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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re CELLPHONE TERMINATION FEE CASES	A115457 (Alameda County JCCP No. 4332)

Denying certification of a class of subscribers to long-term cellphone contracts, the trial court ruled that an intra-class conflict precluded certification inasmuch as many subscribers would oppose the relief the named plaintiffs sought: invalidation of early termination fees in the contracts as unlawful liquidated damages provisions. We conclude the trial court's ruling was erroneously based upon an evaluation of the merits of the plaintiffs' claims. There was no basis for finding an intra-class conflict, and class certification was mandatory as to the plaintiffs' claims under the Consumer Legal Remedies Act (CLRA, Civ. Code, § 1750 et seq.). Inasmuch as class certification was required as to the CLRA claims, the class should also have been certified as to plaintiffs' remaining claims.

Background

This appeal arises from the Judicial Council Coordinated Proceeding denominated Alameda County "Cellphone Termination Fee Cases," JCCP No. 4332. In this proceeding, all of the cases "concern unfair business practices actions against the seven major cell phone providers in California. For purposes of case management, the trial

court divided the coordinated proceedings into three substantive topics: early termination, handset policies, and deposits." (*Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 575, fn. 1.)

In January 2006, certain named plaintiffs[1] (Plaintiffs) moved for class certification with respect to their claims that early termination fees charged by defendants Sprint, Nextel and Verizon[2] (Defendants) are unlawful liquidated damages provisions. According to the motion, the operative complaints[3] allege that the fees are unenforceable penalties under the liquidated damages statute, Civil Code section 1671, subdivision (d) (section 1671(d))[4] and unconscionable contract provisions under section 1670.5, and on this basis violate the Unfair Competition Law (UCL, Bus. & Prof. Code, § 17200 et seq.), the CLRA (§ 1770, subds. (a)(14), (a)(19)), and related equitable and common law duties (claims for unjust enrichment and money had and received). The complaints allege that Defendants require their customers to abide by uniform service agreements that include a provision requiring subscribers to pay flat early termination fees of between $150 and

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1 The named plaintiffs are Ramzy Ayyad (with claims against Sprint), Luis Ramirez (Nextel), Jeweldean Hull (Sprint), Christine Morton (Sprint, Nextel and Verizon), Christina Nguyen (Verizon), Gerry Robertson (Nextel), Richard Samko (Sprint), Amanda Selby (Sprint), Molly White (Verizon), and Katherine Zill (Sprint).

2 The full names of these defendants are Sprint Spectrum, L.P., Wirelessco L.P., Sprint PCS, and Cox Communications PCS (Sprint)**;** Nextel Communications, Inc. and Nextel of California, Inc. (Nextel); and Cellco Partnership dba Verizon Wireless (Verizon).

3 In their motion for class certification, the plaintiffs identify the operative complaints as the June 24, 2005 Third Consolidated Amended ETF Complaints against Sprint, Nextel, and Verizon. Only two of those complaints are in the record. According to the plaintiff's moving papers, however, the relevant allegations are the same in the three complaints. Therefore, we rely on the two complaints in the record as representative of all three operative complaints.

4 All statutory references are to the Civil Code unless otherwise noted.

$200 per telephone number or unit for termination of service prior to the expiration of the contract period. The fees allegedly "lock in" subscribers to a particular carrier's service and generate enormous profits for Defendants.

Plaintiffs sought certification of two classes. The ETF Payer Class would represent all California consumers who were charged or who paid an early termination fee to Defendants at any time from July 23, 1999 forward in connection with a wireless telephone with a California area code. The Current Subscriber Class would represent all California consumers who are parties to contracts with Defendants that include an early termination fee provision in connection with a wireless telephone with a California area code.

Defendants opposed the motion for class certification. As relevant to this appeal, Defendants argued there was an intra-class conflict among current subscribers that precluded certification of that class. Defendants maintained that invalidation or reduction of the early termination fees would prevent them from offering long term contracts with low up-front costs such as subsidized handsets and reduced monthly fees, subsidies that the Defendants recouped either over the life of the contract or from collection of the early termination fees.[5] According to Defendants, if the fees were invalidated or reduced, they would have to increase the price of the handsets or the recurring monthly fees to make up for the lost revenue. They claimed that most members of the proposed Current

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[5] Volumes VIII, IX and X of the Appellants' Appendix consist of materials that were filed under seal in the trial court "based upon [the Defendants'] competitive business environment." These three volumes of the record were also filed under seal in this court. Defendants make no apparent effort in their appellate brief to maintain the confidentiality of the information contained in these documents. They freely cite to and quote from these documents without indicating they were filed under seal. Although the trial court directed Defendants to file redacted public copies of all nondiscovery filings subject to the sealing order, Defendants do not refer this court to alternative public copies of the sealed documents. As far as we have been made aware by the parties, we have not disclosed confidential information in discussing the record in this opinion.

Subscriber class have demonstrated their preference for long-term contracts with early termination fees and lower up-front costs and would oppose Plaintiffs' successful prosecution of the lawsuit.

On June 9, 2006, the trial court granted certification of the ETF Payer Class and denied certification of the Current Subscriber Class. As to the Current Subscriber Class, the court found "troubling" the potential intra-class conflict identified by Defendants. Certification was denied on the ground that class litigation was not the superior method of resolving the class members' claims. The court explained that claims of the Current Subscriber Class could be resolved through the prosecution of the ETF Payer Class action: "If the ETFs in their current amounts are void, then Defendants will be subject to monetary liability. A judgment and the resulting monetary liability will likely cause Defendants to change their business practices." The court also noted that it was "reluctant to move beyond the determination of whether the existing ETFs are lawful and assume any ongoing responsibility for overseeing the pricing practices of the Defendants or opining on what might constitute an acceptable ETF." In sum, "The Court can conclude with great certainty at this time that if it certified the proposed Current Subscriber class to pursue injunctive relief, then the Court would refrain from providing relief beyond a declaration that the current fees are unlawful. The decision concerning the ETF Payer class will provide that limited relief, so there is little point in certifying a Current Subscriber class."

The court subsequently granted Plaintiff's motion for reconsideration, but "reaffirm[ed] its prior order" denying certification of the Current Subscriber Class. Commenting on several aspects of its initial order, the court reiterated that its decision was based in part on the fact that it was "reluctant to assume ongoing supervision of the pricing and marketing of ETFs in the cellphone industry." As to the issue of intra-class conflicts, the court's new written order cited "evidence that significant numbers of current consumers voluntarily choose plans with ETFs when they have the option of

plans without ETFs (but with other costs or charges)." The new order also explained more fully why the court believed the Current Subscriber Class would for all practical purposes obtain the relief plaintiffs seek, assuming the validity of their claims, through prosecution of the ETF Payer Class action. Finally, the court acknowledged that superiority was not a proper consideration in determining whether to certify a class on the CRLA claim, but ruled that the intra-class conflicts independently warranted denial of certification on that claim.

Plaintiffs appeal from the court's orders denying class certification of the Current Subscriber Class.

DISCUSSION

Under the CLRA, class certification is mandatory if the plaintiffs satisfy four statutory criteria. (*Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 140; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 654.) Those criteria are numerosity, commonality, typicality, and adequate representation. (§ 1781, subd. (b).)

For non-CLRA claims, class certification is discretionary. (*Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 740 (*Bell*); Code Civ. Proc., § 382.) In addition to the four criteria applicable to CLRA classes, courts must also consider whether class litigation of the plaintiffs' claims is superior to other forms of litigation. (*Bell, supra,* 115 Cal.App.4th at pp. 740-741.) Trial courts must "carefully weigh respective benefits and burdens and . . . allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." (*Id.* at p. 740.)

"The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' " (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) We review the trial court's ruling for abuse of discretion. (*Ibid.*) " '[A] trial court ruling supported by substantial evidence generally will not be disturbed "unless (1) improper criteria were used or . . . (2) erroneous legal

assumptions were made." ' " (*Id.* at pp. 326-327.) " ' "Any valid pertinent reason stated will be sufficient to uphold the order." ' [Citations.]" (*Id.* at p. 327.) Even under the CLRA, "[t]rial courts have considerable latitude under the four criteria of [section 1781,] subdivision (b) in deciding whether a class action is proper. The subdivision merely circumscribes the factors which trial courts properly may consider." (*Hogya v. Superior Court, supra,* 75 Cal.App.3d at p. 139.)

In the present case, certification of the Current Subscriber Class was denied because of intra-class conflicts and because class litigation would not be a superior method of resolving plaintiffs' claims. Inasmuch as superiority is not a relevant factor in certification of a CLRA class, the denial of certification as to the CLRA claim is based solely on the finding of intra-class conflict. Therefore, we first consider whether the court abused its discretion in denying certification because of intra-class conflicts.

I. *Intra-Class Conflicts*

"The party seeking class certification has the burden of proving the adequacy of its representation. [Citation.] However, when the party opposing certification presents evidence that indicates widespread antagonism to the class suit, the adequacy of representation is called into question. 'It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent. But only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470-471.)

The trial court found there was potential intra-class conflict "because many customers prefer multi-year plans with ETFs and would oppose the prosecution of this lawsuit." The court's statement implies that Plaintiffs' successful prosecution of this lawsuit would prevent other class members from obtaining their preference in wireless contracts: multi-year plans with early termination fees that also offer lower monthly

charges and subsidized handsets. This conclusion in turn is based on the opinions of Defendants' expert witnesses that the elimination or reduction of early termination fees would force the carriers to increase monthly fees or increase the cost of handsets (i.e., reduce handset subsidies) in long-term contracts.

For the reasons explained more fully below, we conclude that the defense experts' economic analysis constituted an attack on the merits of Plaintiffs' lawsuit. Because it was not a proper consideration in the trial court's class certification analysis, it was an abuse of discretion for the court to deny certification of the Current Subscriber Class on this basis. To explain this conclusion, we first review the legal standards governing the Plaintiffs' claims and then consider the Defendants' expert opinion evidence in light of those standards.

A. *Plaintiffs' Legal Challenges to the Early Termination Fees*

In the operative complaints, Plaintiffs challenge the early termination fees as unlawful under section 1671(d). Under that statute, a provision in a consumer contract "liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." (§ 1671, subds. (c)(1), (d).)[6]

Decisions interpreting this statute have created a two-part test for determining whether a liquidated damages provision is valid: (1) fixing the amount of actual damages

[6] Despite the statutory phrase, "the parties to such a contract may agree," a liquidated damages provision need not be expressly negotiated by both parties to a form contract in order to be valid. (*Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern Cal., Inc.* (2006) 135 Cal.App.4th 1023, 1035 (*Utility Consumers).*)

must be impracticable or extremely difficult, and (2) the amount selected must represent a reasonable endeavor to estimate fair compensation for the loss sustained. (*Utility Consumers, supra,* 135 Cal.App.4th at p. 1029.) Impracticability may be established by showing "that the measure of actual damages would be a comparatively small amount and that it would be economically impracticable in each instance of a default to require a [seller] to prove to the satisfaction of the [consumer] the actual damages by accounting procedures." (*Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731, 742 (*Garrett*).) "Determining whether a reasonable endeavor was made depends upon both (1) the motivation and purpose in imposing the charges, and (2) their effect." (*Utility Consumers*, at p. 1029.) "[T]he focus is not . . . on whether liquidated damages are disproportionate to the loss from breach, but on whether they were *intended* to exceed loss substantially—a result of which is to generate a profit." (*Hitz v. First Interstate Bank* (1995) 38 Cal.App.4th 274, 289.) If a liquidated damages provision is declared void under section 1671(d), the consumer is still liable for the actual damages caused by his or her breach of the contract. (*Garrett*, at pp. 740-741.)

The purpose of section 1671(d) is to prevent a liquidated damages provision from being used oppressively against a consumer with little or no bargaining power. (Recommendations Relating to Liquidated Damages, 13 Cal. Law Revision Com. Rep. (1976) pp. 1741-1742.)[7] A liquidated damages provision that "bears no reasonable relationship to the range of actual damages that the parties could have anticipated would

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[7] "The Law Revision Commission recommended a change in the California Liquidated Damages Law in a 1976 report. (Recommendations Relating to Liquidated Damages, 13 Cal. Law Revision Com. Rep. (1976) p. 1739.) The report was subsequently adopted by the Legislature without change. 'A report of the Law Revision Commission proposing a statute that is subsequently adopted by the Legislature without change is entitled to substantial weight in ascertaining legislative purpose.' (*People v. Bailey* (1983) 140 Cal.App.3d 828, 831, fn. 3.)" (*Guthman v. Moss* (1984) 150 Cal.App.3d 501, 510 (*Guthman*).)

flow from a breach" is an unlawful penalty that compels a forfeiture upon a breach of contract. (*Ridgley v. Topa Thrift and Loan Assn.* (1998) 17 Cal.4th 970, 977, citing *Garrett, supra,* 9 Cal.3d at p. 739.) Such penalties are " 'ineffective, and the wronged party can collect only the actual damages sustained.' [Citations.]" (*Ridgley*, at p. 977.)

B. *Defendants' Theory of Intra-Class Conflicts*

Defendants' economic theory, which is the foundation for the trial court's finding of intra-class conflicts, is based on the following premises: (1) the cellphone industry is effectively competitive, so Defendants are not charging supra-competitive prices;[8] (2) any decrease in revenue will cause a corresponding increase in prices;[9] (3) the early termination fees allow Defendants to recover the costs of providing up-front subsidies in term contracts;[10] (4) elimination of early termination fees will force Defendants to find other ways to recoup those costs, such as by decreasing handset subsidies and increasing monthly fees;[11] and (5) the costs of quantifying and collecting actual damages in each

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8 Defense expert, Prof. Jerry A. Hausman, opined: "The wireless industry is intensely competitive, as economic data demonstrate, as expert agencies have repeatedly found, and as the rate of customer switching or 'churn' confirms." Hausman specifically disputed Plaintiffs' allegation that Defendants had the market power to artificially inflate the price for wireless services.

9 "Invalidating the ETF will increase the costs faced by wireless carriers, and it is a fundamental economic concept that cost increases lead to price increases in a competitive industry." In deposition testimony, Hausman added that if early termination fees were reduced rather than eliminated, prices would still increase for other components of the long-term service plan.

10 Upfront subsidies include handset subsidies and promotions such as unlimited night and weekend minutes. "Verizon Wireless recovers these up-front expenditures over time in the form of a stream of service revenues. The subscriber's enforceable contract commitment is similar to an insurance policy in that it helps assure the carrier's recovery of up-front costs if a customer stops her service before the end of her contract."

11 "If the ETF is invalidated, it will become more difficult to enforce contracts . . . . As a result, carriers will face a greater risk that up-front costs of acquiring subscribers

individual case would further increase Defendants' costs and force them to make a corresponding price increase.[12] The evidence and expert opinions cited by Defendants to establish these premises are disputed by Plaintiffs. However, we assume for purposes of analysis that Defendants supported this theory with substantial evidence and their experts' reasoning is logically sound.

We conclude the theory is essentially an attack on the merits of Plaintiffs' claims and was therefore an improper consideration on a motion for class certification. Defendant's theory relies on premises that, if accepted, would demonstrate that the early termination fees are *not* unlawful liquidated damages provisions and that Plaintiffs' claims are therefore meritless. Defense experts opined that if the early termination fees were eliminated the carriers would have to raise their up-front prices (or reduce the up-front subsidies), because those up-front costs could only be recouped if the subscribers either continued to use their services for the entire contract term or paid a fee in the event of an early termination. In other words, the early termination fees permit the carriers to recover their damages in the event of an early termination. The experts further opined that if the fees were eliminated, the carriers would have to recoup those losses elsewhere, implying that the fees in the aggregate merely cover the carriers' losses (damages) in the

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will not be recovered and will have an incentive to reduce such costs. Thus, it is likely that expenditures for handset subsidies, sales commissions, and other up-front costs described above would decline."

[12] "[W]hen a customer terminates his or her contract with Verizon Wireless prior to expiration of the contract term, the carrier has a right to recover from that customer the actual damages suffered by the carrier as a result of the early termination. Instead of performing an individualized calculation for each customer, it is more economically efficient to charge a single fee. Otherwise substantial transaction costs would be incurred in determining the amount of damages each individual terminating customer owes and in collecting those damages from customers who otherwise would have paid an ETF." "The costs of doing so are likely to be prohibitive in relation to the amounts likely to be in question when a customer terminates a wireless service contract."

event of early terminations and do not exceed those losses. Consequently, the early termination fees are a reasonable approximation of the Defendants' damages in the event of the early termination of a subscriber contract and are not designed to generate a profit, thus satisfying the reasonable endeavor requirement of section 1671(d). (*Utility Consumers, supra,*135 Cal.App.4th at 1029; *Hitz, supra,* 38 Cal.App.4th at 289.)

The defense experts also opined that it would be economically inefficient for the carriers to calculate actual damages in each individual case, because the cost of making such calculations was high in comparison to the amount of damages involved. That is, they contend it would be impracticable or extremely difficult to fix actual damages upon early termination of the contracts, the second requirement of section 1671(d). (*Garrett, supra,* 9 Cal.3d at p. 742.)

If the premises of Defendants' theory are incorrect and the early termination fees are in fact unlawful penalties (i.e., the Plaintiffs' claims are *meritorious*), there would be no intra-class conflict. According to the defense experts' economic analysis, long-term contracts with a valid liquidated damages clause could still include low up-front costs, because a *valid* liquidated damages clause would allow Defendants to recoup those costs either over the life of the contract or by collection of liquidated damages in the event of a breach. If Plaintiffs' claims are meritorious, therefore, class members who prefer long-term contracts would still be able to obtain their preference in the competitive marketplace of wireless services. The intra-class conflict would arise only if the trial court barred Defendants from imposing early termination fees even though those fees were *valid* liquidated damages provisions. We will not presume the trial court would make such an erroneous ruling.

Defendants' cited cases are all distinguishable. In each instance, the court of appeal found an intra-class conflict existed assuming the plaintiffs' claims were *meritorious*. In *Global Minerals & Metals Corp. v. Superior Court*, (2003) 113 Cal.App.4th 836 (*Global Minerals & Metals Corp.*), the plaintiffs asserted antitrust

claims against defendants who allegedly manipulated the price of copper. The plaintiffs sought certification of a class of copper purchasers, but because of the nature of the copper distribution chain the class members routinely bought and sold copper among themselves. (*Id.* at pp. 840, 852.) As a result, class members were in varied positions of benefiting and suffering from an elevation in the price of copper, causing inherent conflicts if the antitrust claims were meritorious. (*Id.* at pp. 853-854.) In *Seastrom v. Neways, Inc.*, (2007) 149 Cal.App.4th 1496, the plaintiffs charged that sellers of a dietary supplement committed fraud, breach of contract, and unfair or unlawful business practices by distributing the product without requiring prescriptions, which was unlawful. The proposed class consisted of purchasers of the product, including distributers who bought and resold the product through a pyramid scheme. (*Id.* at pp. 1498-1499.) The court found a disabling conflict because, assuming the claims were meritorious, class members at the top of the pyramid both benefited and suffered from the fraudulent sales and thus had interests which conflicted with class members lower on the pyramid and with the ultimate retail purchasers. (*Id.* at pp. 1501-1503.)

In *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, the plaintiffs alleged that a pharmaceutical company suppressed a generic version of its drug in order to inflate the price of its brand name drug.[13] (*Valley Drug Co. v. Geneva Pharmaceuticals, Inc.* (11th Cir. 2003) 350 F.3d 1181.) The proposed class included both wholesale and retail purchasers of the drug, but the wholesale purchasers, who resold the product, may have benefited from the alleged wrongdoing thereby creating a conflict with the retail

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[13] The Supreme Court has repeatedly stated that, in the absence of controlling California authority, trial courts may take guidance from the class action procedures of the Federal Rules of Civil Procedure, rule 23. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *LaSala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872; *Richmond v. Dart Industries, Inc., supra,* 29 Cal.3d at pp. 470-471.) Consequently, California courts regularly look to federal cases applying these procedures, including analysis of adequacy of representation, as persuasive authority. (See, e.g., *Global Minerals & Metals Corp., supra,* 113 Cal.App.4th at p. 851.)

purchasers if the plaintiffs' claims were meritorious. (*Id.* at pp. 1186, 1190-1191.) Finally, in *Langbecker v. Electronic Data Systems Corp.*, the plaintiffs charged their employer breached its fiduciary duty by offering company stock as a retirement investment option. (*Langbecker v. Electronic Data Systems Corp.* (5th Cir. 2007) 476 F.3d 299, 303-304.) The proposed class included all employees who invested in the stock fund. (Id. at p. 304.) Even assuming the stock fund was an imprudent investment and the company breached its fiduciary duty, some of the class members made money on the fund and among those who lost money some favored a declaration that it became imprudent on a certain date while others favored a much later date. (*Id.* at p. 315.) The court of appeal remanded to the trial court to determine whether these intra-class conflicts precluded class certification. (Id. at p. 316, 318-319.)

In contrast, the defendants' theory of intra-class conflict among current subscribers assumes that early termination fees are reasonable approximations of actual damages (i.e., that Plaintiffs' claims *lack* merit) but that the trial court might nevertheless invalidate or reduce the fees. Notably, Defendants do not claim that an intra-class conflict arises even if the early termination fees are unlawful *penalties*. That is, they do not argue that long-term contracts with subsidized handsets and lower monthly fees are economically viable only if they include a liquidated damages provision that is unlawful under section 1671(d). As shown, Defendants' intra-class conflict argument is based on evidence and expert opinion that the existing early termination fees are lawful liquidated damages provisions.

Because Defendants' argument against class certification is premised on a showing that Plaintiffs' claims lacked merit, it is erroneous. Defendants bring to our attention cases which hold that "a class determination will generally involve considerations on the merits that are ' " 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " ' ([*Caro v. Procter & Gamble Co., supra,* 18 Cal.App.4th at p. 656.])" (*Global Minerals & Metals Corp., supra,* 113 Cal.App.4th

at p. 854.) However, *Caro* more specifically held “the fact some evidence relevant to a class action determination may have been relevant also to the merits of the lawsuit did not preclude the court from considering such evidence at the hearing on Caro’s motion for class certification.” (*Caro*, at p. 656.) There, the appellate court found class litigation was not a superior method of adjudicating the plaintiffs’ claims regarding the misleading labeling of orange juice containers because the class members’ potential recovery was so small it was unlikely many class members would be motivated to collect their damages even if plaintiffs prevailed. (*Id.* at pp. 657, 659-660.) In other words**,** the court assumed the merits of the plaintiffs’ claims and denied certification based on evidence of the class members’ very low potential recoveries. (*Ibid.*) Similarly, in *Global Minerals & Metals Corp.*, the court’s finding of an intra-class conflict was based not on evidence that plaintiffs’ claims lacked merit (i.e., that copper prices were *not* supra-competitive), but on evidence that the copper market “was a complicated and multilevel business structure in which the proposed class members were operating, in both buyer and seller capacities, and over a long period of time” and thus class members would have conflicting interests even if the plaintiffs’ claims were meritorious. (*Global Minerals & Metals Corp.*, at p. 854.) In contrast, Defendants’ intra-class conflict argument is based on an evidentiary showing that early termination fees were reasonable estimates of Defendants’ damages, meaning they were not unlawful penalties. This evidentiary showing constitutes an improper consideration of the merits of Plaintiffs’ claims.

Defendants further contend an intra-class conflict existed in the Current Subscriber Class on the ground that subscribers who terminate their contracts early or in the middle of the contract term would be better off with early termination fees (which would be lower than their actual damages), whereas those who terminate late in the contract term would be better off paying actual damages. The trial court, however, did not find an intra-class conflict among current subscribers on this ground. “Appeal of an order denying class certification ‘presents an exception to the general rule on review that we

look only to the trial court's result, not its rationale.' [Citation.] Erroneous legal assumptions or improper criteria may require reversal 'even though there may be substantial evidence to support the court's order.' [Citation.] Thus, we must determine whether the trial court engaged in correct legal analysis. [Citation.] . . . Any valid pertinent reasons *stated* will be sufficient to uphold the order. [Citation.]" (*Caro v. Procter & Gamble Co., supra,* 18 Cal.App.4th at pp. 655-656, italics added.) In any event, Defendants' argument again relies on evidence that goes to the validity of Plaintiffs' claims: evidence comparing the early termination fees and Defendants' actual damages. That question is one that would be resolved in the litigation of the merits of Plaintiffs' lawsuit. It is not a proper consideration on class certification.

C. *Class Certification Under the CLRA*

As noted, class certification is mandatory in actions brought pursuant to the CLRA if the statutory requirements are satisfied. (§ 1781, subd. (b); *Hogya v. Superior Court, supra,* 75 Cal.App.3d at p. 140; *Caro v. Procter & Gamble Co., supra,* 18 Cal.App.4th at p. 654.) The sole basis for the trial court's denial of class certification on the CLRA claims was the existence of an intra-class conflict. Because we conclude the court's finding was improperly based upon a consideration of the merits of Plaintiffs' claims, we reverse the denial of certification on the CLRA claims.

II. *Superiority*

Class certification as to Plaintiffs' non-CLRA claims was denied on the additional ground that current subscribers could effectively obtain the relief they seek through litigation of the ETF Payer Class claims. The court stated it intended to limit relief to a declaration should the Current Subscriber Class be successful in establishing that the early termination fees were unlawful liquidated damages provisions, since granting injunctive relief might require the court to assume ongoing oversight responsibility regarding Defendants' pricing practices. Declaratory relief did not justify class

certification, the court reasoned, because current subscribers would obtain the practical benefit of declaratory relief through the successful litigation of the ETF Payer Class's claims.

In light of our conclusion that the trial court was required to certify the Current Subscriber Class as to the CLRA claims, the court's reasoning no longer justifies denial of certification as to the non-CLRA claims. Litigation of the CLRA claims involve essentially the same issues as the non-CLRA claims: all claims are premised on the unlawfulness of the early termination fees under section 1671(d). Certifying the class with respect to the non-CLRA claims will present no manageability issues that are not already raised by class litigation of the CLRA claims. We therefore reverse the court's denial of class certification as to Plaintiffs' non-CLRA claims.

DISPOSITION

The trial court's denial of certification of the Current Subscriber Class is reversed. Plaintiffs are awarded their costs on appeal.

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STEVENS, J.*

We concur:

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SIMONS, ACTING P. J.

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NEEDHAM, J.

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* Retired Associate Justice of the Court of Appeal, First District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.