

U.S. Supreme Court Ruling Helps Companies Defend Against Class Actions

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In a unanimous vote, the U.S. Supreme Court on June 12 soundly rejected the Ninth Circuit's tolerance of a civil litigation tactic involving procedures for class certification. The case is *Microsoft v. Baker*.

Traditionally, with limited exceptions, federal courts of appeal have not been able to review district court rulings until the district court issues a final decision. After a district court refuses to certify a class, the court must still resolve the individual plaintiffs' claims, so the decision denying certification does not produce a final order suitable for immediate review on appeal.

Over the past 30 years, plaintiffs have employed a convoluted strategy for appealing such denials: they voluntarily agree to dismiss their claims, which yields a final order that then can be appealed. If the court of appeals reverses the district court and holds that class-action adjudication is proper, the strategy goes, plaintiffs can revive their claims. This strategy yielded mixed results in federal circuit courts.

The Supreme Court in *Microsoft v. Baker* concluded that “plaintiffs in putative class actions cannot transform a tentative interlocutory order ... into a final judgment ... simply by dismissing their claims with prejudice – subject, no less, to the right to 'revive' those claims if the denial of class certification is reversed on appeal.”

Thanks to this decision, companies have a new procedural tool for defending against class-action litigation.

Background of *Microsoft v. Baker*

In a prior lawsuit, plaintiffs brought a class action against Microsoft Corporation alleging that game discs used in a relatively small number of Xbox 360 consoles had become irreparably scratched during regular game play.

In 2007, the district court denied class certification, the Ninth Circuit rejected an appeal under Federal Rule of Civil Procedure 23(f) (which is not an appeal as of right, but may be allowed in the discretion of the court of appeals), and the individual cases were resolved.

In 2011, the same lawyers filed a new lawsuit in the same court, on behalf of a different group of plaintiffs, arguing that intervening case law in the Ninth Circuit could lead to a different result on class certification. Microsoft successfully moved to strike the class allegations, and the Ninth Circuit

again denied plaintiffs' Rule 23(f) petition.

Once again, the plaintiffs had sought interlocutory review of the class certification order and, once again, the Ninth Circuit had declined to accept the permissive appeal. This time, however, rather than settling the individual claims, the plaintiffs filed a notice of dismissal with prejudice and then filed a notice of appeal from the now-final judgment.

Approving this tactic, the Ninth Circuit reversed the district court's decision and remanded the case for further consideration of the parties' class certification arguments. Microsoft appealed.

In early 2016, the U.S. Supreme Court granted *certiorari*. After the passing of Justice Scalia, it deferred oral arguments until the current term.

Issues involved in *Microsoft v. Baker*

Nearly 40 years ago, the U.S. Supreme Court held in *Coopers & Lybrand v. Livesay* that orders granting or denying class certification are not “final decisions” within the meaning of 28 U.S.C. § 1291, the statute that gives the federal courts of appeals jurisdiction over “appeals from all final decisions of the district courts.”

In 1998, Rule 23 was amended to add Rule 23(f), which authorized courts of appeals to allow permissive immediate appeals of orders granting or denying class certification. The courts of appeals have sole discretion over whether to hear such appeals. Different circuits exercise this discretion differently. There is no interlocutory appeal as of right from orders on class certification.

The question in this case was whether a federal court of appeals has jurisdiction under section 1291 to review an order denying class certification after the named plaintiffs have voluntarily dismissed their individual claims with prejudice. An affirmative answer would have effectively created a *right* to appeal an interlocutory order denying certification.

The Supreme Court said no, identifying four bases for its decision:

- Section 1291 empowers federal appellate courts to review only “final decisions,” which preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice.
- Respondents' voluntary-dismissal tactic serves only to exacerbate the problems that Section 1291 addresses, because it invites protracted litigation and piecemeal appeals.
- Respondents' theory would allow indiscriminate appeals of interlocutory orders, which would undercut the discretion that Rule 23(f) vests in the courts of appeals.
- Respondents' voluntary-dismissal device is one-sided because it works to permit immediate appeals from only denials of class

certification.

Although the decision arose in the context of class certification, much of its analysis could be applied to other circumstances in which a party voluntarily dismisses a claim in order to obtain immediate review of what would otherwise be an interlocutory order.

For more information about the impact of this recent U.S. Supreme Court decision on your business and its operations, please contact Christina Gomez, Marcy Glenn, or Stephen Masciocchi.

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