

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

MICHAEL M. CICCARONE and	:	CIVIL ACTION
RHONDA and MICHAEL MEKOSH	:	
	:	
v.	:	
	:	
B.J. MARCHESE, INC.,	:	
BENJAMIN MARCHESE, JR., and	:	NO. 03-CV-1660
BENJAMIN MARCHESE III	:	

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, S.J.

DECEMBER 14, 2004

Plaintiffs Michael M. Ciccarone, Rhonda Mekosh, and Michael Mekosh, filing this class action against B.J. Marchese Inc. ("Marchese Inc."), Benjamin Marchese Jr. ("Marchese Jr."), and Benjamin Marchese III ("Marchese III"), allege that defendants improperly obtained plaintiffs' credit reports, made unauthorized loans in plaintiffs' names, and failed to satisfy pre-existing liens on vehicles "traded-in" by plaintiffs to defendants' car dealership. The court certified this case as a class action under Fed.R.Civ.P. 23(b)(3) and ordered plaintiffs' counsel to notify class members of their rights under Fed.R.Civ.P. 23(c).

After extensive arms-length negotiations, the parties reached a settlement agreement granted preliminary approval. Presently before the court is the parties' joint motion for final approval of the class action settlement.

## **I. BACKGROUND**

### **A. Facts and Procedural History**

On March 19, 2003, plaintiffs filed this complaint seeking class certification, damages and equitable relief. Plaintiffs alleged that defendants: 1) used consumer credit reports for impermissible and unauthorized purposes, including unauthorized loans in consumers names in violation of the Fair Credit Reporting Act, 15 U.S.C. §1681 et seq. ("FCRA"); 2) failed to satisfy pre-existing liens on certain vehicles traded-in by consumers, and certain vehicles sold to consumers; and 3) caused adverse credit reports affecting consumer credit ratings resulting in harm to their credit reputations and invasions of credit privacy.

Defendants answered the complaint, asserted numerous affirmative defenses, and denied any liability to plaintiffs and the class members. On October 9, 2003, class counsel and class representatives Michael M. Ciccarone, Rhonda Mekosh and Michael Mekosh were appointed. The certified class consists of all persons injured from March 19, 2001 through October 9, 2003, with three subgroups of class members:

(a) Plaintiffs and persons who had their consumer report(s) by any defendant for whom the defendants cannot produce authorization of permissible purpose (Group A); and/or

(b) Plaintiffs and persons with loan obligations for vehicles allegedly sold or leased by a defendant that they did not buy or lease from a defendant (Group B); and/or

(c) Plaintiffs and persons with unpaid loan obligation(s) for vehicles after title was given to a defendant under an agreement that the loan defendant (Group C).

The court ordered class counsel to submit a proposed form of notice to class members and approved the form of notice on December 10, 2003. Class counsel complied with the order to mail notice to class members with known addresses by first class mail, and to publish notice in two newspapers.

On March 18, 2004, plaintiffs and defendants filed a joint motion for equitable relief. We granted the parties' joint motion and issued a supplemental order for equitable relief.

Throughout the litigation, plaintiffs and defendants conducted extensive settlement negotiations. These settlement negotiations resulted in the parties' joint motion for equitable relief, and our March 26, 2004 and March 30, 2004 orders approving the proposed stipulated equitable relief. Additionally, counsel for the class, defendants, and Erie Insurance Exchange conducted arms-length negotiations. The court presided over these settlement negotiations with the assistance of the Honorable Magistrate Judge M. Faith Angell. On May 13, 2004, counsel for the class, defendants and Erie Insurance Exchange advised the court that they had reached a settlement for monetary relief of \$2,450,000. We granted preliminary approval to the settlement on July 16, 2004, and ordered class counsel to send notice of the settlement agreement to members of the class.

After notice of the settlement was sent, a fairness hearing was held at which all parties were heard and class members were afforded the opportunity to object. No class member objected or asked to be heard.

**B. The Settlement**

The settlement provides both equitable and monetary relief to the class. Group A class members receive equitable relief: defendants agree to send notification to credit reporting agencies with a consumer dispute verification form stating that: (1) the credit report and/or inquiry was obtained without a permissible purpose; and (2) directing each Credit Reporting Agency to immediately correct its records and permanently delete the identified inquiry promptly.

Group B class members receive equitable relief: defendants agree to send notification to credit reporting agencies with a consumer dispute verification form stating that: (1) the loan or credit obligation referenced in that letter is not a loan obligation incurred by the identified class member; and, (2) directing the lenders and the credit reporting agencies to correct their records immediately and permanently delete the incorrect entry. Class counsel have submitted to the credit reporting agencies available information regarding the consumer, the identity of the fraudulent or unauthorized loan and its date as a request for reinvestigation of disputed information pursuant to FCRA §1681i(a). The credit reporting agencies agree to

investigate reported disputes and notify class counsel and defense counsel of the results of the reinvestigation.

Group C class members also receive equitable relief; defendants agree to send a consumer dispute verification form to credit reporting agencies with a notification that: (1) the loan and credit obligation referenced in the letter relating to the identified class member was no longer a loan obligation incurred by the identified class member after the date of the trade-in; (2) the lender and the credit reporting agency should immediately correct their records and refrain from reporting any such entry as "delinquent"; and (3) no delinquency on the identified loan obligation after the trade-in date should be referenced or re-inserted again in an identified class member's consumer report. Additionally, class counsel agree to submit to the credit reporting agencies available information regarding the consumer, the identity of the fraudulent or unauthorized loan and its date as a request for reinvestigation of disputed information pursuant to FCRA §1681i(a). The credit reporting agencies agree to investigate reported disputes and notify class counsel and defense counsel of the results of the reinvestigation. Defendants also agree to execute and deliver to plaintiffs' counsel written consent to any petition filed in state court by a class member to transfer title of an identified trade-in vehicle to the senior lien holder, or if no secured party, to the bona fide purchaser of the identified vehicle.

The settlement also provides monetary relief in the amount of \$2,450,000. The proposed plan of allocation will distribute the fund as follows:

(1) A total of \$75,000 is set aside as a separate fund for counsel fees for future prosecution and defense of litigation to transfer and clear titles for Group C class members. In the event that the cost of these legal services is less than \$75,000, the remainder will be disbursed to the class.

(2) Reasonable payments will be made or other methods will be used to address alleged liens against Group C class members. This will not create any right in any lender or third-party, or any obligation by class counsel or any class member, and the class member retains the right to dispute amounts claimed by any lender for alleged pre-existing liens on trade-in vehicles.

(3) Attorneys' fees and costs approved by the court will be awarded to counsel.

(4) The remainder of the funds will be distributed to Group B and Group C class members on a *pro rata* basis in proportion to the number of false loans and/or lien obligations in their names.

On December 10, 2003, the court ordered an approved notice of class certification mailed and published. Class counsel subsequently published the notice in two local newspapers and

mailed the notice to all class members. Any potential class member who wished to be excluded was required to file a written request for exclusion by January 14, 2004. Class counsel received nine timely requests for exclusion, but no class member filed an objection to the settlement.

## **II. CLASS CERTIFICATION**

### **A. Rule 23(a) Requisites for Certification**

There are four requirements for class certification; a class member may sue as representative party only if: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law and fact common to the class ("commonality"); (3) the claims of the representative parties are typical of the claims of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy"). Fed.R.Civ.P. 23(a).

#### **1. Numerosity**

Numerosity does not require any minimum number, but generally a class with more than 40 plaintiffs satisfies the requirement. Stewart v. Abraham, 275 F.3d 220, 226-227 (3d Cir. 2001). Groups A, B, and C consist of 3,700, 88, and 89 members respectively. The numerosity requirement of Rule 23(a)(1) is satisfied.

#### **2. Commonality**

"The commonality requirement will be satisfied if the named

plaintiffs share at least one question of fact or law with the grievances of the prospective class.” Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). All Group A class members had their credit reports accessed without authorization, as did named plaintiff Michael Ciccarone. All Group B class members had loan obligations for vehicles sold or leased by a defendant that they did not buy or lease from a defendant, as did named plaintiff Michael Ciccarone. All Group C class members had unpaid loan obligations for vehicles after title was given to a defendant under an agreement that the loan obligations would be paid by a defendant, as did named plaintiffs Michael Ciccarone, Michael Mekosh, and Rhonda Mekosh. Common facts and the corresponding common questions of law satisfy the commonality requirement of Rule 23(a)(2).

### **3. Typicality**

“The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented.” Baby Neal, 43 F.3d at 57. Michael Ciccarone, Rhonda Mekosh, and Michael Mekosh suffered harms nearly identical in nature to those of other class members. The recovery for fraud, defamation, invasion of privacy, and the FCRA are identical for both the named plaintiffs and the class members. The common interest of plaintiffs and class members

makes the named plaintiffs' harm typical of class members in satisfaction of Rule 23(a) (3).

#### **4. Adequacy**

"Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975), cert. denied, 421 U.S. 1011 (1975). Counsel for plaintiffs are commercial litigation attorneys from two different law firms with substantial experience in prosecuting and managing class actions. They are competent, well-qualified, and conducted the litigation with forthrightness and vigor. Named plaintiffs took great interest in the litigation, attended many of the court hearings, and their interests were aligned with those of the class members. For these reasons, the adequacy requirement of Rule 23(a) (4) is satisfied.

#### **B. Certification of the Class Under Rule 23(b) (3)**

Rule 23(b) (3) requires 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. Nonexclusive factors to consider are: (A) the interest of class members 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 class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. Fed.R.Civ.P. 23(b)(3).

Defendants acted similarly towards the members of each of the three subgroups. As a result, common issues of both fact and law would allow highly generalized proof of many elements of plaintiffs' claims. Uniformity of proof is an example of a common issue predominating over individual issues. See Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977). The liability of defendants, especially regarding causation, is an example of an element that would have required largely generic proof in satisfaction of Rule 23(b)(3). See In re School Asbestos Litigation, 789 F.2d 996, 1008 (3d Cir. 1986). While there may well be individualized differences in damages suffered by various class members, the common questions of law and fact regarding the other elements of plaintiffs' claims substantially outweigh these differences.

This class action is also superior to any alternative method of litigation. For Group A class members in particular, individual actions would have been impractical and prohibitively expensive because of the small amounts of individual damages and the limited resources of defendants. Thousands of separate

actions would also impose a severe burden on defendants and the court. By contrast, this class action is manageable and efficient.

Finally, since most of the class members are residents of Pennsylvania and defendants are residents of Pennsylvania, the concentration of litigation in this forum is highly desirable. There is no other pending litigation by any class member.

### **III. SUFFICIENCY OF NOTICE**

Class actions certified under Rule 23(b)(3) require proper notice to class members:

For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

Fed.R.Civ.P. 23(c).

After certifying the class, the court ordered counsel for the parties to submit a proposed form of notice for court approval. The court directed the approved form of notice mailed first class to all identifiable class members, and published

twice in two newspapers. Class counsel identified and obtained the addresses of all class members, mailed the approved form of notice by first class mail to all class members, and published the notice in accordance with the court order.

After preliminary approval of the settlement, class counsel was ordered to send notice of the proposed settlement to all class members. Class counsel mailed to all class members by first class mail a notice of the preliminarily approved settlement stating the time, date, and place of the final approval hearing, and that any class member could opt-out of the settlement, or file and serve an objection and present it at the final approval hearing, all class members would be bound by the terms of the settlement, should it be approved, and would release their claims against defendants, and attorney's fees and costs in a stated approximate amount would be awarded by the court.

For the reasons above, the class satisfies the requirements of Rule 23(c).

#### **IV. JURISDICTION TO APPROVE SETTLEMENT**

Defendants' bankruptcy proceedings have been dismissed, and the bankruptcy court's stay has been lifted. We have jurisdiction to approve this settlement agreement pursuant to 28 U.S.C. §§ 1331 and 1367.

#### **V. FAIRNESS OF THE SETTLEMENT**

Rule 23(e) of the Federal Rules of Civil Procedure mandates

court approval of a class action settlement.<sup>1</sup> Final approval of a proposed class settlement lies within the sound discretion of the court. Girsh v. Jepson, 521 F. 2d 153, 156 (3d Cir. 1975). Approval by the court must be based on the terms and conditions of the proposed settlement; the settlement must stand and fall as a whole and the court may not re-write the agreement. Davies v. Continental Bank, 122 F.R.D. 475 (E.D.Pa. 1988). The proposed settlement must be fair, reasonable, and adequate to members of the certified class. The settlement must be substantively reasonable compared to the likely rewards of litigation. Shlensky v. Dorsey, 574 F.2d 131, 147 (3d Cir.1978).

The Third Circuit has identified nine factors as relevant to determining the fairness of a proposed settlement:

- (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

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<sup>1</sup> 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. Fed.R.Civ.P. 23(e).

judgment;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and,

(9) the range of reasonableness of the settlement fund in light of all the attendant risks of litigation.

Girsh, 521 F.2d at 156. The proponents of a settlement bear the burden of proving that these factors weigh in favor of approval. In Re Cendant Corporation Litigation, 264 F.3d 201, 232 (3d Cir. 2001).

**A. The Complexity, Expense, and Likely Duration of the Litigation**

Absent settlement, and in light of our previous denials of motions for summary judgment, the parties would proceed to trial. Trial would involve great expenses for both parties, and would substantially delay relief. Appeal by the losing party could further delay relief. By contrast, settlement provides immediate relief for the class and finality while avoiding the expenses of further litigation. This factor favors approval of the settlement.

**B. The Reaction of the Class to the Settlement**

Beginning on July 26, 2004, the approved notice, mailed to approximately 3,700 Group A class members, 88 Group B class members, and 98 Group C class members, advised them of the settlement and their right to opt out of the class. Class counsel received only nine timely requests for exclusion, and no

class member filed an objection to the settlement. These facts support approval of the settlement. See Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118-119 (3d Cir. 1990) (29 objections from 281 class members favors settlement).

**C. The Stage of the Proceedings and the Amount of Discovery Completed**

The parties arrived at the settlement after extensive discovery and motions for partial summary judgment from both sides. We denied both motions for partial summary judgment after finding genuine issues of material fact for trial. The parties reached the settlement at a stage where they had an "adequate appreciation" of the merits of the case. In re Prudential Ins. Co. of America Sales Practices Litig., 148 F.3d 283, 319 (3d Cir. 1998). This factor favors approval of the settlement.

**D. The Risks of Establishing Liability and Damages**

These two factors require us to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement. In re Prudential, 148 F.3d at 319. Plaintiffs allege several claims, including fraud, invasion of privacy, and defamation. While some elements of these claims could have been established with a fair degree of certainty,<sup>2</sup> there is still some risk that a jury would find some of the defendants not liable.

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<sup>2</sup> Defendant Benjamin Marchese III admitted to the commission of fraud and is currently in custody.

Plaintiffs also face difficulty in establishing damages. The court doubted much of the testimony of plaintiffs' expert witnesses regarding damages, and might not have admitted it at trial. Similarly, a jury could have substantially discounted damages, particularly as to Group A class members, few of whom could prove actual damages rather than damage to credit reputation from having their credit reports accessed without authorization. It would be difficult to quantify out-of-pocket damages from damaged credit reputation.

These factors favor approval of the settlement.

**E. The Risks of Maintaining the Class Action Through Trial**

A district court may modify or decertify a class at any time during the litigation if it proves unmanageable. In re School Asbestos Litig., 789 F.2d at 1011. We considered decertifying the class on the issue of damages, as there was evidence that damages were somewhat individualized among class members. The settlement provides relief to class members who might receive no damages otherwise because of the difficulties of proof. This factor favors approval of the settlement.

**F. The Ability of Defendants to Withstand a Greater Judgment**

During the proceedings, discovery revealed that defendant Marchese Inc. filed a suggestion of bankruptcy, and the individual defendants had little or no ability to satisfy a judgment. The corporate defendant's insurance company argued

that it was not obliged to indemnify for claims of fraud, and asserted other arguable defenses as well. If defendants had been found liable, there is a strong chance that the class never would have recovered substantial monetary relief. This settlement is funded by the insurer, and there is no reason to believe defendants could satisfy a greater judgment. This factor favors approval.

**G. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and All the Attendant Risks of Litigation**

To assess the reasonableness of a proposed settlement seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement. In re Prudential, 148 F.3d at 322 (quoting In re Gen. Motors Corp., 55 F.3d at 806 (quoting Manual for Complex Litigation (Second) § 30.44 (1985) at 252)). A proposed settlement amounting to a fraction of the best possible recovery is not necessarily inadequate. City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir.1974).

If the parties proceed to trial, and the losing party appeals, it could be years before a final judgment is rendered. Even if judgment were rendered in favor of plaintiffs, defendants' insurance company would resist payment and assert coverage defenses to any action on the policies. Since defendants were unable to satisfy a judgment as large as the

settlement amount, lack of insurance coverage would leave the class without any monetary relief. Defendants' insurance coverage was at most \$4 million, and the insurance company only agreed to the present monetary settlement after extensive negotiation. The monetary sum approximates actual out-of-pocket damages, but will not provide recovery for damages to credit reputation or the total fines that defendants might be assessed.

The monetary component of the settlement of \$2.45 million equals or exceeds the present value of the \$4 million insurance coverage discounted for the chance of failure by the plaintiffs in recovering against the defendants and their insurance carrier. In addition to monetary relief, class members receive the value of the equitable relief. This equitable relief makes class members whole and provides them desired redress by correcting their credit reports, relieving them of false loan obligations, and eliminating liens on the traded-in vehicles. This combination of equitable and monetary relief provides class members with an extremely fair result.

## **VI. CONCLUSION**

The settlement provides class members with the assurance of a reasonably prompt, substantial benefit; weighed against the costly and uncertain prospect of continued litigation, the settlement is clearly in the interest of the class and its subclasses. The settlement is approved as fair, reasonable, and adequate.

An appropriate order follows. The petition for fees and costs will be considered separately.

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

MICHAEL M. CICCARONE and	:	CIVIL ACTION
RHONDA and MICHAEL MEKOSH	:	
	:	
v.	:	
	:	
B.J. MARCHESE, INC.,	:	
BENJAMIN MARCHESE, JR., and	:	NO. 03-CV-1660
BENJAMIN MARCHESE III	:	

ORDER

AND NOW, this 14th day of December, 2004, for the reasons stated in the foregoing memorandum, the court approves the Agreement of Settlement preliminarily approved on July 16, 2004, as fair, reasonable, and adequate.

/s/ Norma L. Shapiro  
Norma L. Shapiro, S.J.