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WLF Asks *En Banc* Court to Overrule Panel Decision Granting Plaintiffs New Rights to Appeal Class Certification Denials

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—Richard Samp, WLF Chief Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) yesterday evening filed a brief urging the U.S. Court of Appeals for the Ninth Circuit to overturn a panel decision that effectively grants plaintiffs a right to immediately appeal a trial court decision not to certify a case as a class action lawsuit. In a brief filed in support of Microsoft’s petition for an *en banc* rehearing in *Baker v. Microsoft Corp.*, WLF argues that allowing such immediate appeals will encourage multiple, piecemeal appeals from a single lawsuit, and it will undermine the evenhanded administration of justice by granting plaintiffs, and only plaintiffs, an extra bite at the class-certification apple.

A three-judge Ninth Circuit panel ruled in this case that plaintiffs whose motion for class certification the trial court denied (and whose motion for interlocutory appeal the court of appeals denied) may stipulate to dismissal of their case with prejudice, and then immediately appeal the class-certification denial as part of their appeal from the dismissal. WLF argues that the statute governing appeals, 28 U.S.C. § 1291, limits appeals to “final decisions,” and that a pre-trial decision denying class certification is not rendered “final” simply because the plaintiffs have stipulated to dismissal with prejudice.

WLF notes that Congress adopted Rule 23(f) in 1998, which permits an appeals court *at its sole discretion* to allow immediate appeal by either plaintiffs or defendants from a class-certification ruling. WLF argues that the Ninth Circuit’s ruling is inconsistent with Rule 23(f) both because it deprives appeals courts of their discretion not to hear appeals and because it would no longer treat plaintiffs and defendants equally (defendants would not enjoy similar immediate appeal rights).

After filing its brief, WLF issued the following statement by Chief Counsel Richard Samp:

“Inappropriate certification of unwieldy class actions already causes a major headache for the business community. It will become a full-blown migraine if the Ninth Circuit permits plaintiffs to force appeals with strategic dismissals. If an appeals court denies discretionary review of a class-certification decision, plaintiffs who wish to appeal should be required to wait until after the case has been fully tried—just as defendants must—so that all appeal issues can be heard at once.”

WLF is a national public interest law firm and policy center that regularly litigates in support of civil justice reform, to ensure that unwarranted lawsuits do not drive up costs for all consumers.

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