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by: Colin E. Flora
Associate Civil Litigation Attorney

7th Circuit (Posner) Examines Role of Class Action Representative

For those who are not regular readers of the Hoosier Litigation Blog: (i) become a regular reader; and (ii) welcome to my little secret, there is, perhaps, only one thing I enjoy writing about more than a good 7th Circuit class action decision and that is a good 7th Circuit class action decision authored by Judge Richard A. Posner. Consequently, despite a handful of cases that merit a blog post from the past couple of weeks, this week's case for discussion had no true contender. This week we take a look at the role of a class representative in a class action case through the lens of *Phillips v. Asset Acceptance, LLC*.

The case stems from the allegedly impermissible attempt to collect a consumer debt after the expiration of the statute of limitations. That is, the defendant – Asset Acceptance – had filed lawsuits against as many as 793 people after the statute of limitations to collect the debt had run. Such an action can, under the right circumstances, constitute a violation of the Fair Debt Collection Practices Act (FDCPA). The court, looking to a prior federal decision, acknowledged the purpose for "outlawing stale suits to collect consumer debts is":

> As with any defendant sued on a stale claim, the passage of time not only dulls the consumer's memory of the circumstances and validity of

> the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt. Indeed, the unfairness of such conduct is particularly clear in the consumer context where courts have imposed a heightened standard of care—that sufficient to protect the least sophisticated consumer. Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits. And, even if the consumer realizes that she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense; this is particularly true in light of the costs of attorneys today.

As a result of the filing of a lawsuit against the named plaintiff Gwendolyn Phillips more than five years after the cause of action accrued, which, unquestionably, exceeded the statute of limitations, this case ensued. It will become clear later in our discussion why I added the word "unquestionably" to the last sentence. Because the attempted collection of a stale debt violates the FDCPA, Phillips filed a counterclaim against Asset Acceptance in the form of a class action on behalf of herself and all other persons who Asset Acceptance had filed a claim against for a stale debt.

Phillips sought to certify a class of similarly situated persons throughout the country. As we've discussed before, even though a case is filed as a "class action," it is not an actual class action until the court rules on class certification. Until then, it is just what is called a putative class action. That is, the plaintiff(s) has put the defendant(s) on notice of intent to seek class-wide relief, but the case is not automatically a case that affects the rights of all other similarly situated persons. In order to have a class certified, and thereby turn the case from a putative class action into a full-fledged class action, the person bringing the case must file for class certification. In order for the class to be certified, the plaintiff must show that s/he has satisfied the four requirements of Rule 23(a) – Numerosity, Commonality, Typicality, and Adequacy of Representation – and one of the forms of Rule 23(b) – the most common of which is a Rule 23(b)(3).

The trial court found that the class could not be certified due, ultimately, to the failure of the numerosity requirement of Rule 23(a). That is, the trial judge determined that the number of persons who would be members of the class was not sufficiently large to merit class certification. Though the ultimate decision to deny certification stems from a failure of numerosity, the real issue was adequacy of representation. As you may recall, I noted that the putative class was of 793 people.

I know of no court decision that has ever found that 793 people was not a sufficiently large number of members to meet the numerosity requirement. The traditional rule of thumb is forty persons. It is not a hard and fast rule, but it is a very frequently cited figure for meriting class certification. Thus, in order for the trial judge to reach the conclusion that he did, he first had to winnow the potential class down from 793 to only 23.

The trial judge reached the 23 figure by chipping away at the potential class membership by determining that there were only 23 persons who the proposed class representative would be adequate to represent. The composition of the 793 persons is important. It is also important to recognize that Phillips was an Illinois resident who had been sued more than five years after the accrual of the claim.

> According to data compiled for use in briefing the motion, the class that the plaintiff wants certified has 793 members, of whom 343 reside in Illinois; there is as yet virtually no information about the others. Of the 343, 290 were sued between four and five years after the claims against them accrued (debt-collection claims accrue on the date that the debt sued on became delinquent), and 45 were sued more than five years after accrual. We don't know the situation of the remaining 8 Illinois debtors (343 − (290 + 45) = 8), though in its brief filed in the district court opposing class certification the defendant said they'd been sued within four years of accrual. Of the 45, 23 were served and 22 not; the corresponding figures for the 290 are 93 and 197 but the served/not served figures for the 290 played no part in the district court's analysis.

The trial court, oddly, opted to not decide what the applicable statute of limitations period was for Asset Acceptance to file a lawsuit against the debtors. Instead, the trial court concluded that because Phillips had been sued more than five years after the accrual, she had no true interest in pressing to represent the persons who had been sued between four and five years after the accrual. This was after the court had already decided that she could only represent the Illinois debtors. Thus, the number was cut down to 343 and then again to forty-five. From the forty-five, the court determined that the twenty-two who had not been served a copy of the lawsuit could not bring a claim. This meant that the putative class stood at only 23. Phillips appealed that decision.

On appeal we get to see a classic Judge Posner decision. It includes moments of frankness that are rarely seen from federal jurists and at least one line that reads as a harsh critique of an argument made by Asset Acceptance. The most direct shot was at the trial judge.

> By March 2011 the motion was ripe for the district judge to rule on, but for unexplained reasons he didn't rule for 25 more months. When finally he did, he denied the motion, precipitating the petition for leave to appeal.

A subsequent shot against Asset Acceptance's argument is a bit more veiled, but in many ways more harsh.

The court of appeals agreed with the choice to narrow the class, for the time being, to the 343 Illinois residents. This was because there had not yet been sufficient information collected to ascertain who the non-Illinois class members – the *Ausländers* as Judge Posner called them– were. It also flows from the fact that the claim was for both violations of the FDCPA and for violations of similar Illinois state law claims. Thus, the state law claims class is the one that was ultimately at issue. That, however, is where the agreement with the trial court ceases.

The court first rejected the proposition that Phillips was not an adequate representative. The court wrote:

> We are skeptical that Phillips is not an adequate representative of the debtors sued more than four but fewer than five years after the creditors' claims accrued, just because her claim is solid whether the statute of limitations is four years or five. To question her adequacy is to be unrealistic about the role of the class representative in a class action suit. The role is nominal. The class representative receives modest compensation (what is called an "incentive fee" or "incentive award") for what usually are minimal services in the class action suit—which is in fact entirely managed by class counsel. For "class action attorneys are the real principals and the class representative/clients their agents" in class action suits. If the suit is successful, they receive much greater compensation than the class representative(s).
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> But Phillips's (modest) services to the class will be greater, and her incentive award likely therefore to be greater if the suit is successful, the more complex the class is. And it will be more complex if the class includes the four-year as well as the five-year debtors. So she does have an incentive to assist in the claims of the four-year debtors, even though any attorneys' fees awarded by the court (if they win) will dwarf her compensation.

Having rejected the issue of adequacy of representation, the court's concern

turned to the typicality requirement. The court, though recognizing that there could, perhaps, be concern over whether Phillips was typical of the four-year persons, disagreed with the trial court's result in addressing such a problem. The court found: "Were there doubt about Phillips's adequacy as class representative—and given that there are grounds for doubt about the typicality of her claim—the judge could have created a subclass consisting of the four-year class members and directed class counsel to designate a representative for it." However, because the court ultimately determined that the applicable statute of limitations was actually four-years, the typicality concerns evaporated.

In determining the applicable statute of limitations, the court had to address the argument of Asset Acceptance contending that the court of appeals could not properly determine the statute of limitations until the trial court, which had passed on making the decision, had taken a crack at it. Asset Acceptance also argued that it would have been error for the trial judge to determine the applicable statute of limitations because it "is a merits issue rather than one of class action procedure." As Judge Posner informatively noted, "In this case, actually, it's both, because resolving it would determine the composition of the class and might (if the answer shrank the class to a size at which a joinder of plaintiffs would be a feasible alternative) determine whether the suit could be maintained as a class action at all." Further, since statute of limitations is a pure question of law, the court could make the determination without resolving factual disputes.

In rejecting the proposition that the trial court was entitled to rule on the issue first, the Judge Posner wrote:

> That's wrong. Appellate courts decide pure questions of law—that is, questions of law the answers to which do not depend on resolving factual disputes—without deference to the answers given by trial judges ("*de novo*," as the cases say). There is no obligation to allow a district court to opine on an issue when the appellate court has no obligation to defer, to even the slightest extent, to the district court's view of the matter.

This portion is an absolutely classic piece from Judge Posner. Not only does it encompass his frankness wherein it flatly answers the argument by saying, "That's Wrong[;]" but it also launches into a seemingly condescending tone in defining the role of appellate courts on *de novo* review. Almost universally, courts will just say that they review issues of pure law *de novo*. It is such a ubiquitous statement that there is virtually no attorney that does not know its meaning right away. Thus, it is clear that here, Judge Posner, is taking a jab at the argument by reminding defense counsel that it is a *de novo* review and which means precisely that the court of

appeals can decide the issue anew. The shot is even more apparent in light of the prior use of the somewhat obscure German word *Ausländers*. That is, on first look the statement "'*de novo*,' as the cases say" may seem to be easily explained as a move away from the classic legal formalism that made Latin a *sine qua non* to the practice of law. The use of *Ausländers* removes all doubt as to the true purpose of the statement.

That said, we can return to the determination of the applicable statute of limitations. Without going into great detail, the issue was actually quite interesting. This is because the underlying debt was for natural gas services. Because the sale of goods in Illinois is governed by a four-year statute of limitations and contracts not in writing are governed by a five-year statute of limitations, the court had to determine whether natural gas services constitute a sale of goods or a run of the mill contract issue. Your first thought may be, well of course the sale of natural gas is a sale of a good. However, it is more complicated because natural gas services includes not just the sale of the natural gas but the service of delivering it. This makes it a "mixed goods-and-services sale." Mixed goods-and-services sales are determined to be either the sale of a good or a service under normal contract law based upon whether the sale of the good or the service in the good is the primary thrust of the relationship. Here, the applicable law defining a sale – Article 2 of the UCC – defines "natural gas" as a good. As Judge Posner recognized, "The drafters must have been aware that natural gas is usually delivered to homes and other places that use natural gas in pipes. So a good can be delivered in a pipe." Thus, the four-year statute of limitations applied.

The next major issue was whether the impermissible debt collection lawsuits were served on the class members. The trial court cut the remaining class in half by concluding that failure to serve the lawsuit meant no-harm-no-foul. However, as the court recognized, "[E]ven if no debtors were ever harmed by being sued but not served, the district judge would have been wrong to exclude from the class the debtors who were not served. Proof of injury is not required when the only damages sought are statutory."

The one very peculiar portion of the decision was the ultimate conclusion. Certainly the court was right to reverse the trial court's denial of class certification order. However, it seems shocking in many ways that the opinion states, "But all that remains for the district judge to do regarding certification is to determine the proper scope of the class." This presupposes that class certification is merited. The reason this is downright shocking is because there is never any discussion of the requirements of Rule 23(b). The entire case is a discussion of Rule 23(a) requirements and never even remotely touches upon Rule 23(b). This would not be a problem if the trial court had concluded that one of the portions of Rule 23(b) was

fully satisfied and that it was only the numerosity issue that prevented class certification. However, that is not what the trial court did. The trial court specifically declined to consider anything relative to Rule 23(b) because a class cannot be certified without first meeting all of the requirements of Rule 23(a). The decision did not even indicate what portion of Rule 23(b) Phillips sought to certify a class under.

Do not get me wrong; I think that the nature of the case and allegations make class certification under Rule 23(b)(3) a no-brainer. Nevertheless, the lack of any mention of Rule 23(b) is startling in an otherwise fantastic opinion.

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

Sources

- *Phillips v. Asset Acceptance, LLC*, --- F.3d---, No. 13-2251, 2013 WL 6223572 (7th Cir. Dec. 2, 2013).
- *Kimber v. Fed. Fin. Corp.*, 668 F.Supp. 1480, 1487 (M.D. Ala. 1987).
- Fair Debt Collection Practices Act – codified at 15 U.S.C. § 1692 *et seq*.
- Federal Rule of Civil Procedure 23.
- Colin E. Flora, *How Does a Class Action Case Work?*, HOOSIER LITIGATION BLOG (July 6, 2012).