LEGALEASE SOLUTIONS LLC

23400 Michigan Avenue, Suite 101
Dearborn, MI 48124
Tel: 1-(866) 534-6177 (toll-free)
Fax: 1-(734) 943-6051
Email: contact@legaleasesolutions.com
www.legaleasesolutions.com

Issues Related to Class Certification in Mississippi

Issues

1. Circumstances under which class certification is granted despite reliance issues and where defendants were guilty of omissions.
2. Identify the theories of common proof of reliance that have been rejected by Mississippi courts.
3. Circumstance under which Mississippi courts have supported certification even though there may be some individual proof required on damages.

Discussion

I. Circumstances Under Which Class Certification Is Granted Despite Reliance Issues And Where Plaintiffs Relied On Omissions Made By The Defendant.

No cases were found where the Fifth Circuit, Federal District Courts of Mississippi or a Mississippi State Court certified a class despite there being reliance issues, or issues regarding omissions. To the contrary, the law is very well settled in the Fifth Circuit that a case that requires reliance (i.e. fraud) is not be suitable for class action treatment if there is any material variation in the representations made, or in the degrees of reliance thereupon. *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882 (5th Cir. 1973). Even where allegations of a proposed class have a common core, class treatment is inappropriate so long as there is a material variation in the representations made or in the kinds or degree of reliance by the persons to whom they were addressed. *Keyes v. Guardian Life Ins. Co. of Am.*, 194 F.R.D. 253, 257 (S.D. Miss. 2000). *Cf. Cope v. Metro. Life Ins. Co.*, 82 Ohio St. 3d 426 (Sup. Ct. 1998) (Ohio Supreme Court holding that when there is

nondisclosure of a material fact, courts permit inferences or presumptions of inducement and reliance, therefore, cases involving common omissions across the entire class are generally certified as class actions, notwithstanding the need for each class member to prove these elements); *Davis v. Southern Bell Tel. & Tel. Co.*, 158 F.R.D. 173, (S.D. Fla 1994) ("Because of the nature of an omission, the presentations of the pure omissions could not have varied materially. Either the omissions were made or not. If they were made, they must all have been made the same way. Thus, the only question concerning the appropriateness of certification of the omissions is whether the omissions were made to all, or many, of the class members.").

II. Theories Of Common Proof Of Reliance That Have Been Rejected By Courts

In *Keyes v. Guardian Life Ins. Co. of Am.*, 194 F.R.D. 253, 253 (S.D. Miss. 2000), the plaintiffs alleged that defendant life insurer induced them to buy whole life insurance policies on the basis of representations that only a limited number of premiums would be required during the initial years of the policy and that after time, the premiums would "vanish" as dividends and interest credited to the policies accumulated sufficiently to cover the cost of future annual premiums. Plaintiffs alleged that the premiums did not vanish but rather, because the actuarial assumptions underlying the policy illustrations (which defendant had failed to disclose) were not realistic, continued to be due and payable beyond the so-called "vanish date." *Id.* Plaintiffs brought a class action alleging fraud against defendant insurer and moved for class certification. *Id.*

In support of certification, plaintiffs argued that reliance could be presumed because of defendant's course of deception and the uniformity of that deception so that issues of any particular individual's reliance were immaterial. *Keyes* 194 F.R.D at 257**.** The court, however, rejected plaintiffs' argument and denied the motion finding that defendant's policies were not sold in a sufficiently uniform manner so as to justify a finding that common

issues predominated. *Id.* at 253. In this regard, the court noted that defendant did not employ a "sales force" or any salespeople, but rather sold its products through independent general agents throughout the country; and it did not train these agents or otherwise require them to provide a scripted or standardized sales pitch. *Id.* 256-257. Therefore, class certification was not proper due to the lack of predominance of common issues over individual ones. *Id.* at 259.

In *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882 (5th Cir. 1973), plaintiffs brought a class action suit against defendant brokerage firm alleging that defendant recommended, through oral and written representations, the purchase of stock of a company which it knew was having financial difficulties. The trial court denied class action certification. *Id.* On appeal, the trial court's decision was upheld on the ground that the common questions of law or fact did not predominate over questions affecting individual members because the oral or written representations made by defendant were not standardized. *Id.* In its decision, the court noted that an action based substantially on oral rather than written misrepresentations cannot be maintained as a class action. *Id.* at 882**.** In addition, if the writings contain material variations, emanate from several sources, or do not actually reach the subject investors, they are no more valid a basis for a class action than dissimilar oral representations. *Id.* See also, *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 211 (5th Cir. 2003) (fraud actions that require proof of individual reliance cannot be certified as Fed. R. Civ. P. 23(b)(3) class actions because individual, rather than common issues will predominate); *Marascalco v. International Computerized Orthokeratology Soc'y.* 181 F.R.D. 331 (N.D. Miss. 1998) (when conduct on the part of the plaintiffs individualizes each case, class certification is inappropriate).

III. Circumstance Under Which Mississippi Courts Have Supported Certification Even Though There May Be Some Individual Proof Required On Damages.

Even when there is wide disparity among class members as to the amount of damages suffered, it does not necessarily mean that class certification is inappropriate. *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003) (class certification denied). Courts have certified classes even in light of the need for individualized calculations of damages. *Id.* However, class treatment may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is inadequate. *Id.* at 307. Where the issue of damages requires separate "mini-trials" of a large number of individual claims, the need to calculate individual damages will defeat predominance. *Id.* In such a situation, it will act as a bar to class certification. *Id.*

The necessity of calculating damages on an individual basis, by itself, can be grounds for not certifying a class. *Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp.*, 100 Fed. Appx. 296, 297 (5th Cir. 2004) (class certification denied). Class certification is not appropriate if plaintiffs fail to demonstrate that the calculation of individualized actual economic damages, if any, suffered by the class members can be performed in accordance with the predominance requirement of Fed. R. Civ. P. 23(b)(3). *Id.* Certification under Fed. R. Civ. P. 23(b)(3) is not appropriate where plaintiffs' claims for compensatory and punitive damages must focus almost entirely on facts and issues specific to individuals rather than the class as a whole. *Id.* See also, *Corley v. Orangefield Indep. Sch. Dist,*.152 Fed. Appx. 350 (5th Cir. 2005) (although relatively few motions to certify a class fail because of disparities in the damages suffered by the class members, courts have nonetheless noted that the lack of a suitable formula for calculation of damages may defeat predominance).

In *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 293 (5th Cir. 2001), plaintiffs were pilots that filed suit against Continental Airlines and the Independent Association of Continental Pilots alleging that they were injured when they lost seniority after the

defendants agreed to restore the seniority of eleven pilots who had lost their seniority when they participated in a strike in 1983-85. The District Court granted certification and on appeal to the Circuit Court the defendants argued that common issues did not predominate because damages under both the Railway Labor Act and the Labor-Management Reporting and Disclosure Act must be calculated in a highly individualized manner. *Id*. at 298. In affirming the certification order, the Circuit Court held that although calculating damages will require some individualized determinations, virtually every issue prior to damages was a common issue. *Id*. The plaintiffs' suit boiled down to one basic factual claim: the defendants' Association took a single act that caused every plaintiff to lose seniority. *Id*. Because every aspect of liability in the case involved this common issue, the issue of damages would not defeat certification. *Id*. See also, *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620 (5th Cir. 1999) (because the common issues pertaining to class members theories of liability are independently sufficient to establish commonality, it is irrelevant whether the class members uniformly allege damages).