

Think A Class Is Certified? Not So Fast.... Second Circuit Affirms Decertification of Class Even After Jury Verdict, Overturning Jury Award

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The U.S. Court of Appeals for the Second Circuit recently held that district courts can decertify a class **after** a jury verdict but before entry of final judgment. In *Mazzei v. Money Store*, 2016 U.S. App. LEXIS 12994 (2d Cir. July 15, 2016), the appellate court affirmed the United States District Court for the Southern District of New York's post-jury-verdict decertification of a class of home loan borrowers, thereby overturning a \$55 million jury award.

The class was comprised of borrowers whose loans with either owned or serviced by the defendant during the relevant time period. After trial, the defendants moved for decertification of the class on the grounds that the named plaintiff had failed to prove class-wide privity of contract between the defendant and borrowers whose loans defendant had only serviced but did not own. After post-trial briefing by both parties, the district court held that plaintiff's failure to prove privity with respect to absent class members necessitated decertification under the "typicality" and "predominance" requirements of Fed. R. Civ. P. 23(a) and 23(b)(3).

On appeal, the Second Circuit rejected the plaintiff's arguments that decertification is unavailable after a jury verdict in favor of a class; that the findings made to support decertification ran afoul of the Seventh Amendment; and that Rule 23 class certification requirements were satisfied. The court noted that the statutory text of Civil Rule 23(c)(1)(c) specifically provides that an "order that grants or denies class certification may be altered or amended before final judgment." The court rejected plaintiff's argument that courts may only overturn a jury verdict under Civil Rule 50(b)'s judgment as a matter of law mechanism. The court cited to case law and statutory commentary in finding that district courts have an "affirmative duty" to monitor and reexamine class decisions as evidence develops in a case. The court held that "[t]he power to decertify a class after trial when appropriate is therefore not only authorized by Federal Rule 23 but is a corollary."

The court also rejected the plaintiff's Seventh Amendment arguments, finding that neither the named plaintiff nor the decertified class members suffered a violation of their constitutional rights. The court noted that the named plaintiff was awarded damages on his individual claims and has no

constitutional right to represent a class. Further, the decertified class members retained the right to refile individual actions if they chose to do so, and the statute of limitations on their claims was tolled during the case under the *American Pipe* tolling rule. As a result, neither the individual plaintiff nor the class members were denied the right to a jury trial.

The most significant ruling to emerge from the decision stems from the discussion on the court's power to make factual findings in support of post-verdict decertification. The court held that, although decertification necessitates making factual determinations which overlap with the merits of the case (which is generally left for the jury to decide), the court may consider merits questions to the extent that they are relevant in determining whether Rule 23 prerequisites for class certification have been met. Such determinations do not bind the jury, and are considered only in deciding whether class certification is appropriate.

However, the court did not hold that district courts have *carte blanche* authority to make factual determinations where the jury has already made factual findings at trial. Instead, the court held that when considering class decertification after a jury verdict, the district court must defer to the jury's factual findings "unless those findings were 'seriously erroneous,' a 'miscarriage of justice,' or 'egregious,'" the same standard used when considering a Rule 59 motion for a new trial. The court further held that, where questions of fact arise that were necessarily not decided by the jury, the district court is empowered to make its own factual findings based on the preponderance of the evidence.

Employing this standard, the Second Circuit found no abuse of discretion in the district court's ruling that the jury's determination on typicality and predominance were "legally insufficient." The court held that by describing the evidence as "legally insufficient," the district court satisfied the requirement of finding the jury's verdict to be at least "seriously erroneous."

While the Second Circuit acknowledged that, ordinarily, the proper solution in such cases is to create a subclass instead of decertifying the class entirely, the court agreed that, under the facts established at trial, there was no basis on which the parties could have determined which members of the class had loans that were owned by defendant, and which had loans that were only serviced by defendant. As a result, decertification was appropriate.

The *Mazzei* decision gives employers and other defendants in a class action another opportunity to refute class treatment of a claim, not only before trial but now afterwards as well.

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