

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

CAROLYN THOMAS, Individually)	
and on Behalf of All Persons)	Civil Action
Similarly Situated,)	No. 00-CV-05118
)	
Plaintiffs)	
)	
vs.)	
)	
NCO FINANCIAL SYSTEMS, INC.)	
)	
Defendant)	

* * *

APPEARANCES:

ANN M. CALDWELL, ESQUIRE, and
CLAYTON S. MORROW, ESQUIRE,
On behalf of Carolyn Thomas,
Individually and on Behalf of
All Persons Similarly Situated,

JAY S. ROTHMAN, ESQUIRE,
On behalf of NCO Financial
Systems, Inc.,

* * *

OPINION

JAMES KNOLL GARDNER,
United States District Judge

The matter is before the court on the Joint Motion for Renewal of Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to the Class filed August 30, 2003. We held oral argument on the motion on August 11, 2003. On September 3, 2003, with leave of court, the parties filed a Supplemental Memorandum of Law in Support of the Joint Motion of Plaintiff and NCO for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to Class.

We conclude that Ann M. Caldwell, Esquire, and Clayton S. Morrow, Esquire, are qualified to be class counsel; however, we also conclude that we are unable to determine whether the publication notice proposed by the parties is the best possible notice to the putative class. As a result, we are unable to conclude that the superiority requirement is satisfied. Because we conclude that class counsel are adequate, but cannot make a determination as to the superiority of a class action resolution, we grant deny the parties' motion.

The within civil action was initiated by a two-count Complaint filed October 10, 2000. Count one claims a violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o. Count two avers a violation of the Fair Credit Reporting Act, 15 U.S.C. 1681-1681v. It is before the court on federal question jurisdiction. See 15 U.S.C. § 1681p; 28 U.S.C. § 1331. Venue is appropriate because defendant resides in Montgomery County. See 28 U.S.C. §§ 118, 1391. Plaintiff has made a jury demand.

Plaintiff seeks class certification. See Fed.R.Civ.P. 23. For purposes of settlement,¹ the parties agree that the

¹ The agreements of counsel made for the purposes of this settlement are inadmissible to prove liability for the facts and circumstances averred in the Complaint in this or any subsequent proceeding should the within settlement agreement fail for any reason. See Fed.R.Evid. 408; Affiliated Manufacturers v. Aluminum Company of America, 56 F.3d 521, 526-528 (3d Cir. 1995). In such an event, the parties will be held only to those contentions made prior to the settlement agreement.

proposed class may be certified.

The issues presented in the parties' motion were first presented to our former colleague United States District Judge Jay C. Waldman as a Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to Class filed March 21, 2002. On August 1, 2002, Judge Waldman denied the motion citing deficiencies in the evidence supporting the appointment of class counsel and supporting the parties' contention that publication notice was the best notice possible under the circumstances presented herein.²

FACTS

Based upon plaintiff's allegations contained in her Complaint, the following are the pertinent facts. Carolyn Thomas is representative of a class of individuals within the United States who accrued and failed to repay debts for personal or household purposes. These debts were listed on their credit report for seven years and deleted prior to NCO reporting the debt to Trans Union, LLC, Experian Information Solutions, Inc., and Equifax, Inc., the three credit reporting agencies.

NCO Financial Systems, Inc. ("NCO"), is a provider of accounts receivable collections services. NCO's focus is on recovery of delinquent and bad debt accounts.

² The within action was transferred from Judge Waldman's docket to our docket on March 4, 2003.

At some point during or after 1998, NCO attempted to collect debts that it had purchased from Commercial Financial Services ("CFS"). Some of the debts that NCO sought to collect had already been deleted from debtors' credit reports pursuant to 15 U.S.C. § 1681c because seven years had passed since the debts were first placed on the debtors' credit reports. Nevertheless, NCO reported to the credit bureaus that the debts were valid and had the debts put back onto the debtors' credit reports.

DISCUSSION

The parties have agreed that if the proposed settlement is approved by the court, then defendant will not contest class certification. A class may be certified if:

- (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.

Fed.R.Civ.P. 23(a). These factors have been reduced to several shorthand labels. The requirements of Rule 23(a)(1) are contained within the "numerosity" requirement. Rule 23(a)(2) is satisfied by the "commonality" requirement. The requirements of Rule 23(a)(3) are set forth in the "typicality" requirement.

Rule 23(a)(4), however, has been broken down into several different requirements. Rule 23(a)(4) requires the court

to measure the adequacy of class counsel, the ability of the proposed class representative to fairly represent the class, and conduct a cost-benefit analysis of litigating the within matter as a class action as opposed to any alternative means of disposition (the "superiority" requirement). Part of the "superiority" requirement mandates that the court evaluate how the parties can best communicate with the putative class.

In his August 1, 2002, Memorandum and Order Judge Jay C. Waldman made a number of legal determinations pertinent to our analysis. Initially, Judge Waldman concluded that the numerosity requirement was satisfied because joinder of all the proposed class members would be impracticable. Next, Judge Waldman held that the commonality requirement was met because that common issues of fact and law within the putative class predominate over all other issues presented therein. In addition, Judge Waldman held that the typicality requirement was satisfied because plaintiff's, as class representative, claims arise from facts and circumstances that typify the other putative class members. Finally, Judge Waldman evaluated the proposed settlement agreement and determined that it was fair, acceptable, and within the range of settlements that court would approve. We conclude that Judge Waldman's findings and conclusions are the law of the case and adopt his conclusions and reasoning herein. See Hamilton v. Leavy, 322 F.3d 776, 786-787 (3d Cir. 2003).

In his Memorandum and Order, however, Judge Waldman reserved judgment in three areas. Initially, the parties neglected to offer any evidence concerning the qualifications of class counsel. Accordingly, Judge Waldman found that he could not determine the adequacy of counsel. Next, the parties neglected to offer any evidence of any pending overlapping actions. Consequently, Judge Waldman concluded that he could not declare that disposition of the facts and circumstances presented herein by a class action was a superior method of resolving this case. Finally, Judge Waldman found that the parties did not submit sufficient evidence to support the conclusion that publication notice by two notices in a two-week period in a single publication was the best possible method of noticing the class.

Therefore, Judge Waldman denied the initial motion because a determination regarding the manageability of the class action could not be made at that time. Because of these deficiencies, Judge Waldman denied the parties' motion without prejudice for the parties to resubmit a motion with additional, appropriate support. The within motion is the parties attempt to address the issues that Judge Waldman identified in his Memorandum and Order as issues he could not resolve.

Adequacy

When determining whether "the representative parties will fairly and adequately protect the interests of the class" the court must engage in a two-step analysis. Fed.R.Civ.P. 23(a)(4). Initially, the court must inquire as to whether proposed class counsel is qualified, experienced, and competent to undertake the representation of the class. See Krell v. Prudential Insurance Company of America, 148 F.3d 283, 312 (3d Cir. 1998). Next, the court must determine whether any conflict of interest exists between the class representative and the proposed class. Id.

Regarding the second step of the analysis, Judge Waldman opined, and we agree, that there does not appear to be any conflict of interest between the proposed class representative, Ms. Thomas, and the putative class. As such, we are satisfied at this point that this factor is met.

As mentioned above, however, Judge Waldman was unable to decide whether proposed class counsel were adequate because of lack of evidentiary support. The parties have since supplemented the record.

For the following reasons, we are satisfied that Ann M. Caldwell, Esquire, and Clayton S. Morrow, Esquire, have the requisite qualifications, experience, and competence to be class counsel. Attorney Caldwell has been involved in ten class

actions, six of which were consumer class actions.³ Because of her extensive experience as a class action attorney, we conclude that she is competent to undertake this representation.

Attorney Morrow has participated in several class actions and attempted class actions. He has previously been appointed as co-class counsel in several pending class actions.⁴ Therefore, we conclude that Attorney Morrow is an experienced class action attorney and competent to undertake this representation in conjunction with Attorney Caldwell.

Superiority

Rule 23(b)(3) of the Federal Rules of Civil Procedure sets out four factors be weighed when determining if a class action is a manageable means of resolving the issues presented for the members of the proposed class. The four factors are:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in

³ Attorney Caldwell has served as either class counsel or co-class counsel in numerous state and federal courts across the country. See Joint Motion for Renewal of Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to the Class, Exhibit A.

⁴ Attorney Morrow has been appointed as either class counsel or co-class counsel in numerous state and federal courts across the country. See Joint Motion for Renewal of Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to the Class, Affidavit of Clayton S. Morrow as to Experience in Class Action Litigation.

- the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3). When considering these prerequisites we must "balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." Georgine v. Amchem Products, 83 F.3d 610, 632 (3d Cir. 1996)(internal citations omitted).

With the caveat that the issue concerning class notification is yet unresolved, we conclude that a class action is the best method of resolving the issues raised in plaintiff's Complaint. While the conduct that defendant is accused of inflicts real harm upon the putative class, that the conduct is illegal is not necessarily intuitive. Rather, the conduct was made illegal because it is the type of harm that is deceptively perpetrated by debt collectors on an unsuspecting and vulnerable public. See 15 U.S.C. § 1692. As a result, resolving the matter through a class action will likely result in greater participation by and protection for the putative, affected class.

Moreover, we note that the potential damages that an individual claimant may win in a single civil action makes it unlikely that a great number of the potential class will choose to pursue this method of resolution. Pursuant to 15 U.S.C. § 1692k(a)(2)(A), an individual plaintiff may be awarded the amount of his actual damages plus other damages as we

may allow; however, the amount of awardable damages is capped at \$1,000.00. When we combine the relative obscurity of the law with the minimal amount of possible recovery, we conclude that the best resolution of the facts and circumstances presented herein is by a class action.

Furthermore, a class action resolution of this matter conserves judicial resources. With 2.2 million persons alleged to be in the putative class, courts could be flooded with litigation that all involved the same basic facts, circumstances, and basis in law. There is no need to risk such a result when we can deal with the whole of the controversy in a fair, thorough, and efficient manner herein. Accordingly, we conclude that the first factor is satisfied.

Next, we must determine whether any other actions regarding the facts and circumstances presented herein have been initiated, and, if so, what effect any action may have on the disposition of this proposed class action. There has been only one other case against NCO based upon similar facts and circumstances presented herein.⁵ The parties agree that this case was settled and is no longer pending. Because of the settlement of the only other lawsuit concerning the issues presented herein, we conclude that other litigation will have no

⁵ See, Joint Motion for Renewal of Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to the Class, Affidavit of Joshua Green.

effect on the disposition of the instant matter. Consequently, we conclude that the second factor is satisfied.

Litigating the within matter in this forum is more desirable than any other forum. Defendant is located within the territorial jurisdiction of the United States District Court for the Eastern District of Pennsylvania. See 28 U.S.C. § 118. It would clearly be less burdensome for defendants to defend this action here. Moreover, the putative class is thought to be spread around the United States. There is no indication that there is any geographic concentration within the class.

Furthermore, we are certain that there is personal jurisdiction over defendant in this forum. We also note that this class is being certified only for the purposes of settlement, which reduces any undesirability there might be or that may arise in litigating this matter in this forum. Hence, we conclude that factor three weighs in favor of litigating this action as a class action in this forum.

Notice

The greatest obstacle to the manageability of this proposed class action is communication with the putative class. As noted above, the proposed class is located throughout the country. Furthermore, the identities of many of the class members is unclear. While defendant is in possession of a list

that includes the names of all the members of the class, the list is over-inclusive. While all of the members of the class may be found on the list, the list likely includes many names of either persons or businesses who are not members of the class. It is impossible at this point to tell which names on the list belong to class members and which do not. Moreover, the parties contend that the names and contact information on the list is outdated. Thus, the parties propose that the putative class be notified by publications in the USA Today and through PR Newswire's National Newslines (US1).

District courts have a "fiduciary responsibility [to be] the guardian of the rights of the absentee class members." Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975). When, as in this case, the class is to be notified of the certification of a class and the settlement of the action, the notice to the putative class must satisfy the requirements of Rules 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure. Carlough v. Amchem Products Inc., 158 F.R.D. 314, 324 (E.D.Pa. 1993). The requirements of Rule 23(c)(2) include those in Rule 23(e) and are, in fact, stricter than those of Rule 23(e). Id. at 324-325. Thus, our analysis continues under Rule 23(c)(2).

In the execution of the court's fiduciary duty the court must ensure that "members of the class [receive] the best notice practicable under the circumstances, including individual

notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2). "Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172, 94 S.Ct. 2140, 2150, 40 L.Ed.2d 732, 746 (1974). "The Advisory Committee's Note to Rule 23 ... [states] that the 'mandatory notice pursuant to subdivision (c)(2) ... is designed to fulfill requirements of due process to which the class action procedure is of course subject.'" Eisen, 417 U.S. at 173-174, 94 S.Ct. at 2150, 40 L.Ed.2d at 746 (citing 28 U.S.C.App., p. 7768); see Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. at 873.

However, the absence of individual notice is not fatal to class certification or settlement. If the members of a putative class may not be determined by reasonable means, then constructive notice by publication may satisfy the requirements of Rule 23(c)(2). Carlough, 158 F.R.D. at 325.

In determining the reasonableness of the effort required, the court must look to the 'anticipated

results, costs, and amount involved.’ [In re Nissan, 552 F.2d 1088, 1099 (5th Cir. 1977).] For example, ‘[a] burdensome search through records that may prove not to contain any of the information sought’ is not required. Id. Rule 23 does not require the parties to exhaust every conceivable method of identifying the individual class members. See, e.g., Burns v. Elrod, 757 F.2d 151, 154 (7th Cir. 1985).

Carlough, 158 F.R.D. at 325. Thus, we must balance the potential for finding information that may permit individual notice against the possibility that the information in the parties’ possession will not yield the names and contact information of those in the putative class and the expense or burden incurred to determine into which of the two categories the reality falls.

We agree that the data that the parties have in their possession is over-inclusive and outdated. The list that NCO received from CFS’s Trustee merely includes a list of names, contact information, and other assorted data. Importantly, the list does not state why the debtor incurred the debt. As a result, NCO has no way of ascertaining which of the 2.2 million potential class members incurred their debt for consumer, family, business or other purposes.⁶ This is significant because the debts at issue herein must have been incurred “primarily for personal, family, or household purposes” in order for liability to follow. 15 U.S.C. § 1692a(5). Accordingly, we conclude that

⁶ Supplemental Memorandum of Law in Support of the Joint Motion of Plaintiff and NCO for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to Class, Affidavit of Joshua Gindin, Esquire.

the list is over-inclusive.

NCO's data is further flawed because there is a high likelihood that the data is outdated. Defendant acquired the data concerning the debtors that included names and contact information in 1999.⁷

The experience of the class representative, Ms. Thomas, illustrates the problems with the data. Ms. Thomas' incurred her debt in 1991. The debt was reported to the credit agencies in late 1991. Pursuant to 15 U.S.C. § 1681c, the debt was listed on Ms. Thomas' credit report for seven years. Therefore, the debt should have been removed from Ms. Thomas' credit report in late 1998. NCO did not acquire Ms. Thomas' information until on or about June 30, 1999. Shortly thereafter, Ms. Thomas discovered that the 1991 debt was again posted on her credit report. At that point, the data that NCO had received was eight years old.

Because the offense requires that the debt be re-posted after it has already been posted for a seven-year period, all of the data regarding actual class members will be at least seven years old. It is unclear whether those persons on the list who are actual members of the class may still be located at the addresses listed in the contact information in NCO's possession or even that those persons have the same name. Accordingly we

⁷ Joint Motion for Renewal of Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to the Class, Affidavit of Joshua Ginden, Esquire.

conclude that the list is outdated.

Instead of using the list in NCO's possession, the parties propose a two-pronged approach to notify the class. First, the parties agree that NCO will publish, at its own expense, an 1/8 page size advertisement in the national edition of the USA Today, Monday-Thursday edition, for two consecutive weeks in substantially the form set forth in Exhibit B to the Agreement of Settlement. The parties propose that this notice be accomplished within 21 days of the entry an Order granting their joint motion. Second, NCO will publish, at its own expense, an advertisement in substantially the form set forth in Exhibit B to the Agreement of Settlement by PR Newswire's National Newswire (US1) once within 21 days of an Order.

The parties jointly assert that this combination of publication notices yields the best possible notice under the circumstances. We note that the USA Today is the nation's largest selling daily newspaper with a circulation of approximately 2.3 million.⁸ We further observe that the US1 distribution network of the PR Newswire Service reaches over 2,000 newspapers, magazines, national wire services, and broadcast networks that are located in all 50 states and the

⁸ See Gannett Co., Inc., About Gannett, Company Profile, <http://www.gannett.com/map/gan007.htm>.

District of Columbia.⁹

Despite the fact that NCO's list is both over-inclusive and outdated, we remain unable to determine that publication notice is the best possible notice under the circumstances. According to the affidavit of Joshua Gindin, an Executive Vice President and General Counsel of NCO, it would require 40-60 hours of work for NCO to generate the list from the tapes NCO received from CFS.¹⁰ Mr. Gindin also states that updating the list to obtain current information would require that all 2.2 million names be skip-searched. What is absent in the parties' motion is any information about the cost of such a skip search.

Beyond the cost of skip searching the list, there are several other areas where the parties need to supplement the record before we are able to conclude what kind of notice is the best possible notice for this proposed class. The information that we require can be reduced to three categories: cost, coverage, and methodology.

The parties have not put onto the record the cost associated with any type of notice. Specifically, the cost of notice by publication in the USA Today, as the parties suggest,

⁹ Joint Motion for Renewal of Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to the Class, Exhibit C.

¹⁰ Joint Motion for Renewal of Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to the Class, Affidavit of Joshua Gindin.

is relevant; the cost of notice by publication in US1 is also relevant; the cost of a direct mailing to all 2.2 million entities or persons on the list is relevant; as noted above, the cost of a skip search on the list; and the cost of a direct mailing to all entities or persons on the list after a skip search has been completed is relevant.

The parties have also not put forth evidence of the coverage of their proposed notice onto the record. Specifically, the number of people that the parties would expect to reach by publication in the USA Today in the manner the parties suggest is relevant; the number of people that the parties would expect to reach by publication over the US1 network is relevant; the number of people the parties would expect to reach via a direct mailing to all 2.2 millions entities and persons on NCO's list is relevant; and the number of people that parties would expect to reach by a direct mailing to those on the list after a skip search had been completed. Additionally, it would be helpful if the parties could articulate how publication notice is a reasonable method to communicate with this proposed class.

Because the parties have not submitted any cost and coverage evidence, they, of course, have not put any evidence onto the record indicating the methodology by which they came to their estimates of cost and coverage. This information is also pertinent to our determination of what notice is best under the

circumstances.

Should the parties submit this information, we would then be in a position to evaluate the reasonableness of the proposed class notification by publication. Until then, we cannot balance the potential for finding information that may permit individual notice against the possibility that the information in the parties' possession will not yield the names and contact information of those in the putative class and the expense or burden incurred to determine which of the two categories the reality falls. See In re Nissan, 522 F.2d 1088, 1099 (5th Cir. 1977); Carlough, 158 F.R.D. 314, 325.

CONCLUSION

For the foregoing reasons, we deny the parties' motion to certify this action as a class action for the purposes of settlement without prejudice for the parties to re-submit their motion on or before November 21, 2003 with the appropriate support.

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

CAROLYN THOMAS, Individually)	
and on Behalf of All Persons)	Civil Action
Similarly Situated,)	No. 00-CV-05118
)	
Plaintiffs)	
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vs.)	
)	
NCO FINANCIAL SYSTEMS, INC.;)	
)	
Defendant)	

O R D E R

NOW, this 21st day of October, 2003, upon consideration of the joint motion filed August 30, 2002, which motion was styled "Joint Motion for Renewal of Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to the Class"; upon consideration of oral argument held August 11, 2003; upon consideration of the joint

supplemental memorandum of law filed September 3, 2003, which memorandum was styled "Supplemental Memorandum of Law in Support of the Joint Motion of Plaintiff and NCO for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to Class"; and for the reasons set forth in the accompanying Opinion,

IT IS ORDERED that the motion is denied without prejudice for the parties to re-submit their motion on or before November 21, 2003 with the appropriate support as described in the accompanying Opinion.

BY THE COURT:

James Knoll Gardner
United States District Judge