

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY M. GREER, Individually, : CIVIL ACTION  
and as Representative of a Class :  
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 :  
v. :  
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 :  
SHAPIRO & KREISMAN : NO. 00-4647

**MEMORANDUM AND ORDER**

HUTTON, J.

December 18, 2001

Presently before the Court is the Parties' Joint Motion for Preliminary Approval of Settlement (Docket No. 21). Plaintiff seeks provisional certification of a class pursuant to Fed.R.Civ.P. 23(b)(3) for the purpose of settlement and preliminary approval of the parties' settlement agreement of September 18, 2001. For the reasons that follow, the instant Motion is **DENIED WITH LEAVE TO RENEW.**

**I. BACKGROUND**

The Representative Plaintiff, Mary M. Greer, filed a class action lawsuit against Defendant Shapiro & Kreisman ("S&K") on September 13, 2000. The essence of the allegations of the Representative Plaintiff is that the Defendant violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et.

seq., by sending virtually identical deceptive debt collection letters to the class members. The class consists of all Pennsylvania residents who were mailed debt collection letters substantially in the form of the letter sent to the Representative Plaintiff, which allegedly failed to advise the consumer that he or she had the right to dispute the validity of the debt.

The pertinent parts of the proposed settlement are as follows. Defendant S&K proposes to create a Settlement Fund in the amount of \$40,000. The Settlement Fund shall be created by the deposit in an interest bearing account controlled by Class Counsel and Hudson Union Bank, but subject to the supervision of the Court. This amount shall be used to satisfy the full and final settlement of all claims of the Class against S&K, including costs to be paid for notice and claims administration, as well as the settlement of the Representative Plaintiff's claims against the Defendant, pursuant to 15 U.S.C. §1692k(a)(2)(B)(i), and the attorney's fees and costs of the Representative Plaintiff and the Class.

The Settlement Fund in the Amount of \$40,000 is proposed to be distributed as follows: 1) \$3,000 advance toward the reasonable fees and costs of providing notice to the Class within five (5) days after the entry of the Preliminary Approval Order;

2) Class counsel will apply to the Court for an award of attorney's fees, costs and expenses in an amount not to exceed \$25,000; 3) Class Counsel will apply to the Court for an award to Representative Plaintiff Greer in an amount not to exceed \$1,500; 4) The remainder (approximately \$10,500) shall be distributed to members of the Class. Class counsel estimate that the pro rata share each claiming Class member will receive pursuant to the settlement agreement should be no less than seventy dollars (\$70.00). There are an estimated 740 members of the putative class.

## **II. DISCUSSION**

The instant Motion presents two issues for the Court: First, whether the putative class is eligible for conditional certification; and second, whether the proposed settlement meets the standards for preliminary approval. These two issues will be considered in turn.

### **A. Conditional Class Certification**

A class may be conditionally certified for the purpose of settlement if it conforms to the requirements of Rule 23 of the Federal Rules of Civil Procedure. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689 (1997); In re Prudential Ins. Co. v. America Sales Litigation,

148 F.3d 283, 307-08 (3d Cir.1998). While the settlement class must satisfy each of the requirements of Rule 23(a) and 23(b)(3), the fact of settlement is relevant to a determination of whether the proposed class meets the requirements imposed by the Rule. Id. Rule 23(a) requires that the proposed class satisfies the criteria of numerosity, commonality, typicality and adequacy of representation.

Numerosity is satisfied when the class is so numerous that joinder of all class members is impracticable. See In re Prudential Ins., 148 F.3d at 309. In this case, joinder of each of the 740 class members would be impracticable. See Weiss v. York Hosp., 745 F.2d 786, 809 n. 35 (3d Cir.1984) (numbers exceeding one hundred will generally sustain numerosity requirement), cert. denied, 470 U.S. 1060 (1985).

Commonality is satisfied when there are questions of law or fact common to the class but does not require an identity of claims or a lack of "factual differences among the claims of the putative class members." In re Prudential, 148 F.3d at 310. The alleged existence of a common unlawful practice generally satisfies the commonality requirement. See Anderson v. Dep't. of Public Welfare, 1 F.Supp.2d 456, 461 (E.D.Pa.1998). In this case, there are common questions of fact and law because the suit challenges a standard practice of mailing debt collection

letters, and the same legal standards appear to govern each class member's claims.

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." See Georgine v. Amchem Products, Inc., 83 F.3d 610, 631 (3d Cir.1996). In the instant case, the claims of the representative, Mary Greer, are typical because they and the claims of each class member are advanced under the same legal theories and arise from the same practice or course of conduct by the Defendant. See Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 923 (3d Cir.1992).

Adequacy of representation requires that the interests of the named plaintiffs are aligned with those of the absentees and that the class counsel is qualified and generally able to conduct the litigation in the interest of the entire class. See Georgine, 83 F.3d at 630. In this case, there is no apparent conflict of interests between the Representative Plaintiff and other class members. Class counsel appear to have the experience and skill to ably represent the proposed class.

Rule 23(b)(3) sets forth the additional requirements of predominance and superiority. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products, 117 S.Ct. at

2249. This instant suit, which challenges the use of virtually identical methods employed with regard to each class member, falls into such a category. Common questions of law and fact predominate because of the virtually identical factual and legal predicates of each class member's claims.

"The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." In re Prudential Ins., 143 F.3d at 316 (quotations omitted). Any interest of members of the class in individually controlling the prosecution of separate actions, see Rule 23(b)(3)(A), is significantly outweighed by the efficiency of the class mechanism given the size of the class and the relatively modest size of each individual damage claim. See id. (modest size of individual claims suggests class procedure is superior). Therefore, based on the above analysis, the Court finds that the Plaintiff has met the requirements for conditional class certification pursuant to Rule 23.

**B. Preliminary Approval of Settlement**

The next inquiry is whether this Court should grant preliminary approval to the class action settlement. The touchstone for approval of a class action settlement is a determination that it is fair, adequate and reasonable. See

Eichenholtz v. Brennan, 52 F.3d 478, 482 (3d Cir.1995); Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir.1975). In evaluating a settlement for preliminary approval, the court determines whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval. See In re Prudential Securities Incorporated Limited Partnerships Litigation, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (citing Manual for Complex Litigation § 30.41 at 237 (3d ed. 1995)).

In Girsh v. Jepson, the Third Circuit established nine factors that courts should consider in determining whether to grant approval to a proposed class action settlement. See Girsh, 521 F.2d at 157. Those factors are as follows:

- 1) the complexity, expense, and likely duration of the litigation;
- 2) the reaction of the class to the settlement;
- 3) the stage of the proceedings and the amount of discovery completed;
- 4) the risks of establishing liability;
- 5) the risks of establishing damages;
- 6) the risks of maintaining the class action through trial;
- 7) the ability of the defendants to withstand a greater settlement;
- 8) the range of reasonableness of the settlement fund in light of the best possible recovery;

9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. at 157.

In their Joint Motion, the parties' have asserted that several of the Girsh factors weigh in favor of preliminary approval of the proposed settlement. First, the parties assert that the stage of proceedings favors preliminary approval of settlement. The agreement to settle did not occur until after the Court's decision to deny the Defendant's Motion to Dismiss, the filing of the Plaintiff's Motion for Class Certification, and the exchange of discovery. Plaintiff's counsel asserts that settlement possibilities were entertained only after they possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits.

Regarding the other factors, the Joint Motion asserts that Plaintiff's counsel recognizes the expense and length of a trial and possible appeals in this action. They have also taken into account the uncertain outcome and risk of litigation, the inherent problems of proof, and the viability of defenses. After considering these issues, Plaintiff's counsel represents to this Court that the settlement is in the best interest of the Class.

Despite the above-mentioned points made in the Joint Motion that weigh in favor of preliminary approval, there are several

provisions in the Proposed Settlement Agreement that concern this Court. Regarding the reasonableness of the settlement, the parties point out that, pursuant to 15 U.S.C. §1692K(a)(2)(B), consumers in an FDCPA class action are limited to recovering the lesser of \$500,000 or 1% of the Defendant's net worth. The Plaintiff has asserted that, under a confidentiality agreement, the Defendant has provided sufficient net worth information that the Representative Plaintiff is convinced that if she won her FDCPA claims at trial and received the statute's maximum recovery, the Class would likely receive nothing. The Plaintiff has not explained to the Court why, based on her calculation of the Defendant's net worth, the class would receive nothing if the case goes to trial and the maximum statutory recovery was awarded. This information is necessary for the Court to assess the fairness of the proposed settlement.

The next issue this Court must consider is whether the Settlement Agreement improperly grants preferential treatment to the Class Representatives or segments of the Class. The FDCPA provides that class representatives are entitled to recover the same amount that he/she would recover if the action were brought on an individual basis, plus limited additional damages as the court may allow. See 15 U.S.C. §1692k(a)(2); Heredia v. Green, 667 F.2d 392, 396 (3d Cir. 1981). It is asserted in the Joint

Motion that the amount payable to the Representative Plaintiff is the settlement amount under the FDCPA for her individual claims. The Plaintiff, however, does not provide the Court with a specific damage calculation as to how she arrived at the requested amount of \$1,500. This information is needed for the Court to determine whether preferential treatment is being given to the Representative Plaintiff.

Another concern of this Court is the proposed attorneys' fees. Paragraph 7 of the Agreement states that Plaintiff's counsel will apply to the Court for a fee award of \$25,000. This represents 62.5% of the total Settlement Fund Amount of \$40,000. This District has held that the general range of attorney fees in "common fund" cases is 19%-45%. See In re SmithKline Beecham Corp. Sec. Lit., 751 F.Supp. 525, 533 (E.D.Pa. 1990). The Joint Motion does not explain to this Court why such a large percentage of the Settlement Fund should be given to the Plaintiffs' attorneys.

**C. Proposed Notice to Putative Class Members**

According to the proposed settlement, the settlement administrator will send individual notices to putative class members identified by the records of the Defendant. The notice correctly informs the putative class members of the nature of the litigation, the nature of the settlement, the possible number of

class members, the requested amount of attorneys' fees, the proposed individual settlement of the Representative Plaintiff, Class members' right to opt out of the class, Class members' right to object to the proposed settlement, and the time and date of the Final Approval Hearing. The proposed notice, however, is deficient in two respects. First, The Proposed Notice of Settlement to Class Members states on page 3 that Class counsel estimate that the pro rata share each Claiming Class member will receive should be no less than \$70.00. This Court is unclear as to how the Plaintiff has arrived at this calculation. Of the \$40,000 Settlement Fund, only \$10,500 will be left over for distribution to Class members after deductions are made for cost of mailing notices (\$3,000), attorneys fees and costs (\$25,000), and the Representative Plaintiff Award (\$1,500). Moreover, the parties estimate that there are 740 Class members. Therefore, if every single Class member decides to participate in the Settlement, each Class member would receive approximately \$14.19. The proposed notice does not explain to Class members how the estimated \$70.00 award was arrived at, or how the range of the award will vary depending on how many Class members participate in the settlement.

Second, Paragraph 10 of the Agreement states that "any class member whose notice is returned as undeliverable shall not

receive a distribution, but will otherwise remain a member of the class for all other purposes of this agreement." This seems to indicate that any class member whose current address is not on file with the Defendant, and whose notice is therefore returned as undeliverable, will be included in the class yet receive no distribution, and will be barred from bringing their own suit.

The main concern behind the notice requirement is the prospect of harm to absent class members. See In re Nazi Era Cases Against German Defendants Litigation, 198 F.R.D. 429, 440 (D.N.J. 2000). After certification, "notice of the settlement is necessary as a matter of constitutional due process [as] an individual's claim cannot be extinguished without notice and an opportunity to be heard." See id. (citing Simer v. Rios, 661 F.2d 655, 664 (7<sup>th</sup> Cir. 1981)).

Under Rule 23, notice "shall be given to all members of the class in such manner as the court directs." See Larkin General Hospital, Ltd. v. American Telephone & Telegraph Company, 93 F.R.D. 497, 502 (E.D.Pa 1982) (citing Fed. R. Civ. P. 23(e)). Adequate notice is important in securing due process of law for the class members, as class members are bound by the judgment entered in the action. See Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367, 378, 379, 116 S.Ct. 873 (1996). When the plaintiff knows the names and addresses of the class members or

can easily determine such information through reasonable efforts, individual notices must be sent to each class member. See Fed.R.Civ.P. 23(c)(2); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-19 (1950). In the event that specific and current names and addresses are unattainable, however, "notice by publication will suffice under Rule 23(c)(2) and under the due process clause." Carlough v. Amchem Prods., Inc., 158 F.R.D. 314, 325 (E.D.Pa.1993) (citing Mullane, 339 U.S. at 317-18).

Therefore, in light of the Court's concern regarding the proposed notice to class members, the parties should use print media outlets, in addition to first-class mail, to ensure that all class members will be adequately informed of the proposed settlement. This additional notification should include publication that will be targeted to Pennsylvania residents that are determined to be a member of the class. See Fry v. Hayt, Hayt & Landau, 198 F.R.D. 461, 474 (E.D.Pa 2000) (holding that notification to class members via first-class mail, coupled with both newspaper and internet publication, will satisfy the notice requirement of Rule 23).

Accordingly, due to the concerns mentioned above, the Court will deny the instant Motion with leave to renew. This will

allow the parties to address the concerns of the Court regarding the reasonableness and fairness of the proposed settlement agreement.

An appropriate Order follows.

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**O R D E R**

AND NOW, this 18<sup>th</sup> day of December, 2001, upon  
consideration of the Parties' Joint Motion for Preliminary Approval  
of Settlement (Docket No. 21), IT IS HEREBY ORDERED that  
Plaintiff's Motion is **DENIED WITH LEAVE TO RENEW.**

BY THE COURT:

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HERBERT J. HUTTON, J.