Filed 1/9/18 Reynante v. Toyota Motor Sales CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GREG REYNANTE et al., Plaintiffs and Appellants, v. TOYOTA MOTOR SALES USA, INC. et al., Defendants and Respondents.	B275937 (Los Angeles County Super. Ct. No. BC426627)

APPEAL from an order of the Superior Court of Los Angeles County, Kenneth R. Freeman, Judge. Affirmed.

Capstone Law, Glenn A. Danas, Jordan L. Lurie, Robert K. Friedl and Katherine W. Kehr for Plaintiffs and Appellants.

Sidley Austin, Michael L. Mallow, David R. Carpenter and Darlene M. Cho for Defendants and Respondents.

I. INTRODUCTION

Plaintiffs Greg Reynante, Julie Reynolds, and Paul Garber appeal from the denial of their motion for class certification. Plaintiffs alleged defendants Toyota Motor Sales USA, Inc., and Toyota Motor North America, Inc. (collectively "Toyota") violated the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.) and the Consumers Legal Remedies Act (CLRA; Civ. Code, § 1750 et seq.) by providing an online fuel calculator that performed a misleading comparison between Environmental Protection Agency (EPA) fuel economy estimates and a consumer's estimate of his or her current vehicle's actual fuel economy.

The trial court denied class certification because individual questions of law or fact predominated over common questions, as well as because the class was not ascertainable and a class action was not superior to individual adjudication. We affirm.

II. BACKGROUND

A. Facts and Allegations

The operative second amended complaint alleges that plaintiffs are members of a putative class of California residents who, after March 12, 2004, purchased or leased a new 2004, 2005, 2006, or 2007 model year Toyota Prius. Plaintiffs challenge certification of only a putative subclass composed of all class members who "accessed Toyota's fuel calculator before they purchased or leased" a new Prius of those model years.

The fuel calculator was located on Toyota's Web site and is alleged to be part of Toyota's misleading advertising. To determine the fuel savings, prospective customers were directed to input their commuting distance in miles, price paid for gasoline, and the fuel economy of their current vehicle. Upon clicking the "Calculate" button, consumers were allegedly shown hundreds to thousands of dollars in annual savings on gasoline by purchasing a Prius. The fuel calculator was allegedly misleading because it compared the EPA fuel economy estimate to a consumer's estimate of his or her current vehicle's actual fuel economy, a comparison with "no common basis." The calculator also allegedly was misleading because the discrepancy between EPA estimates and actual fuel economy was greater for hybrids than it was for conventional vehicles.

Before plaintiff Reynante purchased his 2005 Prius, he accessed the fuel calculator and used it to compare the Prius to the Toyota Matrix, which cost about $10,000 less. Reynante declared he relied on the fuel calculator, and based on the purported fuel savings, purchased the Prius over the Matrix.

Before plaintiff Reynolds purchased her 2004 Toyota Prius, she used the fuel calculator two-to-three times. Using the calculator, Reynolds compared the Prius to the Land Cruiser she was then using. Reynolds got the impression from the calculator that she would get 55-60 miles per gallon with the Prius and bought it based on that expected mileage. However, she got only 35 to 40 miles per gallon.

Before plaintiff Garber purchased his 2006 Toyota Prius, he used the fuel calculator to compare the Prius to the Highlander he was using. Relying on the calculator, he purchased the Prius

and traded in the Highlander. He got only 37 to 43 miles per gallon.

Plaintiffs alleged the fuel calculator's misleading fuel estimates were unlawful, unfair, or fraudulent under the UCL.[1] Namely, plaintiffs alleged defendants misled consumers as to the fuel efficiency of the Prius under "normal driving conditions." Under the CLRA, plaintiffs alleged defendants: represented the Prius as having characteristics it does not have in violation of Civil Code section 1770, subdivision (a)(5); represented the Prius to be of a particular standard, quality or grade, when it was of another, in violation of Civil Code section 1770, subdivision (a)(7); and advertised the Prius with the intent of not selling a Prius as advertised in violation of Civil Code section 1770, subdivision (a)(9).[2]

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[1] For the UCL, Business and Professions Code section 17203 provides in pertinent part: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

[2] Under the CLRA, any consumer who suffers any damage as a result of any unlawful method, act, or practice under Civil Code section 1770 may bring an action to recover or obtain actual and punitive damages, injunctive relief, and restitution. (Civ. Code, § 1780, subd. (a).)

B. *Motion for Class Certification*

Plaintiffs moved for class certification of both the class and subclass. Plaintiffs asserted common questions predominate because for the subclass, putative members accessed the fuel calculator and were likely to be deceived by it in violation of the UCL and CLRA. Specifically, plaintiffs argued as to the UCL that defendants engaged in fraudulent business acts or practices by engaging in conduct by which members of the public are likely to be deceived. A deceptive business practice under the UCL also violates the CLRA. If the trier of fact determined the fuel calculator was likely to deceive a reasonable customer, plaintiffs argued, liability to the subclass could be determined class-wide. Plaintiffs contended that there would not be individual issues for calculating restitution or damages. Restitution under the UCL would be calculated by comparing the price subclass members paid for Priuses that were represented to achieve 55 miles per gallon with the value of those vehicles based on their actual fuel economy as determined by expert testimony. For damages under the CLRA, actual damages would be the reduced fuel economy of the subclass members' vehicles. As to the ascertainability of the class, plaintiffs argued a subclass member need only identify himself or herself as having viewed the fuel calculator prior to purchasing the Prius from the relevant model year. As to the superiority of a class action to individual lawsuits, plaintiffs contended that class members have no incentive to pursue individual claims, there is no other litigation involving the same

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The trial court struck a fraudulent concealment claim as being not amenable to a class action.

controversy known to plaintiffs, and consolidation of all claims in a single action is desirable.

On May 2, 2016, the trial court denied class certification for both the class and subclass. The trial court found, and it is not disputed, that subclass representatives and subclass counsel were adequate, subclass representatives' claims were typical, and the subclass was sufficiently numerous. However, the trial court determined individual issues predominated over common ones, the subclass was not ascertainable, and class action was not superior.

III. DISCUSSION

A. *Class Certification Principles*

Code of Civil Procedure section 382 authorizes class actions when "the question 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." Section 382 applies to class actions under the UCL. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 312-313.) "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." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) "The community of interest requirement involves three factors: '(1) predominant 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.' [Citation.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

For a class action pursuant to the CLRA, "[t]he court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist: [¶] (1) It is impracticable to bring all members of the class before the court. [¶] (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members. [¶] (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. [¶] (4) The representative plaintiffs will fairly and adequately protect the interests of the class." (Civ. Code, § 1781, subd. (b).)[3]

The denial of class certification to an entire class is an appealable order. (*Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at p. 435.) We review a ruling on class certification for abuse of discretion. (*Brinker, supra*, 53 Cal.4th at pp. 1017, 1022; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) A trial court ruling supported by substantial evidence will not be disturbed unless improper criteria were used or erroneous legal assumptions were made. (*Sav-On, supra*, 34 Cal.4th at pp. 326-327.) "An appeal from an order denying class certification presents an exception to customary appellate practice by which we review only the trial court's ruling, not its

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[3] If all requirements are met, the trial court must certify a CLRA class. (*Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 135-136.) Unlike standard class actions, there is no requirement under the CLRA that putative class members demonstrate the superiority of proceeding as a class action. (*Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 728 (*Thompson*).)

rationale. If the trial court failed to conduct the correct legal analysis in deciding not to certify a class action, "'an appellate court is required to reverse an order denying class certification . . . , 'even though there may be substantial evidence to support the court's order.'" [Citation.] In short, we must "'consider only the reasons cited by the trial court for the denial, and ignore other reasons that might support denial." [Citation.]' [Citations.]" (*Alberts v. Aurora Behavioral Health Care* (2015) 241 Cal.App.4th 388, 399; accord, *Lubin v. The Wackenhut Corp.* (2016) 5 Cal.App.5th 926, 935.)

In this appeal, the parties dispute whether there are common questions of law or fact that predominate, the subclass's ascertainability, and the superiority of class action to other methods of adjudication. We examine whether common questions of law or fact predominate over individual questions.

B. *Predominance of Common Questions of Law and Fact*

"The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable

and feasible. 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' [Citations.]" (*Brinker, supra*, 53 Cal.4th at pp. 1021-1022, fn. omitted.) "Predominance is a factual question; accordingly, the trial court's finding that common issues predominate generally is reviewed for substantial evidence. [Citation.]" (*Id.* at p. 1022; *Thompson, supra*, 217 Cal.App.4th at p. 731.)

Here, the trial court found individual claims predominate, in part due to a disclaimer on the fuel calculator itself: "The truth or falsity of the alleged misrepresentations would . . . present an individualized inquiry into each class member's claim. Defendant has introduced evidence that the Fuel Calculator on the Toyota [W]eb[]site provided that 'Keep in mind, results are based on estimates' and that 'ideal fuel economy is dependent on many factors including driving style, road conditions, air conditioning control levels, payload weight and proper tire pressure.' These determinations would be a prerequisite to any finding of liability (i.e., the Court would have to individually assess these factors affecting fuel economy among the class to determine, in the first instance, whether the . . . fuel economy calculator [was] misleading)." (fn. omitted.)

We are persuaded that substantial evidence supports the trial court's determination. Our view is based foremost on our conclusion that, on the particular facts here, there is reason to conclude that each class member's "right to recover depends on facts peculiar to his case." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459; *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 30 ["As we observed in *City of San Jose v.*

Superior Court, supra, 12 Cal.3d at page 463: 'Only in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only damages but also liability'"].) Although it is a general, but not absolute, rule that a class cannot be maintained where liability turns on the facts of individual cases (see *Sav-On, supra*, 34 Cal.4th at p. 339), the problems of proof here appear sufficiently pervasive and substantial as to support the trial court's denial of class certification based on the predominance of those questions.

The subclass at issue here is those purchasers or leasers that "accessed" Toyota's fuel calculator before their purchase. It is a significant step from a plaintiff simply having used the fuel calculator to proving recovery under the UCL or CLRA. With respect to the CLRA claims, actual reliance must be established on a classwide basis for an award of damages, which may be demonstrated by material misrepresentations to the class. (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 221-222 (*Tucker*).) A representation is considered material if it induced the consumer to alter his position to his detriment. (*In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 129.) "[I]f the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is properly not certified as a class action. [Citation.]" (*In re Vioxx Class Cases, supra*, at p. 129.)

Here, defendants presented evidence that the materiality of, or reliance upon, the fuel calculator's calculation would vary from consumer to consumer. The fuel calculator had a disclaimer on its face: "Keep in mind, results are based on estimates [link to pop-up message] and that ideal fuel economy is dependent on

many factors including driving style, road conditions, air conditioning control levels, payload weight and proper tire pressure." The message that popped up added that the calculator's estimate was based on an EPA-estimated 55 miles per gallon.

Whether a consumer was actually misled by the fuel calculator prior to purchasing a Prius necessarily would vary by customer. On the record we have, this concern is sufficiently substantial that it supports the trial court's conclusion that individual issues predominate. Some customers, for example, could have viewed the fuel calculator and have been adequately informed—whether by their experience with vehicle EPA estimates or by the disclaimer—that their actual fuel efficiency would vary based on driving conditions. (See *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 668 [denying class certification where defendant advertised juice as "fresh," "no additives," and "premium" on the label because whether material misrepresentation induced purchase of juice would vary from consumer to consumer; plaintiff himself did not believe it was fresh, and the label also stated juice was "from concentrate"].) It is entirely plausible that some consumers actually used the fuel calculator but were not misled by its particular dollar amounts, aware that the amounts were based on EPA estimates or that their mileage would vary with their real-world driving.

There is evidence that plaintiffs themselves had sufficient knowledge of the Prius's fuel efficiency to avoid being deceived by the fuel estimates. Reynante saw reviews of the Prius online. Reynolds had access to Consumer Reports. Garber performed online research that included using Consumer Reports. Reynolds

also could not remember what the fuel calculator showed as the expected miles per gallon.

Plaintiffs contend that individualized proof is not necessary for a claim under the UCL, citing *In re Tobacco II Cases, supra*, 46 Cal.4th at page 320. While that is a correct citation of law, it does not address the matter of whether there are common questions classwide for purposes of class certification. "A class action for a fraudulent business practice under the UCL still requires that a defendant have 'engaged in uniform conduct likely to mislead the entire class.' [Citations.]" (*Tucker, supra*, 208 Cal.App.4th at pp. 227-228.) Here, there is enough of a gap between a customer merely accessing the fuel calculator to the customer being misled by it that it is reasonable to deny class certification on the ground that many who accessed the calculator may not have been misled by the information it provided, for example if they understood the calculation as a rough estimate.

Furthermore, even if a customer was misled by the fuel calculator, this does not necessarily mean that the calculation caused the customer to purchase the vehicle. (*Kendall v. Scripps Health* (2017) 16 Cal.App.5th 553, 573 [substantial basis for denial of class certification based on lack of predominant common issues on whether "actual injury occurred" in allegedly unfair hospital billing and collection practices, where not every bill would "go to the collections stage, or that harassment or improper practices may occur"].) Reynante, for example, accessed the fuel calculator six months before his purchase, and he subsequently test-drove the Prius. Individual inquiry would be necessary to determine whether it was the fuel calculator that induced his purchase.

"'Class actions will not be permitted . . . where there are diverse factual issues to be resolved, even though there may be many common questions of law.' [Citation.] '[A] class action cannot be maintained where each member's right to recover depends on facts peculiar to his case . . . .' [Citation.]" (*Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 118.) Because the representative plaintiffs have individualized factual issues as to liability, it was not unreasonable for the trial court to conclude the subclass would have similarly diverse questions of fact and to find that individual factual questions will predominate for the subclass. The trial court did not abuse its discretion by denying the class certification.

We do not find the trial court applied an improper criterion in addressing the class certification issue as to predominance. (*Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at pp. 435-436.) "Any valid pertinent reason stated will be sufficient to uphold the order." (*Caro v. Procter & Gamble Co., supra*, 18 Cal.App.4th at p. 656.) Accordingly, we decline to reverse the order, and we need not discuss the parties' arguments concerning ascertainability and superiority.

IV. DISPOSITION

The order denying class certification is affirmed. Defendants are to recover their costs on appeal.

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RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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