

STATE OF MICHIGAN
COURT OF APPEALS

KENNEDY MASONRY, INC, and MORROW
ROOFING, INC,

UNPUBLISHED
November 2, 2004

Plaintiffs-Appellants,

v

ASSOCIATED BUILDERS & CONTRACTORS
OF MICHIGAN WORKERS COMPENSATION
FUND,

No. 247016
Ingham Circuit Court
LC No. 02-001211-CK

Defendant-Appellee.

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted the trial court's order denying their motion for class certification. The trial court determined that the claims of potential class members identified by plaintiffs do not have common questions of law or fact that predominate over questions affecting only individual members, MCR 3.501(A)(1)(b), and that the maintenance of a class action would not be superior to other available methods of adjudication in promoting the convenient administration of justice, MCR 3.501(A)(1)(e). After careful review, we are not "left with a definite and firm conviction that a mistake has been made." *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999). Accordingly, we cannot find the trial court clearly erred. *Id.* This appeal has been decided without oral argument pursuant to MCR 7.214(E). We affirm.

I. Factual Background

Defendant Associated Builders and Contractors of Michigan Self-Insured Workers' Compensation Fund (ABC Fund) is a group self-insurer created in 1995 to provide workers' compensation coverage to its members engaged in construction-related businesses. Pursuant to a master indemnity agreement on file with the Bureau of Workers' Disability Compensation, businesses permitted to join the ABC Fund agree to be jointly and severally liable for the payment of any lawful Workers' Disability Compensation awards against any member of the

fund. Before January 4, 1999, pursuant to its bylaws,¹ the ABC Fund refunded to its members in good standing who had not withdrawn from the fund premiums collected that were in excess of the amount necessary to pay claims and administrative expenses. The ABC Fund's bylaws also permitted surplus interest income earned on the invested premiums to be refunded to its members.² Any refund required the approval of the Workers' Compensation Bureau.³

The instant case arises from legislation that required the ABC Fund to change its bylaws and operating procedures. 1998 PA 457, effective January 4, 1999, amended § 2016 of the Insurance Code, MCL 500.2016, to include workers' compensation self-insurance coverage in its prohibition as an unfair method of competition and an unfair and deceptive act against an insurer conditioning the receipt of a dividend for the current or previous year on the insured's renewal or maintenance of coverage.⁴ When 1998 PA 457 was enacted, MCL 500.2016, as part of the

¹ Art VIII, § 4, of the ABC Fund's bylaws in effect before May 1, 2000, provides: "That portion of each participant's contribution which shall not be required to pay claims, pay administration expenses and fees or to fund required or appropriate reserves may be returned to the participants of the FUND from time to time but only when specifically authorized or approved by the Bureau in accordance with law. No accumulation may be returned if such payment will impair the capital stability and/or security of the FUND. Any participant who withdraws, is expelled and/or is not in good standing, as defined in Article IV, Section 1, shall not be eligible to receive any return from surplus accumulation. In the event the Board is unable to identify or deliver a refund for any reason, such monies shall remain in the FUND for the benefit of the remaining participants."

² Art VIII, § 10, of the ABC Fund's bylaws in effect before May 1, 2000, provides: "Monies paid to the FUND may be held, disbursed, invested, and reinvested, and securities acquired by investment may be disposed of by the FUND, and all profit and loss arising thereof, may be used to pay claims and administrative expenses of the FUND, and any excess monies not used for [the] above purposes may, with approval of the Bureau of Workers' Disability Compensation, be returned to the members."

³ The pertinent bureau administrative rule provides: "Any surplus monies for a fund year in excess of the amount necessary to fulfill all obligations under the act for that fund year, including a provision for claims incurred but not reported, may be declared to be refundable by the trustees at any time, and the amount of the declaration shall be a fixed liability of the fund at the time of the declaration. The date of payment shall be as agreed to by the trustees and the bureau, except that monies not needed to satisfy the loss fund requirements, as established by the aggregate excess contract, may be refunded immediately after the end of the fund year with the approval of the bureau. The intent of this rule is to ensure that sufficient monies are retained so that total assets are greater than total liabilities for each fund year." 1984 AACRS, R 408.43j(2).

⁴ As amended by 1998 PA 457, MCL 500.2016, provides in pertinent part:

- (1) In addition to other provisions of law, the following practices as applied to workers' compensation insurance including worker's compensation coverage provided through a self-insurer's group are defined as unfair methods of

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Insurance Code, was subject to enforcement by the Insurance Commissioner, MCL 500.210. But on June 25, 1999, the Governor transferred this regulatory authority to the Bureau of Workers' Disability Compensation by Executive Order 1999-5. On August 19, 1999, Jack F. Wheatley, Director of the Bureau of Workers' Disability Compensation, wrote to the ABC Fund advising that:

The changes in Public Act 457 require that group bylaws and operating procedures provide for the return of premium surplus and investment income to members who have left the group. The bureau will consider provisions which provide for the placing of former members' surplus in a separate account until all claims are closed for a given year or some other acceptable event has occurred. The bureau will also allow groups to use surplus refunds to offset premium for discounts or credits. However, only current members' surplus may be used. Former members' surplus must be returned to those members who are no longer in the group. These requirements apply only to surplus refunds approved and for members withdrawn on or after January 4, 1999. The bureau will, of course, consider any and all proposals that meet the requirements and provisions of Public Act 457.

In December 1999, ABC Fund amended its bylaws, effective May 1, 2000, because the fund's fiscal year runs from May 1 to April 30. The fund's amended bylaws provide that surplus premiums would no longer be refunded; the fund would either apply the surplus premiums as a credit to future premiums or retain them.⁵ Before the amendments, members who withdrew from

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competition and unfair and deceptive acts or practices in the business of insurance:

(a) As a condition of receiving a dividend for the current or a previous year, requiring an insured to renew or maintain workers' compensation insurance with the insurer beyond the current policy's expiration date or requiring a member to continue participation with a workers' compensation self-insurer group.

⁵ Art VIII, § 4, of the ABC Fund's amended bylaws, effective May 1, 2000, provides (emphasis added): "For the purposes of this section, "Accumulation of Assets" shall mean that portion of each participant's contribution which shall not be required to pay claims, administrative expense and fees or to fund required or appropriate reserves. *Subject to approval of the Bureau, the trustees may use accumulation of assets to offer premium reductions for future plan years or may retain accumulated assets.* No accumulation of assets may be used as a premium reduction if it would impair the capital stability and/or security of the Group. *Any participant who terminated participation in the group during the period January 4, 1999 through May 1, 2000 shall be eligible to receive any return of surplus premium accumulation earned for any period prior to the time of withdrawal providing the participant maintains no outstanding debt to the group. Such surplus premium shall be placed in an escrow account for a period of ten years after the date of termination at which time it will be subsequently paid to the former participant.* If a former participant has ceased to exist, or cannot be located after reasonable efforts, that participant's return of surplus shall be forfeited. Any former participant who terminated participation in the Group during the period January 4,

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the fund were ineligible to receive any refund of surplus premium whatsoever.⁶ Under the fund's amended bylaws, any member who withdrew from the fund between January 4, 1999 and May 1, 2000 was eligible to receive its proportionate share of the surplus refund; however, the refund was to be held in escrow for ten years and would then be refunded to the former participant.⁷ The member's eligibility to receive the surplus was also conditioned on the member's not owing any money to the fund. There is no dispute that the bureau approved the fund's amended bylaws.

Plaintiffs sued the fund for breach of contract based on its escrowing plaintiffs' proportionate share of the funds' surplus in accordance with the amended bylaws, rather than issuing a cash dividend. The source of plaintiffs' asserted contract right to a cash dividend is unclear; ¶ 28 of plaintiffs' complaint alleges the contract consists of "the application completed by each Member, the acceptance by ABC, the Bylaws governing operation of the Fund, and the statutory regulations that govern all contracts of insurance in the State of Michigan."⁸ On appeal, plaintiffs assert that their applications for membership in the fund and the funds' acceptance of their membership were a contractual arrangement that included the implicit agreement that the fund abide by its own bylaws and other applicable state laws. Although nothing in the ABC Funds' bylaws before or after their amendment, or MCL 500.2016, as amended by 1998 PA 457, requires refunding surplus to members, "the trial court is required to accept the allegations made in support of the request for certification as true." *Neal v James*, 252 Mich App 12, 15; 651 NW2d 181 (2002). Generally, a motion for class certification must be decided before reaching the merits of the underlying claims. *Id.*; *Grigg v Robinson Furniture Co*, 78 Mich App 712, 716-717; 260 NW2d 898 (1977).

Plaintiffs allege in count I of their complaint that plaintiff Kennedy Masonry, Inc., which did not renew its membership in the ABC Fund for the fiscal year beginning May 1, 2000, represents a subclass of former members of the ABC Fund who withdrew from the fund during the "window period," and have had their proportionate share of surplus unlawfully escrowed without its even earning interest. The ABC Fund's administrator wrote the bureau a letter dated June 22, 2000, which included its Spring 2000 profit analysis and a list of fund members who terminated participation during the window period, noting their escrowed share of surplus. This

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1999 through May 1, 2000 and who reapplies and is accepted back into the Group on or before May 1, 2002, is eligible to receive a premium reduction in an amount equal to the Accumulation of Assets which the former participant would have received if termination had not occurred."

⁶ See n 1.

⁷ Because the changes to MCL 500.2016 became effective January 4, 1999, and the amended bylaws became effective on May 1, 2000, the amended bylaws created a sixteen-month "window period" during which withdrawing members would have their refunds escrowed.

⁸ Plaintiffs did not attach a copy of an application for membership in the ABC Fund to their complaint but did attach a copy of an application as exhibit I to their application for leave to appeal in this Court. The copy filed with this Court contains no reference to refunding surplus to members but does contain a promise by the prospective member to "abide by the rules and regulations of the Fund."

document lists ninety-four members who withdrew from the ABC Fund during the window period, nine with no share of surplus. The letter indicated that escrowed surpluses ranging from eighty-four cents to \$19,709 (Kennedy) for eighty-five former members.

Acker Steel Erectors, Inc., was one of the eighty-five former members that the June 22, 2000 document indicated had a surplus (\$5,010.89). But based on a subsequent audit, the fund determined that Acker actually owed it \$10,777.55 in unpaid premiums for the fiscal year May 1, 1999 through April 30, 2000. After Acker paid only a portion of the fund's invoice for the unpaid premium, the ABC Fund sued to collect the remainder in 12th District Court. The district court decided the underlying issues involved in the present case in favor of Acker, and the Jackson Circuit Court affirmed in part, reversed in part. The Acker case is now pending review by this Court on leave granted March 15, 2004.⁹ *Associated Builders & Contractors Self-Insurance Workers' Compensation Fund v Acker Steel Erectors, Inc.* (Docket No. 250973).

Plaintiffs also rely on a letter dated August 20, 2001 from the fund's administrator to the bureau disclosing that eight former participants did not renew their membership on May 1, 2001. The attachment to this letter identifies the escrowed surplus of these eight members and includes plaintiff Morrow Roofing, Inc., with a surplus of \$4,974.93. Plaintiffs assert Morrow represents a second subclass of members withdrawing from the fund after April 30, 2000. In count II of their complaint, plaintiffs allege that the fund breached its contract by escrowing the surplus due this subclass of its former members.

Plaintiffs argue in part that because the workers' compensation bureau's approval of the fund's bylaw amendment stated that the change was effective May 1, 2000, the amendment did not apply to members who did not renew their contracts during the window period. For the members withdrawing after that time, plaintiffs argue that the change from issuing refunds to granting credits on premiums does not alter the fact that the fund is violating MCL 500.2016 by conditioning the credit on maintaining membership.

Plaintiffs moved for class certification under MCR 3.501(B). ABC Fund argued that the requirements for class certification were not met because all of the identified potential class members stand in a different position from the other potential class members. Some potential class members had already litigated the issues presented in this suit.¹⁰ Others voluntarily paid delinquent premium assessments after being sued or being put on notice of claim by the fund.¹¹ Some were barred from receiving a refund because they owed money to the fund at the time they left.¹² Other potential members had filed for bankruptcy or had ceased doing business.¹³ ABC

⁹ Constitutional claims regarding 1998 PA 457 amending MCL 500.2016 are pending in this Court in *Heath Care Workers' Compensation Fund v Bureau of Workers' Disability Compensation and Dept. of Consumer & Industry Services* (Docket No. 246050).

¹⁰ Defendant lists five such potential class members (brief on appeal, p 10, footnotes 3, 4, & 5).

¹¹ Defendant lists four potential class members in this category (brief on appeal, p 10, n 6).

¹² Defendant asserts twenty potential class members fit this category (brief on appeal, p 11, n 8).

Fund also contended that the eight members who canceled their policies after April 30, 2000 were not eligible for certification as a subclass because they did not meet the numerosity requirement. Finally, the fund argued that class certification was not the most efficient method for resolving the claims since most of the members of the class could obtain relief in small claims court.

Plaintiffs essentially contend that merely because some of the members of the class might not be eligible to participate in the litigation did not affect the fact that the class met the certification requirements.

On January 23, 2003, the trial court issued an order agreeing with defendant that “the potential class members identified by Plaintiff [sic] do not have common questions of law and fact which predominate over individual questions.” The court further found that “the maintenance of a class action would not be superior to other available methods of adjudication in promoting the convenient administration of justice.” Plaintiffs moved for rehearing, which the trial court denied in an order entered February 12, 2003. This Court granted plaintiffs’ application for leave to appeal.

II. Standard of Review

“This Court reviews a trial court’s decision on class certification under the clearly erroneous standard.” *Neal, supra* at 15, citing *Zine, supra* at 270. “A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made.” *Neal, supra*.

III. Analysis

The requirements for class certification are set forth in MCR 3.501(A)(1)(emphasis added):

One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action *only if*:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (d) the representative parties will fairly and adequately assert and protect the interests of the class; *and*

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¹³ Defendant lists six potential class members in this category (brief on appeal, p 10, n 7).

(e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

“The word ‘and’ following the semicolon in subsection d is critical because it reveals that the action must meet *all* the requirements in MCR 3.501(A)(1); a case cannot proceed as a class action when it satisfies only some, or even most, of these factors.” *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 599; 654 NW2d 572 (2002)(emphasis in original).

A. Numerosity - - MCR 3.501(A)(1)(a)

Defendant does not contest the numerosity requirement with regard to the subclass of plaintiffs Kennedy Masonry represented. But defendant does contest this requirement as applied to the subclass plaintiff Morrow Roofing represented because there were only eight ABC Fund members who canceled their membership in the fund during the 2000-2001 fiscal year. While there is no minimum number of members necessary to satisfy the numerosity requirement, *Zine, supra* at 287, eight members of a proposed class are not so many as to make joinder impracticable. Federal court decisions addressing this issue have held that in order to qualify for certification, a subclass must independently meet all of the requirements for class certification. *Burka v New York City Transit Authority*, 110 FRD 595, 601 (SD NY, 1986).¹⁴ Because eight members are not so many as to make joinder impracticable, MCR 3.501(A)(1)(a), these eight companies should be excluded from the proposed class action both because they fail to meet the numerosity requirement and because their factual situation differs materially from that of plaintiffs who terminated their policies in the “window period” between January 4, 1999 and May 1, 2000. While a question exists with regard to whether the fund’s amended bylaws applied to the window plaintiff(s), there is no question that the amended bylaws applied to the eight companies who terminated their membership after May 1, 2000.

B. Commonality - - MCR 3.501(A)(1)(b)

It is well settled that a class action may be maintained where the claims are part of a common scheme or where they all stem from the same conduct. *Dix v American Bankers Life Assurance Co*, 429 Mich 410, 418; 415 NW2d 206 (1987); *A & M Supply, supra* at 599. Here, plaintiffs’ claims all arise out of the fund’s amendment of its bylaws in response to 1998 PA 457, and its subsequent reliance on those amended bylaws to escrow plaintiffs’ surplus premiums rather than issue a cash refund. But these common legal issues will shortly be resolved definitively in the Acker case currently pending on appeal in Docket No. 250973 long before being resolved in the instant litigation.

¹⁴ This Court has held that it is appropriate to consider federal cases construing FR Civ P 23 for guidance when applying MCR 3.501. *Zine, supra* at 287 n 12; *Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997).

When applying the commonality requirement, damages calculations may be specific to each individual class member. MCR 3.501(A)(1)(b); *A & M Supply*, supra at 600. This Court has recognized that “the question is not whether each member of the class has sustained an identical *amount* of damage . . . but, rather, whether ‘the common issues [that] determine liability predominate.’” *Id.*, quoting *Bogosian v Gulf Oil Corp*, 561 F2d 434, 456 (CA 3, 1977). But to meet this requirement “‘the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.’” *Zine*, supra at 289, quoting *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989). Here, there is no dispute that proposed class members would present common legal and factual questions regarding the terms of the alleged breached contract, the effect of the fund’s amended bylaws, and the application of MCL 500.2016, as amended by 1998 PA 457. Nevertheless, to satisfy the commonality requirement, plaintiffs must “provide some basis for the trial court to conclude that all members of the class had a common injury that could be demonstrated with generalized proof, rather than evidence unique to each class member.” *A & M Supply*, supra at 600, citing *In re Cardizem CD Antitrust Litigation*, 200 FRD 326, 331 (ED Mich, 2001). It is on this basis that plaintiffs’ motion for class certification fails.

Even if plaintiffs’ allegations regarding prospective class members’ contract rights are correct, and assuming the legal issues surrounding the amendment of MCL 500.2016 are resolved in plaintiffs’ favor, each individual class member must establish that it is entitled to a surplus refund but for its withdrawal from the fund. But whether a class member is otherwise entitled to a surplus distribution is dependent on a number of facts unique to that particular class member. To state as plaintiffs do that the class consists of those former members of the fund during the applicable time period “who have since terminated coverage with ABC for any reason, who have been unlawfully denied [or had escrowed] surplus distributions to which they are lawfully entitled . . .” begs the question. Here, generalized proof cannot establish each class member suffered a common injury. Evidence unique to each individual class member is necessary to establish the purported injury. *A & M Supply*, supra at 600; *Zine*, supra at 300.

The commonality factor is closely tied to factor e, whether “the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.” MCR 3.501(A)(1)(e); *Zine*, supra at 289, n 14. This is because “if individual questions of fact predominate over common questions, the case will be unmanageable as a class action.” *Id.*, citing *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502, 504-505; 459 NW2d 1 (1989). Accordingly, we are not left with a definite and firm conviction that the trial court made a mistake in denying plaintiffs’ motion for class certification. *Neal*, supra at 15; *Zine*, supra at 290.

We affirm and remand to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter