

# Supreme Court Dismissal Tactic to Appeal Class Certification Denial Is Invalid: *Microsoft v. Baker*

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In a much-anticipated decision, the **US Supreme Court** held in an 8-0 vote that plaintiffs cannot confer upon themselves a right to appeal class action denials simply by dismissing actions following the denial of class certification.

Instead, when class certification is denied?or a motion to strike class allegations is granted?plaintiffs are limited to seeking permission of the applicable US Court of Appeals, under Federal Rule of Civil Procedure 23(f), to appeal the adverse class ruling if plaintiffs want to seek appellate review before final judgment is entered. If no such permission is granted, plaintiffs have three options—(1) settle claims on an individual basis; (2) petition the relevant district court to certify the interlocutory class certification denial for appeal; or (3) proceed to litigate the case, mindful that the district court could later reverse course and certify a proposed class or, if the district court’s course remained constant, appeal the denial of class certification after a final judgment on the merits.

In the words of the Supreme Court, this framework “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.”

The Court’s decision in this matter is critically important because it places plaintiffs and defendants on an even playing field when it comes to appeal of class certification decisions.

## Background

The plaintiffs in ***Microsoft v. Baker*** were owners of an Xbox360—a home video game console developed by Microsoft—and filed a putative class action alleging that it had a design defect. The US District Court for the Western District of Washington granted Microsoft’s motion to strike plaintiffs’ class allegations from the complaint. In response, plaintiffs sought permission from the US Court of Appeals for the Ninth Circuit to appeal that order under Rule 23(f). When the Ninth Circuit denied the request, plaintiffs voluntarily dismissed their claims with prejudice, claiming that this voluntary dismissal gave them an immediate appellate right. The Ninth Circuit held that it had jurisdiction to entertain the appeal under 28 U.S.C. § 1291, which empowers federal courts of appeals to review

final decisions of the district courts. The Ninth Circuit ruled that the Western District of Washington's rationale for striking plaintiffs' class allegations was an impermissible one, and remanded the matter back to the lower court to determine whether class certification was appropriate.

Microsoft appealed to the US Supreme Court, arguing that plaintiffs' dismissal tactic impermissibly circumvented Rule 23(f).

## The Supreme Court Decision

The Supreme Court reversed and remanded. Justice Ruth Bader Ginsburg delivered the opinion of the Court and was joined by Justices Anthony Kennedy, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Justice Clarence Thomas wrote a concurring opinion and was joined by Chief Justice John Roberts and Justice Samuel Alito. Justice Neil Gorsuch took no part in the consideration or decision of the case.

Ruling in Microsoft's favor, the Court reasoned that the US Congress chose the rulemaking process to settle the issue of how and when a class certification decision could be appealed, and the rule makers did so by adopting Rule 23(f)'s "evenhanded prescription." The Court reasoned that "[i]t is not the prerogative of litigants or federal courts to disturb that settlement."

The Court noted that the one-sided nature of plaintiffs' tactic weighed in favor of rejecting it. It only would permit plaintiffs—never defendants—to force an immediate appeal of an adverse certification ruling. Yet, according to the Court's reasoning, the class issue may be just as important to defendants because an order granting certification may force a defendant to settle notwithstanding a meritorious defense rather than run the risk of potentially ruinous, class-wide liability.

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