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Court Administrator

STATE OF MINNESOTA

FEB - 9 2009

DISTRICT COURT

COUNTY OF RAMSEY

By *[Signature]* Deputy

SECOND JUDICIAL DISTRICT

In the Matter of the Contest of General Election
held on November 4, 2008, for the purpose of
electing a United States Senator for the State of
Minnesota

District Court File No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

Contestants,

vs.

Al Franken,

Contestees,

Dennis Peterson, et. al.,

Petitioners,

Supreme Court File No. A09-65

vs.

Mark Ritchie, Minnesota Secretary of State, et. al.,

Respondents.

**AFFIDAVIT OF CHARLES N. NAUEN IN OPPOSITION TO
MOTION FOR CLASS CERTIFICATION**

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

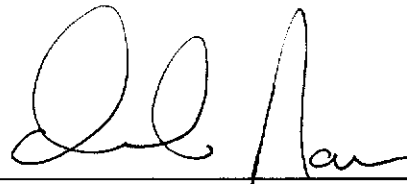
Charles N. Nauen, being duly sworn, deposes and states:

1. I am a partner with the law firm of Lockridge Grindal Nauen P.L.L.P. I represent Petitioners in the above-captioned matter. I submit this affidavit in support of Petitioners' Opposition to Motion for Class Certification;

2. Attached hereto as Exhibit A is a true and correct copy of *Rexam Inc. v. United Steel Workers of America*, AFL-CIO-CLC, 2005 WL 1260914 (D. Minn. May 25, 2005);

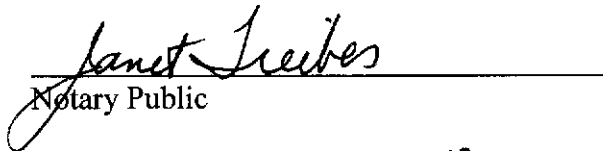
3. Attached hereto as Exhibit B is a true and correct copy of *Kochlin v. Norwest Mortgage, Inc.*, 2001 WL 856206 (Minn. Ct. App. July 31, 2001).

FURTHER YOUR AFFIANT SAYETH NOT.



Charles N. Nauen

Signed and sworn to before me
this 9th day of February, 2009



Notary Public



EXHIBIT A

H

United States District Court, D. Minnesota.
REXAM INC., Plaintiff,

v.

UNITED STEEL WORKERS OF AMERICA, AFL-CIO-CLC; International Association of Machinists and Aerospace Workers; United Steel Workers of America, AFL-CIO-CLC, Local 0188S; and Waldo W. Slagerman; Marlene A. Rudolph; Steven J. Stolarski; Frank Kieswether; Larry Alford; George A. Kneifel; Gail J. Rearick; Dwayne L. Wilson; and Lloyd W. Erickson, Individually, and as Representatives of Persons Similarly Situated, Defendants.
No. 03-2998 ADM/AJB.

May 25, 2005.

James P. McLoughlin, Jr., Moore & Van Allen, Charlotte, NC, and Timothy E. Branson, Dorsey & Whitney LLP, Minneapolis, MN, for and on behalf of Plaintiff.

Sally M. Tedrow, O'Donoghue & O'Donoghue LLP, Washington DC, for and on behalf of Defendants.

MEMORANDUM OPINION AND ORDER

MONTGOMERY, J.

I. INTRODUCTION

*1 On April 5, 2005, oral argument before the undersigned United States District Judge was heard on Rexam, Inc.'s ("Rexam") Motion to Certify Class [Docket No. 76] and Contingent Motion to Amend/Correct Amended Complaint [Docket No. 83]. Rexam's Motions are opposed by Defendants International Association of Machinists ("IAM") and Lloyd W. Erickson ("Erickson").^{FN1} The remaining Defendants, United Steel Workers of America, AFL-CIO-CLC and United Steel Workers of America, AFL-CIO-CLC, Local 0188S (collectively, "USWA"), Waldo W. Slagerman ("Slagerman"), Marlene A. Rudolph ("Rudolph"), Steven J. Stolarski ("Stolarski"), Frank Kieswether ("Kieswether"), Larry Alford ("Alford"), George A. Kneifel ("Kneifel"), Gail J. Rearick ("Rearick"), and Dwayne L. Wilson ("Wilson") (collectively, "individual de-

fendants") filed a joint motion with Rexam to Certify Class ("Joint Mot. to Certify Class") [Docket No. 89]. The joint motion also advocates the formation of seven sub-classes to facilitate effective management of the case.

^{FN1} Unless specifically noted otherwise, IAM will be used to denote both the Union and Erickson.

II. BACKGROUND

For 50 years Rexam (including its predecessors American Can Company ("ACC"), National Can Company ("NCC"), and American National Can Company ("ANC") have employed USWA and IAM members at approximately 140 plants in 34 states.^{FN2} Reilly Aff. (Pl.'s Mem. in Supp. of Mot. to Certify Class [Docket No. 78] Ex. 1) ¶ 5. Since 1960, Rexam has provided its former USWA and IAM employees retiree welfare benefits. Schemm Dep. I (Pl.'s Mem. in Supp. of Mot. to Certify Class Ex. 11) at 37-38; Schemm Dep. II (Pl.'s Mem. in Supp. of Mot. to Certify Class Ex. 12) at 256-57; Pangborn Dep. (Pl.'s Mem. in Supp. of Mot. to Certify Class Ex. 10) at 26-27, 74-75. These benefits are the subject of the collective bargaining agreements ("CBAs") negotiated with each union every three to five years. From 1960 to 1987, the NCC negotiated CBAs with IAM and USWA known as "Master Agreements" while the agreements negotiated by ACC with the unions were referred to as "Basic Agreements." Schemm Dep. II at 256-57. Although the Master and Basic Agreements served as the CBAs for most manufacturing plants, certain individual plants also negotiated separate and exclusive CBAs known as "Independent Agreements." Pangborn Dep. at 74-75.

^{FN2} Rexam currently operates 17 manufacturing plants in 14 states. Reilly Aff. ¶ 5.

In August 1987, NCC purchased the can packaging division of ACC and formed ANC. Schemm Dep. I at 6-7, 25, 35, 68; Barratt Dep. at 36; Pangborn Dep. at 59. ANC continued the practice of negotiating separate CBAs every three to five years with both the USWA and the IAM. Schemm Dep. I at 68-69, 132;

Barratt Dep. at 137-38. In 1988, ANC was purchased by Pechiney, a French aluminum products manager, although it continued to operate as ANC. Schemm Dep. I at 26-30; Barratt Decl. at 6. In July 2000, Rexam, through its subsidiary Rexam Beverage Can Americas Inc. ("Rexam BCA"), purchased ANC from Pechiney. Schemm Dep. I at 31; Barratt Dep. at 136. Rexam assumed responsibility for administering NCC retiree welfare benefits, all IAM retiree welfare benefits, and the USWA retiree welfare benefits for all ACC plans still operating as of the acquisition date. Since 2000, Rexam has continued the practice of negotiating separate CBAs every three to five years with both IAM and USWA. Reilly Aff. ¶ 6.

*2 Between 1961 and the present, retirees of Rexam and its assorted predecessors have experienced numerous changes to their benefits plans. Reilly Aff. ¶ 10. The nature and scope of the retiree benefits, as well as the terms and language used to define them, vary significantly between the different CBAs and whether it is a Master, Basic or Independent Agreement.

Rexam seeks a declaratory judgment regarding its right, as the sponsor and fiduciary, to modify the welfare benefits provided to persons formerly employed by its subsidiary, Rexam BCA, and its predecessors. In the instant motion, Rexam asks this Court to certify a class of more than 3,500 persons:

(1) who retired from Rexam or are a surviving spouse of a retiree or retirement-eligible employee; and

(2) who, at the time of retirement, were represented by the USWA or IAM for collective bargaining; and

(3) who, in the case of retirees are receiving benefits or are eligible to receive benefits, and in the case of the surviving spouses are receiving benefits, pursuant to retiree welfare benefit plans sponsored by Rexam.

Pl.'s Mem. in Supp. of Mot. for Class Certification at 14. In effect, the two questions to be addressed by the declaratory judgment are: (1) did the retirees' welfare benefits vest under their respective CBAs and (2) if so, at what point? Whether benefits vested depends on the language of the individual CBA, particularly the myriad "insurance durational clauses," "benefits coordination clauses" and "extent and limit of coverage clauses." *Id.* at 9. Rexam contends certification as

one large class is appropriate. However, given the variations between CBA terms, unions, and bargaining units, Rexam suggests the litigation would be more effectively managed through the use of several subclasses. Rexam and USWA stipulated to the following seven subclasses:

(1) NCC USWA Subclass (approximately 553 members)-retirees formerly represented by the USWA who retired from NCC between March 1, 1960 and August 31, 1987, and their surviving spouses currently receiving benefits.

(2) ANC USWA (Former NCC Plants) Pre-583 Plan Subclass (approximately 614 members)-retirees formerly represented by the USWA who worked at former NCC plants and retired from ANC after August 31, 1987 and before August 1, 1994, and their surviving spouses currently receiving benefits.

(3) ACC USWA and ANC USWA (Former ACC Plants) Pre-583 Plan Subclass (approximately 68 members)-retirees formerly represented by the USWA who retired from ACC between January 1, 1960 and August 31, 1987, and their surviving spouses currently receiving benefits, and retirees formerly represented by the USWA who retired between September 1, 1987 and July 31, 1994 from ANC plants that were former ACC plants, and their surviving spouses currently receiving benefits.

(4) USWA 583 Plan Subclass (approximately 561 members)-retirees formerly represented by the USWA who retired from ANC and Rexam plants between August 1, 1994 and the present, and their surviving spouses currently receiving benefits.

*3 (5) USWA Managed Care Election Subclass (approximately 161 members)-retirees formerly represented by the USWA who retired from ANC, ACC, or NCC before March 1, 1993 and who later elected to enter Rexam's Freedom of Choice Plan, and their surviving spouses currently receiving benefits.

(6) Whitehouse Plant Subclass (approximately 45 members)-an Independent Agreement retiree group comprised of retirees formerly represented by the USWA who retired from Rexam's Whitehouse, Ohio plant, and their surviving spouses currently receiving benefits.

(7) Valparaiso Plant Subclass (approximately 63

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members)-an Independent Agreement retiree group comprised of retirees formerly represented by the USWA who retired from Rexam's Valparaiso, Indiana plant, and their surviving spouses currently receiving benefits.

Joint Motion for Class Certification at 3-4. Rexam also proposes the following four subclasses should be used to determine whether the welfare benefits of IAM retirees vested:

(1) IAM Pre-583 Plan Subclass (approximately 1072 members)-retirees formerly represented by the IAM who retired from ANC or ACC between January 1, 1960 and July 31, 1994, and their surviving spouses currently receiving benefits.

(2) IAM 583 Plan Subclass (approximately 346 members)-retirees formerly represented by the IAM who retired from ANC and Rexam plants between August 1, 1994 and the present, and their surviving spouses currently receiving benefits.

(3) Washington & Gary Plants Subclass (approximately 40 members)-retirees formerly represented by the IAM who retired from Rexam's Vancouver, Washington and Gary, Indiana plants, and their surviving spouses currently receiving benefits and retirees represented by the IAM who retired from Rexam's Kent, Washington plant before July 31, 1994, and their surviving spouses currently receiving benefits.

(4) San Leandro & Modesto Plants Subclass (approximately 182 members)-an Independent Agreement retiree group comprised of retirees formerly represented by the IAM who retired from Rexam's San Leandro and Modesto plants, and their surviving spouses currently receiving benefits

Pl.'s Mem. of Law in Supp. of Mot. for Class Certification at 27-28.

With the exception of Erickson, all of the individual defendants are members of the proposed USWA subclasses. Amended Class Action Compl. ¶¶ 33, 37, 53. Erickson, a Minnesota resident, is a member of the proposed San Leandro & Modesto Plants Subclass. Defs.' Mem. of Law in Opp'n to Mot. for Class Certification at 14. In its Contingent Motion to Amend Complaint, Rexam seeks to add additional individual defendants so each proposed subclass would have a

named representative. Rexam wishes to add Martha K. Yanosh, Gregory G. George, Delma V. Sisson and Donna M. Hogan to represent the USWA subclasses and Roy Gregory, Donald Schwenk and Alphonso Quiroga to represent the proposed IAM subclasses.^{FN3} While USWA stipulated to the addition of these individual defendants, IAM opposes the motion.

^{FN3}. Of the proposed representatives for the IAM subclasses, only Schwenk resides in Minnesota. See Proposed Second Am. Class Compl. [Docket No. 83] ¶¶ 6-21.

III. DISCUSSION

A. Class Certification

*4 For class certification to be appropriate, plaintiff must first establish the four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 23(a). Class certification is proper when (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative party are typical of the class (typicality); and (4) the representative party will fairly and adequately protect the interests of the class (adequacy).*Id.*

Rexam argues that all 3,500 plus benefits-eligible former employees who, at the time of retirement, were represented by USWA or IAM for collective bargaining purposes, and are presently accepting or deferring their retiree welfare benefits from Rexam, or are benefits-eligible spouses of former employees presently accepting retiree welfare benefits from Rexam, constitute one class as defined by Rule 23(a). As a result, Rexam argues subclasses are not necessary for certification but provide a useful management tool.

The Court will first consider whether this class is suitable for certification. An analysis of each of Rule 23(a)'s four prerequisites is unnecessary, as the Court finds insufficient commonality exists to certify the class.

Rexam argues the proposed defendant class satisfies the Rule 23(a)(2) commonality requirement because

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the legal issues of whether the retiree welfare benefits vested, and, if so, when, is common to all its former employees and their dependents regardless of their controlling CBA, union affiliation, or manufacturing plant. IAM contends the proposed class does not meet the commonality requirement because it requires interpretation of the terms of eleven different groups of CBAs and plans negotiated by different companies and separate unions at both the local and national levels.

“When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.” Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir.1977), cert. denied, 434 U.S. 856 (1977). However, “[w]hen the resolution of a common legal issue is dependent upon factual determinations that will be different for each purported class plaintiff, ... courts have consistently refused to find commonality and have declined to certify a class action.” Liberty Lincoln Mercury Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 76 (D.N.J.1993) (citing Werlein v. United States, 746 F.Supp. 887, 912 (D.Minn.1990), vacated on other grounds, 793 F.Supp. 898 (D.Minn.1992)).

To determine whether the benefits of the retirees or their spouses have vested, the Court must look to the terms of the respective plans and CBAs. See, e.g., Jensen v. SIPCO, 38 F.3d 945, 949 (8th Cir.1994). If any of these plans or CBAs is ambiguous, extrinsic evidence, such as bargaining history, extrinsic documents, and course of dealing, must be considered to determine the meaning of the terms. Seeid.; Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1517 (8th Cir.1988); Local Union No. 150-A, United Food and Comm. Workers v. Dubuque Packing Co., 756 F.2d 66, 69 (8th Cir.1985).

*5 In the instant case, Plaintiff admits eleven different groups of plans and CBAs control whether the welfare benefits of more than 3,500 retirees and their surviving spouses vested. In addition, many of these plans were originally negotiated between several different companies and two different unions. Furthermore, the plans and CBAs vary by individual bargaining unit. Although Rexam argues the proposed class shares the common legal question of whether, or at what point, its welfare benefits vested, Rexam frames the question too broadly. See Howe v. Thomp-

son, 896 F.2d 1107, 1111 (8th Cir.1990) (finding certified class was too broad to serve as the class for purposes of final judgment). This is not a case where the issue stems from a common right shared by all class members that happens to be articulated in separate contracts. See Deboer v. Mellon Mortgage Co., 64 F.3d 1171, 1174 (8th Cir.1995). Neither is it a case where the disparities between class members are limited to ancillary factual circumstances or the degree of the harm. Ultimately, the factfinder will need to make eleven different determinations as to whether the welfare benefits of retirees and their surviving spouses have vested. Where the gravamen of a case calls for interpretation of contract terms that vary from one agreement to another, the case may be inappropriate for class certification. See Sagers v. Yellow Freight System, Inc., 58 F.R.D. 54, 58 (N.D.Ga.1972).

For the aforementioned reasons, it is clear that the individualized differences between the eleven different groups of plans and CBAs, the companies who negotiated them, the separate unions and the individual bargaining groups override any common factual or legal questions. See Smith v. LeBlanc, 2003 U.S. Dist. LEXIS 23478, *5 (D.Minn. Dec. 30, 2003); Sandles v. Ruben, 89 F.R.D. 635, 636-37 (S.D.Fla.1981). As a result, Rexam's motion requesting certification of the more than 3,500 benefits-eligible former employees who, at the time of retirement, were represented by USWA or IAM for collective bargaining purposes, and are presently accepting or deferring their retiree welfare benefits from Rexam, or are benefits-eligible spouses of former employees presently accepting retiree welfare benefits from Rexam, is denied.

B. Subclass Certification

The next issue is whether the defects in the proposed class may be cured by subclasses. See In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1129 (7th Cir.1979) (“Division of a class or potential class into subclasses to account for differences in proof that may be required at trial is clearly permissible”). Although USWA and Rexam have stipulated to the subclasses including USWA retirees, class stipulations are not complete substitutes for the Court's analysis of whether, under Rule 23, certification is appropriate. Hervey v. City of Little Rock, 787 F.2d 1223, 1227 (8th Cir.1986); see

(Cite as: 2005 WL 1260914 (D.Minn.))

Joint Mot. to Certify Class. Under Rule 23(c)(4)(B), courts may certify subclasses provided they each independently meet the requirements of Rule 23 for the maintenance of a class action. Fed.R.Civ.P. 23(c)(4)(B); Paxton v. Union Nat'l Bank of Little Rock, 688 F.2d 552, 559 (8th Cir.1982). Consequently, it is necessary that each of the subclasses meet the four prerequisites of Rule 23(a).

1. Rule 23(a) Requirements

i. Numerosity

*6 Although “no arbitrary rules regarding the necessary size of classes have been established,” the class must be “so numerous that joinder of all members is impracticable.” Paxton, 688 F.2d at 559; Fed.R.Civ.P. 23(a)(1). Courts may also evaluate “the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members.” Paxton, 688 F.2d at 559. None of the eleven proposed subclasses have less than 40 members, while the largest has 1,072 members. See Pl.’s Mem. of Law in Supp. of Mot. for Class Certification at 25-28. The Court is satisfied that it would be impracticable to join 40 or more members for suit. See, e.g., Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 275-76 (10th Cir.1977) (finding a class of 41-46 members sufficiently numerous); Ark. Educ. Ass’n v. Bd. of Educ., Portland Ark. Sch. Dist., 446 F.2d 763, 765-66 (8th Cir.1971) (20 class members). Consequently, each proposed subclass meets the numerosity requirement.

ii. Commonality

The proposed subclasses do not suffer from the same defect as the overly broad class Rexam initially proposed. The subclasses are delineated by CBA, plan, union and bargaining unit. As a result, the members of each subclass share a common question of law and fact: under the terms of the CBA and the plan applicable to each subclass, did the welfare benefits of retirees or their surviving spouses vest and, if so, when? As a result, each proposed subclass satisfies the commonality requirement.

iii. Typicality

Rule 23(a)(3) requires that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” This requirement is satisfied “when the claims of the named plaintiffs emanate from the same event or are based on the same legal theory as the claims of the class members.” Lockwood Motors v. General Motors Corp., 162 F.R.D. 569, 575 (D.Minn.1995). “Thus a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences.” *Id.* “The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff.” DeBoer, 64 F.3d at 1174. Since the typicality inquiry often merges with the commonality analysis, the Eighth Circuit has given typicality an “independent meaning” by holding that Rule 23(a)(3) “requires a demonstration that there are other members of the class who have the same or similar grievances as the [class representative].” Paxton, 688 F.2d at 562 (citation omitted).

The Court is satisfied that each of the proposed subclasses meets the typicality requirement. All of the members of each subclass risk the loss or reduction of their welfare benefits. Whether those benefits have vested will be determined based on the respective CBAs and plans of each subclass and any extrinsic evidence necessary to resolve any ambiguity in their terms. Since these agreements result from collective bargaining, there should be no differences in the claims or defenses of individual members of the class.

iv. Adequacy

*7 In analyzing Rule 23(a)(4), courts should consider both “whether the class representatives have common interests with the class members,” and whether the named plaintiffs “will vigorously prosecute the interests of the class through qualified counsel.” Paxton, 688 F.2d at 562-63 (8th Cir.1982). Because the representatives in a class action must “possess the same interest and suffer the same injury” as their fellow class members, it is axiomatic that they must be members of the class they seek to represent. Roby v. St. Louis Southwestern Ry. Co., 775 F.2d 959, 961 (8th Cir.1985) (citations omitted). Furthermore, nothing in Rule 23 alters the jurisdictional requirement that the court must have *in personam* jurisdiction over the named individual representative of the class.

Calagaz v. Calhoun, 309 F.2d 248, 253 (5th Cir.1962).

a. IAM Subclasses

Lloyd Erickson is the only IAM retiree named in the Amended Class Action Complaint for Declaratory Judgment. See Am. Compl. ¶¶ 33, 37, 53. Before cancer forced him to retire, Erickson worked at the San Leandro plant for 33 years. Erickson Dep. [Docket No. 114] at 9, 13. Erickson was a member of IAM and briefly served as a substitute for a union steward who was having health problems. *Id.* at 9. Erickson currently receives welfare benefits from Rexam. *Id.* at 15-17. The parties contest whether Erickson is an adequate representative for the San Leandro and Modesto Plants Subclass.

Although the standard for adequately representing a class is not high, after reviewing Erickson's deposition, the Court finds Erickson does not qualify as an adequate representative for the San Leandro and Modesto Plants Subclass. Erickson is a 71 year old man with serious health concerns who appears to have been named by Rexam primarily because he is one of two Rexam retirees who were IAM members and currently reside in Minnesota. *Id.* at 7. He did not play a significant role in IAM leadership while at the San Leandro plant and no longer keeps in touch with any former employees. *Id.* at 9, 24. Erickson has not been in the San Leandro area for eleven years and never worked at the Modesto plant. *Id.* at 34-35, 51, 58. He requires regular care for his illnesses. *Id.* at 18-20, 39-42, 46. He has trouble concentrating and remembering routine details. *Id.* at 4-6, 19, 22. His knowledge of the instant lawsuit is limited to an understanding that Rexam is attempting to reduce his retiree benefits. *Id.* at 51-52. Erickson lives at a driving distance of approximately eight hours from Minneapolis, although the trip generally takes him much longer. *Id.* at 52. While he still drives, he admits he has difficulty, gets confused and must drive very slowly once he goes on the highway or encounters traffic. *Id.* at 52-54. As a result, Erickson has been unable to travel to the Twin Cities area to be with his two brothers on holidays. *Id.* at 54-55. Though Erickson gamely responded that he was willing to serve as a class representative, his participation seems less than voluntary. *Id.* at 51-52. For these reasons, the Court is convinced Erickson is not an adequate subclass representative.

*8 No other IAM retiree is currently named as an individual defendant and could serve as a representative for each of the four IAM retiree subclasses. To rectify this shortcoming, Rexam filed a Contingent Motion to Amend Complaint. In its Motion, Rexam requests leave to add as named defendants three additional IAM employees, Roy V. Gregory ("Gregory"), Donald R. Schwenk ("Schwenk") and Alphonso Quiroga ("Quiroga"), who will serve as representatives for the following subclasses:

- IAM Pre-583 Plan Subclass-Gregory
- IAM 583 Plan Subclass-Schwenk
- Washington State & Gary Plants Subclass-Quiroga

Proposed Second Am. Class Action Compl. ¶¶ 19-21, 50. As a threshold matter, the Court finds Gregory and Quiroga can not serve as subclass representatives because they are not residents of the State of Minnesota and Rexam has offered no evidence that they possess the minimum contacts necessary for this Court to exercise *in personam* jurisdiction over them.^{FN4} See Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1072-74 (8th Cir.2005). Without personal jurisdiction over the class representative, the Court has no jurisdiction over the class. See Calagaz, 309 F.2d at 253. The remaining question is whether Rexam should be granted leave to add Schwenk as the representative of the IAM 583 Plan Subclass.

^{FN4}. Apparently, with the exception of Erickson, Schwenk is the only Rexam retiree who was represented by IAM currently residing in Minnesota. See Proposed Second Am. Class Action Compl. ¶¶ 19-21.

Under Rule 15(a), leave to amend should be freely given when justice so requires but may be denied when "undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the non-moving party can be demonstrated." Roberson v. Hayti Police Dept., 241 F.3d 992, 995 (8th Cir.2001). When the motion to amend is made after the deadline set in the Pretrial Scheduling Order, Rule 16(b) only permits modification "upon a showing of good cause." Fed.R.Civ.P. 16(b). "The primary measure of Rule 16's 'good cause' standard is the

moving parties' diligence in attempting to meet the case management order's requirements." *Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir.2001).

The deadline for amending pleadings or adding parties in the instant action expired on June 1, 2004. See Pretrial Scheduling Order [Docket No. 58].^{FN5} Rexam proposed the eleven USWA and IAM subclasses based on the various CBAs and plans. This material was in Rexam's possession before litigation commenced, and was produced as part of Rexam's pretrial disclosures in March 2004. *See id.* In February 2004, Rexam represented it was prepared to file its class certification motion and objected to any discovery on class certification issues. Rule 26(f) Report [Docket No. 54] at 5-6. Furthermore, on November 4, 2004, four days before the first deposition was taken, Rexam forwarded Defendants a copy of its proposed subclass definitions. Tedrow Aff. [Docket No. 98] ¶ 2, Ex. A. These subclasses are identical to those eventually proposed in the present motion. Rexam did not file its Conditional Motion to Amend until March 7, 2005.

^{FN5}. On February 7, 2005, Magistrate Judge Arthur J. Boylan entered an Amended Pretrial Scheduling Order [Docket No. 81], which explicitly stated it only altered the deadlines specifically addressed in the amended order. As the deadline for amending pleadings or adding parties was not modified by the amended order, the June 1, 2004 deadline provided in the February 26, 2004 Pretrial Scheduling Order remains in force.

*9 Rexam contends that it initiated discussions regarding the proposed subclasses at an early stage in the litigation to facilitate management of the case. As it believed the class could be certified as a whole, subclass representatives were necessary only as a means of helping to manage the case, not essential to its certification. However, IAM has consistently contended Rexam's proposed class was overbroad and certification would depend on the individual subclasses. Furthermore, even if the addition of individual defendants to serve as subclass representatives was only to assist in managing the litigation, Rexam did not need to wait until March 7, 2005 to identify the representatives. Therefore, whether subclasses were necessary to certify the entire class or as man-

agement tools, Rexam had ample opportunity to amend the Complaint before its March 7, 2005 motion. In addition, granting Rexam's Motion to Amend now would further delay the litigation since the newly added defendants would have to file an answer, be deposed and may contest their adequacy as class representatives. Finally, Rexam's motion is arguably futile since the Court has no jurisdiction over two of the three proposed defendants. As a result, the Court denies Rexam's Contingent Motion to Amend Complaint to the extent it seeks to add individual, named defendants to represent the IAM subclasses.

Because Erickson is not an adequate subclass representative, Rexam did not name any additional IAM retirees as individual defendants in its Amended Complaint, and Rexam failed to show the good cause necessary to amend its Complaint, there are no adequate representatives for any of the proposed IAM subclasses. As a result, Rexam has failed to satisfy the requirements of Rule 23(a)(4) and the motion to certify the IAM subclasses must be denied.

b. USWA Subclasses

The Amended Class Action Complaint currently names the following individual defendants who may serve as representatives for the USWA subclasses:

- USWA 583 Plan Subclass-Slagerman, Rudolph, Stolarski
- Whitehouse Plant Subclass-Kieswether
- Valparaiso Plant Subclass-Kneifel, Rearick, Wilson

See Am Class Action Compl. ¶¶ 6-9, 11-13. In its Contingent Motion to Amend the Complaint, Rexam requests leave to add the individual defendants listed below to serve as representatives for the remaining USWA subclasses:

- NCC USWA Subclass-Martha K. Yanosh ("Yanosh")
- ANC USWA (Former NCC plants) Pre-583 Plan Subclass-Gregory G. George ("George")
- ACC USWA and ANC USWA (Former ACC Plants)-Delma V. Sisson ("Sisson")

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- USWA Managed Care Election Subclass-Donna M. Hogan ("Hogan")

See Proposed Second Am. Class Action Compl. ¶¶ 15-18, 49. As USWA stipulated to Rexam's Motion to Amend the Complaint, adding the aforementioned individuals does not raise the same concerns as Rexam's attempt to name additional IAM retirees. Contingent Stipulation of Rexam Inc. and USWA Defs. for Amendment of Class Action Compl. ("Stipulation to Amend Compl.") [Docket No. 100]. Although the parties have stipulated to the subclass representatives, the Court must still conduct an independent analysis to determine whether the representatives meet Rule 23(a)(4)'s adequacy requirements. Hervey, 787 F.2d at 1227.

*10 A review of the proposed subclass representatives indicates the following representatives do not reside in Minnesota:

- ACC USWA and ANC USWA (Former ACC Plants)-Sisson

- USWA Managed Care Election Subclass-Hogan

- Whitehouse Plant Subclass-Kieswether

- Valparaiso Plant Subclass-Kneifel, Rearick, Wilson

Proposed Second Am. Class Action Compl. ¶¶ 9, 11-13, 17-18, 49. Once again, neither Rexam nor USWA has provided any evidence that these individual defendants possess sufficient minimum contacts for the Court to exercise *in personam* jurisdiction over them. See Dever, 380 F.3d at 1072-74. As a result, these individual defendants are inadequate class representatives and the Court lacks jurisdiction over the aforementioned four subclasses. See Calagaz, 309 F.2d at 253. In their stipulation, Rexam and USWA agree, in the event any individual defendant is deemed inadequate, to work together to identify an appropriate subclass representative. Stipulation to Am. Compl. ¶ 2. As a result, the Court grants Rexam and USWA 60 days to find and add appropriate representatives for the ACC USWA and ANC USWA (Former ACC Plants) Subclass, the USWA Managed Care Election Subclass, the Whitehouse Plant Subclass, and the Valparaiso Plant Subclass.

The Court finds the individual defendants for the three remaining USWA classes have common interests with the class members and will vigorously prosecute the interests of the class through qualified counsel. All of the proposed class representatives are former Rexam employees who claim benefits under USWA plans. There is no indication that their claims or interests are adverse to the rest of their respective subclasses. Furthermore, the Stipulation to Amend Complaint indicates that each individual defendant will retain USWA counsel to represent them. *Id.* Assuming appropriate amendment of the Complaint, the USWA 583 Plan Subclass, the NCC USWA Subclass, and the ANC USWA (Former NCC plants) Pre-583 Plan Subclass meet Rule 23(a)(4)'s adequacy requirement.

2. Rule 23(b) Requirements

Upon satisfying the four requirements of Rule 23(a), a party seeking class certification must also demonstrate that the action falls within one of the three categories of Fed.R.Civ.P. 23(b). In their Joint Motion for Class Certification, Rexam and USWA move for certification under either, or both, Rule 23(b)(1)(A) or (b)(2). Joint Mot. for Class Certification ¶¶ 7, 12-13. Despite the parties' stipulation, the Court must independently evaluate whether the USWA 583 Plan Subclass, the NCC USWA Subclass, and the ANC USWA (Former NCC plants) Pre-583 Plan Subclass meet Rule 23(b)'s requirements. Hervey, 787 F.2d at 1227.

Rule 23(b) provides, in relevant part:

An action may be maintained as a class action if the prerequisites of subdivision are satisfied, and in addition:

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

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

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class,

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thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole....

Fed.R.Civ.P. 23(b).

The Eighth Circuit has held that "Rule 23(b)(2) certification is appropriate when plaintiffs seek injunctive relief from acts of an employer on grounds generally applicable to the class." *Paxton*, 688 F.2d at 563 (internal quotations and citations omitted); see also *Smith v. United HealthCare Servs., Inc.*, 2002 U.S. Dist. LEXIS 2140, *15 (D.Minn. Feb. 5, 2002). Although the posture of the instant case is for declaratory judgment by the employer, rather than injunctive relief by the employee, the principles are the same. In *John Morrell & Co. v. United Food & Commercial Workers Int'l Union*, a case similar to the instant matter, an employer filed suit against a class of retired former employees seeking a declaratory judgment that retiree welfare benefits were not vested. 825 F.Supp. 1440 (D.S.D.1993), *aff'd*, 37 F.3d 1302 (8th Cir.1994). The parties stipulated class certification was appropriate under either Rule 23(b)(2) or (b)(1)(A) or (B) and the Court certified the class. *Morrell Stipulation* (App. 3 [Docket No. 93]); see also *McKay v. County Election Commissioners for Pulaski County, Arkansas*, 158 F.R.D. 620 (E.D.Ark.1994) (finding certification of defendant class under Rule 23(b)(2) appropriate when plaintiffs sought declaratory and injunctive relief to require defendants to take affirmative steps to implement ADA). For each of the subclasses in the instant case, the relief sought is declaratory and injunctive based on Rexam's proposed class-wide modifications to the retirees' welfare benefits. As a result, certification of each subclass is appropriate under Rule 23(b)(2).^{FN6}

FN6. As Rexam and USWA have stipulated that certification is appropriate under Rule 23(b)(2), the Court will not address whether the alternate ground of certification under Rule 23(b)(1)(A) is necessary at this time.

Having found that three USWA subclasses satisfy the requirements of Rule 23(a) and (b), the following subclasses are certified:

NCC USWA Subclass (approximately 553 members)-retirees formerly represented by the USWA who retired from NCC between March 1, 1960 and August

31, 1987 who are receiving benefits or are eligible to receive benefits, and their surviving spouses currently receiving benefits, pursuant to retiree welfare benefit plans sponsored by Rexam.

ANC USWA (Former NCC Plants) Pre-583 Plan Subclass (approximately 614 members)-retirees formerly represented by the USWA who worked at former NCC plants and retired from ANC after August 31, 1987 and before August 1, 1994 who are receiving benefits or are eligible to receive benefits, and their surviving spouses currently receiving benefits, pursuant to retiree welfare benefit plans sponsored by Rexam.

**12 USWA 583 Plan Subclass (approximately 561 members)*-retirees formerly represented by the USWA who retired from ANC and Rexam plants between August 1, 1994 and the present who are receiving benefits or are eligible to receive benefits, and their surviving spouses currently receiving benefits, pursuant to retiree welfare benefit plans sponsored by Rexam.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion to Certify Class [Docket No. 76] is DENIED;
2. Plaintiff and Defendant USWA's Joint Motion to Certify Class [Docket No. 89] is GRANTED as to the NCC USWA Subclass, the ANC USWA (Former NCC Plants) Pre-583 Plan Subclass, and the USWA 583 Plan Subclass, and DENIED as to the ACC USWA and ANC USWA (Former ACC Plants) Pre-583 Plan Subclass, the USWA Managed Care Election Subclass, the Whitehouse Plant Subclass and the Valparaiso Plant Subclass; and
3. Plaintiff's Conditional Motion to Amend/Correct Amended Complaint [Docket No. 83] is GRANTED as to Martha K. Yanosh and Gregory G. George and DENIED as to the remaining individual defendants.

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EXHIBIT B

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3). NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.
William R. KOCHLIN, et al., Appellants,
v.
NORWEST MORTGAGE, INC., et al., Respondents.
No. C3-01-136.
July 31, 2001.

James W. Rude, Felhaber Larson Fenlon & Vogt and Rodney A. Wilson, Wilson Law Office, P.A., Minneapolis, MN, for appellants.
Alan H. Maclin, Mark G. Schroeder, Brent R. Lindahl, Briggs & Morgan, P.A., St. Paul, MN, for respondents.

Considered and decided by HALBROOKS, Presiding J., SCHUMACHER and WILLIS, JJ.

UNPUBLISHED OPINION

HALBROOKS,

*1 Appellants sued because respondents did not automatically cancel appellants' private mortgage insurance (PMI) when the loan-to-value ratio on appellants' mortgage reached 80%. Appellants prevailed at trial. Appellants now challenge the district court's refusal to certify a class action. Respondents challenge the denial of their motions for summary judgment, directed verdict, JNOV, and a new trial. We affirm.

FACTS

The mortgage of the property owned by appellants William and Rose Kochlin stated that they were required to pay PMI premiums, "if any," for the life of the mortgage and that this requirement could be al-

tered by written agreement with the lender. Appellants' loan-approval conditions document (LACD) stated that PMI was to be paid "until" the loan-to-value ratio (LTV) for the property reached 80%. When appellants' LTV reached 80%, the PMI was not automatically cancelled. Appellants sued respondents Norwest Bank and Norwest Mortgage (collectively Norwest) seeking to recover the PMI premiums paid after their LTV reached 80% and sought to certify a class action. The district court denied (a) appellants' motion to certify a class under Minn. R. Civ. P. 23.02(a)(1), a later motion to certify under Minn. R. Civ. P. 23.02(c), and a subsequent oral motion to certify a class; (b) Norwest's motions for summary judgment, directed verdict, and (after a verdict for appellants) Norwest's motion for JNOV; and (c) Norwest's motion for a new trial. Appellants appeal the denial of class certification. Norwest appeals the denial of summary judgment, directed verdict, JNOV, and a new trial.

DECISION

I.

The district court ruled that under the reasoning of Washington v. Vogel, 158 F.R.D. 689 (M.D.Fla.1994), appellants' request to certify a class action under Minn. R. Civ. P. 23.02(c) was untimely because it was not made when appellants had previously sought to certify a class under Minn. R. Civ. P. 23.02(a)(1).^{FNI} Appellants note that under Minn. R. Civ. P. 23.03(a), an order regarding certification "may be altered or amended before a decision on the merits," that Vogel was partially based on the requesting party's failure to satisfy a federal rule requiring certification requests to be made within 90 days of the filing of the complaint, and that Minnesota lacks a time limit for certification requests. But Minnesota does require resolution of certification requests "[a]s soon as practicable." Minn. R. Civ. P. 23.03(a). Therefore, a party seeking certification must do so as soon as practicable. See State ex rel Neighbors Organized in Support of the Env't v. Doty, 396 N.W.2d 55, 57 (Minn.App.1986) (noting, where timing of certification request not at issue, request is to be made "as soon as practicable"). Here, appellants concede that their second certification re-

quest could have been made with their first request. The trial court found that appellants' failure to do so "was a matter of strategy." Because appellants' second motion was not made "as soon as practicable," we will not reverse on this point.

^{FN1} Minn. R. Civ. P. 23 "closely parallels" and "follows" Fed.R.Civ.P. 23, and has done so since the 1968 revision of the Minnesota rule. 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 23.2 (1998). Therefore, "decisions under [the federal rule] may be of greater persuasive value than the Minnesota Supreme Court's pre 1968 rulings." *Id.*

*2 Noting that certification orders can be altered after an initial denial, appellants allege that their second certification motion cannot be untimely. The authorities cited by appellants to support their argument are distinguishable. See Elster v. Alexander, 608 F.2d 196, 197 (5th Cir.1979) (refusing to treat improper appeal of denial of class certification as petition for mandamus and noting that order regarding certification is open to modification throughout trial); Pettico Enter. v. White, 162 F.R.D. 151, 154-56 (M.D. Ala 1995) (certifying class, where there was no objection, after previously denying certification). Generally, a certification decision will not be altered absent changed circumstances or new information. 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 7.47 (3d ed.1992). Here, because the basis for appellants' second motion could have been incorporated in the initial motion, no changed circumstances underscored the second motion. We affirm the determination that appellants' second certification motion was untimely.^{FN2}

^{FN2} Appellants also allege that the trial court should have certified a class under Minn. R. Civ. P. 23.02(c) at the time of appellants' first certification motion. Appellants' first motion did not seek certification under that rule. Accepting this argument would be inconsistent with the fact that the burden of showing the propriety of certification is on the party seeking certification. Peterson v. BASF Corp., 618 N.W.2d 821, 826 (Minn.App.2000). Also, the authority appellants cite in support of their argument is distinguishable. See Marshall v. Electric

Hose & Rubber Co., 68 F.R.D. 287, 290-92 (D.Del.1975) (addressing basis for certification apparently put in issue by defendant); Weit v. Continental Ill. Nat'l Bank, 60 F.R.D. 5, 7 (N.D.Ill.1973) (addressing all bases for certification under rule 23(b) where "all the elements required by Fed.R.Civ.P. 23(a) and 23(b) are conclusively alleged").

II.

A party seeking class certification must, among other things, satisfy Minn. R. Civ. P. 23.02. See Streich v. American Family Mut. Ins. Co., 399 N.W.2d 210 (Minn.App.1987) (discussing certification process), *review denied* (Minn. Mar. 25, 1987). Rule 23.02(c) allows certification if common questions of law or fact "predominate over any questions affecting only individual members" of the proposed class and a class action is superior to other methods of resolving the controversy. The trial court ruled that the common issues of the LACD and its impact on PMI termination "d[id] not predominate" and that a class action was "not superior to other means for the fair and efficient resolution of this case."

Appellants allege that under Streich and Forcier v. State Farm Mut. Auto. Ins. Co., 310 N.W.2d 124 (Minn.1981), the jury verdict in their favor establishes predominance under rule 23.02(c). In those cases, liability was determined as a matter of law. Streich, 399 N.W.2d at 214-15; Forcier, 310 N.W.2d at 128. Here, the trial court denied both parties' motions for summary judgment because, among other things, fact issues existed regarding liability. Those fact issues related to the meaning of the contract language regarding PMI termination and to the parties' conduct. The mortgage in this case stated that the PMI-termination conditions could be altered by written agreement or applicable law. While the potential proposed class included people with the same LACD that appellants signed, the existence of other PMI-related documents for other members of the proposed class was not excluded. Therefore, the fact that this jury concluded that the combination of appellants' contract language and conduct allowed appellants to recover does not necessarily mean that other borrowers with other language and/or conduct would also recover. Therefore, we decline to reverse on this point.

*3 Appellants claim that Norwest never alleged the existence of non-LACD documents addressing PMI termination and to assume the existence of such agreements is inconsistent with the policy favoring resolution of doubt in favor of class certification. *E.g.* *Streich*, 399 N.W.2d at 218; *Forcier*, 310 N.W.2d at 130. But the burden is on appellants to show certification is proper, not on Norwest to show that it is improper. *Peterson*, 618 N.W.2d at 826. Questions exist regarding the existence and terms of other documents that might alter PMI termination. To the extent that the parties dispute what was, was not, or might have been produced in discovery regarding the possible existence of such documents, we note that discovery issues are within the trial court's wide discretion. *Shetka v. Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916, 921 (Minn.1990).

Appellants also allege that the portion of the order denying their second certification motion, that held that the requirement of predominance is absent, is inconsistent with the first order that held that common questions existed and that those common questions were typical of those to be presented by potential class members. The trial court correctly recognized that it is "far more demanding" to show that common questions will predominate in trial than it is to show the existence of common questions. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622-24, 117 S.Ct. 2231, 2249-50 (1997). The trial court explicitly rejected the idea that a finding of the existence of common questions necessarily meant that those questions would predominate in the litigation. The order denying appellants' first motion stated that the commonality requirement was satisfied because the "core issue" was the "interpretation of the mortgage contract" and, because all members of the proposed class had mortgages originating with the same lender, "it is logical that the terms of their mortgage contracts will be similar with respect to the requirement for [PMI]." The order denying the second motion, however, states the common issue as "the legal interpretation of the conditions [of the LACD]." Because the two orders identify different questions as the crux of the litigation, we reject any allegation that application of res judicata requires that the trial court's ruling on predominance was determined by the first order's commonality and typicality rulings.^{FN3}

^{FN3}. For similar reasons we reject appel-

lants' allegations that the order denying the second motion is internally inconsistent because it finds that the commonality and typicality requirements are satisfied but fails to find that common questions predominate this matter.

Citing *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683 (N.D.Ga.1983), appellants note that cases arising from form contracts are "routinely certified" as class actions. While *Kleiner* states that "claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such[.]" it does so in the context of addressing the lower threshold of the commonality requirement of Fed.R.Civ.P. 23.01 rather than the predominance requirement of rule 23.02(c) at issue here. 97 F.R.D. at 692 (citations omitted). Moreover, because the mortgage allows the PMI requirements to be altered by written agreement, absent information on the existence and content of non-LACD agreements, it is not clear that all members of the proposed class have the same PMI-termination terms.

*4 Appellants allege that because the jury resolved the ambiguity in the PMI-termination language in their favor, potential variations in state law regarding PMI cancellation should not have been a basis on which to deny certification. If a contract is ambiguous, extrinsic evidence may be used to determine its meaning. The terms of a contract are generally fact questions for the jury. *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 643 (Minn.App.1985), review denied (Minn. June 24, 1985). Here, the trial court denied summary judgment on liability because fact questions existed about ambiguous PMI terms and the parties' conduct was relevant to resolving that ambiguity. Because the evidence of parties' conduct could reasonably vary from case to case, we cannot say that this jury's determination should be dispositive for all claims. Appellants also allege that it was error to base denial of certification on the existence of different PMI statutes because (1) most of the statutes cited by the trial court were enacted after this lender stopped using this PMI language, (2) none of the statutes are retroactive, and (3) the statutes do not alter pre-existing contract rights. But contract rights depend on the meaning of the contract. Here, because the PMI portion of the contract was ambiguous, its meaning was a fact ques-

tion partially dependent upon the conduct of the parties to the contract. The contract rights of other alleged members of the proposed class, if any, were unclear. Absent a determination of what those rights were, the existence and extent of any impact of the various state statutes cannot be assessed.

In denying certification, the trial court stated that Minnesota residents may be entitled to greater damages under Minn.Stat. § 47.20, subd. 14 (1998), than if the PMI was cancelled under the terms of their mortgage contract. Appellants allege this ruling misreads the statute. The statute was repealed and rewritten shortly after denial of the second motion. 1999 Minn. Laws ch. 151, §§ 11, 49. Both the past and present versions of the statute require lenders to pay “[a]ny refund or rebate for unearned [PMI] premiums” to the person who makes the mortgage payment. Minn.Stat. § 47.20, subd. 14(b) (1998); Minn.Stat. § 47.207, subd. 5(b) (2000). The trial court’s reading of the prior statute is consistent with the language of “any refund or rebate.” *Cf.* Minn.Stat. § 645.16 (2000) (requiring courts to give statutes their ordinary meaning).

The trial court ruled that, under *Keating v. Phillip Morris, Inc.*, 417 N.W.2d 132 (Minn.App.1987), the different damage calculations required for each mortgage weighed against a determination that the predominance requirement had been satisfied. *Keating* states:

Thus in cases where the fact of injury and damage breaks down in what may be characterized as “virtually a mechanical task,” “capable of mathematical or formula calculation,” the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability. On the other hand, where the issue of damages and impact does not lend itself to such a mechanical calculation, but “requires separate mini-trial[s],” of an overwhelming large number of individual claims, courts have found that the “staggering problems of logistics” thus created “make the damage aspect of [the] case predominate,” and render the case unmanageable as a class action.

*5 *Id.* at 137 (quoting *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir.1977) (footnotes omitted), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1605 (1978)). Appellants allege that the damages here are

the PMI premiums paid after the LTV reached 80% and that all of the information needed to make those determinations is available. The trial court concluded that “separate mini-trials” would be needed because of the differences in state laws, the contract terms regarding PMI termination, and (for some borrowers) the payment history, length of loan, and possible breach of a mortgage contract (e.g., not making payments) to arguably justify a subsequent breach by Norwest (not terminating PMI). The impact of state law on a contract depends at least in part on the terms of the contract. Here, the ambiguity of the PMI terms rendered the meaning of those terms a fact question. Resolution of those facts depended at least partially on the various potential parties’ conduct. Similarly, the existence and impact of multiple breaches of the same contract would also require individual determination. We conclude that the trial court did not err in its rulings.

Because appellants have not shown that the trial court erred in concluding that common questions would not predominate in this litigation, we need not address appellants’ other challenges to the denial of certification. We note, however, that the possible applicability of different statutes of limitation for claims arising in different states and the possible over-breadth of the proposed class, raise questions about whether a class action is a “superior” method of resolving the claims of the class members.

III.

Norwest alleges the trial court should have granted its motions for summary judgment, directed verdict, and JNOV. The standards for these motions are similar. *Howie v. Thomas*, 514 N.W.2d 822, 825 (Minn.App.1994) (stating standards for summary judgment and directed verdict are “similar”); *American Mach. & Tool Co., Inc. v. Strite-Anderson Mfg. Co.*, 353 N.W.2d 592, 598 (Minn.App.1984) (stating directed verdict and JNOV have “same standard”), *review denied* (Minn. Sept. 12, 1984). Summary judgment is appropriate if (1) there are no genuine issues of material fact and (2) one party is entitled to judgment as a matter of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn.1990). On appeal from a denial of summary judgment, we view the record in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993).

We reject Norwest's argument that Norwest Mortgage was entitled to judgment because it lacked privity with appellants. Norwest Bank owned appellants' mortgage and Norwest Mortgage acted as Norwest Bank's agent. Also, it appears that Norwest Mortgage is to be compensated by Norwest Bank for any loss Norwest Mortgage incurred within the scope of its agency. Hollandale Mktg. Ass'n v. Goemat, 245 Minn. 154, 161, 72 N.W.2d 376, 380 (1955). Even if the lack of privity argument were accepted, Norwest Mortgage was not harmed by any failure to dismiss it. See Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

*6 Norwest alleges that the LACD was a condition precedent to, and not a part of, the mortgage and that the mortgage unambiguously required PMI to be paid for the life of the mortgage. A condition precedent is "to be performed before the agreement of the parties becomes operative." Lake Co. v. Molan, 269 Minn. 490, 498, 131 N.W.2d 734, 740 (1964). A "condition" that appellants pay PMI until the LTV reached 80% could not be accomplished before the loan was made and the property mortgaged. While Norwest cites cases for the proposition that the terms of a loan-commitment letter are not terms of a mortgage, there is no indication that any of those cases involve what its own expert admitted is the singularly peculiar LACD used here.

Norwest alleges that the LACD "says nothing about" terminating PMI and therefore, even if the LACD is part of the mortgage contract, it does not render the PMI termination conditions ambiguous. The LACD states that the PMI "[will] remain in force until the loan balance is reduced to 80% of the original value." (Emphasis added.) While the LACD may not use the word "terminate," the reasonable interpretation is that the PMI terminates when the LTV reaches 80%.

Norwest alleges that appellants waived their claim to back-PMI premiums by not requesting PMI be cancelled, despite the fact that appellants had all of the information to do so. Generally, waiver is a jury question. Engstrom v. Farmers & Bankers Life Ins. Co., 230 Minn. 308, 312, 41 N.W.2d 422, 424 (1950). Here, that question was put to the jury with the instruction that Norwest requested and the jury explicitly rejected the idea.

Norwest also alleges that, under Carson v. Cochran, 52 Minn. 67, 53 N.W. 1130 (1892), appellants cannot recover back-PMI premiums because appellants, "without any mistake of fact," voluntarily paid those premiums. Norwest also argued that appellants are estopped from recovering because, by continuing to pay the PMI premiums, they induced Norwest to continue collecting and forwarding those premiums to its PMI insurer. The record shows that appellants believed that it was Norwest's obligation to automatically reduce the mortgage payment by the amount of the PMI premium at the appropriate time. Appellants' position is consistent with both the LACD's statement that PMI would continue "until" the LTV reached 80% and with the statement in the Truth in Lending Disclosure that the mortgage payment would be reduced by an amount equal to the PMI premium in January 1996.

IV.

A ruling on a motion for a new trial is not reversed absent an abuse of the trial court's discretion. Halla Nursery, Inc. v. Baumann-Furrie & Co., 454 N.W.2d 905, 910 (Minn.1990). Norwest alleges it was prejudiced by certain testimony regarding the meaning of the PMI termination conditions in the mortgage and LACD. See Uselman v. Uselman, 464 N.W.2d 130, 138 (Minn.1990) (allowing new trial for prejudicial evidentiary rulings). An individual with the same mortgage and LACD that appellants had, testified that Norwest refunded the PMI premiums he had paid after his LTV reached 80%. That witness's testimony was relevant to address how Norwest (on at least one occasion) treated the documents in question. Norwest also alleges it was prejudiced by the trial court's refusal to let one of its witnesses testify about Norwest's understanding of the LACD, despite the fact that the court let appellants' counsel question the witness on the subject. Counsel's questioning was brief and showed that the witness disagreed with appellants' reading of the LACD. It is unclear how Norwest was prejudiced when the jury heard testimony that was consistent with Norwest's theory of defense. Norwest also challenges the use of a deposition of its general counsel, alleging that the deposition addressed Norwest's practices regarding truth-in-lending disclosures rather than the practices of the mortgagee bank that later sold appellants' mortgage to Norwest. But the truth-in-lending disclosure is

required in mortgage transactions and the portion of the deposition read at trial addressed the meaning of the information contained in the disclosure. Norwest has not shown how the jury's understanding of the required truth-in-lending disclosure caused prejudice.

*7 Norwest also alleges it was prejudiced by certain jury instructions and the special verdict form. *See Molkenbur v. Hart*, 411 N.W.2d 249, 254 (Minn.App.1987) (allowing new trial for prejudicial special verdict form); *Gleeman v. Tripplet*, 301 Minn. 504, 506, 222 N.W.2d 787, 788 (1974) (allowing new trial for prejudicial jury instructions). Norwest alleges that the trial court erred by telling the jury that the contract included documents other than the mortgage and the note because the existence of a contract is a jury question. This argument is a collateral attack on the trial court's prior rejection of Norwest's allegation that the LACD was not a part of, but a condition precedent to, the mortgage. Neither party disputed that a mortgage contract was formed.

Lastly, Norwest alleges the trial court erred in directing the jury to construe the contract against Norwest because it did not draft the contract. But Norwest is the assignee of the mortgage. Generally, an assignee stands in no better shoes than the assignor. *Meyers v. Postal Finance Co.*, 287 N.W.2d 614, 617 (Minn.1979).

Affirmed.

Minn.App.,2001.
Kochlin v. Norwest Mortg., Inc.
Not Reported in N.W.2d, 2001 WL 856206
(Minn.App.)

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