
Nos. 11-1984/2279

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Appellant,

v.

UNITED STATES OF AMERICA
and the STATE OF MICHIGAN

Appellees.

Appeal from the United States District Court
Eastern District of Michigan
Honorable Denise Page Hood

**BLUE CROSS BLUE SHIELD OF MICHIGAN'S PETITION FOR
REHEARING EN BANC**

Todd M. Stenerson
Neil K. Gilman
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
202-955-1500
tstenerson@hunton.com

Robert A. Phillips
BLUE CROSS BLUE SHIELD OF
MICHIGAN
600 Lafayette East, MC 1925
Detroit, MI 48226
313-225-0536
rphillips@bcbsm.com

March 7, 2012

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STATEMENT PURSUANT TO FRAP 35(B)(1)

On February 23, 2011, a motions panel dismissed Blue Cross Blue Shield of Michigan's ("Blue Cross") appeal from the District Court's denial of its motion to dismiss an antitrust lawsuit brought against it by the United States and the State of Michigan. In that motion, Blue Cross argued that the claims were barred by the state action immunity doctrine, first articulated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943).

The motions panel dismissed the appeal for lack of appellate jurisdiction, concluding that it was bound by *Huron Valley Hosp. Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986), which held that denials of state action immunity were not immediately appealable collateral orders.

Blue Cross seeks *en banc* review under Federal Rule of Appellate Procedure 35 because the Sixth Circuit's rule on this question "conflict[s] with the authoritative decisions of other United States Courts of Appeals that have addressed the issue" in the 26 years since *Huron Valley* was decided. *See, e.g., Danner Constr. Co., Inc. v. Hillsborough Cnty. Fla.*, 608 F.3d 809, 812 n.1 (11th Cir. 2010) (denial of state action immunity immediately appealable under collateral order doctrine); *Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth.*, 801 F.2d 1286, 1290 (11th Cir. 1986) (same); *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000) (discussing Fifth Circuit rule that state action

immunity is immediately appealable in some circumstances). In addition, two circuits have stated in dicta that orders denying state action immunity are immediately appealable collateral orders. *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3d Cir. 1999); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987). One circuit has agreed with the Sixth Circuit that such orders are not immediately appealable. *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006).

Whether orders denying state action immunity are immediately appealable presents a question of exceptional importance. State action immunity exists to shield state programs and the entities responsible for carrying out those programs from scrutiny under the antitrust laws. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39 (1985). Because even the act of being scrutinized creates a massive burden on a party being subject to antitrust litigation, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007), even if a defendant is able ultimately to avoid liability, “immers[ing] the parties in the discovery swamp” will do a great deal of damage to the state program and those involved in its administration, *see In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 626 (7th Cir. 2010). This case has been no exception, draining millions of dollars, and creating a substantial distraction, from Blue Cross’s efforts to provide reasonable access to cost-effective, quality care to all residents of Michigan. *See Mich. Comp. Laws §§ 550.53(3), 550.1101-*

1704, 550.1301. And to the extent that the burdens of litigation can force unwarranted settlements, state programs will be harmed by the failure to obtain authoritative decisions on the applicability of the antitrust laws. Indeed, such settlements can require states, municipalities and those acting under their authority to agree to take actions that undermine state policies or refrain from taking actions that further those schemes, thus defeating the very purpose of state action immunity.

I. **BACKGROUND**

Plaintiffs allege that most favored nation clauses in Blue Cross's contracts with hospitals caused some hospitals to increase their prices and have thus reduced competition in the market for the sale of commercial health insurance. Blue Cross filed a motion to dismiss, arguing, among other things, that the allegations against it should be dismissed under the state action doctrine because Blue Cross is a quasi-public entity subject to Michigan's comprehensive regulatory structure that displaced competition with regulation of health care and health care financing markets to ensure widespread access to affordable, quality care. *See* Memorandum in Support of Blue Cross Blue Shield of Michigan's Motion to Dismiss ("Mot. Dismiss") at 9-18 (citing *Blue Cross & Blue Shield of Mich. v. Milliken*, 422 Mich. 1, 42, 367 N.W.2d 1, 23 (1985); Mich. Comp. Laws §§ 550.53(3), 550.1101-1704,

550.1301).¹ That regulatory scheme governs Blue Cross's state-mandated mission to provide access to healthcare to all Michigan residents at a fair and reasonable price, and ensures that it fills the role of a state-chartered "insurer of last resort." To achieve the statutory goals, Michigan's regulatory scheme, among other things, requires that Blue Cross offer access throughout Michigan, requires that Blue Cross offer access to Michigan residents not covered by commercial insurance, contemplates that Blue Cross will use its size to obtain more favorable prices from hospitals than the prices charged to commercial insurers, and anticipates that, in so doing, Blue Cross's hospital contracts might result in hospitals shifting costs to commercial insurers. And, Michigan's regulatory scheme includes extensive regulation of Blue Cross through the Michigan Office of Financial and Insurance Regulation ("OFIR"), which, among other tasks, ensures that whatever the cost-shifting effect of Blue Cross's hospital contracts, Blue Cross pays its "fair share" of hospital costs, Mich. Comp. Laws § 550.1509(4)(b), and which specifically reviewed at least the majority of the MFNs at issue.

¹ Blue Cross' Motion to Dismiss is attached to Appellees' Motion to Dismiss Appeal at Exhibit B.

The District Court denied the motion to dismiss and Blue Cross appealed.² Plaintiffs moved to dismiss the appeal, arguing that the denial of state action immunity is not an immediately appealable collateral order. On February 23, 2012, the motions panel dismissed the appeal, stating that it was bound by the Court's decision in *Huron Valley*, and citing Sixth Circuit Rule 206(c) for the proposition that "Court en banc consideration is required to overrule a published opinion of the court." *United States v. Blue Cross Blue Shield of Michigan*, Nos. 11-1984 & 11-2279 (6th Cir. Feb. 23, 2012) (attached at Exhibit 1).

II. ARGUMENT

The question whether an order denying state action immunity satisfies the collateral order doctrine has led to three distinct lines of case law in the courts of appeals. This Circuit was the first to address this question and, in light of subsequent developments, should take this opportunity to revisit the question and decide whether its decision in *Huron Valley* should remain good law.

² Blue Cross actually filed two notices of appeal, first after the district court issued an oral ruling denying the motion to dismiss and again after the district court issued its opinion. As the motions panel recognized, the second appeal was filed as a "cautionary measure." *United States v. Blue Cross Blue Shield of Michigan*, Nos. 11-1984 & 11-2279 (6th Cir. Feb. 23, 2012).

A. Since This Court's Decision in *Huron Valley*, Circuits Have Split on the Question Whether Denials of Motions to Dismiss on State Action Grounds are Immediately Appealable

Twenty-six years ago, the Sixth Circuit decided *Huron Valley*. This was the first decision of any appellate court addressing the question whether a denial of state action immunity constituted a collateral order subject to an immediate appeal. The Court stated that the state action doctrine “is not an ‘entitlement’ of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim.” 792 F.2d at 567. The Court further stated that the state action determination was not separate from the merits. *Id.*

Since *Huron Valley*, the other circuits have had opportunities to address this question, and have done so in three distinct ways.

First, the Eleventh Circuit has unequivocally held that orders rejecting state action immunity defenses are immediately appealable under the collateral order doctrine. *See, e.g., Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth.*, 801 F.2d 1286, 1290 (11th Cir. 1986); *Danner Constr. Co., Inc. v. Hillsborough Cnty. Fla.*, 608 F.3d 809, 812 n.1 (11th Cir. 2010); *TEC Cogeneration Inc. v. Fla. Power & Light Co.*, 76 F.3d 1560, 1563 n.1 (11th Cir. 1996); *Askew v. DCH Reg'l Health Care Auth.*, 995 F.2d 1033, 1036 (11th Cir. 1993). As the Eleventh Circuit has explained, state action immunity is similar to the qualified immunity discussed in *Mitchell v. Forsyth*, 472 U.S. 511 (1985),

because it provides immunity from suit, rather than just a defense to liability, and “[t]hus, the district court’s decision (denying immunity) is effectively unreviewable on appeal from a final judgment.” *Commuter Transp.*, 801 F.2d at 1289.

Two other circuits, the Third and the Seventh, appear to agree with the Eleventh Circuit, although they have not ruled definitively on the question. Rather, both of these circuits have suggested in dicta that such decisions are immediately appealable. In *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987), the Seventh Circuit held that an order denying a motion to dismiss based upon the First Amendment right to petition the Government for redress of grievances was not an immediately appealable collateral order. In the opinion, Judge Posner distinguished *Commuter Transportation* (one of the Eleventh Circuit cases), explaining that, in that case, state action immunity “had been interpreted to create an immunity from suit and not just from judgment,” while the First Amendment protection at issue in *Segni* had never been understood to provide equivalent protection. *Id.* at 346.

In *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3d Cir. 1999), the Third Circuit followed Judge Posner’s decision in *Segni* on the appealability of the denial of First Amendment protections. The court was more explicit in stating that

orders denying state action immunity defenses are immediately appealable, although again in dicta:

The *Segni* court distinguished *Noerr-Pennington* immunity from “state action” doctrine under *Parker v. Brown*, on the ground that the latter doctrine had been interpreted to create an immunity from suit and not just from judgment We agree with the conclusion reached by the *Segni* court

Id. at 329 (internal citations and quotations omitted).

Second, the Fourth Circuit has disagreed with the Eleventh Circuit and the Third and Seventh Circuit dicta, holding that denials of motions to dismiss on state action grounds are not immediately appealable. *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006).

Third, the Fifth Circuit has held in separate cases that (a) denials of motions to dismiss by state-related entities are immediately appealable, but that (b) denials of motions to dismiss by private entities that claim state action immunity are not. *Martin v. Mem’l Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996); *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000).

B. En Banc Review is Appropriate Because The Collateral Order Doctrine Should Apply to Protect State Entities and Entities Guided by the State From Excessive and Inappropriate Litigation

This Court should hear this matter *en banc* to reconsider *Huron Valley*. As the motions panel recognized, *en banc* review is the only way for this Court to reconsider that precedent. Moreover, an *en banc* decision can offer guidance to

other courts of appeal in the hope of creating a uniform rule. *Cf.* ABA SECTION OF ANTITRUST LAW, STATE ACTION PRACTICE MANUAL, 160 (2d ed. 2010) (“Whether defense counsel will secure immediate review of an adverse decision on state action immunity, therefore, largely turns on the circuit in which the litigation is pending.”).

In addition to clarifying the law, the *en banc* court should reconsider *Huron Valley* because, as the Eleventh Circuit, has held, the collateral order doctrine should allow immediate appeal in this case.

1. The Collateral Order Doctrine

In the ordinary case, a party may only appeal pursuant to 28 U.S.C. § 1291 from an order that “ends litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Caitlin v. United States*, 324 U.S. 229, 233 (1945). However, the Supreme Court allows interlocutory appeals from certain orders that are “collateral” to the underlying merits of the case. *See, e.g., Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). An order is “collateral,” and immediately appealable, if it “(1) conclusively determines a disputed issue; (2) resolves an issue separate from the merits of the action that is too important to be denied review; and (3) will be effectively unreviewable on appeal from a final judgment.” *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 236 (6th Cir. 2011) (quoting *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 444

F.3d 462, 472 (6th Cir. 2006)); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The quintessential situation for applying the collateral order doctrine involves the question whether a party is immune from suit, in which case requiring the party to wait to appeal until after trial effectively results in the loss of immunity. *See, e.g., Forsyth*, 472 U.S. at 527.

2. State Action Immunity is an Immunity from the Burdens of Litigation, Thus Satisfying the First and Third Prongs of the Collateral Order Test

It has long been established that where a district court denies an immunity defense that properly immunizes a defendant from the burdens of litigation, that order satisfies elements (1) and (3) of the collateral order test. Such orders “conclusively determine[] a disputed issue” even where issues of fact may remain (and even where, as here, a defendant may file a later motion once those facts are further developed). As the Supreme Court has explained:

At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may thus escape liability. Even so, the court’s denial of summary judgment finally and conclusively determines the defendant’s claim of right not to stand trial on the plaintiff’s allegations, and because there are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred, it is apparent that *Cohen*’s threshold requirement of a fully consummated decision is satisfied in such a case.

Forsyth, 472 U.S. at 527 (internal quotations omitted). Likewise, such orders are effectively unreviewable on appeal because while an appellate court can fix erroneous assessments of liability, the defendant’s “immunity from suit . . . is

effectively lost if a case is erroneously permitted to go to trial.” *Id.* at 526. For this reason, the question whether state action immunity is an immunity from the burdens of litigation is the primary issue in determining the applicability of the collateral order doctrine here. As one commentator has explained: “If the doctrine properly immunizes a defendant from standing trial, it would follow that the denial of a defendant’s preliminary motion on state action grounds is immediately appealable.” ABA TREATISE at 76.

State action immunity is a judicially created immunity that protects “States’ ability to regulate their domestic commerce” by placing potentially anticompetitive regulatory programs beyond the reach of antitrust law. *S. Motor Carriers Rate Conference Inc. v. United States*, 471 U.S. 48, 56 (1985). The doctrine is rooted in “principles of federalism and state sovereignty,” *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1995), and applies to both state and private entities to address the concern that “[a] plaintiff could frustrate any such program merely by filing suit against the regulated private parties” *S. Motor Carriers*, 471 U.S. at 56. Indeed, as the Eleventh Circuit recognized in applying the collateral order doctrine to the question of state action immunity, a primary purpose of the doctrine is to prevent immunized parties from being subjected to excessive litigation costs. *Commuter Transp.*, 801 F.2d at 1289; *Cf. Twombly*, 550 U.S. at 546 (discussing the high costs of antitrust litigation).

In contrast to the analysis in *Commuter Transportation, Huron Valley* simply asserted, without any analysis, that state action immunity “is not an ‘entitlement’ of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim.” 792 F.2d at 567. It is unclear what formed the basis for this conclusion or what degree of “magnitude” is sufficient to invoke the collateral order doctrine.

The Fourth Circuit engaged in a somewhat longer analysis in rejecting the application of the collateral order doctrine. *S.C. Bd. of Dentistry*, 455 F.3d at 444-46. However, in concluding that state action immunity does not implicate the “harms attendant to litigation itself,” the court ignored the concern that the mere filing of a lawsuit, and not simply ultimate liability, could adversely affect states’ ability to regulate.

For example, the *Commuter Transportation* court, citing a leading antitrust commentator, recognized that, “[a]bsent state immunity local officials will avoid decisions involving antitrust laws which would expose such officials to costly litigation and conclusory allegations.” 801 F.2d at 1289 (citing Phillip Areeda, *Antitrust Law* ¶ 212.3b at p. 57 (1982 Supp.)). Moreover, forcing state actors and others whose conduct is immune from the antitrust laws to go through lengthy and expensive litigation can force parties to resolve these cases without ever obtaining a definitive ruling from an appellate court on whether the conduct is, in fact,

immune. In addition to the costs, this can lead to several other negative consequences, such as inconsistent obligations (where the defendant agrees to a settlement that is contrary to the legislatively-mandated scheme) or the weakening of the legislatively-mandated scheme (where the defendant agrees to refrain from actions it should be taking to further the legislative goals in an effort to avoid further costs and future lawsuits). Thus, the fact of the litigation alone can undermine a state regulatory scheme, and the failure of appellate courts to consider orders rejecting state action immunity defenses will exacerbate the problem.

Blue Cross believes that the Eleventh Circuit has correctly held that state action immunity creates immunity from suit, and that the first and third prongs of the test are thereby satisfied. At the very least, this is a question worthy of reconsideration by the *en banc* Court.

3. Orders Denying State Action Immunity Decide an Important Question That Is Separate From the Merits.

The question whether a party is immune under the state action doctrine is separate from, and antecedent to, the question whether it violated the antitrust laws. In other words, when addressing the question of state action immunity, courts do not address whether the conduct in question violated the antitrust laws, asking only whether that conduct was sufficiently authorized by the state. Thus, the three part state action immunity test asks whether: (1) “the State as sovereign clearly intend[ed] to displace competition in a particular field with a regulatory structure”

(2) the entity's actions were a foreseeable result of the regulatory structure, and (3), in some cases, that the entity was actively supervised by the state. *S. Motor Carriers*, 471 U.S. at 64; *Town of Hallie*, 471 U.S. at 41-42. These questions are separate from the merits question whether, assuming no state action immunity, the conduct violated the antitrust laws because, for example, the anticompetitive effects outweighed the procompetitive benefits (the analysis required under an antitrust rule of reason analysis, *see Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918).) The Fifth Circuit made this point in *Martin*:

[A] claim of such state action immunity is conceptually distinct from the merits of the plaintiff's claim that he has been damaged by the defendants' alleged violation of the federal antitrust laws. An appellate court reviewing the denial of the state or state entity's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. In a case involving alleged anticompetitive acts by a state's municipality or subdivision, all it need determine is a question of law: whether the state entity acted pursuant to a clearly articulated and affirmatively expressed state policy.

Martin, 86 F.3d at 1397; *see also Commuter Transp.*, 801 F.2d at 1290.

As with the other prongs, *Huron Valley* merely stated that the test for state action was "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." 792 F.2d at 567. However, the court did not provide any analysis or explanation for that conclusion. In light of the express contrary determinations by the Fifth and Eleventh Circuits, this Court should take the opportunity to reconsider *Huron Valley*.

III. CONCLUSION

This case meets all the requirements for *en banc* consideration. It addresses a question of exceptional importance to states, municipalities and those regulated by them on which the Court of Appeals have split. Blue Cross therefore respectfully requests that the Court grant its Petition for Rehearing *En Banc*.

/s/ Todd M. Stenerson
Hunton & Williams LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
Telephone: (202) 419-2184
Facsimile: (202) 778-7436
E-mail: tstenerson@hunton.com
Attorney for Blue Cross Blue Shield of
Michigan

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2012, the foregoing Statement was electronically filed with the Clerk of Court using the Court's CM/ECF System, which will send notice and an electronic copy of the same to all counsel of record. Current counsel of record are: Robert B. Nicholson, Todd M. Stenerson, Dee J. Pascoe, Ryan J. Danks, Robert A. Phillips, Kristen Ceara Limarzi, and Neil K. Gilman.

/s/ Todd M. Stenerson
Hunton & Williams LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
Telephone: (202) 419-2184
Facsimile: (202) 778-7436
E-mail: tstenerson@hunton.com
Attorney for Blue Cross Blue Shield of
Michigan

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Leonard Green
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: February 23, 2012

Mr. Todd M. Stenerson
Hunton & Williams
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037

Re: Case No. 11-1984/11-2279, *USA, et al v. Blue Cross Blue Shield of Mich*
Originating Case No. : 10-14155

Dear Counsel,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Roy G. Ford
Case Manager
Direct Dial No. 513-564-7016

cc: Mr. Ryan J. Danks
Ms. Kristen Ceara Limarzi
Ms. Mary Elizabeth Lippitt
Mr. Robert B. Nicholson
Mr. Dee J. Pascoe
Mr. Robert A. Phillips
Mr. David J. Weaver

Enclosure

No mandate to issue

Nos. 11-1984/2279

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 23, 2012
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA; STATE OF)
MICHIGAN,)
)
Plaintiffs - Appellees,)
)
v.)
)
BLUE CROSS BLUE SHIELD OF MICHIGAN,)
)
Defendant - Appellant.)

O R D E R

Before: BOGGS, GILMAN, and GRIFFIN, Circuit Judges.

The United States and the State of Michigan brought this civil antitrust action against Blue Cross Blue Shield of Michigan (“Blue Cross”) seeking to enjoin Blue Cross from the use of most-favored-nation clauses in its contracts with Michigan hospitals. Blue Cross appeals the denial of its motion to dismiss the action.* The government moves to dismiss for lack of a final appealable order. Blue Cross responds that the denial of its claim of state-action immunity from antitrust liability should be immediately appealable as a collateral order. The government replies in support of its motion to dismiss.

Under 28 U.S.C. § 1291, this court has jurisdiction in appeals from “all final decisions” of the district courts. “Denials of summary judgment usually may not be appealed immediately because they are not ‘final decisions of the district courts.’” *Huron Valley Hosp., Inc. v. City of Pontiac*, 792

*The first appeal, No. 11-1984, was filed after the district court announced its decision to deny the motion. The second appeal, No. 11-2279, was filed as a cautionary measure after the district court issued its written opinion. We conclude that both appeals must be dismissed.

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F.2d 563, 566 (6th Cir. 1986). But under the collateral order doctrine, a “‘small class’ of prejudgment orders may be appealed immediately.” *Id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). The “three conditions” for a collateral order are that the order “conclusively determin[e] the disputed question,” resolves an “important issue completely separate from the merits” of the case, and is “effectively unreviewable on appeal from a final judgment.” *Will v. Hallock*, 546 U.S. 345, 349 (2006) (citations omitted).

In *Huron Valley*, we held that “a denial by the district court of th[e state action] defense does not satisfy the three requirements necessary for an appeal under the collateral order doctrine.” 792 F.2d at 567. We must apply *Huron Valley* and dismiss this appeal for lack of an appealable order. “A published prior panel decision ‘remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.’” *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (quoting *Salmi v. Sec’y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir.1985)); *see also* 6th Cir. R. 206(c) (“Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.”)

Therefore, the motion to dismiss is **GRANTED**, and these appeals are dismissed for lack of a final appealable order.

ENTERED BY ORDER OF THE COURT



Clerk