IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO AUTO FINANCE, INC.,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND THE HONORABLE BRENT T. ADAMS, DISTRICT JUDGE,
Respondents,
and
SHIRLEY SCHMITZ,
Real Party in Interest.

No. 39863

FILED

APR 18 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER DENYING PETITION FOR A WRIT OF MANDAMUS

This is a petition for a writ of mandamus to compel the district court to vacate an order certifying a class action. We conclude that the district court did not abuse its discretion in certifying the class and, accordingly, deny the petition.

Shirley Schmitz leased a motor vehicle through Reno Dodge, with pre-packaged financing provided by Wells Fargo Auto Finance, Inc. Under this arrangement, the lessor's rights and obligations under the lease were assigned to Wells Fargo. Unbeknownst to Schmitz, the agreement between Wells Fargo and Reno Dodge permitted Reno Dodge to receive a dealer participation payment for financing transactions at a rate of interest in excess of the minimum acceptable rate established by Wells Fargo.

Schmitz alleges that she was led to believe the monthly payment quoted by Reno Dodge was based upon an interest rate required by Wells Fargo; but in reality, Reno Dodge arbitrarily set the monthly payment based upon a higher interest rate to increase its profit from the

payment based upon a higher interest rate to increase its profit from the transaction. She alleges that, had she known of the dealer participation payment, she would have arranged for a lower rate of financing through her own resources, and that she sustained damages in the amount she paid in excess of Wells Fargo's minimum acceptable interest rate.

The district court granted Schmitz's motion to certify a class of all consumers similarly situated. Wells Fargo then brought the instant petition for writ of mandamus or prohibition to compel the district court to vacate its order of certification.

A writ of mandamus or prohibition is an extraordinary remedy and it is within the discretion of this court to entertain such petitions.[1] A writ of mandamus is available to compel the performance of an official act or to control an abuse of discretion[2] where petitioners do not have a "plain, speedy and adequate remedy in the ordinary course of law."[3] A writ petition is an appropriate avenue of relief from an order certifying a class action.[4]

NRCP 23(a) sets the general parameters for class certification:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1)

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[1]State ex. rel. Dep't Transp. v. Thompson, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983).

[2]Salaiscooper v. Dist. Ct., 117 Nev. 892, 901, 34 P.3d 509, 515 (2001).

[3]NRS 34.170.

[4]See Meyer v. District Court, 110 Nev. 1357, 885 P.2d 622 (1994) (allowing a petition for writ of mandamus to compel a district court to certify a class because the district court's decision not to certify the class was clearly erroneous).

> the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to the factors of numerosity, commonality, typicality and adequate representation by the named class member, at least one of the requirements of NRCP 23(b) must be satisfied. Schmitz sought, and the district court granted, certification under NRCP 23(b)(3):

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . . .
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

We will address Wells Fargo's contentions with regard to certification under NRCP 23(a) and (b) in their turn.

Adequacy of representation

Wells Fargo argues that Schmitz is an inadequate class representative because: (1) two other individual suits pending in district

courts regarding the dealer participation payments involve claims not included in the present suit, showing that Schmitz is an inadequate class representative; (2) Schmitz seeks damages for emotional distress, a highly individualized claim; and (3) the opt-out remedy under NRCP 23(c)(2) cannot cure inadequate representation for individuals desiring to pursue other causes of action or claims, given that few potential plaintiffs in this instance would know the effects of res judicata on their individual claims and would not think to opt out of the class.

Res judicata, or claim preclusion, bars a plaintiff from bringing a second suit against the same party on the same claim. Under this doctrine, all claims asserted in a prior suit, as well as claims that could have been asserted, are precluded.[5] Certainly, such claims held by putative class members could be barred if the class defendants were to prevail.

Due process requires that a potential class member be afforded notice and a meaningful opportunity to be heard.[6] Because a class member need not take an active role in the litigation, the named representative must ensure the class members' interests are adequately protected.[7] If some class members have other potential individual claims against the class defendants that could be barred via res judicata, a conflict of interest could arise preventing the named representative from adequately protecting their interests. One way of preventing such a

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[5]Executive Mgmt. v. Ticor Title Ins. Co., 114 Nev. 823, 835, 963 P.2d 465, 473 (1998).

[6]Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

[7]Id.

conflict of interest is by providing an opt-out provision for potential class members.[8]

Given adequate notice, potential class members with claims other than those asserted by Schmitz will be able to exercise a meaningful decision to pursue their interests via a class action, or to opt out and pursue their interests independently. Here, class treatment is beneficial because many of the claims may be too small to pursue on an individual basis. Also, persons with substantial individual claims that might wish to proceed on their own will in all likelihood have secured counsel for the purpose of prosecuting separate litigation. This latter category of potential litigants should be fully capable of exercising the right to opt out.[9]

We conclude, therefore, that the district court did not abuse its discretion in determining that Schmitz would be an adequate class representative and that putative class members would be protected by an opt-out procedure.

Predominance and superiority under 23(b)(3)

Interest of individual class members

Under NRCP 23(b)(3), the court must first consider the interest of each member "in individually controlling the prosecution or defense of separate actions." "'Where damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class

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[8]Id. at 812-13.

[9]Id. at 813.

action.'"[10] Here, contrary to Wells Fargo's assertion, the individual damage claims appear to be slight, and the disparities between class members' damages would not be so great as to create a substantial interest in individual control of the suit.[11]

Wells Fargo alleges that the district court failed to rigorously analyze the predominance requirement of NRCP 23(b)(3) in terms of judicial efficiency. Wells Fargo asserts that the court must first determine the elements of the parties' claims, then evaluate whether those elements may be proved by evidence common to the putative class members or by individual evidence. Wells Fargo asserts that the district court's certification is flawed because it relied merely upon Schmitz's naked assertions.

In Meyer v. District Court, this court held that, in deciding whether to certify a class, the district court should generally accept the moving party's allegations as true.[12] Generally, a plaintiff seeks class certification before the parties have engaged in discovery. It would be difficult at best for the district court to consider evidence to determine whether a class should be certified because the plaintiffs have likely not obtained such evidence. The district court's inquiry is properly directed at determining whether the requirements for class certification would be met given the allegations set forth in the plaintiffs' complaint. Accordingly, we reject Wells Fargo's arguments for overturning Meyer.

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[10]Winkler v. DTE, Inc., 205 F.R.D. 235, 244 (D. Ariz. 2001) (quoting Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1190 (9th Cir. 2001)).

[11]See id. at 245.

[12]110 Nev. 1357, 1363-64, 885 P.2d 622, 626 (1994).

In determining whether common questions of law or fact predominate over questions involving only individual members, federal courts in general have closely examined the elements of a cause of action and the type of evidence needed to prove those elements.[13]

Schmitz's complaint alleged fraudulent concealment, deceptive trade practices in violation of NRS chapter 598, civil conspiracy and breach of the covenant of good faith and fair dealing. In this connection, the district court found that "all potential class members may have been injured to varying extents by the same alleged consumer fraud scheme."

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[13]See Lienhart v. Dryvit Systems, Inc., 255 F.3d 138, 147-48 (4th Cir. 2001) (holding that class certification was improper where individual proof was required to determine whether a products user followed express instructions regarding the product in a products liability claim, and where the question of damages would require individualized proof); Castano v. American Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996) (holding inter alia that class certification of nicotine-addicted smokers was improper where proof of individual reliance was required to prove fraud); Blackie v. Barrack, 524 F.2d 891, 901, 905-06 (9th Cir. 1975) (holding that certification was proper because subjective reliance was not an element of a claim under Rule 10(b)-5 of the Securities and Exchange Commission and that damages, though individual, could be determined through a simple formula); Mowbray v. Waste Mgmt Holdings, Inc., 189 F.R.D. 194, 198 (D. Mass. 1999) (holding that subjective reliance must be shown in a misrepresentation claim where there was no express warranty in the contract); Mayo v. Sears, Roebuck & Co., 148 F.R.D. 576, 583 (S.D. Ohio 1993) (holding that class certification regarding state fraud claims would turn on the use of identical forms, common sales techniques and routinized procedures for creating liens and extending credit); Cohen v. Uniroyal, Inc., 77 F.R.D. 685, 694-95 (E.D. Pa. 1977) (holding that class certification was proper in a Rule 10(b)-5 action because materiality of the misrepresentation is an objective test in the securities context and the issue of damages, although requiring individualized proof, could be bifurcated from the issue of liability).

Wells Fargo argues that individual proof is required regarding the nondisclosure and reliance elements of Schmitz's claims. However, given the nondisclosure as evidenced by the written contract between Reno Dodge and Schmitz, it is more fitting to presume nondisclosure and to allow defendants to rebut that presumption. Regarding reliance, or causation, the materiality of the misrepresentation may show causation.[14] If the trial court finds a material misrepresentation had been made to the class members, an inference of reliance would arise if the actions of the persons to whom the misrepresentations had been made were consistent with such reliance.[15] "The fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones . . . ."[16] There is no indication that the district court failed to consider the elements of the class action claims or that it failed to appreciate the type of evidence required to prove them.

Wells Fargo next argues that materiality of the nondisclosed fact, in a deceptive trade practices claim, requires individualized proof because materiality is subjective to each individual.

For a deceptive trade practices claim, an objective materiality test is superior to a subjective one.[17] Since the deceptive trade practices

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[14]Mass. Mutual v. Superior Court, 119 Cal. Rptr. 2d 190, 197 (Cal. Ct. App. 4 Dist. 2002); see also Blackie, 524 F.2d at 907 n.22.

[15]Mass. Mutual, 119 Cal.Rptr. 2d at 197.

[16]Blackie, 524 F.2d at 907 n.22.

[17]U.S. v. Watkins, 278 F.3d 961, 967-68 (9th Cir. 2002) (holding that "a matter is material if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action' or 'the maker of the representation knows or has reason to know' that the recipient is

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act is meant to deter salespersons from deceiving consumers, materiality of an omission or misrepresentation certainly can be objectively gauged by a reasonable consumer's reaction to such information.

Wells Fargo next argues that individualized proof is required for damages. It asserts that each plaintiff must show the difference in the amount that he paid and the amount he could have paid if he had obtained financing elsewhere, which cannot be determined by a simple formula. Moreover, Schmitz seeks emotional distress damages, which requires highly individualized proof.

In Johnson v. Travelers Insurance Co., this court stated that "the existence of separate issues concerning the damages sustained by various class members do[es] not prevent a common issue of liability from being adjudicated on a class basis."[18] Here, the evidence suggests that lessees could have obtained financing at the minimum rate allowed by Wells Fargo in its agreement with the dealerships and that the damage calculation would simply consist of subtracting the amount Wells Fargo would have accepted from the amount the consumer actually paid. Whether this is or is not the case, a master may be appointed at a later date to determine individual damages.[19] Hence, the damages question

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likely to consider 'the matter as important'") (quoting Restatement (Second) of Torts § 538(a) (1997)); see also Cohen, 77 F.R.D. at 694 (stating that in securities litigation, materiality of undisclosed information turns on whether or not a reasonable man would attach importance to the information in steering his course of conduct).

[18]89 Nev. 467, 473-74, 515 P.2d 68, 73 (1973).

[19]Id. at 474, 515 P.2d at 73.

does not require such a showing of individualized proof as to predominate over questions common to the class.

Regarding Schmitz's civil conspiracy claim, Wells Fargo argues that Schmitz would have to prove that the dealerships and Wells Fargo entered into agreements with the intent of accomplishing an unlawful objective for the purpose of harming consumers, requiring testimony of each auto dealer to establish intent.

Schmitz names as potential defendants Does 1-20 and ABC partnerships or other entities 21-40. The number of defendants is not overwhelming, and the individual evidence necessary to determine the auto dealers' intent does not predominate over the common questions of fact or law.

Wells Fargo argues that individualized evidence is necessary to resolve statute of limitations issues with regard to each claim, because the limitation period for each cause of action began to run when the individual class member knew, or should have known, the facts constituting elements of the cause of action.

If other common questions of fact or law predominate, "the existence of individual questions relating to the statute of limitations will not alone defeat class certification,"[20] especially when the claim involves a nondisclosure.[21] Here, since the claims are based on allegations of nondisclosure, and there is a sufficient core of common questions, the individual question regarding the statute of limitations does not tip the

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[20]Western States Wholesale v. Synthetic Industries, 206 F.R.D. 271, 279 (C.D. Cal. 2002); see also Waste Management Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000).

[21]See Mass. Mutual, 119 Cal. Rptr. 2d at 199.

balance against class certification. Moreover, "the district court holds discretion to decertify the class if at any time it determines that the plaintiff class and its representatives no longer meet the elements of a class as defined under NRCP 23."[22]

Extent and nature of any litigation concerning the controversy already commenced

NRCP 23(b)(3)(B) is directed at judicial economy and whether individuals prefer to proceed independently.[23] Here, there were three individual suits against auto dealers and Wells Fargo. The current suit is one such case. A second suit has been consolidated with this case for pre-trial purposes. The third suit has been dismissed for lack of evidence of a dealer participation payment. Thus, there is actually only one pending proceeding regarding dealer participation payments, which is the present one, indicating that absent class members would not necessarily prefer individual actions.

Desirability or undesirability of concentrating the litigation of the claims in the particular forum

Schmitz has named as defendants Wells Fargo Auto Finance and auto dealerships in Washoe County that provide financing through Wells Fargo. All of the relevant evidence and witnesses are likely concentrated in this forum, making adjudication in the forum desirable.[24]

Difficulties likely to be encountered in the management of a class action

Under NRCP 23(b)(3)(D), the district court must balance the interest of concentrating common issues in a single trial against the

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[22]Meyer, 110 Nev. at 1365, 885 P.2d at 627.

[23]Winkler, 205 F.R.D. at 245.

[24]See id.

complexities of class treatment.[25] This inquiry is closely related to the predominance inquiry. Here, although there may be some individual issues involved, these do not make the class unmanageable under NRCP 23(b)(3), given the core of common questions. Finally, although the question of whether Wells Fargo's conduct may fall under the deceptive trade practices act may not have been previously litigated, it is not a novel legal theory, as Wells Fargo asserts. Even if it were, the issues are not so novel as to prevent a district court from properly exercising its discretion regarding class certification.

For the above reasons, the district court did not abuse its discretion in finding that a class action was a superior means of adjudication.

Accordingly, we ORDER the petition DENIED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Gibbons

cc: Hon. Brent T. Adams, District Judge
Beckley, Singleton, Chtd.
Severson & Werson
Robert H. Perry
E. Terrance Shea
Jones Vargas
Washoe District Court Clerk

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[25]Id.