

## CLIENT ALERT

### Pencil, Not Ink: Second Circuit Rules Trial Courts Can Revoke Class Certification after Jury Verdicts

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The first motion for class certification is a crucial inflection point in federal class action cases. Because the class action device makes it possible for plaintiffs to lump together many individual claims for damages, an early certification decision can dramatically change a defendant's calculus of the costs and benefits of going to trial versus striking a settlement deal. In many cases, then, the defining battle is not trial or even summary judgment; it is class certification.

But for defendants willing to soldier on, the initial certification decision is hardly the end of the ballgame, as a recent decision from the Court of Appeals for the Second Circuit illustrates. On July 15, 2016, the Second Circuit took the unusual step of approving decertification in a class action, *Mazzei v. The Money Store*, where the jury had already returned a verdict in the class's favor. *Mazzei* reaffirms that the initial certification decision is just a battle, not the war, and that class decertification should be part of a defendant's strategy all the way through trial.

So what, exactly, did the *Mazzei* decision hold? And what does its reasoning mean for defendants facing class action trials going forward?

#### ***Mazzei's* Ruling: Even After Trial, Certification Decisions Are Written in Pencil, Not Ink**

Filed in the Southern District of New York, *Mazzei* was a 15-year-old class action alleging that The Money Store had breached its contracts with class members by charging them unauthorized late fees after accelerating their loans. The district court had originally certified a class of borrowers whose loans were either owned *or* serviced by The Money Store.

After the jury returned a verdict in the plaintiff's favor, the defendant moved to decertify the class. According to The Money Store, common questions no longer predominated because the plaintiff had failed to prove "through class-wide evidence" that it had entered contracts with borrowers whose loans it serviced but did not own directly. The trial court agreed, citing the "complete absence of evidence" at trial that The Money Store had contracts with these "differently situated" members of the certified class, and granted defendant's request to decertify the class.

On appeal, the Second Circuit left intact the jury verdict for the plaintiff as an individual, but agreed with the trial court that decertification was warranted. In so ruling, the three-judge panel held that "a district court has power, consistent with the Seventh Amendment and Rule 23, to decertify a class after a jury verdict and before the entry of final judgment." In fact, the panel explained, district courts have an "affirmative duty" to absent class members to reassess "class decisions in light of [each case's] evidentiary development"—even through trial. "The power to decertify a class after trial when appropriate is therefore not only authorized by Federal Rule 23 but is a corollary."

The Second Circuit also rejected the argument that post-trial decertification deprived class members of their right to a Seventh Amendment jury trial. In fact, the opposite was true: decertification would allow individual members to pursue their own claims independently, just as if the court had granted a motion for a new trial. (And these claims would still be timely because filing a

class action automatically tolls the statute of limitations for class members' claims until certification is denied.) As the Second Circuit summed it up:

The [Seventh Amendment] right of absent class members to a jury trial is [thus] protected, not impaired, by the [Rule 23] decertification procedure, which protects their due process rights (and defendants') by ensuring that any class claim that proceeds to final judgment—and thus binds them—is fairly and appropriately the subject of class treatment.

The panel was careful to clarify, though, that district courts were not free to ignore jury determinations in class action trials. To the contrary, “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.’” In other words, a trial court deciding whether to decertify a class is bound by any factual findings that were *necessary* to the jury’s verdict. Only where the “weight of the evidence” at trial contradicts the verdict may the court disregard the jury’s findings in revisiting certification.

#### **Practice Pointer: Building the Record for Decertification Is Key to Trial Strategy**

The *Mazzei* decision is a crucial reminder that a district court’s initial decision to certify a class is not necessarily the last word on certification. Far from it: district courts have not only the power but the *obligation* to decertify a class as soon as “it appears that the requirements of Rule 23 are not in fact met”—even if that only becomes clear *after* the parties present their evidence at trial and the jury returns its verdict.

In many cases, then, the hard work of opposing class certification may just be beginning when the court first certifies a class. Trial courts often must make their initial certification decisions with only imperfect information about how the case will develop. True, the Supreme Court has instructed district courts to undertake a “rigorous analysis” of the factual bases for certification, even where that means “probing behind the pleadings” and delving into the evidence. But even so, courts confronted with initial motions for certification very rarely have the benefit of a fully developed record before them.

And cases can change dramatically after certification on the long road to trial. Deposition testimony or interrogatory responses from class members may reveal serious divisions that muddy the liability analysis. An expert witness may not come through on an initial promise of a viable class-wide damages model. Individualized questions that first looked like molehills can become mountains as trial approaches and issues crystallize. And even at trial itself, plaintiffs may not be able to fulfill their early promises of proving the claims of hundreds—or thousands, or millions—of absent class members under the evidentiary constraints of a federal court trial.

Even *after* a class is certified, then, companies are well-advised to continue developing the factual record—both through discovery and in presenting evidence at trial—with dual objectives in mind: not only (1) winning on the merits, but also (2) proving that the common questions driving liability no longer predominate over individualized issues. Decertification must remain an integral part of a defendant’s trial strategy: after all, class certification is yet another issue on which plaintiffs continue to bear the ultimate burden of proof. As *Mazzei* makes clear, it’s never too late to revisit the question of whether a single jury trial can effectively determine the defendant’s liability to a class of hundreds, thousands, or even millions of absent members.

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