

Game Over: Supreme Court Delivers Win for Class Action Defendants in *Microsoft*

IN SHORT

The Decision: The United States Supreme Court held that class action plaintiffs cannot obtain an immediate appeal as of right from the denial of class certification by voluntarily dismissing their individual claims.

The Reasoning: The "dismissal device" undermines the final-judgment rule, undermines the discretion given to the courts of appeals by Rule 23(f), and violates principles of fairness because it is available only to class action plaintiffs.

The Implications: Class action plaintiffs cannot use this "dismissal device" to obtain early review "as of right" of the denial of class certification. Given the Court's recognition of the heavy burdens class certification can impose on defendants, the decision may also help class action defendants obtain discretionary appellate review under Rule 23(f). The Court's decision provides courts with a reminder to treat class action defendants evenhandedly.

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In a victory for class action defendants, the United States Supreme Court's decision in *Microsoft Corp. v. Baker*, ___ U.S. ___, No. 15-457, slip op. at 8 (June 12, 2017), puts an end to plaintiffs' manufactured appeals as of right from denials of class certification. The Court's holding reaffirms that class certification decisions are interlocutory and subject to immediate appeal only within the discretion of the courts of appeals under Rule 23(f).

The Background

In 2011, a group of console owners brought a putative nationwide class action against Microsoft Corporation, claiming its popular Xbox 360 console was defectively designed. The district court struck the class allegations, the "functional equivalent to an order denying class certification." The order was not immediately appealable as of right under 28 U.S.C. § 1291 because it was not a final judgment.

Federal Rule of Civil Procedure 23(f) grants an immediate appeal of the grant or denial of class certification, but that appeal lies solely within the discretion of the court of appeals. The *Microsoft* plaintiffs petitioned the Ninth Circuit for discretionary review under Rule 23(f). The Ninth Circuit denied that petition.

In an effort to obtain immediate appellate review, the plaintiffs stipulated to voluntarily dismiss their individual claims, then appealed to the Ninth Circuit. The Ninth Circuit rejected Microsoft's argument that the plaintiffs had "no right to appeal" and were "impermissibly circumvent[ing] Rule 23(f)" and held the voluntary dismissal made the case appealable under § 1291 as a final judgment. The Ninth Circuit also reversed the District Court's order striking the plaintiffs' class allegations.

The Issue

The U.S. Supreme Court granted review to "resolve a Circuit conflict" as to whether "federal courts of appeals have jurisdiction under § 1291 and Article III of the Constitution to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice."

The Outcome

In an opinion by Justice Ginsburg, a five-Justice majority held that the plaintiffs' dismissal of their individual claims did not convert the interlocutory order striking their class allegations into a final, appealable order under § 1291. Three Justices concurred in the judgment, and Justice Gorsuch did not participate. The majority's opinion rested on three considerations.

First, the plaintiffs' "dismissal device subverts the final-judgment rule" by creating the opportunity for repeated, piecemeal appeals. The final-judgment rule funnels all issues into a single appeal at the end of the case, whereas the "dismissal device" in *Microsoft* gives a plaintiff the opportunity to file repeated appeals.

Second, the plaintiffs' dismissal device both "disturb[s] the appropriate relationship between respective courts" and "undercuts Rule 23(f)'s discretionary regime." Rule 23(f) sets out the proper balance for determining whether to allow an interlocutory appeal of a class certification decision and leaves that decision to the discretion of the court of appeals. That discretion "would be severely undermined" by allowing the plaintiffs to bypass that process entirely, as they did here.

Finally, it was fundamentally unfair that the dismissal device would be available only to plaintiffs, not defendants. That "one-sidedness" "reinforce[d]" the Court's conclusion that the voluntary dismissal here "does not support appellate jurisdiction of prejudgment orders denying class certification."

Justice Thomas, joined by Chief Justice Roberts and Justice Alito, concurred in the judgment, agreeing that jurisdiction was lacking, but on constitutional grounds: there was no Article III case-or-controversy after the plaintiffs voluntarily dismissed their claims. A class action claim is merely "a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class," not a separate, independent claim.

Lessons from *Microsoft*

- *Microsoft*—the U.S. Supreme Court's first decision substantively interpreting Rule 23(f)—confirms that class certification rules cannot unevenly favor plaintiffs. This decision provides class action defendants with an additional argument under Rule 23(f) for interlocutory appeal of a grant of class certification.
- *Microsoft* reaffirms that Rule 23(f) is the appropriate mechanism for plaintiffs to seek an immediate appeal in this situation, leaving the decision as to appealability within the sole discretion of the courts of appeals.
- The concurrence provides a reminder that class action claims should not be divorced from named plaintiffs' individual claims. Named plaintiffs' individual claims are the foundation for satisfying the Article III case-or-controversy requirement, without which there should be no class claims.
- Class action parties should continue to monitor relevant pending legislation. The Fairness in Class Action Litigation Act of 2017 (H.R. 985) passed the House of Representatives in March 2017 with a provision that allows appeal as of right by both plaintiffs and defendants from the grant or denial of class certification. Passage of that legislation would moot the specific holding in *Microsoft* but would further reinforce principles of equal treatment for plaintiffs and defendants in class actions.



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THREE KEY TAKEAWAYS

1. Class action plaintiffs cannot manufacture immediate appellate review of the denial of class certification by voluntarily dismissing their individual claims.
2. Any immediate appeal from the denial or grant of class certification should be sought under Rule 23(f) and is within the discretion of the courts of appeals.
3. Courts are reminded to treat class action plaintiffs and defendants evenhandedly, given the heavy burdens that class certification places on class action defendants.

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