

2010

Westgate Resorts v. Shaun S. Adel and Consumer Protection Group, LLC: Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WESTGATE RESORTS, LTD.,

Plaintiff/Counterdefendant –
Appellant,

v.

SHAUN S. ADEL and CONSUMER
PROTECTION GROUP, LLC,

Defendants/Counterclaimants –
Appellees

**Consolidated
Case No. 20100425-SC**

APPEAL FROM FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
HON. LYNN DAVIS, CIVIL NO. 020404068

REPLY BRIEF OF CROSS-APPELLANTS

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ARGUMENT

At issue in CPG's conditional cross-appeal is whether the trial court erred in ruling that claims under the Utah Consumer Sales Practices Act may be brought by an assignee. As CPG noted in its opening brief, Utah law recognizes broad assignability of choses in action, including statutory claims. No statutory or policy reasons exist for exempting UCSPA claims from this general proposition.

In response, Westgate argues that "only a consumer may bring a claim for damages," and, therefore, that assignments are prohibited. *Response Brief of Cross-Appellee* at 20. There are two problems with that assertion. First, nowhere does the Utah Consumer Sales Practices Act use the word 'only' when establishing the actions a consumer may bring for damages suffered by a deceptive act or practice.

The Act creates a statutory remedy, but not at the expense of any other remedy. Indeed, the Act makes clear that "[t]he remedies of this act are in addition to remedies otherwise available for the same conduct under state or local law[.]" Utah Code Ann. § 13-11-23; *see also id.* § 13-11-2 ("This act shall be construed liberally to promote the following policies: . . . (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices; [and] (3) to encourage the development of fair consumer sales practices[.]"). One remedy otherwise available to aggrieved persons under state law is to assign their damage claims to another for vindication.

Moreover, even if the statute said that “only” a consumer may bring a claim, that simply defines the class of persons protected by the statute, *i.e.*, in whom does a chose in action vest? The legislature is aware of how to word a statute if it intends to bar the assignment of claims. *See, e.g.*, Utah Code Ann. § 34A-2-422(1)(b)(i) and (3(a) (prohibiting assignment of workers’ compensation claims, awards, benefits, or settlements), § 35A-3-112 (claims for public assistance not assignable).

Westgate also argues that the class action limitations in the Utah Consumer Sales Practices Act must be read to prohibit CPG standing to advance claims which individual consumers have assigned to CPG. *Id.* at 22. Westgate seeks to imbue CPG’s assigned claims with class action status, something neither CPG nor the trial court have sought to do. An aggregation or assignment of individual claims does not transform individual claims into a class action. As Westgate points out, specific procedures are required to be followed to certify and prosecute a class action case, procedures which are not present in this case.

Westgate further argues that the Utah Consumer Sales Practices Act bars standing to assignees because the Division of Consumer Protection is the only appointed enforcement authority. *Id.* at 21. Westgate’s argument here ignores the Act’s dual enforcement provisions; one the State’s enforcement authority to vindicate the public interest, and the other the rights of individual consumers to seek remedies for damages caused by deceptive acts or practices. CPG has not sought to impose

any penalty under the State's enforcement authority. It has, instead, sought to vindicate the rights of the individual consumers who have assigned their right to damages to CPG.

It is unquestioned that an action is assignable, notwithstanding that the assignment is made solely for the purpose of prosecuting the action. *Mayer v. Rankin*, 63 P. 2d 611, 616 (Utah 1936). Westgate argues that consumer protection claims are not assignable because consumer protection claims are "analogous" to tort claims. *Response Brief of Cross-Appellee* at 23. Although CPG does not see the analogy, Westgate is wrong in any event to assert that all tort claims are not assignable.

As early as the *Mayer* decision, the Court noted that "[t]he rule of nonassignability no longer extends to all actions arising ex delicto." *Mayer v. Rankin* at 616. While injuries to the person's body, reputation or feelings may still be non-assignable (*See e.g., Mayer* at 616, "libel, slander, assault, assault and battery, false imprisonment, for the recovery of a penalty"), "Utah law allows the assignment of a fraud claim." *Russell Packard Development v. Carson*, 2003 UT App 316, ¶36; 78 P. 3rd 616.

It is not clear at all that consumer protection claims should be viewed as similar to tort claims rather than to economic claims. Consumer protection claims are intended to level the bargaining field between innocent, unsuspecting consumers

and large, powerful and sophisticated corporations engaged in systematic deceptive business practices. *See* Utah Code Ann. § 13-11-2 (the purposes of the Act include “to protect consumers from suppliers who commit deceptive and unconscionable sales practices”). Because an assignment is the act of transferring to another one’s property, interests or rights (6 Am. Jur. 2D, *Assignments* § 1(2010)), consumers should not be inhibited from transferring their claims based on such practices.

It is ironic indeed that Westgate, a party that has been found to have made false and fraudulent representations and to have operated a scheme or artifice to defraud consumers, should oppose the assignment of consumer claims on the grounds that such assignments could result in consumers being cheated. *Response Brief of Cross-Appellee* at 24-25. While anything is conceivable and the possibility exists that consumers might be deceived when assigning their consumer claims, that argument could be used to abrogate all consumer transactions, since consumers can obviously be cheated when conducting consumer transactions. To use the possibility of wrongdoing by some parties to ban the transfer of a type of property would go contrary to the historical trend in the United States toward fewer restrictions on the alienation of property interests.

Moreover, restricting the assignment of consumer claims would eviscerate the second prong of enforcement in the Utah Consumer Sales Practices Act, namely the right of consumers to seek remedy from deceptive sales practices. Westgate argues

that because the UPUAA provides for double actual damages and costs of suit and that the UCSPA awards \$2,000 regardless of actual damages, “each consumer could have maintained an action against Westgate.” *Response Brief of Cross-Appellee* at 27. However, one reason for allowing the aggregation of consumer claims is that most people, even with the possibility of added recovery, will lack the motivation to litigate. If the Court precludes the assignment of consumer claims, more deceptive sales practices will go unchallenged. Such a policy would encourage the very behavior which Westgate was found to have perpetrated.

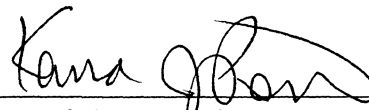
In that same vein, Westgate agrees that the purpose of the private attorney general doctrine is to overcome the possibility of inaction when any individual’s financial interest is insufficient to encourage private litigation to enforce the right. *Response Brief of Cross-Appellee* at 27. It is clear that allowing the aggregation of similar consumer claims and the prosecution of such claims such as that brought by CPG in fact advances societal interests. Allowing the recovery of attorney fees through the private attorney general doctrine helps to fulfill the purpose of the Utah Consumer Sales Practices Act to protect consumers from suppliers who commit deceptive and unconscionable sales practices.

CONCLUSION

For the reasons set forth above and in CPG's brief of appellees and Cross-Appellants, the Court should affirm the trial court's judgment, or in the alternative only, reverse the trial court's dismissal of CPG's Consumer Sales Practices Act.

DATED this 29th day of March, 2011.

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CERTIFICATE OF SERVICE

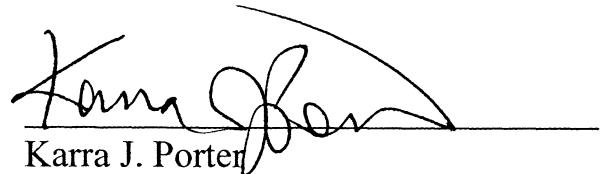
I hereby certify that a copy of **REPLY BRIEF OF CROSS-APPELLANTS** was hand-delivered or mailed to the following this 29th day of March, 2011:

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