

member who has been heard on the record has expressed the opposite sentiment.

The second most important lesson to take out of Stone is that adequacy of representation is an extremely important factor in class certification. As the Court said:

We agree with the assessment of one court that “adequacy of representation is perhaps the most significant of the prerequisites to a determination of class certification.” *Folding Cartons, Inc.*, 79 F.R.D. at 701.

The reason is because:

[a]dequacy of representation is the key to the integrity of class action litigation, not only in pragmatic terms of efficiency and thoroughness of the proceedings, but far more importantly in relation to the fair and just resolution of the dispute. Because the individual right to a day in court is delegated to the named Plaintiff in a class action the Court must be especially sensitive to insuring that the due process rights of the absent parties are protected since they will be bound by any final judgment. Any affirmatives of representation will thus result in a defect of constitutional dimensions. If the due process rights of all parties are not guaranteed, any settlement or judgment is vulnerable to collateral attack. (Citing Folding Cartons, supra).

On page five of her brief, the Plaintiff, in a footnote, makes reference to a case cited by the City Hamer v. Board of Education, 367 N.E.2d 739 (Ill. 1977). In the footnote on page five of her brief, the Plaintiff takes a quote out of Hamer referencing unauthorized taxes and attempts to use that quote as proof that Hamer is inapposite to the City’s motion to decertify.

The Plaintiff is mistaken.

The Hamer case involved a class of Plaintiffs who, if successful, might end up losing money in the long run. Hamer at 745.

The quote cited by Plaintiff is pure dicta. The important lesson from Hamer is that the Plaintiff’s attorney there was a class member, like Mr. Stoltze is a class member here, and the Court

said:

Thus it is blamed while the Plaintiff would also suffer the increased taxes, he would be recompensed for his efforts as well as being reimbursed for the fees paid out, so that he would probably profit financially. On the other hand, **those who would have their taxes increased might be worse off**, on net balance, in the future as a result of this suit.

Hamer at 745.

Thus, despite the Hamer quote utilized by Plaintiffs in their footnote, the Hamer court decided that an increase in taxes to a Plaintiff's class, that would result in a net loss to the class, was grounds for decertification. Hamer at 745. In the same footnote, the Plaintiff also cites to Ross v. City of Geneva, 43 Ill. App.3d 976 (Ill. App. 1976), for the proposition that because fifty objectors out of eleven hundred members of the class objected and the class was not decertified that this class should not be decertified.

The difference is, of course, that the uncontradicted evidence in this record is that the **majority** of the class will lose money upon a refund. They can lose a little bit of money if the City opts to borrow in the short term and repay the next year, or, class members can be bled slowly to death, if the City sells a bond and then repays the bond over twenty years and thus increases the debt by double and the loss by the same, as testified to by City Finance Director Allen McKinley. And of course, since there is no possibility of opting out, it is not unusual to find few complaints in this case. What would be the use? Ms. Kragnes says she doesn't care if her class loses money.

In its initial brief the City cited Vignoroli v. Blue Cross of Iowa, 360 N.W.2d 741 (Iowa 1985) for the proposition that a fundamental conflict going to specific issues destroys class certification. The City asks the question – what could be more fundamental than losing money in a

lawsuit? The Plaintiff has not answered this question because the Plaintiff cannot answer this question, at least not in any way helpful to her case. The fact of this matter is that the conflicts in this class are basic and fundamental and go to the very core of the litigation. The Plaintiff has sued an unjust enrichment that is purely and simply a money claim. Therefore the relief and the consequences of that relief are fundamental and necessary to anything the Plaintiff says or does in Court.

The Plaintiff cites a New York case, Jacobi v. Bache & Co., 16 Fed. R. D. 2d. 71 (S.D. N.Y. 1972) for the proposition that in a conspiracy case, where conspiracy was the main charge, a minor disagreement among some of the multiple Defendants was not enough to destroy the class. What is interesting about Jacobi is the quote the Plaintiff uses on page 7 of her brief from that case. There, the court explicitly found that all the class members would benefit from the suit. Of course, no such finding could be made on the evidence currently in the record in this case.

On page twelve of her brief, Plaintiff makes an outright misrepresentation. She says:

Further, the cases cited by the Defendant only support the proposition that a class representative cannot also serve as the class counsel or be in the same firm as or be related the class representative.

That statement is, sadly, a lie.

As the City pointed out on page thirteen of its initial brief, one U.S. Court of Appeals has adopted a per se rule that a class member can never be class counsel. Zylstra v. Safeway Stores, Inc., 578 Fed.2d 102, 104 (5th Cir. 1978). The second circuit has followed Zylstra with approval. In Re: Agent Orange Product Liability Litigation, 818 Fed.2d 216, 224 (2nd Cir. 1987).

Finally, in her second brief point, the Plaintiff says the class should not be decertified

because the class is seeking declaratory judgment. That is true. The class is also seeking millions of dollars in refunds. If the class representative and class counsel were to drop their claim for refund, then a large part of the intra-class conflicts would disappear. However, they have not dropped their claim for a refund and therefore Plaintiff's Brief Point II is simply a red herring and of no benefit to this analysis.

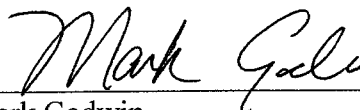
CONCLUSION

The Plaintiff's reply brief fails to address many of the issues raised and cases cited in the City's motion to decertify the class. In addition, the Plaintiff's reply brief fails to take into account all of the intra-class conflicts plus the inadequacy of the representation of the named Plaintiff, plus the inadequacy of the net representation of the named counsel because of their breaches of fiduciary duty. Taken together, all of those conflicts and all of those inadequacies, must compel the court to decertify this class. It is not homogenous. It is not well served by its representative. It is not well served by its counsel.

A class action is a special proceeding. Plaintiffs must jump through many hoops in order to avail themselves of that special proceeding. Plaintiffs have stumbled and fallen badly as they attempt to jump through the hoop of class homogeneity and adequacy of class representation both by the named representative and class counsel.

While the Court, as a matter of law, has discretion and class certification/decertification issues, the City asserts that here that discretion has been constrained to the point of extinction. The uncontradicted evidence is that a majority of the class will in all likelihood lose money if the class is successful in obtaining a large refund. The class representative has admitted that most people don't want to lose money. That remark alone should spell the doom of the certification of this

class. All of the other intra-class conflicts and all of the other inadequacies pointed out in the City's brief necessitate that this class be decertified.



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