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

CUTTING EDGE SPORTS, INC., t/a SOFTBALL AMERICA,	:	MARCH TERM, 2003
	:	No. 01835
Plaintiff,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control No. 052277
BENE-MARC, INC.,	:	
	:	
Defendant,	:	
	:	
v.	:	
	:	
NORTH AMERICAN SPORTS FEDERATION, And NORTHLAND INSURANCE COMPANY,	:	
	:	
Additional Defendants.	:	

ORDER AND OPINION

AND NOW, this 28th day of September, 2004, upon consideration of plaintiff's Motion for Class Certification, defendants' responses 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 September 20, 2004, it is hereby **ORDERED** that said Motion is **DENIED** with leave to re-file within thirty (30) days of the date of entry of this Order in the event that a new representative plaintiff is found for the potential class.

BY THE COURT,

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GENE D. COHEN, J.

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NORTH AMERICAN SPORTS FEDERATION, And NORTHLAND INSURANCE COMPANY,	:	
	:	
	:	
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MEMORANDUM OPINION

The court hereby considers plaintiff's Motion for Certification of a Class of "all teams or leagues or entities acting on their behalf which purchased softball team or league liability insurance from the Bene-Marc, Inc. agency for the years 2001 and 2002." Upon consideration of the pleadings, motion papers, depositions, and all other matters of record, the court makes the following:

I. Findings of Fact

1. Defendant Bene-Marc, Inc. ("Bene-Marc") is an insurance broker that in 2001 and 2002 procured and administered an insurance program for additional defendant North American Sports Federation ("NASF") through which program NASF's members could obtain insurance coverage. NASF is a sanctioning body of amateur sports leagues, including softball.

2. In 2001, the liability insurance coverage offered to the NASF members was issued by Great American Alliance Insurance Co. (the "Great American Liability Policy"), and in 2002, it was issued by additional defendant Northland Insurance Co. (the "Northland Liability Policy").

3. In 2001, NASF members received a brochure offering them the right to purchase "Adult Softball Team Package" and "Adult Softball Team Liability Only" insurance (the "2001 Brochure"). The 2001 Brochure stated that both insurance packages included $2,000,000 in participant liability coverage with no deductible

4. In 2001, the Great American Liability Policy provided only $1,000,000 in participant liability coverage with a $250.00 deductible.[1]

5. The NASF members, including Plaintiff, who purchased the "Adult Softball Team Package" and the "Adult Softball Team Liability Only" insurance in 2001 thereby accepted the offer contained in the 2001 Brochure to purchase insurance that included $2,000,000 in participant liability coverage with no deductible.

6. In 2002, NASF members received a brochure offering them the right to purchase "Adult Softball Team Package" and "Adult Softball Team Liability Only" insurance policies (the "2002 Brochure"). The 2002 Brochure stated that both insurance packages included $2,000,000 in participant liability coverage with no deductible.

7. In 2002, the Northland Liability Policy provided no participant liability coverage. However, if a member purchased both the liability insurance and the excess accident insurance, i.e., the "Adult Softball Team Package," then that member did receive the promised participant liability coverage.

[1] Bene-Marc objects that the First Amended Class Action Complaint does not contain any allegations against Bene-Marc with respect to deficiencies in the Great American Liability Policy. The court disagrees. Plaintiff makes specific allegations as to the inadequacy of the policies for both years 2001 and 2002, and these allegations are incorporated by reference into its claims for breach of contract and unjust enrichment. *See* First Amended Class Action Complaint, ¶¶ 7, 10, 11, 17, 34 and 41.

8. The NASF members, including Plaintiff, who purchased the "Adult Softball Team Liability Only" insurance in 2002 thereby accepted the offer contained in the 2002 Brochure to purchase insurance that included $2,000,000 in participant liability coverage with no deductible.

9. If the offers contained in the 2001 and 2002 Brochures are found to have been made by Bene-Marc, and if the amount each member paid to Bene-Marc for the insurance that was offered is greater than the amount that each member should have paid for the insurance it actually received, then each member may claim the difference between what it paid and what it should have paid as breach of contract damages.

10. If the offers contained in the 2001 and 2002 Brochures are found not to have been made by Bene-Marc, Bene-Marc may still have been unjustly enriched by receiving commissions or fees based on the insurance that was offered to the members rather than on the lesser insurance that was received by the members.

11. Based on the aforementioned Findings of Fact, the proposed class is composed of the following sub-classes (collectively the "Class"):

a. All those NASF members who, in 2001, purchased "Adult Softball Team Liability Only" and "Adult Softball Team Package" insurance through Bene-Marc by submitting the enrollment form contained in, and paying the fees set forth in, the 2001 Brochure ("2001 Sub-Class").

b. All those NASF members who, in 2002, purchased "Adult Softball Team Liability Only" insurance through Bene-Marc by submitting the enrollment form contained in, and paying the fees set forth in, the 2002 Brochure ("2002 Sub-Class").

12. Plaintiff Cutting Edge Sports t/a Softball America ("Plaintiff") organizes adult softball leagues and is a member of NASF. In 2001 and 2002, Plaintiff purchased "Adult Softball Team Liability Only" insurance coverage through Bene-Marc.

13. In 2002, a participant in one of Plaintiff's softball games, Mark Mehler, injured his ankle, and Northland denied coverage for his damages under the Northland Liability Policy.

14. Plaintiff entered into a settlement agreement with Mr. Mehler and his wife in which Plaintiff assigned to them all its right, claims, and causes of action against Bene-Marc, NASF, Northland, Northfield Insurance Co, American National Life Insurance Company of Texas, and U.S. Risk Underwriters, for defense and indemnification in connection with Mr. Mehler's injuries.

15. The Mehlers are currently prosecuting Plaintiff's claims against Bene-Marc, Northland, NASF, and U.S. Risk Underwriters in the Philadelphia Court of Common Pleas, January Term, 2004, No. 003254 (the "Coverage Action").

II. Conclusions of Law

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 and defenses of the representative plaintiff are not typical of the class.

4. The representative plaintiff will not be able adequately to represent the class.

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 its burden of proof, plaintiff must establish sufficient underlying facts from which the court can conclude that each of the certification requirements are 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. At oral argument, the parties agreed that there are approximately 110 entities in the proposed Class. Joinder of so many plaintiffs would clearly be impracticable.

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.

In this case, the Class members entered into contracts based either on the 2001 or 2002 Brochures, all of which contracts were breached. However, since the breach of the 2001 contracts was different than the breach of the 2002 contracts, the damages calculations are different for the two types of contracts. Therefore, the court finds it appropriate to divide the Class into the 2001 Sub-Class and 2002 Sub-Class.

With respect to both sub-classes, however, the only questions remaining for the jury are whether the contracts the members entered into were with Bene-Marc or another entity, what damages, if any, the members suffered because they did not receive the insurance for which they contracted, and/or whether Bene-Marc was unjustly enriched. Therefore, there clearly are common questions of law and fact with respect to each sub-class and the Class as a whole.

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. "Typicality might not be satisfied . . . when the class representative has or is pursuing some other interest divergent from or adverse to the interests of the absent class members." *Id.*, 305 Pa. Super. at 134, n. 6, 451 A.2d at 458, n. 6, *citing*, Samuels v. Smock, 422 A.2d 902 (Pa. Commw. 1980).

Defendants claim that there are factual issues unique to Plaintiff's situation that make it a poor representative of the Class. Specifically, defendants note that Plaintiff was the only member of the Class that submitted an insurance claim, which was denied by Northland. Furthermore, Plaintiff, unlike the other Class members, assigned his claims for non-coverage

against Bene-Marc, NASF, and Northland, among others, to the Mehlers, and the Mehlers, standing in the shoes of Plaintiff, have brought claims against Bene-Marc for fraud, negligent misrepresentation, and malpractice in failing to deliver the $2,000,000 in participant coverage that it promised to Plaintiff in the 2002 Brochure.

If the Mehlers prevail in the Coverage Action, and one or more of the defendants is required to cover their damages, then it will be as if Plaintiff got the coverage that it was promised in the 2002 Brochure, and Plaintiff, unlike the other members of the 2002 Sub-Class, will not have received less coverage than it was promised.[2] Therefore, Plaintiff may not be a member of the 2002 Sub-Class he wishes to represent.

On the other hand, Plaintiff is a member of the 2001 Sub-Class, in that Plaintiff enrolled in the 2001 insurance program, paid its fee to Bene-Marc, did not receive the participant liability coverage stated in the 2001 Brochure, did not make any claims under the Great American Liability Policy, and suffered damages equal to the difference in value, if any, between what Plaintiff paid and what it should have paid for what it received.

D. The Adequacy of Representation Requirement.

Plaintiff must show that it "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.

[2] If Plaintiff were also to prevail on behalf of the 2002 Sub-Class in this action, and receive a refund of the amount it overpaid for the $2,000,000 in participant coverage that the 2002 Sub-Class did not receive, then Plaintiff would in effect obtain a double recovery.

Id. at 1709. Defendants do not dispute that Plaintiff has satisfied requirements 1) and 3), but defendants argue that the Coverage Action creates a conflict of interest between Plaintiff and the other members of the 2002 Sub-Class.

As previously stated, the court in the Coverage Action may determine that Bene-Marc must pay the Mehlers' claims because Bene-Marc promised, and must deliver to, Plaintiff $2,000,000 in participant coverage. In that eventuality, Plaintiff, but not the absent class members, would receive the coverage for which it paid, and Plaintiff would cease to be a member of the 2002 Sub-Class. Because of this conflicting litigation in which Plaintiff is involved (by proxy), it cannot fairly and adequately represent the Class, and a new class representative must be found. *See* Samuels v. Smock, 422 A.2d 902 (Pa. Commw. 1980) (plaintiff who was involved in separate litigation regarding his eligibility for pension benefits was not a fair and adequate representative of class complaining about overpayments made by pension fund).

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 II.B. above, the only questions remaining in this suit are common questions, so they clearly predominate over the individual ones.

Likewise, consideration 2) weighs in favor of certification. The approximately 110 Class members, all of whom should be known to Bene-Marc, NASF and/or Northland, 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 insurance records of all potential class members were centrally stored by [defendant insurer]").

Consideration 3), which favors certification cancels out consideration 4), which disfavors it. The existence of the Coverage Action weighs against certification because the claims asserted in that action and their resolution may be inconsistent with the relief requested by the Class in this action. However, there is also a risk of inconsistent verdicts against Bene-Marc 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 [nationwide] 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 5) 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 its claims fairly and efficiently.

Both considerations 6) and 7) weigh in favor of class certification. As a practical matter, the claims of each Class member are so small[3] that it is unlikely that any Class member would bring a separate claim given the expense of discovery and trial.[4] However, if their claims are prosecuted as a class action, then those shared expenses do not loom so large. Furthermore, given that there are approximately 110 Class members, all known to Bene-Marc, it does not appear that the additional expense of a class action, i.e. notice, will be disproportionate to the Class' recovery. *See* Kelly v. County of Allegheny, 519 A.2d 213, 546 A.2d 608 (1988) (class of 10,429 members whose average recovery was $13.61 certified since cost of locating and notifying class members would not be great).

CONCLUSION

For all the foregoing reasons, plaintiff's Motion for Class Certification is denied with leave to re-file it if a new class representative is found.

BY THE COURT,

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GENE D. COHEN, J.

[3] It appears that the maximum breach of contract damages that each Class member suffered per year was the total premium each paid, approximately $50-55.00 per team. However, it seems likely that their damages are less than that since they did receive some insurance coverage, just not as much as they were promised.

[4] In order to prove Bene-Marc's liability, plaintiff will have to put on fact witnesses regarding who made the offer contained in the brochures, and in order to prove the Class members' damages, plaintiff will most likely need to put on an expert witness regarding the amount of insurance premiums that the Class members should have paid.