Pella v. Saltzman: The Seventh Circuit throws class certification objections out the window.
By Aaron M. Zigler[1]

The Seventh Circuit's latest class certification decision is required reading for class action practitioners. According to the defendant, the decision "works a revolution in class action law, and effectively opens the door to class certification in any case in which a named plaintiff alleges a product defect."[2]

In Pella Corp. v. Saltzman, 606 F.3d 391 (7th Cir. Mar. 12, 2010) (per curiam), *reh'g & reh'g en banc denied* (June 14, 2010), the Seventh Circuit affirmed Judge Zagel's certification under Rule 23(b)(3) of a six-state consumer fraud class seeking damages for Pella's alleged failure to disclose a purported design defect in certain of its windows and Rule 23(b)(2) certification of a nationwide class of homeowners seeking a declaration of their rights *vis-à-vis* Pella.[3]

In affirming the class certification in *Pella*, the Seventh Circuit reaffirmed several broad class certification principles. First, the court held "[w]hile consumer fraud class actions present problems that court must carefully consider before granting certification, there is not and should not be a rule that they never can be certified."[4] In so doing, the court limited three of its previous opinions finding class certification inappropriate to the facts presented in those cases.[5]

The *Pella* court also reaffirmed the principle that class certification is appropriate to aid in the resolution of negative-value claims: "there are times when class certification is 'a sensible and legally permissible alternative to remitting all the buyers to individual suits each of which would cost orders of magnitude more to litigate than the claim would be worth to the plaintiffs.'"[6]

The court also reaffirmed that where case does not present novel issues and the damages sought are not so large that a judgment threatens the very existence of the defendant "it makes good sense … to resolve those claims in one fell swoop while leaving the remaining claimant-specific issues to individual follow-on proceedings. [7]

The district and appellate courts' application of these general principles to the facts is instructive. In *Pella*, several homeowners filed a class action alleging that Pella fraudulently concealed that its ProLine windows have an inherent design defect that permits water to seep behind the aluminum cladding and causes the wood to rot at an accelerated rate.[8] Plaintiffs claimed Pella committed consumer fraud by not disclosing the purported design defect.[9]

Pella began its opposition to class certification by contesting the proposed class definition and arguing that "plaintiffs' proposed class is fatally overbroad" because it "includes numerous individuals who are unlikely to have the claim being litigated."[10] Judge Zagel rejected that claim, finding that "a class may be certified even though the initial definition includes members who have not been injured or do not wish to pursue claims against the defendants" as "any issue relating to whether class members will ultimately be able to prove their damages goes to the merits of the case and not to class certification."[11] The Seventh Circuit agreed: "while it is almost inevitable that a class will include some people who have not been injured by the defendant's conduct because at the outset of the case many members may be

unknown, or the facts bearing on their claims may be unknown, this possibility does not preclude class certification."[12]

In addition, even in the face of the argument that "because Pella's records do not identify most class members, individual inquiry would be required to verify that particular class members have the windows in question,"[13] Judge Zagel certified a nationwide 23(b)(2) class of homeowners "whose windows have not manifested the alleged defect and whose windows have some wood rot but have not been replaced" and a six-state 23(b)(3) statutory consumer fraud subclass of homeowners "whose windows have exhibited wood rot and who have replaced the affected windows."[14]

In rejecting Pella's objection to the scope of the classes, the Seventh Circuit found "the ***narrow*** way in which the district court defined the classes here eliminates concern that the definitions are overbroad or include a great many people who have suffered no injury" reasoning that "while it is almost inevitable that a class will include some people who have not been injured … this possibility does not preclude class certification."[15]

Pella also challenged the standing of the named plaintiffs, arguing that because there are no named plaintiffs who reside in four of the states at issue, they lack standing to sue under those states' laws. The court rejected Pella's objection on the ground that the standing inquiry at class certification is limited to an assessment of whether the named plaintiffs have Article IIII standing - injury in fact that is fairly traceable to the defendant and likely to be addressed by a favorable decision.[16] Judge Zagel held that it was not necessary for plaintiffs to present a named representative from each proposed subclass.[17]

Pella claimed Rule 23(b)(2) certification was inappropriate because the case was really about money.[18] According to Pella, the declaratory relief sought would not lead to an entitlement to relief but instead would require individual litigation to determine any particular class members' entitlement.[19]

However, the Seventh Circuit found that the declaratory relief sought, if granted, would have the effect of determining class members' entitlement to have their windows replaced if the windows manifested the alleged defect and that entitlement would benefit the entire class whether or not they were damaged.[20] That replacement of the windows might require adjudication of individual issues by a special master did not disturb this conclusion.[21]

Pella also argued that Rule 23(b)(3) certification was inappropriate because choice of law variations created insurmountable individual issues.[22] Judge Zagel rejected this argument, finding that although there are some differences in the state consumer protection statutes, the factual and legal questions are substantively the same.[23] Accordingly, the court found that "because the class may be divided into individual state subclasses where any conflict exists" the predominance requirement was met.[24] The Seventh Circuit complemented Judge Zagel's consideration of the issue: "the certification of the six state subclasses demonstrates that the district court carefully considered how the case would proceed explicitly finding that the consumer protection acts of these six states have nearly identical elements[.]"[25]

Pella was not a complete victory for plaintiffs, however. Because the *Pella* plaintiffs pursued a deception theory seeking to recover the damages caused to their homes as a result of wood rot, *Pella* undeniably required individual proof of the amount of damage to class members' homes and that the rot was caused by the windows' design, not some other factor such as improper installation.[26] In addition, as Pella's records did not identify most class members, individual inquiry was required to verify that particular class members have the windows in question.[27] Accordingly, the district court explicitly declined to certify issues related to causation, damages, and statute of limitations.[28] Instead, because of the particular issues presented, the court chose to certify the Rule 23(b)(3) class on the issue of liability only, reserving the issues of each individual's entitlement and amount of damages to another day.[29]

The Seventh Circuit again explicitly endorsed Judge Zagel's treatment of these issues, writing that the "district court has the discretion to split a case by certifing a class for some issues, but not others, or by certifing a class for liability alone where damages or causation may require indivdual assessments.[30] Under Rule 23, district courts are permitted to "devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues."[31]

Under *Pella,* it is clear that the existance of substantial individual issues will not defeat class certification.[32] While all class actions are necessarily complex, Rule 23 empowers courts to devise imaginative solutions when the common issues are better resolved by class treatment.

---

[1] Aaron Zigler is a partner at Korein Tillery practicing class action litigation from its St. Louis office.
[2] Pet. for Reh'g, Pella Corp. v. Saltzman, 606 F.3d 391 (7th Cir. March 12, 2010).
[3] id. at 392-93.
[4] id. at 393.
[5] id. (citing Thorogood v. Sears, Roebuck & Co., 547 F.3d 742 (7th Cir. 2008); Oshana v. Coca-Cola Co., 472 F.3d 506 (7th Cir. 2006) and In re Bridgestone/Firestone Inc., 288 F.3d 1012 (7th Cir. 2002)).
[6] Pella Corp., 606 F.3d at 393 (per curiam) (quoting Thorogood, 547 F.3d at 748).
[7] id. at 394 (per curiam) (quoting Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911 (7th Cir. 2003)).
[8] id. at 392.
[9] id.
[10] Pella's Br. in Opp'n to Class Cert., Saltzman v. Pella Corp., 257 F.R.D. 471 (N.D.Ill. 2009) 2008 WL 4271546 at *20.
[11] Saltzman v. Pella Corp., 257 F.R.D. 471, 477 (N.D. Ill. 2009).
[12] Pella Corp., 606 F.3d at 394.
[13] Saltzman, 257 F.R.D. at 476
[14] id. at 487.
[15] Pella Corp., 606 F.3d at 394 (emphasis added).
[16] Saltzman, 257 F.R.D. at 480.
[17] id.
[18] Pella Corp., 606 F.3d at 395.
[19] id.
[20] id.
[21] id.
[22] Saltzman, 257 F.R.D. at 484.
[23] id. at 484 n.12.
[24] id. at 485-86.
[25] Pella Corp., 606 F.3d at 395.
[26] Saltzman, 257 F.R.D. at 486.
[27] id. at 476.

[28] id. at 393.
[29] id.
[30] id. at 394.
[31] id. at 396
[32] id. at 394 ("Proximate cause, however, is necessarily an individual issue and the need for individual proof alone does not necessarily preclude class certification.").