

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CVO2945
)	Judge Robertson
ANNE VENEMAN,)	
)	
Defendant.)	

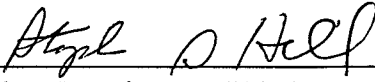
**PLAINTIFFS' EMERGENCY MOTION TO STAY PROCEEDINGS NUNC PRO TUNC
TO DECEMBER 2, 2002 PENDING RESOLUTION OF PLAINTIFFS'
INTERLOCUTORY APPEAL PURSUANT TO FED. R.CIV. P. 23(f)**

Pursuant to LCvR 7.1, plaintiffs move the Court to enter an order staying proceedings in this case solely for purposes of tolling the statute of limitations pending resolution of plaintiffs' Rule 23(f) appeal. Given the emergency nature of this motion, plaintiffs request that the Court appropriately shorten the time for defendant's opposition, if any.

Respectfully submitted,

Of Counsel:

Kenneth C. Anderson #243962
Robert L. Green, Jr. #935775
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610



Alan W. Wiseman #187971
Stephen S. Hill #927137
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610 – Fax

Alexander J. Pires, Jr. #185009
Ingrid Hutto # 473457
CONLON, FRANTZ, PHELAN & PIRES, LLP
1818 N Street, N.W.
Suite 700
Washington, DC 20036
(202) 331-7050
(202) 331-9306 - Fax

Philip Fraas #211219
3050 K Street, N.W.
Suite 400
Washington, DC 20007
(202) 342-8864
(202) 342-8451 – Fax

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CVO2445
)	Judge Robertson
ANNE VENEMAN,)	
)	
Defendant.)	

ORDER

Upon consideration of plaintiffs' emergency motion to stay proceedings in this case, *nunc pro tunc*, to December 2, 2002, for purposes of tolling the statute of limitations pending resolution of plaintiffs' Rule 23(f) appeal and defendants' opposition thereto, it is by the Court hereby

ORDERED that plaintiffs' motion to stay proceedings for purposes of tolling the statute of limitations is GRANTED, and the case is STAYED *nunc pro tunc* to December 2, 2002 for purposes of tolling the statute of limitations pending resolution of plaintiffs' Rule 23(f).

SO ORDERED this _____ day of December, 2002

James Robertson
United States District Judge

Date: _____

cc: Alan W. Wiseman #187971
Stephen S. Hill #927137
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610 – Fax

Alexander J. Pires, Jr. #185009
Ingrid Hutto # 473457
CONLON, FRANTZ, PHELAN & PIRES, LLP
1818 N Street, N.W.
Suite 700
Washington, DC 20036
(202) 331-7050
(202) 331-9306 - Fax

Philip Fraas #211219
3050 K Street, N.W.
Suite 400
Washington, DC 20007
(202) 342-8864
(202) 342-8451 – Fax

Attorneys for Plaintiffs
GUADALUPE L. GARCIA, JR., et al.

Lisa Olson, Esquire
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division
Federal Programs Branch
901 E Street, N.W.
Room 1014
Washington, DC 20530

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,

Plaintiffs,

v.

ANN VENEMAN,

Defendant.

)
)
)
)
) Civil Action No. 1:00CVO2445
) Judge Robertson
)
)
)
)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' EMERGENCY MOTION TO STAY PROCEEDINGS *NUNC PRO TUNC*
TO DECEMBER 2, 2002 PENDING RESOLUTION OF PLAINTIFFS'
INTERLOCUTORY APPEAL PURSUANT TO FED. R. CIV. P 23(f)**

INTRODUCTION

Pursuant to LCvR 7.1, plaintiffs have filed herewith a motion and proposed order to stay the proceedings in this case, *nunc pro tunc* to December 2, 2002, pending resolution of plaintiffs' interlocutory appeal, pursuant to Fed. R. Civ. P. 23(f), of this court's December 2, 2002 Memorandum Order denying plaintiffs' motion for class certification. As required by LCvR 7.1(m), plaintiffs' counsel conferred with defendant's counsel, Lisa Olson, Esq., concerning this motion and Ms. Olson has indicated that defendant opposes the motion. This memorandum is submitted in support of that motion.

FACTS

This action is brought on behalf of a putative class of Hispanic farmers and ranchers who allege, and the facts show, that the United States Department of Agriculture ("USDA") has discriminated against them in connection with their efforts to participate in farm credit and non-credit benefit programs operated by the USDA through its former agency, the Farm Home

Administration (“FmHA”) and its successor, the Farm Service Agency (“FSA”), in violation of the Equal Credit Opportunity Act (“ECOA”). 15 USC §§ 1691 et seq.

Although ECOA contains a two-year statute of limitations, id. §1691e(a), Congress enacted legislation that retroactively extended the limitations period for certain claims against USDA provided that the action was brought within two years of the enactment of the legislation, i.e., by October 21, 2000. Congress took this extraordinary step in response to its belated discovery that in the early 1980s, USDA had secretly dismantled its civil rights investigatory unit and hence hobbled one of its means of ECOA enforcement. As a result of USDA’s secret actions, for a period of nearly twenty years, Hispanic and other minority farmers who complained of discrimination in connection with USDA’s farm credit programs, as USDA forms and regulations expressly encouraged them to do, had their unreviewed complaints relegated to a veritable bureaucratic black hole. Consequently, Congress allowed individuals who filed administrative complaints with USDA between January 1, 1981 and July 1, 1997 to sue for discrimination occurring between January 1, 1981 and December 31, 1996. See Agriculture Rural Development, Food and Drug Administrative and Related Agencies Appropriations Act, 1999. Pub. L. No. 185-277§741, 112 Stat. 2681 (codified at 7 U.S. C. §2297 note).

On October 13, 2000, just eight days prior to the expiration of the extended limitations period, the complaint in the instant case was filed. The filing of this case as a class action tolled the statute of limitations for the putative class members. On December 2, 2002, this Court issued an order denying plaintiffs’ motion for class certification, however, for some reason the Court’s order was not faxed to plaintiffs until the evening of December 4, 2002¹.

Under traditional practice, a class action’s tolling effect on a statute of limitations with respect to the putative class continues until it is deemed no longer reasonable for the putative class to look to the named plaintiffs to protect their interests. See generally Crown, Cork & Seal

¹ The Court’s order was dated and apparently entered on Monday, December 2, 2002, however, plaintiffs counsel did not receive notice until Wednesday, December 4, 2002 at 5:38 p.m. See Exhibit 1 (Fax cover sheet from the clerk’s office.)

Co. Inc. v. Parker, 462 U.S. 345 (1983); Armstrong v. Martin Marietta Corp., 138 F.3d 1374 (11th Cir. 1998). Courts have placed that time at the date the motion for class certification is denied.² See, e.g., Armstrong, 138 F.3d at 1380-81 (citing cases). These cases, however, predate the adoption of Fed. R. Civ. P. 23(f). Indeed, the Armstrong court suggested that it might allow for continued tolling of a statute of limitations during the pendency of an appeal under the proposed Amendment to Rule 23 that became Fed. R. Civ. P. 23(f). Id. at 1389, n.35. It is frankly unclear whether Rule 23(f) permits the continued tolling of the statute of limitations during the pendency of an application for review and any subsequent review granted pursuant thereto. Furthermore, precisely because of this uncertainty, at least one district court stayed its proceedings *nunc pro tunc* pending the appeal pursuant to Rule 23(f). The National Asbestos Workers Medical Fund v. Philip Morris Inc., 2000 U.S. Dist. Lexis 13010 (E.D.N.Y. 2000) (Weinstein, J.) (A copy of the Memorandum Order is attached as Exhibit 2.)

The issue is further complicated by the fact that Rule 23(f) allows plaintiffs ten days from the entry of the order denying class certification to apply to the Court of Appeals for review of the certification decision. However, if the statute is deemed to resume running from the date of the order denying class certification, absent a stay by the Court, the eight days remaining in the statute of limitations period would run before the time provided by Rule 23(f) to file an application for review.

Given the foregoing uncertainties and out of an abundance of caution, plaintiffs are filing this emergency motion for a stay *nunc pro tunc* to the date of the order denying class certification, December 2, 2002, solely for the purpose of continuing to toll the statute of limitations. If the statute is permitted to run before the Court of Appeals can consider plaintiffs' application for review, the valid claims of untold thousands of Hispanic farmers will be extinguished without their ever having received notice of the pending lawsuit or an opportunity

² In that connection, plaintiffs' counsel, in filing this motion, assert their intent to continue vigorously to represent the members of the Garcia putative class through resolution of instant Rule 23(f) interlocutory appeal.

to protect their rights. Even with respect to the hundreds of putative plaintiffs of whom plaintiffs' counsel are aware, it would be an impossible task to contact each of them in the time remaining since counsel received actual notice of the order to determine whether these putative class members wished to intervene in the pending case or to file separate actions. Many of these farmers live in remote rural areas and do not have access to fax machines or the internet.

ARGUMENT

A STAY OF THE PROCEEDINGS PENDING RESOLUTION OF PLAINTIFFS' RULE 23(f) PETITION IS CRUCIAL BECAUSE THE VALID CLAIMS OF THOUSANDS OF HISPANIC FARMERS WILL BE FOREVER LOST WITH THE EXPIRATION OF THE STATUTE OF LIMITATIONS.

If the statute of limitations is not tolled in the instant action, thousands of Hispanic farmers risk losing their opportunity to seek legal redress for legitimate discrimination claims forever. They will once again be victimized by USDA's secret dismantlement of its apparatus for investigating discrimination complaints. Without this Court's intervention, the expiration of the statute of limitations could occur just eight days from this Court's denial of class certification, and members of the Garcia putative class may never be able to seek remedy for violation of their legal rights. For many putative class members whose claims arose during the 1981 to 1996 time period, the running of the statute of limitations will bar their ability to pursue such claims. Plaintiffs therefore requested that this Court grant such a limited stay, *nunc pro tunc*, to December 2, 2002, during the pendency of plaintiffs' Rule 23(f) interlocutory appeal.

In deciding to grant a stay of proceeding in the context of a pending Rule 23(f) petition, the court should consider four factors: (1) whether there is a substantial likelihood that the movant will succeed on the merits of the appeal; (2) whether the movant will suffer irreparable injury if the stay does not issue; (3) whether others will suffer harm if the stay is granted; and (4) whether the public interest will be furthered by the stay. In re Lorazepam & Clorazepate Antitrust Litigation, 208 F.R.D. 1, 3 (D.D.C. 2002). Consideration of these factors should lead the court to conclude that a stay of the proceedings in this matter is warranted.

First, there is a substantial likelihood that plaintiffs will succeed on the merits of its appeal to the D. C. Circuit Court. At this juncture, success on the merits, as in Lorazepam has two layers: procedural and substantive. Procedurally, the D.C. Circuit will likely grant review pursuant to Rule 23(f) under one of the four factors outlined in In re Veneman, No. 02-5021, (D.C. Cir. Oct. 29, 2002). As the D.C. Circuit Court recently noted, interlocutory review of class certification decisions pursuant to Rule 23(f) is ordinarily appropriate in three circumstances: “(1) when a questionable class certification decision creates a ‘death-knell situation’ for either party; (2) when the certification decision presents ‘an unsettled and fundamental issue of law relating to class actions...that is likely to evade end-of-the-case review’; (3) when the certification decision is manifestly erroneous.” Slip op. at 5. In addition to the circumstances listed, the court could also grant review in “special circumstances.” Ibid.

At a minimum plaintiffs submit that the certification order is manifestly erroneous and presents special circumstances. Setting to one side the fact that three carbon copy complaints filed in the same court by African American, Native American and Hispanic farmers results in the putative classes of African American and Native American farmers being certified and the putative class of Hispanic farmers being denied certification, the Hispanic plaintiffs have been faulted for failing to make a “substantial showing” with respect to commonality and a more detailed statistical analysis while being denied any discovery whatsoever. December 2, 2002 Memorandum Order at 8, see also id. at 15-16. It bears recalling the procedural posture in which plaintiffs were placed. When plaintiffs and defendant met with the Court on June 24, 2002 at an in-chambers scheduling conference, plaintiffs presented a detailed discovery proposal in connection with the lifting of the stay on discovery. In the course of the discussion, plaintiffs shared with the Court their concerns about the inadequacy of the centralized data bases to which defendant sought to limit plaintiffs’ class discovery. In response to those concerns, the Court prescribed a procedure directing plaintiffs to file a supplemental memorandum and affidavit of counsel outlining what plaintiffs believed to be the problems with the centralized databases to which USDA sought to confine plaintiffs’ discovery. As the Court described the process in the

June 24, 2002 in-chambers scheduling conference, the purpose of the exercise was “to narrow the issues” in dispute. At no point did plaintiffs ever concede the legitimacy of the limitations which USDA sought to impose upon plaintiffs’ class discovery. Plaintiffs did, however, argue that if the Court sustained what plaintiffs considered to be the governments wholly insupportable position that the only class discovery plaintiffs were entitled to was the central databases described in the meetings between plaintiffs and defense counsel, then plaintiffs could not make the specific linkage that the Court seemed to require in its May 22 order. Plaintiffs argued that if they were in fact to be limited to obviously deficient databases that did not identify the reasons for loan rejections, plaintiffs could not reasonably be required to supply such a linkage. Plaintiffs also made clear, however, their belief that they were entitled to more than the flawed databases and, if the court still insisted on the linkage then plaintiffs were entitled to full discovery of individual loan files to determine the reasons for rejections. Plaintiffs clearly stated their position in this regard:

Consistent with settled authority and the circumstances here presented, plaintiffs submit that they have already presented evidence sufficient to warrant class certification under both disparate treatment and disparate impact theories. Specifically, the long, well-documented history of discrimination by USDA against Hispanic and other minority farmers, the strong anecdotal evidence and the evidence of a statistically significant difference in the ability of white and Hispanic farmers to obtain USDA loans more than satisfy the requirements of Rule 23 with respect to plaintiffs’ disparate treatment and disparate impact claims. The common thread binding these claims is the unfettered discretion of local USDA officials in applying highly subjective eligibility criteria with respect to USDA’s credit and noncredit benefit programs. If, however, the Court is not convinced that plaintiffs have satisfied the requirements of Rule 23, plaintiffs submit that they are entitled to meaningful class discovery that would not be limited, as the government contends, to certain centralized electronic databases that, as defendant concedes, contain no useful information. See June 17, 2002 letter from Jean Lin, Esq. To Stephen S. Hill, Esq. (Ex. E to the Hill Aff. (Ex. 1 to the Second Supplemental Memorandum)).

Plaintiffs' Reply to Defendant's Response To Plaintiffs' Second Supplemental Memorandum In Support of Their Motion for Class Certification, dated September 5, 2002 ("Plaintiffs' Sept. 5 Reply") at 4. (Emphasis added.)

Of course, given USDA's policy of document destruction which continued unabated during the pendency of this and related litigation, it is unclear what data remain in the field offices and individual files. On December 2, without ever lifting the stay on discovery or even addressing the inadequacy of the databases to which the government sought to circumscribe plaintiffs discovery, the Court denied plaintiffs motion for class certification. In essence, what started as a court-prescribed procedure for "narrowing" discovery issues resulted in a denial of plaintiffs' motion for class certification without affording plaintiffs any discovery.

In addition to denying plaintiffs any discovery, the Court also erred in relying upon the current provisions of the Code of Federal Regulations in addressing the issue of the degree of subjectivity involved in the decisionmaking process. See December 2 Memorandum Order at 12-13, and n.5. The Court concludes that the instant case does not fit within the exception outlined in Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 159 n.15 because eight of the eleven eligibility criteria "cannot be properly characterized as subjective." December 2, Memorandum Order at 12. However, as plaintiffs made clear in their Supplemental Memorandum, for most of the period covered by the complaint in this proceeding, the county committee considered only six criteria: credit worthiness, citizenship, experience, character, appropriate farm size and ability to obtain non-USDA credit. See 7 C.F.R. §§ 1941, 1943 (1988) and "[w]ith the exception of citizenship, all of the criteria are highly subjective and fraught with the potential for discrimination against Hispanic farmers and ranchers and other minorities when applied by individuals with unfettered discretion." Plaintiffs' Supplemental Memorandum, dated April 8, 2002, at 7; see also id. at 7-9. Simply put, the criteria cited by the Court were not the ones used by the county committee. Indeed, the county committee's role in the lending process was effectively eliminated after 1999. But the unfettered discretion in applying highly subjective

criteria that once was exercised by the county committee was subsequently exercised by the FSA loan officer.³ See id. at 9.

There is a certain “death knell” aspect to this denial of class certification. The Hispanic farmers who comprise the putative class in this case represent an oppressed and, in some ways, beaten down minority who are confronting a powerful governmental agency that has systematically stripped them of their land and, in some instances, their ability even to subsist as farmers and ranchers. They are confronting an agency which the record shows reflects racial and ethnic animus, not just on the local level but at high levels within the bureaucracy. See, e.g., Plaintiffs’ Sept. 5 Reply at 17 n.11 and Exhibit 3 attached hereto. It is an agency which a former director of the Office of Civil Rights has stated in a sworn declaration, destroys documents and intimidates those who would complain. Gray Decl. ¶ 20 (Exhibit 7 to Plaintiffs’ April 8, 2002 Supplemental Memorandum). Given these circumstances, it took remarkable courage for the named plaintiffs to come forward and assert their rights under ECOA. With the denial of class certification there is no telling how many Hispanic farmers will abandon valid claims for fear of retaliation and intimidation by FSA.

Second, plaintiffs will suffer irreparable injury if the stay does not issue. For many of the putative class members, the filing of this case was their only opportunity to obtain legal redress for the wrongs they have suffered. The running of the statute of limitations will mean that those farmers courageous enough fight for their rights individually will never be able to obtain any justice for their injuries. Third, there is no cognizable harm the defendant will suffer if the stay is granted; no rights of the defendant will be impacted by a short stay in this matter. Lastly, it is in the public interest that this stay be entered. The Garcia case is a controversial discrimination case, which along with its companion cases, addresses proven, well documented pattern and

³ In any other context, matters of this sort might well be raised in a motion for reconsideration. However, given the uncertainty that exists with respect to the continued tolling of the statute of limitations in light of Rule 23(f), and out of an abundance of caution, plaintiffs are constrained to proceed with a Rule 23(f) application. That being said, the Court is obviously free to reconsider its order sua sponte.

practice discrimination. This is a significant case of serious public concern which deserves all the benefits of actual and perceived procedural due process.

Clearly the equities and public interest favor granting the requested stay. Indeed, as Judge Weinstein noted in similar circumstances,

First, a reversal on an interlocutory appeal under Rule 23(f) could result in the prompt revival of the class action since the rule was designed to accommodate the need for quick appellate review of class certification decisions. See F. R. Civ. P. advisory committee notes; see also Appeals at 325 (“the court of appeals’ discretion is to be ‘unfettered’ and similar to that exercised by the Supreme Court in certiorari decisions”).

Interlocutory appeals are now more likely to be granted because Rule 23(f) was shaped so appellate consideration of a class certification decision would not prolong the proceedings or infringe unduly on the province of the district judge. See Blair v. Equifax Check Services, Inc., 181 F.3d 832, 834 (7th Cir. 1999). The statute of limitations period should . . . be tolled after class certification is denied pending a Rule 23(f) appeal to encourage the putative class members to continue to rely on the action’s tolling until the court of appeals has spoken.

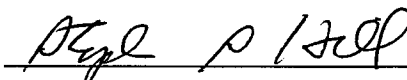
Second, equity supports the issuance of a stay that has the effect of tolling the statute of limitations period should plaintiffs move for an interlocutory appeal under Rule 23(f). The issuance of a stay reflects in part the court’s determination that a party would otherwise suffer undue hardship. See Metropolitan Life Insurance Company v. RJR Nabisco, Inc., 906 F.2d 884, 895 (2d Cir. 1990). Here, the balance of harm weighs in favor of granting a stay. The parties need only wait out an expedited appeals process. Were the statute of limitations period to begin to run before an appeal is taken -- or waived -- hundreds of thousands of potentially viable claims might expire unless new actions were promptly brought.

2000 U.S. Dist. LEXIS 13910 at *7 - *8.

CONCLUSION

Accordingly, for the foregoing reasons, plaintiffs request that the Court grant a stay in this case, *nunc pro tunc*, to December 2, 2002, pending resolution of plaintiffs' Rule 23(f) appeal.

Respectfully submitted,



Of Counsel:

Kenneth C. Anderson #243962
Robert L. Green, Jr. #935775
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610

Alan M. Wiseman #187971
Stephen S. Hill #927137
Yolanda Hawkins #477616
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610 – Fax

Alexander J. Pires, Jr. #185009
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1818 N Street, N.W.
Suite 700
Washington, DC 20036
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(202) 331-9306 – Fax

Philip Fraas #211219
3050 K Street, N.W.
Suite 400
Washington, DC 20007
(202) 342-8864
(202) 342-8451 – Fax

Attorneys for Plaintiffs
GUADALUPE L. GARCIA, JR., et al.

Date: December 9, 2002

Exhibit 1

Civil Action No. 1:00CV02445

2002 DEC -4 PM 5: 38



Steve Hill

United States District Court

For the District of Columbia

Notice of Orders or Judgments
Fed. R. Civ. P. 77(d)

Date: 12/04/02

To: Alan Mitchell Wiseman
1299 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Case Number: 1:00-cv-02445

Instrument Number: 77

This fax will be attempted five times. If you have not received a complete fax on that attempt it will be automatically printed and mailed to you. For questions concerning faxing problems, please call (202) 354-3190.

Number of pages including cover sheet: 3

Exhibit 2

THE NATIONAL ASBESTOS WORKERS MEDICAL FUND, et al., Plaintiffs, -against- PHILIP MORRIS, INC., et al., Defendants.
98 CV 1492

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEWYORK

2000 U.S. Dist. LEXIS 13910

September 26, 2000, Decided

CASE SUMMARY

PROCEDURAL POSTURE: Before the court was the issue of whether a stay should be issued pending an interlocutory appeal, pursuant to Fed. R. Civ. P. 23(f), of an order which denied class certification.

OVERVIEW: An order was entered denying class certification with leave to renew following trial of the claims of one of the members of the class. The court then decided that a stay in the matter, tolling the statute of limitations period pending the outcome of an interlocutory appeal should be granted. The court found that the balance of harm weighs in favor of granting a stay, as the parties need only wait out an expedited appeals process under the newly enacted Fed. R. Civ. P. 23(f). The court reasoned that were the statute of limitations period to begin to run before an appeal was taken -- or waived -- hundreds of thousands of potentially viable claims might expire unless new actions were promptly brought.

OUTCOME: A stay in the matter tolling the statute of limitations period pending the outcome of an interlocutory appeal of an order denying class certification was granted. Equity supported the issuance of a stay, as the parties only had to wait out an expedited appeals process.

CORE TERMS: class certification, statute of limitations, interlocutory appeal, tolling, statute of limitations period, interlocutory, class action, putative, issuance, ended, toll, tolled

CORE CONCEPTS -

Civil Procedure: Entry of Judgments: Stay of Proceedings & Supersedeas

An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders. Fed. R. Civ. P. 23(f).

Civil Procedure: Appeals: Appellate Jurisdiction: Interlocutory Orders

Interlocutory appeals are now more likely to be granted because Fed. R. Civ. P. 23(f) was shaped so appellate consideration of a class certification decision would not prolong the proceedings or infringe unduly on the province of the district judge.

Civil Procedure: Appeals: Appellate Jurisdiction: Interlocutory Orders

Governments: Legislation: Statutes of Limitations: Statutes of Limitations Generally

The statute of limitations period should be tolled after class certification is denied pending a Fed. R. Civ. P. 23(f) appeal to encourage the putative class members to continue to rely on the action's tolling until the court of appeals has spoken.

Civil Procedure: Entry of Judgments: Stay of Proceedings & Supersedeas

The issuance of a stay reflects in part the court's determination that a party would otherwise suffer undue hardship.

COUNSEL: [*1] For Plaintiffs: Donald J. Capuano, James R. O'Connell, O'Donoghue & O'Donoghue, Washington, DC.

For Plaintiffs: Mary Beth Harmon, Law Offices of Peter G. Angelos, P.C., New York, NY.

For Plaintiffs: Kenneth David Pack, H. Russell Smouse, John C.M. Angelos, Peter G. Angelos, R. Bruce McElhone, E. David Hoskins, Joshua J. Kassner, Law Offices of Peter G. Angelos, P.C., Baltimore, MD.

For Plaintiffs: Melvyn I. Weiss, Milberg, Weiss, Bershad, Hynes & Lerach, LLP, New York, NY.

For Philip Morris Inc., Philip Morris Companies, Inc., Defendants: Barbara Robbins, Steven M. Barna, Ben Germana, Peter C. Hein, Stephen R. Blacklocks, Wachtell, Lipton, Rosen & Katz, New York, NY.

For Philip Morris Inc., Philip Morris Companies, Inc., Defendants: Robert McCarter, Murray R. Garnick, Arnold & Porter, Washington, DC.

For Philip Morris Inc., Philip Morris Companies, Inc., Defendants: Paul F. Stecker, Paul F. Jones, Phillips, Lytle, Hitchcock, Blaine & Huber, L.L.P., Buffalo, NY.

For Philip Morris Inc., Philip Morris Companies, Inc., Defendants: Jeffrey M. Wagner, Esq., Thomas J. Frederick, Esq., Dan K. Webb, Esq., Jerome W. Pope, Esq., Winston & Strawn, Chicago, IL. [*2]

For Philip Morris Inc., Philip Morris Companies, Inc., R.J. Reynolds Tobacco Co., British American Tobacco Co., B.A.T. Industries, P.L.C., Loews Corp., Lorillard Tobacco Co., Liggett Group Inc., Liggett & Myers, Inc., Brooke Group, Limited, Hill & Knowlton, Inc., Council for Tobacco Research USA, Inc., Tobacco Institute, Inc., Defendants: Kenneth N. Bass, Kirkland & Ellis, New York, NY.

For Philip Morris Inc., Philip Morris Companies, Inc., Defendants: Stephen R. Blacklocks, Wachtell, Lipton, Rosen & Katz, New York, NY.

For Philip Morris Inc., Philip Morris Companies, Inc., Defendants: Thomas John Quigley, Winston & Strawn, New York, NY.

For R.J. Reynolds Tobacco Co., Defendant: Theodore M. Grossman, Jones, Day, Reavis & Pogue, Cleveland, OH.

For R.J. Reynolds Tobacco Co., Defendant: Steven C. Bennett, Jones, Day, Reavis & Pogue, New York, NY.

For R.J. Reynolds Tobacco Co., Defendant: Alan E. Kraus, Riker, Danzig, Scherer, Hyland & Perretti, LLP, Morristown, NJ.

For R.J. Reynolds Tobacco Co., Defendant: Thomas Schroeder, Gusti W. Frankel, Womble, Carlyle, Sandridge & Rice, P.L.L.C., Winston-Salem, NC.

For Brown & Williamson Tobacco, Corp., Defendant: [*3] Michelle H. Browdy, Esq., Robert F. Huff, Jr., Esq., Elli Leibenstein, Esq., Douglas G. Smith, Esq., Steven M. McCormick, Kirkland & Ellis, Chicago, IL.

For Brown & Williamson Tobacco, Corp., Batus Holdings Inc., American Brands, Inc., Defendants: Peter A. Bellocasa, Marjorie Press Lindblom, Kirkland & Ellis, New York, NY.

For Brown & Williamson Tobacco, Corp., Batus Holdings Inc., American Brands, Inc., Defendants: Kenneth N. Bass, Jennifer G. Gardner, Kirkland & Ellis, Washington, DC.

For British American Tobacco Co., Defendant: Donald I. Strauber, David A. Wallace, Chadbourne & Parke, LLP, New York, NY.

For B.A.T. Industries, P.L.C., Defendant: Joseph M. McLaughlin, Simpson, Thacher & Bartlett, New York, NY.

For Loews Corp., Defendant: Gary Long, Shannon L. Spangler, Shook, Hardy & Bacon, L.L.P., Kansas City, MO.

2000 U.S. Dist. LEXIS 13910, *

For Lorillard Tobacco Co., Defendant: Gary Long, Shannon L. Spangler, William L. Allinder, Donald J. Kemna, Craig E. Proctor, John James Baroni, Shook, Hardy & Bacon, L.L.P., Kansas City, MO.

For Lorillard Tobacco Co., Loews Corp., Defendants: Alan Mansfield, Greenberg Traurig, New York, NY.

For Liggett Group Inc., Liggett & Myers, [*4] Inc., Brooke Group, Limited, Defendants: Michael Matthew Fay, Aaron H. Marks, Nancy E. Struab, Kasowitz, Benson, Torres & Friedman, LLP, New York, NY.

For Hill & Knowlton, Inc., Defendant: Bruce M. Ginsberg, Davis & Gilbert, New York, NY.

For Council for Tobacco Research USA, Inc., Tobacco Institute, Inc., Defendants: Anne E. Cohen, Harry Zirlin, Debevoise & Plimpton, New York, NY.

For plaintiff in *Bergeron, et al. v. Philip Morris Inc., et al*, a related suit pending before this court: Michael C. Spenser, Milberg, Weiss, Bershad, Hynes & Lerach, L.L.P., New York, New York.

JUDGES: Jack B. Weinstein, Senior District Judge.

OPINIONBY: Jack B. Weinstein

OPINION: MEMORANDUM AND ORDER

WEINSTEIN, Senior District Judge:

On September 20 an order was entered denying class certification with leave to renew following trial of the claims of one of the members of the class. See *National Asbestos Workers Medical Fund v. Philip Morris, Inc.*, 2000 U.S. Dist. LEXIS 13562, 2000 WL 1364358 (E.D.N.Y.). That order, though interlocutory, is subject to appeal pursuant to the recently adopted Rule 23(f) of the Federal Rules of Civil Procedure. "An appeal does not stay proceedings in the district court unless[*5] the district judge or the court of appeals so orders." Fed. R. Civ. P. 23(f).

There may be some concern about the effect of this new practice on the running of the statute of limitations pending resolution of the appeal. To ensure that members of the class and defendants as well as the courts are not unnecessarily burdened by individual suits to protect statute of limitations tolling rights prior to the appellate decision, a limited stay is justified -- at least pending clarification of Rule 23(f) practice. To protect the parties, proceedings in the matter of *The National Asbestos Workers Medical Fund v. Philip Morris, Inc.* should be stayed nunc pro tunc to September 20, 2000, but only insofar as the order of that date may affect the running of the statute of limitations.

Prior to the December 1998 enactment of Rule 23(f), courts followed a reasonableness standard in determining when the statute of limitations would start to run in a class action. See *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1380 (11th Cir. 1998). Tolling ended when it was no longer reasonable for the putative class members to rely on the class action as a means of redressing their[*6] individual claims. See *id.* ("once the district court enters the order denying class certification, however, reliance on the named plaintiffs' prosecution of the matter ceases to be reasonable"). It was difficult for plaintiffs to avoid starting individual actions to toll statute of limitations if the district court denied class certification because interlocutory review of class certification decisions was not available except for a rare discretionary interlocutory appeal under section 1292(b) of title 28 or through the even more narrow "collateral final order" doctrine or via mandamus. See Kenneth S. Gould, *Federal Rule of Civil Procedure 23(f): Interlocutory Appeals of Class Action Certification Decisions*, *Journal of Appellate Practice and Process*, 309, 315 (1999)(hereafter "Appeals"); see also *National Asbestos Workers Medical Fund v. Philip Morris*, 71 F. Supp. 2d 139 (E.D.N.Y. 1999). Thus, before the adoption of Rule 23(f) tolling effectively ended when the district court denied class certification. See *Appeals*, at 315.

The enactment of Rule 23(f) in December 1998 signaled a new regime allowing putative class members to more easily obtain interlocutory[*7] appeals on the issue of class certification. The rule does not directly address the question whether taking an interlocutory appeal under Rule 23(f) tolls the statute of limitations. The policies undergirding the adoption of Rule 23(f) suggest, however, that the statute of limitations should be tolled where a party files an interlocutory appeal and the district court grants a stay.

First, a reversal on an interlocutory appeal under Rule 23(f) could result in the prompt revival of the class action since the rule was designed to accommodate the need for quick appellate review of class certification decisions. See F. R. Civ. P. advisory committee notes; see also Appeals at 325 ("the court of appeals' discretion is to be 'unfettered' and similar to that exercised by the Supreme Court in certiorari decisions").

Interlocutory appeals are now more likely to be granted because Rule 23(f) was shaped so appellate consideration of a class certification decision would not prolong the proceedings or infringe unduly on the province of the district judge. See *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). The statute of limitations period should[*8] be tolled after class certification is denied pending a Rule 23(f) appeal to encourage the putative class members to continue to rely on the action's tolling until the court of appeals has spoken.

Second, equity supports the issuance of a stay that has the effect of tolling the statute of limitations period should plaintiffs move for an interlocutory appeal under Rule 23(f). The issuance of a stay reflects in part the court's determination that a party would otherwise suffer undue hardship. See *Metropolitan Life Insurance Company v. RJR Nabisco, Inc.*, 906 F.2d 884, 895 (2d Cir. 1990). Here, the balance of harm weighs in favor of granting a stay. The parties need only wait out an expedited appeals process. Were the statute of limitations period to begin to run before an appeal is taken -- or waived -- hundreds of thousands of potentially viable claims might expire unless new actions were promptly brought.

A stay in the matter of *The National Asbestos Workers Medical Fund v. Philip Morris, Inc.* tolling the statute of limitations period pending the outcome of an interlocutory appeal is granted.

The court will hear any objection to this order.

So ordered

Jack[*9] B. Weinstein

Brooklyn, New York
September 26, 2000

Exhibit 3

DECLARATION OF LOU ANNE KLING

1. I am over 18 years of age and a United States citizen.
2. My home address is 691 8th Street, Granite Falls, Minnesota, 56241.
3. I am a retired family farmer, former USDA Deputy Administrator of the Farm Service Farm Loan Program and former Farm Service Agency Director of Outreach, all based in Washington, DC.
4. The office of Farm Service Agency's Farm Loan Program makes and services farm ownership and farm operating loans to low income, minority and women farmers in the United States, Puerto Rico and US Territories.
5. I was appointed the State Director of the Minnesota office of the Farmers Home Administration (FmHA) on April 19, 1993. The Farmers Home Administration (FmHA) at that time made and serviced the farm loans to low income, minority and women farmers. In December of 1993, FmHA Administrator Michael V. Dunn called and said that Secretary Espy requested that I come to Washington DC and be the Deputy Administrator of the farm loan program. I moved to Washington DC and began work on December 4, 1993. I was confirmed as the Deputy Administrator in May of 1994. Sometime in 1995, Congress put together the reorganization of the USDA. The Farmers Home Administration was abolished. The farm loan program section, with me as the administrator, was moved and merged in with the new agency called the Consolidated Farm Service Agency. This new agency consisted of the "old" Farmers Home Administration farm loan programs (FmHA), the Agricultural Stabilization and Conservation Service programs (ASCS) and the Crop Insurance programs. The Administrator of the old ASCS became the new administrator of the new agency. I was the only woman in the administration of this new agency, of which none of the other program administrators had prepared loan/lending or dealt with minority, low income or women farmers. The attitude of this new FSA administration was very condescending towards me and the feeling was that as a woman and or a farmer, I did not know much and "why were we wasting our time and money on these poor farm managers, they should just pull themselves up by their own bootstraps".
6. Sometime in the spring of 1996, (estimate time), my loan servicing Director, Veldon Hall, (white male) came to my office to tell me he had been charged with a discrimination filing by his new secretary. He explained that he had a noose hanging on his wall and the new secretary, who was African-American, became offended by the sight of the noose. He went on to explain that the noose had been given to him as a gift from his co-workers when he left his job in the Mississippi Delta office and it did not have any meaning, it was given as a joke gift. I became angry and went to Mr. Buntrock, my supervisor, and told him what had happened. Mr. Buntrock said that the Secretary of Agriculture was handling the case and I was not to question or do anything to Veldon Hall. The Office of Inspector General interviewed me twice on this case but nothing happened to Veldon Hall nor did I ever receive information or an explanation of the charges, investigation

- or discipline for Veldon Hall. I was also told to keep my mouth shut by Mr. Buntrock as the Secretary's office had taken care of this problem.
7. Shortly thereafter, about April of 1996, Mr. Buntrock, the administrator of the Farm Service Agency (FSA) called me into his office and stated that Secretary Glickman did not like how I was handling the farm loan program and he was going to move me to a new position. I tried to find why or what the Secretary had problems with my performance but no specific reason was given. I told Mr. Buntrock that "No, I would not go quietly, I wanted to know what I had done wrong". Mr. Buntrock said he would talk to the Secretary again and see if I could stay, as Mr. Buntrock was happy with my performance. Mr. Buntrock also said that Mr. Moos, the Undersecretary of the FSA was happy with my performance and he did not want me removed. A few days later Mr. Buntrock came to me and said he had visited with the Secretary and I would remain in my position. In July of 1996, without any warning or any discussion or meeting, Mr. Buntrock said I would be demoted and reassigned to a new office and job even though my last performance was rated superior. The Secretary would not meet with me nor would any official tell me what or why my performance or conduct was not acceptable and why I was being reassigned and demoted. Mr. Buntrock presented me with a new job description on the new job and that I would not have any staff. I was to develop an Outreach Program for the FSA. I said that without staff that was impossible and all they were doing was putting me in a room to shut me up. Mr. Buntrock finally agreed to give me three staff and a secretary. On July 15, 1996, the moving crew came into my office and moved all my items to a new office in the Portal building, which is two blocks from the USDA building. I was never able to meet with the Secretary. I was also not allowed to attend the Administrators staff meeting any longer.
 8. Carolyn Cooksie was illegally placed in my position. The illegality of Carolyn Cooksie's placement has been determined by the EEOC and the Office of Federal Operations in the Hill vs. Glickman case. It was determined by the courts that she was placed there because she was black and a female. It was found that the Secretary took this illegal/discriminatory action to quiet down the black farmers who were in the Black Farmers Class Action Lawsuit against USDA.
 9. The Outreach Program was only funded after pressure from outside groups, but the funding was never enough to do a decent job of reaching out to the low income, minority and women farmers. Our program was never treated as a viable operation within the agency.
 10. My staff consisted of a Native American male, African-American male, Hispanic male, senior woman, two stay in school minorities females and myself, a white senior woman.
 11. Secretary Espy did my performance rating in 1994 with a Superior rating and I never had a preface rating done until I applied for disability in spring of 2000
 12. I have reviewed the foregoing Declaration and declare under penalty of perjury that it is true and correct to the best of my personal knowledge.

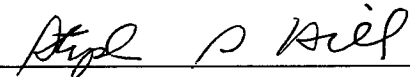

Lou Anne Kling

9-5-02
Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Emergency Motion to Stay Proceedings *Nunc Pro Tunc* to December 2, 2002, Pending Resolution of Plaintiff' Interlocutory Appeal Pursuant To Fed. R. Civ. P. 23(f) was served by hand delivery on this 9th day of December, 2002 upon the following:

Michael Sitcov, Esq.
Lisa Olson, Esq.
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division
20 Massachusetts Ave., N.W.
Room 6118
Washington, DC 20530



Stephen S. Hill