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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SEROZH SARKISYAN, Plaintiff and Appellant, v. NEWPORT INSURANCE COMPANY et al., Defendants and Respondents.	B266684 (Los Angeles County Super. Ct. No. BC417647)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen M. Moloney, Kevin C. Brazile, Rolf M. Treu, Judges. Affirmed.

Law Office of Neal J. Fialkow, Neal J. Fialkow, James S. Cahill, and Haik Hacopian for Plaintiff and Appellant.

Horvitz & Levy, David M. Axelrad, John F. Querio; Prata & Daley, Robert J. Prata, John F. Morning for Defendants and Respondents.

Plaintiff Serozh Sarkisyan (Sarkisyan), as proposed class representative, appeals the trial court's order denying his motion for class certification of claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200) brought against defendants Newport Insurance Company and CW Insurance Group, LLC (collectively, Newport).

In reaching its decision to deny the motion, the trial court determined, inter alia, that the proposed class was not sufficiently ascertainable and lacked a sufficient community of interest. We affirm.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Newport issued an insurance policy to Sarkisyan and another, providing homeowner's coverage for real property they owned in Granada Hills, California, for the policy year commencing July 2008. The policy provided payment for covered losses at replacement cost value (RCV) according to a specified "Loss Settlement" procedure which included a two-step process for payment of claims. Until completion of repairs to or replacement of the damaged portions of the property, Newport would "pay no

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[1] On an earlier appeal by Newport (pursuant to Code Civ. Proc., § 1294, subd. (a)), we affirmed the trial court's denial of Newport's motion to compel an appraisal. (Nov. 28, 2011, B230612 [nonpub. opn.].) There, we held appraisal proceedings were not appropriate as the dispute concerned the scope of coverage under the insurance policy which Newport had issued, thus, requiring an interpretation of the Insurance Code, a matter properly addressed by a court rather than an appraisal panel, under *Kirkwood v. California State Automobile Assn. Inter-Ins. Bureau* (2011) 193 Cal.App.4th 49, 58.

We did not then address whether the amounts stated in the letters sent to insureds were final or subject to revision pursuant to the terms of the insurance policy form at issue or pursuant to the terms of the letters sent to policyholders. We do so in this opinion.

more than the actual cash value [ACV] of the damage." Once actual repair or replacement was completed, Newport would "settle the loss" according to the RCV terms of the policy.

The policy form at issue contains an endorsement defining ACV as "the amount it would take to repair or replace the damaged property, at the time of the loss, with material of like kind and quality subject to a deduction for deterioration, depreciation or obsolescence and contractor's overhead and profit. [ACV] applies to the valuation of property whether that property has sustained partial or total loss."

Sarkisyan sustained a water-related loss at his insured property in February 2009, which he timely reported to Newport. Newport adjusted his claim and issued an ACV payment of $6,764.50 in March 2009. After Sarkisyan retained counsel, the property was reinspected, resulting in an increase in the ACV amount to $9,843.00. The estimate for General Contractor Overhead and Profit (GCOP) was $2,373.95. (No GCOP estimate had been stated for the March 2009 proposed payment.)

The June 2009 letter also explained that Sarkisyan would be able to seek reimbursement of the amount of GCOP withheld as follows: "In addition to the Replacement Cost Available figure noted above, appropriate Profit and Overhead totaling $2,373.95 charged by a general contractor will be allowed. To make a claim for the Profit and Overhead, please submit a copy of the signed Work Authorization." Sarkisyan does not dispute that he never made repairs to his property, did not retain a general contractor, and never sought reimbursement for the GCOP.

In July 2009, Sarkisyan filed the complaint in this litigation, alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the UCL. The complaint also alleged Newport

"improperly exclud[es] payment for general contractor overhead and profit from its payments to its insured's claims" [*sic*] and that this conduct "constitutes a breach of . . . [Newport's] obligation under the policies to pay its insureds general contractor overhead and profit on an actual cash value basis."

The complaint contains class action allegations, and seeks compensatory and punitive damages, disgorgement, restitution, attorney fees and costs.

Newport's answer contains a general denial of all allegations of the complaint and asserts several affirmative defenses, including that the claims alleged in the complaint are barred by the terms of the policy.

Newport's 2010 motion to compel an appraisal of Sarkisyan's insurance policy was denied in the trial court. (That ruling was confirmed by this court on appeal as noted in fn. 1, *ante*.)

The parties have engaged in extensive discovery, through which approximately 1,000 potentially affected policyholders have been identified.

In July 2015, Sarkisyan moved to certify a class consisting of: (a) all of those insureds of Newport in California who, during the period July 10, 2005, to the present, suffered losses to their real properties and filed claims under valid homeowner's insurance policies; and (b) whose loss was investigated by Newport or its agents and an allowance was made for GCOP; and (c) the ACV payment made to the insureds did not include all or part of the GCOP allowance (which was withheld); and (d) whose claim was not later paid on a RCV basis.[2] The motion was supported with evidence which Sarkisyan contended demonstrated his theory of recovery, as well as the existence of an

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[2] The proposed class differs from that alleged in the complaint, a difference that may be attributable to matters learned in discovery, but is not explained by the parties.

ascertainable and sufficiently numerous class, a well-defined community of interest, and the prospect of obtaining substantial benefits from certification which would render proceeding as a class superior to the alternatives of multiple individual actions.

The evidence offered in support of the motion included data regarding Sarkisyan's own circumstances, letters sent to other potential class members, the text of which was based on a standard form claim payment letter, and deposition testimony of Newport employees. Sarkisyan's method of constructing the proposed class was designed not to exclude the claims handling/claim adjustment process or to question the calculation of the GCOP allowance to any class member. Sarkisyan constructed the potential class membership to focus on the GCOP allowance which Newport "promised" in writing but "withheld and [was] never paid based on Newport's dependence on the ACV endorsement." Sarkisyan designated as common issues which predominate, (a) whether Newport's withholding practice is permissible under California insurance law; (b) whether it is permissible for Newport to restrict the definition of ACV as it has; and (c) whether Newport's withholding practice breaches its insurance contract with class members, constitutes bad faith insurance practice and is unlawful or unfair under the UCL.

In its opposition to the motion to certify the class, Newport argued the class was not ascertainable, individual issues of the class members' claims would predominate, Sarkisyan's claims were not typical of the putative class, and class adjudication was not appropriate; instead trial as a class would be unmanageable. To focus the issues, Newport argued that individual issues "permeated" the proposed class, including these three: (1) the need of each class member for general contractor services must be determined on the facts

and circumstances of the individual claim of that person; (2) determination would need to be made whether each class member had been underpaid for its losses; and (3) applicable policy defenses would also need to be determined for each potential class member.

After hearing oral argument and taking the matter under submission, the trial court denied the motion for several reasons. First, it determined that the proposed class was not ascertainable because it included insureds who may not have suffered any injury from having GCOP withheld. Second, the court found that individual issues would predominate. In reaching this conclusion, the court noted that our earlier decision in this case had concerned only "whether the GCOP withholding was . . . [or] was not within the scope of an appraisal." Third, the court found that Sarkisyan had not established typicality or commonality among potential class members because he had failed to submit any evidence or explain how the mere withholding of GCOP resulted in damages typical for the proposed class. Further, the court found that proceeding as a class would not be superior to other methods of adjudication because Sarkisyan had not established how the claims of individual members of the class were of insufficient size to warrant individual action, or why individual potential class members were unable to pursue their claims of any withheld GCOP through the claims adjustment process with Newport or in individual litigation against Newport. The court also found that the individualized issues it identified would render the proposed class unmanageable. The parties stipulated to a stay of further proceedings and Sarkisyan filed this timely appeal.

CONTENTIONS

Sarkisyan contends that the trial court abused its discretion in its determinations, (1) that the proposed class was not ascertainable and

appropriately numerous; (2) in concluding that common questions of law and fact do not predominate and that his claims are not typical of the class; and (3) that class certification is not the superior means to resolve this litigation.

DISCUSSION

Denial of a motion to certify a class is an appealable order. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469.) In reviewing the trial court's denial of the motion to certify the class in this case, we first set out the principles we apply as recently articulated in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*):

"Originally creatures of equity, class actions have been statutorily embraced by the Legislature whenever 'the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .' (Code Civ. Proc., § 382; see *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1078 [(*Fireside Bank*)]; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458.) Drawing on the language of Code of Civil Procedure section 382 and federal precedent, we have articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. (Code Civ. Proc., § 382; *Fireside Bank,* at p. 1089; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *City of San Jose,* at p. 459.) 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately

represent the class.'" (*Fireside Bank,* at p. 1089, quoting *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

[¶] . . .

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]' (*Fireside Bank v. Superior Court, supra,* 40 Cal.4th at p. 1089; see also *Hamwi v. Citinational–Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 472 ['So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld.'].) Predominance is a factual question; accordingly, the trial court's finding that common issues predominate generally is reviewed for substantial evidence. (*Sav–On Drug Stores, Inc. v. Superior Court* [2004] 34 Cal.4th [319] at pp. 328–329.) We must '[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record . . . .' (*Id.* at p. 329.)'" (*Brinker*, *supra*, 53 Cal.4th at pp. 1021–1022.)

The certification question is "'"essentially a procedural one that does not ask whether an action is legally or factually meritorious."'" (*Brinker*, *supra*, 53 Cal.4th at p. 1023.) We turn now to apply these principles to the present case.

A. *Whether the proposed class is ascertainable*

The trial court determined that the proposed class was not ascertainable because it included insureds who may not have suffered any injury. In explaining its ruling the trial court reasoned that the proposed class "includes insured who may not have suffered injury from the GCOP withholding" and determining this "would require a case-by-case analysis of each insured's loss, GCOP, and ACV payment . . . ." Also, the court stated that "there is no description that captures insureds who had damages caused by the withdrawn GCOP."[3]

On appeal Sarkisyan argues the trial court applied an erroneous legal standard when the court "confused issues of ascertainability with the merits of the underlying claims by stating that a 'case-by-case analysis of each insured's loss, GCOP and ACV payment' is required." Sarkisyan errs. In *Brinker,* our Supreme Court held that such an inquiry is required when questions addressing the merits overlap with class certification requirements. (*Brinker, supra*, 53 Cal.4th at p. 1025.) In this case this type of inquiry is needed for evaluation of ascertainability because it is the appropriate method to determine whether Sarkisyan's class definition meets the requirements for certification.

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[3] In reaching these conclusions, the trial court relied in part on facts describing the claims adjustment process set out in the declaration of Newport's expert witness, Anthony Cannon, which opinions the trial court had admitted over Sarkisyan's objection.

Sarkisyan mentions what he considers to be defects in the Cannon declaration in his opening appellate brief, but does so only in a footnote (fn. 3), does not seek appellate review of that ruling, and mistakenly asserts "[t]here was nothing in [Cannon's] Declaration that refuted any aspect of Plaintiff's Motion. Vol. III 0603-0606." We disagree with this last claim for reason discussed in the body of this opinion, *post*.

Among the cases upon which Sarkisyan relies to support his contention are *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325 (*Lee*) and *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524 (*Ghazaryan*). Neither supports his claim. Each did present issues regarding certification of a class in wage and hour litigation in which the defendants contended the class definitions were over-inclusive. However, in response to these claims, the plaintiffs identified ways to narrow the definitions of the proposed classes to only those with a right to recover. (*Lee, supra*, at pp. 1334–1336; *Ghazaryan, supra*, at pp. 1532–1533.) The Court of Appeal noted in each of those cases that class certification is not to be denied when the class definition is only slightly over-inclusive. (*Lee*, *supra*, at pp. 1334–1335; *Ghazaryan, supra*, at p. 1533, fn. 8.)

In the present case, however, Sarkisyan has not offered a way to redefine the class to include only those insureds who have claims which should be included. Although Sarkisyan argues he has done that, his analysis fails to understand the terms of the insurance policy which is the foundation for his argument as to the proper definition for the proposed class. The insurance policy common to the potential members of the class in this case reserves to Newport the right to "settle the loss" according to specified policy terms. It is not sufficient to define class membership according to presence on a list of persons to whom Newport has sent letters stating the ACV for the claims of such persons. This is so because each letter contains a reservation of rights according to the terms of the policy under which the loss analysis upon which Sarkisyan relies is to be made, and the policy contains provisions requiring analysis of the individual circumstances of each claim to determine the correct amount to be paid. Thus, in addition to policy terms requiring the individual settlement of each loss, the letters to potential class

members contain the following language: "Newport . . . reserves the right to inspect the property or require additional information prior to the release of any additional funds," or, in the case of one form of the letter, the following reservation of rights: "This letter does not waive any of our rights or defenses under the policy at issues or otherwise, which we may have now or in the future." These provisions confirm the necessity of a "case-by-case analysis of each insured's loss" as the trial court concluded. These "rights and defenses" include the right to invoke the settlement process to determine if Newport overpaid, or underpaid, for repairs in each case, in addition to determining whether payment of GCOP is appropriate. Such conditions render ascertainability illusory.

The trial court also reasoned that "[t]he proposed class definition does not permit persons to identify themselves as having a right to recover based on the GCOP claim [citation] because there is no description that captures insureds who had damages caused by the withdrawn GCOP." This follows from the provision of the insurance policy requiring that settlement of each particular claim be resolved in conjunction with the making of the repairs. Thus, the policy specifies that GCOP is not to be paid unless and until a contractor is retained to perform the covered repairs and, then only after the policyholder submits a work completion certificate to Newport, which then will be used to determine the propriety of payment of the GCOP amount in the process of settling the loss.

As the trial judge noted in his order denying class certification, the proposed class definition does not permit persons to identify themselves as having the right to recover. The trial court's citation *of Sevidal v. Target Corp*. (2010) 189 Cal.App.4th 905, in support of its conclusion was particularly apt as the *Sevidal* court makes clear the limitation of lists to

define the class that, on closer inspection, are determined to be over-inclusive. (*Id.* at pp. 919–921.) That is the situation in the present case, as the trial court determined.

Sarkisyan also errs in claiming that the trial court impermissibly relied on the testimony contained in the Cannon declaration, submitted by Newport. (See fn. 3, *ante*.) As Newport argues, Cannon does have expertise in claims handling procedures, experience which provides substantial evidence supporting the trial court's ruling. In addition to the court citing the testimony in that declaration as "explaining the claims adjustment process," the court relied on two additional sets of factors, (1) the reasoning in *Sevidal v. Target Corp., supra*, 189 Cal.App.4th at page 920, and (2) the facts contained in other declarations.[4] It was the totality of this material that lead the trial court to its conclusion that "the proposed class definition is not precise and not presently ascertainable."

A trial court does not abuse its discretion when, in considering the evidence presented to it (as well as the allegations of the complaint), it credits one party's evidence as indicating that highly individualized inquiries would dominate resolution of the key issues in the case. Indeed, all of such material provides evidence necessary for the trial court's analysis. (See, *Dailey v. Sears, Roebuck and Co*. (2013) 214 Cal.App.4th 974, 991 [trial court properly evaluates parties' conflicting evidence when evaluating class certification issues].) We find no "manifest abuse of discretion" in the reference to Mr. Cannon's declaration.

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[4] The other declarations were those of Neil Hacopian, who identified insureds who had GCOP withheld and were paid on an ACV basis, and of John Morning, who identified over 2,300 insureds who had been paid on an ACV basis. Sarkisyan makes no objection to the contents of these two declarations.

Further, Sarkisyan's argument that the trial court should have narrowed the class definition to "solve perceived ascertainability concerns" is without merit. Newport correctly addresses the problem with the following argument: "While [Sarkisyan] offered the trial court the options of narrowing the class definition to those Newport insureds to whom a check was sent or of only conditionally certifying a class, nowhere does he explain how these alternatives would cure the overbreadth problems that Newport and the trial court identified. Even limited to Newport insureds to whom checks were sent, the class definition still would not distinguish those class members who might have a right to recover from those who do not."

B. *Whether common issues would predominate*

"'[T]he "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Fireside Bank, supra*, 40 Cal.4th at p. 1089, quoting *Richmond v. Dart Industries, Inc.*[, *supra*,] 29 Cal.3d [at p.] 470.)" (*Brinker, supra*, 53 Cal.4th at p. 1021.)

Sarkisyan argues we should focus on what he describes as the "'ultimate question,'" whether the issues which may be tried jointly, when compared with those requiring separate adjudication, are so numerous or substantial that maintenance of a class action would be advantageous to the judicial process and the litigants, citing *Williams v. Superior Court* (2013) 221 Cal.App.4th 1353, 1370. Next, he argues the trial court misapplied this criterion, claiming the trial court "wrongly reshaped" his theory of recovery. Sarkisyan errs.

In addressing the community of interest prong of its analysis, the trial court began by focusing on the closely related criteria of commonality and

typicality, analyzing "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs and whether other class members have been injured by the same course of conduct, citing *Seastorm v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502, among other cases.

The trial court correctly described the crux of Sarkisyan's action as the withholding of GCOP from claims paid on an ACV basis which caused damage to the insureds. In the language of the trial court ". . . this ignores the same or similar injury factor of commonality and typicality. Even assuming improper and illegal claims practices by [Newport], each putative class member could recover for breach of contract, bad faith, and unfair business practices only by proving that the withdrawal of the GCOP in his or her individual ACV payment resulted in their loss being insufficiently compensated; this involves an individual assessment of each individual's property and damage and the actual claims practices employed . . . ." As discussed in section A, *ante*, this analysis by the trial court is correct. As Newport points out, citing *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, "'There can be no cognizable class unless it is first determined that members who make up the class have sustained the same or similar damage.'" (*Id.* at p. 664.) Those circumstances are not present in this case. The damages here vary in type and extent; the single common element is that Newport issued a policy of insurance.

Newport also points out in its counter to Sarkisyan's argument in this regard individual facts that each putative class member would need to establish, viz., that Newport, as to each potential class member, had breached by failing to pay policy benefits, that GCOP was owed because the services of a general contractor were required to repair the property

damaged, and that each class member was harmed because the actual cost of repair was more than the amount paid by Newport. From this litany of individual factors, Newport argues: "Because of the myriad unique factors . . . Newport's repair estimates frequently overestimate the actual cost to repair the insured's property, such that the amount of GCOP withheld from Newport's ACV payment does not result in any underpayment to the insured. Similarly, in many cases, a general contractor is not actually required to conduct repairs to the damaged property, such that reimbursement for GCOP is unnecessary. In such situations, Newport does not breach its insurance policy . . . ."

Sarkisyan seeks to distinguish the present case from the circumstances presented in *Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094 (*Newell*), a case cited by the trial court. In *Newell*, the Court of Appeal upheld the trial court's sustaining of a demurrer without leave to amend of a complaint seeking, inter alia, to certify a class of homeowners claiming improper claims handling procedures in connection with losses the homeowners had sustained in the 1994 Northridge earthquake. As Newport argues, *Newell* held that when a plaintiff insured seeks to litigate breach of contract, bad faith and UCL claims on behalf of others, he or she cannot show predominance by pointing to one or a few purportedly uniform claims adjustment practices that the insurer employed because that does not prove breach, causation or injury on a class wide basis, and individualized inquiries as to each of those liability elements are still required. (*Newell, supra*, pp. 1103–1104.) Newport's reliance on *Newell* is well-founded.

Another element of analysis of this prong of the requirement for class certification is a showing that the claims of the proposed representative are typical of the class. (*Thompson v. Automobile Club of Southern California*

(2013) 217 Cal.App.4th 719, 732–733; *Caro v. Proctor & Gamble Co.*, *supra*, 18 Cal.App.4th at pp. 663–665.) The trial court determined that "Plaintiff fails to submit any evidence . . . or explain how the mere withholding of GCOP results in typical damages for the proposed class." Newport argues this finding means the trial court held that Sarkisyan's claims are not typical and are insufficiently representative of the class to qualify him to represent it. In further support of this contention, Newport points to the "relatively minor water [damage] loss" which Sarkisyan sustained, arguing it lacked typicality which "claims other class members may have for, as an example, large fire losses or other major damage." Newport also argues, "[t]o the extent class members have previously litigated or compromised their claims with Newport, submitted claims outside of and [which are] therefore barred by the policy's one-year limitations period, or fraudulently misrepresented the existence or extent of their property damage in submitting claims, Sarkisyan's claims are likewise not typical of those class members' claims."

While Sarkisyan accepts this characterization of the trial court's ruling, we do not. The trial court's determination on typicality more likely refers to the question of typicality among class members rather than to whether Sarkisyan's individual claim is not typical. Given that the trial court determined that Sarkisyan would adequately represent the class (and as Newport has not filed a cross-appeal), we do not interpret the language first quoted above as does Newport. For this reason, we do not otherwise address Newport's interpretation.

C. *Whether class certification is the superior means to resolve the litigation*

Sarkisyan contends the trial court erred in finding that class certification is not the superior means of resolving this litigation because it

did not consider whether individual issues can be managed fairly and efficiently.

In making this argument, Sarkisyan implicitly acknowledges that he has the burden to establish the superiority of class adjudication. (See *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 156.)

The trial court correctly stated the four factors to be considered in deciding if class adjudication is superior to individual litigation, relying on *Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 121, which quoted from a noted publication, as follows:

"'[(1)] The interest of each member in controlling his or her own case personally; [¶] [(2)] The difficulties, if any, that are likely to be encountered in managing a class action; [¶] [(3)] The nature and extent of any litigation by individual class members already in progress involving the same controversy; [and] [¶] [(4)] The desirability of consolidating all claims in a single action before a single court.' (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) ¶ 14:16, p. 14-6; accord, *Schneider v. Vennard* (1986) 183 Cal.App.3d 1340, 1347.)"

Applying these factors, the trial court reasoned that Sarkisyan had not explained how the withholding of GCOP on insureds' claims paid only on an ACV basis were either of insufficient size to warrant individual action or encourage the alleged wrongful practice. The trial court noted that Sarkisyan provided no explanation of why the insureds had not themselves pursued their claims. The court concluded that class treatment is not superior to individual litigation because of the individualized inquiries required.

Sarkisyan argues, inter alia, that the trial court was "fixated on the existence of individual issues to the exclusion of manageability of the predominate issue" and that, in so focusing its concern, the trial court "abandoned its '"obligation to consider the use of . . . innovative procedural tools proposed by a party to certify a manageable class." [Citation omitted.]' *Sav–On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 339."

To the contrary, it appears the trial court was legitimately concerned about the numerosity of individual issues and considered that circumstance in evaluating whether the *"'innovative procedural tools*"' (*Sav–On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 339, italics added) alluded to on appeal (and argued in the trial court) might be effective if other requirements for granting class certification had been met. We see nothing in the record from which we may conclude that the trial court abused its discretion in concluding that such innovative procedures would not be appropriate in this case. Moreover, as Sarkisyan had not otherwise established that the trial court erred in its analysis of the other factors required to be present to warrant reversal of the trial court's determination, a determination on this factor contrary to that made in the trial court would not lead to reversal of what appears on this record to be a sound determination.

DISPOSITION

The decision of the trial court is affirmed.

Newport shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.*
GOODMAN

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
HOFFSTADT

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.