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PUTATIVE CLASS ACTION PLAINTIFFS CANNOT ESCAPE THEIR ENEMY AT THE GATES – ARTICLE BY TYLER WINTON, ALEX DAVIS & CLINTON MAGILL

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Not long ago, many practitioners likely thought that class actions, while a relatively novel approach to large-scale construction defect claims, had limited realistic utility in construction defect litigation. Recently, however, courts have more leniently construed the concept of commonality, which has resulted in the filing of— and approval of—more and more putative class action construction defect claims every day. To remain vigilant in protecting our clients' individual defenses, we as practitioners must find "new" ways to combat class certification. Recently, the South Carolina Court of Appeals recognized the validity of a class action waiver in Gates at Williams-Brice Condominium Ass'n v. DDC Construction, Inc.[1] This article will briefly explore the growing class action trend and then dissect the courts' holding in Gates and the lessons to be learned therefrom.

While we do not have precise statistics on the frequency of class action construction defect claims in South Carolina, judging from the number of class action claims that we defend in our office alone; its popularity does not appear to be waning. Rather, the number of construction defect class actions seems to be growing, and the class actions themselves are proliferating. Unsurprisingly, the most frequent construction defect and design defect claims we encounter relate to condominium complexes. Nevertheless, we also see claims—albeit less frequently—relating to tract home builders that implement common construction methods on debatably similar single-family homes or townhome units.

Plaintiff's counsel will invariably offer differing justifications for the use of class actions to pursue their clients' interests. Although we have had success in defeating the certifications of putative classes, and thus avoiding some of the risks inherent in class action litigation; frankly speaking, it is difficult to ignore the many potential benefits that encourage some plaintiff's counsel to focus their practice on larger, multi-family putative class action claims. For some plaintiff's counsel, the potentially limited financial and labor investments (e.g., avoiding retention of multiple experts, the shorter total duration of class claims versus the cumulative duration of every individual claim, etc.) pales in comparison to the potential recovery for, inter alia, percentage-based attorneys' fees calculated from the entire class action settlement. This often makes representation of a putative class too enticing of an opportunity not to pursue.

But wait, how did we get here? Arguably, class action litigation had its origin in bills of peace in equity involving multiple parties.[2] A bill of peace could be brought when a lord of the manor appropriated village common lands to the loss of the manorial tenants, or when a vicar quarreled with his parishioners about tithes.[3] For a time, class action litigation in South Carolina was governed by S.C. Code § 15-5-50 (prior to July 1, 1985), which provided: "When the question is one of common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." Common law roots of the class action "bill of peace" were eventually thrown out in Baughman v. Am. Tel. & Tel. Co.[4] In that case, the Court stated that SCRCP Rules 23 and 42 (related to class actions and consolidation) had the same effect as a bill of peace and thus rendered it unnecessary.

Today, parties seeking class certification bear the burden of proving five prerequisites under South Carolina law.[5] A class may be certified only if all prerequisites under Rule 23(a), SCRCP are satisfied. The court must find:

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

(5) the amount in controversy exceeds one hundred dollars for each member of the class.[6]

In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied.[7] The burden in proving the five prerequisites under South Carolina law rests with the plaintiffs.[8] Importantly, "[t]he failure of the proponents to satisfy any one of the prerequisites is fatal to class certification."[9]

Notwithstanding these established rules for determining the appropriateness of putative class action claims, litigators continue to argue over how to actually apply the rules in the context of ever-proliferating class action scenarios. Although the courts' trending liberal interpretations of commonality and typicality have certainly betrayed many defense attorneys' principled understanding of the class action device, these loose interpretations did not appear out of thin air, devoid of any rational justification. Rather, they are likely a byproduct of the situational impracticality of trial courts efficiently and effectively presiding over hundreds—or even thousands—of individual homeowner claims in construction defect cases. In those situations, courts have become increasingly amenable to approving a putative class representing a bloated collection of homeowners with similar claims stemming from the same development. However, as the number of class actions has grown, so too have the recognized defenses to certification. One recent and important example is the class action waiver defense. This defense, as recognized by the Court of Appeals in Gates, is explored below.

On August 31, 2016, the South Carolina Court of Appeals issued a decision clarifying the extent to which defendants may utilize certain defenses to Rule 23 class actions. In Gates, the Court of Appeals was asked to determine whether a class action waiver in the Master Deed of a condominium complex could prohibit the complex's property owners' association from bringing a class action against the developer and a number of contractors involved in the construction of the units.[10] In Gates, the putative class members alleged a myriad of construction defects at the project.[11] In response, the defendants sought enforcement of a class action waiver contained within a jury trial waiver subsection of the alternative dispute resolution section of the Master Deed.[12]

The Master Deed was originally drafted by the developer; however, shortly after the class action complaint was filed, the property owners' association amended the master deed.[13] The master deed was amended to remove class action and jury trial waiver provisions, as well as provisions related to the limitation of warranties and arbitration.[14]

The defendants filed a motion for a non-jury trial and to strike the homeowners' class action allegations and jury trial demand more than a year after the original complaint was filed — but only three days after the final defendant in the case answered the second amended complaint.[15] The trial court denied the defendants motion on a number of grounds, including

(1) that the master deed had been amended to remove the provisions in question;

(2) that the defendants waived enforcement of the arbitration provisions in the Master Deed, which included the class action and jury trial waiver;

(3) that the provisions in question were unconscionable, oppressive, and one-sided and, therefore, not enforceable; and,

(4) that the defendants failed to timely challenge the amendment or to challenge the mode of trial.[16]

On appeal, the South Carolina Court of Appeals rejected each of the trial court's grounds for refusing to grant Defendants motion.[17] The court held that the amendments to the master deed, which occurred after the initial filing of the complaint and as a result of the litigation, could not retroactively remove the class action and jury trial waivers.[18] Furthermore, the court found that the waivers were "conspicuous and unambiguous" and "expressly incorporated into each unit owner's purchase contract."[19] The court also noted that each purchaser was represented by counsel during the closing for the unit and could have directed questions about these waivers to counsel.[20] In light of this, the court held that the waivers were knowing and enforceable.[21] Finally, because it determined that the waivers remained valid and enforceable despite the decision of the

Defendants not to seek arbitration, the court found that the jury trial and class action waivers were "completely separate and distinct" and set forth in different subsections of the master deed. [22] Therefore, the court reversed the decision of the trial court and remanded the case with instructions to grant the motion for a nonjury trial and strike the class action allegations. [23]

Two non-exhaustive, but important lessons should be taken from the Court of Appeals' decision in Gates. First, it is imperative that construction defendants named in a putative class action complaint immediately investigate whether defenses such as class action waiver, jury trial waiver, or arbitration agreements should be asserted in a responsive pleading. In Gates, a substantial portion of the parties' arguments and the written opinion of the court were dedicated to the issue of whether or not the Defendants had properly and timely raised the mode of trial defenses.[24] Although the Court of Appeals ultimately held that the issue was sufficiently raised and pled, early research and review of the Master Deed or other agreements and the specific assertion of class action waiver, jury trial waiver, the existence of an arbitration agreement, and other affirmative defenses may help avoid the need for costly appeals over these defenses.

The second lesson gleaned from Gates is that developers should continue to utilize clear, unequivocal language to waive the right to class actions and non-jury trials in Master Deeds. The provisions of the Master Deed should also be incorporated into the bylaws of the property owners' association, as the Gates court found this incorporation by reference to be additional support for its finding that the waivers in that case were enforceable.[25]

Although the class action trend in construction defect litigation is unlikely to dissipate anytime in the near future, more defenses to certification will be recognized as the class action enters a growing spotlight. While not an entirely novel concept, the class action waiver is now a recognized defense in South Carolina. Defendants should always be sure to check the Master Deed for class action waiver language, as they may be able to nip a putative class action in the bud. Because we handle more and more construction defect class actions every day, we are in a prime position to keep you apprised of the important developments in this area of the law.

[1] No. 5438, 2016 S.C. App. LEXIS 110 (Ct. App. Aug. 31, 2016).

[2] See Stephen C. Yeazell, Group Litigation and Social Context: Toward a History of the Class Action, 77 COLUM. L. REV. 866, 866-96 (1977).

[3] In re Consumers Power Co. Sec. Litig., 105 F.R.D. 583, 600 (E.D. Mich. 1985).

[4] 378 S.E.2d 599, 601 (1989).

[5] See Rule 23(a), SCRCP; Waller v. Seabrook Island Prop. Owners Ass'n, 388 S.E.2d 799, 801 (1990).

[6] Rule 23(a), SCRCP.

[7] Waller, 388 S.E.2d at 801 (citing General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982)).

[8] Id. at 801.

[9] Ferguson v. Charleston Lincoln/Mercury, 544 S.E.2d 285, 289 (Ct. App. 2001) (quoting Waller, 388 S.E.2d at 801).

[10] No. 5438, 2016 S.C. App. LEXIS 110.

[11] Id. at *1.

[12] Id. at *8.

[13] Id. at *4-5.

[14] Id. at *4-7.

[15] Id. at *7-8.

[16] Id. at *8-9.

[17] Id. at *10-30.

[18] Id. at *10-30.

[19] Id. at *10-30.

[20] Id.

[21] Id. at *28. The court of appeals also noted that whether or not the homeowners were aware of the waivers, they could not avoid their effect under South Carolina law. Id. at *26.

[22] Id at *29-30.

[23] Id at *30-31. On November 17, 2016, the South Carolina Court of Appeals denied Plaintiffs petition for rehearing in this matter. Gates at Williams-Brice v. DDC Constr., Inc., No. 5438, 2016 S.C. App. LEXIS 151, at *1 (Ct. App. Nov. 17, 2016).

[24] See, e.g., 2016 S.C. App. LEXIS 110, at *12-19.

[25] See id. at *26

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