



## News Release

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### **Supreme Court Grants Certiorari in *Microsoft v. Baker***

#### ***DRI November Amicus Brief Sought High Court's Review in Class Certification Case***

**CHICAGO – (January 22, 2016)**—The U.S. Supreme Court has granted certiorari in the case of *Microsoft v. Baker*, a case involving the legitimacy of plaintiff tactics in securing interlocutory review of an adverse class certification decision. DRI-The Voice of the Defense Bar, through its Center for Law and Public Policy, had sought Supreme Court review of the 9<sup>th</sup> Circuit's decision to grant review that that court had previously denied.

In 2007, Xbox 360 console owners filed five actions alleging their Xbox 360 consoles had a propensity to scratch game discs. Plaintiffs sought recovery for breach of warranty, as well as for violation of state consumer protection acts. After sixteen months of discovery, the district court denied class certification. The court found individual issues of causation and damages foreclosed certification, particularly given that fewer than 0.4% of Xbox 360 owners even reported disc scratching. The Ninth Circuit denied a petition for review, the parties settled on an individual basis, and the case was dismissed.

In 2011, however, the same lawyers as in the original lawsuit filed a new action on behalf of different plaintiffs, making the exact same allegations -- but claiming the law on class certification had changed, now permitting class certification. The district court granted Microsoft's motion to strike the class allegations, finding the reasoning in the initial class certification denial persuasive and holding that nothing in recent case law undermined the earlier court's causation analysis. The Ninth Circuit again denied plaintiffs' petition seeking review.

But rather than prosecute their individual claims to final judgment in the district court, the plaintiffs responded by voluntarily dismissing with prejudice and filing a notice of appeal from the dismissal. The Ninth Circuit, in the reported decision identified above, found it had jurisdiction over the appeal from the voluntary dismissal under its recent decision in *Berger v. Home Depot USA, Inc.* It then addressed the merits of the order striking the class allegations and reversed, holding that Rule 23 allows classes to be certified on warranty claims when plaintiffs characterize their claims as turning on common factual questions about the

alleged existence of a defect.

This recent decision gives plaintiffs a troubling new path to immediate review of class certification denials. If this tactic gains currency, plaintiffs (but not defendants) will have the right to an immediate appeal from any adverse class certification ruling. But five circuits have rejected this tactic. Most recently, in *Camesi v. University of Pittsburgh Medical Center*, the Third Circuit termed it “procedural sleight of hand to bring about finality,” instead of taking their individual cases to trial, and held “voluntary dismissals ... constitute impermissible attempts to manufacture finality[.]”

The maneuver also contravenes a unanimous Supreme Court decision limiting review of class decisions.

DRI’s brief takes the position that the Ninth Circuit’s approach allowed plaintiffs who were previously unsuccessful in obtaining interlocutory appellate review of class certification denial under Federal Rule of Civil Procedure 23(f) to obtain a second chance at an interlocutory appeal of the certification order simply by voluntarily dismissing their case with prejudice under Rule 41(a). The position taken by the DRI is that such a tactic robs the appellate courts of their discretion to determine what class certification decisions warrant interlocutory appellate review and creates a one-way street for opportunistic plaintiffs looking to force defendants into high-dollar settlement through multiple appeals despite the existence of a meritorious defense.

Brief co-authors Hilary Ballentine and Mary Massaron of Plunkett Cooney (Bloomfield Hills, MI) are available for interview or expert comment through DRI’s Communications Office.

For the full text of the Supreme Court’s opinion, click [here](#).

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### **About DRI – *The Voice of the Defense Bar***

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