KCC Class Action Services

# KCC Class Action Digest
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## CLASS CERTIFICATION

*Summit Medical Group, Inc. D/B/A St. Elizabeth Physicians v. Coleman,* No. 2021-CA-0804-ME, 2022 WL 1697800 (Ky. Ct. App. May 27, 2022)(Jones, J.)

A state court interlocutory appeal of an order certifying a class action for alleged double billing. Upon review, the Kentucky Appellate Court held that the circuit court abused its discretion when concluding that plaintiff was adequate to serve as the class representative.

Defendant argued the circuit court abused its discretion in finding the plaintiff was an adequate representative as evinced by: (1) a lack of a written fee agreement with any attorney or law firm; (2) a lack of knowledge regarding the legal basis of her claims; (3) uncertainty regarding who was representing her at various points in the litigation; and (4) a lack of overall involvement in the litigation to date, including allowing the case to languish for several years.

The court disagreed that a lack of a fee agreement was a basis for inadequacy, stating that even if a fee agreement existed, it would not govern plaintiff's relationship with class counsel nor bind absent class members.

The court also disagreed plaintiff's lack of knowledge regarding the exact legal theory behind her claims made her an inadequate class representative, noting a class representative does not need to understand the legal theories of the case and is entitled to rely on counsel's expertise and advice.

However, the court found it important to consider the willingness and ability of the class representative to be actively involved with the litigation. The court could not excuse the fact that between May 2013 and August 2018, nothing was accomplished in the case, suggesting plaintiff had the willingness or ability to prevent future similar delays.

The court concluded that allowing the case to proceed with the plaintiff as the named class representative would risk the rights of unnamed class members. For this reason the court held that the circuit court abused its discretion.

## CONSUMER FRAUD

*Bennett v. North American Bancard, LLC,* No. 17-cv-00586-AJB-KSC, 2022 WL 1667045 (S.D. Cal., May 25, 2022) (Battaglia, J.)

In this consumer fraud case, plaintiff alleged defendant falsely promised hundreds of thousands of PayAnywhere and PhoneSwipe customers a no out-of-pocket cost, "pay-as-you-go" service plan. The court denied plaintiffs' motion for class certification finding plaintiff had not met the predominance requirement under Rule 23(b)(3).

Plaintiff sought to certify the following classes: (1) all persons in California who became defendant's pay-as-you-go merchants prior to September 1, 2017, and who were debited at least one $3.99 inactivity fee prior to September 1, 2017; and (2) all persons in California who became defendant's pay-as-you-go merchants prior to September 1, 2017, who were debited at least one $3.99 inactivity fee after September 1, 2017, and did not agree to a contract authorizing debit of the $3.99 inactivity fee.

The court agreed with defendant that common questions did not predominate because the proposed class definitions were overbroad insofar as they encompassed class members who either never saw the alleged misrepresentation or never viewed defendant's email notification and/or website regarding the inactivity fee charges.

For the same reason, the court ruled the alleged misrepresentations did not justify a presumption of reliance. Although the "pay-as-you-go" advertising was the same nationwide, plaintiff had not established that every, or even most, class members were exposed to the same alleged misrepresentation.

Plaintiff did not fare any better with her unjust enrichment claim. Plaintiff's theory of liability was that class members were induced into contracting for the pay as you go services. However, it was because of the contractual relationships that plaintiff could not fulfill the legal requirement indicating there was no valid express contractual relationship between the parties.

Finally, the court held that plaintiff could not show predominance on her conversion claim. The class did not exclude those who saw defendant's emails or website regarding the Inactivity Fee, therefore there was likely a number of people who were given adequate disclosures. Because plaintiff had not suggested a reasonable way these people could be excluded from the class without individualized fact-finding, she had not established the predominance requirement of the conversion claim.

## NOTICE CONTENT

*Luxuma v. Ironbound Express, Inc.,* No. 11-2224, 2022 WL 1773738 (D. N.J. June 1, 2022) (Vazquez, J.)

In this class action alleging that lease agreements for transportation services violated Truth-In-Leasing regulations under the Motor Carrier Act, after class certification, the court granted in part and denied in part plaintiffs' motion to approve the form of class notice.

The court, *inter alia*, found that:

(1) Plaintiffs' proposed parenthetical regarding class member rights and options need not be included in the cover page since it was included in another section of the notice.

(2) Plaintiffs had provided no explanation for why (and the court saw no reason why) a third-party administrator should not be appointed to oversee the class notice process.

(3) Plaintiffs were correct that the notice should not include language that class members MUST be able to prove damages in order to recover because damages is a legal word which may confuse class members. However, it was not "chilling" for the notice to state that if they remained a member of the class action (by not choosing to be excluded from it), they will be asked to provide relevant information.

(4) The notice should not include defendant's proposed sentence that class members may be required to appear for and testify at a deposition or trial because it is "chilling" and unnamed class members are not subject to discovery.

(5) Language was rejected that class members may advise the court if they do not consider that they are being fairly and adequately represented by counsel, but the notice could include that they have the right to hire their own lawyer at their own cost or to file their own lawsuit. And if they do not, they will be represented by class counsel and also be able to object to any settlement and may retain their own attorney at their own cost to object.

(6) For clarity purposes, the notice should be modified to state that if they wished to stay in the case, they need do nothing preceding the sentence stating that if they wished to be excluded they had to complete and return a postcard or form.

(7) Defendant was required to provide last known addresses and email addresses of potential class members to the extent it is able.

## INSURANCE

*Kombol v. Allstate Vehicle and Property Insurance Company,* No. 1:20-cv-00070-SPW, 2022 WL 1303111 (D. Mont. May 2, 2022) (Watters, J.)

This was a proposed class action regarding Allstate's alleged failure to incorporate and adhere to an objective standard for determining when an insured's covered structural repair required the services of a general contractor and the subsequent inclusion of sums for General Contractor Overhead and Profit (GCOP) in the insured's claim reimbursement. Plaintiff sought to certify two classes: a breach of contract class and a Unfair Trade Practices Act class. Upon the motion of plaintiff, the court denied class certification finding the class definitions were overbroad and unascertainable. It also found that the case lacked the required predominance for class certification under Rule 23 (b)(3).

The court stated that an essential element to each claim was the allegation that Allstate failed to pay GCOP when it was required to do so under the insurance contract. As asserted by Plaintiff, an insured is entitled to GCOP when it is "reasonably likely" that the services of a general contractor will be needed to complete the repairs. The "reasonably likely" standard necessarily entailed a predominance problem because it required the separate adjudication of each individual claim.

The court also found that class action treatment was not superior to individual adjudication. Determining whether each insured was entitled to recover individually would require an analysis of the facts and circumstances of every insured's claim including value of the loss, complexity of repair work, type of trade(s) and non-trade(s) work needed, and the number of trades, trades people, and non-related trades involved.



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