IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LAWRENCE G. RUPPERT and
THOMAS A. LARSON,
on behalf of themselves and on behalf
of all others similarly situated,

Plaintiffs,

v.

ALLIANT ENERGY CASH
BALANCE PENSION PLAN,

Defendant.

OPINION and ORDER

08-cv-127-bbc

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In this case brought under the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, plaintiffs Lawrence Ruppert and Thomas Larson contend that defendant Alliant Energy Cash Balance Pension Plan underpaid them when it calculated the lump sum distributions of their retirement benefits. Initially, plaintiffs were challenging a plan that defendant put into effect in 1998. I certified two subclasses (to address a potential statute of limitations defense), dkt. #67, and concluded that defendant had not calculated plaintiffs' rates correctly. Dkt. #316. To correct the error, I concluded that defendant was required to apply an interest crediting rate of 8.2% and no pre-retirement mortality discount. Dkt. #380.

Before judgment was entered, defendant amended the plan substantially in May

2011 and made it effective retroactively to January 1, 1998 so that it applied to all of the class members. In particular, instead of using the 30-year Treasury rate to calculate future interest credits, defendant used a five-year rolling average, which led to many of the class members receiving an additional payment, but most still received less than they would have under this court's orders. I agreed with the parties' contention that all of plaintiffs' claims challenging the 1998 plan were moot, dkt. #504, and, after plaintiffs filed an amended complaint challenging the validity of the 2011 amendment, I directed the parties to file new motions regarding class certification and summary judgment. Dkt. #517. Both motions are ready for review.

Both sides ask the court to resolve the cross motions for summary judgment before the motion for class certification. Dft.'s Br., dkt. #548, at 1; Plts.' Br., dkt. #551-1, at 1-2. Although the Court of Appeals for the Seventh Circuit has not prohibited district courts from deciding the merits first in all circumstances, Cowen v. Bank United of Texas, FSB, 70 F.3d 937, 941-42 (7th Cir. 1995), it has expressed skepticism in a number of cases about "put[ting] the cart before the horse." Larson v. JPMorgan Chase & Co., 530 F.3d 578, 581 (7th Cir. 2008); see also Thomas v. City of Peoria, 580 F.3d 633, 635 (7th Cir. 2009); Wiesmueller v. Kosobucki, 513 F.3d 784, 786-87 (7th Cir. 2008); Bertrand ex rel. Bertrand v. Maram, 495 F.3d 452, 455-56 (7th Cir. 2007); Bieneman v. City of Chicago, 838 F.2d 962, 964 (7th Cir. 1988) (per curiam); Premier Electrical Construction Co. v. National Electrical Contractors Association, Inc., 814 F.2d 358, 363 (7th Cir. 1987); Watkins v. Blinzinger, 789 F.2d 474, 475-76 n. 3 (7th Cir. 1986). In this case, it should have been

obvious to both sides that the merits of the case cannot be resolved until the class is defined. If I were to resolve the motions for summary judgment first, that would mean I could decide only the claims of the two named plaintiffs. However, in their summary judgment motions both sides are seeking relief that extends beyond the claims on which Ruppert and Larson have standing to sue. In addition, defendant raises issues about the scope of the named plaintiffs' claims and their ability to serve as class representatives that must be addressed before deciding the merits. Accordingly, I will consider plaintiffs' motion for class certification first. (Plaintiffs has moved for leave to file a reply brief in support of their motion for class certification, along with the proposed brief. That motion will be granted.)

I am granting plaintiffs' motion for class certification, but only as to claims regarding the interest crediting rate and the pre-retirement mortality discount for lump sum recipients. With respect to the merits, the arguments defendant raises related to the classes I am certifying are arguments I have rejected before. Accordingly, I am granting plaintiffs' motion for summary judgment and denying defendant's motion. I will give the parties an opportunity to file a proposed judgment and to address the question whether class members should receive a new notice.

OPINION

In the order granting plaintiffs' first motion for class certification, I concluded that the named representatives had standing and that the proposed class was sufficiently ascertainable. In addition, I concluded that plaintiffs satisfied each of the prerequisites in

Fed. R. Civ. P. 23(a): (1) the class was sufficiently numerous because it included at least 200 members; (2) an issue common to all members of the proposed class was whether defendant's method for determining the value of their pre-retirement lump sums was illegal; (3) class counsel was adequate; (4) the named plaintiffs were adequate class representatives that had claims typical of the class and any concerns about differences in applying a potential statute of limitations defense could be resolved by creating two subclasses. Finally, I concluded that certification was appropriate under Rule 23(b)(2) because plaintiffs were seeking a class-wide declaration and any monetary relief would be "the direct, anticipated consequence of the declaration." Dkt. #67 at 19 (quoting Berger v. Xerox Corp. Retirement Income Guarantee Plan, 338 F.3d 755, 764 (7th Cir. 2003)).

In response to plaintiffs' new motion for class certification, defendant does not challenge the requirements regarding numerosity, commonality and the adequacy of class counsel. Because the facts regarding those requirements have not changed significantly since the first motion for class certification, I see no reason to question the parties' view. However, defendant does challenge plaintiffs' ability to satisfy some of the other prerequisites.

First, defendant criticizes plaintiffs' proposed class definition:

> Each person who (i) since January 1, 1998, accrued under the terms of the Alliant Energy Cash Balance Pension Plan (the "Plan"), a vested or partially vested interest in a notional account balance established in their name by the Plan; (ii) received a distribution between January 1, 1998 and August 17, 2006; and (iii) has a claim to an additional payment under the Plan as amended on May 10, 2011 once the Plan is interpreted in light of the requirements of ERISA.

Defendant says that the proposed class is overly simplistic because it fails to take into account the different claims and defenses at issue in this case:

- the claim that defendant is using the wrong rate to calculate future interest credits;
- the claim that defendant should not have applied a pre-retirement mortality discount;
- the claim that the May 2011 amendment required defendant to apply the actual interest credit in the partial year of distribution to those participants who did not receive corrective payments under the amendment (the parties refer to this as a "partial year injury");
- the defense that some or all of the class members' claims are barred by the statute of limitations.

In addition, defendant says that named plaintiffs Ruppert and Larson are not adequate representatives for various reasons. With respect to plaintiff Ruppert, defendant says that he (and all other class members who received lump sump payments in 2006) received a *better* rate than the 8.2% that plaintiffs claim they are entitled to receive under ERISA, so he cannot represent the interests of class members who are challenging the rate defendant used. With respect to plaintiff Larson, defendant says that he is not an adequate representative for *any* class members because he filed for bankruptcy in 2004. First, because Larson collected his lump sum benefit in 2000, his claim belongs not to him but to the bankruptcy estate. Dft.'s Br., dkt. #548, at 14 (citing Boyd v. Meriter Health Services Employment Retirement Plan, No. 10-cv-426-wmc, slip op. at 25-26 (W.D. Wis. Feb. 2, 2012) (Conley, C.J.); EEOC v. J.D. Streett & Co., Inc., No. 05-4186, 2006 WL 3076667, at *2 (S.D. Ill. Oct. 30, 2006); Gennrich v. Mordhorst, Nos. 98-34305-7, 99-3121-7, 2000

WL 33950027, at *2-3 (Bankr. W.D. Wis. May 31, 2000)). Second, defendant argues that because Larson failed to disclose his claim during the bankruptcy proceedings, he should be judicially estopped from pursuing it now. With respect to the "partial year" claim, defendant says that neither named plaintiff can serve as an adequate representative as to that claim because plaintiffs concede that neither named plaintiff has such a claim. (Plaintiffs say this is so because "Mr. Ruppert actually received a corrective payment and a retroactive increase to his account balance and because Mr. Larson (who did not receive a corrective payment) commenced his benefit in 2000, a year when the crediting rate was only 4%." Plts.' Br. dkt. #551-1, at 7.) Finally, defendant says that neither Ruppert nor Larson are adequate representatives because they did not exhaust their administrative remedies.

For the reasons explained in the original order granting class certification, I disagree with defendant's contention that plaintiffs Ruppert and Larson make poor class representatives because they failed to exhaust their administrative remedies. Dkt. #67 at 9. In addition, I agree with plaintiffs that the 2004 bankruptcy action does not bar Larson from acting as a class representative. If, as I concluded in the November 23, 2011 order, dkt. #504, the class members' claims arise out of the 2011 amendment, Larson could not have raised his claims in bankruptcy court in 2004. If that is wrong and Larson's claim accrued when he received his lump sum benefit in 2000, then defendant waived the issue by failing to raise it sooner. RK Co. v. See, 622 F.3d 846, 850 (7th Cir. 2010)("'real party in interest' is a defense subject to waiver"); Papakosmas v. Papakosmas, 483 F.3d 617, 624

(9th Cir. 2007) (judicial estoppel may be waived); Beall v. United States, 467 F.3d 864, 870 (5th Cir. 2006) (same); Steger v. General Electric Co., 318 F.3d 1066, 1080 (11th Cir. 2003) (question of which party has right to bring claim is question of who is real party in interest under Fed. R. Civ. P. 17, which is not jurisdictional and may waived); Lee v. Deloitte & Touche LLP, 428 F. Supp. 2d 825, 830-31 (N.D. Ill. 2006) (question whether debtor or trustee has right to bring claim is not question of Article III standing and may be waived).

With respect to plaintiff Ruppert's adequacy as a class representative, plaintiffs acquiesce in a footnote to defendant's view that Ruppert would not make an adequate representative with respect to the claims regarding the projection rate, but they say that it is not a problem because Larson can represent class members with those claims. Plts.' Br., dkt. #555-1, at 7 n.6. Because I have concluded that the 2004 bankruptcy proceeding does not bar Larson from serving as a class representative, I agree with this contention as well.

In response to defendant's argument about the "partial year" claims, plaintiffs say first that such a claim "does not appear in the [amended complaint] and has heretofore never been advanced by Plaintiffs." Plts.' Br., dkt. #555-1, at 7. This concession seems to present an easy resolution of the issue; if the claim is not part of the case, then it can be ignored. However, in a later discussion in their reply brief, plaintiffs seem to assume that they *are* asserting this claim, but that it is not an issue relevant to class certification because it does not affect any class member who received a lump sum benefit:

> Defendant's concern is purely academic because there is not a single lump sum recipient class member who has a "partial year claim" or "partial year injury,"

> i.e., there is not a single lump sum recipient between January 1, 1998 and August 17, 2006 who did not receive a corrective payment and did not receive a retroactive increase to his or her account balance (as required by the retroactively amended Plan § 3.5(b)) even though he or she commenced benefits in a year when the actual interest crediting rate exceeded 4% – 1998, 1999, 2003, 2004 or 2006. This moots the question of who is or is not an adequate representative of this subset of participants and similarly obviates the need for the Court to concern itself with certifying a "partial year" claim as Defendant requests (assuming a class is re-certified). See Def. Class Opp. at 4, 7-13 & n.2, 16-17 & n.4.
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> While it is conceivable that one or more annuity recipients may have such a claim, whether one or more than one such participant may have such a claim cannot be known until the Court rules on the parties' competing annuitant damages proposals (and how, if at all, annuitants are potentially impacted by this issue). If, after the Court's ruling, it can be shown there are any affected annuity recipients, the Court can address the issue then. See, e.g., Fed. R. Civ. P. 23(c)(1)(C) (allowing the Court to alter or amend class certification order before final judgment).

Plts.' Br., dkt. #551-1, at 8-9.

There are a number of problems with plaintiffs' position. First, plaintiffs fail to reconcile their view that they have not included a "partial year" claim in their complaint with their view that some annuity recipients may be entitled to damages on this claim. Second, plaintiffs fail to explain why it matters that the claim applies to annuity recipients rather than lump sum benefits. Either way, neither Ruppert nor Larson can represent the interests of the class members to which this claim applies. Ultimately, however, no class member can recover on a claim that is not part of the case. Because plaintiffs concede they have not included this claim in their complaint, I am disregarding it and plaintiffs may not seek these damages for any class member at a later date. Further, in light of the already protracted

nature of the proceedings, I decline to give plaintiffs leave to amend their complaint to include this claim, particularly because they admit it is speculative. Plts.' Br., dkt. #555-1, at 10 n.8 ("Defendant's assertion that there is even a theoretical claim here is dubious.").

Plaintiffs' response reveals another problem with the scope of the proposed class, which is that both of the named plaintiffs are lump sum recipients, so neither of them can represent the interests of the annuitants. Plaintiffs cannot recover damages for annuity recipients if they do not have a named plaintiff to represent those class members. Arreola v. Godinez, 546 F.3d 788, 799 (7th Cir. 2008) (class action must have named plaintiff for each type of relief sought); Rahman v. Chertoff, 530 F.3d 622, 626 (7th Cir. 2008) ("the certified class must correspond to the injuries received by the representative plaintiffs"). See also Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (requirements of Rule 23 "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims") (internal quotations omitted). Presumably, counsel for plaintiffs knows that the annuitants have separate interests because, in Boyd, slip op. at 5-11, he proposed separate subclasses for them. In light of the amount of time this case has been proceeding and the number of separate issues that the claims of the annuitants raise, e.g., Plt.'s Brs., dkt. ##463, 416 and 406, I decline to grant plaintiffs an opportunity to look for possible representatives for the annuitants. Randall v. Rolls-Royce Corp., 637 F.3d 818, 827 (7th Cir. 2011) (affirming district court's decision to deny request to name new representatives when it was made almost four years after suit had begun).

These conclusions resolve many of defendant's objections to the class definition. The class must be limited to lump sump recipients who would be entitled to recover additional benefits if defendant applied a rate of 8.2% or if defendant did not apply a pre-retirement mortality discount. Plaintiff Ruppert may represent those class members seeking to eliminate the discount; plaintiff Larson may represent those class members who will benefit from the different rate. Because I already have rejected defendant's statute of limitations defense, I agree with plaintiffs that it is unnecessary to create subclasses to account for that defense.

In accordance with Rule 23(c)(1)(B), I am defining two subclasses as follows:

> Subclass A: Each person who (i) since January 1, 1998, accrued under the terms of the Alliant Energy Cash Balance Pension Plan (the "Plan"), a vested or partially vested interest in a notional account balance established in their name by the Plan; (ii) received a lump sum distribution between January 1, 1998 and August 17, 2006; and (iii) received an interest crediting rate of less than 8.2% under the Plan as amended on May 10, 2011.

> Subclass B: Each person who (i) since January 1, 1998, accrued under the terms of the Alliant Energy Cash Balance Pension Plan (the "Plan"), a vested or partially vested interest in a notional account balance established in their name by the Plan; (ii) received a lump sum distribution between January 1, 1998 and August 17, 2006; and (iii) would have received a larger benefit under the Plan as amended on May 10, 2011, if defendant had not applied a pre-retirement mortality discount.

The remaining question is whether plaintiffs have shown that certification is appropriate under Rule 23(b). In the first order on certification, dkt. #67, I certified the class under Rule 23(b)(2): "the party opposing the class has acted or refused to act on

grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Although plaintiffs were (and are) seeking monetary relief in addition to a declaration, I followed Berger in concluding that awarding damages in a 23(b)(2) class is appropriate when they are "the direct, anticipated consequence of the declaration." Id. at 764.

Both sides ask for certification under Rule 23(b)(2). Plaintiffs acknowledge the Supreme Court's decision in Dukes, 131 S. Ct. at 2557, in which the Court held that money damages may not be awarded under a 23(b)(2) class if they are "not incidental to the injunctive or declaratory relief," but declined to reach the broader question whether money damages may be awarded under Rule 23(b)(2) in any circumstance. Although Dukes leaves some doubt regarding the availability of money damages, the Court did not foreclose such relief. Before Dukes, the Court of Appeals for the Seventh Circuit held that monetary relief may be awarded under Rule 23(b)(2) if it is "mechanically computable," Randall, 637 F.3d at 826, which is consistent with the statement in Dukes that the damages must be "incidental" to the declaration. Accordingly, I will continue to follow the standard in this circuit. Because the claims I am certifying are limited to two calculations that may be applied the same way to each member of a particular subclass, I conclude that certification under Rule 23(b)(2) remains appropriate.

Plaintiffs ask the court to certify a class under Rule 23(b)(1)(A), Rule 23(b)(1)(B) and Rule 23(b)(3) as well, but their arguments are conclusory and they fail to cite any

relevant authority from the Court of Appeals for the Seventh Circuit. Accordingly, I decline to consider these other provisions.

With the class limited to the two subclasses that I have defined above, the parties' cross motions for summary judgment may be resolved without extended discussion. Defendant argues that it is entitled to summary judgment because plaintiffs did not exhaust their administrative remedies, the statute of limitations has expired with respect to some or all of the class members and ERISA did not require it to apply a rate of 8.2% or prohibit it from applying a pre-retirement mortality discount. I have considered and rejected each of these arguments in previous orders. Although defendant raises some new arguments and cites some additional case law, defendant had an opportunity to present its case before. For example, although I invited the parties in an order dated November 8, 2011, dkt. #496, to address the question whether the May 2011 plan triggered a new limitations period, defendant responded to that order without citing a single case to support the view that the new plan did not trigger a new limitations period. Defendant's brief in support of its motion for summary judgment brief is littered with case law on this issue, but litigation would never end if courts continuously re-examined issues because one party or the other comes up with what it thinks is a better argument. Defendant has had more than an adequate opportunity to challenge each issue it now raises, so I decline to consider those issues yet again. It is time for this litigation to end.

The only issue defendant could not have raised before is its argument that the court

of appeals approved a rate similar to defendant's in Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc., 651 F.3d 600, 610 n.17 (7th Cir. 2011). Although defendant may be correct that the court of appeals will conclude that its five-year rolling average is appropriate, Thompson does not resolve the question. The discussion defendant cites is in the context of a one-paragraph footnote in which the court declined to decide whether the district court had applied an appropriate method in determining the rate. In light of all the briefs and hearings the parties have devoted to this issue and the multiple opinions in which I have considered this issue, I decline to revisit it now without more definitive guidance from the court of appeals.

I see two remaining issues. The first question is whether plaintiffs should prepare an amended notice for the class members before judgment is entered and, if so, what form that notice should take. The second question relates to the content of the judgment. I will give the parties an opportunity to address both issues.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion for leave to file a reply brief in support of their motion for class certification, dkt. #551, is GRANTED.

2. The motion for class certification filed by plaintiffs Lawrence Ruppert and Thomas Larson and to reappoint class counsel, dkt. #536, is GRANTED IN PART; two subclasses

are certified as follows:

> Subclass A: Each person who (i) since January 1, 1998, accrued under the terms of the Alliant Energy Cash Balance Pension Plan (the "Plan"), a vested or partially vested interest in a notional account balance established in their name by the Plan; (ii) received a lump sum distribution between January 1, 1998 and August 17, 2006; and (iii) received an interest crediting rate of less than 8.2% under the Plan as amended on May 10, 2011.
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> Subclass B: Each person who (i) since January 1, 1998, accrued under the terms of the Alliant Energy Cash Balance Pension Plan (the "Plan"), a vested or partially vested interest in a notional account balance established in their name by the Plan; (ii) received a lump sum distribution between January 1, 1998 and August 17, 2006; and (iii) would have received a larger benefit under the Plan as amended on May 10, 2011, if defendant had not applied a pre-retirement mortality discount.

Eli Gottesdiener is APPOINTED as class counsel for both subclasses.

3. Plaintiffs' motion for summary judgment, dkt. #533, is GRANTED with respect to the claims of the certified subclasses, and defendant Alliant Energy Cash Balance Pension Plan's motion for summary judgment, dkt. #527, is DENIED with respect to the claims of the certified subclasses. Both motions are DENIED as moot with respect to the issues beyond the scope of those subclasses.

4. The parties may have until July 13, 2012 in which to file and serve a brief addressing the question whether class members should receive an amended notice before judgment is entered. If either side believes that notice is appropriate, it should submit a proposed notice to the court. If the parties do not agree whether a notice is needed or on the form of the notice, they may have until July 20, 2012 to submit a response to the other side's proposal.

5. The parties may have until July 13, 2012, to submit a proposed judgment and materials necessary to show that the judgment is accurate and consistent with this order. If the parties cannot agree on a proposed judgment, they may have until July 20, 2012, to submit a response to the other side's proposal.

Entered this 2d day of July, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge