IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

NOS COMMUNICATIONS, INC.; NOSVA LIMITED PARTNERSHIP, AFFINITY NETWORK, INC., ROBERT A. LICHTENSTEIN, and JOSEPH T. KOPPY,	)	No. 60736-7-I
Defendants/petitioners,	)	COMMISSIONER'S RULING DENYING DISCRETIONARY REVIEW
v.	)	
BAXTER AIR, INC., and all others similarly situated,	)	
Plaintiff/respondent.	)	

Defendants/petitioners NOS Communications, Inc., NOSVA Limited Partnership, and Affinity Network, Inc. seek discretionary review of a September 2007 trial court order granting class certification on the issues of causation and damages in this Consumer Protection Act (CPA) claim against it by plaintiff/respondent Baxter Air, Inc. For the reasons stated below, discretionary review is denied.

Petitioners, hereafter Affinity, are three related companies that market long distance telecommunications services to small businesses based on a "cents per call unit" instead of "cents per minute." In November 2005, Baxter Air, an Affinity customer, filed a complaint alleging that Affinity's solicitations and billing practices violated the CPA. Baxter Air sought class action certification for a group of more than 1000 Washington consumers. In

December 2006, the trial court granted class action certification on the liability elements of Baxter Air's CPA claim, <u>i.e.</u>, whether Affinity engaged in an unfair or deceptive act or practice, in trade or commerce, which affected the public interest. The court left class certification of the other elements of the claim, causation and damage, for another day: "Issues of causation and damage will be addressed by further order of the Court, as provided in *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 256 (2003)."[1] On February 1, 2007, a panel of this court denied Affinity's motion for discretionary review of the partial class action certification.[2]

Shortly thereafter, Baxter Air filed a motion for summary judgment on liability. In July 2007, the trial court granted summary judgment. Affinity filed a notice of discretionary review, but withdrew it.[3] Affinity also moved for summary judgment dismissal, arguing absence of causation and federal preemption of the damages claims. In September 2007, the trial court denied summary judgment, ruling that causation and damages must be determined at trial.

Then in June 2007, Baxter Air sought class certification on causation and damages. In September 2007, the trial court granted the motion[4]:

> The Court now finds that causation and damages may be adjudicated on a class-wide basis. Plaintiffs have established that the Defendants used deceptive practices to sell long distance services to the class, and each

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[1] This order was entered by the Honorable Richard A. Jones.

[2] No. 59231-9-I.

[3] No. 60411-2-I.

[4] The orders was entered by the Honorable Harry McCarthy.

> member of the class purchased Defendants' services. Plaintiffs have offered a reasonable means of establishing the damages to the class based on expert testimony and statistical sampling.
>
> As noted previously, the claims of individual class members are likely valued at a few hundred or thousand dollars each, and class adjudication of common issues is therefore superior, indeed likely the only realistic method of resolving the claims. Requiring proof of damages on an individual basis would be impracticable and imprecise, and class-wide adjudication of damages can be accomplished within the applicable standards of proof, by fair and reasonable inference.

Affinity seeks discretionary review of this order, arguing that it is directly contradictory to Sitton and Indoor Billboard v. Integra Telecom, ___ Wn.2d ___, 170 P.3d 10 (2007), and it constitutes obvious error and a departure from the usual and accepted course of judicial proceedings by failing to contain a rigorous analysis of the CR 23 criteria.[5]

In Sitton, a class of plaintiffs brought an action against State Farm Insurance alleging that it acted in bad faith and in violation of the CPA in

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[5] Discretionary review may be accepted only in the following circumstances:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
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> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
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> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
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> (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

denying coverage for medical expenses. Plaintiffs alleged State Farm systematically used its medical utilization review process for the sole purpose of denying or limiting benefits. State Farm argued that the trial plan violated due process and its right to a jury trial because it contemplated an award of damages without requiring plaintiffs to prove individual causation and without allowing State Farm an opportunity to show it had a reasonable justification for denying individual claims. The court agreed, reasoning that the effect of the plan was to eliminate causation as an element of plaintiff's bad faith and CPA claims, but left open the possibility of bifurcated phases. Sitton, 116 Wn. App. at 258.

Affinity contends that in the December 2006 order granting class certification on liability, the trial court ruled that Sitton was controlling, that in doing so it recognized that causation and damages must be proved on an individual basis, that the decision granting class certification on causation and damages fails to address the tension between Sitton and Schnall v. AT&T Wireless Servs., Inc., 139 Wn. App. 280, 161 P.3d 395 (2007), or even cite the cases, and that the decision fails to take account of Indoor Billboard. Affinity also contends that the trial court ignored the local rules which required Baxter Air to move for class certification within 90 days of the answer and improperly considered expert testimony. Finally, Affinity contends that Baxter Air failed to meet the typicality, predominance, and adequate representative requirements of CR 23(a).

Baxter Air contends that the trial court considered extensive arguments from both parties regarding the applicable law, that there is no tension between Sitton and Schnall, and that neither case stands for the proposition that causation and damages must be proven on an individual basis.

The parties are thoroughly familiar with the basic principles of class certification; it is unnecessary to set them out in detail here. They correctly agree that this court reviews a trial court class certification decision for a manifest abuse of discretion.[6] And remedy by appeal from a final judgment is generally adequate, and the court discourages piecemeal review.[7] A party seeking discretionary review under RAP 2.3(b) bears a heavy burden.[8] Thus, to demonstrate that discretionary review is warranted, Affinity must demonstrate that the trial court's decision granting class certification as to causation and damages is such an abuse of discretion as to warrant interlocutory review. They have not met this burden.

To the extent Affinity challenges class certification under CR 23(a) and as to liability, it previously sought and was denied discretionary review. There is no basis to reconsider that decision now. Similarly, Affinity's procedural challenges to the certification order do not warrant interlocutory review.

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[6] Sitton, 116 Wn. App. at 250.

[7] Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 127, 467 P.2d 372 (1970).

[8] In re Grove, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995).

Affinity's objection that the certification order is inadequate also fails. As noted above, Affinity raised the same "lack of rigorous analysis" argument when it sought discretionary review of the December 2006 partial class certification order; a panel of this court denied review. Moreover, Affinity appears to read too much into the trial court's reference to Sitton in the December 2006 order. It did not indicate that the *result* in Sitton would control; instead, it may be read as indicating that in considering whether to grant class certification as to causation and damages, the principles set forth in Sitton would be considered and applied. As the parties know, the law is not static. This court's decision in Schnall was filed after Sitton and after the December 2006 order. In Schnall, plaintiffs brought a class action suit against AT&T Wireless on behalf of customers who were charged a connectivity charge, alleging that by charging the fee without disclosing it, misleading its customers and breaching customer contracts, AT&T violated the CPA. This court agreed that causation is an element of the class CPA claim, but reversed the denial of class certification, in part on the ground that the mere existence of individualized issues of causation/reliance did not preclude a class action. The court noted the difficulty in proving reliance in cases alleging nondisclosure of material facts, as opposed to those alleging affirmative misrepresentation. Schnall, 139 Wn. App. at 291.

In light of the parties' extensive briefing, the trial court was well aware of the issues and caselaw, including Sitton and Schnall. The trial court's decisions granting summary judgment on liability and denying summary judgment of

causation and damages were extensive and thoughtful; there is no basis to conclude that the trial court failed to consider the arguments and caselaw when it granted class certification as to causation and damages.

Furthermore, the petition for review in Schnall is set for consideration in June 2008. If the Washington Supreme Court grants review, the impact of the court's decision on this case may be raised and considered on appeal from a final judgment. And nothing in Indoor Billboard obviously changes the landscape regarding discretionary review in this matter. While the court in Indoor Billboard reaffirmed that proof of causation is a required element of a CPA claim, the case says nothing specific about class certification of CPA claims.[9]

Neither Sitton nor Schnall necessarily addresses every aspect of class certification that arises in the present action. And it remains to be seen how Indoor Billboard will be applied to the question of class action certification. But with trial scheduled to commence in April 2008, less than four months from now, these are issues best left to review from a final judgment.

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[9] The court in Indoor Billboard rejected the argument that causation can be established merely by showing payment of an invoice, i.e. that money was lost. The court concluded

> [W]here a defendant has engaged in an unfair or deceptive act or practice, *and there has been an affirmative misrepresentation of fact*, our case law establishes that there must be some demonstration of a causal link between the misrepresentation and the plaintiff's injury. . . .
>
> We hold that the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim. A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury.

(emphasis added). Indoor Billboard, 170 P.3d at 22-23.

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Now, therefore, it is

ORDERED that discretionary review is denied.

Done this 10th day of January, 2008.

Mary S. Neel
Court Commissioner

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