



When at first you don't succeed, seek post-verdict decertification: Lessons learned from *Mazzei v. The Money Store*

August 23, 2016

What do you do when a court certifies a class over your objection and denies your motion for directed verdict on the critical class certification issue at trial, and a jury awards \$32 million (\$54 million if you count pre-judgment interest) on an individual claim worth \$133.80? This was the situation the defendants faced in *Mazzei v. The Money Store*, 2016 U.S. App. LEXIS 12994 (2nd Cir. July 15, 2016). What happened defied all odds.

The Facts

In 1994, while working for The Money Store, Joe Mazzei took out a mortgage, which his employer both originated and serviced. Beginning in 1997, Mr. Mazzei began to miss payments and started receiving notices of default in 1998. In 1999, Mazzei lost his job when The Money Store changed ownership. In 2000, he received a notice of default and the servicer accelerated his loan. Mazzei filed for bankruptcy protection and then paid off his note in full. But, as part of the pay-off, Mazzei was required to pay 10 late fees of \$26.76 each, five of which were assessed after the notice of acceleration.

Hoping to have the last laugh, Mazzei paid the late fees and then, in 2000, sued The Money Store, its successors and the servicer alleging that the post-acceleration late fees violated the terms of his note. His claim was tiny — just \$133.80. But he obtained class certification on a breach of contract claim that included all similarly situated borrowers “who signed form loan agreements on loans which were owned or serviced by the defendants” that were assessed post-acceleration late fees. (Emphasis added.)

The Issues

Here was the problem: The class was composed of “borrowers whose loans were either owned by The Money Store (via origination or assignment) or serviced by it.” Mazzei, 2016 U.S. App. LEXIS 12994 at *6. (Emphasis in original.) So, to prove his breach of contract claim, Mazzei was required to prove that the class members were in a contractual relationship with the defendant — which could not include those class members whose claims it merely serviced.

The fundamental difference between these two groups of class members was obvious from the start — the class definition itself revealed the class-wide legal issue. Yet the trial court let the case go to trial, where the jury found, as a matter of fact, that there was privity of contract between the defendant and those whose loans it were merely serviced. *Id.* at *19.

Surely the jury’s verdict was grim news, but defense counsel moved to decertify the class before the verdict was entered as a final judgment, as expressly provided by Rule 23(c)(1)(C). It provides that “[a]n order that grants or denies class certification may be altered or amended before final judgment.”

But what about the jury’s fact-finding that there was privity of contract between the defendant and the serviced-only class members? Can a court simply disregard those findings? And what about the Seventh Amendment? Doesn’t the re-examination clause, which provides that “no fact tried to a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law,” prohibit this?

The trial court granted the defendant’s motion to decertify, finding that the plaintiff failed to present competent evidence on the issue of privity of contract. The only evidence Mazzei presented came from his expert, who conceded that he was “expressing no opinion whatsoever on the defendants in this case,” but rather opined only that, ordinarily, the servicing agreements would have authorized the servicer to waive late fees. Mazzei, 2016 U.S. App. LEXIS 12994 at *21. The trial court thus ruled in the alternative that it would have granted a motion for judgment as a matter of law under Rule 50 if decertification had not been appropriate. *Id.* at *6.

The Takeaways

The Second Circuit affirmed, and here are the key holdings:

First, a motion to decertify under Rule 23(c)(1)(C) may be granted after a jury verdict, but before entry of final judgment. *Id.* at **8-10.

Second, the Seventh Amendment is no bar to post-verdict decertification, since there is no constitutional right for anyone to represent a class, and absent class members’ claims are both preserved and tolled once the class is certified and spring back to life if the class is decertified. *Id.* at **10-11, citing *America Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1978). Thus, Rule 23(c)(1)(C) preserves the due process rights of absent class members through the decertification process.

Third, “when a district court considers decertification (or modification) of a class after a jury verdict, the district court must defer to any factual findings the jury necessarily made unless those findings were ‘seriously erroneous,’ a ‘miscarriage of justice,’ or ‘egregious,’” as required by a Rule 59 motion for a new trial on weight-of-the-evidence grounds. It may also be wise to move for judgment as a matter of law pursuant to Rule 50.

Fourth, the privity issue revealed a fundamental misalignment between the interests of Mazzei as class representative and the serviced-only class members — whether borrowers whose loans were serviced but not owned by The Money Store were in fact in privity of contract with The Money Store was an issue that was central to the claims of those class members, but not to Mazzei’s claims. The evident misalignment presented a legal issue that was clear on the face of the class definition. Mazzei provides authority to strike similar class definitions in future classes.

Finally, the most important lesson is this: Never give up. This case took 15 years to try to verdict and appeal. Yet the same class defenses that were identified on the face of the complaint remained viable even after class certification and final verdict. Perhaps no case can ever illustrate better than this one why class definitions are so important and why courts should vet them closely at the earliest practicable time. Indeed, the plaintiff’s evidentiary omission, which proved fatal at trial and supported the court’s

finding under Rule 59, id. at **19-21, was foreseeable early in the case.

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