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## Consumer Credit

### **Decertification of Borrower Class After \$32M Verdict Affirmed by Second Circuit**

BY PERRY COOPER

**A** class of mortgage borrowers awarded \$32 million by a jury was properly decertified after the verdict, the Second Circuit said (*Mazzei v. Money Store*, 2016 BL 227527, 2d Cir., No. 15-2054, 7/15/16).

Decertification after a jury verdict but before the entry of final judgment comports with Fed. R. Civ. P. 23, the federal rule that governs class actions, and the Seventh Amendment right to a jury, Judge Dennis Jacobs wrote July 15 for the U.S. Court of Appeals for the Second Circuit.

Defense attorney Rebecca Weinstein Bacon said decertification after a jury verdict doesn't happen often, but that's because "class action trials are kind of like unicorns—you don't see a lot of them."

But a number of courts have recognized that the procedure is appropriate, Bacon, a partner at Bartlit Beck Herman Palenchar & Scott LLP in Chicago, told Bloomberg BNA.

"This is a good reminder for defendants that there are a lot of opportunities up until final judgment to take a stab at decertification," she said.

**A Teachable Moment.** Decertification is always a risk class plaintiffs' face, plaintiffs' attorney Jonathan D. Selbin told Bloomberg BNA. Selbin is a partner at Lief Cabraser Heimann & Bernstein LLP in New York.

Selbin said he and colleague Elizabeth Cabraser are using the decision as a teachable moment with the more junior attorneys at their firm.

"It means you've got to be really careful that your evidence comes in exactly as you said it would," he said. "You've got to try it as a class action start to finish."

Bacon and Selbin represented the opposing parties in one of the few consumer class actions to go to trial in recent years.

The jury ruled in favor of Whirlpool Corp. over allegations that its front-loading washing machines were prone to mold in *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.* (*Glazer v. Whirlpool Corp.*), N.D. Ohio, No. 08-65001, verdict 10/30/14 (15 CLASS 1265, 11/14/14).

**Improper Late Fees.** After Joseph Mazzei defaulted on a mortgage loan, it was accelerated, meaning the entire principal and interest became due. He filed a class action against The Money Store and other loan servicers

alleging they improperly charged late fees after the acceleration.

Mazzei won certification for a class of borrowers whose loans were owned or serviced by the lender. A jury awarded \$133.80 to Mazzei and \$32 million to the class.

The defendants moved for decertification after the verdict. The trial judge granted the motion, finding that Mazzei failed to prove through classwide evidence that borrowers whose loans were only serviced by The Money Store had a contractual relationship with the company.

**High Decertification Standard.** On appeal, Mazzei argued that decertification isn't available after a jury verdict.

But the Second Circuit said Rule 23 provides that a certification order "may be altered or amended before final judgment."

The decertification didn't impinge on the class's right to a trial by jury under the Seventh Amendment either, the appeals court said.

Mazzei will receive the \$134 in individual damages awarded to him by the jury, the court said.

The decertification order vacated the \$32 million class award.

But the absent class members are still able to file individual actions for breach of contract damages because the statute of limitations on their claims was tolled by the class action.

The last relevant question on appeal, the court said, was how to deal with the jury finding that the absent class members were all in privity with the defendant when the judge found otherwise.

"We hold that 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,'" the court said.

This high standard of error was met, making decertification appropriate here, the appeal court concluded.

Judges Amalya L. Kearse and Ralph K. Winter joined the opinion.

Sharma & DeYoung LLP and Paul Grobman in New York represented Mazzei.

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*The opinion is at [http://www.bloomberglaw.com/public/document/Mazzei\\_v\\_Money\\_Store\\_No\\_152054\\_](http://www.bloomberglaw.com/public/document/Mazzei_v_Money_Store_No_152054_)*

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