IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

NICHOLAS A. CLEMENTE, ESQ., and NICHOLAS A. CLEMENTE, P.C., on behalf of themselves and all others similarly situated,	:	DECEMBER TERM, 2002
	:	No. 00802
	:	Commerce Program
Plaintiffs,	:	
	:	Control No. 073907
v.	:	
REPUBLIC FIRST BANK,	:	
Defendant.	:	

ORDER AND OPINION

AND NOW, this 18th day of March 2005, upon consideration of plaintiffs' Motion for Class Certification, defendant's response thereto, the briefs in support and opposition, and all other matters of record, and upon hearing the oral arguments of counsel for the parties on February 10, 2005, it is hereby **ORDERED** that said Motion is **GRANTED.**

1. The above-captioned action is certified as a class action with respect to plaintiffs' claims for breach of contract and unjust enrichment.

2. Two sub-classes are hereby certified and defined as follows:

> Sub-Class One - All persons and entities that had loans from First Republic Bank or Republic First Bank (the "Bank") outstanding on the date(s) in 1991 when the Bank redefined its Prime Rate to be greater than the Wall Street Journal's Prime Rate, where the interest rate set forth in their loan documents was based on the Bank's Prime Rate, which one or more of the loan documents required the Bank to announce publicly.
>
> Sub-Class Two - All persons and entities that had loans from the Bank outstanding on the date(s) in 1998 when the Bank redefined its Prime Rate to be greater than the Wall Street Journal's Prime Rate plus one percent, where the interest rate set forth in their loan documents was based on the Bank's Prime Rate, which one or more of the loan documents required the Bank to announce publicly.

2. Plaintiffs are appointed as representatives of Sub-Class One.

3. Plaintiffs' counsel is appointed as counsel for the two sub-classes.

4. Within thirty (30) days of the date of entry of this Order, plaintiffs' counsel shall identify move to add one or more representative plaintiffs for Sub Class Two, or Sub-Class Two shall be deemed dismissed.

5. The parties shall jointly prepare a case management order regarding fact and expert discovery and dispositive motions and shall submit it to the court within thirty (30) days of the date of entry of this Order. If the parties are unable to arrive at an agreement as to all dates, they shall submit letters to the court setting forth those dates agreed upon and those that are still in dispute.

6. The parties shall jointly prepare a proposal for the notification procedure and proposed forms of notice to the class members and shall submit them to the court within forty-five (45) days from the date of entry of this Order. If the parties are unable to arrive at an agreement as to notification of the class, they shall submit letters to the court setting forth those issues regarding notice upon which they agree and those that are still in dispute.

BY THE COURT,

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C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

The court hereby considers plaintiff's Motion for Certification of a Class of "all persons who obtained loans from First Republic Bank or Republic First Bank (the "Bank") from 1988 through the present with interest rates pegged to its Bank Prime or Announced Prime Rate." Upon consideration of the pleadings, motion papers, depositions, and all other matters of record, the court makes the following:

I. Findings of Fact

From its inception in 1988, the form documents evidencing many of the Bank's consumer and commercial loan products stated that the interest payable on the outstanding principal amount would be "the Bank's prime rate of interest" plus whatever additional amount of interest the Bank and the borrower had agreed upon.

The documents evidencing plaintiffs' four loans from Bank call for interest payable in the amount of "the Bank's prime rate of interest plus One %."

In plaintiffs' and other borrowers' loan documents, "the Bank's prime rate of interest"

was defined as “the rate of interest publicly announced from time to time by Bank in Philadelphia, Pennsylvania as its ‘Prime Rate’” (hereinafter known as the “Bank’s Prime Rate”).

From its inception in1988 until the Fall of 1991, the Bank’s Announced Prime Rate was equal to the Wall Street Journal’s (“WSJ”) Prime Rate.

In or about the Fall of 1991, the Bank changed its Prime Rate from the WSJ Prime Rate to the WSJ Prime Rate plus 1%.

The parties dispute whether the Bank publicly announced the Fall 1991 redefinition(s) of its Prime Rate.

There were approximately 58 borrowers who had loans from the Bank outstanding on the date(s) in 1991 when the Bank redefined its Prime Rate to be greater than the Wall Street Journal’s Prime Rate, and whose interest rates set forth in their loan documents were based on the Bank’s Prime Rate, which one or more of the loan documents required the Bank to announce publicly.

In or about November, 1998, the Bank changed its Prime Rate from the WSJ Prime Rate plus 1% to the WSJ Prime Rate plus 1.75%.

From in or about November, 1998 through in or about January, 1999, the Bank’s Prime Rate was the WSJ Prime Rate plus 1.75%.

The Bank did not publicly announced the 1998 redefinition of its Prime Rate.

The parties dispute whether the Bank refunded to all members of the putative class the additional .75% it charged during the period from approximately November, 1998 through January, 1999.

There were approximately 128 borrowers who had loans from the Bank outstanding on the date(s) in 1998 when the Bank redefined its Prime Rate to be greater than the Wall Street

Journal's Prime Rate plus one percent, and whose interest rates set forth in their loan documents were based on the Bank's Prime Rate, which one or more of the loan documents required the Bank to announce publicly.

The Bank did not charge plaintiffs the additional .75% that it charged other borrowers during the period from approximately November, 1998 through January, 1999.

Sub-Class One shall include all persons and entities that had loans from First Republic Bank or Republic First Bank (the "Bank") outstanding on the date(s) in 1991 when the Bank redefined its Prime Rate to be greater than the Wall Street Journal's Prime Rate, where the interest rate set forth in their loan documents was based on the Bank's Prime Rate, which one or more of the loan documents required the Bank to announce publicly.

Sub-Class Two shall include all persons and entities that had loans from the Bank outstanding on the date(s) in 1998 when the Bank redefined its Prime Rate to be greater than the Wall Street Journal's Prime Rate plus one percent, where the interest rate set forth in their loan documents was based on the Bank's Prime Rate, which one or more of the loan documents required the Bank to announce publicly.

II. Conclusions of Law

1. The sub-classes are so numerous that joinder of all members is impracticable.

2. There are questions of law or fact common to the two sub-classes.

3. The claims and defenses of the representative plaintiffs are typical of the first sub-class, but not the second.

4. The representative plaintiffs will be able adequately to represent the first sub-class, but not the second.

5. A class action is a fair and representative method for adjudication of the controversy

between the parties.

III. Discussion

The court may certify this action as a class action only if the following requirements are met:

> (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;
> (4) The representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in [Pa. R. Civ. P.] 1709; and
> (5) A class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in [Pa. R. Civ. P.] 1708.

Pa. R. Civ. P. 1702. Plaintiffs bear the burden of proving all five of these class certification requirements. *See* Janicik v. Prudential Insurance Co. of America, 305 Pa. Super. 120, 128, 451 A.2d 451, 454 (1982). To meet their burden of proof, plaintiffs must establish sufficient underlying facts from which the court can conclude that each of the certification requirements is met. *Id*. 305 Pa. Super. at 130, 451 A.2d at 455.

A. The Numerosity Requirement

> Whether the number [of potential class members] is so large as to make joinder impracticable is dependent not upon an arbitrary limit, but rather upon the circumstances surrounding each case. . . . The class representative need not plead or prove the number of class members so long as [it] is able to define the class with some precision and affords the court with sufficient indicia that more members exist than it would be practicable to join.

Janicik, 305 Pa. Super. at 131, 451 A.2d at 456. Joinder of the approximately 58 and 128 sub-class members would clearly be impracticable, so the numerosity requirement is met.

B. The Common Questions Requirement

> Common questions will generally exist if the class members' legal grievances arise out of the same practice or course of conduct on the part of the class opponent. Claims arising from interpretations of a form contract generally give rise to common questions. Class actions may be maintained even when the

> claims of members of the class are based on different contracts, so long as the relevant contractual provisions raise common questions of law and fact and do not differ materially. If later refinement of the issues reveals that seemingly similar contractual provisions merit differing interpretations, the court may create appropriate subclasses.

Janicik, 305 Pa. Super. at 133, 451 A.2d at 457. Plaintiffs ask that we certify a class of every borrower who was given a loan by the Bank where the interest rate was based on the "the Bank's prime rate of interest" which was defined in the form loan documents as "the rate of interest publicly announced from time to time by Bank in Philadelphia, Pennsylvania as its 'Prime Rate.'" Plaintiffs argue that each of such borrowers was misled by the Bank as to the interest rates that they were charged over the life of their loans.

The court assumes that each borrower had some understanding of the initial interest rate that it would be charged on the loan or it would not have taken out the loan. The court cannot, however, assume that each borrower had the same understanding as plaintiffs that the Bank's Prime Rate was equal to WSJ Prime Rate. Determining each class member's understanding of what the Bank's Prime Rate was tied to at the time each member entered into its loan is an individualized inquiry that is inappropriate for a class action. However, if, as plaintiffs claim, the Bank changed its Prime Rate from the WSJ Prime Rate to the WSJ Prime Rate plus 1%, and later changed it again to the WSJ Prime Rate plus 1.75%, without publicly announcing those changes, then the Bank breached each of the class members' loan agreements. The issue of breach is, therefore, a common question for the members of the two sub-classes of borrowers who had loans outstanding in 1991 and/or 1998 when the Bank changed the definition of its Prime Rate.[1]

[1] Borrowers who took out loans after the Bank redefined its Prime Rate are not members of the class because they, presumably, agreed to the rate that the Bank was charging at the time that they took out their loans.

C. The Typicality Requirement.

"The typicality requirement['s] . . . purpose is to determine whether the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that [its] pursuit of [its] own interests will advance those of the proposed class members." Janicik, 305 Pa. Super. at 134, 451 A.2d at 458.

Plaintiffs were borrowers who had loans outstanding from the Bank in 1991 when the Bank first redefined its Prime Rate, and plaintiffs were subsequently charged the redefined rate. Although the Bank redefined its Prime Rate again in 1998, it did not charge plaintiffs that rate, although it may have charged the redefined rate to, and failed to reimburse, other borrowers. Therefore, plaintiffs' claims are typical of Sub-Class I, but not of Sub-Class II, so they are appropriate class representatives of Sub-Class I only.

D. The Adequacy of Representation Requirement.

Plaintiffs must show that they "will fairly and adequately assert and protect the interests of the absent class members." Pa. R. Civ. P. 1702(4). In order to make this determination, the court must consider:

> 1) whether the attorney for the representative parties will adequately represent the interests of the class;
> 2) whether the representative parties have a conflict of interest in the maintenance of the class action; and
> 3) whether the representative parties have or can acquire adequate financial resources to assure that the interest of the class will not be harmed.

Id. at 1709. The court sees no reason why class counsel would not fairly and adequately represent the class. However, as stated previously, plaintiffs are members of Sub-Class One only, so plaintiffs' counsel must find new plaintiffs to represent Sub-Class Two.

E. The Fair and Efficient Method Requirement.

In determining whether a class action is a fair and efficient method of adjudicating the

controversy, the court shall consider:

> 1) whether common questions of law or fact predominate over any question affecting only individual members;
> 2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
> 3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> i) inconsistent or varying adjudications with respect to individual members of the class; or
>
> ii) adjudications [with preclusive effect over non-parties];
>
> 4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
> 5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
> 6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
> 7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Pa. R. Civ. P. 1708.

Consideration 1) favors class certification. As set forth in Section III.B. above, the question of whether the Bank breached the form loan documents by failing to publicly announce its redefined Prime Rate is a common question. If the Bank is found to have done so, then the amount of interest that the Bank overcharged may vary from class member to class member, but the calculation of such damages should be a fairly straightforward and simple matter.

Defendant argues that the issue of whether the four year Statute of Limitations for breach of contract actions bars plaintiffs' claims is not a common issue because the court must inquire into when each plaintiff discovered that he/she/it was being overcharged by the Bank. However, if the Bank uniformly concealed the redefinition of its Prime Rate from all class members, the statute of limitations may be tolled. Furthermore, the weight of authority supports plaintiffs' argument that alleged individual issues as to the application of statute of limitations will not

defeat certification if there are other common issues.[2] *See* In re: Linerboard Antitrust Litigation, 305 F.3d 145, 162 (3d Cir. 2002) (antitrust litigation); Mowbray v. Waste Management Holdings, Inc., 208 F.3d 288, 295-7 (1st Cir. 2000) (breach of contract); Hoxworth v. Blinder, Robinson & Co., Inc., 980 F.2d 912, 924 (3d Cir. 1992) (securities litigation).[3] Therefore, the common questions predominate over the individual ones.

Likewise, consideration 2) weighs in favor of certification. The approximately 58 and 128 sub-class members, all of whom should be known to the Bank, are not so numerous or hard to find as to be unmanageable. *See* Janicik, 305 Pa. Super. at 143, 451 A.2d at 462 ("The evidence here indicated that the names, addresses, and [relevant] records of all potential class members were centrally stored by [defendant]").

Consideration 3) also favors certification because there is a risk of inconsistent verdicts against the Bank if the class members' claims were to be prosecuted separately. *See* Janicik, 305 Pa. Super. at 143-4, 451 A.2d at 462-3 ("The class action, when compared to separate actions under this criterion, affords the speedier and more comprehensive determination of the claim and thus, the better means to insure recovery if the claim proves meritorious or to spare [defendant] repetitive piecemeal litigation if it does not.")

Consideration 4) favors certification because the court is unaware of any other actions pending involving the issues presented here. Consideration 5) also favors certification, because neither party has objected to this court as the appropriate forum in which to litigate this class action, and the court sees no reason why it cannot mange the class and resolve the class' claims

[2] It may be that, after ruling on summary judgment on the issue of the statute of limitations, the court will have to decertify or redefine the class, and/or bifurcate the litigation.

[3] "Federal precedent is instructive in construing Pennsylvania's class action rules. Many provisions of Pennsylvania's revised class action rules have been taken virtually verbatim from the federal rules; other provisions are derived from federal case law. Federal class action precedent is not, however, binding upon our courts." Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 127, 451 A.2d 451, 454, n. 3 (1982)

fairly and efficiently.

Neither party has informed the court as to what the average class member's damages might be, although there was some representation made at the hearing that plaintiffs' claimed damages are in the neighborhood of $25,000. It therefore appears on the scant record before the court that consideration 6) does not argue for class certification because the separate claims of individual class members may be sufficient in amount to support separate actions However, consideration 7) weighs in favor of class certification. Given that there are approximately 186 class members, all known to Bank, it does not appear that the additional expense of a class action, i.e. notice, will be disproportionate to the class' recovery.

CONCLUSION

For all the foregoing reasons, plaintiffs' Motion for Class Certification is granted and two sub-classes are certified, although one is be conditioned on the naming of a new class representative.

BY THE COURT,

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C. DARNELL JONES, II, J.