

Blog Entry: Supreme Court Swats Down the “Voluntary-Dismissal Tactic”

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Let's say you're a plaintiff in a federal action and you're seeking class certification. The district court denies your motion. You then seek the court of appeals' permission to appeal that interlocutory order under Rule 23(f) of the Federal Rules of Civil Procedure, but that court says no. What to do?

One option would be to pursue your individual claims to final judgment and then appeal the denial of your class certification motion - even if you were to win on your individual claims. But pursuing that might not be terribly efficient, given the time and expense involved. So you might consider Plan B: move the district court to dismiss your case *with prejudice* but reserve in your motion the right to revive your claims in the event the court of appeals reverses the denial of the class certification order.

That's basically what happened in *Microsoft Corp. v. Baker*, a decision handed down by the United States Supreme Court on June 12, 2017. At issue was whether Xbox 360 game consoles were defectively designed. The district court denied class certification, the court of appeals denied plaintiff's petition for permission to appeal, and plaintiffs then moved the district court to dismiss his case with prejudice while reserving the right to revive their claims should the court of appeals reverse on class certification. Why did plaintiffs dismiss *with prejudice*? Because, they figured, an order granting that motion would be an adjudication on the merits and would therefore be appealable as of right.

Microsoft stipulated to plaintiffs' motion to dismiss with prejudice, but with one important qualification: it did not agree that plaintiffs could revive their claims post-dismissal.

The district court granted the joint dismissal motion and plaintiff then appealed the class certification denial order. The Ninth Circuit Court of Appeals assumed jurisdiction under 28 U.S.C. 1291: "The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States...". Upon doing so, it "rejected Microsoft's argument that [plaintiffs'] voluntary dismissal, explicitly engineered to appeal the District Court's interlocutory order striking the class allegations, impermissibly circumvented Rule 23(f)." Instead, it reasoned that "[b]ecause the stipulated dismissal did not involve a settlement ... it was a sufficiently adverse - and thus appealable - final decision." (Quotes are from SCOTUS.)

The Ninth Circuit went on to rule that the district court abused its discretion by denying plaintiffs' class certification motion, and remanded for further proceedings on that issue.

Microsoft sought review in the Supreme Court, which granted certiorari and reversed.

The issue? “Do 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 holding? “§1291 does not countenance jurisdiction by these means.”

Why? “Because [plaintiffs’] dismissal device subverts the final-judgment rule and the process Congress has established for refining that rule and for determining when nonfinal orders may be immediately appealed, the tactic does not give rise to a final decision under §1291.” The Court, in short, did not look kindly upon plaintiffs’ maneuver of orchestrating the dismissal of their own case for the sole purpose of obtaining what they could not obtain when they petitioned for permission to pursue an interlocutory appeal under Rule 23(f). “Plaintiffs in putative class actions,” it stated, “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. ... Were [plaintiffs’] reasoning embraced by this Court, Congress’ final decision rule would end up a pretty puny one.”

In other words, don’t be cute.

The case is *Microsoft Corp. v. Baker*, 582 U.S. ____ (2017), and the decision can be found at <https://goo.gl/2qjsVA>.