

# Class Actions Alert

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## It Settled—Now What? Ninth Circuit Limits Settling Plaintiffs’ Ability to Appeal Orders Denying Class Certification

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### Key Points

- The 9th Circuit has held that settlement of a plaintiff’s individual claims moots the appeal of an order denying class certification, unless the settlement agreement specifically preserves the plaintiff’s personal stake in the outcome on appeal.
- The decision makes it clear that if plaintiffs wish to appeal the denial of class certification after settling their individual claims, they must retain a concrete, financial stake in the outcome of the putative class claims.
- The decision underscores the importance to defendants of challenging a named plaintiff’s individual claims throughout the case, including through trial, rather than settling on terms that authorize the plaintiff to appeal the denial of class certification.

A key inflection point in class actions arises after the trial court has denied class certification, but not yet addressed the plaintiff’s individual claims on the merits. While a plaintiff may wish to immediately appeal an order denying class certification, such orders are interlocutory and, absent a successful petition under Fed. R. Civ. P. 23(f), can only be appealed after entry of final judgment—and thus after trial or settlement of the plaintiff’s individual claims. Rather than face the risks of trial, most would-be class representatives elect to settle individual claims and then appeal the denial of certification. In *Brady v. AutoZone Stores, Inc.*, No. 19-35122, 2020 WL 2893709 (9th Cir. June 3, 2020), the 9th Circuit limited the ability of such plaintiffs to do this without running afoul of Article III.

### The Underlying Suit and Settlement Agreement

In 2013, plaintiff Michael Brady filed a putative class action in federal court for alleged violation of Washington’s meal break laws. After the district court twice rejected Brady’s attempts to certify a class, he entered into a settlement agreement that resolved his individual claims along with his “claims to costs or attorneys’ fees.” *Id.* Although the settlement agreement expressly did not extend to Brady’s class claims (i.e., “was not intended to settle or resolve Brady’s Class Claims”), it otherwise

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provided Brady no entitlement to any financial reward if the class claims ultimately succeeded. *Id.*

After the parties finalized their settlement agreement, and pursuant to their stipulation, the district court entered final judgment. Brady appealed, seeking review of the orders denying class certification. Because defendants had agreed not to challenge Brady's right to appeal, neither party raised any mootness arguments on appeal.

## The Appeal

At oral argument, however, the 9th Circuit asked whether Brady's personal stake in the resolution of the appeal had been mooted as a result of the settlement of his individual claims. Its recent opinion holds it is mooted.

The court explained that to preserve the viability of putative class claims, the settlement agreement must leave the settling plaintiff with some sort of "concrete" and "financial" interest in those claims. *Id.* at \*2. For example, the settlement agreement may preserve the plaintiff's ability to seek an "award enhancement fee" or attorneys' fees and costs, if a class were ultimately certified after reversal of an order denying certification. *Id.* In these scenarios, "the class representative maintain[s] 'a continued financial interest in the advancement of the class claims' such that the case [is] not moot." *Id.* (citation omitted).

By contrast, a putative class representative cannot retain a personal stake in the action by merely failing to address the class claims in the settlement agreement. Instead, the settlement agreement must affirmatively preserve the plaintiff's concrete, financial stake in the resolution of the class claims.

The 9th Circuit held that the parties' settlement agreement did not expressly provide Brady with such an ongoing personal stake in the outcome on appeal, and therefore dismissed the appeal as moot. Brady would not "receive any additional compensation for the class claims," had no "possibility of an award of attorney's fees[,] and although he "expressly did not resolve the class claims, he did not retain a financial stake in them." *Id.* The court declined to reach Brady's argument that his purported obligation to repay his lawyers for advanced litigation costs would provide the requisite personal stake, noting that Brady had provided no evidence to support the factual premise of this argument. *Id.* at \*3.

## The Takeaways

*Brady* has changed the calculus for plaintiffs after the trial court denies class certification. Faced with the risks and expense of trying individual claims that are often of questionable merit, plaintiffs and their counsel look for an exit from the trial court that allows them to appeal the denial of certification. After the U.S. Supreme Court's decision in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), would-be class representatives can no longer dismiss their individual claims while preserving that right. While such plaintiffs can still settle their individual claims, *Brady* now requires that they negotiate a settlement agreement that preserves their financial stake in the putative class claims or try their individual claims.

*Brady* also changes the calculus for defendants who have prevailed at class certification, because they are more likely to be presented with settlement terms that

allow plaintiffs to recover incentive awards, fees, or costs by plaintiffs who believe these terms are required to preserve their right to appeal. Such terms—along with the risks of appellate reversal of the order denying certification—may well be unacceptable to defendants. Defendants therefore should be prepared both for class certification and then trial of the plaintiff’s individual claims, because a win on certification may not sound the death knell for the action. Given that a named plaintiff’s individual claims are too often lawyer-driven and manufactured for purposes of leveraging the threat of aggregate class liability, defendants would do well to prepare aggressively for trial of those claims, just as they aggressively oppose class certification.

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