IN THE SUPREME COURT OF THE STATE OF DELAWARE

WIT CAPITAL GROUP, INC., and WIT CAPITAL CORPORATION, d/b/a WIT CAPITAL,	§	
	§	No. 568, 2004
Defendants Below, Appellants,	§	Court Below: Superior Court of the State of Delaware in and for
v.	§	New Castle County
ARTHUR E. BENNING, SR., BARBARA-LEE BENNING, ARTHUR E. BENNING, JR., and JANESSA DABLER,	§	C.A. No. 99C-06-157
Plaintiffs Below, Appellees.	§	

Submitted: May 25, 2005
Decided: June 20, 2005

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

NOW, THEREFORE, this 20th day of June 2005, the Court having considered the briefs and oral arguments of the parties, it appears to the Court that:

1. This is an appeal from a Superior Court order certifying a plaintiff class under Superior Court Civil Rule 23. The action was brought on behalf of a class of former customers of Wit Capital Group, Inc. and Wit Capital Corporation (collectively, "Wit Capital"). The plaintiffs claimed that the members of the class were deprived of their contractual right to participate in various initial public

offerings ("IPOs") of various securities wherein Wit Capital was an underwriter. Those contractual breaches are alleged to have occurred for four separate, independent reasons. Specifically, plaintiffs claim that: (1) Wit Capital improperly determined the account balances of qualified customers (*i.e.*, those customers' eligibility to acquire IPO stock) as of an incorrect date; (2) Wit Capital improperly denied IPO allocations to qualified customers because it considered only the value of the cash, rather than the value of both stock and cash, in those customers' accounts; (3) Wit Capital improperly allocated to certain customers more than the number of shares to which those customers were entitled; and (4) Wit Capital improperly gave priority to "flippers" (customers who sold their IPO stock within 60 days) over customers who did not "flip" their IPO stock.

2. The trial court certified a class that consisted of four subclasses of qualified Wit Capital customers who had been improperly denied IPO allocations. Each subclass corresponded to one of the four causes of action enumerated above. On appeal, Wit Capital claims that the Superior Court improperly certified the class as a matter of law.

3. Wit Capital urges that the Superior Court erred in five different respects. First, Wit Capital argues that it is impossible to identify the members of each of the four subclasses, unless the court first determines the merits of each customer's claim. The consequence, Wit Capital asserts, is that the trial court

created "merits-based" subclasses that are legally proscribed under class action jurisprudence. Second, Wit Capital contends that an indispensable element of contract liability to the class—that the members of the class in fact suffered a loss (the "fact of loss")—can only be determined by first inquiring at what point in time each class member/customer would have sold his or her IPO stock. The result of that process is that questions affecting individual class members will inevitably predominate over questions of fact and law that are common to the class. Third, Wit Capital claims that because individual issues will predominate over class issues, individual arbitrations would be superior to class action treatment for resolving the plaintiffs' claims. Fourth, Wit Capital contends that there is no record support for the trial court's determination that the members of the class are so numerous as to make their joinder as individual plaintiffs impracticable. Fifth, Wit Capital urges that because no showing was made that at least one named plaintiff belongs to each of the four subclasses, no support exists for the trial court's rulings that: (i) the claims of the named plaintiffs are "typical" of the claims of the class, and (ii) the named plaintiffs will fairly and adequately represent the interests of the subclasses.

4. To the extent Wit Capital contends that the trial court formulated incorrect precepts or applied those precepts incorrectly, this Court reviews such

claims *de novo*.[1] To the extent that Wit Capital challenges the trial court's findings of fact in applying legal precepts to reach its ultimate determination, our standard of review is whether or not those findings are supported by the record and are the product of an orderly and logical deductive process.[2]

5. Wit Capital's first claim of error cannot survive scrutiny, because it boils down to an unsupported assertion that before any of the four subclasses can be certified, the trial court would first have to determine whether the legal theory upon which each of the four respective subclasses is based states a cognizable claim for breach of contract. If there is no cognizable legal claim, the argument goes, no subclass exists that is legally entitled to recover.

5. Although Wit Capital's legal reasoning is correct, its premise is not. Wit Capital asserts, but has not demonstrated, that the trial court must first determine the legal sufficiency of plaintiffs' four contract causes of action before a class can be certified. That premise overlooks the fact that while the litigation is pending, a class certification is *always* provisional; that is, the determination of the certified class can be revisited and modified in light of later developments in the case.[3] Therefore, it was not improper for the trial court to certify a class

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[1] *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 474 (Del. 1992).

[2] *Leon N. Weiner & Assoc., Inc. v. Krapf*, 584 A.2d 1220, 1223 (Del. 1991).

[3] SUPER. CT. CIV. R. 23(c)(1); see, *Joseph v. Shell Oil Co.*, C.A. No. 7450, 1985 WL 21125 at *2 (Del. Ch. Feb. 8, 1985).

comprising four subclasses, based on the assumption that the four predicate theories of wrongdoing would withstand a motion to dismiss if such a motion were later prosecuted. To the extent that any or all of those theories did not survive dismissal, then the corresponding subclass could be excised from the class. If Wit Capital truly believed that the plaintiffs' theories of recovery were not legally sound, it could have presented, and asked the trial court to decide, a Rule 12(b)(6) dismissal motion before entertaining the class certification motion. Wit Capital cannot oppose class certification based on the presumed outcome of a dismissal motion it did not make.

7. Wit Capital's second claim of error rests upon the undisputed proposition that for a class to be certified, the issues of fact and law common to the class must predominate over the issues that are peculiar to individual class members.[4] In this case, Wit Capital argues, those individual issues predominate and the trial court erred in holding otherwise, because for Wit Capital to be liable to the class for breach of contract, the breach must have caused harm on a "class-wide" basis. Here, Wit Capital contends, the "fact of harm" cannot be established on a class-wide basis unless all members of the putative class had timely received their IPO allocations and then sold their allocated IPO stock at a profit. But that scenario cannot be presumed for purposes of defining the class, Wit Capital urges, because

[4] SUPER. CT. CIV. R. 23(b)(3).

other scenarios are equally, if not more, likely. It is equally likely (Wit Capital says) that some class members continued to hold their stock, other class members would have sold their stock at a profit, and the remaining class members would have sold at a loss. In each case the critical variable would be each specific class member's investment circumstances. For that reason, Wit Capital urges, it is impossible to identify those persons who (assuming their IPO shares had been properly allocated) would have sold those shares at a profit, without first interrogating each putative class member to ascertain whether or not that in fact occurred. In short, Wit Capital concludes, the "fact of harm" element of plaintiffs' contract cause of action, like the element of "reliance" in a fraud action, is inherently individual and, consequently, precludes class action treatment.

8. The plaintiffs did not squarely respond to this argument in the Superior Court proceedings, and the trial court's class certification opinion did not address this contention either. The plaintiffs' argument on appeal appears to be that the "fact of harm" can be established on a class-wide basis through the testimony of an expert retained to develop an analytical model that is based on the assumption that all class members would have sold their stock at a time when the market price was higher than the IPO price. Alternatively, and in any event, plaintiffs contend, Wit Capital's "predominance of individual issues" argument is a red herring, because it

is relevant only to the measure of damages (which is not a basis for defeating certification), rather than to the fact of harm (which can be).

9. The trial court disposed of the "fact of harm" issue by ruling that dividing the class into four subclasses would automatically guarantee that class issues predominate over individual ones. In so concluding, the trial court implicitly rejected Wit Capital's arguments described in paragraphs 7 and 8 above, but did not explicitly address those arguments or explain why they lacked merit. Nor did the trial court articulate the basis for its conclusion that dividing the class into four subclasses would obviate individual issues predominating over class issues.

10. A separate requirement for class action certification is that class action treatment must be found to be a superior method for "the fair and efficient adjudication of the controversy."[5] In its opinion the Superior Court addressed this issue insofar as it found that individual arbitrations would be economically impractical because the cost of arbitrating any single customer's claim would likely exceed the amount of the claim itself. Wit Capital's third argument on appeal is that that ruling is erroneous as well.

11. In advancing that argument, Wit Capital has conflated its "individual issue/fact of harm" position with its "superiority method of adjudication"

[5] SUPER. CT. CIV. R. 23(b)(3).

contention. Wit Capital does that by urging that because the fact of harm must be established on an individual-by-individual basis to identify which persons belong to which subclass (if any), that process would make class action treatment unwieldy and inferior to the alternative, which is to conduct individual arbitrations. The trial court did not address this conflated "fact of harm" argument in analyzing whether class action treatment was a superior method of adjudication. Thus, the basis for the trial court's "superiority method of adjudication" ruling is unclear for the same reason as its "predominance of class over individual issues" ruling.

12. Wit Capital's fourth claim of error attacks the trial court's determination that the members of the class are so numerous as to make the joinder of individual members impracticable.[6] Wit Capital argues that this ruling is erroneous, because it rests upon assumptions and speculation rather than specific evidence. We disagree. Wit Capital's argument overlooks the fact that the trial judge had a very limited record to work with at this stage. That record consisted primarily of undisputed evidence that Wit Capital had a multitude of customers who collectively had engaged in thousands of IPO trades. The trial court's reasoning may fairly be read as a determination that the number of class members, even if divided into four subclasses, would likely be too numerous to make their individual joinder practicable. At this stage that is sufficient, because if evidence

[6] SUPER. CT. CIV. R. 23(a)(1).

later comes to light indicating that the membership of any subclass is numerically insufficient, the trial court may eliminate or redefine the subclass in light of such newly-developed evidence.

13. Wit Capital's final argument on appeal is that the trial court erroneously determined that the claims of the class representatives are typical of those of the class and that the named representatives would adequately represent the interests of the class.[7] There was no showing of "typicality," Wit Capital contends, because the plaintiffs have not shown that one or more of the class representatives are identically situated with (*i.e.*, were injured in the precise manner as) the members of each subclass. Nor was adequacy of representation established, Wit Capital argues, because there are inherent conflicts among each of the subclasses. Specifically, Wit Capital contends that because only a limited number of IPO shares were available to its customers (a "zero sum game"), each subclass—which has an interest in maximizing its proportion of the total IPO shares—will necessarily seek to minimize the proportion held by other subclasses.

14. The trial court's opinion as to these arguments consists of only the following three sentences: "Plaintiffs have alleged that one or all of the Plaintiffs were wrongfully denied IPO allocations as a result of each of the four separate theories of recovery. Therefore, Plaintiffs' claims are typical of the sub-classes.

[7] SUPER. CT. CIV. R. 23(b)(3)(A).

As representative parties, Plaintiffs have the ability to fairly and adequately protect the interests of the class."[8]

15. The apparent premise of the trial judge's finding of "typicality" was her understanding that the plaintiffs were claiming that they (or some of them) were members of each of the four subclasses. If plaintiffs were alleging that, then the trial court's adequacy of representation ruling would be correct. In their Answering Brief on appeal, however, the plaintiffs do not defend the trial court's reasoning on that ground. Rather, that Answering Brief suggests that the representative plaintiffs are *not* members of each of the subclasses, because the plaintiffs argue that it is not necessary for the class representatives to be a member of each subclass so long as the subclasses were "affected by very closely related conduct" arising out of a single or common scheme. Thus, the trial court's ruling on these issues appears not to be supported by the party that is charged with defending the opinion on appeal.

16. For the reasons stated above, the trial court's opinion and its rulings on the issues of predominance, superiority, typicality, and adequacy of representation are insufficient to enable this Court meaningfully to review whether, given the appellants' claims of error, those rulings are correct. The case must therefore be remanded to enable the trial court to clarify its rulings in a supplemental opinion.

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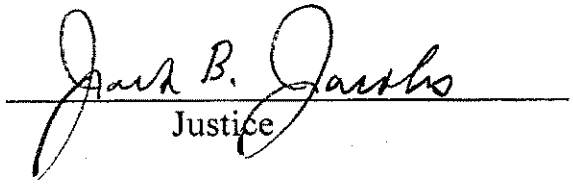
[8] *Benning v. Wit Capital Group, Inc.*, C.A. No. 99C-06-157, 2004 WL 3030005 at *6 (Del. Super. Nov. 30, 2004).

NOW, THEREFORE, IT IS ORDERED that this matter is **REVERSED** and **REMANDED** to the Superior Court with instructions to address, in a supplemental class certification proceeding and supplemental opinion, the specific arguments that this Court has found were not adequately addressed in the trial court's opinion. Jurisdiction is otherwise retained.

BY THE COURT:



Justice