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Voluntary Dismissals, Jurisdiction & Waiving Appellate Review

Bryan Lammon
University of Toledo College of Law

VOLUNTARY DISMISSALS, JURISDICTION & WAIVING APPELLATE REVIEW

Bryan Lammon[*]

I. INTRODUCTION

Litigants have long tried to create a final, appealable decision by voluntarily dismissing some or all of their claims.[1] In one variation on this tactic, litigants face an adverse interlocutory decision—that is, a decision that makes their claims less attractive but does not effectively resolve them.[2] Litigants then voluntarily dismiss their claims with prejudice. Litigants also purport to reserve the right to appeal the interlocutory decision and, should the court of appeals reverse, reinstate the dismissed claims. These litigants are essentially gambling their claims on the chance of reversal.

This voluntary-dismissal tactic is an end-run around the established means for taking interlocutory appeals. It also undermines the longstanding federal policy against piecemeal appellate review. And the Supreme Court's 2017 decision in *Microsoft Corp. v. Baker* should have foreclosed this tactic for good.[3] *Microsoft* held that plaintiffs cannot appeal a denial of class certification by voluntarily dismissing their claims.[4] That was the correct outcome. But the Court's proffered rationales were problematic. The majority reasoned that the voluntary dismissal did not produce a final, appealable decision under 28 U.S.C. § 1291.[5] The concurrence thought that the voluntary dismissal extinguished Article III jurisdiction.[6] But neither of these is correct. And both create new issues. The majority's finality reasoning has both limited the application of *Microsoft* outside the class-action context and injected further confusion into the law of appellate jurisdiction. And the concurrence's Article III rationale threatens valuable, longstanding practices in the federal courts.

*Professor, University of Toledo College of Law. Thanks to the University of Toledo College of Law for funding this research. And special thanks, as always, to Nicole Porter.

1. *See, e.g.*, Mgmt. Invs. v. United Mine Workers of Am., 610 F.2d 384, 393 (6th Cir. 1979).

2. For more on the variations of manufactured finality, see Bryan Lammon, *Manufactured Finality*, 69 VILL. L. REV. (forthcoming 2024) (manuscript at 17–38) [hereinafter Lammon, *Manufactured Finality*].

3. Microsoft Corp. v. Baker, 582 U.S. 23 (2017).

4. *Id.* at 27.

5. *See id.* at 38–42.

6. *See id.* at 43–44 (Thomas, J., concurring in the judgment).

The Court will eventually be asked to again address litigants' attempts at manufacturing interlocutory appeals from adverse decisions.[7] When it does, the Court should hold that these voluntary dismissals do not create a jurisdictional problem, appellate or Article III. These dismissals instead implicate waiver. When a litigant suffers an adverse decision that harms its claims but does not effectively resolve them, that litigant has not lost. By voluntarily dismissing the claims, that litigant waives any right to appellate review. The federal courts have applied this rule—which has nothing to do with finality or Article III jurisdiction—for centuries. Everyone overlooked it in *Microsoft*.

This Article explains the flaws in *Microsoft*'s proffered rationales. It then shows that this issue is, has been, and should remain an issue of waiver.

II. MANUFACTURED FINALITY AFTER ADVERSE INTERLOCUTORY ORDERS

A. The Final-Judgment Rule

The main source of federal appellate jurisdiction—28 U.S.C. § 1291—gives the courts of appeals jurisdiction over "final decisions" of the district courts. A final decision is normally one that ends litigation on the merits and leaves nothing for the district court to do but enforce the judgment.[8] This rule of generally delaying appeals—often called the "final-judgment rule"—reflects a longstanding policy against piecemeal appellate review.[9] Delaying appeals means that district court litigation can proceed uninterrupted by multiple appeals, which not only would add expense and delay but also could be used to harass lesser-resourced parties. Consolidating all issues into a single appeal also reduces appellate workloads, as only a single panel of appellate judges need to learn the case, and they can resolve all issues in a single opinion. And waiting for the final resolution of an action might moot some of the district court's interlocutory decisions. That is, a party aggrieved by an interlocutory decision might ultimately prevail, thereby obviating the need to review the earlier decision.

But delaying appeals also comes with costs. An interlocutory decision might make a claim more difficult to prove or less valuable to pursue. Or an interlocutory decision might reject a valid defense that would have

7. *See, e.g.*, Petition for a Writ of Certiorari, Swisher Int'l, Inc. v. Trendsettah USA, Inc., 2022 WL 3685603 (Aug. 22, 2022) (No. 22-172).

8. Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 586 (2020); Catlin v. United States, 324 U.S. 229, 233 (1945).

9. *E.g.*, Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994).

narrowed or eliminated a claim. Litigants unable to secure immediate review of these decisions might abandon their claims or settle on unfavorable terms. Or they might be forced into proceedings that will later be deemed unnecessary.

By typically postponing appeals until the end of district court proceedings, the final-judgment rule reflects a belief that in most cases the benefits of delaying appeals outweigh the costs.[10] But like most rules, the final-judgment rule has exceptions, two of which are particularly relevant to the present discussion.

First are certified appeals under 28 U.S.C. § 1292(b).[11] Section 1292(b) authorizes discretionary appeals in civil actions. When the district court determines "that [an otherwise non-appealable] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," it can certify that order for an immediate appeal.[12] The would-be appellant can then petition the court of appeals for permission to appeal. That court in turn has more-or-less complete discretion over whether to hear the appeal.[13]

The second exception is found in Federal Rule of Civil Procedure 23(f).[14] This rule allows for discretionary appeals from most class-certification decisions.[15] Conventional wisdom tells us that in many class actions (particularly those seeking damages) the class-certification decision is the major issue.[16] If the district court certifies the class, the

10. *See* Edward H. Cooper, *Timing as Jurisdiction: Federal Appeals in Context*, 47 L. & CONTEMP. PROBS. 157, 157–58 (1984); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1547–48 (2000).

11. *See generally* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165 (1990); *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1959); Tory Weigand, *Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review*, 19 ROGER WILLIAMS U. L. REV. 183 (2014).

12. 28 U.S.C. § 1292(b).

13. *Id.*

14. For in-depth studies of Rule 23(f), see generally Stephen B. Burbank & Sean Farhang, *Class Certification in the U.S. Courts of Appeals: A Longitudinal Study*, 84 L. & CONTEMP. PROBS. 73 (2021); Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. APP. PRAC. & PROCESS 284 (2022) [hereinafter Lammon, *Class-Action Appeals*]; Solimine & Hines, *supra* note 10.

15. FED. R. CIV. P. 23(f).

16. *See, e.g.*, 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3931.1 (3d ed. 2012) ("The determination whether to certify a class can effectively conclude the action, one way or the other."); Robert Bone & David Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1262 (2002) ("Over the years since 1966, the certification decision has taken on great strategic importance."); Richard Freer, *Preclusion and the Denial of Class Certification: Avoiding the "Death by a Thousand Cuts"*, 99 IOWA L. REV. BULL. 85, 97 (2014) ("[T]he class certification ruling is the watershed event in the litigation . . . ."); Solimine & Hines, *supra* note 10,

defendant—suddenly facing immense potential liability—has a strong incentive to settle.[17] If the district court denies class certification, the plaintiffs will likely abandon their claims or settle them for a minimal amount.[18] In either event, appellate review of the class-certification decision is unlikely.[19] Rule 23(f) thus facilitates appellate review of class-certification decisions, giving the courts of appeals discretion to allow immediate appeals from those decisions.[20]

B. Manufacturing Appeals from Adverse Interlocutory Orders

There are many other avenues for interlocutory review. Some are statutory.[21] Others come from judicial decisions that deem seemingly interlocutory decisions "final" and thus immediately appealable for purposes of § 1291.[22]

But litigants aren't always able to secure interlocutory appellate review through one of these established methods. When it comes to certified appeals under § 1292(b), courts have developed some stringent criteria

at 1546. *But see* Burbank & Farhang, *supra* note 14, at 81, 90 (noting that a fair number of class actions proceed past class certification to a final judgment); Robert Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 981 (2017) [hereinafter Klonoff, *Class Actions Part II*] (same).

17. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).

18. *See* Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 742 (2013) [hereinafter Klonoff, *Decline*].

19. Appellate review of a class settlement requires an objector to that settlement. Devlin v. Scardelletti, 536 U.S. 1, 14 (2002).

20. On the standards for granting review under Rule 23(f), see generally Solimine & Hines, *supra* note 10; Carey Erhard, *A Discussion of the Interlocutory Review of Class Certification Orders Under Federal Rule of Civil Procedure 23(f)*, 51 DRAKE L. REV. 151 (2002); Charles Flores, *Appealing Class Action Certification Under Federal Rule of Civil Procedure 23(f)*, 4 SETON HALL CIR. REV. 27 (2007); Tanner Franklin, *Rule 23(f): On the Way to Achieving Laudable Goals, Despite Multiple Interpretations*, 67 BAYLOR L. REV. 412 (2015); Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal for a New Guideline*, 2004 COLUM. BUS. L. REV. 231; Aimee Mackay, *Appealability of Class Certification Orders Under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 NW. U. L. REV. 755 (2002).

21. For examples of interlocutory appeals as of right, see 9 U.S.C. § 16(a) (authorizing appeals from certain refusing to direct arbitration); 28 U.S.C. § 1292(a)(1) (authorizing appeals from certain orders involving injunctions). For examples of discretionary appeals, see 28 U.S.C. § 158(d)(2) (authorizing discretionary appeals in bankruptcy proceedings); *id.* § 1292(d)(1) (authorizing discretionary appeals from the U.S. Court of Federal Claims); 8 U.S.C. § 2166(e)(3) (authorizing discretionary appeals under the Puerto Rico Oversight, Management, and Economic Stability Act). There is also 28 U.S.C. § 1651, which provides for immediate appellate review via writs of mandamus.

22. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); *see also* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 42–49 (2d ed. 2009); Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 737–46 (1993); Aaron Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 360–86 (2010).

that an order must satisfy to be eligible for certification.[23] Further, district courts can be reluctant to certify their decisions, and even when they do, courts of appeals can be stingy with their own discretion.[24] The same can be true for discretionary appeals of class-certification decisions under Rule 23(f). I recently found that of the 771 Rule 23(f) petitions filed from 2013 to 2017, the courts of appeals granted only 25%.[25]

When the established avenues for interlocutory appeals aren't available, litigants sometimes try to "manufacture" their own interlocutory appeal by creating a seemingly final decision. Manufactured finality comes in several different forms.[26] The present discussion focuses on the voluntary dismissal of claims due to an adverse interlocutory decision.

In this variety of manufactured finality, a district court decision makes a claim more difficult to prove or less valuable to pursue (or both). For example, the district court might deny class certification, leaving only the named plaintiffs' claims.[27] The district court might order that claims be arbitrated.[28] Or the district court might limit the type or amount of relief a party can recover.[29] Many other examples exist.[30]

These decisions are interlocutory—they do not resolve the claims at issue, and more remains to be done in the district court. Immediate appellate review would normally come via § 1292(b) (or, if the order involved class certification, via Rule 23(f)). But when litigants cannot obtain a discretionary appeal, they sometimes try to create a final,

23. *See* 16 WRIGHT ET AL., *supra* note 16, at § 3929; Bryan Lammon, *Three Ideas for Discretionary Appeals*, 53 AKRON L. REV. 639, 646 (2019) [hereinafter Lammon, *Three Ideas*]; Solimine, *supra* note 11, at 1193.

24. 16 WRIGHT ET AL., *supra* note 16, at § 3929; Solimine, *supra* note 11, at 1165.

25. *See* Lammon, *Class-Action Appeals*, *supra* note 14, at 303.

26. *See generally* Lammon, *Manufactured Finality*, *supra* note 2, at 17–38.

27. *See, e.g.*, Microsoft Corp. v. Baker, 582 U.S. 23, 33–34 (2017); Anderson Living Tr. v. WPX Energy Prods., LLC, 904 F.3d 1135, 1145 (10th Cir. 2018); *see also* Camesi v. Univ. of Pittsburgh Med. Ctr., 729 F.3d 239, 245 (3d Cir. 2013) (denial of collective-action certification under the Fair Labor Standards Act).

28. *See, e.g.*, Langere v. Verizon Wireless Servs., LLC, 983 F.3d 1115, 1117 (9th Cir. 2020); Keena v. Groupon, Inc., 886 F.3d 360, 364–65 (4th Cir. 2018).

29. *See, e.g.*, Princeton Digit. Image Corp. v. Off. Depot Inc., 913 F.3d 1342, 1348–49 (Fed. Cir. 2019); Palka v. City of Chicago, 662 F.3d 428, 436 (7th Cir. 2011).

30. *See, e.g.*, Martin v. Franklin Cap. Corp., 251 F.3d 1284, 1288–89 (10th Cir. 2001) (voluntary dismissal of all claims following refusal to remand to state court), *abrogated on other grounds by* Dart Cherokee Basin Operating Co. v. Owens, 574 U.S. 81 (2014); West v. Macht, 197 F.3d 1185, 1188 (7th Cir. 1999) (voluntary dismissal of all claims after denial of in forma pauperis status on some claims); Palmieri v. Defaria, 88 F.3d 136, 138 (2d Cir. 1996) (voluntary dismissal after exclusion of plaintiff's evidence); Plasterers Loc. Union No. 346 v. Wyland Enters. Inc., 819 F.2d 217, 218 (9th Cir. 1987) (voluntary dismissal after denial of motion to disqualify opposing counsel); Mgmt. Invs. v. United Mine Workers of Am., 610 F.2d 384, 387 (6th Cir. 1979) (voluntary dismissal of federal claims after refusal to extend pendent jurisdiction over state claims).

appealable decision by voluntarily dismissing their claims.[31]

The thought is that this voluntary dismissal ends district court proceedings and thus produces a final decision under § 1291. But the would-be appellant also purports to reserve the right to appeal and challenge the adverse interlocutory decision. And should the court of appeals reverse that interlocutory decision, the would-be appellant also purports to reserve the right to reinstate the voluntarily dismissed claim.

These litigants are essentially gambling their claim on the chance of reversal. If the court of appeals affirms the interlocutory decision, the action is over. But if the court of appeals reverses, district court proceedings resume. In that latter scenario, the would-be appellant has essentially secured an interlocutory appeal.

C. The Reasons for Disallowing These Appeals

There are several problems with this voluntary-dismissal tactic.

First, it's a pretty obvious end-run around the established rules for interlocutory appeals. Congress, rulemakers, and courts have determined the ways in which litigants can obtain interlocutory review. These avenues reflect a balancing of the interests that underlie appeal timing. Litigants home-brewing their own means of interlocutory review throws off that balance.

Second and similarly, this voluntary-dismissal tactic undermines court control over interlocutory appeals. Many established avenues for interlocutory review involve some amount of court control. For example, a district court first decides whether to certify an order for an appeal under § 1292(b). A court of appeals has discretion over whether to hear an appeal from a class-certification decision under Rule 23(f). This voluntary-dismissal tactic, in contrast, puts litigants in control of appellate jurisdiction. And it supplants a discretionary appeal with a right to appeal. That further undermines the balance Congress and rulemakers struck in crafting the existing avenues for interlocutory appeals.

Third, this voluntary-dismissal tactic creates a risk of piecemeal appeals—precisely what the final-judgment rule exists to prevent. Rather than litigate an action to a final judgment, after which all issues can be decided in a single appeal, the plaintiff halts proceedings to appeal a mid-litigation decision. To be sure, if the court of appeals affirms the district court's decision, the action is likely over. But the plaintiff is hoping that the court of appeals will reverse, after which the case will resume. Then, should the case proceed to a final judgment, the court of appeals might hear a second appeal. Indeed, a plaintiff could use this tactic multiple

31. *See, e.g.*, *Langere*, 983 F.3d at 1117; *Princeton Digit. Image*, 913 F.3d at 1349.

times, voluntarily dismissing its claims anytime it disagreed with a district court decision. Doing so would be risky. But there's nothing stopping a plaintiff from trying it.

III. VOLUNTARY DISMISSALS & JURISDICTION: APPELLATE & ARTICLE III

Given the problems with this voluntary-dismissal tactic, most courts of appeals have rejected it. Courts have held, for example, that plaintiffs cannot voluntarily dismiss their claims and then appeal from an order that those claims be arbitrated.[32] The same is true for an order limiting the relief that plaintiffs could obtain.[33] And in *Microsoft*, the Supreme Court held that plaintiffs cannot appeal from the denial of class certification by voluntarily dismissing their claims.[34]

The outcome in all of these cases is correct. But the rationale has often been jurisdictional. Most courts, including the Supreme Court, have reasoned that these voluntary dismissals do not result in a final, appealable decision under § 1291.[35] As an alternative, some courts and judges have contended that voluntary dismissal extinguishes Article III jurisdiction.[36] In either case, the court of appeals lacks jurisdiction.

Neither of these jurisdictional rationales is correct. In this Section, I use the *Microsoft* opinions—that of both the majority and the concurrence—to explain why. I also show the troubling consequences of a jurisdictional approach. In the next Section, I explain an alternative rationale for disallowing these appeals: waiver.

A. Microsoft's Rejection of Manufactured Appeals from Class-Certification Decisions

The plaintiffs in *Microsoft* brought a purported class action on behalf of all owners of Microsoft's Xbox 360 gaming console, claiming that a defect in the console scratched game discs during normal use.[37] After the district court declined to certify the class, the plaintiffs sought permission to appeal that decision under Rule 23(f).[38] When the Ninth Circuit

32. *See, e.g.*, *Langere*, 983 F.3d at 1117; *Keena*, 886 F.3d at 364–65; Bynum v. Maplebear Inc., 698 F. App'x 23, 24 (2d Cir. 2017).

33. *See, e.g.*, *Princeton Digit. Image*, 913 F.3d at 1348–49; *Palka*, 662 F.3d at 436.

34. Microsoft Corp. v. Baker, 582 U.S. 23, 27 (2017).

35. *See, e.g.*, *id.*; *Langere*, 983 F.3d at 1122–23; *Princeton Digit. Image*, 913 F.3d at 1348–49.

36. *See Microsoft*, 582 U.S. at 41 (Thomas, J., concurring in the judgment); Levy v. W. Coast Life Ins. Co., 44 F.4th 621, 626 (7th Cir. 2022); Woodard v. STP Corp., 170 F.3d 1043, 1044 (11th Cir. 1999); Druhan v. Am. Mut. Life, 166 F.3d 1324, 1326 (11th Cir. 1999).

37. *Microsoft*, 582 U.S. at 33.

38. *Id.* at 34.

declined to hear the Rule 23(f) appeal, the named plaintiffs voluntarily dismissed their claims with prejudice and then, in an appeal from that dismissal, sought review of the certification decision.[39] The named plaintiffs assumed that reversal of the certification decision would allow them to reinstate their individual claims and represent the class.

The Supreme Court unanimously held that the plaintiffs could not appeal from their voluntary dismissal.[40] Five Justices determined that the voluntary dismissal did not produce a final, appealable decision under § 1291.[41] Three Justices concurred in the judgment, contending that the voluntary dismissal extinguished Article III jurisdiction.[42]

B. Finality Under § 1291

The *Microsoft* majority saw a statutory appellate-jurisdiction problem: the voluntary dismissal did not result in a final decision under § 1291.[43] It did so through an interpretation of § 1291, which courts often use to reach what they think are pragmatic outcomes.[44] The Court noted that the final-judgment rule "preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice."[45] And the Court would interpret § 1291 to further those interests.[46] Of particular significance to the majority was the damage the voluntary-dismissal tactic did to Rule 23(f).[47] That rule reflected Congress's preference for rulemaking, not judicial decisions, as the source of appellate-jurisdiction rules.[48] It also embodied a careful balance of interests that the Rules Committee struck.[49] The voluntary-dismissal tactic undermined both.[50] The harm to Rule 23(f) thus required holding that the voluntary dismissal did not produce a final decision.

There are several problems with the majority's rationale. For one thing, it's in some serious tension with how we normally understand the term

39. *Id.* at 35.

40. *Id.* at 27.

41. *Id.*

42. *See id.* at 43–44 (Thomas, J., concurring in the judgment). Justice Gorsuch did not participate in the decision.

43. *Id.* at 27 (majority opinion).

44. *See* Bryan Lammon, Hall v. Hall*: A Lose-Lose Case for Appellate Jurisdiction*, 68 EMORY L.J. ONLINE 1001, 1011–12 (2018) [hereinafter Lammon, *Lose-Lose Case*] (discussing courts' use of § 1291 to create seemingly pragmatic appellate-jurisdiction rules).

45. *Microsoft*, 582 U.S. at 36–37.

46. *Id.* at 37.

47. *Id.* at 39.

48. *Id.* at 40.

49. *Id.* at 39–40.

50. *Id.* at 40.

"final decisions" in § 1291.[51] The general statutes governing appellate jurisdiction require only a "final decision" (under § 1291) and a timely appeal (under 28 U.S.C. § 2107).[52] A voluntary dismissal does not create a timeliness issue. So all that remains is the necessity of a final decision. And the paradigmatic final decision is one that marks the end of district court proceedings.[53] So when a district court is done with a case, it has issued a final decision.[54] And a district court is done once a party has voluntarily dismissed all unresolved claims.

The voluntary dismissal in *Microsoft* fit this paradigm.[55] It resolved all outstanding claims, and there was nothing more for the district court to do. The *Microsoft* majority could hold that there was no final decision only by giving "final" a new meaning: a decision is not final if the would-be appellant is trying to circumvent Rule 23(f).[56]

Microsoft is hardly the first opinion to add a definition of "final"—much of the law of federal appellate jurisdiction is built on interpretations of that term.[57] Therein lies the second problem: these new definitions of "final" inject further complexity, uncertainty, and unpredictability into the already-Byzantine area of federal appellate jurisdiction.[58] In the resulting confusion, courts and litigants conflate the two uses of "final decisions"—first as a term of art in the appellate-jurisdiction context, and second in the more everyday sense of describing the end of district court proceedings.[59]

Consider the Federal Circuit's decision in *Princeton Digital Image Corp. v. Office Depot Inc.*, in which the court held that a claimant could

51. *See* Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1833–34 (2018) [hereinafter Lammon, *Finality*].

52. Fairley v. Andrews, 578 F.3d 518, 521 (7th Cir. 2009) ("The only prerequisites to appellate jurisdiction are a final judgment and a timely notice of appeal. 28 U.S.C. § 1291.").

53. Catlin v. United States, 324 U.S. 229, 233 (1945).

54. *See* Lammon, *Manufactured Finality*, *supra* note 2, at 50–54 (explaining this "final-if-finished" understanding of § 1291).

55. *See Microsoft*, 582 U.S. at 43 (Thomas, J., concurring in the judgment).

56. *See* Lammon, *Finality*, *supra* note 51, at 1833–34.

57. *See id.* at 1818.

58. *See* Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 L. & CONTEMP. PROBS. 165, 165–66 (1984) (noting "the unconscionable intricacy of the existing law, depending as it does on overlapping exceptions, each less lucid than the next"); Cooper, *supra* note 10, at 157 ("The final judgment requirement has been supplemented by a list of elaborations, expansions, evasions, and outright exceptions that is dazzling in its complexity."); Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. APP. PRAC. & PROCESS 285, 291 (1999) (calling the current system "arcane and confusing"); Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 L. & CONTEMP. PROBS. 171, 172 (1984) ("The existing federal finality-appealability situation is an unacceptable morass."); Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 556 (2002) (noting the "dizzying array of statutory and judicially-created [finality] exceptions").

59. *See* Lammon, *Finality*, *supra* note 51, at 1819–23 (discussing and criticizing the use of "final decisions" as a term of art).

not voluntarily dismiss its claims and then appeal an order limiting its recovery.[60] The order limiting recovery did not effectively resolve the claims or foreclose any recovery; it simply limited what the claimant might win.[61] Following *Microsoft*, the Federal Circuit held that the voluntary dismissal did not produce a final decision under § 1291.[62] But then the court did something odd. The Federal Circuit said that because there was no final decision, the case was not over in the district court.[63] That is, the case must go on, despite the claimant's voluntarily dismissing its claims. The Federal Circuit never explained how the voluntary dismissal was vacated. But it was.[64]

The third problem with the *Microsoft* majority's holding is its potentially limited application outside of the class-action context. Most courts of appeals to consider *Microsoft*'s scope have said that it extends to other areas.[65] For example, several courts have applied *Microsoft* to orders directing arbitration, holding that plaintiffs cannot manufacture an appeal from these orders by voluntarily dismissing their claims.[66] The Federal Circuit has held that a claimant could not appeal from a voluntary dismissal after the district court limited the recoverable damages.[67] And the Seventh Circuit has held that a plaintiff could not appeal from the denial of appointed counsel by voluntarily dismissing his claims.[68]

But not all courts have extended *Microsoft*. The Ninth Circuit has continued to hold that litigants can appeal some kinds of adverse interlocutory orders by voluntarily dismissing their claims. In *Rodriguez v. Taco Bell Corp.*, the Ninth Circuit held that a voluntary with-prejudice dismissal allowed a plaintiff to appeal the denial of the plaintiff's summary-judgment motion.[69] The court thought that *Microsoft* did not apply because *Rodriguez* did "not involve an attempt to obtain review of a class certification issue."[70] So "a voluntary dismissal of remaining

60. Princeton Digit. Image Corp. v. Off. Depot Inc., 913 F.3d 1342, 1349 (Fed. Cir. 2019).

61. *Id.* at 1345.

62. *Id.* at 1349.

63. *Id.* at 1350.

64. In a handful of cases that plaintiffs voluntarily dismissed in reliance on pre-*Microsoft* precedent, plaintiffs sought to undo their voluntary dismissals via a motion under Federal Rule of Civil Procedure 60(b)(6). *See, e.g.*, Bobbitt v. Milberg LLP, 807 F. App'x 628, 631–32 (9th Cir. 2020); Strafford v. Eli Lilly & Co., 801 F. App'x 467, 469 (9th Cir. 2020); Henson v. Fid. Nat'l Fin., Inc., 943 F.3d 434, 455 (9th Cir. 2019).

65. *See, e.g.*, Langere v. Verizon Wireless Servs., LLC, 983 F.3d 1115, 1123 (9th Cir. 2020); *Princeton Digit. Image*, 913 F.3d at 1347.

66. *See, e.g.*, *Langere*, 983 F.3d at 1117; Keena v. Groupon, Inc., 886 F.3d 360, 364–65 (4th Cir. 2018); Bynum v. Maplebear Inc., 698 F. App'x 23, 24 (2d Cir. 2017).

67. *See Princeton Digit. Image*, 913 F.3d at 1348–49.

68. Lush v. Bd. of Trs., 29 F.4th 377, 380 (7th Cir. 2022).

69. Rodriguez v. Taco Bell Corp., 896 F.3d 952, 955–56 (9th Cir. 2018).

70. *Id.* at 955.

claims can render the earlier interlocutory order appealable, so long as the discretionary regime of Rule 23(f) is not undermined."[71] The Ninth Circuit reached a similar conclusion in *Trendsettah USA, Inc. v. Swisher International, Inc.*, which held that a plaintiff could appeal an adverse new-trial order by voluntarily dismissing its claims with prejudice.[72] The court explained that *Microsoft* applied only in contexts with specific rules on appeals, such as class actions and arbitration.[73]

By focusing so much on Rule 23(f), the *Microsoft* majority did not resolve the larger question: can plaintiffs appeal an adverse interlocutory decision by voluntarily dismissing their claims? So the issue will probably end up back before the Supreme Court. And when it does, personnel changes on the Court could lead to adopting the rationale of the *Microsoft* concurrence.[74]

C. "Adversariness" & Article III Jurisdiction

Three justices concurred in the judgment in *Microsoft*.[75] As they saw things, the voluntary dismissal left nothing for the district court to do and thus produced a final decision.[76] But they agreed that the plaintiffs could not appeal after the voluntary dismissal. The reason: the voluntary dismissal extinguished Article III jurisdiction.[77] The concurrence said that Article III's case-or-controversy requirement requires that parties be adverse.[78] When the *Microsoft* plaintiffs voluntarily dismissed their claims, "they consented to the judgment against them and disavowed any right to relief."[79] At that point, the parties were no longer adverse.[80] So there was no longer Article III jurisdiction.

Like the majority opinion, the *Microsoft* concurrence has several problems.

First, although it didn't use the term, the concurrence appears to invoke the concept of appellate standing.[81] But any reliance on appellate standing

71. *Id.*

72. Trendsettah USA, Inc. v. Swisher Int'l, Inc., 31 F.4th 1124, 1132 (9th Cir. 2022).

73. *Id.* at 1131–32. The court reached this conclusion in trying to reconcile *Rodriguez* and *Langere v. Verizon Wireless Servs., LLC*, 983 F.3d 1115 (9th Cir. 2020), in which the Ninth Circuit held that *Microsoft* applied to the arbitration context.

74. *See* 15A WRIGHT ET AL., *supra* note 16, at § 3914.8.1 (noting this possibility).

75. Microsoft Corp. v. Baker, 582 U.S. 23, 43 (2017) (Thomas, J., concurring in the judgment).

76. *Id.* at 43–44.

77. *Id.* at 44.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See also* Levy v. W. Coast Life Ins. Co., 44 F.4th 621, 626 (7th Cir. 2022) (suggesting that consent to a judgment can affect Article III—not statutory—jurisdiction because a party who consents to a judgment does not suffer an injury in fact).

is misplaced. Issues of appellate standing can arise when an appeal is a litigant's first opportunity to show standing. For example, when seeking direct review of an administrative decision in a federal appellate court, the petitioner must establish Article III standing.[82] Appellate standing issues also arise when a third party tries to appeal a decision that none of the original parties want to challenge.[83] In either case, a party is invoking federal jurisdiction for the first time.[84] So that party must establish the familiar Article III requirements of standing: an injury that is fairly traceable to the defendant and likely to be redressed by a favorable decision.[85] In this sense, appellate standing is little different from standing in the district court. The issue merely arises in a different forum.

Article III does not, however, require that litigants re-establish standing at each level of the federal courts. As Ryan Scott has explained, such a conception of appellate standing is "plainly wrong."[86] A party must establish Article III's case-or-controversy requirements, including standing, to invoke the federal judicial power.[87] That power is the power of the judicial branch, which Congress has separated into three levels of Article III courts. As a case moves between those levels, it remains in the judicial branch. An appeal accordingly does not mark "the end of one case or controversy and the beginning of a new one."[88] It instead marks the movement of the same case from one part of the judicial branch to another.[89]

Perhaps what the *Microsoft* concurrence meant was mootness. After all, mootness is generally "standing set in a time frame,"[90] and it requires that a litigant retain a personal stake in litigation throughout an action. But for an action to be moot, it must be "impossible for a court to grant any effectual relief whatever to the prevailing party."[91] In voluntarily dismissing its claims, a plaintiff does not concede that it has received everything it sought in its complaint or that no relief is available. The

82. *See* Ryan W. Scott, *Circumventing Standing to Appeal*, 72 FLA. L. REV. 741, 752 (2020) (citing INS v. Chadha, 462 U.S. 919, 935, 939–40 (1983); Barlow v. Collins, 397 U.S. 159, 164 (1970); Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151–52 (1970)).

83. *See id.* at 753–54.

84. *See id.* at 769.

85. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

86. Scott, *supra* note 82, at 749; *see also id.* at 771–73.

87. *Lujan*, 504 U.S. at 561.

88. Scott, *supra* note 82, at 771.

89. *Id.* at 773.

90. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)). Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 170 (2000) (noting "that this description of mootness is not comprehensive").

91. Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 307 (2012) (quotation marks omitted).

relief the plaintiff seeks is still possible. The plaintiff might be unlikely to obtain that relief given the voluntary dismissal. But that goes to the merits of the plaintiff's request, not its possibility.[92] And one must be careful not to conflate jurisdiction and the merits.[93]

To be fair, the concurrence never mentioned standing or mootness. It instead said that the parties were no longer adverse after the voluntary dismissal. But that's not right either.[94] The parties still disagreed on the propriety of class certification. The plaintiffs had an adverse judgment against them and wanted to challenge that judgment. Microsoft defended that judgment. That sounds a lot like adversity.[95]

The Article III rationale also imperils at least two longstanding practices in federal courts. First are conditional guilty pleas under Federal Rule of Criminal Procedure 11(a)(2). That rule allows a criminal defendant to enter a conditional guilty plea that reserves the right to appeal an adverse pretrial decision (often a decision on the exclusion or suppression of evidence).[96] A defendant who prevails on appeal can then withdraw the plea.[97] As Adam Steinman has shown, the *Microsoft* concurrence's conception of Article III and adversity "suggests that this rule is unconstitutional": "The guilty plea—like a voluntary dismissal—would seem to extinguish 'adversity' and thereby deprive the appellate court of jurisdiction to hear the appeal."[98]

The second practice involves voluntary dismissals after dispositive

92. Shahi v. U.S. Dep't of State, 33 F.4th 927, 931 (7th Cir. 2022) (noting, in rejecting a jurisdictional characterization of an issue, that "[t]he problem is not impossibility but the lack of an entitlement").

93. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."); Bell v. Hood, 327 U.S. 678, 682 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.").

94. *See* 15A WRIGHT ET AL., *supra* note 16, at § 3914.8.1; Adam N. Steinman, *Lost in Transplantation: The Supreme Court's Post-Prudence Jurisprudence*, 70 VAND. L. REV. EN BANC 289, 299 (2017). And even if the parties were no longer adverse, it's not clear that adversity is an Article III (rather than a prudential) requirement. *See* Steinman, *supra*, at 297–98.

95. Along these lines, several courts of appeals opinions have said that the lack of adversity prevents an appeal without specifying whether that lack implicated § 1291 or Article III. *See, e.g.*, Dearth v. Mukasey, 516 F.3d 413, 415 (6th Cir. 2008) ("Generally, a plaintiff who requests or consents to the dismissal of his action cannot appeal that dismissal because it is not an involuntary adverse judgment."); Seidman v. City of Beverly Hills, 785 F.2d 1447, 1448 (9th Cir. 1986) ("A plaintiff may not appeal a voluntary dismissal because it is not an involuntary adverse judgment against him."). To the extent these decisions suggest that adversariness is a requirement for statutory jurisdiction, they're wrong. *See* Fairley v. Andrews, 578 F.3d 518, 521 (7th Cir. 2009) ("The only prerequisites to appellate jurisdiction are a final judgment and a timely notice of appeal. Whether a party consented to that judgment . . . is irrelevant." (citation omitted)); Downey v. State Farm Fire & Cas. Co., 266 F.3d 675, 682 (7th Cir. 2001) ("[F]or jurisdictional purposes there is no distinction between 'consent' and 'adversarial' judgments.").

96. FED. R. CRIM. P. 11(a)(2).

97. *Id.*

98. Steinman, *supra* note 94, at 300.

interlocutory orders. These dismissals are similar to those discussed throughout this Article. But there is a key difference: the interlocutory order effectively resolves the action.[99] The district court's decision is nominally interlocutory. But its substance resolves the claims; only one party can prevail after the order. Were that party to move for summary judgment, it would win. But sometimes the litigant who lost on the interlocutory order (and thus effectively lost the case) will voluntarily dismiss the action or otherwise invite its end. That litigant then seeks to appeal the dispositive interlocutory order.

For example, a district court might exclude evidence that a claimant needs to succeed on a claim, such as all evidence of causation in a tort case.[100] The evidentiary decision is interlocutory. But it prevents the claimant from prevailing on the merits. Other examples include the resolution of some claims that necessarily resolves other, un-adjudicated claims;[101] denials of summary judgment that effectively resolve the claims;[102] and the rejection of all theories that the claimant wants to pursue.[103]

Courts—including the Supreme Court—have long held that plaintiffs faced with such an order can secure a final, appealable decision by voluntarily dismissing their claims.[104] In 1917's *Thomsen v. Cayser*, for

99. *See* Lammon, *Manufactured Finality*, *supra* note 2, at 30–31.

100. *See, e.g.*, *Fairley*, 578 F.3d at 521–22; McMillian v. Sheraton Chi. Hotel & Towers, 567 F.3d 839, 843–44 (7th Cir. 2009); INB Banking Co. v. Iron Peddlers, Inc., 993 F.2d 1291, 1292 (7th Cir. 1993); Distaff, Inc. v. Springfield Contracting Corp., 984 F.2d 108, 111 (4th Cir. 1993).

101. *E.g.*, Affinity Living Grp., LLC v. Starstone Specialty Ins. Co., 959 F.3d 634, 638 (4th Cir. 2020); Horn v. Berdon, Inc. Defined Ben. Pension Plan, 938 F.2d 125, 126 n.1 (9th Cir. 1991).

102. *E.g.*, Ali v. Fed. Ins. Co., 719 F.3d 83, 90 (2d Cir. 2013); Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130, 1137 (9th Cir. 2001), *overruled in part by* Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003).

103. *E.g.*, Levy v. W. Coast Life Ins. Co., 44 F.4th 621, 625 (7th Cir. 2022); Bogorad v. Eli Lilly & Co., 768 F.2d 93, 94 (6th Cir. 1985); Raceway Props., Inc. v. Emprise Corp., 613 F.2d 656, 657 (6th Cir. 1980) (per curiam).

104. *See* Lammon, *Manufactured Finality*, *supra* note 2, at 30–35. The Supreme Court's decision in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), is probably best understood as involving a dispositive interlocutory decision. *Procter & Gamble* was a civil antitrust suit, and the defendants sought grand-jury minutes that the government was using in preparing its case. *Id.* at 679. When the district court ordered the government to produce the minutes, the government asked the district court to amend its order to provide that it would dismiss the case if the government did not produce them. *Id.* The district court agreed, the government persisted in refusing to disclose, and the district court dismissed the case. *Id.* at 679–80. The Supreme Court held that the government could appeal. *Id.* at 680. The Court explained that the government "had lost on the merits and was only seeking an expeditious review." *Id.* at 681. Granted, it's difficult to see how the discovery order effectively resolved the case. *But see* OFS Fitel, LLC v. Epstein, Becker & Green, P.C., 549 F.3d 1344, 1358 (11th Cir. 2008) ("As in *Procter & Gamble*, [the plaintiff] had lost on the merits of the contested exclusion of its expert and the district court's final order merely allowed [the plaintiff] to seek an expeditious review of that ruling."); Laczay v. Ross Adhesives, 855 F.2d 351, 353 (6th Cir. 1988) (explaining that *Procter & Gamble* was a case in which the party seeking to appeal after voluntarily dismissing its claims had effectively lost on the merits). But the Court thought that *Procter & Gamble* was a case in which the plaintiff did not consent to a judgment, only that

example, the Supreme Court held that plaintiffs had not waived a challenge to a judgment when the plaintiffs declined to prosecute a new trial on a different theory of relief.[105] The plaintiffs initially prevailed in a trial on their antitrust claims, though the trial court did not require that the plaintiffs prove that the restraint at issue was unreasonable.[106] The court of appeals reversed—holding that the plaintiffs needed to prove unreasonableness—and ordered a new trial at which the plaintiffs could try again.[107] But the plaintiffs knew that they could not prove unreasonableness—were that required, they would lose. So rather than pursue this new trial, the plaintiffs waived their right to a retrial and asked the court to enter an appropriate judgment.[108]

The Supreme Court held that the plaintiffs had not waived any challenge to that judgment.[109] "The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay."[110] In other words, the plaintiffs had lost on the theory they wanted to pursue (that they did not need to show an unreasonable restraint) and admitted that they lost on the theory that the lower courts required them to pursue (requiring a showing of unreasonable restraint).[111] The nominally interlocutory decision requiring proof of an unreasonable restraint thus effectively decided their case.

Voluntary dismissals after dispositive interlocutory orders are valuable, as the voluntary dismissal accelerates the inevitable end of district court proceedings.[112] There's no risk of piecemeal appeal or undermining the established rules of appellate jurisdiction. But under the

any judgment be final. 356 U.S. at 681. *See also* Druhan v. Am. Mut. Life, 166 F.3d 1324, 1325 n.4 (11th Cir. 1999) ("*Procter & Gamble* involved a plaintiff seeking to influence the court's discretion in determining the appropriate sanction for discovery violations, while this case involves an affirmative request by the plaintiff that the case be dismissed with prejudice."); Plasterers Loc. Union No. 346 v. Wyland Enterprises Inc., 819 F.2d 217, 218 (9th Cir. 1987) ("The holding in *Procter & Gamble* applies only if the only other route of appeal is a contempt judgment, and by taking a dismissal and appealing, the appellant avoids unseemly conflict with the District Court over the contempt issue." (quotation marks omitted)).

105. Thomsen v. Cayser, 243 U.S. 66, 83 (1917).

106. *Id.* at 75.

107. *Id.*

108. *Id.*

109. *Id.* at 83.

110. *Id.*

111. *Cf.* Bogorad v. Eli Lilly & Co., 768 F.2d 93, 94 (6th Cir. 1985) (holding that the plaintiff could appeal from voluntary dismissal because district court's decisions "ruled out the cause of action she was seeking to present"); Raceway Props., Inc. v. Emprise Corp., 613 F.2d 656, 657 (6th Cir. 1980) (per curiam) (plaintiffs could appeal from voluntary, with-prejudice dismissal after district court's market-definition decision in an antitrust suit effectively resolved the action; the plaintiffs could not proceed under the district court's market definition).

112. *See* Ali v. Fed. Ins. Co., 719 F.3d 83, 88 (2d Cir. 2013); Lammon, *Manufactured Finality*, *supra* note 2, at 31–32.

Microsoft concurrence's conception of adversity, these voluntary dismissals would extinguish Article III jurisdiction and prevent any appeal.

IV. VOLUNTARY DISMISSALS & WAIVING APPELLATE REVIEW

Voluntary dismissals after adverse interlocutory orders do not create an appellate-jurisdiction problem. They also don't create an Article III problem. But this isn't to say that parties should be able to obtain appellate review by voluntarily dismissing claims after adverse interlocutory orders. They generally shouldn't.[113] The reason has to do with waiver.[114]

When a plaintiff voluntarily dismisses its claims, it normally consents to the judgment against it. And consenting to a judgment can waive the consenting party's right to appellate review. The Supreme Court has said as much for over 200 years. The earliest decisions (both of which, oddly enough, involved a party named "Evans") were cryptic. *United States v. Evans* declared that "[i]t is not a ground for a writ of error that the judge below refused to reinstate a cause after nonsuit."[115] And *Evans v. Phillips* said only that a litigant could not seek a writ of error when it had "submitted to a nonsuit in the circuit court."[116] Neither case explained the basis for the decision—whether it was jurisdictional (statutory or Article III) or waiver. And while the Court dismissed the writ of error in *Evans v. Phillips*, it affirmed the judgment in *United States v. Evans*.[117]

But the Supreme Court finally explained the point in a pair of late-nineteenth century cases. *United States v. Babbitt* held that a party who consents to a judgment waives any challenge to that judgment.[118] After prevailing in the court of claims, the government asked the court to enter a judgment against it that would facilitate appellate review.[119] Apparently *Babbitt* was one of several cases raising the same issue (whether to include time at West Point within the calculation of army officers' longevity pay), and the government wanted an appellate ruling on the issue.[120] The Supreme Court held that the government's consenting to the

113. But not always. In some contexts, particularly new-trial orders, allowing litigants to gamble their claims on an immediate appeal might make some sense.

114. *See* 15A WRIGHT ET AL., *supra* note 16, at § 3902 ("The true principle at work, however, is one of waiver or consent; the appropriate disposition, if the appeal represents no more than a retroactive attempt to undo consent properly given, is affirmance rather than dismissal.").

115. United States v. Evans, 9 U.S. 280, 281 (1809).

116. Evans v. Phillips, 17 U.S. 73, 74 (1819).

117. *See id.*; *Evans*, 9 U.S. at 281.

118. United States v. Babbitt, 104 U.S. 767, 768 (1881).

119. *Id.* at 767.

120. *Id.* at 768.

judgment prevented the government from taking an appeal: "[W]hen a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent."[121]

And in *Pacific Railroad v. Ketchum*, the Supreme Court explained that consented judgments raise waiver issues, not jurisdictional ones.[122] The appellee argued that the Court lacked jurisdiction to review a consent decree.[123] But the Supreme Court's jurisdictional statute at that time created a right to appeal from all "final decrees."[124] The consent decree was final and thus appealable—jurisdiction was secure.[125] The Court noted, however, that the consent could affect the issues it would consider.[126] If the appellant consented to the decree, the Court "cannot consider any errors that may be assigned which were in law waived by the consent."[127] And "[i]f all the errors complained of come within the waiver, the decree below will be affirmed, but only after hearing."[128] But in either case, the Court "must still receive and decide the case."[129] That is, the Court had jurisdiction.

The rule in these cases makes sense. When a party has suffered an adverse decision but has not actually lost on its claims, a voluntary dismissal is an invited—but not inevitable—loss. And a party that chooses to lose cannot complain about that loss on appeal. Further, the rule applies just as much today—and to the courts of appeals—as it did to the Supreme Court in 1879.[130]

Everyone appears to have overlooked the waiver issue in *Microsoft*. The defendant didn't argue waiver, focusing instead on jurisdiction (both appellate and Article III).[131] The majority did not mention any of the above cases. The closest anyone came was the concurrence, which cited *Evans v. Phillips* and *Babbitt* for the proposition that "a party may not appeal from the voluntary dismissal of a claim, since the party consented

121. *Id.*

122. Pac. R.R. v. Ketchum, 101 U.S. 289, 295 (1879).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *See* Downey v. St. Farm Fire & Cas. Co., 266 F.3d 675, 682 (7th Cir. 2001) (noting that while the statutory language has changed since *Ketchum*, "the critical language has survived"); *see also* INB Banking Co. v. Iron Peddlers, Inc., 993 F.2d 1291, 1292 (7th Cir. 1993) (applying *Ketchum* to hold that a defendant could appeal an adverse judgment that it invited because an in limine decision effectively resolved the action for the plaintiff).

131. Brief for Petitioner, Microsoft Corp. v. Baker, 582 U.S. 23 (2016) (No. 15-457). The defendant did cite to the two *Evans* cases for the proposition that the voluntary dismissal rendered the case moot. *Id.* at 35–36.

to the judgment against it."[132] But waiver was a much more straightforward basis for dealing with the voluntary dismissal in *Microsoft*. And waiver comes with none of the baggage that accompanies *Microsoft*'s jurisdictional rationales.

This is not to say that consent to a judgment always waives the right to appeal. You can't generalize about appeals after consent judgments; there are too many different varieties of consent judgments, which implicate different issues. For example, when a particular outcome is inevitable (such as with a dispositive interlocutory decision[133]), or when the parties definitively agree to the resolution of all outstanding issues (such as a stipulation to the amount of damages[134]), there is no waiver from the consent. The consent is not to the action's outcome but only to its end.[135] Things are different when a party has not lost and there is more to be litigated. In that scenario, consent to an adverse judgment means giving up. And would-be appellants who gave up in the district court cannot complain about any defect in the judgment that they invited.

V. CONCLUSION

Given *Microsoft*'s odd and potentially limiting rationale, the Supreme Court will likely have to again address appeals after voluntary dismissals due to adverse interlocutory decisions. When it does, the Court should recognize that these dismissals do not create a jurisdictional problem at all. They instead implicate waiver. And long-standing, well-established waiver rules can keep litigants from manufacturing these appeals.

132. Microsoft Corp. v. Baker, 582 U.S. 23, 45 (2017) (Thomas, J., concurring in the judgment). The concurrence also cited to *Lord v. Veazie*, 49 U.S. 251 (1850), and *Deakins v. Monaghan*, 484 U.S. 193 (1988). Neither *Lord* nor *Deakins* supports the jurisdictional characterization of the consent rule. *Lord* involved a collusive lawsuit in which the parties were not adverse at all—"there [was] no real dispute between the plaintiff and defendant in [the] suit, but, on the contrary, . . . their interest [was] one and the same." 49 U.S. at 256. *Deakins* involved an issue of whether a federal court could hear certain equitable claims, and that issue became moot when the plaintiffs disclaimed any intent to seek equitable relief in federal court. 484 U.S. at 199–200.

133. *See supra* Part III.C; *see also* Lammon, *Manufactured Finality*, *supra* note 2, at 30–32.

134. *See, e.g.*, Sprint Nextel Corp. v. Wireless Buybacks Holdings, LLC, 938 F.3d 113, 121–22 (4th Cir. 2019); Hudson v. Chicago Tchrs. Union, Loc. No. 1, 922 F.2d 1306, 1310 (7th Cir. 1991); *see also* Lammon, *Manufactured Finality*, *supra* note 2, at 35.

135. *See supra* note 104.