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NEWSLETTERS

No Points For Creativity: High Court Blocks Plaintiffs' Attempt To Finagle Appealable 'Final Decision'

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The U.S. Supreme Court recently held in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017) that putative class-action plaintiffs could not immediately appeal the denial of class certification despite their attempt to manufacture a "final decision" by dismissing their claims with prejudice. Going forward, this means that plaintiffs facing class-certification denials are stuck with less inventive, less effective options. They can ask for discretionary interlocutory review, proceed to trial individually, or—if that's not worth it—settle or drop the case entirely.

In *Baker*, a group of plaintiffs filed a class action, but suffered early defeats as the district court struck their class allegations (effectively denying certification) and the U.S. Court of Appeals for the Ninth Circuit declined their request for discretionary interlocutory review. At that point, plaintiffs could have braved trial individually, settled, or given up. But instead they went all in on a procedural gambit: they voluntarily dismissed their claims with prejudice, then appealed arguing that the dismissal was an immediately appealable "final decision" under 28 U.S.C. § 1291. The Ninth Circuit agreed, but – in a decision that split only on reasoning – the U.S. Supreme Court reversed.

Justice Ginsburg's majority concluded that plaintiffs' dismissal was not an appealable "final decision" under § 1291 for at least four reasons. First, long-standing precedent holds that a class-certification denial is not a final decision and there's no need for a procedural loophole. Second, plaintiffs facing certification denial already have remedies, including seeking discretionary interlocutory review under § 1292(b) or Federal Rule of Civil Procedure 23(f). Third, allowing plaintiffs to skip those discretionary routes and to create their own automatic appeal would clog appellate dockets. And last, the majority opinion reasoned that the practice would be unfair because only plaintiffs (not defendants) can unilaterally dismiss their claims and thus only plaintiffs (not defendants) could unilaterally appeal adverse class-certification decisions. In sum, the majority rejected plaintiffs' ploy as an end run around § 1291.

But Justice Thomas's concurrence rejected the tactic on a different basis – the U.S. Constitution. His logic was straightforward: if plaintiffs voluntarily dismiss their claims with prejudice, then there's no live "case" or "controversy" as required for jurisdiction under the federal Constitution's Article III. In other words, once plaintiffs raise the white flag, the legal fight is over. There's nothing left to resolve.

At bottom, *Baker* means that plaintiffs facing class-certification denial

RELATED PEOPLE

Dylan A. Pittman
Partner
Indianapolis

P 317-261-7841
F 317-231-7433
dylan.pittman@btlaw.com

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have no silver procedural bullet. They cannot manufacture a final decision through voluntary dismissal. They must instead make do with the traditional, imperfect options: seeking discretionary interlocutory review, braving trial alone, settling, or surrendering.

Dylan Pittman is an associate in Barnes & Thornburg's Indianapolis office and a member of the Commercial Litigation Practice Group. Dylan concentrates his practice on complex commercial litigation and appeals. Dylan can be reached at (317) 261-7841 or dylan.pittman@btlaw.com.