

# Supreme Court: Plaintiffs May Not Voluntarily Dismiss Case to Appeal Class Certification Decision

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Plaintiffs may not voluntarily dismiss their class action claims upon receiving an adverse class certification decision and subsequently invoke 28 U.S.C. § 1291, the general rule that appeals can be taken only from a final judgment, to appeal the decision as a matter of right, the U.S. Supreme Court has ruled. *Microsoft Corporation v. Baker*, No. 15-457 (June 12, 2017).

## Background

In this case, the plaintiffs were denied Rule 23(f) permission to appeal the district court's refusal to grant class certification. Rather than pursuing their individual claims to final judgment on the merits, the plaintiffs stipulated to a voluntary dismissal of their claims "with prejudice," but reserved the right to revive their claims if the Court of Appeals reversed the district court's certification denial. Microsoft stipulated to the dismissal, but maintained that respondents would have "no right to appeal" the order striking the class allegations after thus dismissing their claims. The U.S. Court of Appeals for the Ninth Circuit, in San Francisco, relying on *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), accepted the plaintiffs' appeal and reversed the district court's decision rejecting class-based adjudication. The Ninth Circuit stated that "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal" of a class certification denial. Therefore, the Ninth Circuit, after reviewing the district court's decision, ultimately held that the lower court had abused its discretion in striking the plaintiffs' class allegations. (For a full summary of the procedural history or an analysis of the Supreme Court oral argument, please see our article, [Supreme Court Hears Argument on Appellate Jurisdiction after Denial of Class Certification](#).)

## Question is Jurisdiction

The Supreme Court agreed to review the case to resolve a circuit conflict over the following question: 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

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plaintiffs have voluntarily dismissed their claims with prejudice?

## Going Too Far

Justice Ruth Bader Ginsburg, writing for a court majority (that included Justices Anthony Kennedy, Stephen Breyer, Sonia Sotomayor, and Elena Kagan), stated that the plaintiffs' voluntary-dismissal tactic "invites protracted litigation and piecemeal appeals." Stressing that the final judgment rule (now codified in § 1291) preserves the proper balance between trial and appellate courts, minimizes harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice, the majority found the plaintiffs' attempt to secure appeals as of right from adverse class-certification orders stretched § 1291 too far.

The Court concluded that because the device subverted 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 majority of the Court found the plaintiffs' tactic did not give rise to a "final decision" under § 1291.

While the plaintiffs maintained that their position promoted efficiency (because after dismissal with prejudice, the case is over if the plaintiff loses on appeal) the Court disagreed. It found the plaintiffs overlooked the prospect that plaintiffs with weak merits claims will readily assume the risk in order to leverage class certification for a hefty settlement.

Additionally, the majority was concerned that if plaintiffs' voluntary dismissal tactic was allowed, Rule 23(f)'s careful calibration — as well as Congress' intent behind the rule — would be "severely undermined." Further, the plaintiffs' theory would permit only plaintiffs, and never defendants, to force an immediate appeal of an adverse certification ruling.

Accordingly, the majority did not find it appropriate to disturb the rulemaking process carefully selected by Congress to govern in this context. The judgment of the Ninth Circuit was therefore reversed, and the case remanded for further proceedings consistent with the Court's opinion.

## Concurrence

The concurrence, led by Justice Clarence Thomas (joined by Chief Justice John Roberts and Justice Samuel Alito) agreed with the majority that the Court of Appeals lacked jurisdiction over the plaintiffs' appeal, but would have grounded that conclusion in Article III of the Constitution, instead of 28 U.S.C. § 1291.

Justice Thomas reiterated that the judicial power of the United States extends only to "cases" and "controversies," which limits the jurisdiction of the federal courts to issues in which the parties maintain an "actual" and "concrete" interest. Here, he stated, the plaintiffs' appeal from their voluntary dismissal did not satisfy this jurisdictional requirement. Once the plaintiffs asked the district court to dismiss their claims, they consented to the judgment against them and disavowed any right to relief from Microsoft. The parties, thus, were no longer adverse to each other on any claims and the Court of Appeals could not "affect the[ir] rights" in any legally cognizable manner.

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While this decision is not surprising, a different outcome would have had severe consequences for companies defending against class actions. Microsoft issued a statement praising the decision, commenting, "This case was about following procedural rules that Congress established and that

work for everyone. No party should be able to do an end-run around these rules and have rights that the other party doesn't get. We're grateful to the Supreme Court for its time and consideration of this issue."

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National Law Review, Volumess VII, Number 164

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