CATHERINE M. DUFFY, et. al., Plaintiffs	*	IN THE
	*	CIRCUIT COURT
	*	FOR
v.	*	
	*	BALTIMORE COUNTY
JERRY'S CHEVROLET, INC., Defendants	*	CASE NO.: 03-C-00-008650

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MEMORANDUM OPINION AND ORDER OF COURT CERTIFYING THE CLASS

According to Maryland Rule 2-231, in order to determine whether a class should be certified, the Court must first look to the four prerequisites of section (a):

(1) The class is so numerous that joinder of all members is impracticable;

(2) There are questions of law or fact common to the class;

(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) The representative parties will fairly and adequately protect the interests of the class.

If all four elements are met, the Court must then ensure that at least one of the three criteria of section (b) is satisfied:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class that

would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds 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.

Having read and considered the Plaintiff's Motion for Certification of the Class, Defendant's Opposition to Certification and Plaintiff's Reply Memorandum in Further Support of Class Certification, as well as having heard and considered the oral arguments presented in reference to this matter, the Court finds that the four requirements of Rule 2-231(a) have been met and Rule 2-231(b)(2) and (3) have been satisfied. THEREFORE, it is this 27th day of August HEREBY ORDERED that Plaintiff's Motion for Certification of the Class is GRANTED for the reasons stated herein. The Class is HEREBY DEFINED as:

> All Customers who, from August 23, 1997 through the date of certification: (1) purchased or leased with an option to buy a new motor vehicle from Jerry's, where, (2) as part of the sales contract, a $595 fee for "DEALER PRICE ADD ON PRE-DELIVERY PREP KARKRAFT FINISH PROTECTION" was included in the price of the motor vehicle. Excluded from the Class are those individuals who now or have ever been employee's of Jerry's Chevrolet, and the spouses, parents, siblings and children of all such individuals.

A. The Prerequisites of Rule 2-231

1. Numerosity (2-231(a)(1))

Although Plaintiff is not required to produce a precise number of potential class members, she is required to demonstrate that the class is so numerous that joinder is impracticable. *Jessie J. Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 497 (D.Md. 1998). Because the "DEALER PRICE ADD ON PRE-DELIVERY PREP KARKRAFT FINISH PROTECTION" charge was included in almost every new car and truck sales contract from August 1997 through the date of filing this lawsuit, the class will potentially number in the thousands. In fact, Jerry's has identified approximately 5,000 consumers who have made such purchases within this time period. Consequently, the Court concludes, as Defendant has conceded, that joinder would be difficult under these circumstances and that the numerosity element has been satisfied.

2. **Commonality of Facts or Law (2-231(a)(2))**

Defendant asserts that because "each customer negotiated his or her agreement individually, based on individual circumstances and market conditions," the Court cannot, without examining the specific exchanges of information between Jerry's and its customers, conclude that there are facts sufficiently common to the class so as to satisfy this prerequisite. Some customers, it is alleged, "read the various window stickers and paper disclosures more closely than others" and "some, like plaintiff, did not read them at all..." Therefore, "the flow of information, the extent to which a certain piece of information formed part of the basis of the customer's bargain, and the customer's reliance on that information in deciding to enter into the contract and on what terms will vary considerably from person to person." Counsel even cites Plaintiff Duffy's deposition as proof that the circumstances surrounding each potential plaintiff's purchase are so drastically different so as to preclude a finding of commonality.

Q: "You knew from your car-buying experiences that the terms of the deal would be something that you would negotiate with the dealership, right?"

A: "Correct."

Q: "And those were the total price and monthly payment and down payment factors...related to your situation personally, correct?"

A: "Correct."

However, the case law in this jurisdiction makes clear that "the threshold of commonality is not a high one and is easily met in most cases. It does not require that all, or even most issues be common, nor that common issues predominate, but only that common issues exist. Although the standard for commonality varies among jurisdictions, a common articulation requires that the lawsuit exhibit a common nucleus of operative facts...The commonality requirement does not ask us to assess the common issues vis-a-vis individual issues, but only to ask whether common issues exist." *Philip Morris, Inc., et. al. v. Angeletti,* 358 Md. 689, 734-735 (2000). Jerry's used uniform contracts to conduct its sales transactions which specifically charged consumers $595 for goods or services that were, according to the complaint, already included in the base price of each vehicle and the cost of which was reimbursed to Jerry's by the manufacturer. These factual circumstances sufficiently cross the threshold of commonality. Jerry's practice and policy of charging consumers for "DEALER ADD ON PRE-DELIVERY PREP KARKRAFT FINISH PROTECTION" also raises several legal and factual questions common to the class, such as whether Jerry's included the $595 charges knowing that they provided little or no benefit to the customer and whether such action constitutes a breach of contract. It is interesting to note that, during his deposition, Mr. Stautberg, owner and President of Jerry's Chevrolet, admitted under

oath that Jerry's customers received nothing in exchange for this fee:

Q: "If the customer does not pay the $595 is there any difference in the predelivery prep that's performed on the car?"

A: "No."

Q: "So, regardless, they get the same predelivery prep?"

A Nods his head indicating yes.

However, during oral arguments, counsel for the Defendant claimed that Jerry's consumers did receive something of value for the charge:

THE COURT: "Yeah, but Jerry's wants the Court to take the position that the $595 because it represented absolutely nothing that the buyer was going to get, had to be eliminated when going from the asking price to the selling price. Now, why should I accept that position?"

MR. NAZARIAN: "Well, I want to make very clear, Jerry's is not saying, never will say, that the $595 was for nothing. That's their position. All right."

THE COURT: "Well, what did a buyer get? I thought that was a conceded point. What did a buyer get from Jerry's Chevrolet for this $595 prep Karkraft finish protection?"

MR. NAZARIAN: "Well, there is nothing conceded about it, Your Honor."

THE COURT: "Well, you tell me, what did the buyer get?"

MR. NAZARIAN: "The buyer got, according to the testimony in this case, preparation, cleaning of the vehicle. They got the Karkraft finish protection. Jerry's added onto the price because this is America and you can charge whatever you want for a car."

This discrepancy, which should be clarified, serves to further solidify the conclusion that the threshold requirement has been crossed and the question of whether the $595 represented anything of value is a factual issue common to the class.

3. Typicality of Claims and Defenses (2-231(a)(3)

"The typicality requirement...has been construed to require that the relief sought will benefit all class members and that no individual claim within the class be so unique as to impair the necessary alignment of interest." *Ramirez v. Webb* 102 F.R.D. 968, 971 W.D. Mich. 1984). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims." *Philip Morris* at 737. "Thus, while the claims of particular individuals may vary in detail from one another, the collective claims focus on particular policies applicable to each class member thereby satisfying the typicality requirement of Rule 23(a)." *Briggs v. Brown & Williamson Tobacco Corp., Inc.* 414 F. Supp. 371, 375 (E.D. Va. 1976).

Ms. Duffy's claim is certainly typical of all class members. As is the case with those consumers, she purchased her new car from Jerry's Chevrolet and signed a standard contract, designed and uniformly used by the dealership. That contract included a $595 charge for "DEALER PRICE ADD ON PRE-DELIVERY PREP KARKRAFT FINISH PROTECTION" which, as a prerequisite to being defined as a member of this class, must have, as well, been included in each member's sales contract. And, allegedly, the fee charged was, in each case, a built-in buffer to raise the initial bargaining price of Jerry's cars but had no value. Consequently, Plaintiff's transaction, representative of the transactions conducted with each class member, raises legal issues and theories typical to the class. These very factual circumstances form the

basis for Ms. Duffy's and the classes' claims for both breach of contract Consumer Protection Act violations.

Yet, Defendant would have the Court conclude that Plaintiff does not meet the typicality requirement on the basis that proof of individual reliance is necessary to establish a claim for both breach of contract and Consumer Protection Act violation. Counsel states that "a class representative's inability to prove reliance precludes her from satisfying the typicality requirement with respect to claims requiring proof of reliance." While this blanket statement may be true in particular situations, it is grossly misleading in the context at hand.

First, Defendant cites *Clopton v. Budget Rent A Car Corp.*, 197 F.R.D. 502 (N.D. Ala. 2000) as incontrovertible proof that all "contract claims require individualized discovery and analysis and cannot be lumped together, even when the defendant's forms and allegedly offensive policies are uniform." However, a close reading of *Clopton* reveals that the factual nature of that case is so significantly distinguishable that it does not support such a conclusion. There, the plaintiff attempted to include in the class anyone who had rented a vehicle from one of Budget Rent A Car's 1500 nationwide outlets, yet the Court determined that one of the bars to certification was that litigation required application of the statutory laws of different jurisdictions and thus independent reviews of each claim. In the instant case, however, the Court is faced with common claims arising from the allegedly unlawful conduct of a single car dealership whose clientele are located in one geographic locale. Maryland statutory law is applicable to all class members and poses no litigation problems.

Additionally, certification was denied in *Clopton* on the basis that the class' claims hinged primarily on

> highly individualized circumstances with respect to whether each particular class member was, in fact, charged for an amount of fuel he or she did not use and whether the charge for such amount constituted a breach of the rental agreement. While the allegations of Clopton's amended complaint suggest that Budget applied a uniform policy class-wide that caused Budget to breach its contractual obligations regarding refueling charges, it is manifest at this point in the proceedings that Clopton is not going to be seeking to establish any of his claims based on evidence of such a uniform practice. It appears, rather, that Clopton's allegations regarding charges for fuel not actually used would be proven, if at all, by affirmatively showing that Budget failed to follow established procedures and/or there was otherwise some random element of 'human error' that caused him to be charged for gasoline he did not use. Indeed, it appears that Clopton's individual contract-based claims will likely boil down to a factual dispute about how full the tank of his vehicle was when he returned it and whether a particular Adamson employee used an erroneous assumption as to the size of the tank to calculate the refueling charge. 509.

Here, no such individualized fact finding is necessary to litigate a claim for breach of contract. It is irrelevant what each individual class member paid for his or her car or, for that matter, what each consumer's reasons and motivations were for their particular purchase. Rather, the breach of contract claim in this case hinges on facts common to the class - that each plaintiff was charged the same amount of money for a service which arguably did not exist and that this fee was uniformly misrepresented in the dealership's contracts - and these facts are sufficient to permit litigation of whether Jerry's breached the covenant of good faith and fair dealing required of every party to a contract and whether Jerry's breached its sales contract by failing to provide something of value in exchange for the $595 fee.

Second, although both Plaintiff and Defendant concede that reliance is a necessary element of any claim under the Consumer Protection Act, Defendant argues that under no circumstance can reliance be presumed. However, a review of the case law from various

jurisdictions yields the conclusion that "reliance may be sufficiently established by inference or presumption from circumstantial evidence to warrant submission to a jury without direct testimony from each member of the class." *Amato v. General Motors Corporation,* 463 N.E. 2d 625, 629 (1982). To hold otherwise would subvert the very intent of class actions and would preclude all class action suits for which the bases are Consumer Protection Act violations or, for that matter, any claims that require proof of reliance.

> In a day of mass media advertising hype intended to saturate the markets with inducements to purchase the heralded product, consumer claims would amount to little if acceptance of the representations made for the product could be manifested only by one-on-one proof of individual exposure. The implication of such a requirement is that a multiplicity of individual claims would have to be proven in separate lawsuits, or not at all. That consequence would result in utter negation of the fundamental objectives of class-action procedure both expressed and implicit in Civ. R. 23. *Id.* at 628.

Thus, where multiple plaintiffs, standing in the same shoes, are subject to the uniform deceptive practices of defendants, class certification has been held to be appropriate and reliance implied from the circumstances. See, for example, *Chisolm v. TranSouth Financial Corp.*, 194 F.R.D. 538 (E.D. Va. 2000) and *Becher v. Long Island Lighting Company*, 64 F.Supp. 2d 174 (E.D. N.Y. 1999). Cases such as *Philip Morris*, as cited by the Defendant, which hold that reliance is an individualized determination necessary in Consumer Protection Act claims, are inappropriate watermarks for reliance issues in the class certification context. Under those fact patterns, individual reliance was necessary because the details of each plaintiff's situation were drastically different yet necessary to prove their claims. For example, although smokers uniformly use cigarettes, they differ as to the amount that they smoke in a day, the severity of their habit and how they began smoking. Each of these individualized factors, and others are important

variations that affect the outcome of a Consumer Protection Act violation complaint.

In contrast, the case at bar presents sufficiently uniform circumstantial evidence to imply reliance. All of the class members purchased their cars from Jerry's under the same contract terms, which included a $595 charge for Karkraft finish. Whether or not each plaintiff read the disclosure that pertained to this fee is irrelevant. Because this arguably bogus charge was included on the face of every contract as a component of the total suggested price of each vehicle and the class members completed their purchases with Jerry's, it may be presumed that these consumers relied on the legality and validity of their contracts. The circumstantial evidence, as a whole, yields the logical conclusion that they relied on the representation that every fee charged them by the dealership represented something of value. Thus, class action litigation on this claim may proceed on the question of whether Jerry's practices violated the Consumer Protection Act.

4. **Adequate Representation (2-231(a)(4))**

"There are two criteria for determining whether the representation of the class will be adequate: (1) the representation must have a common interest with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter v. General Motors Corp.*, 532 F.2d 511, 524-525(6th Cir.), cert. denied 429 U.S. 870 (1976). The first inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc., et. al. v. George Windsor*, 521 U.S. 591, 625 (1997). However, a finding of commonality and typicality will often yield a finding of adequate class representation, as that requirement "tends to merge with the commonality and typicality criteria...which serve as 'guideposts for

determining whether maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 626, citing *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 157 (1982). Having already determined that Ms. Duffy's transactions with Jerry's Chevrolet is representative of and raises legal claims typical of the class, the Court concludes that she will be a more than adequate representative with the same goals and interests as the rest of the class.

Finally, based upon the memoranda filed in this case and the oral arguments presented to the court, there can be no question that counsel are both competent and experienced class action attorneys who will vigorously litigate the interests of their clients.

B. The Prerequisites of 2-231(b)

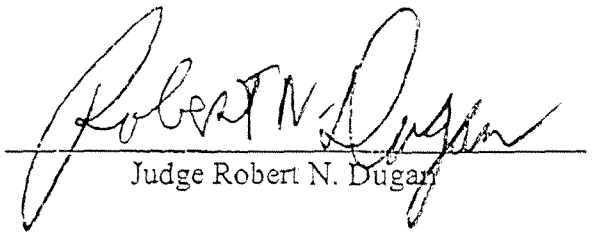
1. Request for Equitable and Injunctive Relief (Rule 2-231(b)(2)

It is not necessary to address Plaintiff's original argument for certification under this section as Defendant is no longer charging its customers the $595 fee for Karkraft finish.

2. Predominance of Class Issues (Rule 2-231(b)(3)

In order to certify a class under Rule 2-231(b)(3), two requirements must be satisfied: (1) the common questions of law or fact must predominate over any individual questions and (2) a class action must be superior to other available methods for the fair and efficient adjudication of the controversy. As discussed above, Ms. Duffy's transaction with Jerry's and the claims arising under that sale are not only representative of the class but are virtually identical to those of the class. It is not necessary to delve into the individual details surrounding each class member's negotiations with the dealership and the evidence offered to support their claims would be the

same as that offered to prove Ms. Duffy's claims. Consequently, individual trials, which would not only be lengthy and but also duplicative, are unnecessary. The potentially overwhelming number of claims could cause the court system to be bogged down with essentially the same case over and over again, distinguished only by the different plaintiff. Multiple cases also means varying results, due in part to the differing judicial styles and interpretations. Additionally, Class action is further appropriate because it provides a vehicle through which the injured consumers, who might not otherwise be able to afford the costs of litigation, can recoup their damages. Finally, the minimal damages caused each consumer may serve as a deterrence to the expenditure of time and money required to pursue a claim. The pooled resources of a class make litigation more viable and certification the superior method of adjudication.



Judge Robert N. Dugan