[Cite as *San Allen, Inc. v. Buehrer*, 2011-Ohio-1676.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94651

SAN ALLEN, INC., ET AL.

PLAINTIFFS-APPELLEES

vs.

STEPHEN BUEHRER, ADMINISTRATOR OHIO BUREAU OF WORKERS' COMPENSATION

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-644950 and CV-689611

BEFORE: S. Gallagher, J., Celebrezze, P.J., and Sweeney, J.

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SEAN C. GALLAGHER, J.:

{¶ 1} Defendant-appellant Stephen Buehrer,[1] Administrator, Ohio Bureau of Workers' Compensation ("the BWC"), appeals the judgment of the Cuyahoga County Court of Common Pleas that granted the motion for class certification of plaintiffs-appellees San Allen, Inc., d.b.a. Corky and Lenny's, et al. ("plaintiffs").[2] For the reasons stated herein, we affirm the decision of the trial court.

{¶ 2} Plaintiffs filed a class action complaint, on behalf of themselves and similarly situated employers, raising statutory and constitutional challenges to the BWC's implementation of a group-experience rating plan. The plan allegedly granted group rated employers excessive discounts, which were subsidized by overcharging non-group rated employers through inflated base rates.[3] More specifically, plaintiffs claim that the BWC's group-experience rating plan violated Section 2, Article I and Section 35,

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[1] Stephen Buehrer currently serves as the Administrator for the BWC. Marsha P. Ryan held that office at the time this litigation commenced, and the case caption was originally *San Allen, Inc. v. Ryan.*

[2] Plaintiffs-appellees include San Allen, Inc., d.b.a. Corky and Lenny's; Timely Advertising Specialty Co., d.b.a. S.E. Bennett Company; Linderme Tube Co.; Cambridge Manufacturing Jewelers, Ltd.; D&J Structural Contracting, Inc.; Lifecenter Plus, Inc.; and David W. Steinbach, Inc.

[3] This case was consolidated with *Nick Mayer Lincoln Mercury v. Ohio Bur. of Workers' Comp.*, Cuyahoga County Common Pleas Court Case No. CV-689611. The trial court dismissed the *Nick Mayer* case; however, this court reversed that decision in *Nick Mayer Lincoln Mercury v. Ohio Bur. of Workers' Comp.*, Cuyahoga

Article II of the Ohio Constitution and R.C. 4123.29 and 4123.34.[4] Plaintiffs state that they are all employers that were non-group rated for one or more of the policy years at issue.

{¶ 3} Following earlier proceedings in this matter, including the trial court's granting and subsequent vacating of a preliminary injunction, plaintiffs filed a motion for class certification. The trial court granted plaintiffs' motion and certified the following class:

> **"Ohio private employers subscribing to the Ohio workers' compensation State Fund, for any policy year from July 1, 2001 through and including policy year July 1, 2008, who in any of those policy years were rated on a non-group basis and who reported payroll and paid premiums in a manual classification for which the base rate was 'inflated' due to experience modifications under the group experience rating plan."**

App. No. 93752, 2010-Ohio-2782.

[4] Plaintiffs allege a violation of former R.C. 4123.29(A)(4)(c), which provided as follows: "In providing employer group plans under division (A)(4) of this section, the administrator shall consider an employer group as a single employing entity for the purposes of retrospective rating. No employer may be a member of more than one group for the purpose of obtaining workers' compensation coverage under this division." The section was amended, effective January 6, 2009. As amended, "group" was substituted for "retrospective" before "rating" in the first sentence, so that the sentence reads, in pertinent part, that "the administrator shall consider an employer group as a single employing entity for purposes of group rating." The BWC states that notwithstanding this amendment, it no longer applies group experience modifiers in its calculation of non-group rated employers' base rates.

{¶ 4} The BWC filed this appeal, raising eight assignments of error for our review. Because all of the assigned errors challenge the trial court's decision to grant class certification, we address them together.

{¶ 5} A trial judge has broad discretion in deciding whether to certify a class action, and that determination will not be disturbed absent an abuse of discretion. *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 5. "However, the trial court's discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, 694 N.E.2d 442.

{¶ 6} In determining whether to certify a class, the trial court cannot consider the merits of the case. *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St.3d 230, 233, 466 N.E.2d 875. Further, the party seeking class certification has the burden of showing that class certification is appropriate. *State ex rel. Ogan v. Teater* (1978), 54 Ohio St.2d 235, 247, 375 N.E.2d 1233.

{¶ 7} There are seven prerequisites that must be met before a court may certify a case as a class action pursuant to Civ.R. 23, which are as

follows: "(1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met." (Internal citations omitted.) *Hamilton,* 82 Ohio St.3d at 71.

{¶ 8} The BWC's first challenge is to the scope of the class. Civ.R. 23 requires that an identifiable class must exist and the definition of the class must be unambiguous. This requirement "will not be deemed satisfied unless the description of [the class] is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. Thus, the class definition must be precise enough to permit identification within a reasonable effort." (Internal quotations and citations omitted.) *Hamilton*, 82 Ohio St.3d at 71-72. Additionally, "the class, where possible, should be defined upon the basis of the manner in which the defendant acted toward an ascertainable group of persons." (Internal quotations and citation omitted.) Id. at 73.

{¶ 9} The BWC argues that the trial court certified an overly broad class that included parties who suffered no injury attributable to the BWC's group-experience rating plan. A review of the class definition reflects that the class was limited to those non-group rated employers "who reported payroll and paid premiums in a manual classification for which the base rate was 'inflated'" for any policy year from July 1, 2001 through and including policy year July 1, 2008. This definition necessarily excludes those who did not report payroll and pay premiums based upon an inflated base rate. The BWC also claims the class included employers who received a net economic benefit attributable to group rating and/or the non-group discount available during some of the policy years. However, this merely raises the issue of a setoff or a recoupment in the event that the class should prevail in its suit to recover damages from the BWC. Because the class definition is limited to those who claim to have suffered a common, class-wide injury, i.e., an overcharge in their premiums through inflated base rates, the class definition is not overly broad.[5]

{¶ 10} The focus of a trial court in determining whether a class is readily identifiable is "whether the means is specified at the time of certification to

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[5] Moreover, because the fact of damage and the liability element of the claim can be established on a class-wide basis, this case is distinguishable from *Hoang v. E* Trade Group, Inc.*, 151 Ohio App.3d 363, 2003-Ohio-301, 784 N.E.2d 151; and *Gottlieb v. City of S. Euclid*, 157 Ohio App.3d 250, 2004-Ohio-2705, 810 N.E.2d 970.

determine whether a particular individual is a member." *Hamilton*, 82 Ohio St.3d at 73. Here, the BWC's own records reflect the base rates paid by non-group rated employers and the annual premiums paid by each employer. As the trial court found, "[t]he BWC communicates with the proposed class members, stores each employer's payment history, and assigns a policy number to each employer. The BWC's own records regarding employer payments make the class readily identifiable." We cannot say the trial court abused its discretion in finding that an identifiable class existed.

{¶ 11} Next, the BWC challenges the named representatives' membership in the class, the typicality of their claims, and the adequacy of their representation. "The class membership prerequisite requires only that the representative have proper standing. In order to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent." (Internal quotations and citation omitted.) Id. at 74. "The requirement for typicality is met where there is no express conflict between the class representatives and the class. Similarly, a representative is deemed adequate so long as his or her interest is not antagonistic to that of other class members." Id. at 77-78. Civ.R. 23 also requires the existence of questions of law or fact common to the class. "If there is a common nucleus

of operative facts, or a common liability issue, the rule is satisfied." *Hamilton*, 82 Ohio St.3d at 77.

{¶ 12} Here, each of the named plaintiffs was non-group rated in one or more of the pertinent policy years. The plaintiffs claim that the BWC's group-experience rating plan was unlawfully applied to each member and that they suffered the same injury by having paid excessive premiums based on inflated base rates. The plaintiffs assert that "the actuarially sound off-balance for the years in question should have been no more than 1.23[.]" All class members are seeking restitution for the alleged overcharges paid.

{¶ 13} The BWC's challenge to the merits of plaintiffs' claim of an inflated base rate is not an appropriate consideration for class certification. See *Ojalvo*, 12 Ohio St.3d at 233. We also are not persuaded by the BWC's arguments pertaining to injury, setoff, and recoupment. Here, each employer would have actually suffered damages if they were in fact overcharged for premiums through inflated base rates in any of the policy years. Insofar as the BWC seeks to apply individual setoff or recoupment defenses to the claims, "a trial court should not dispose of a class certification solely on the basis of disparate damages." *Ojalvo*, 12 Ohio St.3d at 232.

This is particularly the case where the calculation of damages is not particularly complicated. See *Hamilton*, 82 Ohio St.3d at 81.[6]

{¶ 14} The trial court found as follows: "The foundational injury asserted by Plaintiffs is inflated policy payments incurred by employers in non-group rated policies. Plaintiffs therefore assert common claims for the restitution of funds wrongfully collected. The named Plaintiffs and the proposed class members possess the same interest, and have allegedly suffered the same injury. * * * [A]ll proposed members of the class seek restitution for over-charges on workers' compensation policies issued by the BWC to non-group rated employers. The typical underlying claim is for damages. * * * That the named Plaintiffs might have received benefits during some of the challenged policy periods is of no consequence regarding an intra-class conflict because the proposed class consists of employers seeking restitution for over-charges during at least one covered policy period. The Court does not perceive any intra-class antagonism sufficient to deny class certification. Based on the above, the Civ.R. 23(A)(2) requirement of commonality is also satisfied." We do not find the trial court abused its discretion in finding the class membership, typicality, adequacy, and commonality requirements were met.

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[6] We also note that a right to setoff was not raised as an affirmative defense or asserted as a counterclaim by the BWC.

{¶ 15} The BWC has not challenged the numerosity requirement. The trial court found as follows: "Plaintiffs have asserted 'Without class certification a large segment of the victimized employer population will go uncompensated.' The annual premiums paid by many of the proposed class members might not justify the time and expense of bringing an individual suit to recover over-charges. The court finds that the individual employer financial harm might be relatively minor in some instances. Individual actions by all potentially aggrieved members are unlikely. Additionally, the number and location of employers paying the BWC policies in the covered period suggest that joinder is impracticable." We find no abuse of discretion with regard to this determination.

{¶ 16} Next, the BWC argues that the trial court erroneously determined that a class action is superior to other available methods for the fair and efficient adjudication of the controversy under Civ.R. 23(B)(3). Civ.R. 23(B)(3) is satisfied if "the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The BWC argues that there is no "necessity" for class certification in this case

{¶ 17} In *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, the Ohio Supreme Court

recognized that "[n]eed is a relevant factor to determine whether the class action is 'superior to other available methods for the fair and efficient adjudication of the controversy,' as required for certification pursuant to Civ.R. 23(B)(3)." Id. at ¶ 33. Therefore, the court found that a trial court does not abuse its discretion by considering the "need, or whether plaintiffs' action would accomplish the same result without the additional burden and expense of a class action," in determining whether class certification is warranted. Id. Indeed, there have been several cases that have found no need to grant class certification where a determination regarding state conduct or the constitutionality of a statute would automatically apply to all similarly situated persons. See *Davis*, 111 Ohio St.3d 118; *Frisch's Restaurant, Inc. v. Conrad*, Franklin App. No. 05AP-412, 2005-Ohio-5426; *Smith v. State Teachers Retirement Bd.* (Feb. 5, 1998), Franklin App. No. 97APE07-943; *State ex rel. Horvath v. State Teachers Retirement Bd.* (Mar. 31, 1995), Franklin App. No. 94APE07-988.

{¶ 18} However, there is no general prohibition against bringing a class action raising a statutory or constitutional challenge.[7] Here, the trial court considered the necessity factor, but determined in favor of class adjudication because of the discretionary application of a ruling in this case. In the *Davis*

[7] We note that no such rule was announced in *Davis* or in this court's decision in *Gottlieb*.

line of cases, the relief accorded was predetermined and a determination in favor of the plaintiffs would automatically accrue to the benefit of others similarly situated. Id. at ¶ 22. As argued by plaintiffs, the claim in this case is for the restitution of wrongfully collected and retained premiums, and the requested relief would not automatically inure to the benefit of those in the proposed class without resort to class litigation. Unlike the situation in *Davis* where the defendant agreed to honor the judgment in the case as to the employees in the proposed class, there has been no representation by the BWC that it will make class-wide restitution if relief is accorded to the plaintiffs herein.

{¶ 19} The trial court recognized the predominating question as to whether restitution is owed for overcharges of employers outside the group-experience rating plan. It also found that "[c]lass adjudication is superior to individually adjudicated actions" and that "the interests of efficiency and economy in common adjudication outweigh the interests of individualized adjudication." We find no abuse of discretion with regard to the trial court's determination.

{¶ 20} We also recognize that to the extent that individual determinations may exist as to damages, the action can be bifurcated and subclasses may be created. See *Assn. for Hosp. & Health Sys. v. Ohio Dept. of Human Serv.*, Franklin App. Nos. 04AP-762 and 04AP-763, 2006-Ohio-67.

A class action is not defeated solely because of some factual variations among class members. Further, that some members may not be entitled to relief because of some particular factor will not bar the class action. As the Ohio Supreme Court has stated: "The mere existence of different facts associated with the various members of a proposed class is not by itself a bar to certification of that class. If it were, then a great majority of motions for class certification would be denied. Civ.R. 23(B)(3) gives leeway in this regard and permits class certification where there are facts common to the class members." *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d at ¶ 10.

{¶ 21} Finally, the BWC asserts that in determining whether the requirements of Civ.R. 23 were met, the trial court improperly considered the merits of the claims by applying its ruling on the preliminary injunction. Our review of the trial court's decision reflects that the trial court did not consider the merits of the claims. The trial court's references to "the restitution owed to Plaintiffs because of Defendant's over-charges of employers outside the group rating plan" and "the group premiums were based on an unlawful enactment by the Bureau" merely emphasized the central issues in the case. We find the trial court conducted a rigorous analysis in determining whether the prerequisites of Civ.R. 23 were satisfied and did not abuse its discretion in granting class certification.

{¶ 22} Accordingly, we overrule the BWC's assignments of error. We affirm the trial court's decision to grant class certification and remand the matter for further proceedings. On remand, the trial court should strongly consider bifurcating the action on liability and damages. The court must keep in mind that the policy behind a class action lawsuit is "to simplify the resolution of complex litigation, not complicate it." *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 97, 521 N.E.2d 1091.

Judgment affirmed; case remanded.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
JAMES J. SWEENEY, J., CONCUR