

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

CAROLYN THOMAS : CIVIL ACTION  
 :  
 v. :  
 :  
 NCO FINANCIAL SYSTEMS, INC. : NO. 00-5118

M E M O R A N D U M

WALDMAN, J.

July 31, 2002

I. Introduction

Plaintiff has asserted claims under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. ("FDCPA"). Presently before the court is the parties' Joint Motion for Class Certification of a Settlement Class and Preliminary Approval of the Settlement and Notice to Class. The parties seek provisional certification of a settlement class, conditional certification of plaintiff as class representative and his counsel as class counsel, preliminary approval of a proposed settlement, and approval of their proffered notice of the class action and proposed settlement.

The parties seek to certify a settlement class defined as "all persons in the United States who incurred a debt primarily for personal, family, or household purposes (other than officers, directors and employees of NCO) which was previously owned or serviced by Commercial Financial Services ("CFS"), and which was reported by NCO to one or more credit reporting

agencies" at any time "between October 10, 1999 and the date of entry of the Preliminary Approval Order."

Plaintiff alleges that during the class period defendant routinely and deliberately changed the actual charge-off date or date of last activity to a later date or failed to report any date of last activity when reporting information to credit bureaus for the purpose of collecting debts. Plaintiff alleges that defendant reported the debt in its own name rather than the name of the original creditor, thereby causing confusion as to the source of the debt and its date of origin. By so doing, defendant caused the debt to continue to appear on the credit reports for plaintiff and class members beyond the seven-year period permitted law. See 15 U.S.C. § 1681c. Plaintiff asserts that the practices employed by defendant were false, deceptive and misleading in violation of the FDCPA. See 15 U.S.C. § 1692e.

NCO is a Pennsylvania corporation with its principal place of business in Fort Washington. It is the world's largest provider of accounts receivable collection services and serves clients throughout the United States. Most of the company's accounts receivable services have focused on recovery of delinquent and bad debt accounts, primarily in the financial services, health care, education and telecommunication sectors. The parties represent that approximately 2.2 million persons

qualify as members of the proposed class. For purposes of the class action damage cap in 15 U.S.C. § 1692k(a)(2)(B), defendant's net worth does not exceed \$8,000,000.

## **II. Certification of Settlement Class**

Certification of class actions is governed by Fed. R. Civ. P. 23(a) which requires that the following factors be satisfied:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and,
- (4) the representative parties will fairly and adequately protect the interests of the class.

A plaintiff must also satisfy one of the requirements of subsection (b) of Rule 23. The parties have moved for certification under Rule 23(b)(3) which requires the court to find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The fact of settlement, of course, is also relevant to a class certification. When a court is asked to certify only a settlement class, it logically follows that considerations

pertinent to the conduct of trial are less significant. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 619-20 (1997).

The burden is ordinarily on the plaintiff to demonstrate that a class should be certified. See Davis v. Romney, 490 F.2d 1360, 1366 (3d Cir. 1974). When deciding a motion for class certification, however, the court does not pass upon the ultimate merits of the plaintiff's claims. See Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177-78 (1974).

#### Numerosity

Rule 23(a)(1) permits class action treatment only when "the class is so numerous that joinder of all class members is impracticable." There is not a minimum number which automatically satisfies the numerosity requirement and plaintiff does not have to allege the exact identity or number of the proposed class members. See Williams v. Empire Funding Corp., 183 F.R.D. 428, 437-38 (E.D. Pa. 1998); Dirks v. Clayton Brokerage Co. of St. Louis, 105 F.R.D. 125, 131 (D. Minn. 1985). Classes of more than a hundred persons are generally sufficient to satisfy the numerosity requirement. See Weiss v. York Hospital, 745 F.2d 786, 809 n.35 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985); Williams, 183 F.R.D. at 437-38. The parties agree that the actions complained of during the class period involve approximately 2.2 million persons. Joinder of all members of the class would clearly be impracticable.

### Commonality

The court must next determine whether common questions of law and fact exist in the putative class. The commonality requirement is subsumed by the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions. See Amchem Products, 521 U.S. at 610; Ralston v. Zats, 2000 WL 1781590, \*4 (E.D. Pa. Nov. 7, 2000); Strain v. Nutri/System, Inc., 1990 WL 209325, \*3 (E.D. Pa. Dec. 12, 1990) ("The threshold for commonality under Rule 23(a)(2) is significantly less rigorous than the Rule 23(b)(3) requirement that common questions of law or fact predominate over questions affecting only individual class members").

The named plaintiff need only share one question of law or fact with the prospective class. See Williams, 183 F.R.D. at 438. The alleged existence of a common unlawful practice generally satisfies the commonality requirement. See Ralston, 2000 WL 1781590, at \*5; Anderson v. Dep't. of Public Welfare, 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998). Plaintiff relies on essentially the same legal predicate and the same practices as would the proposed class. This is sufficient to show commonality.

### Typicality

Under Rule 23(a)(3), the claims of the representative parties must be typical of those of the class they seek to

represent. The typicality requirement is satisfied if the plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory. See Barnes v. American Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998); Baby Neal v. Casey, 43 F.3d 48, 57 (3d Cir. 1994).

The threshold for establishing typicality is low. See Zlotnick v. Tie Communications, Inc., 123 F.R.D. 189, 193 (E.D. Pa. 1988). The term "typical" does not mean "identical." Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1984). The court must focus on whether the plaintiff's individual circumstances are markedly different or whether the legal theory upon which the claims are based differs from that upon which the claims of the other class members will be based. Id. at 786.

Generally, the typicality requirement is satisfied where all claims arise from the same alleged fraudulent scheme. See In re Prudential Ins. Co. v. America Sales Litig., 148 F.3d 283, 312 (3d Cir. 1998); Baby Neal, 43 F.3d 48, 57 ("cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims"). Like the other class members, plaintiff's claim is predicated on defendant's practice

of altering or failing to provide the charge off date and naming itself as the original creditor.

#### Adequacy

The adequacy requirement of Rule 23(a)(4) involves a two-step inquiry. See In re Prudential, 148 F.3d 283, 312; Lewis v. Curtis, 671 F.2d 779, 788 (3d Cir.), cert. denied, 459 U.S. 880 (1982). First, the court must be satisfied that plaintiff's counsel is qualified, experienced and capable of conducting the proposed class litigation. The court must then determine that there is no conflict of interest between the claims of the class representative and the other members of the proposed class. This requirement overlaps with typicality. See General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982); Torres v. Careercom Corp., 1992 WL 245923, \*3 (E.D. Pa. Sept. 18, 1992).

As discussed above, plaintiff's claim appears to be typical. There is no apparent conflict of interest. No specific information, however, has been provided as to the qualifications and experience of counsel. The entire discussion of this factor consists of a single conclusory statement which reads "Said attorneys have substantial experience in consumer class action

litigation." Counsel have not identified any such class action or provided the results thereof, and the court is unable to make the requisite finding from the limited information publicly available.<sup>1</sup>

### Predominance

To certify a class under Rule 23(b)(3), the court must find that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The existence of individual questions of fact does not per se preclude class certification. See Eisenberg, 766 F.2d at 787. Rather, predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., 521 U.S. at 623.

Class certification is generally appropriate where a defendant has engaged in a pattern of uniform activity. See id.

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<sup>1</sup> One of plaintiff's attorneys lists his practice areas in Martindale-Hubbell as general practice, personal injury law and probate. He appears as counsel in no class action with a reported disposition, either by publication or on a database. Plaintiff's other attorney does list consumer litigation as a practice area and appears as co-counsel in three class actions with dispositions reported or available on the Westlaw or LEXIS database. In the most recent of these, a motion to dismiss her client's class action securities fraud complaint was granted. In another, she filed a class action RICO complaint which was never pursued as the defendant shortly thereafter filed for bankruptcy and the Bankruptcy Court denied a request for relief from the automatic stay. In the third class action, she appeared for an objector to object to the proposed settlement and to the adequacy of representation by class counsel.

at 624 (predominance test readily met in cases alleging consumer fraud); In re Prudential, 148 F.3d at 314-15 (predominance requirement is satisfied where class member claims arise from a common scheme by defendant). A common question of law predominates, that is whether defendant's practice of changing the charge off date or date of last activity, or not providing a date of last activity, and reporting the debt in its own name violates the FDCPA. Each class member would also have to prove many, if not all, of the same essential facts about defendant's practices with respect to reporting information to credit bureaus for purposes of debt collection.

#### Superiority

This 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. Co., 148 F.3d at 316 (internal citations omitted). Rule 23(b)(3) identifies four considerations pertinent to this determination: the interest of class members in bringing separate actions; any litigation already commenced by or against class members; the desirability of litigating the claims in the forum; and, the likely difficulties in managing the class action.

In cases of this type, the amount of actual damages will rarely be substantial. See Lake v. First Nationwide Bank, 156 F.R.D. 615, 626 (E.D. Pa. 1994). As there is also a relatively modest cap on statutory damages, class members would

have little incentive to prosecute actions individually. See id. at 616.<sup>2</sup> Moreover, most prospective class members are likely unaware that their rights have been violated. See Sledge v. Sands, 182 F.R.D. 255, 259 (N.D. Ill. 1998).

The parties have not addressed the question of whether any other actions have been commenced by prospective class members against defendant. It would seem that this is something which could be determined by NCO's general counsel without undue effort. Since the presumption that even those aware of a viable cause of action would be unlikely to pursue it individually is a significant consideration, this is information which should be presented to the court.

The putative class is nationwide. There is no suggestion that the members are disproportionately located in any other forum or region. Defendant maintains its principal office in the Philadelphia suburbs and litigation in this district would clearly be less burdensome for it than litigation elsewhere. Moreover, as certification is sought only for a settlement class, the only further proceedings contemplated would be in connection with a fairness hearing.

No difficulty in managing the class action is apparent with one significant exception. The number of class members is

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<sup>2</sup> Under the FDCPA, each class member may recover actual damages, attorneys fees and statutory damages of up to \$1000. See 15 U.S.C. § 1692k(a)(2)(A).

substantial and they are located throughout the country. It is not clear that appropriate notice could be provided in a manner sufficiently economical to proceed on a class basis. See Six(6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1304 (9th Cir. 1990) (the "'manageability' requirement includes consideration of the potential difficulties in notifying class members of the suit").

### **III. Preliminary Approval of Settlement and Notice to Class**

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); In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liability Litig., 55 F.3d 768, 785 (3d Cir. 1994); Stoetzner v. United States Steel Corp., 897 F.2d 115, 118 (3d Cir. 1990); Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 965 (3d Cir. 1983); Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975).

In evaluating a settlement for preliminary approval, the court need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute. See Detroit v. Grinnell Corp., 495 F.2d 448, 456 (2d Cir. 1974). 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)).

The parties represent that the settlement agreement is the product of lengthy arms-length negotiations conducted over the course of several face-to-face meetings and numerous telephone conferences. While there is no reference to any formal discovery, it appears that putative class counsel have all of the information necessary as a practical matter to sustain a FDCPA claim. The settlement funds available to claimants would constitute 150% of the maximum recovery under the FDCPA and would be distributed pro rata in an amount up to \$100 per claimant. Up to \$15,000 of any unclaimed funds would be distributed to the National Consumer Law Center. Any unclaimed funds in excess of \$15,000 would revert to NCO.

The agreement also provides for a permanent injunction to ensure that defendant does not knowingly report, excepting any bona fide error, any CFS accounts that are the subject of this lawsuit to any credit reporting agency or like entity unless it has first independently verified the accuracy of such credit information and determined that reporting the information is

legally permissible. While not expressly so stated, it appears and the court assumes that the "accuracy" and "legally permissible" language encompasses any repetition of the practices complained of.

While resolution by trial is rarely risk free, the one specific defense maintained by defendant of "bona fide error," see 15 U.S.C. § 1692k(c), would not appear to be a particularly promising one. The conduct complained of was systemic, continuing and widespread. The bona fide error defense generally encompasses clerical mistakes or instances where, despite procedures employed to avoid a particular type of error, such an error is inadvertently made. See Patzka v. Viterbo College, 917 F. Supp. 654, 659 (W.D. Wisc. 1996). In the instant case, the offending conduct appears to result from procedures intentionally adopted and employed to produce the type of error complained of.<sup>3</sup>

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<sup>3</sup> The bona fide error defense does not encompass a mistake of law regarding the requirements or applicability of the Act. See Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 27 (2d Cir. 1989); Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037, 1038 (8th Cir. 1984); Baker v. G.C. Services Corp., 677 F.2d 775, 779 (9th Cir. 1982).

The proposed attorney fees represent 41% of the portion of the fund dedicated to payment of claims and fees.<sup>4</sup> The proposed incentive bonus for the class representative is modest and appears reasonable. There is no preferential treatment of the class representative or any segment of the class.

While the settlement fund would exceed defendant's maximum liability in a class action by virtue of the 1% cap, it is considerably less than the exposure defendant would face from individual suits by even a small percentage of putative class members. Each claiming class member would receive the maximum \$100 provided only if the percentage of claimants were .0545% or less. With a claim rate of 5%, each claimant would receive \$1.09. Nevertheless, given the unlikelihood of individual suits, the 1% statutory cap on damages in class actions, the inability to project the claim rate and the provision of some meaningful injunctive relief, the court cannot say that the proposed settlement falls outside the range of possible approval.

The proposed notice sets forth in understandable language all pertinent information, including a summary of the proposed settlement terms and an explanation of opt-out rights.

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<sup>4</sup> This is not excessive per se. See In re Smithkline Beckman Corp. Sec. Lit., 751 F. Supp. 525, 544 (E.D. Pa. 1990) (noting general range of attorney fees in common fund cases is 19% to 45%). The circumstances of each case, however, must be examined and a cross-check against the lodestar conducted in ultimately resolving fee requests. This is one function of the final fairness hearing.

It provides a toll free number that class members can call to obtain a claim form. The agreement provides for notice by publication of a 1/8 page notice in the national edition of USA Today once in each of two consecutive weeks.

Rule 23(c)(2) requires that members of a class certified under Rule 23(b)(3) be provided with "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," of the pendency of the action, their right to opt-out, the effect of their failure to do so and their right to appear through counsel. Rule 23(e) provides for notice to class members of a proposed settlement "in such manner as the court directs."

In a case where a settlement class has been provisionally certified and a proposed settlement tentatively approved, notice of certification and of the proposed settlement are properly combined but must satisfy the requirement of Rule 23(c)(2). See Fry v. Hayt, 198 F.R.D. 461, 474 (E.D. Pa. 2000); In re Ikon Office Solutions, 194 F.R.D. 166, 174 (E.D. Pa. 2000); Collier v. Montgomery Housing Authority, 192 F.R.D. 176, 186 (E.D. Pa. 2000). See also Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994) (applying Rule 23(c)(2) standard to settlement class). This is entirely reasonable since such will be the first notice of the pendency of the action and their critical right to opt-out which is directed to class members.

The requirement that individual notice be sent to all class members whose names and addresses may be ascertained with reasonable effort is mandatory. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175-76 (1974) (rejecting notice by publication to class of 2,250,000 despite prohibitive cost of providing individual notice to ascertainable class members); Zimmer Paper Products, Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir.), cert. denied, 474 U.S. 902 (1985); Carlough v. Amchem Products, Inc., 158 F.R.D. 314, 325 (E.D. Pa. 1993) (notice by publication inadequate where putative class member's name and address is known or ascertainable with reasonable effort).

While a court may direct the defendant to effectuate notice where it can do so with less difficulty or expense than the representative plaintiffs, the cost of notice is borne by the plaintiffs unless the cost to the defendant would be insubstantial such as where it routinely directs mail to putative class members in the ordinary course of business. See Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 356, 359 (1978); Eisen, 417 U.S. at 178; Barahona-Gomez v. Reno, 167 F.3d 1228, 1236 (9th Cir. 1999); Silber, 18 F.3d at 1452; Southern Ute Indian Tribe v. Amoco Production Co., 2 F.3d 1023, 1029 (10th Cir. 1993); Miles v. America Online, 202 F.R.D. 297, 305 (M.D.

Fla. 2001); In re Playmobil Antitrust Litigation, 35 F. Supp. 2d 231, 249 (E.D.N.Y. 1998).<sup>5</sup>

The parties have provided no information regarding the availability of the names and addresses of putative class members or otherwise to show that the proposed notice is the best practicable. Even as to the proposed publication, the parties do not explain how two notices in a single publication is reasonably calculated to provide actual notice to the millions of putative class members. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317-18 (1950); Peters v. National R.R. Passenger Corp., 966 F.2d 1483, 1486 (D.C. Cir. 1992).

#### IV. Conclusion

Plaintiff has satisfied the numerosity, commonality and typicality requirements of Rule 23(a), as well as the criteria of Rule 23(b)(3) that common issues of fact or law predominate. In the absence of any specific information about the professional experience of proposed class counsel, the court cannot conscientiously determine the adequacy of representation. The court also cannot conscientiously conclude that a class action is a superior method of litigating the controversy in the absence of information about the pendency of other overlapping lawsuits and

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<sup>5</sup> In the context of a settlement, of course, the parties are free to agree that the defendant shall absorb the cost of notification. Indeed, NCO has agreed to pay the cost of the limited notification presently proposed.

about potential difficulties in providing adequate notice insofar as this affects manageability.

The proposed settlement appears to be within the range of possible approval. In the absence of any information about the possibility of individual notice, however, the court cannot conclude that the notice proposed is the best notice practicable. Moreover, even as to publication, the court has reservations about the adequacy of two notices in a two-week period in a single publication.

Accordingly, the parties' motion will be denied without prejudice to renew with additional pertinent information regarding proposed class counsel, the pendency of other individual or class actions, the provision of the best notice practicable and the effect of the requirement of such notice on the manageability of the case as a class action. An appropriate order will be entered.

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CAROLYN THOMAS : CIVIL ACTION  
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 v. :  
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 NCO FINANCIAL SYSTEMS, INC., : NO. 00-5118

O R D E R

AND NOW, this                    day of July, 2002, upon  
consideration of the parties' Joint Motion for Certification of  
Settlement Class and Preliminary Approval of Settlement and  
Notice to Class (Doc. #47), consistent with the accompanying  
memorandum, **IT IS HEREBY ORDERED** that said Motion is **DENIED**  
without prejudice to renew within fifteen days with additional  
pertinent information regarding proposed class counsel, the  
pendency of other individual or class actions, the provision of  
the best notice practicable and the effect of the requirement of  
such notice on the manageability of the case as a class action.

BY THE COURT:

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JAY C. WALDMAN, J.