

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

ROBERT DRINKMAN,

Plaintiff,

v.

ENCORE RECEIVABLE MANAGEMENT, INC.,

Defendant.

MEMORANDUM AND ORDER

07-C-363-S

Plaintiff Robert Drinkman ("Drinkman") brought this action as a class action against defendant Encore Receivable Management, Inc. ("Encore") alleging that pre-recorded messages used by Encore including those left on Drinkman's answering machine violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq. Jurisdiction is based on 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d). The matter is presently before the Court on plaintiff's motion for class certification under Federal Rule of Civil Procedure 23. The following facts are based on plaintiff's allegations and affidavits.

BACKGROUND

Prior to April 2007 plaintiff incurred a debt with J.C. Penny. Plaintiff fell behind on his payments to J.C. Penny. In April 2007 defendant left thirteen pre-recorded messages on plaintiff's answering machine in an attempt to contact plaintiff concerning his debt. Plaintiff alleges that the thirteen messages were identical and stated:

Please contact Mr. Baker at 1-877-409-2110 about an important personal business matter. Again, this is Mr. Baker 1-877-409-2110, I look forward to your quick response.

(Compl. ¶9.)

Furthermore, plaintiff alleges that he is a "consumer", that defendant is a "debt collector" and that his debt is a "consumer debt" as all terms are defined under the FDCPA. 15 U.S.C. §§ 1692a(3), (5) and (6). Also, plaintiff alleges that the messages left by defendant violated the FDCPA because the messages failed to meaningfully disclose that the calls were from a debt collector. 15 U.S.C. §§ 1692d(6) and 1692e(11). Finally, plaintiff alleges that defendant left similar messages for "hundreds, if not thousands" of other consumers. (Compl. ¶¶ 11-18.) Accordingly, plaintiff seeks certification of this action as a class action with the class defined as:

All Wisconsin "consumers" (as that term is defined by 15 U.S.C. § 1692a(3)) that received pre-recorded messages from the Defendant, within one year prior to the date of the filing of this suit, in which the Defendant failed to include meaningful disclosure of the caller's identity as a debt collector.

(Pl.'s Mem. in Supp. at 1.)

MEMORANDUM

Under Federal Rule of Civil Procedure 23 district courts maintain broad discretion in determining whether certification of a class-action lawsuit is appropriate. Keele v. Wexler, 149 F.3d 589, 592 (7th Cir. 1998) (citation omitted). "[P]laintiff has the

burden of proving that a case is appropriately a class action and meets all the requirements of Rule 23." Valentino v. Howlett, 528 F.2d 975, 978 (7th Cir. 1976) (citation omitted). Furthermore, the Court is not required to accept all the allegations in the complaint as true, but instead must exercise judgment and sound discretion in addressing the factual and legal inquiries that become necessary under the requirements of Rule 23 even if that requires a preliminary inquiry into the merits of the case. Szabo v. Bridgeport Mach., Inc., 249 F.3d 672, 675-76 (7th Cir. 2001).

Before addressing the express requirements under Rule 23 courts have addressed two implicit ones. Blihovde v. St. Croix, 219 F.R.D. 607, 614 (W.D. Wis. 2003). First, the proposed class definition must be definite, i.e., ascertainable, precise and objective. Id. (citation omitted); see also Alliance To End Repression v. Rochford, 565 F.2d 975, 977-78 (7th Cir. 1977). Second, named plaintiffs "must be members of the class they propose to represent." Bilhovde, at 614. (citation omitted). The express requirements under Rule 23 begin with the four listed under Rule 23(a). Under Rule 23(a) a class will 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.

Next, plaintiff must satisfy one of the requirements under Rule 23(b). Pertinent to this case are Rules 23(b)(2) and (3). Rule 23(b)(2) requires defendant to have acted in a manner that is generally applicable to the class thereby making injunctive and/or declaratory relief appropriate. Rule 23(b)(3) requires "that the 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." Whether a class is certified under Rule 23(b)(2) or Rule 23(b)(3) is important because (b)(3) requires as a matter of due process that class members receive personal notice and an opportunity to opt out of the class action but (b)(2) does not. In re Allstate Ins. Co., 400 F.3d 505, 506 (7th Cir. 2005); Lemon v. Int'l Union of Operating Eng'r, Local No. 139, AFL-CIO, 216 F.3d 577, 580 (7th Cir. 2000).

Furthermore, certification of a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979). Accordingly, if plaintiff fails to satisfy any requirement under Rule 23 the Court will not grant class certification.

1. Implicit requirements

Defendant argues that plaintiff's proposed class definition is vague, i.e., not definite, because the requirement that each class member have received a message lacking "meaningful disclosure" of defendant's identity will require the Court to address whether each phone message received by a potential class member contained "meaningful disclosure" as set forth under 15 U.S.C. § 1692d(6). Several district courts have determined that a class definition was not definite when the plaintiff had "simply incorporated the language of the statutory prohibition into its class definition" because the court would be required "to conduct individual inquiries into the merits of each potential plaintiff's case in order to determine their qualifications as class members." Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1169 (S.D. Ind. 1997); Pastor v. State Farm Mut. Auto. Ins., No. 05-C-1459, 2005 WL 2453900, at *2 (N.D. Ill. Sept. 30, 2005) aff'd 487 F.3d 1042 (7th Cir. 2007); Fletcher v. ZLB Behring LLC, 245 F.R.D. 328 (N.D. Ill. 2006). Although not binding precedent the Court considers such reasoning persuasive.

Plaintiff's class definition merely incorporates the statutory prohibition that a debt collector not place telephone calls without "meaningful disclosure" of its identity. 15 U.S.C. § 1692d(6). If plaintiff's class definition stands as is, the Court would be required to conduct individual inquiries into whether each potential

class member received a message containing "meaningful disclosure" of defendant's identity in an effort to determine if each potential class member was qualified to be an actual class member. Furthermore, even whether the message used with Drinkman contained "meaningful disclosure" has not yet been determined. Accordingly, the fact that the Court would be forced to make individual decisions on the merits of each potential class member's claim, including Drinkman's claim, before it could even certify the class demonstrates that plaintiff's class definition is not definite.

However, the Court has determined that the definiteness problem can be easily remedied without denying certification. Accordingly, the Court amends the class definition in the following manner:

All Wisconsin "consumers" (as that term is defined by 15 U.S.C. § 1692a(3)) that received pre-recorded messages from Defendant, within one year prior to July 3, 2007, in which Defendant included nothing more than the caller's name, a phone number and a reference to some important matter.

The above class definition requires a mere cursory review of the pre-recorded messages to look for (1) the caller's name; (2) a phone number; and (3) a reference to some important matter. Accordingly, whether such a message provides "meaningful disclosure" of defendant's identity as a debt collector, i.e., a central issue in this case, can be decided after class certification as opposed to being decided when determining class certification.

Moreover, plaintiff is a member of the newly defined class because he received a pre-recorded message from defendant that contained only (1) the caller's name; (2) a phone number; and (3) a reference to some important matter. Also, plaintiff is a member of the newly defined class without the Court having to first determine whether the message left for him contained "meaningful disclosure" of defendant's identity as a debt collector. Accordingly, the newly defined class satisfies the implicit class action requirements.

2. Rule 23(a) Requirements

a. Numerosity

Although to satisfy the numerosity requirement under Rule 23(a)(1) plaintiff is not required to provide the exact number of persons in his proposed class, he may not rely on mere conclusory allegations concerning the impracticality of joinder or mere speculation concerning the size of the class. Marcial v. Coronet Ins. Co., 880 F.2d 954, 957 (7th Cir. 1989) (citations omitted). Plaintiff alleged that the class could range from the hundreds to thousands because defendant regularly used messages substantially the same as those used with plaintiff to contact people concerning unpaid debts. Defendant provided a list of 1159 potential class members. Although not every potential class member may be an actual class member the number is not speculative and if even half of those on the list fell under the class definition the class

would be so numerous that joinder would be impractical. Accordingly, the Court determines that the numerosity requirement is satisfied.

b. Commonality

Generally, “[a] common nucleus of operative fact[s]” satisfies the commonality requirement under Rule 23(a)(2). Rosario v. Livaditis, 963 F.2d 1012, 1018 (7th Cir. 1992) (citation omitted). In this case, the common nucleus of operative facts is that defendant used pre-recorded messages substantially the same as those used with plaintiff to contact the other class members in an attempt to collect outstanding debts. Furthermore, the common issue of law is whether such pre-recorded messages contain “meaningful disclosure” of defendant’s identity as a debt collector as required under 15 U.S.C. §§ 1692d(6) and 1692e(11). Accordingly, the Court determines that the commonality requirement is satisfied.

c. Typicality

The typicality requirement under Rule 23(a)(3) “is closely related to the preceding question of commonality.” Rosario, at 1018. Both the commonality and typicality requirements “ensure that only those plaintiffs . . . who can advance the same factual and legal arguments may be grouped together as a class.” Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997). However, under the typicality requirement the focus is on whether the

representative plaintiff's claim is based on the same legal theory and arises from the same course of conduct that gives rise to the claims of the other members of the proposed class. Rosario, 963 F.2d at 1018 (citing De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)). Drinkman claims that the pre-recorded messages used by defendant in contacting him about his debt violated the FDCPA because the messages did not contain "meaningful disclosure" of defendant's identity as a debt collector. This claim is based on the same legal theory (i.e., violation of the FDCPA) and arises out of the same course of conduct (i.e., defendant's use of pre-recorded messages to contact debtors) as the other proposed class members' claims. Accordingly, the Court determines that the typicality requirement is satisfied.

d. Adequacy of Representation

There are two parts in determining the adequacy of representation: (1) "the adequacy of the named plaintiff's counsel[;]" and (2) "the adequacy of representation provided in protecting the different, separate, and distinct interest[s] of the class members." Retired Chi. Police Ass'n v. Chicago, 7 F.3d 584, 598 (7th Cir. 1993) (quoting Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 697 (7th Cir. 1986) (en banc)). Accordingly, if there are "antagonistic or conflicting claims" among class members then there is not adequate representation. Rosario, 963 F.2d at 1018 (citation omitted).

In this case, Drinkman's counsel, Thomas J. Lyons, Jr. ("Lyons"), has been involved in representing both individuals and classes in consumer rights litigation for over ten years and started a law firm, Consumer Justice Center, P.A., in 1996 to focus on such litigation. Furthermore, Lyons has previously been certified as class counsel in no less than seventeen other cases and has aggressively investigated the potential claims in this case. Based on the affidavits submitted, the Court is persuaded that Attorney Lyons will provide fair and adequate representation for the interests of the class in this case. Moreover, there are no apparent "antagonistic or conflicting claims" between Drinkman and potential class members.¹ Accordingly, the Court determines that the adequacy of representation requirement is satisfied.

3. Rule 23(b) (2)

Once all the requirements under Rule 23(a) have been satisfied the party seeking class certification must also satisfy one of the requirements under Rule 23(b). Plaintiff asserts that the Court can certify this case as a class action under Rule 23(b) (2) because defendant acted "on grounds generally applicable to the class"

¹The Court notes that Drinkman has an individual claim for actual damages based on the volume of calls he received from defendant, but this individual claim does not create any conflict with the class claim which is based on the contents of the message. Furthermore, whether or not Drinkman is successful on his individual claim is unrelated to and will not harm the class claim because the class statutory damages are set by the statute and cannot be affected by any actual damages recoverable by Drinkman.

(i.e., defendant used substantially the same pre-recorded messages to contact class members) which makes declaratory relief (i.e., a declaration from the Court that defendant's use such of pre-recorded messages violates the FDCPA) appropriate. However, plaintiff also requests that the class be provided with the statutory damages that accompany such a violation.

Although in general a class must be certified under Rule 23(b)(3), not Rule 23(b)(2), when damages are requested, the Seventh Circuit has reasoned that "[w]hen the main relief sought is injunctive or declaratory, and the damages are only 'incidental,' the suit can be maintained under Rule 23(b)(2). In re Allstate, 400 F.3d at 507 (citations omitted). Furthermore, "incidental" damages has been defined as damages where the computation "is mechanical, 'without the need for individual calculation,' . . . so that a separate damages suit by individual class members would be a waste of resources." Id. (citations omitted).

Moreover, a declaratory judgment establishing a violation of the FDCPA produces recoverable statutory damages without the proof of any actual damages being necessary. See Keele, 149 F.3d at 593. Also, other district courts have determined that the FDCPA's class action statutory damages provision, 15 U.S.C. § 1692k(2)(B)²,

²The statute permits the recovery of damages "in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000

requires nothing more than a mechanical computation on a class-wide basis to determine such damages, and accordingly, that such statutory damages are "incidental" which permits class certification under Rule 23(b)(2). See, e.g., Hamilton v. Am. Corrective Counseling Serv., Inc., No. 3:05-CV-434RM, 2007 WL 541817, at *3 (N.D. Ind. Feb. 14, 2007) (citing a list of district court cases certifying FDCPA class actions under Rule 23(b)(2) for declaratory relief along with statutory damages).

In this case, plaintiff's request that the proposed class receive statutory damages under 15 U.S.C. § 1692k(2)(B) is a request for "incidental" damages that flow directly from the main relief sought for the class (i.e., declaratory relief) because such damages require a mere mechanical computation without any need for individual calculation (i.e., divide the lesser of \$500,000 or 1 per centum of defendant's net worth by the number of class members). Furthermore, defendant acted on grounds generally applicable to the class by using substantially the same pre-recorded messages to contact class members. Accordingly, plaintiff's proposed class, as newly defined in this order, is certifiable under Rule 23(b)(2).

4. Conclusion

Plaintiff's proposed class, as amended by the Court, satisfies the implicit class action requirements. Also, plaintiff has proven

or 1 per centum of the net worth of the debt collector."

that this action satisfies all the requirements for class certification found under Rule 23(a). Furthermore, plaintiff's action can be maintained as a class action because it satisfies Rule 23(b) (2). Although Drinkman also sought class certification under Rule 23(b) (3) that request is moot based on his satisfaction of Rule 23(b) (2). Moreover, the class being certified under Rule 23(b) (2) means that prior to resolution of this action there is no requirement that class members be given notice of the case. In re Allstate, 400 F.3d at 506; see also Federal Rule of Civil Procedure 23(c) (2) (A). Accordingly, as required under Rule 23(c) (1) (B):

(1) The certified class is defined as:

All Wisconsin "consumers" (as that term is defined by 15 U.S.C. § 1692a(3)) that received pre-recorded messages from Defendant, within one year prior to July 3, 2007, in which Defendant included nothing more than a person's name, a phone number and a reference to some important matter.

(2) The class claims are that defendant violated the FDCPA by failing to meaningfully disclose that it was a debt collector on such pre-recorded messages covered under the class definition. See 15 U.S.C. §§ 1692d(6) & 1692e(11).

(3) Class counsel for this action shall be Thomas J. Lyons, Jr. Of the Consumer Justice Center, P.A.

ORDER

IT IS ORDERED that plaintiff's motion for class certification is GRANTED in accordance with the above.

Entered this 3rd day of December, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge