

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

JAMES H. O'NEILL, Individually on	:	
Behalf of Himself and on Behalf of all	:	
Others Similarly Situated,	:	
	:	
PLAINTIFFS, :		CIVIL ACTION
	:	
	:	
v. :		NO. 97-2514
	:	
BENEFICIAL MUTUAL SAVINGS	:	
BANK, and LESLIE CARSON, Esq.	:	
	:	
DEFENDANTS. :		

MEMORANDUM ORDER

The parties in this action have submitted a settlement agreement for this Court's approval. The proposed agreement stipulates that the defendants will settle individually with the six identified class members who were allegedly charged monthly late fees after their loans had been subject to foreclosure action. Both parties are of the opinion that notice to the other class members of their proposed settlement agreement of this pre-certification case is not necessary. (Release and Settlement Agreement, at 2).

Because the case was brought as a class action, settlement is subject to Fed.R.Civ.P. 23(e), which provides that, "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed.R.Civ.P. 23(e). Furthermore, Rule 23(e) applies even if the case has not been certified as a class action at the time of the

proposed settlement. *See Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir.), *cert. denied sub nom. Glen Alden Corp. v. Kahan*, 398 U.S. 950 (1970) (stating “suit brought as class action should be treated as such for purposes of dismissal or compromise, until there is a full determination the class action is not proper”).

The policies underlying Rule 23(e) are helpful in determining whether notice of the proposed settlement is required. These policies include

detering collusion on the part of the parties to the litigation, helping to guarantee an adequate consideration of the class interest and enabling potential class members to protect their own interests by allowing them to object to the application, to take over representation of the class action or to file their own suit elsewhere.

Gupta v. Penn Jersey Corp., 582 F.Supp. 1058, 1060 (E.D.Pa. 1984)[Kelly, J.] *See also Larkin Gen. Hosp. Ltd. v. American Tel. & Tel. Co.*, 93 F.R.D. 497, 500 (E.D.Pa. 1982)[Lord, J.] (citing purpose of Rule 23(e) to discourage “use of the class action device to secure an unjust private settlement”).

In *Gupta* Judge Kelly acknowledged that Rule 23(e) does not specifically mandate the notification of putative class members of a pre-certification settlement. *Gupta* 582 F.Supp. at 1060. Nonetheless, the court held that, in that instance, notice was required, stating, “the *presumption* should be that the spectre of abuse in an individual settlement and class dismissal at the precertification stage is sufficient to warrant notice to absent class members before court approval of any such arrangement.” *Id.* (emphasis in original)(citations omitted).

In *Gupta* the court noted that the settlement did not appear at all collusive because the settling plaintiff would receive no direct monetary payment. However, the court found that the members of the class were geographically proximate, and might have heard about the suit. *Id.* at

1061. Furthermore, the court found that because there was a relatively small number of class members, the expense and burden of notification would be slight. *Id.* Thus the court found it appropriate that they be notified of the proposed settlement. *Id.*

Here, the settling plaintiff would receive a direct monetary payment as part of the settlement, raising, at least, the possibility of collusion. The possibility is compounded by an apparent discrepancy between the putative class identified in the original complaint and that identified in the proposed settlement agreement.

The original and amended complaints identify the putative class as “all persons against whom Beneficial continued to assess or collect late fees on a defaulted promissory note or mortgage *after* the default or acceleration of the note.” Complaint, at 6; Amended Complaint, at 6 (emphasis in originals). This putative class is broader and more inclusive than the class subsequently referred to in the proposed Release and Settlement Agreement.

The proposed agreement describes a class consisting of sixty accounts for which foreclosure had been either completed, or in the process of completion between January, 1991 and March, 1997. *See* Release and Settlement Agreement, Exhibit A. Of those sixty foreclosure actions, the proposed agreement states that monthly late fees had been assessed against only six. *Id.* The proposed Release and Settlement Agreement, however, ignores the class members against whom foreclosure proceedings have not been initiated, but against whom late fees nonetheless have been assessed after either default or acceleration of the mortgage or note. Yet these other class members were included in the original and amended complaints, may have heard about the case in one way or another, and may be relying on it to protect their interests in the same manner as the sixty foreclosed accounts.

Thus, to ensure that all the putative class members' interests are protected, they should be afforded notice of the proposed settlement, along with an opportunity to object, prior to the Court's approval of the settlement. Nor will such notification of class members, who, according to the plaintiffs' amended complaint "consists of hundreds of persons in the Commonwealth," be overly burdensome or expensive. *Cf. Larkin Gen. Hosp. Ltd. v. American Tel. & Tel. Co.*, 93 F.R.D. 497, 503 (E.D.Pa. 1982)(notice not required to putative class of thirty thousand members).

For the foregoing reasons, on this 12th Day of September, 1997, it is HEREBY ORDERED that the putative class, as identified in the amended complaint, be given notice of the parties' proposed Release and Settlement Agreement. It is further ORDERED that the class members be afforded twenty (20) days from the date of mailing of the notice in which to submit objection to the proposed settlement, and that counsel are hereby obligated to notify the Court of any such objection.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.