in the decision to consolidate. *See id.* at 590 (describing the choices made by plaintiffs in filing a complaint consolidated for all purposes).

Moreover, the *In re Refrigerant* rule does not guarantee Bednarz and Frank any later opportunity to appeal. That's because cases consolidated in an MDL are only consolidated for "the duration of the pretrial proceedings." *Id.* at 592; *see Hampton*, 318 F.3d at 216. So even an MDL complaint fully consolidated for pretrial purposes is deconsolidated if and when plaintiffs elect to return to their originating districts. And if cases are returned to their originating districts, objectors face a unique risk of not knowing when or how to appeal. *See supra* at 9–11. Accordingly, whatever consolidation occurs in the MDL does not impact Bednarz and Franks' appellate rights.

The settling parties alternatively assert that "the [MDL] court could (and likely would) first certify judgment under Rule 54(b)" before remanding the cases to their originating courts. Opp. Br. 29. Again,

perhaps. Rule 54(b) permits a district court to allow appeal from a judgment in an action involving multiple claims or parties "only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). The decision to grant Rule 54(b) certification, which this Court has called "exceptional," is "in the discretion of the district court." *Bldg. Indus. Ass'n of Superior Cal. v. Babbitt*, 161 F.3d 740, 743 (D.C. Cir. 1998) (citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956)). And while the decision to *grant* Rule 54(b) certification is reviewable for abuse of discretion, *see id.*, every circuit to consider the issue has held that the *denial* of Rule 54(b) certification is not appealable. *See, e.g.*, *Makuc v. Am. Honda Motor Co.*, 692 F.2d 172, 173–74 (1st Cir. 1982) (dismissing the appeal of a denial of a Rule 54(b) certification to comport with the rule's underlying objective of avoiding piecemeal appeals); *accord Jeannette Sheet Glass Corp. v. United States*, 803 F.2d 1576, 1580–81 (Fed. Cir. 1986).

In short, the entirely discretionary decision about Rule 54(b) certification is not a "likely" path to appellate review of the district court's approval of the American and Southwest settlements. Opp. Br. 29. The district court has twice declined to certify under Rule 54(b) and may do

so again. *See* ECF 374; ECF 425. Bednarz and Frank's ability to appeal the approval of the settlements should not turn on either the unknown future location of the proceedings or the uncertain possibility of a later Rule 54(b) certification.

Not knowing which (if any) of these options for later appeal will exist is exactly the uncertainty *Gelboim* instructs courts to avoid. *See* 574 U.S. at 414–15. At least one other court has recognized as much. In *Birchmeier v. Caribbean Cruise Line, Inc.*, the Seventh Circuit considered a challenge to an interim award of attorney's fees. 896 F.3d 792, 795 (7th Cir. 2018). The court recognized the possibility that the plaintiffs might have another opportunity, later in the litigation, to appeal the fees. *Id.* at 796. Because of the intricacies of post-judgment awards, however, it was also possible that if the plaintiffs were denied immediate appeal, "a second [opportunity for appeal] might *not* follow." *Id.* "Such dilemmas" concerning jurisdiction, the court reasoned, "should be avoided" in light of *Gelboim*. *Id.* Accordingly, the Seventh Circuit granted immediate appeal. *Id.*

Bednarz and Frank face the same uncertainty here. The settling parties are correct that another chance for Bednarz and Frank to appeal

might follow remand to the originating courts, a final resolution in the MDL court, or a potential Rule 54(b) certification. Opp. Br. 28–30. But these later chances to appeal "might *not* follow." *Birchmeier*, 896 F.3d at 796. *Gelboim* thus counsels that this decision is final because finality avoids jurisdictional "quandar[ies]" that would arise were appeal delayed. 574 U.S. at 414.

In addition to these practical considerations, Bednarz and Frank are similarly situated to plaintiffs for whom *Gelboim* squarely provides a final decision. Imagine a named plaintiff who sued only American and Southwest and whose claims were consolidated in an MDL with cases against four airlines. If she objected to American and Southwest's settlements and had those objections denied in an order approving the settlement, that would be a final decision. *See id.* at 413–14. Bednarz and Frank differ from that hypothetical plaintiff in only one respect: they were not parties to a case prior to the MDL. But they face the same possibility of lack of later appeal that such a plaintiff would face, *see supra* at 9–15, and are similarly disconnected from the underlying MDL as such a plaintiff would be.

Indeed, the settling parties do not contest Bednarz and Frank's disconnection from the rest of the MDL. Like the *Gelboim* plaintiffs, Bednarz and Frank have received an order—approving the Southwest and American settlements—that dismisses their objections "in [their] entirety." 574 U.S. at 408. This decision, moreover, makes Bednarz and Frank "no longer participants in the consolidated proceedings" because they are not named plaintiffs and had no role in any of the 105 underlying cases in the MDL. *Id.* at 414. Their only role in the litigation came through objecting to the American and Southwest settlements. *See* ECF 329; *Molock*, 952 F.3d at 297. In sum, Bednarz and Frank are not "parties"—in any respect—"to the same underlying case as the class representatives." Opp. Br. 32.

Bednarz and Frank's disconnection from the underlying MDL and uncertain later opportunity to appeal refutes the settling parties' argument that Bednarz and Frank's appeal is precluded because they are attempting to appeal a case that does not resolve "all claims against all parties." Opp. Br. 23 (quoting *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 159 (D.C. Cir. 2005)). The settling parties' argument assumes its conclusion about which claims and parties matter.

But in order to determine the relevant "claims" and "parties" for purposes of the final judgment rule, it is necessary to consider how the rule applies in this unique situation. And the rationale underlying the rule against appeals of partial settlements—promoting fairness and efficiency—supports finality here.[2]

The settling parties' failure to recognize the significance of objectors' role in an MDL settlement also dooms their argument that *Gelboim* requires Bednarz and Frank to appeal via Rule 54(b). Opp. Br. 26–27. *Gelboim* establishes that where a party has one of several claims decided in an MDL, that party's exclusive route to appeal is Rule 54(b) as her case is not final under § 1291. *See* 574 U.S. at 416. But *Gelboim* did not consider—because it had no reason to—whether Rule 54(b) or § 1291 applies where a party seeking to appeal has no claims remaining in the MDL. Although the Court did not consider this precise question, the

[2] Indeed, none of the cases the settling parties cite address the unique circumstances presented here: objectors to an MDL settlement who are not otherwise connected to any other part of the MDL litigation, and who might otherwise lose any opportunity to appeal. The only MDL case that the settling parties cite, *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1364 (2d Cir. 1991), was decided pre-*Gelboim* and did not consider this question.

principles it sets forth demonstrate that the district court's order is a final judgment within the meaning of § 1291. *See supra* at 9–15.

Finally, the settling parties argue that allowing immediate appeal here would contravene courts' preference, under § 1291, to avoid piecemeal appeals. *See* Opp. Br. 34. Ordinarily, allowing objectors to immediately appeal a partial settlement may well lead to multiple appeals. When a partial settlement is reached in non-MDL litigation, discretionary Rule 54(b) certification (rather than § 1291 finality) promotes clarity and efficiency by preventing premature appeals that could be lodged later. *See id.* at 22.

But the settling parties fail to consider that permitting immediate appeal in this unique circumstance—an objection to a partial settlement within a class action MDL—may ultimately prevent later piecemeal litigation. The settling parties' lengthy account of when Bednarz and Frank might be able to appeal demonstrates precisely why this is so. For instance, if the cases are returned to their originating courts, *see supra* at 9–11, it is unclear whether objectors would be able to take a single appeal at any time. Instead, they might have to appeal in each individual originating court, leading to far more piecemeal appeals than granting

immediate appeal would create. *Hampton*, 318 F.3d at 217 (noting that "one of the objectives of the final judgment rule" is to "ensure only a single appeal"). If the point is to avoid piecemeal appeals and jurisdictional quandaries, then the "sensible solution"—here as in *Gelboim*—is to allow appeal now. 574 U.S. at 415. Accordingly, the district court's decision approving the settlement over Bednarz and Frank's objections is final under § 1291.

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February 16, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on February 16, 2021, a copy of Appointed Amicus Curiae's Reply Brief in Support of Jurisdiction was served via the Court's ECF system on all counsel of record.

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