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Issues Related to Class Certification in Texas

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 Texas courts.
3. Circumstance under which Texas 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 Defendants Are Guilty of Omissions.**

“Where a party had no opportunity to learn the truth, a presumption of reliance is warranted to a greater degree than where there is a misrepresentation.” *In re Great Southern Life Ins. Co. Sales Practices Litig.*, 192 F.R.D. 212 (N.D. Tex. 2000). In *Great Southern*, plaintiffs brought a class action against Great Southern Life regarding so-called “vanishing premium” policies it sold to the plaintiffs. The complaint alleged that defendant Great Southern Life kept insurance agents affiliated with it in the dark as to the true actuarial tables, rates of return and other formulas used to determine policy values and therefore these agents could not properly advise potential purchasers. *Id.* at 214. Plaintiffs’ relied on these omissions as the foundation of their case on the merits as well as the case for class

certification. *Id.* The complaint alleged violations of the Texas Business and Commercial Code as well as fraud, fraudulent concealment and deceit. *Id.* at 219.

In deciding plaintiffs' motion for certification, the court observed that generally, courts have denied certification in consumer class actions where misrepresentation or fraud is alleged. *In re Great Southern Life*, 192 F.R.D. at 220. This was due to the different level of reliance in each consumer transaction, thereby creating different elements of proof and different defenses for each class member. *Id.* However, the court, citing to *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (U.S. 1972), held that positive proof of reliance is unnecessary in cases involving primarily a failure to disclose. *Id.* The court noted that in a misrepresentation case a rebuttable presumption of reliance is observed. *Id.* However, where a party had no opportunity to learn the truth, a presumption of reliance is warranted to a greater degree than where there is a misrepresentation. *Id.* As a result, the court granted certification finding that on the reliance issue common issues predominated. *Id.*

In *Longden v. Sunderman*, 123 F.R.D. 547 (N.D. Texas 1988), a group of investors who felt they had been defrauded by a syndication filed a class action for securities fraud against the syndication and an accounting firm. In support of their motion to certify the action, plaintiffs argued that the commonality and predominance requirements were met because the evidence reflected that defendants disseminated a uniform marketing plan that contained material misrepresentations and omissions. *Id.* at 551. Defendants challenged class certification upon the assertion that questions of individual reliance on the alleged misrepresentations and omissions in the uniform marketing plan by class members clearly predominated. *Id.* at 553.

In granting certification, the District Court held that plaintiff could prove reliance under one of three theories, any one of which does not create an obstacle to class certification: 1) that reliance can be proved on a class-wide basis based upon a standardized

sales plan, 2) that because they have alleged a common scheme to defraud the public, putative class members are entitled to a presumption of reliance based on a “fraud on the market” theory under Rule 10b-5 (employment of manipulative and deceptive devices in the sale of securities) or 3) that should class members’ personal reliance on defendants’ allegedly misleading materials ultimately have to be decided on an individual basis, it would not be an insurmountable obstacle for the court to continue the class action. *Longden*, 123 F.R.D. at 553-555. The Court further held that rather than rule out a class action in any case where reliance may be a matter of individual proof, it is more efficient to order separate trials, if necessary, to resolve the reliance issue. *Id.*

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

Where individual reliance is necessary to prove actual damages, a class action may not be certified on this issue. *Henry Schein v. Stromboe*, 102 S.W.3d 675 (2002); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417 (5th Cir. Tex. 2001); *Perrone v. GMAC*, 232 F.3d 433 (5th Cir. Tex. 2000). In *Henry Schein*, *supra* at 679-684, plaintiff buyers brought a class action suit against defendant, a seller of software programs, alleging breach of contract, breach of express and implied warranties, fraudulent and negligent misrepresentations, and violations of the Texas Deceptive Trade Practices Act. The trial court granted the plaintiffs’ motion to certify the class and the Court of Appeals affirmed. *Id.* On appeal to the Supreme Court of Texas, the defendant argued that reliance is not a common issue but one that must necessarily be determined for each individual. *Id.* at 685.

The Supreme Court, in reversing the Court of Appeals, noted that reliance was an element of five of the plaintiffs' causes of action: fraud, breach of express warranty (to a certain extent), negligent misrepresentation, promissory estoppel, and the Texas Deceptive Trade Practices Act. *Henry Schein*, 102 S.W.3d at 693. The Supreme Court further noted that the 20,000 class members are held to the same standards of proof of reliance that they

would be required to meet if each sued individually. *Id.* However, this did not mean that reliance could not be proved class-wide with evidence generally applicable to all class members. *Id.* But evidence insufficient to prove reliance in a suit by an individual does not become sufficient in a class action simply because there are more plaintiffs. *Id.* The Supreme Court held that the procedural device of a class action eliminates the necessity of adducing the same evidence over and over again in a multitude of individual actions but it does not lessen the quality of evidence required in an individual action or relax substantive burdens of proof. *Id.* at 694. The Court further held that if a plaintiff could prove reliance in an individual action with the same evidence offered to show class-wide reliance, then the issue is one of law and fact common to the class. *Id.*

In *Henry Schein*, the plaintiffs argued that they had established “class-wide reliance” on misrepresentations made by Schein through evidence that Schein wanted purchasers to rely on its advertisements and other representations about its software products. *Henry Schein*, 102 S.W.3d at 694. However, the Court found that there was no evidence that purchasers actually did rely on Schein's statements so uniformly that common issues of reliance predominate over individual issues. *Id.* To the contrary, there was evidence in the record that purchasers relied on recommendations from colleagues and others rather than any statements made directly or indirectly by Schein. *Id.* The Court further noted that the trial court did not explain in its certification order how the plaintiffs could avoid individual proof of reliance or why the necessity for such proof would not defeat the predominance requirement for certification. *Id.* As such, the Supreme Court held that certification order was erroneous and reversed. *Id.*

“A fraud class action cannot be certified when individual reliance will be an issue.” *Patterson v. Mobil Oil Corp.*, 241 F.3d 417 (5th Cir. Tex. 2001). In *Patterson*, the class action plaintiffs brought an action under the Racketeer Influenced and Corrupt Organizations

Act against their employer Mobil. *Id.* at 418. The plaintiffs had suffered injuries at their workplace and alleged that they relied on Mobil's representation to them that it had workers' compensation insurance in foregoing negligence lawsuits against Mobil. *Id.* Mobil's representation, however, turned out to be false. *Id.*

The court held that claims for money damages in which individual reliance is an element are poor candidates for class treatment. *Patterson*, 241 F.3d at 419. In the case before it, each member of the class was required to prove their individual reliance upon Mobil's alleged fraud. *Id.* The court noted that in order to do that, each plaintiff would have to make an individual showing that she could have and would have sued Mobil, but did not do so because the asserted false statements led her to believe her suit to be barred by the workers' compensation regime. *Id.* As a result, the court vacated the district court's class certification and denied the motion to certify. *Id.*

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

Class certification may be granted even if individual damages may vary from one class member to another. See *Chevron U.S.A., Inc. v. Kennedy*, 808 S.W.2d 159 (Tex. App. El Paso 1991). In *Chevron U.S.A.*, defendant Chevron owed royalties to the plaintiffs pursuant to certain oil, gas and mineral leases. *Id.* at 161. Plaintiffs' claimed that Chevron wrongfully retained certain royalties under the leases. *Id.* at 162. Plaintiffs commenced a class action and moved for certification which the trial court granted. *Id.* at 161. On appeal, Chevron argued that certification was erroneous because there was a deficiency of questions of law or fact common to the class due to the varying amounts of royalties to be paid to the plaintiffs. *Id.* at 162. The Court of Appeals disagreed and held that despite the varying amounts of potential damages, the standard conduct of Chevron, the questions as to cross-conveyances and the resultant proportionately diminished royalties or the wrongfully withheld royalties were relative to all potential class members. *Id.* Therefore, because the

class claims were based upon the same legal theories, the varying damage claims will not defeat class certification. *Id.*

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