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7th Cir. (Posner) Examines Interlocutory Appeals of Class Certification Decisions under 23(f)

After a week off, we return with a short, yet informative, discussion of a recent decision from the Seventh Circuit. If you are a regular reader of the Hoosier Litigation Blog, then you know that I am an ardent fan of dedicating my posts to class action decisions authored by Seventh Circuit Judge Richard A. Posner. Since we now have two class action decisions in just over a week from Judge Posner, it was a difficult choice to pick this week's topic. Ultimately, due to the fact that we have not previously discussed appeals of class certification decisions under Rule 23(f), *Driver v. AppleIllinois, LLC* got the nod over *Parko v. Shell Oil Co*.

I. A Brief Discussion of *Parko v. Shell Oil*

Before we launch into our discussion of Rule 23(f) and *Driver*, I will take a moment and point out a few of the notable points from *Parko*, since I am not going into depth on that case. In *Parko*, the court reversed certification of a class because the plaintiffs seeking certification offered a damages model that the trial court did not examine for predominance issues. The court rebuked the trial judge for "th[inking] it enough at th[e certification] stage that the plaintiffs intend to rely on common evidence and a single methodology to prove both injury and damages, and that whether the evidence and the methodology are sound and convincing is a

question going to the strength of the plaintiffs' case and should be postponed to summary judgment proceedings or trial."

In reaching this conclusion, the court cites to the Supreme Court's decision in *Comcast v. Behrend* for the proposition that a trial judge cannot "refus[e] to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination." This is important, because it seems to confirm what I have previously speculated about the *Comcast* decision: it is going to be used for the point that where a damages model is proposed, it can be challenged on predominance grounds. This is in stark contrast to early speculation by bloggers and reliance by district courts for the proposition that it stands for a requirement that damages be calculable on class wide basis.

One last point on *Parko*: defendants challenged class certification on numerosity grounds. The class purported to have 150 members. Defendants argued that 140 of those members have not been injured and thereby lack standing to pursue a claim. The court rejected the argument, finding:

> To require the district judge to determine whether each of the 150 members of the class has sustained an injury. . . would make the class certification process unworkable; the process would require, in this case, 150 trials before the class could be certified. The defendants are thus asking us to put the cart before the horse. How many (if any) of the class members have a valid claim is the issue to be determined after the class is certified.

II. Rule 23(f) Appeals and *Driver v. AppleIllinois, LLC*

For those unfamiliar with the basic mechanics of a class action case, here is a very brief summary. The case is filed as a purported class action, but is not at that time a class action. Once discovery has been conducted to a reasonable degree, the party seeking class certification will move the court for certification of a class pursuant to Rule 23. The basic structure of Rule 23 creates four prerequisites in Rule 23(a) that must be satisfied then creates three types of class actions under Rule 23(b) each of which comes with additional requirements, but only one of which needs to be met to certify the class. Because the primary thrust of class certification is in sections a and b of the rule, they draw the most of the focus of case law and analysis. Consequently, Rule 23(f) often goes overlooked. That is, until you are looking to appeal a class certification decision.

Because the decision on whether the case can be certified as a class comes at an early juncture in the case, and therefore before trial, it is not a "final" decision for purposes of an appeal. Typically speaking, for something to be final, it needs to be determinative of the case. Generally this will be dismissal or a verdict after trial. Final decisions are appealable without leave from the trial court. However, there are some decisions that occur prior to a final decision that are sufficiently crucial that an appeal may be necessary to avoid wasted time and money. These kind of appeals are known as interlocutory appeals. Class certification decisions are therefore interlocutory decisions that need an interlocutory appeal. Rule 23(f) provides the basis for such an appeal in a class action case.

Rule 23(f) states:

> A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Note the use of the phrase "may permit" in the first sentence of the rule. This is a discretionary decision that the appellate court does not need to accept. *Driver* is a case in which the court decided to deny the petition. What makes it unique, however, is that the court decided to write a seven-page decision informing us why they were denying the petition specifically because the court "th[ought] it may be helpful to future litigants contemplating Rule 23(f) appeals to spell out our reasons for this second denial."

This was actually the second petition filed by the defendant in the case. The first too was denied. As the court recognized, the rule does not forbid repeated petitions "if, as is not uncommon, the district judge alters the class definition from time to time and therefore issues a new certification order each time." However, the court thought it necessary to create a standard to handle repeat motions.

The initial class certification decision, the judge defined a class of "employees who worked as tipped employees earning a sub-minimum, tip credit wage rate, and who performed duties unrelated to their tipped occupation for which they are not paid at the minimum wage rate." The judge modified that definition and then altered it once more creating this appeal. The last definition simplified the original to "employees who worked as tipped employees earning a sub-minimum, tip credit wage rate."

The court noted that the last "definition is overinclusive because it says

nothing about the tipped employees' work for which they weren't tipped" – a distinction important to the specific allegations of the case. However, the petition was not filed to challenge the new definition. Peculiarly, the appeal that was sought was to once more address the initial class certification decision – the same challenge that was denied appeal in the first petition. The defendant's position was that because the "court changed the definition since [the] denial of [the] previous petition [it now] opens the door for him to renew his challenge to the *intitial* grant of class certification on grounds derived from developments in the litigation since that grant, including subsequent rulings by the district court."

In classic Judge Posner fashion, he responds to defendant's contentions saying, "That can't be right." He further noted that it is quite likely that a judge will alter the class definition during the course of the case, but that there is no reason why altering the definition "should open the door to an interlocutory appeal unrelated to that alteration." The rule applied by the Tenth and Seventh Circuits – also seemingly relied upon in the Third and D.C. Circuits – is "that to justify a second appeal from an order granting or denying class certification the order appealed from must have "materially alter[ed] a previous order granting or denying class certification." The court recognized that there had been a material alteration in the case but that the defendant sought to challenge something altogether different.

The court left us with one final useful reminder. After noting that the defendants could have petitioned the trial judge to decertify the class, the court recognized that "a refusal to decertify a class is neither an order granting nor an order denying certification; it is merely a denial of reconsideration of a previous ruling." This means that if the trial court denies a motion to decertify a class action, Rule 23(f) does not provide a mechanism to appeal that denial.

Join us again next time for further discussion of developments in the law.

Sources

- *Driver v. AppleIllinois, LLC*, ---F.3d---, No. 13-8029, 2014 WL 130481 (7th Cir. Jan. 15, 2014).

- *Parko v. Shell Oil Co.*, ---F.3d---, Nos. 13-8023 & 13-8024, 2014 WL 187184 (7th Cir. Jan. 17, 2014).

- *Comcast Corp. v. Behrend*, 569 U.S. ___, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013).

- Federal Rule of Civil Procedure 23(f).

- Colin E. Flora, *7th Circuit Again Certifies Butler v. Sears, Roebuck, & Co. Classes*, HOOSIER LITIGATION BLOG (Aug. 23, 2013).