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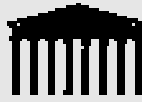

Class Action Appeals

by Andrew M. Low

I had always enjoyed softball games on warm summer evenings, but it had been decades since the last time I played. When an e-mail announced that our firm was going to field a co-ed team in the law firm league, I decided to give it a try.

The first game was a comedy of errors, and we were blown out. We managed to eke out a win in the second game, though, and even looked half-competent at times. The third game on the schedule was against a team I didn't recognize. As best I could tell from the schedule, the team was formed by a group of firms that were too small to field full teams themselves.

On game day, our team arrived at the diamond in front of the old Tivoli Brewery in Denver and began to stretch and play catch. Our opponents showed up a few minutes later and quickly broke up into small groups to warm up. The team's manager directed the practice efficiently, moving groups from one exercise to another so everyone threw, hit, fielded grounders and fly balls, and practiced timing on double plays. They looked ominously proficient, quite unlike our ragtag bunch of amateurs.

When it was time to play ball, the two managers met at home plate and shook hands. To my surprise, the opposing manager was Tim Flegleman. I wondered why such a professional-looking team would have a manager who had failed at every sport I had ever seen him attempt. As I checked out our opponents, I noticed that one of the players was Susan Victor. No surprise there; unlike Flegleman, Victor was a natural athlete and kept herself in top shape.

I walked over and said hello to Flegleman.

"I didn't know you were a ballplayer," I said.

I expected Flegleman to reply with one of his patented boasts, but he surprised me again.

"Oh, I just organized this team so the lawyers at my firm and three other small firms could play," he said modestly. "We're one player short tonight, so I'm going to fill in and play right field."

That made sense, I thought. Right field was where the weakest fielder usually played.

Flegleman's team was up first. I trotted out to left field, from where I usually watched most of the action and sometimes fielded a fly ball. Their leadoff batter grounded to short, and we made an easy play at first. A promising beginning, I thought. Susan Victor was up next. She took the first two pitches, but swatted the third cleanly over second base for a single. The next batter singled, as well, leaving two on with one out.

Again to my surprise, Flegleman batted next, in the cleanup spot. This made no sense at all. The fourth position in the lineup usually was reserved for a slugger—someone who could bring home any of the first three batters who had gotten on base. I shrugged off my doubts and, because it was Flegleman, I moved several steps closer to the infield.

That turned out to be a serious miscalculation. On the first pitch, Flegleman turned smoothly, snapped his wrists, and hit a thunderous shot to left field. The ball sailed eighty feet over my head. I scampered after it, but to no avail. By the time I retrieved the ball and threw it back to the infield, Flegleman had made it around the bases with time to spare.

The rest of the game followed the pattern set in the first inning. We managed to score a few runs, but Flegleman's team outclassed us at every position. Flegleman himself hit four home runs and accounted for eleven runs batted in. No matter how far back the outfielders played, Flegleman hit it farther.

As the players dispersed after the game, Flegleman stayed to collect the bats and equipment. I walked over and patted him on the back. "You're a heckuva ballplayer," I said. "Where did you learn to do that?"

Flegleman looked sheepish and said, "I was recruited out of high school by the Dodgers. I played on their minor league teams for a few years, but I never advanced past double-A ball. I could hit fastballs and changeups just fine, but sliders and curves always got by me. I saw the writing on the wall, so I went to college and law school, and here I am."

"But I've seen you at sport after sport—snowboarding, Nordic skiing, rock climbing, and—"

"And I stink. I know. I'm a natural at any sport based on hitting a moving ball—tennis, racquetball, baseball—you name it. At everything else, I'm a total klutz."

"So, why don't you stick to the sports you're good at?" I asked.

Flegleman shrugged sadly. "It's no fun for my opponents because I always win. That's why I usually just manage this team and don't play. I keep trying to find another sport where I can be just average, so I can enjoy it socially with friends. Haven't found it yet."

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As we talked, we had been walking toward the parking lot. I helped Flegleman heft the equipment bags into the back of his SUV. Susan Victor, who was parked in the next slot, was sitting on her open tailgate, changing out of her cleats.

"What do you think of our secret weapon?" she asked.

"He's amazing," I said, shaking my head in admiration.

"I wish I were as good at figuring out what to do about the *Bioflex* litigation," Flegleman said. "I'll tell you what: Meet me at the Rock Bottom Brewery, and I'll buy if you'll give me some advice."

Fifteen minutes later we were settled at an outdoor table looking out on the Sixteenth Street Mall, with tall mugs of draft beer in front of us. The sun had just dropped below the Rocky Mountain skyline, and the air was beginning to cool.

"What's the case about, Tim?" Victor asked.

"A class action alleging defects in prosthetic knee replacements. I represent Bioflex, Inc., the manufacturer of the devices. A number of them have failed, requiring surgery to remove and replace the defective devices with new ones in which the design error was corrected. About fifty have failed so far. Recovery from the original implantation operation is lengthy and painful. Patients who have had to go through it a second time are very angry."

"I can see why," Victor said. "But how can that be a class action? Fifty plaintiffs usually isn't enough to satisfy the requirement of numerosity."

"Oh, they're not involved. All of the plaintiffs in my case had a knee replaced with a device that continues to work normally. Bioflex thinks that fewer than one-tenth of one percent of the implanted devices will ever fail, but the plaintiffs who will never need more surgery are still seeking damages for stress and anxiety."

"What court are you in?" Victor asked.

"The case was filed in Colorado state court, and we removed to federal court under the Class Action Fairness Act, which grants the federal courts jurisdiction over parties in different states in which the total value of the claims exceeds $5 million."[1]

"So what's your problem, Tim?"

Flegleman sighed. "I'm convinced the case should not be certified as a class action. Products liability law and rules of damages vary from state to state. A class action here would have to apply the laws of fifty states, depending on where each plaintiff resides. The named plaintiff says this problem can be circumvented simply by applying the law of Colorado to everyone's claim, but that doesn't seem right to me. Also, there will be factual variations from plaintiff to plaintiff. I didn't find a case on point in the Tenth Circuit, but I argued that class certification should be denied because common questions of fact would not predominate."

"I take it the federal judge disagreed?" Victor asked sympathetically.

"Yup," Flegleman said lugubriously. "He certified the class ten days ago."

"And now you want to appeal?"

"I'm going to try," Flegleman said. "But the usual way to take up an interlocutory order is under 28 U.S.C. § 1292(b), which is discretionary, and very few federal appellate courts have agreed to hear appeals of class certification orders under that statute."

"Well, Tim, I have good news and then better news for you," Victor said. "But you're going to have to act fast."

"I'm all about fast," Flegleman said eagerly. "Point me in the right direction."

"Well, the good news is that you are almost certainly correct in your opposition to class certification. While the Tenth Circuit hasn't decided a case on point, the Seventh Circuit has. *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*[2] arose from a products liability case in which the named plaintiffs sought to represent a nationwide class of persons who had purchased an allegedly defective product that had not yet failed. The appellate court reversed the certification of a class, holding that variations in the law and facts among products liability plaintiffs located in fifty states normally preclude a manageable class action. The court also rejected a proposal that the district court simply apply the law of the named plaintiff's home state to all class members. More important, though, is the procedure by which the appeal reached the Seventh Circuit."

"Not § 1292(b)?"

"No, you're right that the federal appellate courts accepted few class action appeals under that statute. The Seventh Circuit heard the appeal under recently adopted F.R.C.P. 23(f), which gives federal appellate courts discretion to hear appeals from the grant or denial of class certification. Under this rule, the circuits have been more willing to hear appeals concerning class certification."

Flegleman looked at Victor skeptically. "A little more willing or a lot more willing?"

"A lot," Victor reassured him. "At last count, the federal appellate courts had accepted more than ninety appeals under Rule 23(f)."

Flegleman's face brightened. "That sounds promising. How do I go about persuading the Tenth Circuit to accept my appeal?"

"The Advisory Committee suggested that each circuit adopt its own standards for deciding petitions under Rule 23(f). While the Tenth Circuit hasn't announced its standards, the leading case again is from the Seventh Circuit. In *Blair v. Equifax Check Services, Inc.*,[3] the court held that review is appropriate where: (1) denial of class certification would be a "death knell" for the litigation because the plaintiff's claim is too small to justify the expense of litigation; (2) certification of a class would be a death knell because the exposure is so great that the defendant would be forced to settle; or (3) an appeal might facilitate the development of the law. Other circuits also consider whether the district court's decision was manifestly erroneous."[4]

Flegleman had pulled out a small notepad and was scribbling furiously. "Is the law the same in Colorado?"

"Very similar," Victor said. "Colorado's Rule 23(f) refers to a statute that adopts a procedure essentially identical to federal Rule 23(f).[5] The Colorado Court of Appeals has adopted a set of standards from an Eleventh Circuit case to evaluate whether to accept a class action appeal."[6]

"That's very helpful, but you said something about having to act fast?"

Victor nodded. "The rule gives you only ten days after entry of an order granting or denying class certification to file your petition in the appellate court. You said the order was entered ten days ago, so—"

"My time has expired," Flegleman wailed.

"Not so fast. Under F.R.C.P. 6(a), in calculating any period of time that is less than eleven days, you don't count weekends or holidays, so—"

Flegleman rapidly counted on his fingers. "So I still have four more days," he exulted. Jumping to his feet, he intoned, "There's not a moment to lose!" He squared his team-logo baseball cap on his head, dropped a twenty on the table, nodded gravely at Victor, and strode off without another word.

As we watched Flegleman turn the corner, Victor turned to me, shrugged, and said, "Well, he's a great baseball player."

I agreed and signaled the waiter for the check.

NOTES

1. *See* 28 U.S.C. § 1332(d).

2. *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 288 F.3d 1012 (7th Cir. 2002). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir. 2001) (affirming denial of class certification in a medical device case).

3. *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999).

4. *See, e.g., In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002). For other factors, *see In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144-45 (4th Cir. 2001); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000).

5. CRS § 13-90-901 (2003).

6. *Clark v. Farmers Ins. Exch.*, 117 P.3d 26 (Colo.App. 2004) (adopting the five-factor test of *Prado-Steiman, supra* note 4). n