

# Game Over: Supreme Court Denies Plaintiff's Class Certification Appeal after Voluntary Dismissal in Xbox 360 Lawsuit

Article By:

Lawrence I Weinstein

Jeffrey H Warshafsky

Russell Kostelak

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Recently, the Supreme Court in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), held that the plaintiff in a putative class action involving Xbox 360 game consoles could not appeal from the District Court's denial of class certification after plaintiff voluntarily dismissed his claims with prejudice. While 28 U.S.C. § 1291 allows appeals from final decisions as a matter of right, the Supreme Court held that plaintiff's voluntary dismissal did not qualify as an appealable final decision. The Court determined that allowing such an appeal would undermine § 1291's finality principle and subvert the discretionary nature of interlocutory class certification appeals under Rule 23(f). Gamers, in other words, could not be allowed to hack § 1291 in this way.

The underlying lawsuit began in 2011 when plaintiff Seth Baker filed a putative class action lawsuit in the Western District of Washington, alleging that Microsoft's Xbox 360 gaming console scratched and destroyed his game discs during game play. The District Court denied the class certification and struck plaintiff's class allegations. Generally, the denial of class certification is not a final decision that triggers the right to appeal under § 1291. Plaintiff therefore filed an interlocutory appeal from the denial of class certification under Fed. R. Civ. P. 23(f), which allows for discretionary interlocutory appeals. The Ninth Circuit, however, denied plaintiff's petition. At this point, instead of proceeding with the litigation or settling his individual claims, the plaintiff chose to voluntarily dismiss his case with prejudice in an attempt to finagle a "final decision" and the right to immediately appeal to the Ninth Circuit under § 1291. On appeal, the Ninth Circuit determined that the voluntary dismissal constituted a final decision under § 1291, and held that the district court abused its discretion in striking the plaintiff's class allegations.

The Supreme Court granted certiorari and addressed the following question: Do federal courts of appeals have jurisdiction under § 1291 to review a district court order striking or denying class certification after the named plaintiffs voluntarily dismissed their claims with prejudice? The Court, in an 8-0 opinion authored by Justice Ginsburg, answered in the negative: the plaintiff's voluntary dismissal did not constitute a final decision that gave him the right to appeal under § 1291.

First, the Court noted that the plaintiff's voluntary dismissal tactic would invite protracted litigation and piecemeal appeals. The Court envisioned a scenario in which the District Court denies class certification on certain grounds, the plaintiff appeals this issue and the Court of Appeals reverses and remands to the District Court. On remand, if the District Court denies class certification on different grounds, the plaintiff could again seek to voluntarily dismiss the case and receive another appeal as of right. Because the plaintiff could exercise this voluntary dismissal tactic for each class certification denial, the tactic would lend itself to multiple interlocutory appeals, in contravention of § 1291's attempt to minimize such appeals by permitting them as of right only for final judgments.

Second, the Court explained that the plaintiff's tactic would allow for indiscriminate appellate review of interlocutory orders, thereby undercutting the discretionary scheme of Rule 23(f). Rule 23(f) authorizes permissive interlocutory appeals from adverse class certification orders at the discretion of the Court of Appeals. By allowing plaintiff an appeal as of right under § 1291 through his voluntary dismissal, the Ninth Circuit would have no discretion to deny the appeal once jurisdiction was established. This would undercut the circuit court's discretion over class certification appeals under Rule 23(f), the Supreme Court noted.

Third, the Court took issue with the one-sided nature of the plaintiff's right to appeal if a voluntary dismissal were considered a final decision under § 1291. Because only a plaintiff can initiate a voluntary dismissal, it follows that only a plaintiff could force an immediate appeal. The inability of defendants to initiate a voluntary dismissal and force a right to appeal in this way provided further justification for denying appellate jurisdiction after the plaintiff's voluntary dismissal.

In short, the Court found that the plaintiff's voluntary dismissal maneuver contravened the "final decision" requirement of § 1291. If the Court allowed plaintiff to game the system by appealing after voluntary dismissal, it would turn Congress' final decision rule into a "pretty puny one." With this ruling, the Court shut down a potential plaintiff-only appellate 'cheat code' to 'skip a level' and get automatic appellate review of adverse class certification rulings.

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National Law Review, Volume VII, Number 187

Source URL: <https://natlawreview.com/article/game-over-supreme-court-denies-plaintiff-s-class-certification-appeal-after>