IN THE SUPREME COURT OF THE STATE OF OREGON

MARILYN C. PEARSON and LAURA GRANDIN, individually and on behalf of all similarly situated persons,
Plaintiffs-Appellants,
Respondents on Review

v.

PHILIP MORRIS, INC., aka Philip Morris USA, Inc., a foreign corporation,
Defendant-Respondent,
Petitioner on Review,

and

PHILIP MORRIS COMPANIES, INC., aka Altria Group, Inc., a foreign corporation,
Defendant.

Court of Appeals
A137297

S061745

Amicus Brief of Oregon Trial Lawyers Association

En Banc Court of Appeals Decision, June 19, 2013
Decision on Reconsideration, August 23, 2013

Opinion by Armstrong, J., joined by Wollheim, Ortega, Sercombe, Nakamoto, and Egan, JJ.

Dissent by Duncan, J., joined by Haselton, CJ, and Schuman and Hadlock, JJ.

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I.

INTRODUCTION

This case gives this Court its first opportunity to interpret Oregon's class action rule as significantly revised in 1992. Amicus Oregon Trial Lawyers Association ("OTLA") will provide this Court with a structure for interpreting the current rule and applying it to this case.

Section II will summarize this Court's interpretation of Oregon's prior class action procedure. Section III will explain relevant changes made by the 1992 amendments to ORCP 32. Then section IV will explain the procedural division between the class trial and the claims form process in a case certified under current ORCP 32. Section V will apply the preceding analysis to provide a structure for this Court's resolution of this case.

II.

THE ORIGINAL CLASS ACTION PROCEDURE

What is now ORCP 32 was enacted by the 1973 Legislature in response to the holding of American Timber & Trading Co. v. First National Bank, 263 Or 1, 500 P2d 1204 (1972), "that class actions at law were not permissible under then existing statutory authority." Bernard v. First National Bank, 275 Or 145, 150, 550 P2d 1203 (1976), emphasis deleted. It was recodified as ORCP 32 after the establishment of the Oregon Rules of Civil

Procedure.

Bernard extensively considered the text and legislative history of the 1973 statute. The proposal originally submitted to the legislature "was an exact duplicate" of the federal class action rule. Bernard, 275 Or at 150. That rule permits a class action if the four requirements of FRCP 23(a) are satisfied and the case fits under at least one of the three categories set forth in FRCP 23(b). The third of these "is the most common category for money damages cases." Rubenstein, 2 Newberg on Class Actions, §4.1 at 7 (5th ed 2012). It requires finding that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that proceeding as "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FRCP 23(b)(3).

Bernard then recounted the opposition to the original proposal and certain compromises ultimately adopted. 275 Or at 151-152. The legislature generally accepted the FRCP 23(a) requirements and the specific categories set forth in FRCP 23(b). Former ORS 13.220, quoted in significant part in Bernard, 275 Or at 149-150. However, the legislature added the following sentence to FRCP 23(b)(3)'s requirements of predominance and superiority:

> "Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate

> adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages." Former ORS 13.220(2)(c), quoted in Bernard, 275 Or at 150.

This sentence was added "to prevent abuses perceived under Rule 23 which would put an unmanageable burden upon the court system." Bernard, 275 Or at 152. As a result, "the scope of the class action in Oregon was intended to be circumscribed to a greater extent than is the case under some federal courts' interpretation of Rule 23." Bernard, 275 Or at 152. Bernard and the other Oregon decisions cited in the Merits Brief of Petitioner Philip Morris USA Inc. ("Philip Morris Merits Brief"), 28-30, all interpret this now-superseded definition of predominance.

While Bernard focused on the former predominance requirement, this Court also noted another unique aspect of Oregon class action procedure, the claim form requirement then contained in ORS 13.260(2) and (3).[1] This procedure represented a "compromise" under which "the legislature accepted an 'opt-out' provision for purposes of inclusion in the class at the commencement of the action, but included the claim statement requirement to enable the court to exclude from recovery any member who failed to file such a statement affirmatively prior to the entry of judgment." Bernard, 275 Or at 168. This

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[1] Now ORCP 32 F(2) and (3).

Court understood the claim form was to be used "for the purpose of determining [individual] damages *after* a general determination of liability." Id., emphasis in original.

This Court elaborated on this last point in Benj. Franklin Federal Savings & Loan Ass'n v. Dooley, 287 Or 693, 601 P2d 1248 (1979). Dooley held that a court cannot "order the payment of damages prior to the filing of claim statements." Id., 287 Or at 698. This is because the claim form, whether prepared by a class member or from the defendant's records, is "not conclusive and the opposing party may contest" it. Id.

III.

THE 1992 AMENDMENTS

ORCP 32 B was amended in 1992 to "substitute a unitary structure of class actions for the tripartite classification scheme of the former section."[2] Council on Court Procedures, Staff Comment to ORCP 32 B, 1992, reprinted in Kloppenberg, Oregon Rules of Civil Procedure: 1994 Handbook, 88 (1993). Under the amended rule, a case which satisfies the requirements of ORCP 32 A can proceed as a class action if the trial court also finds "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." ORCP 32 B. There are eight "matters pertinent" to a finding of

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[2] The claim form requirement was not changed.

superiority. Id. The third of these is "[t]he extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members." ORCP 32 B(3).

Several aspects of the text of current ORCP 32 B demonstrate an intent to expand what this Court had described in Bernard, 275 Or at 152, as the narrowly "circumscribed * * * scope of the class action in Oregon." To begin with, predominance was demoted from an essential requirement for certification of most money damage classes to one of several relevant considerations. In Shea v. Chicago Pneumatic Tool Co., 164 Or App 198, 207, 990 P2d 912 (1999) (Landau, P.J.), rev. denied, 330 Or 252, 6 P3d 1099 (2000), the Court of Appeals correctly recognized that predominance is no longer "*require[d*] as a *sine qua non* of certification of any class," emphasis in original.

In addition, the second sentence of what began as ORS 13.220(2)(c) and became ORCP 32 B(3), quoted above at 2-3, was removed. The Council on Court Procedures explained it had "abandoned as unduly rigid" the "flat prohibition" on finding predominance "if any claims of individual class members are likely to require adjudication of any separate issues apart from ascertaining damages." Council on Court Procedures, Staff Comment to ORCP 32 B, 1992, reprinted in Kloppenberg, 88.[3]

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[3] This constitutes the "specific indication" required by Bernard, 275 Or at

Finally, the 1992 amendments modified ORCP 32 B's manageability factor. The 1973 legislature had directed courts to consider "[t]he difficulties likely to be encountered in the management of a class action, including the feasibility of giving adequate notice." Former ORS 13.220(2)(c)(D), quoted in Bernard, 275 Or at 150. The current rule requires assessment of "[t]he difficulties likely to be encountered in the management of a class action that will be eliminated or significantly reduced if the controversy is adjudicated by other available means." ORCP 32 B(7).

This shifts the inquiry from an absolute (how difficult will it be) to a relative concept (would some other means of resolution significantly reduce the difficulties). Consequently, it should no longer be possible to deny certification by predicting that few, if any, individual claims would be brought.

IV.

HOW A CASE PROCEEDS AFTER CERTIFICATION

A. Introduction

The claim form requirement potentially divides a case certified as a class action into two phases. The first phase is a trial (or summary judgment decision) which produces what Bernard, 275 Or at 168, called "a general determination of liability." If the defendant prevails, it is entitled to judgment

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159, in the passage quoted in Philip Morris Merits Brief, 48.

without further class proceedings.[4]

But if the defendant is found liable to the class, the extent of its liability depends on the claims form process. This is because ORCP 32 F(3) dictates that any class member who "fails to file" a claim form has his or her "claim for monetary recovery * * * dismissed without prejudice to the right to maintain an individual, but not a class, action for such claim."

B. The Class Trial

The function of the class trial is to resolve issues which are or are claimed to be common to the class.[5] Some issues are necessarily common, which is to say they necessarily will be answered the same way for each class member whether the resolution is favorable or unfavorable to the class.

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[4] The United States Supreme Court has held that an adverse class judgment is preclusive only on the common claims litigated in the class action and not on individual questions that could not have been joined in the class action. Cooper v. Federal Reserve Bank, 467 US 867, 880 (1984).

[5] In some class cases, common issues are resolved on summary judgment. E.g., Tolbert v. First National Bank, 312 Or 485, 495, 823 P2d 965 (1991). Also, the class trial or summary judgment hearing may decide issues common to groups within a class, whether or not these are formally designated subclasses pursuant to ORCP 32 G. E.g., Derenco, Inc. v. Benj. Franklin Federal Savings & Loan Ass'n, 281 Or 533, 550, 560, 568-569, 577 P2d 477 (1978) (upholding single class involving three different types of security instruments which resulted in different outcomes for different portions of the class); Alsea Veneer, Inc. v. State, 117 Or App 42, 54, 843 P2d 492 (1992), affirmed summarily, 318 Or 33, 41, 862 P2d 95 (1993) (potential differences in damage formulas for policyholders of three different types of workers' compensation policies "may be resolved with the creation of subclasses").

Derenco provides two examples. One involved the construction of a form of mortgage which stated "that the deposits [of tax and insurance reserves] will be 'non-interest bearing.'" Id., 281 Or at 560. This Court "ruled as a matter of law that defendant owes no responsibility to any borrowers under this form." Id., 281 Or at 569.

Another necessarily common issue was the defense that borrowers were bound by "the custom of loaning institutions making use of such deposits." 281 Or at 555. Its resolution would be the same for each class member whether such a custom existed or, as this Court found, id. at 554, the evidence negated its existence. See also Delgado v. Del Monte Fresh Produce, N.A., 260 Or App 480, 491, 317 P3d 419 (2014) ("Proof of an employer custom or practice necessarily requires class-wide common proof").

Other issues are potentially common to the class depending on how they are resolved by the trier of fact. An example is the fraud claim which this Court recently considered in Strawn v. Farmers Insurance Co., 350 Or 336, 258 P3d 1199 (2011). As this Court explained, the proof common to the class provided the basis from which the jury inferred classwide reliance on the defendants' fraudulent misrepresentations. Id., 350 Or at 358-362.

The fact that the Strawn class had been certified did "not foreclose issues over the adequacy of * * * proof of reliance." Id. at 356 n 13. If the

plaintiffs had not put on sufficient common evidence to permit an inference of classwide reliance, the trial court could have directed a verdict for the defendants. See id. at 362 ("the trial court properly denied Farmers's motion for directed verdict on that ground"). And in all events, a jury could have rendered a verdict for the defendants on that question. In either such case, the defendants would have prevailed on the class fraud claim.

C. The Claims Form Process

To the extent that individuals file claim forms, "both parties are free to contest the claims, [and] the court then determines the actual damages for each class member." Dooley, 287 Or at 698. A challenge could either be to the defendant's liability to a particular claimant or the calculation of that individual's damages.

In a case like Dooley, where the defendant had "the necessary information for calculation of damages for each class member," 287 Or at 696 n1, disputes likely will involve the amount of damages. This Court read the pre-1992 class procedure as demonstrating "the legislature's willingness to allow individual inquiry concerning the issue of damages." Hurt v. Midrex Division, 276 Or 925, 930, 556 P2d 1337 (1976). This is also true under federal procedure. See 2 Newberg on Class Actions, §4.54 at 208 ("the black letter rule is that individual damage calculations generally do not defeat a

finding that common issues predominate"). When the defendant cannot identify class members from its records, the claim form process is likely to involve both individual liability and damage questions.

The extent of the individual questions presented in a particular case is related to the number of claims filed. Resolution of a few hundred individual issues will require substantially fewer judicial resources than tens of thousand of such issues. See Hurt, 276 Or at 927, 930 (pronouncing class of about 600 with individualized damage questions "manageable"). It is self-evident that the claims rate will be lower when the names and addresses of individual class members are not known (as appears to be the case here) so that claims forms cannot be mailed to them. The long duration of the proposed class period here and the fact that the proposed class is not limited to Oregon residents may further reduce the claims rate. Under these circumstances, the likely claims rate and thus the extent of individual questions at the claims form stage is a question of fact requiring a trial court's consideration of evidence, not a question of law.[6]

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[6] When there are genuine issues of material fact with respect to a particular individual's claim, Philip Morris has the right to present those issues to a trier of fact. See Bernard, 275 Or at 169 ("there is no indication that the legislature intended to give [claim forms] conclusive effect and, thus, to deprive defendants of their substantial rights to cross-examine the claimants under oath"). See also Dooley, 287 Or at 698 ("both parties are free to contest the claims, [and] the court then determines the actual damages for each class

V.

IMPLICATIONS FOR THIS CASE

A. General Structure

The parties do not contest the Court of Appeals' analysis that, while it reviews a trial court's superiority determination for abuse of discretion, "[w]hen a discretionary decision involves weighing factors that, in turn, depend on legal conclusions, we review the underlying legal conclusions for legal error." Pearson v. Philip Morris, Inc. 257 Or App 106, 168, 306 P3d 665 (2013). Nor do the parties contest that, "[w]hen a trial court makes a discretionary determination based on a legal error," the normal consequence is a "remand for a new exercise of the trial court's discretion." Id. See Bernard, 275 Or at 153-154 (whether common questions predominate is a legal conclusion); Alsea Veneer, 117 Or App at 55, affirmed summarily, 318 Or at 41 ("in view of the fact that each of the considerations in ORCP 32A and B weigh in favor of certification we conclude that the court erred in not certifying the class").

The first step in addressing predominance is to identify the common questions. The Court of Appeals correctly interpreted the current

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member.") The existence of this procedure allays the concerns expressed in the Merits Brief of *Amicus Curiae* Maurice J. Holland in Support of Petitioner on Review, 7, 9-10.

version of ORCP 32 B in its holding that:

> "[W]hen determining whether a question is common or individual, a court is determining how the question should be litigated; it is not resolving the question itself. In other words, it is determining whether it is possible and appropriate for the parties to litigate the question through evidence common to the class." Pearson, 257 Or App at 156.

Under the original definition of predominance, trial courts had a larger predictive role, given the instruction to decide whether it was "likely that final determination of the action will require separate adjudications of the claims of numerous members of the class" except as to damages. Former ORS 13.220(2)(c) and former ORCP 32 B(3). Compare Bernard, 275 Or at 162 (reversing trial court class certification on the grounds "it appears probable that many claimants' knowledge will legitimately be in issue and that separate adjudications of the claims of numerous members of the class will be required to dispose of the question of defendants' liability") with Hurt, 276 Or at 930 (reversing trial court class decertification following Bernard on the grounds that "it is 'likely' that the defenses, although involving knowledge and the reasonableness of conduct, are common to all plaintiffs involved").

Now that the procedural requirement to assess the likely outcome has been removed, such an assessment at the class certification stage would

interfere with the right to a jury's determination of the merits.[7] The trial court plays a gatekeeper role, evaluating whether it is possible to try the case to a verdict for the class using common evidence. Of course, common evidence which is legally insufficient to permit a verdict for the class does not create a common question. See Strawn, 350 Or at 356, quoting Newman v. Tualatin Development Co., 287 Or 47, 54, 597 P2d 800 (1979) (evidence of individual reliance required when "the alleged express warranty is such a small part of the item purchased"). See also 2 Newberg on Class Actions, §4.49 at 196 (Under the federal class action rule, "[i]f the 'same evidence will suffice for each member to make a prima facie showing,' * * * then it is a common issue").

Once the common questions are identified, then this Court must decide whether they predominate over the individual issues. Since predominance is described the same way under the Oregon and federal rules (even though predominance plays a lesser role in an Oregon certification decision), it is appropriate to look to federal definitions of predominance. These are appropriately summarized in Pearson, 257 Or App at 167. See 2 Newberg on Class Actions, §4.53 at 204.

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[7] The 1992 amendments also removed what began as ORS 13.220(2)(c)(F), a "matter[ ] pertinent" to the findings of superiority and predominance, which read as follows: "After a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal." Quoted in Bernard, 275 Or at 150.

Should this Court agree that common questions predominate, it is surely appropriate to remand this case to the trial court to assess whether to certify "the entire case as a class action" or to certify "an issue class"[8] on the common issues. Pearson, 257 Or App at 168. Among other reasons, remand is warranted because ORCP 32 C(1) expressly gives the trial court the flexibility to "alter[ ] or amend[ ]" its certification ruling in light of subsequent proceedings in this case "before the decision on the merits."

B. Reliance Need Not Be Established

Plaintiffs can present this case to a jury in a manner which does not require proof of reliance. Whether the UTPA "requires reliance as an element of causation necessarily depends on the particular unlawful practice alleged." Sanders v. Francis, 277 Or 593, 598-599, 561 P2d 1003 (1977). The Court of Appeals misapplied this test.

Respondents' Brief on the Merits ("Respondents' Brief"), 8-10, summarizes the evidence from which a jury could find that Philip Morris perpetuated a massive consumer fraud by withholding facts that it internally acknowledged made its express statements an "illusion." Declaration of David

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[8] Philip Morris's argument against issue class certification contains an inherent contradiction. It first asserts the number of issues left for resolution in individual cases "would thus compound * * * a judicial nightmare." Philip Morris Merits Brief, 49. But then it contends "few (if any) would likely bring suit to take advantage" of the resolution of the common issues. Id., 50.

Sugerman in Support of Plaintiffs' Motion for Class Certification, Ex. 6, 2. See also Philip Morris Merits Brief, 6, citing Declaration of Peter English, ¶ 31 (before the beginning of the class period Philip Morris disclosed to the Federal Trade Commission the facts which it withheld from consumers).

Plaintiffs have represented to this Court that they are prepared to proceed solely on their non-disclosure allegations. Respondents' Brief, 15 n19. For the reasons argued above at 12-13, because there is common evidence to support this particular unlawful trade practice, this issue should be decided by the trier of fact, not removed from the case by a pretrial assessment that different "facts * * * apply to plaintiff's particular claim." Pearson, 257 Or App at 144.

Dated this 10th day of April, 2014.

Respectfully submitted,

LAW OFFICE OF PHIL GOLDSMITH

By: /s/ Phil Goldsmith
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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3462 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s/ Phil Goldsmith
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CERTIFICATE OF SERVICE AND FILING

I certify that on April 10, 2014, I filed the foregoing **AMICUS BRIEF** with the Appellate Court Administrator in .PDF, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

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