

WASHINGTON SUPREME COURT

Pickett v. Holland America Line-Westours, Inc.

145 Wash. 2d 178 (2001) · Decided November 29, 2001

SUMMARY

The Washington Supreme Court reviewed approval of a class-action settlement involving Holland America’s collection and representation of cruise “port charges and taxes.” The court held that appellate review should focus on whether the settlement was fair, adequate, and reasonable, rather than deciding the merits of the underlying class-certification ruling. Applying an abuse-of-discretion standard, the court concluded that the settlement should be approved.

CASE DETAILS

COURT	Washington Supreme Court
WRITING FOR THE COURT	Madsen, J.; Madsen; Alexander; Smith; Johnson; Ireland; Bridge; Owens
JURISDICTION	Washington
DECIDED	November 29, 2001
DISPOSITION	reversed
PROCEDURAL POSTURE	A class-action objector appealed the trial court's approval of a proposed settlement. The Court of Appeals reversed, reasoning in part that the trial court had improperly denied class certification. The Washington Supreme Court granted review and considered whether the Court of Appeals should have reached the merits of the prior class-certification ruling and whether the settlement was fair, adequate, and reasonable.
STANDARD OF REVIEW	A trial court's approval of a class-action settlement is reviewed for abuse of discretion. An appellate court's review is more limited than the trial court's and should not decide the ultimate merits of the underlying dispute.
PRECEDENTIAL VALUE	published precedential Washington Supreme Court opinion
PARTIES	Leonard Bebchick v. Holland America Line-Westours, Inc., Francine Pickett, Brian Cohen, Jack Masin, Belle Masin

TOPICS

class actions

consumer protection

appellate procedure

civil procedure

contracts

PRACTICE AREAS

consumer protection

class actions

civil procedure

appellate procedure

contracts

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by deciding the merits of the trial court's denial of class certification when reviewing approval of a class-action settlement.
2. Whether the settlement was fair, adequate, and reasonable under Washington Civil Rule 23(e).
3. What standard governs appellate review of a trial court's approval of a class-action settlement.

HOLDINGS

1. When reviewing approval of a class-action settlement, an appellate court should confine its review to whether the settlement is fair, adequate, and reasonable and should not decide the merits of the trial court's earlier denial of class certification in the first instance.
2. A proposed class-action settlement may be approved when the trial court determines that it is fair, adequate, and reasonable, and the approval is reviewed for abuse of discretion.

KEY QUOTATIONS

“the court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (at 189)

“Accordingly, we hold that the Court of Appeals erred by deciding the merits of the trial court’s denial of class certification in the first instance.” (at 191)

“Based on the foregoing considerations we reverse the Court of Appeals and approve the settlement as “fair, adequate, and reasonable.”” (at 201)

FACTUAL BACKGROUND

The plaintiffs alleged that Holland represented cruise port charges and taxes as governmental fees even though part of the amounts collected were retained for other corporate purposes. The proposed class included more than 750,000 consumers who purchased cruises during the relevant period, and the settlement provided transferable travel vouchers ranging from \$10 to \$50. After notice, fewer than 50 objections were received, and the trial court found the settlement fair, reasonable, and adequate.

PROCEDURAL HISTORY

Plaintiffs brought Washington Consumer Protection Act, unjust-enrichment, and negligent-misrepresentation claims concerning alleged markup of cruise port charges and taxes and moved for class certification. The trial court denied certification, and discretionary interlocutory review was denied. The parties later negotiated a

settlement, the trial court conditionally certified a settlement class, approved the settlement after notice and an opportunity to object, and entered judgment dismissing the action with prejudice. Leonard Bebchick objected and appealed; the Court of Appeals reversed, and the Washington Supreme Court reversed the Court of Appeals and approved the settlement.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The Court of Appeals' decision was reversed, and the class settlement was approved as fair, adequate, and reasonable. No further remand instruction was stated.

CASES CITED

- Pickett v. Holland America Line-Westours, Inc., 101 Wn. App. 901, 922, 6 P.3d 63 (2000)
- Officers for Justice v. Civil Service Commission, 688 F.2d 615, 623-25 (9th Cir. 1982)
- American Pipe & Construction Co. v. Utah, 414 U.S. 538, 550-51, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)
- Anderson v. Unisys Corp., 47 F.3d 302, 308 (8th Cir. 1995)
- Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 820-22, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)
- Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 793, 719 P.2d 531 (1986)
- Nuttall v. Dowell, 31 Wn. App. 98, 111, 639 P.2d 832 (1982)
- Mason v. Mortgage America, Inc., 114 Wn.2d 842, 792 P.2d 142 (1990)
- City of Detroit v. Grinnell Corp., 495 F.2d 448, 454-55 (2d Cir. 1974)
- Reed v. General Motors Corp., 703 F.2d 170, 175 (5th Cir. 1983)

OPINION

MADSEN, J.

Madsen, J. In 1996, Francine Pickett, Brian Cohen, and Jack and Belle Masin (Plaintiffs) filed suit against Holland America Line-Westours, Inc., (Holland) on behalf of all persons similarly situated (those persons purchasing cruises after April 19, 1992) to recover a portion of the “port charges and taxes” charged to them in addition to their cruise fares. Clerk’s Papers (CP) at 2-14.

The foundation for Plaintiffs’ claim is that these charges exceeded the actual taxes and port charges paid by Holland to port authorities and governmental entities, that Holland used the markup for other corporate purposes, and that Holland misrepresented this fact in its advertising and contracts. Plaintiffs claimed this was a violation of the Washington Consumer Protection Act (CPA), chapter 19.86 RCW, and raised additional claims of unjust enrichment and negligent misrepresentation.

Id. Pursuant to CR 23(b)(3) Plaintiffs moved for class certification of their CPA claims. Their motion was denied by the trial court. Plaintiffs sought interlocutory discretionary review by the Court of Appeals of this ruling. See RAP 2.3(b).

The Court of Appeals Commissioner denied discretionary review, based on a determination that Plaintiffs failed to establish that the trial court “committed obvious or probable error.” CP at 1234-41. Thereafter, the parties reached a proposed settlement, the trial court conditionally certified a class for settlement purposes, and notice was sent to the class members, allowing them to “opt out” or appear at the hearing and object to the settlement.

A lone objector, Leonard Bebchick (an attorney from the District of Columbia), intervened and sought court disapproval of the settlement. Notwithstanding Bebchick’s objection, the trial court approved the settlement as being “fair, adequate, and reasonable” and entered an order to this effect. Bebchick appealed, with Holland and *183the Plaintiffs standing in opposition, and the Court of Appeals reversed in a published decision.

Pickett v. Holland Am. Line-Westours, Inc., 101 Wn. App. 901, 922, 6 P.3d 63 (2000). We hold that the class settlement is “fair, adequate, and reasonable,” and we reverse. FACTS The named Plaintiffs in this case are Francine Pickett (from New York), Brian Cohen (also from New York), and Jack and Belle Masin (from Florida).

On April 19, 1996, they filed suit against Holland, a Seattle based corporation, on behalf of all consumers who purchased cruises on Holland after April 19, 1992 (the preceding four years) and paid “port charges and taxes” in addition to their cruise fare. Plaintiffs’ complaint alleged violations of the Washington CPA, negligent misrepresentation, and unjust enrichment.

The gravamen of Plaintiffs’ claim is that Holland represented to them, through its advertising and cruise contracts, that “port charges and taxes” were mandatory fees levied by port authorities and government entities, when in fact a portion of these fees were knowingly collected by Holland for other purposes.

The following provision of Holland’s cruise contract is illustrative of Holland’s representations: “Additions to Fare/Port Charges/Taxes:... (b) Similarly, the amount specified in the Holland America Line brochure for port charges and taxes was based upon the amount of governmental charges, taxes and fees in existence at the time of printing. If increases have occurred or should hereafter occur in those amounts, Owner and HALW reserve the right to require you to pay the additional amounts as a condition of taking the Cruise or Cruisetour.

No right of cancellation exists under these circumstances.” Pickett, 101 Wn. App. at 917. Plaintiffs never alleged they were “overcharged” and each named Plaintiff concedes that they paid “port charges and taxes” in the exact amount advertised in Holland’s litera*184ture. CP at 845, 867-69, 885, 911. Instead, Plaintiffs alleged that Holland deceived them by representing that “port charges

and taxes” were solely governmental fees, when in fact, a portion of these fees were used by Holland for other purposes.

Plaintiffs sought recovery of the difference between the actual governmentally imposed port charges and taxes, and the amount collected by Holland. The financial documents illustrating the amounts charged passengers for “port charges and taxes,” and the corresponding amounts paid by Holland for actual governmentally imposed charges were filed with this Court under seal.

These documents provide a rough approximation of the amount allegedly overcharged. For instance, for one specific seven-day cruise consumers were allegedly overcharged \$26.48. Charges and expenses for other cruise destinations are similar in amount.

The amounts are higher for longer cruises. On July 24, 1996, Holland moved for partial summary judgment against all Plaintiffs other than Pickett, arguing that their actions were barred by a contractual limitations period. Holland’s cruise contract provides that a lawsuit may not be maintained against Holland unless it is notified in writing of any potential claim within 30 days of the conclusion of the cruise, and the lawsuit is filed within 180 days after the cruise.

The only named Plaintiff to comply with this provision was Pickett. Judge Armstrong held that Washington’s discovery rule was applicable to Plaintiffs’ CPA claims, see RCW 4.16.080(4), and as such, the claims of Plaintiffs were tolled until they discovered the facts underlying their cause of action. Based on the limited amount of discovery conducted at that point in the proceedings the court was unable to make a determination on this issue, and accordingly, Holland’s motion was denied.

Plaintiffs quickly moved for class certification pursuant to CR 23. Concerned about the expense of certifying a class with upward of a million members, the court deferred its ruling on this question to allow the parties time to conduct *185discovery and submit briefing regarding the likelihood of Plaintiffs’ success on the merits. Judge Armstrong recognized that the decision of whether to certify the class was not dependent on the merits of the action, but nevertheless wanted some analysis on the viability of Plaintiffs’ claim before undertaking the expense of certifying such a large class.

The matter was then transferred to another trial judge, Judge White. After extensive briefing, the trial court heard Plaintiffs’ class certification motion on September 22, 1997. Holland argued that class certification was improper under CR 23(b)(3), which requires, in part, a finding that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” CR 23(b)(3).

The trial court agreed, citing three critical issues. First, the court found that the need to address choice of law questions for individual class members would make class certification inefficient.

Second, the court found that there are a significant number of individualized inquiries that would have to be made with respect to Holland's contractual limitations period.

And third, individual issues of proof related to causation and injury by each class member would cause "individual issues [to] predominate over common questions." CP at 66. Accordingly, Plaintiffs' motion was denied. Plaintiffs sought interlocutory discretionary review of the trial court's ruling.

On January 22, 1998, in an eight page decision, the Court of Appeals Commissioner denied review of the trial court's denial of class certification based on a determination that the trial court did not commit "obvious or probable error." CP at 1241. Thereafter, the parties reached a settlement agreement and a class was conditionally certified for settlement purposes.

Pursuant to the settlement agreement, members of the class were to receive fully transferable travel vouchers, redeemable for future Holland cruises. They are valid for *186three years from the date of issuance. The voucher amounts vary, depending upon the length of the original cruise and the date of its departure.

The amounts are as follows:

Years of Departure	Duration of Cruise	Voucher Amount
1992-94	Under 14 Days	\$10.00
	14-21 Days	\$15.00
	Over 21 Days	\$20.00
1995-96	Under 14 Days	\$25.00
	14-21 Days	\$37.50
	Over 21 Days	\$50.00

The principal restriction on use of the vouchers is that they must be used for a booking made within 45 days of departure.

On April 21, 1998, the trial court preliminarily approved the settlement and scheduled a hearing for September 28, 1998, to determine whether the settlement was "fair, adequate, and reasonable." The court also ordered that notice of the proposed settlement be given to all class members allowing them to object to the settlement or "opt out." Fewer than 50 objections were made out of a class of over 750,000.

One of these objectors, Leonard Beichick, appeared at the court's reasonableness hearing and is the respondent before this Court. On October 2, 1998, after evaluating the settlement in open court, the trial court entered a final judgment and order of dismissal with prejudice, approving the class settlement. Specifically, the court found that the "[s]ettlement is, in all respects, fair, reasonable, and adequate to the Plaintiff settlement class, and within the authority of the parties and resulted from extensive arm's-length negotiations." CP at 289.

The Court of Appeals reversed in a published decision. Pickett, 101 Wn. App. 901. The court initially determined that the trial court's original order denying class certification was wrong. Specifically, the court held: (1) that Washington law applied to each of the class members' CPA *187claims, so there were no individual choice of law questions; (2) a showing of individual reliance was not required under the CPA, and thus, there were no individual issues as to causation; and (3) that none of the class members' claims was time barred.

After making these legal determinations the court disapproved the settlement, stating that its holding regarding class certification “clears the way for certification of the class action by the trial court on remand. This dramatically changes the facts and will undoubtedly change the analysis of each factor by both the court and the plaintiffs’ class.” *Id.* at 922.

Holland petitioned this Court for its review. The Washington Software Alliance and the Association of Washington Business have filed amici briefs urging reversal. We hold that the class settlement is “fair, adequate, and reasonable.” Accordingly, we reverse. ANALYSIS The principal issue before this Court, despite the contentions of Bebachick (and now the class), is whether the Court of Appeals erred by addressing the merits of the trial court’s original denial of class certification in the first instance, rather than confining itself to the question of whether the class settlement is “fair, adequate, and reasonable.”¹ “The class action device, while capable of the fair and efficient adjudication of a large number of claims, is also susceptible to abuse and carries with it certain inherent structural risks.” *Officers for Justice v. Civil Serv.*

Comm’n, 688 F.2d 615, 623 (9th Cir. 1982). CR 23 is designed to guard against many of the potential failings of the class action device, and consequently protect the interests of all parties, in part, by mandating that class action settlements be court approved. CR 23(e) provides that: A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal *188or compromise shall be given to all members of the class in such manner as the court directs.

CR 23 is identical to its federal counterpart, Fed. R. Civ. R 23, and thus, federal cases interpreting the analogous federal provision are highly persuasive. *Brown v. Brown*, 6 Wn. App. 249, 252, 492 P.2d 581 (1971). “The primary concern of this subsection is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties.” *Officers for Justice*, 688 F.2d at 624 (citing *Collins v. Thompson*, 679 F.2d 168, 172 (9th Cir.

1982)); see also *Simer v. Rios*, 661 F.2d 655, 664 (7th Cir. 1981); *Mendoza v. United States*, 623 F.2d 1338, 1344 (9th Cir. 1980); *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975); *Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970); see generally 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1797, at 226 (1972)).

The requirements of CR 23(e) are for the most part procedural, requiring notice of a proposed settlement be given to class members and that they be given an opportunity to object to the settlement. In this case, class members were also given the opportunity to “opt out.” Although CR 23 is silent in guiding trial courts in their review of class settlements, it is universally stated that a proposed class settlement may be approved by the trial court if it is determined to be “fair, adequate, and reasonable.” *Torrisi v. Tucson Elec.*

Power Co., 8 F.3d 1370, 1375 (9th Cir. 1993); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir. 1981); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977). The criteria generally utilized to make this determination include: the likelihood of success by plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and the absence of *189collusion.

2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.43 “General Criteria for Settlement Approval” (3d ed. 1992). The above list is not exhaustive, nor will each factor be relevant in every case. *Officers for Justice*, 688 F.2d at 625. “The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case.” *Id.* This is a delicate, albeit largely unintrusive, inquiry by the trial court.

[T]he court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Id. It is not the trial court’s duty, nor place, to make sure that every party is content with the settlement. Indeed, this would contravene the very nature of consensual settlements. Rather, the trial court should look to the possibility of inequitable treatment between class members. It may be unavoidable that some class members will always be happier with a given result than others, but potential injustice arises as the distribution of benefits and burdens in a class remedy becomes increasingly unequal.

Although maximizing the overall gain is a valid pursuit in resolving a class action, a small minority of the class members may not be asked to bear an unduly disproportional share of the accompanying burdens. *Mendoza*, 623 F.2d at 1344. A reviewing court’s role is even more limited than that of the trial court. “Great weight is accorded his [the trial judge’s] views because he is exposed to the litigants, and their strategies, positions and proofs.

He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.” *190In fact, so much respect is accorded the opinion of the trial court in these matters that this Court will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the [trial court] has abused its discretion.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 454-55 (2d Cir. 1974) (first alteration in original) (citation omitted) (quoting *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir.

1971)). More importantly, [neither the trial court nor [an appellate] court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.....

Finally, it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. *Officers for Justice*, 688 F.2d at 625 (emphasis added); accord *Kaye v. Fast Food Operators, Inc.*, 99 F.R.D. 161 (S.D.N.Y. 1983); *Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976); *Grunin*, 513 F.2d 114; *Grinnell*, 495 F.2d 448; *Bogges v. Hogan*, 410 F. Supp. 433 (N.D.

Ill. 1975); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir. 1974); *Wellman v. Dickinson*, 497 F. Supp. 824 (S.D.N.Y. 1980). This is not to say that a reviewing court should not look to the merits of the Plaintiffs' case, but that review should be limited to assessing rough probabilities of success as they existed at the time of the settlement.

As Holland correctly notes, any other approach would directly stifle litigants' willingness to settle class action claims, a result contrary to the policy favoring settlements. Were the rule otherwise, "[p]arties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and thus no basis for a compromise." *West Virginia v. Chas.*

Pfizer & Co., 440 F.2d 1079, 1086 (2d Cir. 1971) (quoting *Fla. Trailer & Equip. Co. v. Deal*, 284 F.2d 567, 571 (1960)). The facts of this case are illustrative. Holland and the Plaintiffs settled. Notice of the proposed settlement was given to over 750,000 class members, who had an opportunity to object to the trial court that the settlement was not "fair, adequate, and reasonable." In this case, *Bebchick* did so, but the trial court approved the settlement despite *Bebchick's* objection.

Bebchick appealed, and the Court of Appeals decided the merits of the trial court's orders preceding the settlement approval, and used its holdings as a basis for determining that the settlement was not "fair, adequate, and reasonable." This begs the question: If this were procedurally proper, why would a party in Holland's position ever settle a case? Holland settled to avoid litigation, not to be subsumed by it.

Under the Court of Appeals' approach Holland bore all the risk. If the Court of Appeals had affirmed the trial court's rulings, and thus held that the settlement was fair, adequate, and reasonable to the class, Holland would be bound by the settlement despite the fact that such a ruling would have meant Holland might have been able to avoid all liability had it litigated the case.

However, if the trial court's orders were reversed, as they were in this case, and thus the settlement were disapproved, Holland would be back to litigating the case. In essence, it was a no-lose proposition for the class under the Court of Appeals' approach. Either they received a settlement or they went back to trial in a highly advantageous position. This type of result is not dictated by either the letter or spirit of CR 23.

Accordingly, we hold that the Court of Appeals erred by deciding the merits of the trial court's denial of class certification in the first instance. The remaining question then, is whether the class settlement was "fair, adequate, and reasonable." In reviewing *192 whether the class settlement was "fair, adequate, and reasonable" we apply an abuse of discretion standard to the trial court's finding.

Moore v. Nat'l Ass'n of Sec. Dealers, 762 F.2d 1093, 1106 (D.C. Cir. 1985). As noted above, courts generally refer to eight criteria, with differing degrees of emphasis, in making a settlement approval determination: the likelihood of success by plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objections; and the presence of good faith and the absence of collusion.

2 Newberg & Conte, *Newberg on Class Actions* § 11.43. Those criteria relevant to this suit are evaluated below, each of which, in our opinion, weighs heavily in favor of approval of the settlement as "fair, adequate, and reasonable." a. Likelihood of Success by Plaintiffs The likelihood of success by Plaintiffs must be evaluated as it existed at the time of settlement.

See *E.E.O.C. v. Hiram Walker & Sons*, 768 F.2d 884, 890 (7th Cir. 1985) (noting that there was "great uncertainty about the proper resolution of a number of legal issues involved, any one of which, if resolved in favor of Walker, would result in no recovery"); *Grinnel*, 495 F.2d at 457 (recognizing that there "would have been a serious question as to whether these actions could have been maintained as class actions at all").

At the time of settlement, Plaintiffs were in a situation of great uncertainty regarding the instant suit and, as Holland correctly notes, this weighs heavily in favor of a finding that the settlement was fair, adequate, and reasonable. Holland had a pending summary judgment motion regarding its contractual limitations period, which it had renewed after discovery revealed some of the named Plaintiffs may have discovered the facts underlying their cause of action long before filing suit.

Additionally, Plaintiffs' motion for class certification had been denied by the trial court, and the Court of Appeals had denied interlocutory discretionary review of this order based on a determination*193 that the trial court had not committed "obvious or probable error." A central issue in this case, from its beginning, has been class certification. It is true that this Court has neither the " 'right [n]or the duty to reach any ultimate conclusions on the issues of fact and law

which underlie the merits of the dispute.’ ” Kaye, 99 F.R.D. at 163 (quoting Grinnell, 495 F.2d at 456).

However, it is equally true that an assessment of the legal obstacles faced by Plaintiffs in this case, as to the question of class certification, bears directly on the level of risk Plaintiffs faced in receiving no recovery at all. Holland correctly observes that at the time of settlement Plaintiffs faced an uphill battle in attempting to secure class certification due the trial court’s original denial.

As the Eleventh Circuit has noted, appellate reversal of a trial court’s denial of class certification is a rarity: [trial] courts have broad discretion with respect to such rulings, and denials of class certification usually stand....

Thus, reliance on the possibility of a reversal of the court’s certification decision is ordinarily not reasonable. *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1381 (11th Cir. 1998). Even under the substantive criteria for class certification, it is apparent that Plaintiffs faced significant obstacles. CR 23(b)(3), the provision relating to class certification, requires, in part, a trial court finding that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” CR 23(b)(3).

The trial court found certification improper in this case, raising three principal concerns, each of which would be an independent ground to deny certification. First, the court found that there are a significant number of individualized inquiries that would have to be made with respect to Holland’s contractual limitations period.

Second, the court found that individual issues of *194proof related to causation and injury by each class member would cause individual issues to predominate over the common issues of fact and law. And third, the need to address choice of law questions for individual class members would make class certification inefficient. Each of these determinations was overturned by the Court of Appeals.

The most significant challenge to class certification faced by the class was the question of whether some, if not most, of the class members’ claims would be time barred by reason of Holland’s contractual limitations period. Holland’s cruise contract states: [Y]ou may not maintain a lawsuit against Owner, HALW or the Ship, nor will Owner, HALW or the Ship be liable therefore, unless HALW is provided with written notice of claim within thirty (30) days after conclusion of the Cruise [and]... the lawsuit for such claim is commenced not later than one-hundred eighty (180) days after conclusion of the Cruise.

CP at 409. Indeed, at the time of settlement Holland had a pending summary judgment motion regarding this issue. The Court of Appeals determined, and Bebachick argues, that the United States Supreme Court’s class action tolling principles, established in *American Pipe & Construction Co.*

v. Utah, 414 U.S. 538, 551, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), allow the claims of all class members to proceed, so long as one class member filed within the contractual limitations period (or statute of limitations).

According to the Court of Appeals, since named Plaintiff Pickett strictly complied with Holland's contractual limitations period by filing suit within 180 days of the conclusion of her cruise (which ended on January 20, 1996), the claims of all class members were revived. This argument is based on a fundamental misunderstanding of American Pipe.

In American Pipe the Supreme Court stated: A... class action is no longer "an invitation to joinder" but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions.

Under the circumstances of this case, where the District Court found that the named plaintiffs asserted claims that were "typical of the claims or defenses of the class" and would "fairly and adequately protect the interests of the class,"... the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue....

To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties....

Id. at 550-51. As later cases have clarified, "[t]he American Pipe rule does not operate to revive stale claims, but rather tolls the limitations period on viable claims while the trial court determines the parameters of the class in any possible class action." *Anderson v. Unisys Corp.*, 47 F.3d 302, 308 (8th Cir. 1995).

Thus, the filing of a class action lawsuit, as one that is representative in nature, preserves the claims of only those persons whose claims were not time barred at the time the class suit was filed. Since the class in the instant suit encompassed all passengers that had traveled on a Holland cruise in the four years preceding the filing of suit, many of the class members' claims would be time barred even under American Pipe if Holland's contractual limitations provision is given effect.

Alternatively, the Court of Appeals held that Washington's discovery rule applied to Plaintiffs' CPA claims, and as such, Plaintiffs' "cause of action [is]... not... deemed to have accrued until the discovery by the aggrieved party of the facts constituting the [CPA violation]." *Pickett*, 101 Wn. App. at 913. See RCW 4.16.080(4); see also *Reeves v. Teuscher*, 881 F.2d 1495, 1501 (9th Cir.

1989). However, even if this were the case, and Holland's contractual limitations period were valid, there would still be questions of what individual Plaintiffs had knowledge of and when they *196gained such knowledge. This would arguably make class certification impractical. Since the

proposed class encompassed all persons completing cruises in the four years preceding the lawsuit (which is the statute of limitations under the CPA), and Holland's contractual limitation period was 180 days, there would still be members of the proposed class whose claims could have lapsed even with application of the discovery rule.

This was a significant risk for Plaintiffs at the time of settlement. The trial court's denial of class certification was also based on its determination that individual questions of causation would make class litigation of Plaintiffs' CPA claims impractical. An actionable private claim under Washington's CPA requires "[a] causal link... between the unfair or deceptive acts and the injury suffered by plaintiff." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*

Co., 105 Wn.2d 778, 793, 719 P.2d 531 (1986). In *Hangman Ridge*, we did not elaborate on the level of proof required to show causation. The issue under the facts of this case is whether individual reliance and knowledge is required to prove causation. If it is, class certification is most likely impractical because a showing that each class member specifically relied on Holland's alleged misrepresentations would be required.

Holland cites *Nuttall v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982), a pre-*Hangman* Court of Appeals decision, which stands for the proposition that actual reliance is required in a money damages CPA claim based on misrepresentation.

In *Nuttall*, the court held that "a party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied upon it." *Id.* at 111. This is the only Washington authority directly on point (i.e., dealing with a money damages claim based on misrepresentation). Both parties cite to out of state cases supporting their respective positions.

See, e.g., *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699 (Fla. Dist. Ct. App. 2000) (holding that under Florida CPA reliance and damages are shown by the fact that *197 person parted with money); *Zekman v. Direct Am. Marketers, Inc.*, 286 Ill. App. 3d 462, 675 N.E.2d 994 (1997) (finding that a party must have relied on the wrong to some extent); *Weinberg v. Sun Co.*, 1999 PA Super.

228, 740 A.2d 1152 (requiring showing that false representation made a difference in a purchasing decision). Citing a Court of Appeals decision, *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 942 P.2d 1072 (1997), the Court of Appeals in this case held that "[i]njury and causation are established if the plaintiff loses money because of unlawful conduct." *Pickett*, 101 Wn.

App. at 916. Both *Edmonds* and the Court of Appeals in the instant suit cited our decision in *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), as the basis for this principle. This is debatable. Neither *Edmonds* nor *Mason* stands directly for the proposition for which it is cited.

In *Edmonds*, the plaintiff relied on representations made by the defendant in buying a house. The contract did not alert the plaintiff that the defendant would summarily decide any controversy over earnest money. The defendant's unilateral determination that plaintiff defaulted was deemed an unfair act. Since the plaintiff relied on the representation of defendant in signing the agreement, and lost money, injury and causation were established.

In *Mason*, which involved representations made in the purchase of a mobile home, the issue of causation never even arose, and this court's discussion was limited to injury. Under the posture of this case, we believe it is enough to say that this is a debatable question without a clear answer under Washington law at the time of the parties' settlement, and presented a risk to the Plaintiffs class favoring settlement.

Moreover, the Court of Appeals, in its original denial of interlocutory discretionary review engaged in a written analysis similar to that outlined above in determining that the trial court had not committed "obvious or probable error" in denying class certification. CP at 1241.

The Court of Appeals' written denial was properly considered by the parties in deciding that settlement was warranted, as it foreshadowed the high level of risk attending any subsequent litigation and, most importantly, was relevant to the trial court's determination that the settlement was reasonable.

The final basis for the trial court's denial of class certification was its determination that individual choice of law questions would predominate. The Court of Appeals held that there was no choice of law problem because the sole claim was under Washington's CPA and individual members of the class could "opt out." *Pickett*, 101 Wn. App. at 912.

However, as *Holland* argues, the United States Constitution puts limits on the application of state law to national class action lawsuits. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), the Supreme Court held that a state must have " 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [a state's] law is not arbitrary or unfair." *Id.* at 821-22 (quoting *Allstate Ins.*

Co. v. Hague, 449 U.S. 302, 312-13, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)). The Court gave "little credence" to the proposition that plaintiffs "by failing to opt out, evinced their desire to be bound by [a state's] law." *Id.* at 820.

However, even under *Phillips Petroleum's* choice of law requirements an "important element" of determining fairness is "the expectation of the parties." *Id.* at 822. *Bebchick* argues that this issue was resolved by reason of *Holland's* choice of law provision in its cruise contract. *Holland's* cruise contract states: [As to Cruises and as to the Ship segment of your Cruisetour, it] will be construed in accordance with the general maritime law of the United States.

[As to the non-Ship segment of your Cruisetour, it will be construed in accordance with the laws of the State of Washington, U.S.A.] All disputes and matters whatsoever arising under, in connection with or incident to this contract shall be litigated... in the courts of the State of Washington, U.S.A..... CP at 797. *199 Unlike the Court of Appeals, we merely recognize that all of the above issues injected a high degree of uncertainty into this case for Plaintiffs.

The parties' decision to avoid the costly and protracted litigation that would inevitably follow, and the very real prospect that Plaintiffs might receive little or no recovery if the trial court were affirmed on any ground, are all factors weighing in favor of settlement approval. b. Amount and Nature of Discovery and Evidence At the time of settlement the parties had engaged in two years of extensive discovery. c. Settlement Terms and Conditions Under the settlement, members of the class receive fully transferable travel vouchers, redeemable for future Holland cruises, valid for three years from the date of issuance.

The voucher amounts vary, depending upon the length of the original cruise and the date of its departure, and range from \$10.00 to \$50.00. The principal restriction on use of the vouchers is that they must be used for a booking made within 45 days of departure.

The face value of the settlement is over \$20 million. However, even were the amount far smaller, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." Grinnell, 495 F.2d at 455.

The second circuit has gone so far as to conclude that "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." Id. at n.2. Bebachick's only tangible argument against the validity of the settlement is that the vouchers are not sufficiently beneficial to the class because they are unlikely to be used by large numbers of class members.

This may or may not be the case. There was evidence that Holland's cruise customers tend to be quite loyal, and that 30-40 percent of each *200cruise vessel is occupied by prior customers. However, this issue is further mitigated by the fact that the travel vouchers are fully transferable, even though they have no cash value.

As Plaintiffs note in their Court of Appeals briefing, [f]or those Class members who choose not to cruise again, the Vouchers can be transferred or sold: (a) to travel agents who do a large volume of business with Holland America who will be most likely to give their repeat cruise customers close to full value for their Vouchers as a mechanism for creating goodwill and increasing business; (b) to cruise consolidators, agents who specialize in buying up berths in bulk to sell at steep discounts at the last minute; (c) through Internet marketing mechanisms; or (d) to a formal market maker....

Br. of Resp't at 11. d. Recommendation and Experience of Counsel When experienced and skilled class counsel support a settlement, their views are given great weight. *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983). There has been no suggestion by any party that the class received anything other than excellent representation. Indeed, as Holland notes, the trial court went out of its way to point out this fact: I guess Holland America ends up paying for both sides but they got their money's worth because... [t]his case has been litigated very professionally from beginning to end.

I continued to get a great deal of pleasure in the briefs that are submitted. They are letter perfect. Report of Proceedings (No. 96-2-10831-6 KNT Sept. 28, 1998) at 116. e. Reaction of Class The reaction of the class members to a proposed settlement is one factor in assessing whether or not a settlement is fair, adequate, and reasonable. *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir.

1975) (approving settlement where only 5 members of a class of 253 objected); *Bryan*, 494 F.2d at 803 ("While the proportion of the class opposed *201to a settlement is one factor to be considered in assessing its fairness,... a settlement is not unfair or unreasonable simply because a large number of class members oppose it.").

As Holland correctly asserts, in this case the trial court received fewer than 50 objections to the proposed settlement out of 470,000 class notices sent to more than 750,000 potential class members. This de minimis level of objection is far smaller than that approved by federal courts in similar instances. See *Lelsz v. Kavanagh*, 783 F. Supp. 286, 289 (N.D.

Tex. 1991) (approving settlement for class of 5,683 where 370 objected); *Parker v. Anderson*, 667 F.2d 1204, 1207 (5th Cir. 1982) (affirming approval of settlement where 1 class member out of 11 objected); *Grinnell*, 495 F.2d at 462 ("Any claim by appellants that the settlement offer is grossly and unreasonably inadequate is belied by the fact that, from all appearances, the vast preponderance of the class members willingly approved the offer.

Only twenty objectors appeared from the group of 14,156 claimants." f. The Presence of Good Faith and the Absence of Collusion There has been no allegation of bad faith in this case. Based on the foregoing considerations we reverse the Court of Appeals and approve the settlement as "fair, adequate, and reasonable." CONCLUSION We hold that the Court of Appeals erred by deciding the merits of the trial court's denial of class certification in the first instance, rather than confining itself to the question of whether the class settlement was "fair, adequate, and reasonable." We reverse the Court of Appeals and hold that the class settlement is fair, adequate, and reasonable.

Alexander, C.J., and Smith, Johnson, Ireland, Bridge, and Owens, JJ., concur. Before the Court of Appeals the Class advocated affirmance of the trial court's approval of the settlement, reasoning that *Bebchick's* arguments show his "fundamental misunderstanding of both (1) the trial court's

role in evaluating a proposed class action settlement; and (2) this Court's role in reviewing the trial court's approval of the settlement." Br. of Eesp't at 7.

Retrieved from lawtools.ai · <https://lawtools.ai/cases/state/washington-washington-supreme-court/2001/pickett-v-holland-america-line-westours-inc-9bz01d34>