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# Microsoft V. Baker Slams The Back Door On Rule 23(f)

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*Law360, New York (June 29, 2017, 11:41 AM EDT)* -- On June 12, 2017, the U.S. Supreme Court issued its decision in Microsoft Corp. v. Baker et al., a closely watched case in the class action world.

Baker presented the following question: Can a plaintiff who is denied class-action certification and denied Rule 23(f) permission to appeal create an appealable "final judgment" by voluntarily dismissing his or her claims with prejudice? The Supreme Court's answer is a resounding "no."

The court's decision will impact a number of class certification denials currently pending in the Ninth Circuit, which plaintiffs appealed based on similar Baker dismissals. The decision also shuts the door to plaintiffs attempting an end-run around Rule 23(f)'s permissive appeal standard.

We describe the background, decision and implications of Baker in more depth below.

**Baker Background**

The fact pattern in Baker mirrors that of other class certification decisions on appeal. The plaintiffs sued Microsoft on behalf of themselves and a putative class of similarly situated consumers after they purchased allegedly defective X-Box consoles.

The district court struck the plaintiffs' class allegations, effectively denying class certification. The Court of Appeals denied the plaintiffs permission to appeal under Rule 23(f). Rather than pursue their individual claims, the plaintiffs voluntarily dismissed the action, but reserved the right to revive their claims if the district court's class certification decision was reversed.

The plaintiffs appealed, the Ninth Circuit reversed the district court's decision, and Microsoft appealed to the Supreme Court.

**Majority and Concurring Opinions — Same Answer, Different Reasoning**

The Supreme Court unanimously rejected the plaintiffs' voluntary-dismissal tactic, but offered different explanations for why it was impermissible.

The majority opinion, authored by Justice Ginsberg and joined by Justices Kagan, Kennedy, Sotomayor and Breyer, concluded that the plaintiffs' voluntary dismissal does not constitute a "final judgment" under 28 U.S.C. § 1291. The concurring opinion, issued by Justice Thomas and joined by Justice Alito and Chief Justice Roberts,[1] however, found the tactic impermissible under Article III.

***Majority — No "Final Judgment"***

The majority's decision that the plaintiffs' voluntary dismissal is not a "final judgment" required for immediate appeal under § 1291 was based on two guiding principles.

First, in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), the Supreme Court held that the "death knell doctrine" — i.e., that a refusal to certify could effectively end a putative class action where the cost of litigating substantially outweighed the value of the plaintiff's individual claim — did not warrant mandatory appellate jurisdiction of an interlocutory class certification order.

The court's decision in Cooper was grounded in a number of factors: (i) the possibility for multiple appeals of class certification decisions based on different reasoning; (ii) the fact that appellate courts would be forced into the trial process; and (iii) the one-sidedness of the doctrine, which operated only in favor of plaintiffs despite the importance of class certification for defendants.

The availability of interlocutory review under § 1292(b) — which requires district court certification of "controlling questions of law" — would provide sufficient review of class certification order, the Coopers court held.

The plaintiffs' voluntary-dismissal tactic, the majority in Baker held, was even more likely to invite protracted litigation and piecemeal appeals than the death-knell theory in Coopers, as courts under the death-knell doctrine could decline to hear a case if they believed the cost-benefit analysis did not apply.

Appeals courts facing voluntary dismissals similar to the plaintiffs' do not even have such a control here, the majority held. The reasoning in Cooper, the majority concluded, accordingly applies with even stronger force here.

Second, the majority looked to the purpose of Rule 23(f) for guidance. That rule allows the court of appeal to grant permission to appeal an order granting or denying class certification.

In creating the rule, the drafters struck a balance between the competing concerns in Coopers, providing class certification litigants with an alternative mechanism to appeal that did not require district court certification while simultaneously allowing appeals courts to control the process to prevent abusive litigation tactics.

The majority held that the plaintiffs' voluntary dismissal "undercuts Rule 23(f)'s discretionary regime." They rejected plaintiffs' argument that Rule 23(f) is irrelevant because the plaintiffs appealed a "final judgment."

"Plaintiffs in putative class actions cannot transform an interlocutory order ... into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice," the court held. A decision to the contrary would undermine the purpose and process of Rule 23(f).

***Concurring Opinion — No Article III Jurisdiction***

The concurring opinion took a different approach, rejecting the majority's reading of "finality" under § 1291, and instead finding that the plaintiffs' appeal faltered under Article III of the Constitution.

When plaintiffs voluntarily dismissed their claims, they consented to judgment against them by the court, the concurrence reasoned. After that, the parties were no longer adverse, and there was no longer a "case or controversy" as required for Article III jurisdiction.

The concurrence rejected the plaintiffs' argument that the possibility of pursuing a class action constitutes a "controversy," as class claims require viable individual claims, which the plaintiffs had relinquished. Without an Article III "case or controversy," the Ninth Circuit lacked jurisdiction to hear plaintiffs' appeal.

**Takeaway**

Baker will have an immediate impact on a number of cases pending appeal, particularly in the food misbranding arena, where parties appealed based on stipulated dismissals to get clarity from the Ninth Circuit on applicable class certification standards.

Baker also removes a powerful weapon in plaintiffs counsel's arsenal — they will no longer be able to force piecemeal litigation through long delays from class certification to appeal. Overall, Baker is a win for companies facing class certification claims.

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[1] Justice Gorsuch did not take part in the consideration or decision of the case.

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