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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000499-ME

STEWART TITLE GUARANTY COMPANY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR, JUDGE
ACTION NO. 03-CI-010090

TIMOTHY F. FINNEY AND
JANE A. FINNEY, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Stewart Title Guaranty Company (Stewart) appeals from a February 15, 2011 order of the Jefferson Circuit Court which sustained Appellees' (the Finneys) motion to certify a class action against Stewart. In so

doing, the circuit court applied the correct legal standards and did not abuse its discretion. Therefore, we affirm.

I. Facts and Procedure

Stewart is a title insurer for Kentucky homeowners. It has been providing title insurance in Kentucky since at least 1990. In general, title insurers indemnify lenders or homeowners from potential injury caused by title defects. Stewart, like other title insurers, contractually employs dependent and independent agents to perform title services. These agents maintain employment with Stewart for various durations, and each issues numerous policies. Stewart receives a share of the premiums collected by the agents. The agents calculate policy rates based upon Stewart's rate manuals.

The Kentucky Department of Insurance requires "every title insurer, before use in this state, [to] file with the Commissioner [of the Department of Insurance] its schedule of the risk portion of premium rates for title insurance, and thereafter every modification or amendment thereof." Kentucky Revised Statutes (KRS) 304.22-020(1). The Department must approve any modification to the title insurer's existing rates before the new rate can be charged to customers.

In 1990, Stewart submitted a rate manual to the Department for approval. Following approval, Stewart used the 1990 schedule rates until at least December 20, 1994. On that date, Stewart submitted another rate manual (the 1994 Rate Manual) to the Department, asking to increase the charges for its "Owner or Leasehold," "Loan or Mortgage," and "Simultaneous Issue" rates. The

1994 Rate Manual also proposed a "reissue" discount to those homeowners who, within the previous ten years, had purchased an owners' title insurance policy and subsequently chose to purchase another. The Department did not approve the 1994 Rate Manual. As a result, the rates proposed in that manual should never have been charged to Stewart's insureds.

On December 13, 1999, Stewart submitted a new rate manual (the 1999 Rate Manual), again seeking to increase its schedule rates. The 1999 Rate Manual proposed a "reissue" discount to those owners who, within the previous five years, had purchased either owners' or lenders' title insurance policies and subsequently needed to purchase another policy. This manual was approved. In its 1999 application, Stewart represented that the premium rates it had been applying were those which had been approved "Effective July 13, 1990." Stewart further represented to the Department that Stewart had used the approved 1990 rates until the 1999 Rate Manual's submission. The Finneys allege, however, that this is untrue. Instead, they claim, Stewart used the higher 1994 rates, which it was not permitted to do, from the date of the 1994 application until the modification was approved in 1999.

The Finneys claim to have obtained three policies from Stewart following submission of the 1999 Rate Manual, at rates which they believe are consistent with the 1994 Rate Manual rather than the 1999 Rate Manual. In 2003, the Finneys refinanced their residence and wished to obtain title insurance. Stewart charged $337.00, consistent with the 1994 rates, rather than the 1999 rates

or the 1999 reissue discount. According to 1999 rates and reissue discount, the charges should have been $172.00.

Having discovered the alleged rate disparity, the Finneys filed suit, claiming Stewart's agent had overcharged them by applying the rejected 1994 Rate Manual instead of the 1999 rates, and by failing to allow them the reissue discount as required by the 1999 Rate Manual. Their claim was brought as a class action. The circuit court certified two classes. The first class is the "Overcharge Class," for those who paid premiums in excess of the 1999 Rates, and is not in dispute. The second class, whose certification Stewart has contested on appeal, is the "Reissue Subclass." It includes all persons who:

a. Between December 13, 1999, and July 16, 2003;

b. Had mortgages on, and/or fee or leasehold interests in, real property located within the Commonwealth of Kentucky;

c. Paid premiums for the purchase of title insurance from Stewart for "lender or loan" policies;

d. Within five years of the payment of the premium, and in connections with a mortgage refinancing transaction, had either (i) an unreleased mortgage from a lender in Louisville, (ii) a mortgage held by an out-of-sate institutional lender, (iii) a mortgage that was assigned to an out-of-state institutional lender, (iv) a mortgage that was in the name of servicing company (such as Mortgage Electronic Registration Systems(MERS)), (v) a mortgage on a Fannie Mae or Freddie Mac form and not held by a local lender, or (vi) purchased a policy of title insurance from Stewart; and

e. Did not receive the reissue discount specified in the 1999 Rate Manual.

The only question before us is whether certification of the Reissue Subclass was appropriate.

II. Standard of Review

The parties properly agree that our standard of review is abuse of discretion. *Beattie v. CenturyTel Inc*., 511 F.3d 554, 560 (6th Cir. 2007);[1] *Sowders v. Atkins*, 646 S.W.2d 344, 346 (Ky. 1983). "The [trial] court's decision certifying the class is subject to a very limited review and will be reversed only upon a strong showing that the [trial] court's decision was a clear abuse of discretion." *Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004) (internal quotation marks omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted). Furthermore, we are not deprived of jurisdiction to entertain the appeal due to its interlocutory nature. Kentucky Rule(s) of Civil Procedure (CR) 23.06.

III. Discussion

Stewart challenges the certification on the grounds that: (1) the analysis under CR 23 was not sufficiently rigorous; and (2) the trial court failed to accord sufficient significance to individualized inquiries which prevent a finding of

[1] "It is well established that Kentucky courts rely upon Federal case law when interpreting a Kentucky rule of procedure that is similar to its federal counterpart." *Curtis Green & Clay Green, Inc. v. Clark*, 318 S.W.3d 98, 105 (Ky. App. 2010). Fed.R.Civ.P. 23 is the federal counterpart of CR 23, and is similar. Thus, federal case law is persuasive in interpreting CR 23.

CR 23's requirements of commonality, predominance, and superiority. We will address each argument in turn.

a. Rigorous Analysis

Stewart first argues that the circuit court failed to undertake a sufficiently rigorous analysis as required by both CR 23.01 and CR 23.02. However, review of the relevant case law reveals that rigorous analysis need be undertaken only with regard to CR 23.01. The U.S. Supreme Court concluded that a class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [CR 23.01] have been satisfied." *Gen. Telephone Co. of Southwest v. Falcon*, 102 S. Ct. 2364, 2372 (1982), *see Beattie v. CenturyTel Inc.*, 511 F.3d 554, 560 (6th Cir. 2007). A trial court performs a rigorous analysis of the CR 23.01 prerequisites by conducting a "probe behind the pleadings" which touches upon the merits. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "Actual, not presumed, conformance with [CR 23.01] remains, however, indispensable." *Falcon*, 102 S. Ct. at 2372. *Wal-Mart* does not specifically require that a rigorous analysis be undertaken pursuant to CR 23.02.

Stewart's point is effectively moot since, in this case, a rigorous analysis was undertaken. Such analysis is apparent in the order certifying the subclass. Therein, the circuit court delved rather extensively into the merits, considering the bases of the Finneys' claim, the rate manuals at issue, and viability of the broader subclass. The analysis properly probed behind the pleadings and was sufficient to prevent frivolous claims. Thus, the circuit court did not abuse its

discretion on this matter because it conducted a rigorous analysis as required by CR 23.01.

Even if a rigorous analysis were also required by CR 23.02, the analysis the circuit court performed in accordance with CR 23.01 would have been sufficient to satisfy the requirements of both rules. Whether the analysis is performed nominally under CR 23.01 or CR 23.02, the conduct of a proper rigorous analysis requires consideration of the same facts and circumstances. Stewart has identified no abuse of discretion in the conduct of the circuit court's rigorous analysis.

Furthermore, there exists a presumption in favor of class certification. *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968). Stewart claims that such an approach is incompatible with the concept of a rigorous analysis, but we disagree. Where, as here, the circuit court probes beyond the pleadings to certify a class, it has done all that is required by the "rigorous analysis" rule, and the presumption does not interfere with that inquiry.

b. Commonality

Stewart next argues the circuit court incorrectly found sufficient commonality among the claims the Finneys wished to include in the Reissue Subclass. More specifically, Stewart claims that determining eligibility would require individualized inquiries that defeat the purpose for pursuing these claims as a class action.

CR 23.01 requires that class actions have "questions of law or fact common to the class." It is unnecessary to have a "complete identity of facts relating to all members as long as there is a common nucleus of operative facts." *Wiley v. Adkins*, 48 S.W.3d 20, 23 (Ky. 2001) (citing *Falcon,* 102 S. Ct. 2364, 2370 (1982)). This provides the circuit court some discretion to determine whether the facts indicate the same injury. To satisfy the commonality requirement, the plaintiff must "demonstrate that class members have suffered the 'same injury,' not merely a violation of the same provision of law." *Wal-Mart,* 131 S. Ct. at 2551. Thus, while the injury to each prospective class member must be the same, the specific details may vary, provided they arise from a common nucleus of operative facts.

That the prospective class members have suffered the same injury is evidence of a "common contention." A common contention is capable of class-wide resolution for each claim within the class by determining whether the common contention is true or false. *Walmart,* 131 S. Ct. at 2551. This suggests that raising common questions is not as important as "the capacity to generate common answers" for class-wide resolution, which is impeded by dissimilarities within the class. *Id*. (citing Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 131–32 (2009)). If the dissimilarities are too great among class members, then there is no common question. *Walmart,* 131 S. Ct. at 2562. Thus, where a common contention is based upon the same injury among prospective class members, there is a common question capable of generating

answers for class-wide resolution. This is true even when there are different facts, provided the dissimilarities are not too great to prevent resolution of the claims by common answers.

The circuit court appropriately conducted the commonality inquiry, and its conclusion is not the product of an abuse of discretion. It found the record supported a conclusion that Stewart had issued the 1994 Rate Manual to its agents, who "monolithically followed its directives. Thus, if Stewart [had] denied the discount to one client, it denied it as to all." (Opinion and Order, February 15, 2011, p. 7). Therefore, there was a common question which could be resolved by a common answer. The circuit court further determined that all members of the class had common contentions, including whether Stewart gave the appropriate reissue discounts for mortgage refinancing, whether Stewart used the correct pre-qualifications for the reissue discount, and whether Stewart gave the required reissue discounts for refinanced residences. Although some of the agents who authorized the charges were dependent agents and others were independent agents, the operative facts necessary to the inquiry are the same. By providing one common answer to whether Stewart charged policy holders according to the 1994 rates rather than the 1999 rates and discount, a common question would be answered by generalized proof to advance the litigation. Thus, the circuit court did not abuse its discretion.

The circuit court established another protection against improper certification of the subclass by strictly limiting subclass membership. The criteria

for eligibility into the Reissue Subclass sufficiently limited class membership to a small group of potential members: all Reissue Subclass members must have been customers of Stewart involved in a transaction within Kentucky, who purchased title insurance.

Any dissimilarity among the members of the subclass is insufficient to prevent commonality. The primary dissimilarity Stewart has identified is the number of policies each Stewart insured has purchased, which agent they purchased the policies from, and in what region of Kentucky the insureds reside. The number of policies does not affect the rates and discounts used. There is no evidence that the identity of the agent or the area where the customer lives is relevant to whether the agents used the 1999 rates and discount. Therefore, the circuit court did not abuse its discretion when it found sufficient commonality to warrant subclass certification.

c. Predominance

Another requirement of certification of a class action is that there be "questions of law or fact common to the members of the class [which] predominate over any questions affecting only individual members." CR 23.02(c).

The purpose of the predominance requirement is to test whether a proposed class is "sufficiently cohesive to warrant adjudication." *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2236 (1997). "This, in turn, entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to

the class[.]" *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (quotation marks omitted). The predominance inquiry is intended to prevent mini-trials within the class action and the adjudication of class-wide claims with individual determinations which require individualized proof. *Rodney v. Nw. Airlines, Inc*., 146 F. App'x 783, 792 (6th Cir. 2005). Class-wide issues predominate if resolution of some of the legal or factual questions for class-wide resolution can be achieved using generalized proof, and if these particular issues are more substantial than those requiring individualized proof. *Thacker v. Chesapeake Appalachia, L.L.C*., 259 F.R.D. 262, 268 (E.D. Ky. 2009). In other words, there is no predominance where issues are idiosyncratic to a particular class member.

Stewart suggests that the only way it is capable of gathering the necessary evidence to litigate its liability with respect to each prospective subclass member is to conduct a very intensive, very costly canvass of its agents' records. Stewart repeatedly emphasizes the difficulty of proving these facts for each class member due to the nature of their relationship to their agents. The circuit court concluded, to the contrary, that Stewart possessed the ability to perform audits and reviews of its agents' records and was therefore easily capable of gathering this information. The Finneys contend Stewart should not be rewarded for less than the best business practices, and that any other issues, like the rates and discount used for Stewart's customers, may be resolved by generalized proof. Since the parties' arguments give rise to the possibility that this case includes both common

questions resolved by generalized proof and individualized inquiries needed for Reissue Subclass eligibility, the dispute is resolved by determining whether individualized inquiries predominate over the common questions.

Stewart chiefly relies upon *Randleman v. Fidelity Nat. Title Ins. Co*., 646 F.3d 347 (6th Cir. 2011). In *Randleman*, the court affirmed a class decertification, based upon the "highly individualized inquiry" needed for each member to prove entitlement to the refinance rate at issue. *Id*. at 356. The Randlemans had purchased a lender's title insurance policy and an owner's policy, and later refinanced their home, but their mortgagee required them to purchase a new title insurance policy – facts virtually the same as those the Finneys have presented. Fidelity submitted a rate manual to Ohio Title Insurance Rating Bureau, as required by law, which bound Fidelity and required a discounted premium rate. The trial court originally presumed that proof the insurer had received appropriate information to issue a policy would have led to the discovery of "a prior mortgage in the process of issuing title insurance, [which] necessarily mean[t] that the applicant purchased title insurance in connection with that prior mortgage." *Id*. at 353. The presumption was found to be false, because in Ohio the purchase of title insurance for a mortgage is not mandatory, and therefore each member would need to prove by highly individualized inquiries whether he or she was entitled to the discount. *Id*.

In *Randleman*, a common question was no longer answerable by generalized proof, but only by individualized inquiries, therefore making common issues no longer predominant. Class-wide resolution would devolve into a set of mini-trials and therefore become inferior to individual actions brought by individual plaintiffs. Stewart interprets *Randleman* as barring all class actions concerning any reissue discount. We disagree.

Randleman is distinguishable from the Finneys' situation. The Finneys' claim is based upon common questions relating to the 1994 Rate Manual, which do not require resolution by individualized inquiries. Where, as here, giving the rate discount to an eligible insured is mandatory, resolution of the question is routine. Which customers should have received the discount is determinable by the criteria Stewart itself created in its 1999 Rate Manual.

It is significant that most of the individuality upon which Stewart bases its argument concerns whether Stewart actually overcharged its customers. Calculating the damages by verifying which rates were used is what Stewart seeks to avoid, due to the nature of its relations with its agents. In *Hancock v. Chicago Title Ins. Co*., a trial court considered how individual inquiries into class membership affected class certification. 263 F.R.D. 383 (N.D. Tex. 2009). It denied certification because there was not class-wide proof of the claim or class membership without "an extensive file-by-file review" which, "[*a*]*bsent any larger common questions* [would require] the type of mini-trials that defeat class certification." *Id*. at 388-90 (emphasis added). In *Hancock* there was no dispute

about overcharging, which, in the case before us, Finney alleges is based on improper use of the 1994 Rate Manual. *Hancock* suggests that had there been a "larger common question," class certification would have been appropriate.

The improper application of the 1994 Rate Manual and the resulting failure to give insureds the proper reissue discount are provable by general proof of directives which the "agents monolithically followed." Thus, the circuit court did not abuse its discretion.

d. CR 23.02(c) Superiority

Superiority is the second requirement for class certification as established by CR 23.02(c). It requires:

> a class action [to be] superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (i) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (iv) the difficulties likely to be encountered in the management of a class action.

CR 23.02(c). In other words, "[t]he superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316 (3rd Cir. 1998) (internal quotations omitted).

The circuit court applied these factors as follows. First, each individual class member has little interest in controlling the litigation, since most members seek the same remedy using similar means. Many members have similar situations, and the members and their lawyers would not reasonably consider individual litigation due to the volume of plaintiffs and the relatively low damages at stake per claimant. Second, litigation has been ongoing for some time and putative class members would be saved time and money while preventing the same litigation to occur in other courts, to be solved by the same generalized proof of the 1994 rates being applied by Stewart's agents. An individual member would stand to lose a significant sum but gain little by resort to individual litigation. Third, the desirability of concentrating litigation in a particular forum is neither for nor against class certification.

The circuit court applied these factors appropriately and correctly. In *Prudential*, the appellate court agreed with the trial court that "the relatively modest size of individual claims and the sheer volume of those claims in the aggregate" rendered a class action the only reasonable form of litigation. *Id.*

Here, the Finneys stand to recover only a few hundred dollars if they prevail, a claim no lawyer could reasonably or economically litigate, while Stewart would not be deterred from denying mandatory rate discounts to future insureds. Second, there is no "compelling interest" for the members to control the litigation. *Id*. Third, individual litigation, especially in separate forums, would cause strain on judicial resources. *Id*. In certifying the Reissue Subclass, the circuit court

balanced the fairness and efficiency of class-action litigation appropriately. It did not abuse its discretion.

Stewart raises the question of manageability as if it were distinct from the superiority analysis. Manageability, however, is the fourth criterion for superiority and does not require a separate inquiry. Nevertheless, we are not persuaded that class certification is unwarranted because the litigation would be unmanageable.

Courts sometimes determine manageability by the number of class members, the ability to instruct the jury on relevant law, whether the plaintiffs failed to provide a "trial blueprint to this Court to make the action manageable," the sample jury instructions or jury verdict forms, the number of subclasses in relation to number of individual questions, and whether the elements of state law varied. *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 461-62 (D.N.J. 1998). Another bar to certification is "insuperable obstacles" relating to variances in state law, and the size of individual and class-wide aggregate monetary claims. *Prudential,* 148 F.3d at 316.

The circuit court found the class action to be manageable. More specifically, it found that Stewart had the ability to audit and identify the eligible members, even if it must sort through thousands of closing files, which its agents are contractually required to keep. It found that a large class size is not sufficient to deny certification. We agree.

There is only one sub-issue – the Reissue discount applicable to this state applying this state's laws. There are no indications of unreasonably great numbers of plaintiffs, inefficiency, or a variety of individual questions. Thus, the circuit court did not abuse its discretion in determining the superiority of handling these cases as a single class action rather than a multiplicity of individual lawsuits.

IV. Conclusion

We find no abuse of discretion in the certification of these classes and affirm the circuit court's order.

ALL CONCUR.

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