COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1683 **Cir. Ct. No. 2001CV12349**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

CATHERINE D. NOONAN AND DANIEL A. NOONAN,

PLAINTIFFS-APPELLANTS,

V.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, DOE A; DOE B; DOE C; INSURER X; INSURER Y AND INSURER D,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: EARL SCHMIDT, Judge. *Affirmed*.

Before Dykman, Deininger and Higginbotham, JJ.

¶1 DYKMAN, J. Catherine and Daniel Noonan (Noonans) appeal from an order denying their motion for class certification in their action for breach

of contract and breach of fiduciary duty against The Northwestern Mutual Life Insurance Company (NML). Noonans contend that the circuit court erroneously denied class certification because, on the facts in the record, all three criteria for class certification are met and no facts indicate a class action would be unmanageable. We conclude that the circuit court's decision to deny class certification, because a class action would be unmanageable, is supported by the record, and is not an erroneous exercise of discretion. Accordingly, we affirm.

Background

¶2 The following facts are taken from the circuit court's decision to deny class certification.[1] NML sells financial instruments, such as annuities and life insurance policies, through independent agents throughout the United States. In 1976, Noonans purchased NML annuity contracts through one of NML's agents, Daniel Madigan. The contracts provided Noonans with a share of the divisible surplus of NML, called "dividends."

¶3 When Noonans purchased their annuity contracts, most of NML's financial instruments were invested in long-term securities. However, in the early 1980s, high interest rates caused some NML annuity owners to redeem their annuities because short-term bonds were more lucrative. Because their portfolio was uncompetitive in that market, in the mid-1980s NML altered the basis for paying dividends for their annuities, creating a "segmented account" that paid dividends using a higher interest rate.

[1] For a more detailed factual background, *see* ***Noonan v. Northwestern Mut. Life Ins. Co.***, 2004 WI App 154, ¶¶3-9, 276 Wis. 2d 33, 687 N.W.2d 254.

¶4 Noonans allege they first realized a change had been made in the distribution of dividends for their NML annuities in 2000. They sued NML for breach of contract and breach of fiduciary duty, seeking actual and punitive damages. After we reversed the circuit court's judgment and order granting NML's motion to dismiss, *see* ***Noonan v. Northwestern Mut. Life Ins. Co.***, 2004 WI App 154, ¶2, 276 Wis.2d 33, 687 N.W.2d 254, Noonans moved for class certification. The parties briefed and argued the issue of class certification to the circuit court, which denied the motion. Noonans appeal from the denial of class certification.[2]

Standard of Review

¶5 We review a circuit court's denial of class certification for an erroneous exercise of discretion.[3] ***Sisters of St. Mary v. AAER Sprayed Insulation***, 151 Wis. 2d 708, 713, 445 N.W.2d 723 (Ct. App. 1989) (citation omitted). "A trial court properly exercises its discretion if it examines the relevant facts, applies a proper legal standard and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach." ***Id.*** (citation omitted). A proper exercise of discretion relies on facts in the record or inferences

[2] We granted Noonan's petition for leave to appeal the denial of class certification pursuant to WIS. STAT. § 808.03(2) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] Noonans concede that the standard of review for a denial of class certification is for an erroneous exercise of discretion, but assert that discretionary determinations based on erroneous views of the law are not given any deference. *See* ***Consumer's Co-Op of Walworth County v. Olsen***, 142 Wis. 2d 465, 473, 419 N.W.2d 211 (1988). This correctly states the erroneous exercise of discretion standard of review, but does not convince us to change that standard to a less deferential one. Because we conclude that the legal criteria for class certification were properly identified and applied to the facts in this case, we do not further question the circuit court's exercise of its discretion.

reasonably derived from the record. ***Goberville v. Goberville***, 2005 WI App 58, ¶7, 280 Wis. 2d 405, 694 N.W.2d 503 (citation omitted). Further, while a circuit court is required to articulate its reasoning, we may look to the record to find support for the circuit court's decision if that reasoning is not clear. ***Id.*** (citing ***Vier v. Vier***, 62 Wis. 2d 636, 639-40, 215 N.W.2d 432 (1974)).

¶6 We are not persuaded by Noonans's recitation of federal cases demonstrating that some federal circuits give less deference to denials of class certification than other discretionary decisions. *See*, *e.g.*, ***Robidoux v. Celani***, 987 F.2d 931, 935 (2d Cir. 1993) (concluding that "abuse of discretion can be found more readily on appeals from the denial of class status than in other areas, for the courts have built a body of case law with respect to class action status") (citation omitted). We rely on Wisconsin case law, which compels us to grant a circuit court's findings as to the manageability of a class action "a wide range of discretion." ***Sisters of St. Mary***, 151 Wis. 2d at 714 (citation omitted).

¶7 We uphold a circuit court's discretionary decision unless discretion was erroneously exercised, even if the trial court did not make its reasoning clear and even if we would have reached a different decision ourselves. *See*, *e.g.*, ***Vier***, 62 Wis. 2d at 641 (affirming circuit court even though it did not explain the reason for its decision and even though supreme court may have reached a different decision in its place, because circuit court's decision was not unreasonable).

Discussion

¶8 Under WIS. STAT. § 803.08, a party seeking class certification must establish three elements: commonality, numerosity, and adequate representation. *See* ***Sisters of St. Mary***, 151 Wis. 2d at 713-14. In deciding whether to certify a class, the circuit court also addresses the basic question of manageability,

determining "whether the advantages of disposing of the entire controversy in one proceeding are outweighed by the difficulties of combining divergent issues and persons." ***Id.*** at 714 (citations omitted). If all three elements of class certification are met, it is in the public interest to certify the class. ***Id.*** (citing ***Mercury Records v. Econ. Consultants***, 91 Wis. 2d 482, 490, 283 N.W.2d 613 (Ct. App. 1979)). However, even if all three elements of class certification are met, a circuit court may deny certification if it reasonably determines that the case would be unmanageable as a class action. ***Id.*** at 715. Here, the parties do not dispute that the elements of numerosity and adequacy are met. They argue over whether commonality is met and whether the circuit court properly determined that the case would be unmanageable as a class action. We conclude that the court's decision that a class action would be unmanageable in this case is supported by the facts in the record, and that it therefore properly exercised its discretion when it denied class certification.[4]

¶9 The determination of manageability is "primarily a factual one with which a [trial] court generally has a greater familiarity and expertise than does a court of appeals." ***Id.*** at 714. A circuit court, in determining class certification, must resolve "whether, considering the effect of all of the burdens [of class

[4] The circuit court said, in denying class certification: "Because the jury trial to determine the issues of breach of contract, breach of fiduciary duty, punitiveness and concomitant damages will not be manageable as a class action, the Court denies the motion." The court's ruling on commonality is not clear. However, because a court may deny certification because of unmanageability even if all the criteria for certification are met, the circuit court's denial of certification on a reasonable finding of unmanageability is dispositive. *See* ***Sisters of St. Mary***, 151 Wis. 2d at 715; ***Adams v. Kansas City Life Ins. Co***, 192 F.R.D. 274, 277 n.5 (W.D. Mo. 2000); ***In re Jackson Nat'l Life Ins. Co. Premium Litig.***, 183 F.R.D. 217, 220 (W.D. Mich. 1998); ***Keyes v. Guardian Life Ins. Co. of Am.***, 194 F.R.D. 253, 256 (S.D. Miss. 2000); ***Parkhill v. Minnesota Mut. Life Ins. Co***., 188 F.R.D. 332, 340 (D. Minn. 1999). Thus, we need not determine whether commonality was met.

certification] together, which includes any synergistic effect those burdens may have, the burdens of a class action outweigh the benefits." ***Id.*** at 716. The court may consider difficulties it anticipates during discovery, trial, and jury verdict in reaching its decision on manageability. *See* ***id.*** at 716-19.

¶10 Here, the circuit court identified choice of law and damages issues for plaintiffs from all fifty states who obtained their annuities under disparate scenarios as contributing to the unmanageability of a class action. Noonans argue that the circuit court erroneously relied on those factors and failed to weigh the potential benefits of a class action in determining that a class action would be unmanageable. We disagree.

¶11 Noonans first contest the circuit court's reliance on its finding that multiple states' laws may apply to various aspects of this case in determining that a class action would be unmanageable.[5] They argue that the circuit court's reliance on choice of law issues as a factor against class certification was an error of law because Wisconsin case law mandates that Wisconsin law apply to each issue in this case, relying on ***Beloit Liquidating Trust v. Grade***, 2004 WI 39, 270 Wis. 2d 356, 677 N.W.2d 298. We disagree.

¶12 In ***Beloit***, the supreme court concluded that, under WIS. STAT. § 180.1704 (1999-2000) and Wisconsin case law, Wisconsin law applied to an action for breach of fiduciary duty by a liquidating trust against a corporation incorporated in Delaware but domiciled in Wisconsin. ***Beloit***, 270 Wis. 2d 356, ¶¶1-3. In reaching that conclusion, the ***Beloit*** court first held that § 180.1704 put

[5] The parties do not contest that the policies at issue do not have a choice of law provision, and thus choice of law must be determined by case law.

the Delaware corporation on notice that it would be subject to Wisconsin law if it transacted business in Wisconsin. ***Id.***, ¶23. Then, the court explained that Wisconsin case law sets out two tests for determining choice of law. First, courts look to "whether the contacts of one state to the facts of the case are so obviously limited and minimal that application of that state's law constitutes officious intermeddling." ***Id.***, ¶24 (citation omitted). Then, courts analyze the five factors set forth in ***Heath v. Zellmer***, 35 Wis. 2d 578, 595, 151 N.W.2d 664 (Ct. App. 1967): "(1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law." ***Id.***, ¶25. The ***Beloit*** court concluded that both tests supported applying Wisconsin law. ***Id.***, ¶¶24-32.

¶13 We are not convinced that ***Beloit*** mandates Wisconsin law apply uniformly in this case. First, neither test is as clearly met here as in ***Beloit***. In ***Beloit***, the first test was met because the corporation's contacts with Delaware were limited to incorporation and filing bankruptcy there while every other significant event occurred in Wisconsin, so that "application of Delaware law … would constitute officious intermeddling with the laws of Wisconsin." ***Id***., ¶24. Here, in contrast, the putative class contains members who purchased annuities in all fifty states, from independent agents. Thus, the contacts of foreign states are not so minimal here as to exclude their laws as "officious intermeddling." The court also relied on the corporation's minimal contact with Delaware and its extensive contact with Wisconsin in concluding all five ***Heath*** factors were met. ***Id***., ¶¶26-31. Because the putative class members in this case are domiciled and

purchased their annuities from agents in all fifty states, the ***Heath*** factors do not weigh as heavily toward the application of Wisconsin law as they did in ***Beloit***.[6]

¶14 Noonans also rely on ***Schlosser v. Allis-Chalmers Corp.***, 86 Wis. 2d 226, 239, 271 N.W.2d 879 (1978) (***Schlosser II***), in which the supreme court stated that Wisconsin "follows the 'grouping of contacts' approach to determine which state law applies to resolve questions of contract. By this method the law of the state with which the contract has its most significant relationship applies."[7] Noonans contend that because NML is a Wisconsin company, has its home office here, and manages annuities here, Wisconsin has the most significant relationship to the contracts in this case and thus Wisconsin law controls. However, as the circuit court noted, this case is distinguishable from ***Schlosser II***. Here, each putative class member individually purchased their annuities, while in ***Schlosser II***, the life insurance policy was issued as a term of employment. *See* ***Id.*** While the plaintiff class members in ***Schlosser II*** lived and worked in various states, they were all subject to the same master insurance plan purchased by Allis-Chalmers for their benefit. ***Id.*** at 235, 239-41. They all received the same letter

[6] We need not extensively analyze each factor under ***Heath v. Zellmer***, 35 Wis. 2d 578, 595, 151 N.W.2d 664 (Ct. App. 1967), nor conclude which state's laws will apply to which issues in this case. For the purposes of concluding that the circuit court reasonably identified choice of law issues as contributing to the unmanageability of a class action, it suffices for us to distinguish this case from ***Beloit Liquidating Trust v. Grade***, 2004 WI 39, 270 Wis. 2d 356, 677 N.W.2d 298, because this case is much less clearly governed solely by Wisconsin law.

[7] As highlighted during oral arguments to this court, which test to follow when deciding choice of law in Wisconsin is less than clear. In ***Schlosser v. Allis-Chalmers Corp.***, 86 Wis. 2d 226, 239-40, 271 N.W.2d 879 (1970) (***Schlosser II***), for example, the court stated it followed the "grouping of contacts" test but also relied on the five ***Heath*** factors. However, we need not resolve the state of choice of law in Wisconsin today. We conclude that under the various tests for choice of law identified and argued by the parties, the circuit court did not erroneously exercise its discretion in relying on choice of law concerns in deciding a class action would be unmanageable.

notifying them of the change in their benefits. ***Id***. at 235. Further, the ***Schlosser II*** court relied on the following comment in the Second Restatement of Conflict of Laws:

> *h. Group life insurance.* In the case of group life insurance, rights against the insurer are usually governed by the law which governs the master policy. This is because it is desirable that each individual insured should enjoy the same privileges and protection. So where an employer arranges for group life insurance for its employees, the rights of a particular employee against the insurer will usually be determined, in the absence of an effective choice-of-law clause and at least as to most issues, not by the local law of the state where the employee was domiciled and received his certificate but rather by the law governing the master policy with respect to that issue. This will usually be the state where the employer has his principal place of business.

Id. at 239-40 n.2 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 192 cmt. h (1971)). Here, there are more significant contacts with the various states involved than in ***Schlosser II***, and thus a "grouping of contacts" inquiry requires a more arduous judicial task and its result is less certain.

¶15 In addition, the ***Schlosser II*** court identified the following five factors from § 188 of the Second Restatement following its explanation of the "grouping of contacts" rule: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties." ***Id.*** (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188). Because the contracts at issue here were negotiated and purchased in various states and the putative class members continue to reside there, these factors do not clearly establish that Wisconsin law applies.

¶16 Noonans also contend that Wisconsin's statute of limitations necessarily applies to all class members, and therefore any concern the circuit court had over the application of various statutes of limitation was erroneous.[8] Noonans rely on ***Abraham v. General Cas. Co. of Wisconsin***, 217 Wis. 2d 294, 576 N.W.2d 46 (1998), which explains the "final significant event" test for determining which state's statute of limitations will apply for an action sounding in contract.[9] The ***Abraham*** court concluded that "a claim sounding in contract is a 'foreign cause of action' when the final significant event giving rise to a suable claim occurs outside the state of Wisconsin." ***Id.*** at 311. There, Abraham was a Wisconsin resident with an insurance policy issued by General Casualty, a Wisconsin corporation. ***Id.*** at 306. The insurance contract was negotiated and issued in Wisconsin. ***Id.*** The only event that occurred outside of Wisconsin was the injury for which Abraham sought insurance coverage. ***Id.*** at 299-300. The ***Abraham*** court concluded that the Wisconsin statute of limitation applied because Abraham had a "suable claim" for breach of contract when General Casualty

[8] The court said: "NML has concerns about the applicability of the other state laws. Noonans argue that the laws of the forty-nine other states where the contracts were actually sold are not relevant. Statutes of limitation, for example, may very well be relevant."

[9] ***Abraham v. General Cas. Co. of Wisconsin***, 217 Wis. 2d 294, 296 n.1, 576 N.W.2d 46 (1998) interpreted Wisconsin's borrowing statute, which states:

> **Application of foreign statutes of limitation. (1)** If an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies has expired, no action may be maintained in this state.
>
> **(2)** If an action is brought in this state on a foreign cause of action and the foreign period of limitation which applies to that action has not expired, but the applicable Wisconsin period of limitation has expired, no action may be maintained in this state.

Id. (quoting WIS. STAT. § 893.07 (1993-1994), which is identical to the current version).

denied his claim for underinsured motorist benefits in Wisconsin, rather than when he was injured in Florida. ***Id***. at 312-13.

¶17 ***Abraham***, however, is distinguishable on its facts. Abraham had a cause of action when his benefits were denied. That occurred entirely in Wisconsin. General Casualty denied the benefits and Abraham was notified of that denial in Wisconsin. There was no complexity in determining that the "final significant event" giving rise to his suable claim thus occurred in Wisconsin. Here, the facts are more varied. The putative class members reside in all fifty states. Their suable claims arose when NML breached their contracts, if it did. But where, and when, did this "final significant event" occur? We, and the circuit court, are left with the ambiguity discussed in the concurring opinion in ***Abraham***:

> Does [the final significant event] occur in the state where the party in breach is located? Does it occur in the state wherein the injured party resides? Does it occur in the state where the … contract was negotiated or purchased? Does it occur in the state from which the breach is communicated?

Id. at 315 (Bradley, J., concurring). The circuit court reasonably identified the resolution of such questions as to each putative class member, and the application of potentially differing statutes of limitations, as an obstacle to class certification.[10] The varied factual scenarios under which the plaintiffs entered into their contracts and then learned of NML's breach provide support for the court's conclusion that the potential application of various statutes of limitation contributed to the unmanageability of a class action.

[10] *See, e.g.*, COLO. REV. STAT. ANN. § 13-80-101 (West 2006) (three-year statute of limitations for breach of contract in Colorado); CAL. CIV. PRO. CODE § 337 (West 2006) (four-year statue of limitation for breach of contract in California).

¶18 Thus, Wisconsin law would not clearly apply to each aspect of a class action in this case, as the Noonans contend. On the motion for class certification, the parties briefed and argued the issue of which state's laws would apply, and the circuit court reasonably found that the varied factual scenarios for each putative class member rendered the determination and application of choice of law for all putative class members unmanageable. For example, as NML argues, whether NML owed each plaintiff a fiduciary duty would vary depending on the applicability of individual state laws.[11] As we held in our previous decision in this case, Noonans's allegations state a claim for breach of fiduciary duty under Wisconsin law. ***Noonan***, 276 Wis. 2d 33, ¶¶19-26. Whether the other putative class members state a claim for breach of fiduciary duty under their respective state laws has not yet been decided. *See* ***id***. (relying on Wisconsin law in determining that NML owes Noonans a fiduciary duty). If other states' laws control the breach of fiduciary duty claim in this case, the application of those potentially differing laws would certainly render this case unmanageable. *See, e.g.*, ***Sisters of St. Mary***, 151 Wis. 2d at 718.

¶19 Also, the circuit court recognized that the application of different states' laws to the putative class members' breach of contract claims would prove unmanageable.[12] As NML correctly asserts, the states have widely differing rules

[11] We note that the circuit court did not explain this reasoning for its decision. However, it did specifically find that a jury trial to determine breach of fiduciary duty would be unmanageable and later qualified its concern with choice of law for statutes of limitations with the phrase "for example," indicating other choice of law concerns were present. We conclude that such concerns were reasonable, and applied to the issue of fiduciary duties.

[12] The court concluded that a jury trial to determine breach of contract would be unmanageable, and later said: "The Noonans also made shortshrift of other concerns NML has over commonality regarding equitable remedies the law has developed to take the harshness out of unambiguous contracts, e.g. waiver, estoppel, etc. These remedies may be applicable to any number of the proposed class depending on their individual facts." After stating its concern over (continued)

for the interpretation of contracts, most significantly concerning parol evidence.[13] Thus, the determination of which state's laws apply for the interpretation of the contracts at issue, and the resulting application of those rules to the contracts of each putative class member, was a reasonable factor for the circuit court to consider.[14]

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choice of law issues, the court said: "The Court is not aware what the adversarial strategies of the parties will be, but it is more likely than not that many fact situations between clients and independent agents will be material and probative." While the court's reasoning is not clear from its opinion, we conclude on our own review of the record that the court was reasonable in concluding that the potential application of differing state laws to the interpretation of the contracts at issue contributed to the unmanageability of a class action.

[13] We have decided that, under Wisconsin law, the Noonans's contracts are unambiguous in stating "that annuity policyholders 'will share in the divisible surplus of the Company' and the 'share shall be determined annually and credited as a dividend,'" and thus Noonans state a claim for breach of contract in their complaint. ***Noonan***, 276 Wis. 2d 33, ¶17. However, the states have developed different tests for determining whether a contract is ambiguous, and thus the absence of ambiguity under Wisconsin law does not necessarily translate into the absence of ambiguity if other states' laws apply. *See*, *e.g.*, ***Dieter v. Chrysler Corp***., 2000 WI 45, ¶15, 234 Wis. 2d 670, 610 N.W.2. 832 ("Contractual language is ambiguous only when it is reasonably and fairly susceptible to more than one construction.") (citation omitted); ***Bunkers v. Jacobson***, 653 N.W.2d 732, 738 (S.D. 2002) ("Ambiguity exists when [the contract] is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.") (citation omitted); ***Petovello v. Murray***, 362 N.W.2d 857, 858 (Mich. Ct. App. 1984) ("It is a fundamental principal of law that, if the language of a written contract is subject to two or more reasonable interpretations or is inconsistent on its face, the contract is ambiguous, and a factual development is necessary to determine the intent of the parties."). Furthermore, the states have developed differing laws on the use of extrinsic evidence to help interpret contracts. *See*, *e.g.*, ***Jake C. Byers, Inc. v. J.B.C. Invs***., 834 S.W.2d 806, 811 (Mo. Ct. App. 1992) ("In the absence of fraud, accident, mistake, or duress, the parol evidence rule prohibits evidence of prior or contemporaneous oral agreements which vary or contradict the terms of an unambiguous, final and complete writing.") (citations omitted); ***Mercury Inv. Co. v. F.W. Woolworth Co***., 706 P.2d 523, 529 (Okla. 1985) ("While parol testimony cannot vary, modify or contradict the terms of the instrument, it is admissible to explain the meaning of words when there is a latent ambiguity in the written text of the agreement.") (citations omitted); ***Hibbett Sporting Goods, Inc., v. Biernbaum***, 375 So. 2d 431, 434 (Ala. 1979) ("Where there exists doubt that the written agreement was ever intended to reflect the full agreement of the parties, the courts of this State have not hesitated to admit contradictory parol evidence of their true agreement.") (citations omitted).

[14] We are not convinced by Noonans's assertion that the court was required to disregard the individual purchases of contracts and focus solely on the similarity of contract language (continued)

¶20 Because it is not clear from the record that Wisconsin law definitively controls, the circuit court was justified in identifying the forgoing choice of law concerns as rendering a class action unmanageable.[15] We therefore conclude that it did not erroneously exercise its discretion in relying on this factor.

¶21 Noonans also contend that the circuit court erred by considering individual agent/plaintiff relationships as relevant to a determination of individual damages. They contend that the cases on which the circuit court relied were limited to claims for fraudulent misrepresentation, thus necessitating an analysis of individual sales, while here the conduct of the home office, not the individual agents, is relevant. We conclude that the trial court correctly identified individual interactions between agents and purchasers as relevant to a determination of damages for Noonans's claims for breach of contract and breach of fiduciary duty.[16]

¶22 Contrary to Noonans's assertion, the federal cases on which the circuit court relied were not limited to actions for fraudulent misrepresentation. In

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among all putative class members. The circumstances under which each putative class member purchased annuities and where each "final significant event" occurred is relevant under Wisconsin law for determining which state's law to apply to a breach of contract claim. *See* ***Abraham***, 217 Wis. 2d at 315 (Bradley, J., concurring); ***Schlosser II***, 86 Wis. 2d at 239 n.2.

[15] The parties disagree over whether punitive damages are also a potential choice of law issue. Noonans contend that punitive damages are necessarily controlled by Wisconsin law while NML contends that they are not, claiming that such damages would be available under some states' laws and not others. We need not resolve this issue. The circuit court's order denying class certification does not appear to consider punitive damages as a potential choice of law concern. Rather, the court specifies its concern over punitive damages as the issue of individual determinations, citing recent Wisconsin cases.

[16] Manageability under WIS. STAT. § 803.08 mirrors the question of manageability under FED. R. CIV. P. 23(b)(3). ***Sisters of St. Mary***, 151 Wis. 2d at 713-14. The circuit court thus correctly relied for guidance on federal cases discussing class certification under FED. R. CIV. P. 23(b)(3).

Adams v. Kansas City Life Ins. Co, 192 F.R.D. 274, 275-77 (W.D. Mo. 2000), for example, the court found that the plaintiff's claims were too individualized and fact specific to support class certification for claims including fraudulent inducement, breach of fiduciary duty, and breach of contract in connection with the defendant's sale of life insurance policies. The court explained that individual agent/purchaser interactions would be relevant to proving reliance in the fraudulent inducement claim, and would also be necessary for proving the existence of a fiduciary duty and interpreting the ambiguous insurance contract. ***Id.*** at 277-82.

¶23 In ***In re Jackson Nat'l Life Ins. Co. Premium Litig.***, 183 F.R.D. 217, 219 (W.D. Mich. 1998), the court denied class certification for plaintiffs' claims, including their claims for fraud, breach of fiduciary duty, and breach of contract for the defendant's sale of misleading insurance policies. The court found that class certification was inappropriate under FED. R. CIV. P. 23(b)(3) because plaintiffs had "failed to show that the disparate legal and factual issues posed by this case are manageable in trial." ***Id.*** at 223. In reaching this conclusion, the court explained that the class action would require introduction of agent/purchaser interactions, because "the information … was generally communicated to consumers, if at all, through varying oral representations," so that "adjudication of the claims will … unavoidably require individualized treatment."[17] ***Id.*** at 224.

¶24 Here, the court found that a class action would entail the introduction of an unmanageable amount of evidence of agent/purchaser

[17] *See also* ***Parkhill***, 188 F.R.D. at 335, 342-45 (denying class certification for plaintiff's claims for breach of contract and breach of Minnesota's consumer protection statutes because both claims would require evidence of individual contract purchases).

interactions to determine damages and affirmative defenses.[18] The circuit court had sufficient material from which to conclude that individual agent/purchaser interactions would need to be introduced during trial to determine damages, based on the varied factual scenarios under which individual plaintiffs obtained annuities and learned of the alleged breach.[19] Because the circuit court explained the factors it considered in determining the issue of individual damages would render a class action unmanageable, and reached a decision a reasonable judge could reach, we conclude it did not erroneously exercise its discretion in relying on this factor.

¶25 Further, Noonans assert that the circuit court erroneously disregarded the "common fund" method typically used in class actions in finding that the jury would have to determine damages as to each individual plaintiff. In support, Noonans argue that ***Schlosser v. Allis-Chalmers Corp***., 65 Wis. 2d 153, 168-72, 222 N.W.2d 156 (1974) (***Schlosser I***), compels class certification in this case. ***Schlosser I***, however, is inapposite. In ***Schlosser I***, the supreme court

[18] The court was "especially concerned with the punitive damages question and award," noting that recent Wisconsin cases may indicate higher evidentiary standards for the defense of punitive damages. *See, e.g.,* ***Strenke v. Hogner***, 2005 WI 25, ¶¶38-41, 279 Wis. 2d 52, 694 N.W.2d 296 (concluding that punitive damages in Wisconsin require that the defendant's actions were "deliberate," "actually disregard[ed] the rights of the plaintiff," and were "sufficiently aggravated to warrant punishment by punitive damages," thus requiring evidence establishing punitive damages are warranted by clear and convincing evidence). (Citations omitted.) Noonans contend that this is a non-issue because punitive damages are only available in Wisconsin on the breach of fiduciary duty claim, not on the claim for breach of contract, and focus exclusively on the actions of the top management. We again note that this argument fails because this case is not clearly governed solely by Wisconsin law. Further, we do not analyze this concern of the trial court in isolation, but together with the other burdens to class certification. In their entirety, those burdens support the circuit court's decision to deny class certification.

[19] Both parties submitted documents detailing the method by which dividends were originally distributed under the Noonans's annuities and how the 1985 change affected dividend distribution. As already noted, the parties also agreed that the putative class contained members from all fifty states and that each purchased their annuities from independent agents.

upheld the circuit court's determination that a class action could be maintained. ***Id.*** The ***Schlosser I*** court concluded that the circuit court reasonably certified the class because it could easily resolve the issue of separately triable damages, and accordingly affirmed. Here, Noonans urge us to reverse the circuit court's denial of class certification, arguing that its finding that the potentially disparate damage awards contributed to the unmanageability of a class action was unreasonable. As in ***Schlosser I***, we conclude that the circuit court's decision was reasonable and we therefore will not disturb it.

¶26 The circuit court found that a jury verdict would "inquire as to damages and not as to a formula" and that "[i]ndividual damage awards will have to be fleshed out for the jury." We are not convinced that the court's failure to specifically address a "common fund" method for determining damages for the class means that it erroneously exercised its discretion. Noonans thoroughly argued in their brief to the circuit court on their motion for class certification how they believed damage awards could be easily handled by the circuit court in a class action.[20] However, the circuit court concluded the issue of damages nonetheless

[20] Noonans argued:

> If the class makes a recovery by settlement or judgement, administration of the recovered fund occurs, in which the formula and procedure for distribution of the recovery among the class members are determined and implemented. 5 Newberg, ch. 10, 11. The administration and distribution process is usually handled by a court-appointed administrator.
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> ….
>
> Any dollar differential between amounts due annuities, including both those still in the "deferral" period and those which have terminated or reached maturity since March 1, 1985, would in the normal course be recognized in the distribution formula applied in the administration of any Class recovery.

contributed to the unmanageability of a class action.[21] A reasonable judge could conclude that despite the availability of case management techniques in determining damages, the complicated factual scenarios in this case under which those damages arose rendered a class action unmanageable.[22] As we explained in ***Sisters of St. Mary***:

> "Where the fact of injury and damage breaks down in what may be characterized as virtually a mechanical task, capable of mathematical or formula calculation, the existence of individualized claims for damages seems to offer no barrier to class certification on grounds of manageability. On the other hand, where the issue of damages and impact does not lend itself to such a mechanical calculation, but requires separate mini-trials of an overwhelming large number of individual claims, courts have found that the staggering problems of logistics thus created 'make the damage aspect of [the] case predominate,' and render the case unmanageable as a class action."
>
> The trial court's conclusion that the present case falls into the latter category rather than the former is not unreasonable.

Sisters of St. Mary's, 151 Wis. 2d at 720-21 (citations omitted).

¶27 Noonans also assert any reliance by the circuit court on affirmative defenses or mitigating factors for determining damages—if NML can establish that any putative class members learned of the 1985 change to dividend

[21] While the circuit court did not explain its analysis of those available methods for managing damages among the putative class, we conclude that is not fatal to its decision. We may look beyond the actual decision for support for a circuit court's exercise of its discretion. *See* ***Vier v. Vier***, 62 Wis. 2d 636, 639-40, 215 N.W.2d 432 (1974).

[22] We also note that a circuit court may reasonably deny class certification despite the availability of case management techniques. *See* ***Sisters of St. Mary***, 151 Wis. 2d at 718.

distribution and accepted it—was erroneous because there was no record to support that finding. We disagree.

¶28 In its brief in opposition to class certification, NML argued that some of the putative class members either waived or are estopped from asserting claims because they knew of the 1985 change and accepted it. The record reflects that NML's independent agents had been informed of the change, and that it was the agents' job to communicate information to annuity owners. Thus, it was logical for the circuit court to infer that some agents had communicated the 1985 change in dividend distribution to their clients. If those putative class members knew of the change and accepted it, this would raise the issue of whether they waived their right to enforce the previous provisions, depending on which state's laws would apply. *See* 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:25 (4th ed. 2000) (discussing differing states' views on waiver of contract provisions).

¶29 Finally, Noonans argue that the circuit court was required to balance the benefits and burdens of class action certification, and here ignored all the benefits in reaching its decision. However, on our review of the record, we conclude that Noonans adequately presented all those benefits to the circuit court for its consideration.[23] On our own review of those benefits and the burdens

[23] Noonans argued:

> The actions of NML complained of here were directed against the Class, not individually against the named plaintiffs or any other individual member of the Class. The dividend rights of the entire Class were adversely impacted in the same, class-wide way. There are far too many injured annuity owners to even consider separate actions. The rights of the Class are in good hands. It would be unjust and against the public interest to deny class certification in these circumstances.

already explained, we conclude that a reasonable judge could find that class certification was nonetheless unmanageable in this case. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.