

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

ALVIN PIERCE and SANDRA)	
PIERCE, individually)	
and on behalf of all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 09-0787
)	
CARRINGTON RECOVERY SERVICES,)	
LLC,)	
)	
Defendant.)	

MEMORANDUM and ORDER

Gary L. Lancaster,
Chief Judge.

March 22, 2010

This is an action alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq ("FDCPA"). Plaintiffs, Alvin and Sandra Pierce, allege on behalf of themselves and all others similar situated that defendant, Carrington Recovery Services, LLC, ("Carrington") sent debt collection letters that violated the requirements of the FDCPA, 15 U.S.C. § 1692(g). Before the court is the parties' joint motion for preliminary approval of class action settlement. [Doc. No. 22].

For the reasons set forth below, the motion will be granted.

I. Background

Plaintiffs first filed this class action lawsuit against defendant on May 25, 2009, in the Court of Common Pleas of

Allegheny County. Defendant removed the case to this court on June 18, 2009 pursuant to 28 U.S.C. § 1331. In their complaint, plaintiffs allege that defendant, a debt collection agency, sent debt collection letters that fail to comply with the requirements of FDCPA, which states that a collection letter must contain "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector." 15 U.S.C. § 1692(g)(3) (emphasis added). The letter defendant mailed states: "In addition, we would like to advise you that you have thirty (30) days after receipt of this Notice to dispute the validity of the above debt, or any portion thereof, and if you do not do so, the debt will be assumed to be valid." Plaintiffs contend the letter is unlawful because it fails to include the words "by the debt collector."

Following mediation, the parties reached a preliminary proposed settlement, and on November 24, 2009, entered in a Class Action Settlement Agreement ("Agreement"). For purposes of this settlement only, defendant denies any liability under the statute. The parties have agreed to certification, for settlement purposes only, of a class defined as:

(a) All natural persons with addresses in the Commonwealth of Pennsylvania; (b) against whom the Defendant undertook collection by sending a collection letter which states "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the

validity of the debt, or any portion thereof, the debt will be assumed to be valid." ; (c) in connection with the collection of a debt for personal family or household purposes; (d) within one (1) year prior to May 25, 2009. (All such persons shall be collectively referred to hereinafter as the "Settlement Class Members").

The Settlement Class does not include, and therefore does not affect or release, the claims of persons who would come within the defined Settlement Class above, but who have filed for protection under the federal bankruptcy laws.

The Agreement divides the Settlement Class Members into two categories: those who received a collection letter and those who were sent a collection letter in the mail that was returned as undeliverable.¹ Defendant will reduce the purported outstanding sum due and owed on the alleged debt by for those who received the letter by ten percent (10%), and send them a check for \$100. The parties estimate there are fifty-four (54) Settlement Class Members in this category. For those who never received the letter, defendant will reduce their debt by five percent (5%), and send them a check for \$50. The parties estimate there are forty-eight (48) Settlement Class Members in this category. Defendant will also make a cy pres payment of \$1,800 to the National Consumer Law Center. Defendant will create a settlement account into which it will deposit \$9,600 (the "Total Monetary Fund"), from which the

1

Defendant has agreed to conduct a skip trace (at its cost) to find the current address of those class members whose mail was returned by the United States Post Office.

checks sent to the Settlement Class Members and the National Consumer Law Center will be drawn. Defendant also agrees to pay attorneys' fees of \$18,000. The parties estimate that the total value of the debt reduction for the Settlement Class Members will be \$473,698.80.

The representative plaintiffs agree to waive an incentive fee. However, the parties also agree that plaintiffs Alvin and Sandra Pierce owe nothing to defendant with regards to two mortgage loans totaling \$113,322.25 that were the subject of the collection letters. Defendant agrees to fully satisfy this alleged debt to the original creditor. The parties aver that this resolution is the result of a separate dispute between the two parties that predates the class action, and included it here for the sake of judicial economy.

Within fourteen (14) days of the court's order approving the preliminary settlement, defendant or settlement administrator will mail the Class Notice to the Class Settlement Members at the last known address as reflected in the computer records of defendant. The Class Notice informs Class Members of the Agreement, their rights under it and how they may participate or opt out. It also informs them that defendant is fully discharging the alleged debt of the named plaintiffs as a result of a separate action. Class Members who participate agree to release defendant from any and all claims raised in the complaint regarding the

alleged improper notice under the FDCPA.

II. Standard of Review

It is plaintiff's burden to prove that this action satisfies all the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 183-84 (3d Cir. 2001). The United States Court of Appeals for the Third Circuit has noted that "Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiffs' and counsel's ability to fairly and adequately protect class interests." In re Community Bank of Northern Virginia, 418 F.3d 277, 301 (3d Cir. 2005). In order for a class to be certifiable under Rule 23(a), it must meet four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Id. If the court finds that the proposed class satisfies the four requirements of Rule 23(a), the court must determine whether the class fits within one of the categories set forth in Rule 23(b). Id.

Here, plaintiffs seek certification under Rule 23(b)(3), which provides that certification is proper if the court finds that "questions of law or fact common to the members of the class predominate over any questions affecting individual class members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy." Fed. R. Civ.

P. 23(b)(3).

In reviewing a submission pursuant to Rules 23(a) and (b), a court "must set forth persuasive reasons, stated with objectivity, why the submissions of counsel totally reflect the independent judgment of the court." In re Community, 418 F.3d at 301. Although a class certification decision requires a thorough examination of the factual and legal allegations, "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 178 (1974) (citation and quotations omitted).

In the context of settlement-only class certifications, the Supreme Court of the United States has noted that "a district court need not inquire whether the case, if tried, would present intractable management problems. . ." Amchem. Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997). The United States Court of Appeals for the Third Circuit has stressed, however, that "regardless of whether a district court certifies a class for trial or for settlement, it must first find that the case satisfies all the requirements of Rule 23." In re Community Bank, 418 F.3d at 300. The court of appeals directed that "[i]n making this analysis, the district court may take the terms of the proposed settlement into consideration. The central inquiry, however, is

adequacy of representation." Id.

III. Discussion

A. Rule 23(a)

1. Numerosity

Rule 23(a)(1) permits class action treatment only when "the class is so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 182 (3d Cir. 2001). Here, the parties agree that approximately 102 transactions took place that violated the notification requirements of FDCPA. Therefore, there are potentially a maximum of 102 class members. The court finds that the Agreement satisfies the numerosity requirement of Rule 23(a)(1). See Grant v. Sullivan, 131 F.R.D. 436, 446 (M.D.Pa. 1990) (stating that courts have certified classes with as few as fourteen persons).

2. Commonality and Typicality

"The concepts of commonality and typicality are broadly defined and tend to merge." In re Community Bank, 418 F.3d at 303. The court of appeals has stated that this 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 for and by Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). "Because the requirement [of commonality] may be satisfied by a

single common issue," the requirement is usually easily met in most cases. Id. In this case, plaintiffs claim that they and the class members received, or were meant to receive, a collection letter that wrongfully stated the language required by FCDPA. The court finds this sufficient to establish commonality and typicality.

3. Adequacy of representation

Finally, Rule 23(a)(4) requires that plaintiffs must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry 'serves to uncover conflicts of interest between named parties and the class they seek to represent.'" Beck v. Maximus, Inc., 457 F.3d 291, 296 (3d Cir. 2006) (quoting Amchem, 521 U.S. at 625). It "assures that the named plaintiffs' claims are not antagonistic to the class and that the attorneys for the class representatives are experienced and qualified to prosecute the claims on behalf of the entire class." Id. (quoting Baby Neal, 43 F.3d at 55). Thus, the court needs to determine whether there is a conflict between the representative's interests and those of the class and whether the class attorney is capable of representing the class. Allen v. Holiday Universal, 249 F.R.D. 166, 180 (E.D. Pa. 2008) (citation omitted). The burden is on defendant to prove that the representative will not adequately represent the class. Stewart v. Assocs. Consumer Discount Company, 183 F.R.D. 189, 196-197 (E.D. Pa. 1998).

Here, as noted, plaintiffs' claims are the epitome of those of the class, and there is no apparent conflict of interest. Plaintiff's counsel is known to the court as an experienced consumer protection advocate. Defendant raises no objection to his ability to adequately represent the class. The court does note its concern with the disparity between the total debt relief granted to the representative plaintiffs and the partial debt relief granted to Settlement Class Members. However, the parties maintain, and include in the notification to class members, that this relief is in fact the result of a separate dispute between Carrington and the class representatives, and was included here for the sake of judicial economy. Therefore, the court finds that the adequacy of representation of Rule 23(a)(4) has been met.

B. Rule 23(b)(3)

As stated above, the parties seek certification pursuant to Rule 23(b)(3), which requires the court to examine whether common questions of law or fact predominate and whether "the class action mechanism is the superior method for adjudicating the case." Fed. R. Civ. P. 23(b)(3).

1. Predominance

The predominance inquiry examines "whether the proposed class is sufficiently cohesive to warrant adjudication by representation." In re Community Bank, 418 F.3d at 308-09 (citing

Amchem, 521 U.S. 623-24) "A proper predominance inquiry 'trains on the legal or factual questions that qualify each member's case as a genuine controversy, questions that preexist any settlement.'" Id. (quoting Amchem, 521 U.S. at 623). In this vein, "a predominance analysis 'is similar to the requirement of Rule 23(a)(3) that claims or defenses of the named representatives must be typical of the claims or defenses of the class.'" Id. (quoting Amchem, 521 U.S. at 623 n. 18).

Here, as discussed in the Rule 23 analysis, all the claims arise from the same factual predicate, i.e. all potential class members suffered from the same alleged injury. As a result, the court finds that the predominance requirement has been satisfied.

2. Superiority

The superiority requirement of Rule 23(b)(3) asks a district 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 Community Bank, 418 at 309 (quoting Georgine v. Amchem Prods., Inc., 83 F.3d 610, 632 (3d Cir. 1996)). Rule 23(b)(3) instructs that the matters pertinent to this inquiry include:

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

Id.

We find no reason why a Rule 23(b)(3) class action is not the superior means to adjudicate this matter. Class members are unlikely to have the financial incentive to litigate their suits individually because most, if not all, of the class members' claims are modest in light of the costs of litigation. See In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 522-23 (D.N.J. 1997) ("The class action device may allow plaintiffs to "pool claims which would be uneconomical to litigate individually"). Furthermore, this action saves time and expense because, assuming each transaction represents one individual, there are potentially 102 lawsuits. As a result, the court finds that this class action satisfies the superiority requirement.

C. The Proposed Settlement

Final approval of a class action settlement requires a finding that the settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(1)(c). At this juncture, however, the court must only make "a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." Manual for Complex Litigation (Fourth), § 21.632 (2004). Accordingly, the

only question before the court is whether the 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." Mehling v. New York Life Ins. Co., 246 F.R.D. 467, 472 (E.D.Pa. 2007) (citations omitted). At this stage, the court "need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute." Id. A common inquiry is whether the proposed settlement is the result of "arms-length negotiations." Id.

Here, the Agreement is the product of an arms-length negotiation. The parties here agreed that defendant will make a diligent effort to find all the affected class members, and provide them with potentially substantial debt relief. Although the Agreement does provide the named representatives with complete relief of their debt, the court is satisfied that the class notice makes clear that such relief is the result of a separate proceeding between the two parties. The Agreement does not prevent Class Members from contesting any amount they may owe defendant as the named representatives did. As a result, the court finds that the settlement merits preliminary approval. Therefore, the court will preliminarily approve the settlement.

D. The Proposed Notice

Rule 23(e)(1)(B) provides that this court "must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal or compromise." Notice of provisional certification of a class action and preliminary approval of a settlement may be combined but must satisfy Rule 23(c)(2). Fry v. Hayt, Hayt & Landau, 198 F.R.D. 461, 474 (E.D. Pa. 2000). Rule 23(c)(2) requires that, in a class certified pursuant to Rule 23(b)(3), "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," must be provided. Fed. R. Civ. P. 23(c)(2). The notice must inform the class members 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. Id.

After reviewing the parties' submissions, the court finds that the proposed notice substantially complies with Rule 23(c)(2) and Rule 23(e). The parties propose notice in the form of direct mailing to the Settlement Class Members. Defendant has agreed to conduct a skip trace (at its cost) to ascertain the current address of those class members whose mail was returned by the United States Post Office. The notice informs members of the action, their right to opt-out, the consequences of failing to opt-out, and their right to appear through counsel. As a result, the court finds the notice

is adequate.

E. Appointment of Class Counsel

Pursuant to Rule 23(g)(1)(B), "a court that certifies a class must appoint class counsel." In appointing class counsel, the court must consider: (1) the work counsel has done in identifying or investigating the potential claims; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1).

The court finds that Clayton S. Morrow is qualified to "fairly and adequately represent the interests of the class" as required by Rule 23(g)(1). The biography counsel submitted detailing his experience handling consumer class actions is sufficient. Accordingly, the court will appoint Clayton S. Morrow as class counsel.

IV. Conclusion

For the reasons set forth above, the Joint Motion for Preliminary Approval of Class Action Settlement will be granted.

An appropriate order follows.

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

ALVIN PIERCE and SANDRA)
PIERCE, individually)
and on behalf of all others)
similarly situated,)
)
Plaintiffs,)
)
v.) Civil Action No. 09-0787
)
CARRINGTON RECOVERY SERVICES,)
LLC,)
)
Defendant.)

ORDER

Therefore, this 22nd day of March, 2010, IT IS HEREBY ORDERED that the Joint Motion for Preliminary Approval of Class Action Settlement [Doc. No. 22] is GRANTED as follows:

All terms contained herein shall have the same meanings as set forth in the class action settlement agreement executed by the parties [Doc. No. 22, Ex. 1].

1. Class Certification: Civil Action No. 09-0787, styled Pierce v. Carrington Recovery Services, LLC, shall be maintained, for settlement purposes, as a class action on behalf of the following class of plaintiffs:

(a) All natural persons with addresses in the Commonwealth of Pennsylvania; (b) against whom the Defendant undertook collection by sending a collection letter which states "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid."; (c) in connection with the collection of a debt for

personal family or household purposes; (d) within one (1) year prior to May 25, 2009. (All such persons shall be collectively referred to hereinafter as the "Settlement Class Members."

The Settlement Class does not include, and therefore does not affect or release, the claims of persons who would come within the defined Settlement Class above, but who have filed for protection under the federal bankruptcy laws.

With respect to the following cause of action:

[a]ny and all claims which are based on or related to the claims in the Complaint filed in the Lawsuit with respect to the Released Parties' allegedly improper notice under the Fair Debt Collection Practices Act §1692(g).

2. Class Representative and Class Counsel: Alvin and Sandra Pierce are designated as Class Representatives and Clayton S. Morrow is designated as Class Counsel.
3. The certification of this class is conditioned on the final approval of the settlement and, in the event the settlement is not approved, the certification shall be vacated.
4. Exclusion: The notice to class members must inform them as to how they may exclude themselves from the class.
5. Proposed settlement: The proposed settlement between the plaintiff class and defendant appears, upon preliminary review, to be within the range of reasonableness and accordingly shall be submitted to the class members for their consideration and for hearing under Federal Rule of Civil Procedure 23(e). The terms of the settlement are as follows:
Defendant will pay \$100 to each identified

Class Member and reduce the purported outstanding sum due and owing on the alleged debt by ten percent (10%) who (i) was sent a collection letter the same or similar to Exhibit A of the Complaint not returned as undeliverable and (ii) does not exclude him/herself from the settlement. Defendant will pay \$50 to each identified Class Member and reduce the purported outstanding sum due and owing on the alleged debt by five percent (5%) who (i) was sent a collection letter the same or similar to Exhibit A of the Complaint and was returned as undeliverable and (ii) does not exclude him/herself from the settlement.

Defendants agree to conduct a skip trace (at their cost) to ascertain the current address of those class members whose mail was returned by the U.S. Post Office. Any notice and check returned with a forwarding address will be re-mailed to the address provided. The checks shall be void after 90 days from the date of issuance. Any class members who do not timely opt out of the settlement and whose checks are not cashed within 90 days from the date of issuance, those funds will be distributed to the Defendant.

Defendant nevertheless will pay to the National Consumer Law Center (NCLC) the sum of One Thousand Eight Hundred Dollars (\$1,800) representing a cy pres award. Defendant shall send the class the payments described in this paragraph 10 days after the Court issues a Final Order approving this Agreement.

6. Notice: The court finds that the notice proposed by the parties is the best practicable under the circumstances. The defendant will directly mail to each Class Member a copy of the Notice attached to the Agreement. [Doc. No. 22, Ex. 3].
7. Hearing: A hearing will be held before this court on Monday, May 17, 2010, at 9:30 a.m. in Courtroom 3A, 3rd Floor, United States Courthouse, Pittsburgh, Pennsylvania, to consider

whether the settlement should be given final approval by the court:

(A) Written objections by class members to the proposed settlement will be considered if received by the court and class counsel on or before April 23, 2010;

(B) Any class member who wishes to opt-out of the proposed settlement must post-mark a notice to both the court and class counsel by April 23, 2010;

(C) Defendant or settlement administrator shall notify plaintiffs' counsel of the number and identify of persons who have timely elected to opt-out of the Class or who intend to object to the settlement by April 30, 2010;

(D) Class counsel shall prepare and file with the Court, and serve on defendant's counsel, a list of all persons who have timely opted-out of the Class or who intend to object to the settlement by May 7, 2010;

(E) At the settlement hearing, class members may be heard orally in support of, or if any have timely submitted written objections, in opposition to the settlement;

(F) Class counsel and counsel for defendants should be prepared at the hearing to respond to objections filed by class members and to provide other information as appropriate, bearing on whether or not the settlement should be approved.

8. In the event the Effective Date occurs, all class members will be deemed to have forever released and discharged the Released Claims. In the event that the Effective Date does not occur for any reason whatsoever, the settlement agreement shall be deemed null and void and shall have no effect whatsoever.

BY THE COURT:

Handwritten signature of G. L. Hancock in cursive script, written over a horizontal line.

cc: All Counsel of Record