

Class Action Defense Strategy Blog

Up-to-date information on class action litigation

SHEPPARD MULLIN

SHEPPARD MULLIN RICHTER & HAMPTON LLP

ATTORNEYS AT LAW

Class Action Defense Strategy Blog

Posted at 5:57 AM on December 31, 2009 by Sheppard Mullin

Tenth Circuit Reaffirms That a Case Terminates When the Class Representative's Claims Become Moot Before Class Certification

By *[Sascha Henry](#)* and *[Paul Seeley](#)*

In [Clark v. State Farm Mutual Automobile Insurance Co.](#), Nos. 07-1454, 07-1466, the Tenth Circuit affirmed a district court's order denying class certification because it lost jurisdiction when the representative plaintiff's claims became moot. [Clark](#) shows how a defendant's request for a merits determination before class certification was rewarded when the resulting decision mooted the named plaintiff's claim and defeated class certification.

The [Clark](#) litigation began in 2000 in Colorado state court. The plaintiff was a pedestrian hit by a driver insured by State Farm. State Farm's insurance policy only allowed the plaintiff to recover a statutory minimum and did not offer the insured any increased coverage beyond those limits. After the plaintiff accepted the statutory minimum in settlement, a Colorado court held insurance policies, like State Farm's, must allow insureds to purchase coverage in excess of the statutory minimum and any policy not offering the extended coverage must be reformed to include it. [Brennan v. Farmers Alliance Mut. Ins. Co.](#), 961 P.2d 550 (Colo. Ct. App. 1998). The plaintiff, on behalf of himself and all others similarly situated, filed suit against State Farm by asserting claims for breach of contract, breach of good faith, and reformation. The plaintiff argued State Farm's failure to include excess coverage constituted a breach of a contract previously reformed by the operation of law.

After State Farm successfully removed the case to federal court, numerous appeals followed. After the second appeal ([Clark II](#)), the Tenth Circuit ordered the trial court to determine whether [Brennan](#) applied retroactively. If [Brennan](#) did not apply retroactively, then the plaintiff's entire case could be resolved: the court would reform the contract as of the date of judgment, award damages, and dismiss the plaintiff's other claims because there could be no breach of previously unreformed contract. If [Brennan](#) applied retroactively, however, then the

plaintiff's contract claims would survive since it would be possible that State Farm breached a contract previously reformed by Brennan as a matter of law.

On remand, State Farm moved the district court to determine the issue of reformation before class certification. The court agreed and signed State Farm's proposed order (the "Case Management Order"). After the district court held Brennan did not apply retroactively, it awarded damages and dismissed the plaintiff's remaining claims. Both parties appealed, but neither party appealed the Case Management Order. In Clark III, the Tenth Circuit affirmed the district court, but remanded to determine the class certification issues.

After Clark III, State Farm paid the judgment. When the plaintiff subsequently filed his class certification motion, the district court held that the case was mooted by State Farm's payment and, therefore, the plaintiff could not represent the class. The district court also denied, as untimely, motions to intervene brought by other potential class representatives. The plaintiff appealed the mootness determination. The interveners also appealed, but their appeal was immediately dismissed as untimely filed.

The Tenth Circuit recognized the general rule regarding class actions and mootness: If the named plaintiff's claims become moot prior to class certification, then the district court loses jurisdiction because the parties have no "personal stake" in an actual case or controversy. The Supreme Court created two exceptions, either of which would allow class certification despite the mooted claims: (1) If the plaintiff's claim is "capable of repetition, yet evading review" or (2) when the nature of the claim is too transitory to allow a determination of class status before the claim becomes moot. Another exception, adopted by some circuits, allows for class certification if the named plaintiff's claims are mooted before the plaintiff could be reasonably expected to file a class certification motion.

In Clark, the Tenth Circuit rejected the plaintiff's argument that his case fit within the third exception. The court pointed out that the plaintiff failed to appeal the Case Management Order, despite recognizing that it allowed the court to decide the merits before class certification, thereby potentially mooting his claim. As the Case Management Order was not appealed, it became the "law of the case" and, therefore, could not be challenged by the plaintiff on this appeal. In essence, the plaintiff had one opportunity to appeal the Case Management Order and failed to do so. Thus, a merits determination made under that Case Management Order that mooted the plaintiff's claims was binding and final. As none of the other recognized exceptions applied to the plaintiff's claims, the Tenth Circuit held that it, and the district court, lacked jurisdiction over class certification and the case had to be dismissed as moot.