

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HORIZON UNLIMITED, INC. & : CIVIL ACTION
JOHN HARE :
 :
v. :
 :
RICHARD SILVA & SNA, INC. : NO. 97-7430

MEMORANDUM and ORDER

Norma L. Shapiro, J.

May 11, 1998

Plaintiffs Horizon Unlimited, Inc. ("Horizon") and John Hare ("Hare") (collectively the "plaintiffs"), alleging violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann. tit. 73, § 201-1, et seq., filed this action against defendants Richard Silva ("Silva") and SNA, Inc. ("SNA") (collectively the "defendants"). Plaintiffs seek class certification under Federal Rule of Civil Procedure 23; defendants oppose certification. For the reasons stated below, plaintiffs' motion for class certification will be denied.

BACKGROUND

Plaintiffs each purchased a Seawind airplane kit manufactured by SNA, of which Silva is president. The Seawind kit contains fiberglass and machine parts; the purchaser provides the engine, propeller and other parts. The purchaser also must construct at least 51% of the aircraft under Federal Aviation Administration ("FAA") regulations. The purchaser may obtain outside help to construct the airplane, but under FAA regulations defendants are not permitted to construct the airplane for the

buyer.

Purchasers of the Seawind kit modify their airplanes and deviate from the instructions in the SNA manual. (Richard Silva Aff. ¶ 7, attached as Ex. 1 to Def.'s Brief ["Silva Aff."]). Purchasers may select different types of turbine engines to install in the Seawind kit; this will affect the performance of the completed aircraft. (Id. ¶¶ 2, 7). Many Seawind customers contract with third-parties to construct the airplanes for them; the contractors vary in education and experience, also affecting the operation of the finished Seawinds.

Hare, through a third-party builder, deviated from the instructions in the Seawind manual when installing the following: elevator trim system, brakes, flap drive, canopy actuator, hydraulic system and rudders. (Id. ¶ 8). Horizon made alterations to its Seawind when installing: the elevator, internal console, ailerons, rudder, flap drive, spray rails, landing gear, brakes, wheels, nose wheel steering and stabilizer. (Id. ¶ 9).

One hundred Seawind kits have been purchased, but only twelve of those Seawind airplanes are fully constructed and operational today. (Silva Aff. ¶ 2). Thirty-five of the Seawind customers purchased their kits prior to SNA's formation in 1991; they were not affected by any specifications printed in SNA's promotional brochures. (Id. ¶ 5).

Plaintiffs allege their Seawind airplanes did not perform as represented in SNA's promotional brochures. Plaintiffs' Complaint does not state how their airplanes are deficient or what brochure specifications they are challenging; plaintiffs only allege the airplanes did not "perform according to the specifications and building times" printed in the promotional materials.

Plaintiffs' action is proceeding on a claim for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), Pa. Stat. Ann. tit. 73, § 201-1, et seq., for alleged misrepresentations in SNA's promotional brochures.¹ They now seek to certify a class of "all persons who purchased a Seawind aircraft, which are manufactured, marketed and sold by defendants, and who have suffered economic loss as a result [of] the acts alleged herein."

DISCUSSION

Federal Rule of Civil Procedure 23(a) provides that:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (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

¹ The court previously dismissed plaintiffs' claims for breach of warranty, negligent misrepresentation and fraud and deceit. See Horizon Unlimited, Inc v. Silva, No. 97-7430, 1998 WL 88391 (E.D. Pa. Feb. 26, 1998), reconsideration denied, Horizon Unlimited, Inc v. Silva, No. 97-7430, 1998 WL 150999 (E.D. Pa. Mar. 27, 1998).

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

To obtain class action certification, plaintiffs must establish that all four requisites of Rule 23(a) and at least one part of Rule 23(b) are met. See Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). The plaintiff bears the burden of establishing each of these requirements. See Hutchinson v. Lehman, No. 94-5571, 1995 WL 31616, at *2 (E.D. Pa. Jan. 27, 1995); Lloyd v. City of Philadelphia, 121 F.R.D. 246, 249 (E.D. Pa. 1988); see also Anderson v. Home Style Stores, Inc., 58 F.R.D. 125, 130 (E.D. Pa. 1972).

I. NUMEROSITY

Rule 23 provides a remedy for situations where the parties are so numerous it is impracticable to bring each member before the court. There is no precise number necessary for class certification. Whether to certify a class must be based on the particular facts of each case. See, e.g., Fox v. Prudent Resources Trust, 69 F.R.D. 74, 78 (E.D. Pa. 1975).

"The numerosity test is one of practicability of joinder." Ulloa v. City of Philadelphia, 95 F.R.D. 109, 115 (E.D. Pa. 1982). Factors in evaluating impracticability of joinder are: 1) the size of the putative class; 2) the

geographic location of the members of the proposed class; and 3) the relative ease or difficulty in identifying members of the class for joinder. See Ardrey, 142 F.R.D. at 110; see Kilgo v. Bowman Trans., Inc., 789 F.2d 859, 878 (11th Cir. 1986); Andrews v. Bechtel Power Corp., 780 F.2d 124, 131-32 (1st Cir. 1985), cert. denied, 476 U.S. 1172 (1986); MacNeal v. Columbine Exploration Corp., 123 F.R.D. 181, 185 (E.D. Pa. 1988).

Plaintiffs seek to certify a class of 100 Seawind customers. "While the absolute number of class members is not the sole determining factor, generally the courts have found the numerosity requirement fulfilled where the class exceeds 100." Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 109 (E.D. Pa. 1992) (quoting Fox, 69 F.R.D. at 78); see Kromnick v. State Farm Ins. Co., 112 F.R.D. 124, 127 (E.D. Pa. 1986). However, 35 of the 100 customers purchased their Seawind kits prior to the existence of SNA; they did not rely on any representations made in SNA publications when purchasing their airplane kits and are not similarly situated to the remaining 65 customers. These 35 customers may be too small for certification as a sub-class. See Crawford v. Western Elec. Co., 614 F.2d 1300, 1305 (5th Cir. 1980) (34 members insufficient); Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073, 1077 (10th Cir.

1975) (37 members insufficient); Roundtree v. Cincinnati Bell, Inc., 90 F.R.D. 7, 9 (S.D. Ohio 1979) (36 members insufficient).

A potential class of 65 members is sufficiently large to satisfy the first step in the numerosity requirement. See Metts v. Houstoun, No. 97-4123, 1997 WL 688804, at *2 (E.D. Pa. Oct. 24, 1997) (Shapiro, J.) (64 members); Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307, 309 (S.D. Ohio 1976) (55 members); Bachman v. Collier, 73 F.R.D. 300, 304 (D.D.C. 1976) (63 members); Urban v. Breier, 401 F. Supp. 706, 709 (E.D. Wis. 1975) (54 members). However, of the 65 customers who purchased kits after the formation of SNA, there are only 12 completed Seawind airplanes. It is impossible for those who have not completed construction to determine whether they have suffered any damage or if SNA's promotional representations in the brochures were inaccurate; those with uncompleted kits have no action against defendants at this time and cannot be included in a proposed class.

A class of the 12 customers with completed Seawind kits is too small for certification. See Moore v. Western Pa. Water Co., 73 F.R.D. 450, 452 (W.D. Pa. 1977) (14 members insufficient); Bernstein v. National Liberty Int'l Corp., 407 F. Supp. 709, 716-17 (E.D. Pa. 1976) (17 members

insufficient); Tuma v. American Can Co., 367 F. Supp. 1178, 1189 (D.N.J. 1973) (12 members insufficient). There is no apparent difficulty in joinder that would justify class certification of such a small group.

The second factor is the geographical diversity of the proposed class members. See Ardrey, 142 F.R.D. at 110. Class actions are appropriate "when members of the class are from disparate geographical areas and where members cannot easily be identified." Wilcox v. Petit, 117 F.R.D. 314, 317 (D. Me. 1987); see Andrews, 780 F.2d at 131-32. See Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980) (denying certification because the 31 proposed class members all worked for the same company and lived in "a compact geographical area"), cert. denied, 449 U.S. 1113 (1981); Browne v. Sabatina, No. 89-1228, 1990 WL 895, at *1 (E.D. Pa. Jan. 5, 1990) (Shapiro, J.) (denying certification of 57 member class because the members all lived in "the same area of Philadelphia"). When "potential class members are located throughout a number of counties [of several states] joinder ... would be impracticable." Gentry v. C & D Oil Co., 102 F.R.D. 490, 493 (W.D. Ark. 1984).

Seawind airplane kits were marketed and sold nationally and internationally. The prior manufacturer of the Seawind kit was a Canadian company; plaintiff Hare is a Canadian

citizen. The court will assume the 12 proposed class members come from a diverse geographical area.

If the class members cannot easily be identified, certification is appropriate. See Ardrey, 142 F.R.D. at 110; Westcott v. Califano, 460 F. Supp. 737, 745 (D. Mass. 1978) aff'd, 443 U.S. 76 (1979). Here there is no difficulty identifying the purchasers of Seawind aircraft kits from SNA. While the proposed class members come from a diverse geographical area, the size and ease of identification fail to satisfy the numerosity requirement of Rule 23(a)(1).

II. COMMONALITY AND TYPICALITY

Rule 23(a) requires the proposed representative to show "questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), and claims "typical" of the class. Fed. R. Civ. P. 23(a)(3). "Although Rule 23 establishes these two prerequisites as separate and distinct, the analyses overlap, and therefore these concepts are often discussed together." Hassine v. Jeffes, 846 F.2d 169, 176 n.4 (3d Cir. 1988); see Droughn v. F.M.C. Corp., 74 F.R.D. 639, 642-43 (E.D. Pa. 1977). Both requirements:

serve as guideposts for determining whether under particular circumstances 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.

General Tele. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

The inquiry is whether there is potential conflict between claims of the representatives and other class members. See Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir.), cert. denied sub nom., Weinstein v. Eisenberg, 474 U.S. 946 (1985); Weiss v. York Hosp., 745 F.2d 786, 809 n.36 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985). The proposed class must be sufficiently "homogeneous" for certification. See Hagans v. Wyman, 527 F.2d 1151, 1154 (2d Cir. 1975).

Commonality is generally found in cases involving injunctive relief, where all proposed class members are seeking the same remedy. See Baby Neal v. Casey, 43 F.3d 48, 57 (3d Cir. 1994); Anderson v. Department of Public Welfare, No. 97-3808, 1998 WL 154654, at *4 (E.D. Pa. Apr. 1, 1998). Plaintiffs are not seeking injunctive relief; they are seeking damages for each individual customer's economic loss.

Because the Seawind is sold as a kit to be assembled by the individual purchaser or a third-party, the proposed class representatives do not have "typical" claims. Each kit is incomplete; the purchaser must acquire an engine and other vital components. Seawind purchasers obtain the component parts from different manufacturers. Some

purchasers do not follow the instructions in the SNA manual; this results in variations among the Seawind airplanes. The two Seawind airplanes owned by plaintiffs were built by different third-parties under different circumstances; they deviate from those built according to standard SNA instructions in a number of ways. These variations among Seawind airplanes have an effect on the performance of each airplane. If the proposed class were certified, there would be few, if any, questions common to the class and no typical claims because of the differences among the furnished airplanes and the deviations in construction.

In addition, only twelve Seawind kits have been assembled into operational airplanes. It is impossible to determine what, if any, problems the unbuilt Seawind airplanes will have when they are completed; any future problems are speculative at this time. Plaintiffs have failed to establish commonality and typicality among the claims of the proposed class and the named plaintiffs under Rule 23(a)(2), (3). See Calhoun v. Horn, 96-350, 1997 WL 633682, at *4 (E.D. Pa. Oct. 8, 1997) (Shapiro, J.) (conflicting factual backgrounds preclude certification).

III. ADEQUACY

The named class members must "fairly and adequately protect the interests of the class." Fed. R. Civ. P.

23(a)(4). The adequacy requirement focuses on whether the named plaintiff has "the ability and the incentive to represent the claims of the class vigorously, that he or she has obtained adequate counsel, and that there is no conflict between the individual's claims and those asserted on behalf of the class." Hassine, 846 F.2d at 179; see General Tele. Co., 457 U.S. at 157 n.13; Weiss, 745 F.2d at 811.

The court has no reason to doubt the adequacy of plaintiffs' counsel. See Wetzel, 508 F.2d at 247 ("[T]he plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation"). Plaintiffs have an incentive to prosecute their claim vigorously, but they are not able to represent the proposed class adequately because of the differing means of construction, component parts and other differences among the Seawind airplanes when constructed; a conflict might easily arise among plaintiffs, who made extensive modifications from the SNA instruction manual, and other members of the proposed class who may not have deviated from the instructions. The potential conflict among the Seawind customers militates against class certification; plaintiffs have failed to satisfy the requirements of Rule 23(a)(4).

IV. Rule 23(b) Requirements

In addition to the requirements of Rule 23(a),

plaintiffs must also satisfy one of the requirements of Rule 23(b):

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

(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 which would establish incompatible standards of conduct for the party opposing the class, or

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

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

Plaintiffs have not satisfied Rule 23(b)(1). There is no danger of inconsistent judgments regarding individual members of the proposed class creating inconsistent duties by defendants. Many Seawind kit owners have adapted their kit in different ways

and used different component parts in building the kits, so a judgment for any individual customer would not affect the rights or interests of other customers who built their Seawind with different component parts or in a different manner.

Rule 23(b)(2) "is most commonly invoked in civil rights actions and other institutional reform cases." Metts, 1997 WL 68804, at *5. Rule 23(b)(2) is applicable when plaintiffs seek "appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Baby Neal, 43 F.3d at 58. Plaintiffs' Complaint does not seek either declaratory or injunctive relief under their UTPCPL claim; they seek only damages for statements in promotional brochures that allegedly were misleading or inaccurate. Plaintiffs have failed to meet the requirements of Rule 23(b)(2).

Common questions of law or fact do not predominate over questions affecting only individual members of the proposed class under Rule 23(b)(3). "In determining whether common questions predominate, the court's inquiry is directed primarily toward the issue of liability." Cumberland Farms, Inc. v. Browing-Ferris Indus., Inc., 120 F.R.D. 642, 647 (E.D. Pa.), reconsideration denied, No. 87-3717, 1988 WL 120740 (E.D. Pa. Nov. 8, 1988); see Bogosian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978). Defendants' liability will be affected by the alterations Seawind customers made to their

kits and the different component parts customers used to finish the airplanes. It would be necessary to determine how each customer's deviations from the SNA instruction manual during construction affected each airplane's performance. The discrepancies between the specifications stated in the Seawind promotional brochures and the actual performance of completed airplanes cannot be compared unless each Seawind customer shows either that it completed the kit according to SNA instructions or that its deviations did not cause the discrepancies between the airplane's advertised and actual performance. Each Seawind customer's case will be highly fact-specific, so questions of fact will not predominate. A class action is not superior to other available methods for the fair and efficient adjudication of this controversy. Plaintiffs have failed to meet the requirements of Rule 23(b)(3).

CONCLUSION

Plaintiffs have failed to satisfy the numerosity, commonality, typicality and adequacy requirements of Rule 23(a). Plaintiffs have also failed to meet the requirements of Rule 23(b). Class certification will be denied.

An appropriate Order follows.

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RICHARD SILVA & SNA, INC. : NO. 97-7430

ORDER

AND NOW, this 11th day of May, 1998, in accordance with the attached Memorandum, it is hereby **ORDERED** that plaintiffs' motion for class certification under Federal Rule of Civil Procedure 23 is **DENIED**.

Norma L. Shapiro, J.