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United States District Court,
W.D. Missouri,
Western Division.

Elizabeth O'SHAUGHNESSY, MIchael O'Shaughnessy, and Randall L. Hensley, Individually and on Behalf of Others Similarly Situated, Plaintiffs,
v.
CYPRESS MEDIA, L.L.C., Defendant.

No. 4:13–cv–0947–DGK.
| Signed July 13, 2015.

Attorneys and Law Firms

Jeffrey M. Hensley, Theodore C. Beckett, III, Beckett & Hensley, L.C., Kansas City, MO, for Plaintiffs.

Darin Shreves, David Clay Britton, III, James Moloney, V., John Bradley Leitch, Robin E. Stewart, Richard N. Bien, Lathrop & Gage LLP, Kansas City, MO, for Defendant.

ORDER DENYING CLASS CERTIFICATION

GREG KAYS, Chief Judge.

***1** This putative class-action lawsuit alleges that Defendant Cypress Media, L.L.C. ("Cypress"), a newspaper publisher, unlawfully "double-billed" some of its subscribers. This lawsuit was originally filed in the Circuit Court of Jackson County, Missouri, and then removed to this Court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332.

Now before the Court is Plaintiffs' Motion for Class Certification (Doc. 67). Finding that Plaintiffs have not demonstrated that there are questions of law or fact common to the class, or that questions of law or fact common to the class predominate over questions affecting individual members, the Court DENIES the motion.

Factual Background

Defendant Cypress owns and operates three newspapers, the *Kansas City Star* ("the *KC Star* "), the *Fort Worth Star–Telegram* ("the *Star–Telegram* "), and the *Belleville News–Democrat* ("the *News–Democrat* "). The named Plaintiffs in this case are Elizabeth O'Shaughnessy, Michael O'Shaughnessy, and Randall Hensley.

Elizabeth and Michael O'Shaughnessy share one account with the *KC Star* and have been subscribers for approximately 25 years. They have spent about eight hours participating in this case, and they have not reviewed any filings since the initial petition.

Randall Hensley is the brother of Plaintiffs' counsel Jeff Hensley. He subscribed to the *KC Star* from October 12, 2009, to November 7, 2013. Randall Hensley has spent about three hours participating in this litigation, and, aside from reviewing the initial petition, he has not reviewed the motions or other filings in this case. [1]

1 Defendant contends Hensley received "discounted rates during much of the class period" and "received numerous credits on his account to induce him to remain a subscriber."The billing records it has submitted in support fall short of proving these claims.

None of the three have ever subscribed to, or purchased anything from, the *Star–Telegram* or the *News–Democrat.*

Plaintiffs' Petition alleges Cypress unlawfully double billed some of its subscribers by shortening the length of their subscriptions. It seeks compensatory damages for breach of contract (Count I), breach of implied duty of good faith and fair dealing (Count II), violation of the Missouri Merchandising Practices Act ("MMPA") (Count III), [2] and a claim for money had and received (Count IV).

2 Although the MMPA is the only consumer protection statute mentioned in the Petition, Plaintiffs' briefing suggests Cypress's billing practice violates other states' consumer protection statutes as well. For example, Plaintiffs contend that the common questions of law and fact in this case include whether the Billing Practice violates the MMPA "and similar consumer protection statutes." Suggestions in Supp. (Doc. 67) at 14.

From August 1, 2008, to August 1, 2013 there were approximately 363,561 home delivery subscribers to the *KC Star.*Of these, 201,122 were Missouri residents, 161,814 were Kansas residents, and 625 were residents of other states. During this same period, there were 314,358 home delivery subscribers to the *Star–Telegram* and 85,394 home delivery

subscribers to the *News–Democrat.*All of the former were Texas residents, and all of the latter were Illinois residents. The total number of home delivery subscribers to these three newspapers during this time period was 763,313.

Home delivery newspaper subscriptions at each newspaper operate as follows. A subscriber initiates service through one of several methods, usually at one of many discounted introductory rates, and pays for an initial billing period or agrees to a monthly charge by a debit or credit card. (The monthly debit option is called "Easy Pay" by the *KC Star* and "EZ Pay" by the *News–Democrat* and the *Star–Telegram*). Subscription service is ongoing and ends only when a subscriber cancels. After the introductory period expires, the subscription converts to a full-rate subscription for that frequency (number of days per week the subscriber receives a newspaper), and the subscriber is asked to select and pay for a new billing period. Subscription rates vary by newspaper.

***2** Each paper uses multiple different forms, both written and oral, to explain to initial subscribers what the terms of the subscription are. When a subscriber's billing period is about to end, the subscriber receives a written subscription renewal notice that sets out the options for the next billing period. Each paper's renewal notice is slightly different. Some of these differences are merely differences in wording or format; others are substantive. Generally speaking, the renewal notice might include some language informing the subscriber of various terms affecting their subscription service, including charges for special editions of the paper, the ongoing nature of their subscription service, and other information. Again, the exact contents of the renewal notice varies by newspaper.

While the billing period on initial subscription documents and the Subscription Renewal Notices is for terms of weeks, months, a year, the subscription service itself is ongoing. As each newspaper is delivered, the subscriber is charged a debit to the amount deposited to the subscriber's account. For some subscribers, Cypress deducts charges for premium editions—occasional editions of the newspaper that include special content above and beyond that included in a typical newspaper edition, [3] —by shortening the subscriber's billing period. For example, if the subscriber's billing period were set to expire June 30, and then the subscriber receives a special edition, Cypress would shorten the billing period to June 27 (or whatever number of days that at the regular rate equaled the charge for the premium edition), to account for the premium edition. The customer-specific portion of the subscription renewal notice may or may not disclose the debits for premium editions.

3 Premium editions often focus on a holiday, a prominent local event, or an election. The content for a premium edition varies for each paper. Premium editions are charged at a higher daily rate because they include additional content and cost more to produce and deliver.

The date on which the funds in the subscriber's account are expected to expire is referred to as the "paid-through" date or the "pays to" date. When funds in the account near the paid-through date, a subscription renewal notice is sent prompting the subscriber to pay for the next subscription billing period.

As administered by Cypress, billing periods are estimates and flexible based on changes in delivery frequency, customer choice, and credits and debits that may accrue during the billing period. Credits may be given for missed papers, late delivery, poor delivery service, or to induce a customer to remain a subscriber. When a credit is added to a subscriber's account, the effect is to extend the number of days remaining in a billing period, which extends the paid-through date. Debits to an account, such as premium editions, shorten the paid-through date. It is unclear from the record whether any other events besides premium edition charges shorten the paid-through date.

Policies regarding receipt of, and charges for, premium editions vary by newspaper. Subscribers to the *KC Star* can opt out of receiving premium edition charges by calling customer service. Those who opt out receive the premium edition at the regular daily rate. Different subscribers were charged different amounts for premium editions based on variations in their normal daily rate. The *KC Star* changed its subscription renewal notice in March 2011.

***3** Subscribers to the *News–Democrat* who select the EZ Pay option, which allows for automatic, recurring credit card billing, are not charged for premium editions. Until September 30, 2013, the *Star–Telegram* was on a carrier collect system where carriers were charged for premium editions and then were responsible for charging the subscriber whatever amount the carrier determined. Additionally, Cypress did not charge some subscribers on introductory promotional rates for premium editions.

With few exceptions, Premium Editions are only delivered to subscribers who already receive the paper that day as part of their normal delivery frequency. For example, if a premium

edition is delivered on Thursday but the subscriber is on a Sunday-only delivery frequency, the subscriber does not receive the Premium Edition and is not charged for it.

Standard Governing Class Certification

Rule 23 governs class certification. A party seeking class certification must satisfy all of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b).Fed.R.Civ.P. 23(b). The Supreme Court has instructed district courts to engage in a "rigorous analysis" in determining whether the Rule 23(a) requirements are met. *Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 161 (1982). These requirements are satisfied when "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."Fed.R.Civ.P. 23(a). They are typically summarized as numerosity, commonality, typicality, and adequacy. *In re Constar Int'l Inc. Sec. Litig.,* 585 F.3d 774, 780 (3d Cir.2009).

Plaintiffs identify Rule 23(b)(3) as the Rule 23(b) category they are pursuing. Under Rule 23(b)(3), a party seeking class certification must satisfy the court that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."A finding under subsection (3) may be based on,

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3). In addition to these explicit requirements, Rule 23 implicitly requires that a class exist, that the proposed representative be a member of the class, and that the proposed class be "ascertainable or identifiable" and "administratively manageable." *Dumas v. Albers Med., Inc.,* No. 03–0640–CV–W–GAF, 2005 WL 2172030, at *5 n. 7 (W.D.Mo. Sept. 7, 2005).

***4** The party seeking class certification bears the burden of showing that all of the requirements have been met. *Perez–Benites v. Candy Brand, LLC,* 267 F.R.D. 242, 246 (W.D.Ark.2010). This includes the burden of defining a proper class. *See In re Paxil Litig.,* 212 F.R.D. 539, 546 (C.D.Cal.2003).

Discussion

Plaintiffs propose defining the class as,

> All present and former home delivery subscription customers of Cypress Media, LLC who entered into Standard Agreements with Cypress Media, LLC, through the Cypress Companies, for Newspaper Services during the time frame from July 26, 2008, through the present, where Cypress Media, LLC shortened the Home Delivery Subscription Customer's paid for Subscription Period as a result of Cypress Media, LLC's Billing Practice.

Suggestions in Supp. (Doc. 67) at 11. Plaintiffs define the "Billing Practice" as Cypress's shortening customers' agreed upon and paid for subscription periods to pay down charges incurred by receiving "Premium Editions," "Special Editions," "Frequency Days," and "Bonus Days." *Id.* at 7. They define "home delivery subscription customers" as "those newspaper subscription customers of the Cypress Companies who receive printed newspapers delivered to their residence or a business." [4] *Id.* at 3. Plaintiffs define "Standard Agreements" as "typewritten, standard-form subscription agreements and subscription renewal agreements, or other materially similar written agreements with Cypress through the Cypress Companies for Newspaper Services."*Id.* at 2. Plaintiffs have submitted several different form agreements from each newspaper as purported examples of these "Standard Agreements."

4 The phrase "home delivery subscription customers" is a misnomer because it includes customers who receive

printed newspapers at their place of business. While puzzling, this is irrelevant for certification purposes.

I. The Rule 23(a) factors are not satisfied.

Of the four Rule 23(a) factors, no factor besides numerosity is completely satisfied here. Although the typicality and adequacy factors are partially met and could satisfy a class that was more narrowly defined, the lack of commonality in the claims of any conceivable class here is fatal to Plaintiffs' motion. The Court discusses each of these factors below.

A. The numerosity requirement is satisfied.

There is no magic number to satisfy the numerosity requirement; the putative class must simply be so numerous that joinder of all class members is impractical. *In re St. Jude Med., Inc.,* 425 F.3d 1116, 1119 (8th Cir.2005). Plaintiffs allege that hundreds of thousands of individuals and entities throughout Missouri, Kansas, Texas, Illinois, and elsewhere were subject to the Billing Practice. Cypress does not dispute numerosity, and it is clear that the number of potential class members is so large that joinder is impractical. Accordingly, the Court finds this element is satisfied.

B. The typicality requirement is not satisfied with respect to subscribers to the *Star–Telegram* or *News–Democrat.*

"A plaintiff's claim is typical if it arises from the same event, practice, or course of conduct that gives rise to the claims of other class members and if his or her claims are based on the same legal theory."*Newberg on Class Actions* § 3:29 (5th ed.2015)."The test for typicality is not demanding and 'focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent.' " *Id.* (quoting *James v. City of Dallas, Tex.,* 254 F.3d 551, 571 (5th Cir.2001)). The court should deny certification when the variation between the plaintiff's claims and the absent class members' claims "strikes at the heart of the respective causes of actions." *Id.* (quoting *Deiter v. Microsoft Corp.,* 436 F.3d 461, 467 (8th Cir.2006)). The plaintiff's claims need not be identical to those of the class; typicality is satisfied so long as named plaintiff's claims share the essential characteristics of the absent class members' claims. *Id.*

***5** In the present case, Plaintiffs' claims are not typical of putative class members who subscribe to the *Star–Telegram* or the *News–Democrat.*Plaintiffs' claims arise out of their subscription to the *KC Star,* and as discussed below, the subscription agreements and renewal forms used by each newspaper are materially different. Even among the *KC Star* subscribers, Plaintiffs' legal theory may not be typical. Plaintiffs reside in Missouri, so the MMPA likely applies to their claims. Almost 45% of subscribers, however, live in other states, so their claims may be governed by those states' law. And the Court cannot simply conclude that the MMPA is a "close enough" legal theory to the consumer protection laws of other states, when Plaintiffs do not reference any other state's law in the Petition. The *Star–Telegram* and *News–Democrat*'s subscriber's claims will be governed by Texas or Illinois law. *See Perras v. H & R Block,* —— F.3d ——, 2015 WL 3775418, at *4 (8th Cir. June 18, 2015) (noting that however broad the MMPA's scope, it does not regulate out-of-state transactions involving out-of-state class members; other states consumer protection statutes govern these claims). Hence, the named Plaintiffs' claims are typical only of, at best, *KC Star* subscribers.

C. Randall Hensley is not an adequate class representative and the O'Shaughnessys' may represent *KC Star* subscribers only.

The purpose of ensuring that the named plaintiff will adequately represent the class is "to uncover conflicts of interest between named parties and the class they seek to represent."*Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625 (1997). In order to satisfy 23(a)(4)'s adequacy requirement, the named plaintiff must be "part of the class and possess the same interest and suffer the same injury as the class members."*Id.* at 625–26 (quotations omitted). In addition to determining the adequacy of the plaintiff as a class representative, the court must determine whether plaintiff's counsel is adequate. *Id.* In the absence of evidence to the contrary, the court assumes that class counsel is adequate. *Morgan v. United Parcel Serv. of Am., Inc.,* 169 F.R.D. 349, 357 (E.D.Mo.1996). In the present case, Defendant disputes Plaintiffs' adequacy as class representatives, but not class counsel's adequacy to represent the class.

That said, Randall Hensley is not an adequate class representative for another reason—because he is the brother of one of the attorneys representing the putative class. A close personal relationship between the name plaintiff and class counsel "creates a *present* conflict of interest—an incentive for [the named plaintiff] to place the interest of [class counsel] above those of the class."*London v. Wal–Mart Stores, Inc.,* 340 F.3d 1246, 1255 (11th Cir.2003). This close relationship, in turn, "casts doubt on the [named plaintiff's] ability to place the interests of the class above that of class counsel."*Id.* A

sibling relationship is especially problematic because there is a "natural assumption that brothers enjoy a close personal and family relationship" and so "would be inclined to support each other's interests."*Susman v. Lincoln Am. Corp.,* 561 F.2d 86, 95 (7th Cir.1977) (holding class counsel's brother was an inadequate class representative). Since Randall Hensley is related to class counsel, he is more likely to refrain from criticizing a fee request submitted by him, or to give too much deference to his recommendation regarding a settlement. *See London,* 340 F.3d at 1255; *Susman,* 561 F.2d at 95. Consequently, he is not an adequate class representative. [5]

5 Because the Court finds Randall Hensley is not an adequate representative for this reason, it does not need to address Cypress's other claim that he would not be an adequate representative because he has allegedly suffered no damages.

***6** Turning to the O'Shaughnessys, the Court finds they are adequate representatives of *KC Star* subscribers, but not *Star–Telegram* or *News–Democrat* subscribers. The O'Shaughnessys' claims are based on the *KC Star* subscription agreements and renewal forms they used, and their claims would be governed by Missouri law. These claims are different from the *Star–Telegram* and *News–Democrat* subscribers' claims, and perhaps even some Kansas-based *KC Star* subscribers' claims. Thus, the O'Shaughnessys' are adequate representatives of at most *KC Star* subscribers only.

This is important because there are conceivably three distinct classes (or subclasses) here: *KC Star* subscribers, *Star–Telegram* subscribers, and *News–Democrat* subscribers. If the class representatives are from only one group of subscribers a potential conflict of interest exists. There is a risk that in any settlement the class representatives might try to leverage the claims of the class members in the other subclasses for their benefit. That is, they might discount the claims of the *Star–Telegram* and *News–Democrat* subscribers in return for Cypress paying a premium for *KC Star* subscribers' claims.

Because of this conflict, the Court will allow the O'Shaughnessys to serve as class representatives of *KC Star* subscribers only. Given that there are no other named Plaintiffs who subscribe to the *Star–Telegram* and *News–Democrat,* any class the Court might certify should be limited to *KC Star* subscribers. [6]

6 Plaintiffs alternately argue that if the Court finds they are not adequate class representatives, the Court should allow the addition or substitution of unnamed class members as named plaintiffs. Unfortunately, Plaintiffs have failed to identify anyone who could serve in this capacity. The Court declines to certify a class and then see if Plaintiffs' counsel can find an adequate class representative. Because the Court holds that no named Plaintiff holds claims typical of the proposed class, it need not consider Defendant's argument that Plaintiffs have not spent sufficient time working on their case.

D. The commonality requirement is not satisfied.

To satisfy Rule 23(a)(2)'s commonality requirement the plaintiff must do more than show the presence of common questions of law or fact. *Wal–Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, 2551 (2011). The plaintiff must show that there are common questions with "common *answers* apt to drive the resolution of the litigation" for the proposed class as a whole. *Id.* (quotation omitted). The class claims "must depend on a common contention" which is "of such a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve the issue that is central to the validity of each one of the claims in one stroke."*Id.*

Plaintiff contends that the common questions of law and fact in this case include whether the Billing Practice: is allowed under the Standard Agreements; breaches the implied duty of good faith and fair dealing; violates the MMPA "and similar consumer protection statutes;" and gave Cypress money it was not entitled to receive. Plaintiffs contend these "questions of law and fact are *identical* to the entire proposed class."Suggestions in Supp. (Doc. 67) at 14 (emphasis added).

Cypress responds that there can be no common questions here because there are no Standard Agreements. Each newspaper used different language in various forms to communicate the terms of its subscription services to its readers. Even within each paper, different subscribers saw different language at different times describing these terms. There are material differences among subscribers that make any determination of liability issues through common evidence impossible. Cypress also contends there is no class-wide common injury.

***7** After carefully reviewing the purported Standard Agreements, the Court finds that there are no Standard Agreements here which serve as common evidence on which to base class-wide liability determinations. Even within the same newspaper's stable of form agreements, the

information provided about the newspaper's billing practices is so different that the forms are not "standard" in any way. For example, one alleged Standard Agreement submitted by Plaintiffs, a subscription order agreement used by the *KC Star* (Doc. 67–6 at 1), does not mention premium editions, higher rates, or paid-through dates at all. But other "Standard Agreements" used by the *KC Star,* various subscription renewal notices offered by Plaintiffs (Doc. 67–6 at 3, 5, 10), provide fairly detailed explanations of how much a subscriber will be charged for premium editions and when they will be published. Among other things, these forms state that

> For 2013, all subscribers will receive a paper in addition to their paid subscription on the following days, if service is available: Jan 21; Sept. 2; Sept. 16; Oct. 14; Nov. 11; Nov. 28; Dec. 23; and Dec. 24. Premium editions will be charged at a higher rate, not to exceed an additional $2.00, plus applicable tax. Premium Editions scheduled for 2013 include: January—Your 2013 Personal Finance Guide; March—Kansas City Food: A Collective Experience; May—Summer Planner; August—Football Preview; September—Consumer Technology; and November—Thanksgiving Holiday Package.

(Doc. 67–6 at 3, 5, 10). These disclosures—or in the case of the subscription order agreement above, the lack of such disclosure—goes to the heart of Plaintiffs' case, because the Billing Practice may have been entirely legal if it was properly disclosed to the putative class members. The fact that two of the purported Standard Agreements from the same newspaper disclose materially different information concerning the alleged Billing Practice means they are not alike or "standard" for purposes of this case. Further, Plaintiffs have not suggested which potential class members may have received which Standard Agreements. Hence there is no way to establish liability on a class-wide basis, even among a subclass of subscribers to the *KC Star.*

Likewise, the "Standard Agreements" from the *News–Democrat* and *Star–Telegram* confirm that all three newspapers use multiple forms that are materially different from each other. The agreements used by the *News–Democrat* and *Star–Telegram* make different disclosures than those from the *KC Star.*One renewal notice sent by the *News–Democrat* (Doc. 67–7 at 1) notifies the reader that, "Your paid-thru date is subject to change due to charges for premium editions throughout the year."Another renewal notice sent by the *Star–Telegram* (Doc. 67–8 at 1) states, "On July 4th all home delivery subscribers will receive a Premium Content Section with an additional charge of $1.00. Current expire date will be adjusted."While similar, these renewal notices make different disclosures that are relevant to this lawsuit. The former indicates there may be charges for premium editions throughout the year. The latter states there will be one premium content publication sent; it will be sent on July 4; it will cost $1.00; and this charge will be paid for by adjusting the subscriber's subscription expiration date.

***8** Depending on how each newspaper actually billed their respective customers and what services they actually provided, Cypress may have breached its contract or violated a consumer protection statute with respect to different groups of customers. In order to make these determinations, however, the fact-finder will have to make individualized determinations about each form. Furthermore, given that the wording of these forms changed over time, and that customers used different forms to initiate and renew their subscriptions at different times, the fact-finder will have to sift through different documents for each subscriber to determine liability. As Cypress notes, a particular *KC Star* subscriber may have initially subscribed in response to a telemarketing call offering a special discounted rate, then continued her subscription under terms offered in a pre-March 2011 subscription renewal agreement, and then renewed her subscription again using a different renewal agreement. Thus there would be one set of facts relevant to her initial billing period; another set relevant to billing before March 2011, and a third set relevant to billing after March 2011. These facts would be different for *KC Star* subscribers who subscribed at different times or used different forms, and these facts would be different for *News–Democrat* and *Star–Telegram* subscribers as well. Moreover, Plaintiffs have not proposed any manageable way for the Court to potentially cleave off subclasses based on the receipt of certain forms at certain times. *See In re Paxil Litig.,* 212 F.R.D. at 546 (imposing on the plaintiffs the burden of defining the class). Hence, Plaintiffs fail to meet Rule 23(a)'s commonality requirement, and a class cannot be certified. [7]

[7] Because the Court holds that the lack of any Standard Agreement means the commonality requirement is not

satisfied, it need not consider Defendant's claim that there is no class-wide common injury.

II. This case cannot be certified under Rule 23(b)(3) because common issues do not predominate over individual issues.

The proposed class here also fails because it does not meet Rule 23(b)(3)'s requirement that common issues predominate over individual ones, the 23(b) factor Plaintiffs have identified as justifying class certification. "At the core of Rule 23(b)(3)'s predominance requirement is the issue of whether the defendant's liability to all plaintiffs may be established with common evidence." *Avritt v. Reliastar Life Ins. Co.,* 615 F.3d 1023, 1029 (8th Cir.2010)."If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question."*Blades v. Monsanto Co.,* 400 F.3d 562, 566 (8th Cir.2005)."If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question."*Id.*"In making its determination, the district court must undertake a rigorous analysis that includes examination of what the parties would be required to prove at trial."*Avritt,* 615 F.3d at 1029. This analysis "is more demanding than Rule 23(a)."*Comcast Corp. v. Behrend,* 133 S.Ct. 1426, 1432 (2013).

***9** In the present case, it is impossible to determine on a class-wide basis whether Cypress incurred any liability to the class members because there were so many different service arrangements used by different class members at different times. Evidentiary variables include: the paper the class member subscribed to, when and how the class member subscribed, the exact language used in the initial agreement, whether and how the subscription was renewed, and the exact language used to renew the agreement. Even if Plaintiff proposed certifying a class of only Missouri residents who subscribed to the *KC Star,* issues of law or fact common to the class would still not predominate over individual issues. Although the fact-finder would not have to inquire about which paper the class member subscribed to, the evidence used to answer the remaining questions would still be different for each class member.

The obstacle to class certification here is that this is not a case where a single form contract was used throughout the class. Cypress used multiple forms which are not materially similar, a fact which makes it difficult for common issues of fact to predominate. *See Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.,* 601 F.3d 1159, 1171 (11th Cir.2010) ("[C]laims for breach of contract are peculiarly driven by the terms of the parties' agreement, and common questions rarely will predominate if the relevant terms vary in substance among the contracts. It is the form contract, executed under like conditions by all class members, that best facilitates class treatment.").

Of course, certifying a larger class would be even more difficult because the Court would have to perform a choice of law analysis for four states, and then likely apply the class member's home state law to his or her claim. This weighs against finding that common issues predominate. *See*7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1780.1 (3d ed. 2014) ("As a matter of general principle, the predominance requirement of Rule 23(b)(3) will not be satisfied if the trial court determines that the class claims must be decided on the basis of the laws of multiple states" because "the legal issues no longer pose a common question"). This is particularly true where, as here, the class action would have to be litigated under the consumer-protection statutes of multiple states. *See, e.g., Perras,* 2015 WL 3775418, at *4 (finding common questions of law did not predominate over any individual questions in class action which would have to be brought under multiple states consumer-protection statutes); *In re St. Jude Med.,* 425 F.3d at 1120 (noting an individualized choice-of-law analysis must be made for each plaintiff's claim, consumer protection laws vary considerably, and courts must respect these differences).

Accordingly, Plaintiffs have not shown that Rule 23(b)(3) is satisfied, and so the Court cannot certify a class. [8]

8 Because this argument is dispositive of the Rule 23(b) issue here, the Court does not consider Defendant's other argument that individual issues predominate because damages are not capable of measurement on a class-wide basis.

Conclusion

***10** For the reasons discussed above, the Court holds Plaintiffs have not demonstrated that there are questions of law or fact common to the class, or that questions of law or fact common to the class predominate over questions affecting individual members. Accordingly, the Court DENIES Plaintiffs' Motion for Class Certification (Doc. 67).

IT IS SO ORDERED.

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United States Court of Appeals,
Eleventh Circuit.

Robert C. LISK, individually and on behalf of a class of similarly situated persons, Plaintiff–Appellant,
v.
LUMBER ONE WOOD PRESERVING, LLC, Defendant–Appellee.

No. 14–11714. | July 10, 2015.

Synopsis

Background: Buyer of "pressure-treated" wood filed putative class action against manufacturer, alleging breach of express warranty and violation of Alabama Deceptive Trade Practices Act (ADTPA). The United States District Court for the Northern District of Alabama, Abdul K. Kallon, J., 993 F.Supp.2d 1376, granted manufacturer's motion to dismiss. Buyer appealed.

Holdings: The Court of Appeals, Hinkle, J., held that:

[1] federal class action rule did not abridge, enlarge, or modify a substantive right under ADTPA, and thus class action rule, rather than ADTPA's prohibition on private class actions, applied under federal Rules Enabling Act to class action, and

[2] buyer's allegations were sufficient to state a claim for relief as third-party beneficiary of express warranty.

Reversed and remanded.

West Headnotes (11)

[1] **Federal Courts**
Pleading

Court of Appeals reviews de novo a district court's ruling that a complaint fails to state a claim.

Cases that cite this headnote

[2] **Action**
Statutory Rights of Action

Antitrust and Trade Regulation
Private Entities or Individuals

Alabama Deceptive Trade Practices Act (ADTPA) creates a private right of action in favor of a consumer against a person who violates the statute. Ala.Code § 8–195(5), (7) (1975).

Cases that cite this headnote

[3] **Federal Civil Procedure**
Consumers, Purchasers, Borrowers, and Debtors

Federal class action rule did not abridge, enlarge, or modify a substantive right under Alabama Deceptive Trade Practices Act (ADTPA), and thus class action rule, rather than ADTPA's prohibition on private class actions, applied under federal Rules Enabling Act to buyer's private class action against wood manufacturer, alleging that manufacturer defectively "treated" its wood in violation of ADTPA; manufacturer was obligated to comply with ADTPA by making accurate representations, buyer had substantive right to obtain wood that complied with those representations, each buyer was entitled to seek redress under ADTPA, and class action rule did not alter the substantive rights but allowed buyers to bring one action instead of separate actions. 28 U.S.C.A. § 2072(b); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.; Ala.Code § 8–195(5), (7) (1975).

Cases that cite this headnote

[4] **Federal Civil Procedure**
Construction and Operation in General

The federal Rules Enabling Act authorizes the Supreme Court to adopt rules of practice and procedure that apply not only in cases arising under federal law but also in cases in which state law supplies the rule of decision. 28 U.S.C.A. § 2072.

Cases that cite this headnote

[5] **Federal Civil Procedure**
State Statutes and Rules Superseded

Under the plain terms of the federal Rules Enabling Act, a federal rule applies in any federal lawsuit, and thus displaces any conflicting state provision, so long as the federal rule does not abridge, enlarge, or modify any substantive right. 28 U.S.C.A. § 2072.

Cases that cite this headnote

[6] **Federal Civil Procedure**
State Statutes and Rules Superseded

Under the federal Rules Enabling Act, a state statute precluding class actions for specific kinds of claims conflicts with federal class action rule and so is displaced for claims in federal court so long as applying federal class action rule does not abridge, enlarge, or modify any substantive right. 28 U.S.C.A. § 2072; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[7] **Federal Civil Procedure**
State Statutes and Rules Superseded

The question whether a federal rule abridges, enlarges, or modifies a substantive right under the federal Rules Enabling Act, under which a federal rule may displace a conflicting state provision so long as the rule does not abridge any substantive right, turns on matters of substance, not on the placement of a statute within a state code. 28 U.S.C.A. § 2072.

Cases that cite this headnote

[8] **Federal Civil Procedure**
State Statutes and Rules Superseded

A "substantive right" under the federal Rules Enabling Act, under which a federal rule may displace a conflicting state provision so long as the rule does not abridge any substantive right, is one that inheres in the rules of decision by which the court will adjudicate the petitioner's rights. 28 U.S.C.A. § 2072(b).

Cases that cite this headnote

[9] **Contracts**
Agreement for Benefit of Third Person

Buyer's allegations were sufficient to state a claim for relief as third-party beneficiary of express warranty in class action brought under Alabama law against wood manufacturer for breach of express warranty related to the treatment of its wood; buyer alleged that manufacturer breached its warranty by selling wood that was not pressure-treated, that manufacturer intended to benefit remote buyers when it warranted that its wood was pressure treated, and manufacturer knew its wood was bound for end users and that they would suffer substantial harm if the wood did not conform to the warranty. Code 1975, § 7–2–313(1)(a).

Cases that cite this headnote

[10] **Contracts**
Agreement for Benefit of Third Person

Under Alabama law, a manufacturer's express warranty, like any contractual obligation, may run in favor of a third-party beneficiary. Code 1975, § 7–2–313(1)(a).

Cases that cite this headnote

[11] **Contracts**
Agreement for Benefit of Third Person

The general standard governing third-party-beneficiary claims for breach of a manufacturer's express warranty under Alabama law is: to recover under a third-party beneficiary theory, the complainant must show: (1) that the contracting parties intended, at the time the contract was created, to bestow a direct benefit upon a third party; (2) that the complainant was the intended beneficiary of the contract; and (3) that the contract was breached. Code 1975, § 7–2–313(1)(a).

Cases that cite this headnote

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Appeal from the United States District Court for the Northern District of Alabama. D.C. Docket No. 3:13–cv–01402–AKK.

Before MARCUS and JILL PRYOR, Circuit Judges, and HINKLE, * District Judge.

Opinion

HINKLE, District Judge:

***1** In this proposed class action, the named plaintiff asserts that wood he bought for a fence at his home was not properly pressure-treated and that it prematurely rotted. He asserts claims against the defendant wood manufacturer under Alabama law, first for violating the Alabama Deceptive Trade Practices Act, and second for breach of express warranty. The district court dismissed the claims.

This appeal presents two issues. The first arises from a conflict between Federal Rule of Civil Procedure 23, which authorizes class actions including for consumer claims of this kind, and the ADTPA, which creates a private right of action but forbids private class actions. We hold that Rule 23 controls.

The second issue arises from the lack of privity between the plaintiff and the defendant. Alabama law allows a consumer to recover for breach of an express warranty, even in the absence of privity, in some circumstances. We hold that the complaint adequately alleges the required circumstances and thus states a claim on which relief can be granted.

I

The complaint alleges these facts. The named plaintiff Robert Lisk entered a contract with Clean Cut Fence Company for installation of a fence at his home. The contract called for Clean Cut to use "treated" wood. The contract said, "All fencing materials shall be warranted only through their respective manufacturers."

Clean Cut built the fence using wood it purchased from Capitol Wholesale Fence Company. Capitol was a distributor for, and obtained the wood from, the defendant Lumber One Wood Preserving, LLC ("Lumber One"). Lumber One manufactured the wood.

Lumber One warranted—and said on its website, advertising, and product labeling—that its wood was treated with MCA technology licensed by Osmose, Inc. MCA-treated wood remains free from rot, fungal decay, and termite attacks for at least 15 years. But Lumber One defectively manufactured and treated its wood—if it treated the wood at all.

Within three years after installation, Mr. Lisk's fence posts were rotten. Clean Cut informed Mr. Lisk that other customers had experienced similar problems with Lumber One's wood.

II

Mr. Lisk filed a complaint seeking to represent a nationwide class of all purchasers of Lumber One's defectively "treated" wood. The complaint names Lumber One as the only defendant. Mr. Lisk and Lumber One are citizens of different states—Tennessee and Alabama—but the amount of Mr. Lisk's individual claim does not exceed $75,000. Mr. Lisk invoked federal jurisdiction under the Class Action Fairness Act. The parties assume, and for present purpose we accept, that Alabama law governs the substantive claims.

Lumber One moved to dismiss, asserting that the ADTPA does not authorize a private class action, that the complaint does not adequately plead an express warranty that runs to a remote purchaser, that dismissal of the defective claims would leave pending only an ADTPA individual claim, and that this would leave no basis for federal jurisdiction.

***2** The district court granted the motion and dismissed the complaint. Mr. Lisk appeals.

III

The district court's order is correct only if the complaint fails to state a class-action claim on which relief can be granted under the ADTPA and fails to state an express-warranty claim at all. To avoid dismissal for failure to state a claim, a

complaint must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."*Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The complaint's factual allegations, though not its legal conclusions, must be accepted as true. *Id.; see also Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The complaint must include "allegations plausibly suggesting (not merely consistent with)" the plaintiff's entitlement to relief. *Twombly,* 550 U.S. at 557. The complaint must set out facts —not mere labels or conclusions—that "render plaintiffs' entitlement to relief plausible."*Id.* at 569 n. 14.

[1] We review de novo a district court's ruling that a complaint fails to state a claim. *Hill v. White,* 321 F.3d 1334, 1335 (11th Cir.2003).

IV

The ADTPA prohibits a variety of deceptive practices, including misrepresenting the characteristics or qualities of goods and representing that goods are of a particular standard or quality when they are not. Ala.Code § 8–195(5), (7) (1975). Misrepresenting that wood is MCA pressure-treated, when it is not, violates the statute.

[2] The ADTPA creates a private right of action in favor of a consumer against a person who violates the statute. The consumer may recover the greater of $100 or actual damages or, in the court's discretion, up to three times actual damages, together with attorney's fees. *Id.* § 8–19–10(a). But the ADTPA provides that only the Alabama Attorney General or a district attorney may bring a class action; a private individual may not:

> A consumer or other person bringing an action under this chapter may not bring an action on behalf of a class; provided, however, that the office of the Attorney General or district attorney shall have the authority to bring action in a representative capacity on behalf of any named person or persons. In any such action brought by the office of the Attorney General or a district attorney the court shall not award minimum damages or treble damages, but recovery shall be limited to actual damages suffered by the person or persons, plus reasonable attorney's fees and costs.

Id. § 8–19–10(f).

If this case were pending in an Alabama state court, the statute would preclude presentation of the ADTPA claims in a private class action. But the case is in federal court. Federal Rule of Civil Procedure 23 allows class actions and makes no exception for cases of this kind. Instead, the rule provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members," if specified conditions are met. The complaint alleges, and for present purposes we assume, that the conditions are met here.

***3** **[3]** The issue, then, is whether Rule 23 applies or is instead displaced by the contrary provision of the ADTPA.

The Supreme Court addressed a nearly identical issue in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.,* 559 U.S. 393, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010). A New York statute required insurers to pay valid claims within 30 days and imposed interest at two percent per month on late payments. A separate New York statute allowed class actions on conditions tracking those in Federal Rule of Civil Procedure 23 but prohibited class actions for claims seeking statutory penalties. Under New York law, the two-percent monthly interest was a penalty within the meaning of the class-action statute. An individual whose claim was paid late filed a proposed class action against his insurer in federal court seeking to recover the statutory interest. The issue there, as here, was which provision controlled—Rule 23 or the state-law prohibition on class actions for claims of this kind.

The Supreme Court held that Rule 23 governed. The decision compels the same result here.

There is room for debate only because in *Shady Grove* the Court split 4–1–4; no single rationale garnered five votes. Justice Scalia authored a plurality opinion for four justices. Justice Stevens concurred separately. Four justices dissented.

In our case the parties debate with vigor whether we should follow the analysis of Justice Scalia (under which Rule 23 plainly controls) or that of Justice Stevens (under which the issue is closer). But before turning to that question, it is important to note that Justice Stevens joined parts of Justice Scalia's opinion. Those parts, labeled sections I and II–A,

thus were joined by five justices; those parts were the opinion of the Court. And those parts confirmed the analysis long followed in resolving conflicts between the Federal Rules of Civil Procedure and contrary provisions of state law.

[4] **[5]** **[6]** The short version of that analysis is this. The federal Rules Enabling Act authorizes the Supreme Court to adopt rules of practice and procedure that apply not only in cases arising under federal law but also in cases in which state law supplies the rule of decision. The Act provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2072. Under the plain terms of the statute, a federal rule applies in any federal lawsuit, and thus displaces any conflicting state provision, so long as the federal rule does not "abridge, enlarge or modify any substantive right."*See, e.g., Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). A state statute precluding class actions for specific kinds of claims conflicts with Rule 23 and so is displaced for claims in federal court so long as applying Rule 23 does not "abridge, enlarge or modify any substantive right."

***4** To this point in the analysis, the five justices in the *Shady Grove* majority agreed. Justice Stevens parted company with the other four only on the proper approach for deciding whether a federal rule abridges, enlarges, or modifies a substantive right. But of critical importance here, all five justices agreed that applying Rule 23 to allow a class action for a statutory penalty created by New York law did not abridge, enlarge, or modify a substantive right; Rule 23 controlled. Regardless of which *Shady Grove* opinion is binding, the *holding* is binding. On this there can be no dispute.

The holding controls our case. There is no relevant, meaningful distinction between a statutorily created penalty of the kind at issue in *Shady Grove,* on the one hand, and a statutorily created claim for deceptive practices of the kind at issue here, on the other hand. Each is a creature of state law. For each, state law allows an injured person to seek redress in an individual action but precludes the person from maintaining a class action. The state's purpose in precluding class actions, while perhaps not completely clear, is essentially the same—to allow individual redress but to prelude class recoveries that, in the legislature's view, may go too far.

Indeed, on one view ours is a stronger case than *Shady Grove* for applying Rule 23. The New York statute at issue there precluded statutory-penalty class actions altogether. The Alabama statute at issue here, in contrast, allows class actions so long as they are brought by the Attorney General or a district attorney. If Rule 23 did not abridge, enlarge, or modify a substantive right under the New York statute, even though the statute precluded class actions altogether, it is difficult to conclude that Rule 23 abridges, enlarges, or modifies a substantive right in Alabama, when all the statute does is prescribe who can bring a class claim based on the very same substantive conduct.

[7] To be sure, the New York prohibition on statutory-penalty class actions was included in a procedural statute addressing class actions generally; the prohibition was not part of the statute that created the statutory penalty. The Alabama class-action prohibition, in contrast, is part of the ADTPA itself. Some district courts have said this is controlling. *See Lisk v. Lumber One Wood Preserving, LLC,* 993 F.Supp.2d 1376, 1383–84 (N.D.Ala.2014) (collecting cases). But how a state chooses to organize its statutes affects the analysis not at all. Surely the New York legislature could not change the *Shady Grove* holding simply by reenacting the same provision as part of the statutory-interest statute. Surely an identical ban on statutory-interest class actions adopted by another state would not override Rule 23 just because it was placed in a different part of the state's code. The goal of national uniformity that underlies the federal rules ought not be sacrificed on so insubstantial a ground. And more importantly, the question whether a federal rule abridges, enlarges, or modifies a substantive right turns on matters of substance—not on the placement of a statute within a state code.

***5** It is true, as well, that the New York class-action statute at issue in *Shady Grove,* at least on its face, applied to claims arising not only under New York substantive law, but under the laws of other jurisdictions. This weakened the argument that the New York class-action statute created substantive rights. Still, the claim at issue in *Shady Grove* arose under

New York substantive law. The Supreme Court held that Rule 23 controlled over the New York class-action statute even as applied to a claim arising under New York substantive law. And again, the New York legislature or courts surely could not have changed the result simply by amending or construing the New York class-action statute so that it applied only to claims arising under New York substantive law. The *Shady Grove* holding cannot fairly be limited to state class-action provisions that, on their face, seem to apply to claims arising under the laws of other jurisdictions.

The bottom line is this. The Alabama statute restricting class actions, like the New York statute at issue in *Shady Grove,* does not apply in federal court. Rule 23 controls.

What we have said to this point squares with the views set out not only in Justice Scalia's majority opinion in *Shady Grove* (the portion of his opinion joined by five justices and thus constituting the opinion of the Court) but also with the views set out in both Justice Scalia's plurality opinion and in Justice Stevens's concurrence. This makes it unnecessary to decide whether the further binding opinion is that of the plurality or Justice Stevens.

Leaving this issue unresolved comports with the general preference for avoiding unnecessary rulings and is especially appropriate for two additional reasons. First, the Supreme Court has said, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."*Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quotation omitted). As the Supreme Court has itself acknowledged, applying this test is difficult. *See Nichols v. United States,* 511 U.S. 738, 745–46, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). For some issues, asking which of two opinions is narrower is akin to asking, "Which is taller, left or right?"The Supreme Court can avoid the dilemma by simply reconsidering the issue that fragmented the Court originally. *See id.* at 746–47 (overruling an earlier, fragmented decision). But that of course is not an option for a circuit court. An issue that presents this level of uncertainty is best reserved for a case in which it matters.

Second, we apparently have taken as many as three different approaches—or we at least have articulated our approach three different ways—when confronting other fragmented Supreme Court decisions. *See, e.g., Wellons v. Comm'r, Ga. Dep't of Corrs.,* 754 F.3d 1268, 1269 n. 2 (11th Cir.2014) ("Justice O'Connor was the fifth and decisive vote for the plurality opinion. Thus, her concurrence set binding precedent."); *Swisher Int'l, Inc. v. Schaefer,* 550 F.3d 1046, 1053–58 (11th Cir.2008) (assuming that neither the four-person plurality nor a single justice's concurrence was narrower, independently analyzing the underlying issue, and siding with the single justice, partly on the ground that the dissenters agreed); *United States v. Robison,* 505 F.3d 1208, 1221 (11th Cir.2007) (following an opinion deemed narrowest and explicitly disregarding the view of the dissenters because *Marks* says to follow the opinion of the justices "who *concurred in the judgments* on the narrowest grounds" (emphasis by the court in *Robison)* (quoting *Marks,* 430 U.S. at 193)). Again, these decisions can be sorted out or reconciled when it makes a difference to the outcome.

***6** In sum, Rule 23 applies in this case. The ADTPA prohibition on class actions does not.

[8] This result makes sense. On any view, the only issue is whether, as applied here, Rule 23 abridges, enlarges, or modifies a "substantive right." 28 U.S.C. § 2072(b). A "substantive right" is one that inheres in "the rules of decision by which [the] court will adjudicate [the petitioner's] rights."*Royalty Network, Inc. v. Harris,* 756 F.3d 1351, 1361 (11th Cir.2014) (quoting *Hanna v. Plumer,* 380 U.S. 460, 465, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)). Lumber One's substantive obligation was to comply with the ADTPA—to make only accurate representations about its product. The substantive right of Mr. Lisk and other buyers was to obtain wood that complied with Lumber One's representations. These are the "rules of decision" that will govern the ADTPA claim. Under Alabama law, Mr. Lisk and other buyers were and are entitled to seek redress. Rule 23 alters these substantive rights and obligations not a whit; with or without Rule 23, the parties have the same substantive rights and responsibilities. The disputed issue is not whether Mr. Lisk and other buyers are entitled to redress for any misrepresentation; they are. The disputed issue is only whether they may seek redress in one action or must instead bring separate actions—whether any representative action may be brought by a consumer or must be brought by the Attorney General or a district attorney. Because Rule 23 does not "abridge, enlarge or modify any substantive right,"Rule 23 is valid and applies in this action.

V

Under Alabama law, "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty...."Ala.Code § 7–2–313(1)(a) (1975). The complaint alleges that "Lumber One's website, advertising, and product labeling represented that its treated lumber was pressure treated using MCA technology licensed by Osmose, Inc." As the district court correctly ruled, the complaint adequately alleges an express warranty to Lumber One's buyer, Capitol Wholesale. Lumber One does not dispute this conclusion on this appeal.

[9] **[10]** **[11]** The contested issue is whether Mr. Lisk has adequately stated a claim for relief as a third-party beneficiary of the express warranty. Under Alabama law, a manufacturer's express warranty, like any contractual obligation, may run in favor of a third-party beneficiary. *See Harris Moran Seed Co. v. Phillips,* 949 So.2d 916, 922–25 (Ala.Civ.App.2006). The general standard governing third-party-beneficiary claims is this: "To recover under a third-party beneficiary theory, the complainant must show: 1) that the contracting parties intended, at the time the contract was created, to bestow a direct benefit upon a third party; 2) that the complainant was the intended beneficiary of the contract; and 3) that the contract was breached."*Sheetz, Aiken & Aiken, Inc. v. Spann, Hall, Ritchie, Inc.,* 512 So.2d 99, 101–02 (Ala.1987).

***7** Mr. Lisk has explicitly alleged each of these three elements of a third-party-beneficiary claim. The complaint alleges that Lumber One breached its warranty by selling wood that was not pressure-treated at all or was treated improperly. And the complaint alleges that when Lumber One warranted that its wood was pressure-treated, Lumber One intended to benefit remote purchasers like Mr. Lisk and the proposed class members: "Lumber One intended to protect future customers of Capitol Wholesale Fence Company, other wholesalers, and subsequent purchasers, including end-users like Plaintiff and Class Members, when it warranted the quality of its products...."

Under Federal Rule of Civil Procedure 9(b), "intent ... and other conditions of a person's mind may be alleged generally."Mr. Lisk's allegation of intent easily meets this standard. To be sure, a complaint must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,"*Iqbal,* 556 U.S. at 678, and must include "allegations plausibly suggesting (not merely consistent with)" the plaintiff's entitlement to relief. *Twombly,* 550 U.S. at 557. But there is nothing implausible about the allegation that a lumber manufacturer intends to warrant its product to end users. Quite the contrary. It is entirely plausible that a manufacturer would so warrant its product, lest end users choose to buy wood manufactured by someone else—someone willing to stand behind its product.

This conclusion draws support from the leading Alabama decision on this issue. In *Harris Moran Seed Co. v. Phillips,* 949 So.2d 916 (Ala.Civ.App.2006), a tomato-seed manufacturer warranted that its seeds conformed to the label, but otherwise the manufacturer sold the seeds "as is." Remote purchasers—farmers who bought from a seller who bought from a distributor who bought from the seed manufacturer —asserted third-party-beneficiary claims under the true-to-label warranty. The court upheld a jury verdict for the farmers, ruling that the farmers were indeed third-party beneficiaries.

Our case is like *Harris Moran* in most respects. In each case the product was distributed through the same number of layers. Wood, like seeds, may appear sound but be defective. A defect in wood, like a defect in seeds, may become evident only after substantial work is done and substantial expense is incurred, whether in installing a fence or growing a crop. Manufacturers of wood, like those of seeds, might well choose to extend a warranty to end users to increase the market for the product.

Harris Moran said that a "court [may] look at the surrounding circumstances" in determining whether an end user is a third-party beneficiary. *Id.* at 920–21. One of the circumstances a court may consider is the foreseeability of harm to end users. *Id.* at 923. Lumber One knew its wood was bound for end users and that they would suffer substantial harm if the wood did not conform to the warranty. Here, as in *Harris Moran,* the circumstances provide substantial support for the third-party-beneficiary claim.

***8** To be sure, there may also be differences in our case and *Harris Moran.*There the court found support in the manufacturer's sales agreement, which did not explicitly designate end users as third-party beneficiaries but did include references to end users and required them to be notified of warranty limitations. Here the complaint does not make similar allegations about the agreement

between Lumber One and its distributor, perhaps because the agreement is not yet available to Mr. Lisk. If the agreement disclaims any warranty to end users, that will support Lumber One and may even entitle Lumber One to prevail. *See Bay Lines, Inc. v. Stoughton Trailers, Inc.*, 838 So.2d 1013, 1016, 1018–19 (Ala.2002) (rejecting a third-party-beneficiary claim because the manufacturer's warranty was explicitly "limited to the original equipment purchaser"). It will be time enough to address the effect of the agreement when its terms are known.

The complaint adequately states an express-warranty claim on which relief can be granted.

VI

For these reasons, the judgment is reversed, and the case is remanded to the district court.

* Honorable Robert L. Hinkle, United States District Judge for the Northern District of Florida, sitting by designation.

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