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Supreme Court to Hear Oral Argument on Plaintiffs' Procedural Gimmick for Appealing Class Certification Denials

(Microsoft Corp. v. Baker)

“The Ninth Circuit’s holding not only deprives appeals courts of their statutory discretion, but it also unfairly favors plaintiffs over defendants, who cannot similarly create an immediate appeal via strategic dismissal.”

—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation will attend tomorrow morning’s 10:00 a.m. oral argument in *Microsoft Corp. v. Baker* at the U.S. Supreme Court. The Court will hear argument on whether it should overturn a decision of the U.S. Court of Appeals for the Ninth Circuit that effectively grants plaintiffs immediate appeal rights to which federal law does not entitle them. WLF’s *amicus* brief on the merits, which was joined by the National Association of Manufacturers, the International Association of Defense Counsel, and the NFIB Small Business Legal Institute, argued that permitting plaintiffs (and *only* plaintiffs) automatic immediate appeals from denials of class certification will encourage multiple, piecemeal appeals from a single lawsuit and will undermine the evenhanded administration of justice. Senior Litigation Counsel Cory Andrews will attend the argument and be available Tuesday to comment on the case and any likely outcome.

The case involves a district court’s interlocutory order striking the plaintiffs’ class allegations from the complaint—an order for which a panel of the Ninth Circuit had already refused interlocutory appeal. Rather than proceed to trial on their individual claims and then contest the denial of class certification in a post-trial appeal, plaintiffs voluntarily dismissed all of their claims with prejudice, then immediately appealed the class-certification denial as part of their appeal from the “final order” dismissing their claims.

As WLF’s brief points out, the plaintiffs’ stipulated dismissal with prejudice rendered the case moot when it destroyed the adversity necessary for a live dispute under Article III of the U.S. Constitution. WLF also demonstrates that the statute governing appeals, 28 U.S.C. § 1291, strictly limits appeals to final decisions, and that a pre-trial order denying class certification does not become “final” simply because plaintiffs strategically elect to dismiss their case with prejudice. Finally, WLF’s brief contends that the Ninth Circuit’s holding subverts Rule 23(f), which permits an appeals court *at its sole discretion* to allow interlocutory appeal (by plaintiffs *or* defendants) from a class-certification order. If this gimmick can force an appeal, the discretionary nature of such appeals will go by the boards.

Celebrating its 40th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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