20140033

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Darilyn Baker, Individually and on Behalf of all persons similarly situated	)	
Plaintiff and Appellant	)	**Supreme Court No. 20140033**
vs.	)	
Autos, Inc., a North Dakota Corporation d.b.a. "Global Auto"; RW Enterprises, Inc. a North Dakota Corporation, Robert Opperude, an individual, Randy Westby, an individual; and James Henderson, an individual	)	
Defendants and Appellees	)	

Appeal from Ward County District Court Case No. 51-2001-CV-01576

Opinion and Order Denying Class Certification

entered January 27, 2014

The Honorable Gary H. Lee, District Judge

REPLY BRIEF OF APPELLANT

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I. Facts Support Class Certification.

¶ 1 The Trial Court had photo copies of more than five hundred separate retail sales transactions. Nearly all qualify to be members of one or more classes of plaintiffs. (Those prior to April 1, 2007, only contain $25.00 Late Charge clause) The Trial Court also had before it:

1. An Expert's Opinion (**Defense presented NO Expert Opinion**) [Docket No. 33, App. Pp. 17 - 34] analyzing the Baker RISA Contract documentation (Docket No.s 66 & 67; App. Pp. 45-6] and opined:

   a. RISA (Ch. 51-13, N.D.C.C) prohibits Late Fee assessments in excess of $10.00, Contract clause asserting right to charge $25.00 late fee violates RISA

   b. RISA and TILA (15 U.S.C. 1601 et seq.) require retail lenders charging "loan fees" to include loan fee amount within disclosure of "Annual Percentage Rate" (APR) and "Finance Charge."

   c. RISA and TILA require retail lenders charging "document preparation fees" to include such fees within APR and "Finance Charge" disclosures.

   d. RISA merchants who fail to accurately disclose "APR" or "Finance Charge" are not regulated lenders exempt from Usury interest rate limitations imposed by North Dakota law. (§§ 47-14-09; 51-13-03(1), N.D.C.C.)

   e. Analysis of Baker transaction specifics found both a Loan Fee and Document Administration Fee had been charged. Neither charge had been included within APR or Finance Charge disclosures, resulting in understatement of APR by **6.595%**; and Finance Charge by **$387.45.**

2. Summary Spreadsheet Report of the RISA contracts documenting universality of Baker documentation wrongful practices. Excel Spreadsheet summaries were presented in multiple formats (Docket No.s 100 - 102) Only one spreadsheet is reprinted within the Appendix (Docket. No. 102, App. Pp. 53-64), which spreadsheet documents:

   a. Four Hundred Forty (**440**) RISA contracts excluding Loan Fee charges from APR calculation, causing understated APR disclosure by one percent (1%) or more. [TILA Regulation Z caps allowable understatement at one-eighth of one per cent (0.125%) (12 CFR 226)] All 440 contracts dated after April 1, 2007.

   b. Column labeled "APR with Loan Fee" corrects APR disclosure for each of the 440 contracts, from a high of 47% to a low of 26%; all 440 disclosures understate APR by 1% or more.

   c. All 440 contracts charged loan fees; from a low of $200.00, to a high of $500.00. None charged no loan fee.

   d. All 440 contracts understate finance charges; understated by a minimum of $200.00, to a high of $500.00.

3. The contractual agreement among Defendants agreeing to split proceeds of their financing activity. Agreement specifically addresses revenue derived from "fees, such as late fees, loan fees, additional interest, and documentation fees." [Docket No. 98, App. 51]

II. Post-Class Certification Discovery

¶ 2 Both the Trial Court's opinion and Defendants' Briefs demand trial ready identification of all class members at the time of class certification. Rule 23, N.D.R.Civ.P., requires the class be "described" for which "a question of law or fact common to the class exists." Only after certification can anyone afford time and expense to examine each potential class member's contract to document:

1. Is a loan fee charged?
2. Is a document preparation fee charged?
3. Did disclosure of either charge comply with RISA?
4. Does a clause assert a right to charge $25.00 late fees?
5. Were any late charges assessed and paid?

No protracted trial process is necessary to answer the above question of each contract to determine if the contract is or is not within the class, but the process is cost prohibitive prior to class certification.

¶ 3 By Court Rule, decisions to certify or deny class certification are made before all relevant discovery is complete. See N.D.R.Civ.P. 23(b)(1) (court shall determine whether to certify as a class action "as soon as practicable after the commencement of a class action"). Decisions to grant or deny certification of class is not akin to a motion for summary judgment in which merits of a claim are considered. Howe v. Microsoft Corp., 2003 N.D. 12, ¶ 19, 656 N.W.2d 285 (N.D., 2003). Nothing in Rule 23 indicates necessity or propriety of an inquiry into the merits. Ib. ¶ 20. **In the instant case, discovery was not closed on the date the Court heard oral arguments or on the date the Trial Court entered is ruling.**

¶ 4 The expense of discovery varies greatly if only one transaction is at issue or if five hundred transactions need examination. At the class certification stage, the cost of expert examination of each contract **is prohibitive until after the class is certified.** Even without such individualized analysis, the Trial Court has before it ample documentation of the nearly universal wrongful conduct of Defendants after April 1, 2007. 440 transactions asset excessive late fees; charge loan fees; and charge document preparation fees without required disclosure. (Docket. No. 102, App. Pp. 53-64).

¶ 5 Quoted from Linder v. Thrifty Oil Co., 23 Cal.4th 429, 97 Cal.Rptr.2d 179, 2 P.3d 27 (Cal.2000), this Court stated:

> "Were we to condone merit-based challenges as part and parcel of the certification process, similar procedural protections would be necessary to ensure that an otherwise certifiable class is not unfairly denied the opportunity to proceed on legitimate claims. **Substantial discovery also may be required if plaintiffs are expected to make meaningful presentations on the merits.**" Howe at ¶ 22 (Emphasis added)

Until class certification, "meaningful presentation of the merits" is cost prohibitive. Quoted further from Linder v. Thrifty Oil Co., this Court recognized importance of economics of scale in the discovery process:

> "While the mere denial of certification does not, as a legal matter, terminate the right of any plaintiff to pursue claims on an individual basis, **it is likely to have that net effect when there has been injury of insufficient size to warrant individual action.**" Howe at ¶ 22 (Emphasis added)

In the instant case more than five hundred retail sales contract were entered into by Defendants. It has never been claimed all contracts violated RISA or Usury limitations – only contracts charging loan fees and document preparation fees not disclosed within APR

and Finance Charge disclosures. 440 RISA contracts charge loan fees of $200.00 or more causing understatement of APR disclosure by 1% or more – none earn exemption from Usury law rate regulation.

¶ 6 Subsequent to the Trial Court's Ruling, Plaintiff learned in a related case deposition, Defendant's bookkeeper possess computerized records accurately depicting history of payments and late fees on every RISA contract. These are ordinary business records similar to any lending entity used to keep track outstanding business transactions. Post-certification discovery would allow this additional evidence be presented. An additional group of contracts not yet summarized has also been identified. These might also be included within the class even though not identified prior to certification. Defendants wrongly require all elements of proof of claim be presented at the time of class certification.

III. Identical Damages Not a Pre-requisite.

¶ 7 Defendants assert "*none of the 500 retail installment contracts are identical. Each transaction consists of different purchase amounts, payment histories, finance charge, annual percentage rates, etc.*" (RW Enterprises Br., ¶ 9; Global Autos Br., ¶ 12) These variables are conceded. When initiated in January, 2006, Defendants; joint enterprise charged no loan fees. Not until April 2007, did loan fee abuse commence. Thereafter, 440 transactions charge "Loan Fees" as high as $500.00, and "Document Administration Fees" of $195.00. These fees cause APR disclosure understatements as high as 28%, and Finance Charges understated by as much as $695.00.

¶ 7 There are always individual variables in every usury class. Variation in damages for individual class members does not change the "common questions of law or fact." **Only**

computation of damages are affected by the conceded factual variables – application of common question of law does not change. (Trial Court's demand for uniformity of remedy is not a pre-requisite). The formula for remedies are universally supplied by statute. They are mathematical computations. All necessary factual variables are readily ascertainable. These are strict liability statutes. Either the merchant complied or it did not. If not, a remedy formula applies.

¶ 8 Contrary to assertions made by Defense Counsel, this writer is not aware of any RISA contract not asserting a right to assess a $25.00.00 late fee. If exceptions exist, each would be excluded. It takes only seconds to determine if the contract asserts authority to charge a $25.00 late fee. In the same manner, the presence or absence of loan fees and document administration fees is readily ascertained on each contract. Contracts without such fees charged would not be members of the class. At least 440 contracts are now known to charge both fees not within APR and Finance Charge disclosures. The information is summarized to the Trail Court in spreadsheets (Docket No.s 100 - 102). Spreadsheet documenting significance of Loan Fee APR understatement is before this Court. (Docket No. 102, App. Pp. 53).

IV. Mandan Supply is no longer good law.

¶ 9 Both Defense counsel cite Mandan Supply, Inc. v. Steckler, 244 N.W.2d 698 (N.D. 1976), arguing usury laws have no application to RISA. The statutory scheme as existed at the time of Mandan Supply no longer exists. RISA no longer addresses interest rates. Instead it now relies solely on statutory disclosures. Ch. 51-13, N.D.C.C. North Dakota's interest

rate limitation legislation now is **exclusively** within the State's usury statute (§47-14-08, N.D.C.C.). Unlike 1976, RISA now specifically cites the State's Usury Statute, assigning "regulated lender" status only to RISA merchants who comply with disclosure requirements:

> **"A retail seller who complies with the disclosure provisions of this chapter is deemed a regulated lender under section 47-14-09."** §51-13-03(1), N.D.C.C.

Retail sellers who fail to comply with disclosure provisions of the Act are not "regulated lenders. §47-14-09, N.D.C.C.. Retail merchants not regulated are subject to usury law rate limitations. §47-14-08, N.D.C.C.. All 500+ contracts charged interest rates more than double applicable usury law rate limitations.

V. Ipso Facto Liability.

¶ 10 Defense Counsel makes fun of the possibility the Trial Court could make rulings which "*Ipso Facto*" find their RISA contracts violate both RISA and Usury law. In fact, the legislature chose to do so. The law imposes strict liability upon violators. If a merchant fails to include loan fees within disclosure of APR and Finance Charges, it is a violation of RISA disclosure requirements. Such merchant does not gain regulated lender status and may not charge interest rates in excess of rates permitted by State usury law. The same laws apply to every contract. Only the amount of actual damages varies from case to case, not the law. The same is true of contracts assessing $25.00 late fee charges. **Universal questions are presented**:

* What penalty is imposed for its intentional insertion in a contract?
* Does it require actual use to violate RISA, or is the mere written threat a

violation?

* Is knowing use a "willful" violation of the RISA?

All are universal questions of law demand "fair and efficient adjudication" by class action.

CONCLUSION

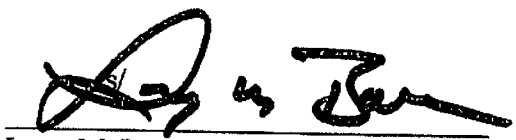
¶ 11 The Trial Court relied on diversity of remedy to reject class action status to victims of universal wrongful conduct. All contracts raise the same attendant common questions of law:

* Does a merchant satisfy RISA disclosure requirements if Loan Fees and/or document preparation fees are omitted from APR and Finance Charge disclosures?

* Is it a willful violation of RISA to contractually assert a right to charge $25.00 late fees?

"Fair and Efficient" adjudication compels these common legal questions be collectively answered. Once answered, remedies may readably be computed by applicable statutory damage formula. The Trial Court abused its discretion and should be reversed.

Submitted to the Court this 23rd day of April, 2014.



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Defendants and Appellees	)	

Certification of Service

I, Larry M. Baer, Co-Counsel for Darily Baker, Appellant, do hereby certify that on April 23, 2014, I did place in the U.S. Mails, with pre-paid postage attached and addressed to:

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true and correct copies of Reply Brief of the Appellant in the above entitled civil action .

1 Appellant's Brief
2. Appendix.

Dated this 23rd day of April, 2014

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