2019 IL App (2d) 180791-U
No. 2-18-0791
Order filed June 17, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ADELPHIA, INC., d/b/a VILLAGE AUTO, DAN'S ONE STOP SHOP, LLC, and ELEMENT GARAGE, LLC,	)	Appeal from the Circuit Court of Kane County.
Plaintiffs-Appellees,	)	
v.	)	Nos. 15-L-386 15-L-426 15-L-541
HERITAGE-CRYSTAL CLEAN, INC., and HERITAGE-CRYSTAL CLEAN, LLC,	)	Honorable Mark A. Pheanis,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order granting class certification was not an abuse of discretion. Affirmed.

¶ 2 Pursuant to Illinois Supreme Court Rule 306(a)(8) (eff. Mar. 8, 2016), this court granted defendants (Heritage-Crystal Clean, LLC, (hereinafter, "HCC") and Heritage-Crystal Clean, Inc.) leave to file an interlocutory appeal. Specifically, plaintiffs (Adelphia, Inc., d/b/a Village Auto, Dan's One Stop Shop, LLC, and Element Garage), pursuant to section 2-801 of the Code

of Civil Procedure (Code) (735 ILCS 5/2-801 (West 2016)), brought a class-action complaint alleging claims under the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) (815 ILCS 505/1 *et seq*. (West 2016)), for breach of contract, and for unjust enrichment in relation to a fuel surcharge that defendants charged customers. On August 28, 2018, the trial court certified three separate classes, one for each cause of action. Defendants appeal the class certification, essentially arguing that no certification is appropriate, let alone certification of three classes. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 HCC delivers and services cleaning systems for oily automotive and mechanical parts. The named plaintiffs are auto mechanic shops that contracted with HCC to periodically clean machine parts and to remove used oil and other waste from their premises.[1] HCC, a subsidiary of Heritage-Crystal Clean, Inc., is headquartered in Elgin, but services customers throughout the United States and Ontario, Canada. HCC provides its services to customers for an agreed-upon base service rate established in the customer's service agreement, which includes an Illinois choice-of-law provision and a Kane County forum-selection clause. Work orders and invoices for services rendered also comprise the "agreement" between the parties.

¶ 5 In addition to the base service rate, beginning in 2005, HCC began charging customers a "fuel surcharge" after performing its services.[2] Although the fuel surcharge is not listed in the form service agreements, the charges appear on work orders and invoices.

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[1] Element Garage, LLC, operates in Alabama. Adelphia, d/b/a Village Auto, operates in West Virginia. Dan's One Stop Shop, LLC, operates in Oklahoma.

[2] In 2015, HCC replaced the fuel surcharge with an "energy surcharge." For simplicity, we will simply refer to the fuel surcharge.

¶ 6 Defendants successfully moved to dismiss plaintiffs' initial complaints. Plaintiffs' present, third-amended complaint asserts that the fuel surcharge is not actually related to fuel and that HCC uniformly misrepresents and fails to disclose information about the fuel surcharge that would make a reasonable customer aware of its illegitimate and deceptive nature. Specifically, plaintiffs allege that the fuel surcharge is a "sham" fee because: (1) it is not actually a fuel surcharge, as that term represents; (2) the fuel surcharge is not based on or calculated using HCC's actual or increased fuel costs; and (3) HCC is "double-dipping" by charging a fuel surcharge, when it already recovers all of its fuel costs in the base service rate. The complaint listed examples of fuel surcharges that plaintiffs paid to defendants ranging from around $10 to $19 per invoice. Plaintiffs' complaint alleges three causes of action: (1) against both defendants, violation of the ICFA, in that defendants misrepresented and failed to disclose material facts regarding the nature, purpose, and effect of the fuel surcharge fee; (2) against HCC only, breach of contract, in that plaintiffs entered into valid agreements with HCC, and the manner in which HCC charged, calculated, and collected the fuel surcharge violated the agreements and caused damages because the fee was not an agreed-upon term in the parties' agreements and, alternatively, it was not what it purported to be; and (3) against only Heritage-Crystal Clean, Inc., unjust enrichment in that, by collecting all or a portion of the fuel surcharges in unconscionable amounts to plaintiffs' detriment, it has been unjustly enriched. Plaintiffs alleged that class certification is appropriate, because resolution of whether the charge is illegitimate will determine in a single trial defendants' liability to plaintiffs and thousands of class members.

¶ 7 Defendants did not move to dismiss the third-amended complaint; rather, they answered it, denying most essential allegations and asserting 13 affirmative defenses (none of which objected that the claims fell outside of their respective statutes of limitations).[3]

¶ 8 Plaintiffs moved for class certification, seeking certification of three classes, one for each cause of action. Plaintiffs asserted that the evidence reflected that defendants' fuel surcharge practices are standardized and that defendants could determine each customer who paid the fuel surcharge, the date of payment, and the amount paid from 2005 to the present. Plaintiffs asserted further that the evidence reflected that the fuel surcharge is not based on any of HCC's *own* actual or increased fuel costs, is instead based on copying competitor charges and the market generally, and, further, that sales representatives are not trained or informed about HCC's fuel costs, how the fuel surcharge is calculated, or that the surcharge is not based on defendants' actual or increased fuel costs. Plaintiffs also asserted that the evidence showed that, prior to 2005, defendants absorbed fuel costs into their base service rate and that, even after they started charging a fuel surcharge, the methodology for capturing fuel costs in the base service rate continued. Plaintiffs argued that by charging an illegitimate fuel surcharge through identical means (*i.e.*, when presenting work orders and invoices to class members after providing

[3] Defendants proffered the following 13 affirmative defenses: (1) voluntary payment; (2) waiver/consent; (3) estoppel; (4) acceptance/ratification; (5) *laches*; (6) accord and satisfaction; (7) offset for any failure to pay under the agreements; (8) failure to mitigate damages; (9) lack of standing under the ICFA; (10) lack of standing for plaintiffs that did not pay the fuel surcharge; (11) Adelphia's continued payment of the surcharge after filing suit; (12) Element Garage's continued payment of the surcharge after filing suit; and (13) Dan's One Stop Shop's payment of the surcharge two days prior to filing suit.

services), defendants acted wrongfully in the same basic manner toward every member of each putative class. Plaintiffs presented evidence from multiple persons that they either believed, or thought it was reasonable to believe, that a fuel surcharge represented a charge to recover defendants' actual fuel costs. Moreover, plaintiffs presented the opinion of a forensic accounting and damages expert who concluded, among other things, that the surcharge reflects nothing more than additional revenue and profit and that class-wide damages can be calculated from the information stored in defendants' databases.

¶ 9 Defendants responded, arguing, primarily, that each HCC-customer relationship is unique, reflecting highly-negotiated agreements that include fuel surcharges as part of the negotiated pricing. For example, if a customer objected to the fuel surcharge and declined to pay it, the sales representatives possessed significant negotiating authority to obtain and keep the business and, therefore, the surcharge could be stricken or the base service rate would instead increase. Defendants maintain that every single work order and invoice for each customer and each service provided could be the product of a negotiation that may affect the fuel surcharge and "[t]here are literally thousands of variations that can, and do, occur." Customers are required to sign the work orders, and copies are kept by the local branch and sent to HCC's corporate offices. Defendants argued that the evidence reflected that the fuel surcharge was instituted in 2005 as a response to skyrocketing fuel costs and that they are "reasonably related" to HCC's fuel costs. Further, they asserted that plaintiffs inexplicably sought to represent members of three overlapping nationwide classes, certification of which would result in recovery of the exact same monies for the exact same conduct and transactions. According to defendants, certifying three classes would create a "procedural and logistical nightmare" with thousands of differentiating qualifications amongst the classes.

¶ 10 Further, defendants argued that plaintiffs' proposed classes were not ascertainable and overly broad; plaintiffs did not satisfy commonality because plaintiffs and the putative class members were not subject to common proofs on the claims; and that the voluntary-payment defense and exceptions thereto required individualized inquiry. Finally, defendants objected that damages issues underscored problems inherent in the proposed classes, the named plaintiffs were not adequate representatives, plaintiffs' satisfaction of the numerosity requirement was questionable, and, finally, class action was not appropriate.

¶ 11 On May 31, 2018, the court held a hearing on the motion for class certification. Reference to this hearing appears in the briefs, but no transcript, bystander's report, or other record from the hearing appears in the record. After the hearing, purportedly at the court's request, each side submitted to the court proposed findings of fact and conclusions of law.

¶ 12 On August 28, 2018, the court entered plaintiffs' 37-page proposal as its order granting class certification. In sum, the court found that plaintiffs satisfied the requisite elements of section 2-801 of the Code as to each class. We note that, with respect to the ICFA, the court found that "Illinois law applies equally to the claims of each class member because the standard service agreement in this case, applicable to all class members throughout each Class Period, mandates that Illinois law applies for all [HCC] customers." Similarly, the court found that Illinois law governed the breach-of-contract claim, as the service agreement contained the Illinois choice-of-law provision. Finally, the court determined that the unjust-enrichment claim did not require analysis of multiple state laws, as Illinois had the most significant relationship with the occurrence and the conduct at issue originated here.

¶ 13 The court found that evidence was presented supporting plaintiffs' claims that defendants' sales representatives did not know what HCC's actual fuel costs were or how fuel

surcharge amounts were calculated and, therefore, could not have accurately explained those things to a customer. Further, the court found that evidence suggested that a reasonable consumer paying the fuel surcharge would believe it was reasonably related to or based upon HCC's actual or increased fuel costs and the term might be deceptive as defined by the ICFA. Accordingly, the court identified issues common to the class, such as whether: (1) the term "fuel surcharge" is a term of art bearing a specific meaning either in the industry or at large; (2) the purported "fuel surcharge" is actually a fuel surcharge; (3) HCC's use of the term "fuel surcharge" is unfair and/or deceptive; (4) HCC already recovers its fuel costs in the base service rate it charges its customers; and (5) whether HCC uniformly misrepresented and/or failed to disclose material information about the fuel surcharge to plaintiffs and class members that would have informed them of the fee's allegedly-illegitimate nature. The court found that determination of the common issues predominated over any individual issues. The court considered the elements of all three claims and determined, for all, that the proof necessary for plaintiffs to establish recovery was the same for every class member, as liability and damages depended on defendants' common course of conduct and class members' payment of the allegedly-illegitimate fuel surcharge. The court found class-action adjudication was appropriate, as the alternative, individual class members bringing separate suits, would be inefficient and duplicative, given the shared legal and factual issues involved, as well as the relatively small damages amounts individual class members might have in comparison to the costs of litigation. Finally, the court concluded that defendants' voluntary-payment defense did not preclude class certification.

¶ 14 The court certified three classes as follows:

ICFA Class: "All persons and entities in the United States that paid Heritage-Crystal Clean, Inc. or Heritage-Crystal Clean, LLC a 'fuel surcharge' fee or 'energy surcharge' fee from May 22, 2012[,] through the date of class notice (the 'Class Period')."

Breach-of-Contract Class: "All persons and entities in the United States that entered into a written contract with Heritage-Crystal Clean, LLC, and that paid Heritage Crystal Clean, LLC a 'fuel surcharge' fee or 'energy surcharge' fee from May 22, 2005[,] through the date of class notice (the 'Class Period')."

Unjust-Enrichment Class: "All persons and entities in the United States that indirectly paid Heritage-Crystal Clean, Inc. a 'fuel surcharge' fee or 'energy surcharge' fee from May 22, 2010[,] through the date of class notice (the 'Class Period')."

¶ 15 On September 27, 2018, defendants petitioned for interlocutory appeal and, on October 30, 2018, we granted the petition.

¶ 16 II. ANALYSIS

¶ 17 To aid the reader, we briefly outline our analysis. We start in section A, by setting forth general applicable standards. Then, we group defendants' arguments into three categories. Specifically, in section B, we address and reject defendants' arguments that the court abused its discretion by making improper factual findings. In section C, we address and reject defendants' arguments that none of the classes satisfies the prerequisites for certification, because: (1) the underlying claims are time barred; and (2) plaintiffs cannot as a matter of law state a claim for any of the underlying causes of action. Last, in section D, we address and reject defendants' contentions that no class may be certified, let alone three classes, because: (1) each class lacks uniformity, such that they are vague, undefined, and redundant; (2) each class fails on the

elements of commonality, predominance, and typicality; and (3) key affirmative defenses require individualized inquiry.

¶ 18 A. Standards

¶ 19 Class certification is governed by section 2-801 of the Code, which is patterned after Rule 23 of the Federal Rules of Civil Procedure. See *Getto v. City of Chicago*, 86 Ill. 2d 39, 47 (1981). Accordingly, federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125 (2005). Under section 2-801, class action is permitted only if: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members (commonality); (3) the representative parties will fairly and adequately protect the interests of the class (adequacy); and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy (appropriateness). 735 ILCS 5/2-801 (West 2016). The party seeking certification bears the burden of demonstrating that class certification is appropriate. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 71-72 (2007). A class action suit is "predicated on the inability of the court to entertain the actual appearance of all members of the class as well as the impracticality of having each member prosecute his [or her] individual claim." *Miner v. Gillette Co.*, 87 Ill. 2d 7, 14 (1981).

¶ 20 Class-certification decisions rest within the trial court's sound discretion and should be disturbed only where the court clearly abused its discretion or applied impermissible legal criteria. *Avery*, 216 Ill. 2d at 125-26. Generally, in exercising its discretion, a court should err in favor of granting class certification. *Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 672 (2006). A court abuses its discretion where its decision is unreasonable. See, *e.g.*, *Ramirez*

v. Midway Moving and Storage, Inc., 378 Ill. App. 3d 51, 53 (2007). We emphasize that the appellate court's scope of review is limited. See *Cruz v. Unilock Chicago*, 383 Ill. App. 3d 752, 761 (2008). We may not "indulge in an independent, *de novo* evaluation of the facts alleged and the facts of record to justify certification." *Id.*

¶ 21 B. Factual Findings

¶ 22 We address first defendants' argument that the court's certification order improperly determined facts that must be left to the ultimate fact finder.

¶ 23 Defendants rely upon *Cruz*, where the trial court *denied* plaintiffs' class-certification motion, and the appellate court reversed. In doing so, the appellate court found that the trial court made factual determinations that crossed the line into the ultimate issues of the plaintiffs' complaint, and noted, too, that "defendant's contentions show a similar bent toward the merits of plaintiffs' complaint as opposed to controverting and rebutting the allegations[.]" *Cruz*, 383 Ill. App. 3d at 772. The court considered the extent to which a trial court, when considering class certification, may make factual findings:

> "[W]e hold that the trial court may conduct any factual inquiry necessary to resolve the issue of class certification presented by the record. However, we emphasize that the trial court's discretion is limited to an inquiry " 'into whether [the] plaintiff is asserting a claim which, *assuming its merits*, will satisfy the requirements of [section 2-801] as distinguished from an inquiry into the merits of [the] plaintiff's particular individual claims.' " [Citation.] Thus, *the trial court is not to determine the merits of the complaint, but only the propriety of class certification*, and its factual inquiry and resolution of factual issues is to be limited solely to that determination." (Emphases added.) *Cruz*, 383 Ill. App. 3d at 764.

¶ 24 Defendants here cite the following statements in the court's order where, in their view, the court improperly made factual findings on ultimate issues:

1. "[T]he evidence provided at the class certification hearing demonstrates that the class members were exposed to similar representations from [HCC] when they inquired about the fuel surcharge, and there is *little possibility* that a customer was informed of [HCC]'s actual fuel costs or how the fuel surcharge was calculated." (Emphasis added.)

2. "[B]ecause there is evidence to suggest that [HCC] failed to disclose material information to class members regarding the true nature of the fuel surcharge *** any negotiations of the fuel surcharge amount necessarily could not have informed a customer of the allegedly deceptive and unfair nature of the fee."

3. "[I]t would be *impossible* for [HCC] to provide such information as no calculation justifying the fuel surcharge amounts was ever performed by [HCC] and its employees *wrongfully believed* the fuel surcharge was charged to recover [HCC's] actual fuel costs." (Emphases added.)

4. "Like the fraud/lack-of-knowledge exception, the Court finds class-wide evidence may also fit within the 'mistake of fact' exception to the voluntary payment defense *** As previously stated, plaintiffs and class members arguably did not and could not possess the requisite 'full knowledge of the facts' necessary to protest the 'fuel surcharge.'"

5. "The evidence before the Court further suggests that a reasonable consumer paying [HCC's] 'fuel surcharge' would believe it was reasonably related to or based upon HCC's actual or increased fuel costs."

Defendants argue that the aforementioned, sweeping findings were incorrect, oversimplified the issues, masked differences that render class certification inappropriate, and constituted an abuse of discretion.

¶ 25 The full context and other portions of the decision convince us that the court was merely reciting evidence that supported plaintiffs' theory of the case and arguments favoring certification, as opposed to deciding the merits of the underlying claims. Specifically, in defendants' first example recited above, the emphasized language "there is little possibility" actually reflects the court's *change* to the language which, as submitted by plaintiffs, had been written with the more definite "there is *no* possibility ***." In the second example, the court noted simply that there was "evidence *to suggest*" support for plaintiff's theory, and, in fact, the court inserted that language instead of plaintiffs' original language, which had concluded, "the evidence suggests". In the third example, defendants do not provide the entire quotation, notably omitting the beginning of the sentence, wherein the court introduced the finding with "[a]dditionally, *there is evidence that* it would be impossible for [HCC] to provide such information as no calculation justifying the fuel surcharge amounts was ever performed by [HCC] and its employees wrongfully believed the fuel surcharge was charged to recover [HCC's] actual fuel costs." (Emphasis added.) By noting the evidence presented to *suggest* the remainder of the statement, the court was simply referencing the existence of evidence supporting plaintiffs' claims, not deciding the matter. In defendants' fourth example, the court noted that an exception *may* apply and that plaintiffs *arguably* did not possess knowledge. Again, this language reflects the court's consideration of evidence and law, not findings on the ultimate issues in the case. Finally, the last example again utilizes the language that the evidence "suggests" something, rather than the court making a finding.

¶ 26 We further note that defendants object to the court's near-wholesale adoption of plaintiffs' proposed findings of fact and conclusions of law, suggesting that, when it rejected defendants' arguments, the court could not have applied a deliberative or "carefully considered" analysis. They argue that the court's entry of plaintiffs' suggested classes and proposed order in their entirety "without changing, adding, or removing a single word" constitutes an abuse of discretion. However, defendants cite no authority for the proposition that it is an abuse of discretion to adopt a party's proposed findings of fact and conclusions of law. We note that there exists authority to the contrary, acknowledging that, while the discretion afforded the findings perhaps warrants slightly more scrutiny, adopting a party's findings of fact and conclusions of law is a common and useful practice in complicated cases and warrants no change to the standard of review. See, *e.g.*, *Shapiro v. Regional Board of School Trustees of Cook County*, 116 Ill. App. 3d 397, 403-04 (1983); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 263 (1982).

¶ 27 Moreover, defendants misrepresent that the court entered plaintiffs' proposal "without changing, adding, or removing a single word." In fact, although the court changed the order minimally, it did so in a manner that convinces us that it was not prejudging the merits of the claims at the class-certification stage. We delineated some of the court's changes above. In addition, we note that plaintiffs used numerous conclusive phrases in their proposed order, such as "could not have informed," "no possibility," "withheld," "a fuel surcharge that has no relation," and "could not have informed a customer of the deceptive nature***." The court, however, modified this phraseology to use less-conclusive language; specifically, "may not have informed," "little possibility," "failed to disclose," "a fuel surcharge that may have no relation," and "may not have informed a customer of the allegedly deceptive ***," respectively. At other points, the court inserted the phrase "at this point," instead of simply, "there exists no evidence."

It inserted "arguably," "allegedly," "that may establish," "plaintiff argues," and "it is reasonable to argue" (instead of, it is reasonable to conclude). One of plaintiffs' proposed sentences stated that the court "rejects" HCC's voluntary-payment defense, "in accordance with Illinois precedent." The court, however, changed that proposed sentence to instead read, "the court declines to find at this juncture that [HCC]'s voluntary[-]payment defense bars class certification."

¶ 28 In sum, we decline to find an abuse of discretion the court's factual findings, as it is clear to us that the court here, unlike that in *Cruz*, was *not* prematurely determining the merits of plaintiffs' claims but, rather, was simply considering the proffered evidence and plaintiffs' theory of the case only for purposes of class certification.

¶ 29 C. Prerequisites for Certification

¶ 30 Next, we consider defendants' arguments that none of the classes satisfies the prerequisites for certification, because: (1) the underlying claims are time barred; and (2) plaintiffs cannot as a matter of law state a claim for any of the underlying causes of action.

¶ 31 1. Statute of Limitations

¶ 32 First, defendants assert that all of plaintiffs' claims fail because they are time barred. Specifically, they assert that the statutes of limitations for plaintiffs' claims are: for the ICFA claim, 3 years (815 ILCS 505/10a(e) (West 2016)); for unjust enrichment, 5 years (735 ILCS 5/13-205 (West 2016)); and for breach of contract, 10 years (735 ILCS 5/13-206 (West 2016)). Defendants argue that the fuel surcharge first appeared on invoices and work orders in 2005. Therefore, they assert, the statute of limitations on each claim began to run when the customer first received notice of the fuel surcharge, regardless of whether defendants failed to disclose the "true nature of the charge." Defendants assert that determining when each class member first

noticed the charge requires individualized inquiry that should bar class certification. As such, defendants argue, plaintiffs have failed to state timely claims, their case cannot proceed, and the certified classes fail as a matter of law.

¶ 33 Plaintiffs respond that this defense is forfeited. We agree. The statute of limitations is an affirmative defense which must be pleaded and proved by a defendant. See, *e.g.*, *Goldman v. Walco Tool & Engineering Co.*, 243 Ill. App. 3d 981, 989 (1993). "The facts constituting any affirmative defense must be plainly set forth in the answer or reply to a complaint, so as to give color to the opposing party's claim and assert a new matter by which the apparent right is defeated." *Id.* If not timely raised, the statute-of-limitations defense is forfeited. *Smith v. Menold Construction, Inc*., 348 Ill. App. 3d 1051, 1058 (2004).

¶ 34 Defendants did not raise a statute-of-limitations defense before the trial court as an affirmative defense, they did not raise it in their opposition to class certification, and they cannot raise it for the first time on appeal. See, *e.g.*, *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 413 (2002) (arguments not raised in the trial court are forfeited on appeal). Although, in one multi-sentence footnote, without citation to any relevant authority, in their 40-page brief opposing class certification, defendants asserted that "statutes of limitations *may* also bar some putative class members' claims," (emphasis added), this is hardly adequate to preserve the defense. See, *e.g.*, *Smith*, 348 Ill. App. 3d at 1058 (defendant's conclusory statement that "the applicable statute of limitations has expired" was insufficient to meet its initial burden of establishing expiration). Defendants also assert that the general rule concerning forfeiture of an argument not raised below does not apply, since this is an interlocutory appeal and proceedings below technically remain ongoing. We disagree. The rule—that issues not raised in the trial court are forfeited and may not be raised for the first time on appeal—applies to interlocutory

appeals. See *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶ 58 (2014). Finally, defendants suggest that this court can ignore forfeiture. We decline to do so here, where defendants have successfully moved to dismiss plaintiffs' prior complaints, and, in their answer to the present complaint, defendants asserted 13 affirmative defenses, none of which implicated statutes of limitations.

¶ 35 2. Sufficiency of Claims

¶ 36 Defendants next contend that the trial court erred as a matter of law because it failed to assess the legal sufficiency of plaintiffs' claims before certifying the class. They argue that a court cannot certify a class where plaintiffs do not have a viable claim. In sum, defendants assert that plaintiffs cannot state an ICFA claim as a matter of law, because: (1) the fraud allegations are inherently breach-of-contract allegations and a breach of contractual promise is not actionable under the ICFA; and (2) certification of a nationwide ICFA class is improper because the ICFA does not reach beyond state lines. Defendants assert that plaintiffs fail to state a breach-of-contract claim, because: (1) they cannot identify a single provision of the contract that has been breached; and (2) the work order identifies and discloses that a fuel surcharge will be assessed, and plaintiffs signed their acknowledgement and agreement to the term. Finally, defendants assert that plaintiffs fail to state an unjust-enrichment claim, because: (1) they do not allege an underlying tort or make any allegations regarding an unjustly-retained benefit from Heritage-Crystal Clean, Inc.; (2) they fail to make an evidentiary showing that Heritage-Crystal Clean, Inc., retained a benefit from the fuel surcharge; (3) unjust enrichment cannot proceed in the face of a governing contract; and (4) certification of a nationwide unjust-enrichment class is improper because, in the absence of a contract between the parties that contains a choice-of-law

provision, each class member's claim is governed by the specific unjust-enrichment law of its own state.

¶ 37 Plaintiffs again contend that defendants raise these arguments for the first time on appeal, that they are arguing a pseudo-motion to dismiss, and that forfeiture applies. We agree. Defendants did not move to dismiss the third amended complaint for failure to state a claim; rather, they answered the complaint. Further, with the exception of some of the unjust-enrichment arguments and a reference to plaintiffs' struggle to identify a term in the contract that was breached, defendants did not proffer these specific arguments in their written brief opposing class certification, and we must presume that they made no such assertions at oral argument on the motion for class certification, as no hearing transcript or other report is in the record and, in the absence of a proper record, we resolve discrepancies against the appellant. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) ("an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant"). Again, at the most basic level, arguments not raised in the trial court are forfeited on appeal. See, *e.g.*, *Robinson*, 201 Ill. 2d at 413.

¶ 38 Defendants contend that they are not raising a pseudo-motion to dismiss, because plaintiffs' failure to state a viable claim is a threshold question reviewed *de novo*. However, *de novo* "review" is still the review of a decision made by the lower court; it is not the opportunity to raise an issue for the first time on appeal.[4] In that regard, the cases upon which defendants

[4] **Moreover, we note that the concept that insufficiency claims can be raised at any**

rely are distinguishable from the facts here. Defendants point to *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45 (2007), and *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134 (2002), both cases wherein our supreme court ultimately concluded that the plaintiffs failed to state a valid cause of action and, therefore, that no class could be certified. However, in both cases, the defendants *had* moved to dismiss the pending complaints for failure to state a claim. In *Barbara's Sales*, an interlocutory appeal, the defendant had moved to dismiss an ICFA claim for failure to state a cause of action, because it did not allege the deception required by the ICFA. The trial court denied the motion to dismiss and certified the class, but the supreme court ultimately determined that the plaintiff had failed to plead actions establishing the deception required to form an actionable ICFA claim and, consequently, reversed the class certification. *Barbara's Sales*, 227 Ill. 3d at 72-73. In *Oliveira*, the trial court granted the defendant's motion to dismiss for failure to state a claim and denied plaintiff's request for class certification. The supreme court affirmed the trial court's dismissal of the complaint and held that appeal of the denial of class certification was rendered moot. *Oliveira*, 201 Ill. 2d at 155-56. Here, in contrast, defendants did not move to dismiss the third amended complaint for failure to state a claim, nor raise these arguments in this manner when opposing class certification below.

¶ 39 In a footnote in their appellate reply brief, defendants suggest that they *did* raise these arguments below. They assert that, instead of filing a motion to dismiss the third amended complaint, as they had previously done with respect to plaintiffs' earlier complaints, they strategically opted to "dispute the sufficiency" of the claims in response to plaintiffs' class-

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time is not completely without limitation, and courts have held that the ability to raise that concept applies only to claims that are not cognizable. See, *e.g.*, *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 60-62 (1994); *In re Estate of Yanni*, 2015 IL App (2d) 150108, ¶ 20.

certification motion. To support this contention, they point to the following sentences in their memorandum in objection to class certification: (1) arguing, as to the ICFA claim, "[a]t base this is an unreasonable theory that should not be entertained;" (2) as to the contract claim, "[p]laintiffs fail to explain how this is a breach of contract;" (3) as to unjust enrichment, "without a showing of a benefit to [Heritage-Crystal Clean, Inc.], no unjust enrichment can stand; and (4) their statement, with respect to their argument that the named plaintiffs are not adequate representatives for the class, that "none of the plaintiffs have valid claims under any of the causes of actions. Accordingly, because they cannot prove their individual claims, they cannot represent any of the putative classes." Defendants suggest that the trial court, knowing that defendants moved to dismiss previous complaints, but not the present one, should have either: (1) read those isolated sentences in defendants' memorandum opposing class certification as, effectively, akin to a motion to dismiss; or (2) *sua sponte* raised all of the arguments defendants now raise on appeal. We disagree. Although the court must implicitly consider whether the plaintiffs are stating a viable cause of action, as presented here, the court was charged with considering whether, *assuming the merits of plaintiffs' claims*, class-certification was appropriate and *not* with deciding whether plaintiffs' claims would *succeed*. See *Cruz*, 383 Ill. App. 3d at 764.

¶ 40 In sum, we find that the failure-to-state-a-claim arguments were either not raised or were insufficiently raised below for purposes of our review. As such, for purposes of this appeal concerning only class certification, we find defendants' failure-to-state-a-claim arguments forfeited.

D. Class Certification

¶ 41 We now address defendants' contentions that no class may be certified, let alone three classes, because: (1) each class lacks uniformity, such that they are vague, undefined, and redundant; (2) each class fails on the elements of commonality; and (3) key affirmative defenses require individualized inquiry.

¶ 42 1. Class Definitions

¶ 43 Defendants argue that the court abused its discretion in certifying three vague, undefined, and redundant classes. Defendants argue that the three classes all stem from the same single alleged wrong and purportedly seek an identical recovery for the same single injury. They argue that certifying three overlapping classes undermines two core purposes of class adjudication, *i.e.*, efficiency and consistency. See, *e.g.*, *Portwood v. Ford Motor Co.*, 183 Ill. 2d 459, 464 (1998) (purposes of class-action procedure include efficiency and economy of litigation). Further, defendants assert that plaintiffs have *never* explained why three classes are necessary or beneficial and, further, that they might require *further* sub-classing. Moreover, because each class seeks the same recovery for the same alleged wrong, multiple, inconsistent recoveries might result and "the monetary cost of administration of these triplicate classes will take away from any recovery ultimately realized by plaintiffs."

¶ 44 Defendants also argue that the three-class scenario here creates conflicts of interest between classes. For example, if the fuel surcharge constitutes a breach of contract, the unjust-enrichment claim would be invalidated (see, *e.g.*, *People ex re. Hartigan v. E & E Hauling, Inc.*, 153 Ill. 2d 473, 497 (1992) (unjust enrichment is based on implied contract and has no application where a specific contract governs the relationship)). Also, defendants allege, fraud claims may not be sustained when the underlying conduct is "garden variety" breach of contract, rendering those two classes mutually exclusive. Defendants assert that putative class members

might misunderstand the class notice and not properly opt in, or might feel they must opt out of some classes and, if only one or two claims ultimately succeeds, individuals who opted out of the victorious class may have inadvertently opted themselves out of recovery simply because they were presented with three separate class options for the same alleged wrong. Defendants assert that the court's decision has created an "administrative nightmare."

¶ 45 In addition to arguing that the court erred in certifying three classes, defendants attack each class as vague, undefined, and unascertainable. The primary flaw they emphasize is that each plaintiff had the ability to negotiate rates with HCC, those rate negotiations provided the opportunity to inquire about, discuss, and negotiate their fees, including the fuel surcharge, and evidence of clear and informed negotiation by customers would be a basis for excluding potential plaintiffs from bringing the claims. As such, the classes include customers who might not have suffered injury, are over- and under-inclusive (for example, striking from a prior class definition "corporate" customer, when there is no clear differentiation between corporate and other customers when it comes to the causes of action), and unascertainable, as it is not feasible to separate class members who negotiate their rates from those who could have done so and from those who did not do so.

¶ 46 Preliminarily, plaintiffs argue, yet again, that defendants' arguments challenging the propriety of three separate classes are forfeited. Indeed, we agree that some of the aforementioned arguments were not raised below. Defendants challenged the propriety of class certification and the class definitions below, but it does not appear that they challenged the overall propriety of multiple classes on some of the bases alleged now. However, as defendants asserted below that plaintiffs inexplicably sought to represent members of three overlapping

nationwide classes, certification of which would result in recovery for the exact same monies for the exact same conduct and transactions, we address their arguments.

¶ 47 Again, the trial court certified the following classes:

> *Consumer Fraud Act Class*: "All persons and entities in the United States that paid Heritage-Crystal Clean, Inc. or Heritage-Crystal Clean, LLC a 'fuel surcharge' fee or 'energy surcharge' fee from May 22, 2012 through the date of class notice (the 'Class Period')."
>
> *Breach of Contract Class*: "All persons and entities in the United States that entered into a written contract with Heritage-Crystal Clean, LLC, and that paid Heritage Crystal Clean, LLC a 'fuel surcharge' fee or 'energy surcharge' fee from May 22, 2005 through the date of class notice (the 'Class Period')."
>
> *Unjust Enrichment Class*: "All persons and entities in the United States that indirectly paid Heritage-Crystal Clean, Inc. a 'fuel surcharge' fee or 'energy surcharge' fee from May 22, 2010 through the date of class notice (the 'Class Period')."

¶ 48 We reject defendants' arguments that the court abused its discretion and that the classes must fail because their definitions are vague, undefined, or redundant. Rather, each class clearly identifies putative class members as those persons or entities in the United States who paid the fuel surcharge within specified time frames. Further, evidence was presented to suggest that each class member may be readily identified through defendants' electronic records. Moreover, although putative plaintiffs might belong to multiple classes, the classes are not entirely redundant because the *defendants* differ in each class: the ICFA class concerns both defendants, the breach-of-contract class concerns only HCC, and the unjust-enrichment class concerns only Heritage-Crystal Clean, Inc.

¶ 49 In addition, although defendants assert that the class is over-inclusive because it might include customers who did not suffer injury or who negotiated their rates, it is clear that a customer who did not pay an amount designated as a fuel surcharge would simply not be a member of any of the three classes. Moreover, if, ultimately, a plaintiff cannot establish harm, damages inquiries will be resolved against them. Not every question must be common; "[i]t is routine in class actions to have a final phase in which individualized proof must be submitted." *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014). This, too, protects against defendants' concerns about a risk of double recovery of damages, as the trial court will protect against multiple recoveries, if any claim is ultimately successful.

¶ 50 Further, there is nothing inherently improper with certifying multiple classes. Indeed, as plaintiffs point out, it is not clear how the court's certification of plaintiffs' three classes is any different than a routine situation in which trial courts certify a single class action covering multiple claims. Multiple classes and subclasses are permissible. Indeed, section 2-802 of the Code provides:

> "(b) Class Action on Limited Issues and Sub-classes. When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or divided into sub-classes and each sub-class treated as a class. The provisions of this rule shall then be construed and applied accordingly." 735 ILCS 5/2-802(b) (West 2016).

See also *Williams v. Chartwell Financial Services, Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000) (multiple classes within a single case are specifically permitted by rule and, to the extent the district court denied certification under the belief that the very existence of subclasses justified the denial, it erred). In addition, if the definitions prove unworkable, they need not be set in

stone, as section 2-802(a) allows the court to amend its class certification order, if necessary, before a decision on the merits. 735 ILCS 5/2-802(b) (West 2016).

¶ 51 Defendants cite *Bolden v. Walsh Group*, 282 F.R.D. 169, 175 (N.D. Ill. 2012) to suggest that multiple classes cannot stand, but the court there simply permitted two classes instead of four and, although the nature of the harm differed between classes, there was no discussion that multiple classes were somehow rare or unique. Similarly, defendants assert that there is an issue with multiple classes, because there might be need for further subclasses, but one case they cite, *Shafer-Pearson Agency, Inc. v. Chubb Corp.*, 237 Ill. App. 3d 1031, 1034 (1992), certified a class with 10 subclasses, hardly supporting defendants' overall suggestion that multiple classes are inherently inefficient and constitute an abuse of discretion.

¶ 52 We also agree with plaintiffs that there is no authority to suggest that three separate or confusing notices must be sent to potential class members; rather, the court has discretion to craft the content of one class notice in a manner that ensures potential members understand that they may be members of one or more of the three classes. We are also not concerned about conflicts of interest if only some of the claims prevail, as plaintiffs are entitled to pursue alternative theories of recovery. In sum, we reject defendants' assertions that the trial court abused its discretion in certifying three classes here and as defined.

¶ 53 2. Commonality, Typicality, and Predominance

¶ 54 Defendants also challenge the propriety of the classes based upon predominance and typicality, which are closely related to commonality. As to the ICFA claim, defendants contend that individual variations in what a customer received, understood, and relied upon (for example, was there a common definition or understanding of the meaning of "fuel surcharge" and the individualized negotiations between customers and HCC) "dooms" the class. As to the contract

claim, defendants contend that wide-ranging lack of uniformity in the contracts and individual negotiations requires extensive inquiry not conducive to class-wide determination. As to the unjust-enrichment claim, defendants contend that proof of each member's claim will require examination of what representations and communications were made to each member.

¶ 55 Commonality requires questions of law or fact common to the class that predominate over any questions affecting only individual members. 735 ILCS 5/2-801(2) (West 2016). It is a two-factor showing: (1) that there are questions of fact or law common to the class; and (2) the common questions predominate over any questions affecting only individual members. *Walczak*, 365 Ill. App. 3d at 673. "Predominance is shown not by whether common issues outnumber individual issues, but by whether common issues or individual issues will be the focus of most of the efforts of the parties and the court." *Cruz*, 383 Ill. App. 3d at 772-73. Plaintiffs seeking class certification satisfy the predominance requirement by showing that the favorable adjudication of the named plaintiffs' claims will establish the right to recovery in other class members. *Id*. at 773; see also *Avery*, 216 Ill. 2d at 128 (to satisfy the commonality requirement, it must be shown that successful adjudication of the class representatives' individual claims will establish a right of recovery in other class members). "In other words, where predominance is established, a judgment in favor of the class members should decisively settle the controversy, and all that should remain is for the other class members to file proof of their claims." *Cruz*, 383 Ill. App. 3d at 773. A class action is proper where the defendant allegedly acted wrongfully in the same basic manner as to an entire class, and, in such circumstances, the common class questions predominate the case and the class action is not defeated. *Walczak*, 365 Ill. App. 3d at 674.

¶ 56 Again, we bear in mind that, at the class-certification stage, the court is only to ascertain the existence of common factual issues, not to resolve their merits. *Cruz*, 383 Ill. App. 3d at 775.

The court in *Cruz* emphasized that the court must simply identify common issues, the resolution of which would determine the matter, rather than the ultimate success or merits of the case. *Id*. Moreover, the court noted, "[w]hile we discern that, if the common issues are proved in favor of plaintiffs, the trial court would face significant individual variations in damages, this should not defeat the determination that the commonality/predominance prerequisite is satisfied. [*Clark v. TAP Pharmaceutical Products, Inc*., 343 Ill. App. 3d 538, 549 (2003)] ('[i]ndividual questions of injury and damages do not defeat class certification.')." *Cruz*, 383 Ill. App. 3d at 777. See also, *Oshana v. Coca-Cola Bottling Co.*, 472 F.3d 506, 513 (7th Cir. 2006) (typicality is satisfied if the plaintiff's claim arises from the same practice and legal theory as that of the other class members); *Kramer v. American Bank and Trust Co., N.A.*, 2017 WL 1196965, at *6 (N.D. Ill. Mar. 31, 2017) (typicality may be satisfied, despite factual distinctions between the named plaintiff's claims and those of class members, since the focus is on whether the named plaintiff's claims have the same "essential characteristics" as the claims of the class at large).

¶ 57 We find defendants' arguments challenging commonality, predominance, and typicality unconvincing, and we conclude that the trial court here reasonably found that there were common questions of law or fact that predominate over any questions affecting individual members. The trial court reasonably found, based on the evidence presented, issues common to the class, such as whether: (1) the term "fuel surcharge" is a term of art bearing a specific meaning either in the industry or at large; (2) the purported "fuel surcharge" is actually a fuel surcharge; (3) HCC's use of the term "fuel surcharge" is unfair and/or deceptive; (4) HCC already recovers its fuel costs in the base service rate it charges its customers; and (5) whether HCC uniformly misrepresented and/or failed to disclose material information about the fuel surcharge to plaintiffs and class members that would have informed them of the fee's allegedly-

illegitimate nature. Indeed, we agree with the court that, on all claims, liability and damages depend on defendants' common course of conduct and class members' payment of the allegedly-illegitimate fuel surcharge, such that resolution of the common questions will decisively conclude the matter for each class.

¶ 58 Further, it appears that many of defendants' arguments are premised on a misunderstanding of plaintiffs' theory of the case. As to all claims, plaintiffs allege that common questions predominate because customers were exposed to the same information regarding the fuel surcharge and were not *able* to learn of its alleged illegitimacy. Although defendants argue that some sales representatives discounted charges and fees on invoices until the customer was satisfied with the overall price, plaintiffs assert that the negotiations are irrelevant because the issue is not whether the fuel surcharge was disclosed or whether the customer paid $1 or $50 for the fuel surcharge, or negotiated an amount in between. Rather, in either scenario, the basis of the claims is that the fuel surcharge is an illegitimate "sham" fee and that defendants uniformly failed to disclose important information about the fee, which prevented their customers from knowing the true nature of its illegitimacy. In other words, despite defendants' insistence to the contrary, any negotiations of the fuel surcharge *amount* did not concern informing the customer of the deceptive and unfair nature of the fee. As such, the trial court reasonably rejected defendants' arguments of individualized inquiry, finding for purposes of class certification that there existed evidence suggesting that class members were exposed to similar representations from HCC when inquiring about the fuel surcharge and that the customers would not have been informed of HCC's actual fuel costs or how the fuel surcharge was calculated (because the sales representatives did not know). These are common questions applicable to customers that paid a fuel surcharge.

¶ 59 Again, a class action is not defeated solely because of factual variations among grievances, nor where class members may be differently affected by the applicability of various defenses. See *Walczak*, 365 Ill. App. 3d at 677. Courts should not turn the class-certification proceedings into a "dress rehearsal for the trial on the merits" (*Messner v. Northshore University Health System*, 669 F.3d 802, 811 (7th Cir. 2012)) and, similarly, *defendants* should not approach a case as though class certification is proper only when the class is "sure to prevail on the merits." (*Scheicher v. Wendt*, 618 F. 3d 679, 685 (7th Cir. 2010)). Indeed, "[e]very consumer fraud involves elements of reliance and causation *** [A] rule requiring 100% of commonality would eviscerate consumer-fraud class actions." *Suchanek*, 764 F.3d at 759.

¶ 60 In sum, we reject defendants' arguments. The trial court did not abuse its discretion in finding that common questions predominate over questions affecting only individual members of the classes. A failure of proof on the common questions will end the case and each class will ultimately prevail or fail together. See, *e.g.*, *Bell v. PNC Bank, National Assoc.*, 800 F.3d 360, 376-77 (7th Cir. 2015).

¶ 61 3. Affirmative Defenses

¶ 62 Defendants finally argue that they have asserted numerous affirmative defenses that require individualized inquiry into each customer's course of dealings with HCC. They argue that the court, by making improper factual findings (an argument we previously rejected), improperly outright rejected these defenses. For example, they contend that the court found that mistake-of-fact and duress exceptions apply to bar defendants' voluntary-payment-doctrine defense in the case. Defendants assert that even those *exceptions* to the defense would require individualized factual inquiry and that the court failed to address how the issues can be resolved through class-wide adjudication. Defendants assert that their defenses are not simply a question

of assessment of damages, but concern, rather, whether any individual plaintiff has an actionable wrong and would be a proper member of the class. They argue that this individualized analysis precludes class-wide adjudication.

¶ 63 Plaintiffs (correctly) respond that, although they assert that a "host" of affirmative defenses require individualized inquiry, the only affirmative defense defendants' raised and argued below and in their brief is the voluntary-payment doctrine. Further, plaintiffs do not appear to be pursuing a "duress" exception to the concept of voluntary payment.

¶ 64 In any event, we cannot conclude that the court unreasonably "decline[d] to find at this juncture that [HCC]'s voluntary[-]payment defense bars class certification." This sentence from the court's order rebuts defendants' contention that the court rejected the defense on the merits. Rather, the court noted evidence that, even if the fuel surcharge was disclosed on the work orders and invoices that customers subsequently paid, customers were not aware of the purported *illegitimacy* of the charge, which might implicate the voluntariness of the payment. This was not unreasonable, given plaintiffs' theory of the case and the evidence presented. Indeed, the voluntary-payment doctrine provides that, "*absent fraud, misrepresentation* or mistake of fact, money that is voluntarily paid under a claim of right to the payment and *with full knowledge of the facts* by the payer cannot be recovered unless the payment was made as a result of compulsion." (Emphases added.) *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 587 (2004). There is precedent that the voluntary-payment doctrine does not apply to claims of deception or fraud under the ICFA. See, *e.g.*, *Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, ¶ 24. Therefore, we cannot find unreasonable the court's finding that, at this stage, the voluntary-payment defense does not bar class certification.

¶ 65 In sum, we conclude that the trial court did not abuse its discretion in its class certification order. A class action is an appropriate method to fairly and efficiently adjudicate the controversy where "[t]he numerous individuals in the proposed class and the existence of predominant common questions of fact or law indicate that a class action would serve the economies of time, effort, and expense as well as prevent inconsistent results. Litigating the claims on an individual basis would waste judicial resources, while addressing the common issues in a single proceeding would aid judicial efficiency and administration." *Cruz*, 383 Ill. App. 3d at 780. The trial court's finding that those factors were satisfied here was not unreasonable. We reiterate, as stated above and as discussed at oral argument, the court may revisit the class definitions or, as the case evolves, determine that class certification of all or some of the classes is inappropriate. As it stands, however, the present decision was not unreasonable.

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 68 Affirmed.