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

IRENE MILKMAN,	:	June Term, 2000
Plaintiff	:	
	:	No. 3775
v.	:	
	:	Commerce Case Program
AMERICAN TRAVELLERS LIFE	:	
INSURANCE COMPANY, et al.,	:	Control No. 072171
Defendants	:	

OPINION

This Opinion is being issued to comply with the requirement under Pennsylvania Rule of Civil Procedure 1710(a) that a Court's order resolving a motion for certification be accompanied by findings of fact and conclusions of law setting forth the reasons for its decision. In addition to addressing the stipulated motion for certification, the Court has also taken this opportunity to address selected issues raised by the Parties' motion for class settlement and the opposition thereto of the Office of the Attorney General of the State of Texas. For the reasons set forth in this Opinion, the class proposed by the Parties is certified, and notice of the settlement proposed by the Parties, as modified, shall be sent to the certified class.

FINDINGS OF FACT

1. Defendant American Travellers Life Insurance Company ("American Travellers") is a Pennsylvania corporation authorized by the Pennsylvania Insurance Commissioner to transact business as a life and disability insurer in the Commonwealth. Complaint at ¶ 5. American

Travellers has also transacted business in Texas and California as ATL Life Insurance Company ("ATL"). Id. at ¶ 6.

2. Defendant Conseco Senior Health Insurance Company ("Conseco") is the leading providers of long-term care insurance in the United States. Complaint at ¶ 7. Conseco is a wholly owned subsidiary of Conseco, Inc. and acquired American Travellers in 1996. Id.

3. Plaintiff Irene Milkman is a resident of Pennsylvania. Complaint at ¶ 3.

4. The Plaintiff seeks to represent a class of persons who purchased American Travellers or ATL "guaranteed renewable" long-term care ("LTC") and home health care ("HHC") policies ("Policies") from the Defendants and their agents from January 1, 1989 to the present and whose premiums were increased by the Defendants. Complaint at ¶ 10.

5. Each of the Policies includes the following language:

> We can change the Renewal Premium Rates. We can only change them if they are changed for all policies in your state on this policy form. Notice of any change in rates will be sent at least 31 days in advance.

Complaint at ¶ 40.

6. According to the Plaintiff, the Defendants developed the Policies as an "experimental" insurance product that was guaranteed as renewable and gave no indication that the Policy premiums would be increased. Plaintiff's Memorandum at 7-8. When the Defendants sold the Policies, they supposedly were aware that the Policy premiums would have to be increased substantially to ensure the viability of the Policies as a whole. Complaint at ¶¶ 28-29.

7. After Conseco acquired American Travellers in 1996, it continued to sell the Policies. Around this time, the Defendants allegedly decided that they would seek increases in the Policies'

premiums but did not inform either existing or potential Policyholders. Complaint at ¶ 36. The Defendants also allegedly did not inform applicants that the "renewable" Policies had an exceptionally high lapse rate. Id. at ¶ 39.

8. When the Defendants raised the Policy premiums, they did so by way of a letter that stated that the increases were a result of either increased medical costs, higher claims rate or other cost increases. Plaintiff's Memorandum at 8. The Plaintiff contends that these explanations are false. Id.

9. The Defendants also "closed the book" on the Policies by ceasing to sell new Policies and limiting service to existing Policyholders. Plaintiff's Memorandum at 8.

10. As a result of the Policy premium increases, many Policyholders were forced to discontinue their insurance coverage and were unable to secure insurance similar to that provided by the Policies elsewhere. Complaint at ¶ 29.

11. The Plaintiff applied for an LTC Policy on May 19, 1990. Complaint at ¶ 3. In a letter dated July 13, 1999, the Plaintiff was notified that the quarterly premiums for her Policy would be increased 15 percent from $87.38 to $100.50. Id. at ¶ 45. This letter claimed that the increases were necessary as a result of higher claims than expected. Id. at ¶ 46.

12. Cases similar to this one have been initiated in other states. The first of these cases was Blau v. American Travellers, Orange County Superior Court Case No. 00C03063, filed in California on March 8, 2000. A second suit, Lane v. American Travellers, San Diego Superior Court Case No. GIF 745641, was filed in California on March 24, 2000.

13. On June 29, 2000, the Plaintiff initiated the instant action. In her amended complaint, the Plaintiff asserts claims for violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law,[1] negligent misrepresentation, fraud/intentional misrepresentation and constructive fraud.

14. A fourth action captioned Weaver v. Conseco Senior Health Insurance Co., was filed in Harris County, Texas on November 22, 2000.

15. The Parties in this action, as well as the Blau and Lane actions, have coordinated their discovery efforts and engaged in extensive discovery.

16. On July 27, 2001, the Plaintiff and the Defendants filed a Joint Motion for Preliminary Approval of Proposed Class Action Settlement ("Motion"). The Motion addresses class certification and the proposed settlement of the action.

17. The Parties seek certification of the following "Class":

> All persons who purchased Home Health Care ("HHC"), Nursing Home or Long-Term Care ("LTC") Policies from 1975 to present from the following companies: Conseco Senior Health Insurance Company (except for Preference and FQ series), Conseco Health Insurance Company (except for Solution Series), American Travellers Life Insurance Company, ATL Life Insurance Company, Great Republic Life Insurance Company Transport Life Insurance Company, Universal Fidelity Life Insurance Company, Pioneer Life Insurance Company, Conseco Life Insurance Company of New York (except for Preference, FQ, and Solutions series), J.C. Penney Life Insurance Company, Continental Life Insurance Company, National Group Life Insurance Company and Health and Life Insurance Company of America. . . . Excluded from the class are the Defendants, their affiliates, subsidiaries, and any judicial officer presiding over the settlement.

Motion at 13.

---

[1] 73 Pa. C.S. §§ 201-1-201-9.3.

18. The Parties have also proposed a settlement ("Settlement") with the following terms:

- The Defendants are released from liability for all claims members of the Class have had, currently have or will have against the Defendants, including the claims raised in the Complaint. Motion Ex. A at ¶ III.1.

- Class members with in-force or current Policies may choose: (1) to receive a replacement policy at a five percent discount; (2) to exchange the Policy for a refund of all premiums paid less claims paid; or (3) to keep the Policy with the right to request a refund of all premiums paid less claims paid if premiums increase above a certain amount. In addition to these options, Class members with in-force Policies are also entitled to either a five percent match on initial premiums for a new Conseco annuity policy or a 50 percent match on first year premiums for a new Conseco life insurance policy. Motion Ex. A at ¶ III.3.A.

- Class members whose Policies lapsed due to premium increases may choose: (1) a refund of all premiums paid less claims paid; and either (2) a five percent match on initial premiums for a new Conseco annuity policy; or (3) a 50 percent match on first year premiums for a new Conseco life insurance policy. Motion Ex. A at ¶ III.3.B.

- Class members whose Policies lapsed due to any other reason or who are currently receiving benefits may choose: (1) a five percent match on initial premiums for a new Conseco annuity policy; or (2) a 50 percent match on first year premiums for a new Conseco life insurance policy. Motion Ex. A at ¶¶ III.3.C, III.3.D.

- All Policyholders who wish to claim any portion of the recovery provided for under the Settlement must elect their desired remedy and mail a prepared election form no later than 10 days before a final approval hearing. Motion Ex. A at ¶ III.4.F. Those Policyholders who fail to respond will be limited to keeping the Policy with the right to request a refund of all premiums paid less claims paid if premiums increase above a certain amount. Id.

- Class members wishing to be excluded from the Settlement must send a written request for exclusion no later than 25 days before a final approval hearing.

- Each of the named plaintiffs in the instant action, Blau and Lane will receive incentive compensation of up to $10,000. Motion Ex. A at ¶ III.5.

- Plaintiff's counsel may apply for attorneys' fees of up to $4.5 million. Motion Ex. A at ¶ III.6.

- The Parties will take steps to stay the Blau, Lane and Weaver actions, and, once the Settlement is approved by the Court, the Parties will move for the dismissal of Blau and Lane. Motion Ex. A at III.7.

19. The Parties have submitted a proposed notice of the Settlement to be sent to the Class ("Notice"). According to the Parties' submissions, the Notice will be sent to all identifiable Class members via first class mail and will be published in USA Today.

20. The Office of the Attorney General of the State of Texas ("Attorney General's Office") requested permission to and subsequently was permitted to file an amicus curiae brief in this action opposing the Motion.[2]

DISCUSSION

The Class meets the requirements for certification and has been certified. Moreover, the Notice, as modified at the Court's instruction, is appropriate and should be sent to Class members.

X. The Plaintiff Is Entitled to Certification of the Class

The purpose behind allowing class action suits is "to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation

[2] No Pennsylvania decision or rule addresses whether an amicus curiae brief is permitted at the trial court level. However, several Pennsylvania appellate court decisions have noted that amicus curiae briefs were filed with the trial court and have not criticized this action. Altshuler v. Pennsylvania Liquor Control Bd., 729 A.2d 1272, 1274 n.5 (Pa. Commw. Ct. 1999) (noting filing of amicus brief with trial court); Cherry Valley Assocs. v. Stroud Twp. Bd. of Supervisors, 109 Pa. Commw. 246, 530 A.2d 1039 (1987) (where petition to intervene was denied, trial court allowed petitioner to file amicus brief). Cf. Newberg v. Board of Public Educ., 330 Pa. Super. 65, 69, 478 A.2d 1352, 1354 (1984) (appellants who participated in trial court proceedings as amici curiae had no standing to appeal the trial court's final decree); In re Petition to Amend Home Rule Charter of City of Pittsburgh, 69 Pa. Commw. 292, 450 A.2d 802 (1982) (one who appears as an amicus curiae before the trial court is not a party and does not have standing to appeal). This implies that the Attorney General's Office may file an amicus brief with the Court, and the Court granted the Attorney General's Office's request.

and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate." DiLucido v. Terminix Int'l, Inc., 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (1996) (citing Bell v. Beneficial Consumer Discount Co., 465 Pa. 225, 231, 348 A.2d 734, 737 (1975)). See also Lilian v. Commonwealth, 467 Pa. 15, 21, 354 A.2d 250, 253 (1976) ("[t]he class action in Pennsylvania is a procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims"). For a suit to proceed as class action, Rule[3] 1702 requires that five criteria be 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 Rule 1709; and
> (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Rule 1702.[4] In contrast to Federal Rule of Civil Procedure 23, which governs class action suits brought in federal court, in Rule 1702 "does not require that the class action method be 'superior' to alternative modes of suit." Weinberg v. Sun Co., 740 A.2d 1152, 1163 (Pa. Super. Ct. 1999).

The burden of proving each of these elements is initially on the moving party, although this burden "is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made." Cambanis v. Nationwide Ins. Co., 348 Pa. Super. 41, 45, 501 A.2d

---

[3] Each Pennsylvania Rule of Civil Procedure is referred to individually as a "Rule."

[4] It has been noted that "the requirements for class certification are closely interrelated and overlapping. . . ." Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 130, 451 A.2d 455 (1982) (citations omitted).

635, 637 (1985) (citing Bell v. Beneficial Consumer Discount Co., 241 Pa. Super. 192, 205, 360 A.2d 681, 688 (1976)). Once the moving party has established that each of the elements is satisfied, "the class opponent shoulders the burden, which has shifted, of coming forward with contrary evidence challenging the prima facie case." D'Amelio v. Blue Cross of Lehigh Valley, 347 Pa. Super. 441, 449, 500 A.2d 1137, 1141 (1985) (citations omitted).

A. Numerosity

The numerosity requirement for maintaining a class action is not determined by applying a specific formula:

> Whether the number is so large as to make joinder impracticable is dependent not upon any arbitrary limit, but rather upon the circumstances surrounding [each] case. In determining numerosity, the court should examine whether the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants. The class representative need not plead or prove the number of class members so long as she 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 v. Prudential Ins. Co., 305 Pa. Super. 120, 131-132, 451 A.2d 451, 456 (1982) (citations and quotation marks omitted).

The Plaintiff has represented that the Class consists of approximately 500,000 members in all 50 states, the District of Columbia, Guam, the Virgin Islands and Puerto Rico. This clearly satisfies the numerosity requirement for certification.

B. Commonality

A plaintiff generally satisfies its burden of showing commonality where "the class members' legal grievances arise out of the same practice or course of conduct on the part of the class opponent."

Foust v. Southeastern Pa. Transp. Auth., 756 A.2d 112, 118 (Pa. Commw. Ct. 2000) (citing Janicik, 305 Pa. Super. at 133, 451 A.2d at 457) (quotation marks omitted). See also D'Amelio, 347 Pa. Super. at 452, 500 A.2d at 1142 ("[w]hile the existence of individual questions is not necessarily fatal, it is essential that there be a predominance of common issues shared by all class members which can be justly resolved in a single proceeding"); Allegheny County Housing Auth. v. Berry, 338 Pa. Super. 338, 342, 487 A.2d 995, 997 (1985) ("[t]he common question of fact means precisely that the facts must be substantially the same so that proof as to one claimant would be proof as to all"). In examining the commonality of the class's claims, a court should focus on the cause, and not the amount, of the alleged damages. Weismer v. Beech-Nut Nutrition Corp., 419 Pa. Super. 403, 409, 615 A.2d 428, 431 (1992) ("[o]nce a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification").

In this case, the Parties have set forth 11 allegedly common questions of law and fact, including:

- Whether the Defendants fraudulently induced the sale and renewal of the Policies by withholding material information or otherwise defrauded the Class members;
- Whether the Defendants engaged in inadequate underwriting procedures and/or wrongfully underpriced their LTC Policies to stimulate Policy sales;
- Whether the Defendants affirmatively concealed from their policyholders the defects inherent in the LTC Policy;
- Whether the Defendants engaged in unfair, deceptive, misleading or negligent practices;
- Whether the Defendants' failure to disclose that these level-premium policies were caught in a "death spiral" constitutes fraud;
- Whether the Defendants committed acts intentionally and/or as part of a scheme reasonably calculated to deceive and to defraud Class members;

- Whether the Defendants conspired with each other and/or others;
- Whether the Defendants improperly sought to gain an unfair advantage against individuals targeted for Policy sales;
- Whether the Defendants improperly sought to mislead individuals targeted for Policy sales about the nature of the Policies;
- Whether the Class has sustained damages; and
- The proper measure of damages to be awarded the Class.

This is sufficient to satisfy the commonality requirement for certification.

C. Typicality

As a third step in the certification test, a class action plaintiff must show that the class action parties' claims and defenses are typical of the entire class. The purpose behind this requirement "is to determine whether the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members, to ensure that the pursuit of their interests will advance those of the proposed class members." DiLucido v. Terminix Int'l, Inc., 450 Pa. Super. 393, 404, 676 A.2d 1237, 1242 (1996). The existence of "factual differences with regard to each member of the class does not render the named parties' claims atypical of the class as a whole." Cribb v. United Health Clubs Inc., 336 Pa. Super. 479, 484, 485 A.2d 1182, 1185 (1985) (citing Ablin, Inc. v. Bell Tel. of Pa., 291 Pa. Super. 40, 435 A.2d 208 (1981)).

To support their assertion that her claims are typical of the entire Class, the Plaintiff points to the following:

- The Plaintiff applied for a Policy from American Travellers on May 19, 1990 and subsequently purchased a Policy. Complaint at ¶ 3.

- The Plaintiff was informed of a 15 percent increase in the premiums on her Policy by one of the Defendants' form letters. Complaint at ¶ 45.

- The reasons given for the increase in the Plaintiff's premiums allegedly were false. Complaint at ¶ 46.

- The Plaintiff suffered harm similar to that allegedly suffered by the rest of the Class. Complaint at ¶ 51.

Based on these representations, the Court concludes that the Plaintiff's claims are typical of those of the Class.

D. Fair and Adequate Representation

When reviewing whether a class action plaintiff will fairly and adequately represent the class's interests, a court must consider, among other matters, the criteria set forth in Pennsylvania Rule of Civil Procedure 1709:

> (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 interests of the class will not be harmed.

Rule 1709. See also Haft v. United States Steel Corp., 305 Pa. Super. 109, 117, 451 A.2d 445, 449 (1982) (where plaintiff demonstrated his willingness to pursue the litigation and his considerable knowledge of the underlying facts and circumstances, he was an appropriate class representative).[5] It

[5] Courts have held that "an affidavit of counsel that it will advance the necessary costs is all that is required" to meet the adequate financial resources requirement. O'Neill, 1998 WL 1543498, at *7 (quoting Janicik, 305 Pa. Super. at 137-38, 451 A.2d at 459-60).

is generally presumed that no conflict of interest exists and that the plaintiff's attorney is adequate. Janicik, 305 Pa. Super. at 136-37, 415 A.2d at 458-59.

As demonstrated by the credentials set forth in the Motion, the Plaintiff's attorneys are more than capable of representing the interests of the Class and there do not appear to be any conflicts of interest between the Plaintiff and the Class. See Plaintiff's Memorandum at 17-22. In addition, the Motion asserts that Plaintiff's counsel has advanced and will continue to advance all costs of litigation, while the Defendants have agreed to pay the costs of Notice and Settlement administration. Motion at 22-23. Thus, the Plaintiff has met the requirement of showing she will be a fair and adequate representative of the Class.

E. Fair and Efficient Method

To determine if a class action would constitute a fair and efficient method of resolving the issues in dispute, a court must look for the following criteria:

> (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 which would confront the party opposing the class with incompatible standards of conduct;
> > (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (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.

Rule 1708.

1. Predomination of Common Questions of Law

The issues regarding the predomination of common questions of law have been discussed supra.

2. Management Difficulties

While a court must consider the potential difficulties in managing the class action, any such difficulties generally are not accorded much weight:

> Problems of administration alone . . . ordinarily should not justify the denial of an otherwise appropriate class action, for to do so would contradict the policies underlying this device. Yaffe v. Powers, 454 F.2d 1362, 1365 (1st Cir. 1972). Accord, Explanatory Note to Pa. R. Civ. P. 1708 (manageability criterion should not be employed as an "escape hatch" to defeat otherwise proper class action); Manual for Complex Litigation, § 1.43 (1981). Rather, the court should rely on the ingenuity and aid of counsel and upon its plenary authority to control the action to solve whatever management problems the litigation may bring. Buchanan v. Brentwood Federal Savings & Loan Ass'n, 457 Pa. 135, 161, 320 A.2d 117, 131 (1974); In re Antibiotic Antitrust Actions, 333 F. Supp. 278, 282-83 (S.D.N.Y. 1971); Newberg, Newberg on Class Actions, § 2100.

Janicik, 305 Pa. Super. at 142, 451 A.2d at 462.

Given the willingness of the Parties to cooperate in advancing toward settling this matter, the Court believes that any difficulties in managing this case can be easily overcome. Thus, the Plaintiff has satisfied the manageability requirement.

3. Risks of Separate Actions and Other Litigation

In considering the effect of separate actions, a court should not limit its review to questions of issue and claim preclusion:

> The precedential effect of a decision, even if incorrect, may have a chilling effect on the assertion of similar claims, and, combined with the expiring of statutes of limitation, may often "substantially impair or impede" potential litigants' ability to protect their interests. Moreover, as with the related criteria concerning the complexity and expenses of litigation, the court may consider the parties' circumstances and respective ability to pursue separate actions.

Janicik, 305 Pa. Super. at 143, 415 A.2d at 462. See also Cambanis, 348 Pa. Super. at 54, 501 A.2d at 642 ("there are risks of inconsistent adjudications where several trial courts may be faced with seemingly identical cases and the resolution of one case may have a chilling effect on others").

Here, the Parties have coordinated their actions with those undertaken in Blau and Lane, and both of those cases are addressed by the Settlement. In addition, no class has been certified in Weaver, which was not initially filed as a class action and has not progressed beyond the preliminary stage. Accordingly, no other actions are obstacles to certifying the Class.

4. Propriety of Forum

The Philadelphia Court of Common Pleas Trial Division appears to be an appropriate forum for this matter. American Travellers is a Pennsylvania corporation, and a number of Class members are

Pennsylvania residents. This supports the conclusion that the Court is a proper forum for the resolution of issues presented in the Complaint.

5. Feasibility of Separate Actions and Recovery of Individual Class Members

Although no precise figures are given for the Class as a whole, the Complaint alleges that the Plaintiff saw her quarterly Policy premiums increased by $13.12. This is low enough to preclude separate actions for each Class member, yet large enough to justify the expense and effort of maintaining this suit as a class action. Cf. Kelly v. County of Allegheny, 519 Pa. 213, 223-24, 546 A.2d 608, 613 (1988) (recovery of $13.61 per plaintiff was neither "trivial" nor "de minimis" and justified class action). In addition, the consequences of up to 500,000 Class members filing individual claims is a concern and militates in favor of certification. As a result, the Plaintiff has satisfied all seven elements to show that a class action is a fair and efficient method of resolving this dispute and are entitled to certification of the Class.

XI. Certification of a National Class with an "Opt Out" Procedure for the Entire Class Is Appropriate

The Parties have requested that the Court employ an "opt out" notification procedure for non-residents of Pennsylvania. The Attorney General's Office, in turn, has asked that Texas residents be subject to an "opt in" procedure. The Court agrees with the Parties that an "opt out" procedure is more appropriate here.

The Court recently had an opportunity to examine whether Pennsylvania requires nonresidents to "opt in" to a Pennsylvania class. In Parsky v. First Union Corp., February Term, 2000, No. 772, 2001 WL 987764 (C.P. Phila. Aug. 17, 2001), the Court examined Klemow v. Time, Inc., 466 Pa.

189, 353 A.2d 12 (1976), and Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), among other cases, to determine whether Pennsylvania permits the use of an "opt out" procedure for nonresidents:

> Klemow's "opt in" mandate appears to have been supplanted entirely by Phillips Petroleum. As noted supra, the Klemow court's overriding concern was with the constitutional restraints on a court's exercise of personal jurisdiction, and all of the cases cited in the Klemow footnote refer to personal jurisdiction or due process requirements.[6] While valid in 1976, this concern was removed when the Supreme Court in Phillips Petroleum held that an "opt out" procedure for nonresident class action plaintiffs was constitutionally permissible. As a result, Phillips Petroleum's expansion of the boundaries of personal jurisdiction rendered the reasons underlying the limitations imposed in Klemow moot, leading this Court to question whether present-day nonresident class members are generally required to "opt in."[7]

---

[6] Indeed, the Klemow cases hardly refer to Pennsylvania law at all. See Botwinick v. Credit Exch., Inc., 419 Pa. 65, 213 A.2d 349 (1965) (Pennsylvania court could not constitutionally exercise personal jurisdiction over a New York corporation merely because it owned a Pennsylvania subsidiary); Hanson v. Denckla, 357 U.S. 235 (1958) (Florida court's exercise of personal or in rem jurisdiction over trustee or trust did not comport with due process requirements); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (statutory notice in newspaper did not satisfy constitutional due process requirements for notice); Pennoyer v. Neff, 95 U.S. 714 (1877) (exercise of personal jurisdiction over defendant did not comport with due process requirements); Simpson v. Simpson, 404 Pa. 247, 172 A.2d 168 (1961) (court had personal jurisdiction over defendant); McGinley v. Scott, 401 Pa. 310, 164 A.2d 424 (1960) (Pennsylvania court had personal jurisdiction over Commonwealth officer).

[7] For the same reason, the 1977 Explanatory Notes that accompany Pennsylvania's class action rules may be equally inapplicable, as they predate Phillips Petroleum and are based on perceived limitations to personal jurisdiction. See also Neal v. Lu, 365 Pa. Super. 464 n.1, 471, 530 A.2d 103, 107 n.1 (1987) ("the explanatory notes are not part of the rules themselves, and therefore do not bind our interpretation"). Moreover, the statement in Weinberg that the Pennsylvania Rules of Civil Procedure "provide an explicit procedure for residents of other states to submit themselves to our jurisdiction and be included in Pennsylvania class actions" is no more than dictum and is not binding on the Court. See T.B. v. L.R.M., 753 A.2d 873, 883 n.2 (Pa. Super. Ct. 2000) (dictum in a Pennsylvania Superior Court decision is not binding on a Pennsylvania trial court).

There is little reason for concern that this interpretation of the Pennsylvania class action rules alone will make Pennsylvania an especially attractive forum for national class action suits. As noted by the Supreme Court in Phillips Petroleum, the majority of states have class action rules that allow an "opt out" procedure for nonresidents. 472 U.S. at 814 n.5.

2001 WL 987764, at *3. The Court went on to note that revisions in Pennsylvania's class action rules and the goal of judicial economy supported the conclusion that an "opt out" procedure could be used for Pennsylvania residents and non-residents.[8]

The use of an "opt out" procedure is even more appropriate here. It is the "the long-standing public policy of this Commonwealth to permit the aggregation of small claims which otherwise could not be litigated in individual actions." Kelly v. County of Allegheny, 519 Pa. 213, 223, 546 A.2d 608, 612-13 (1988). See also Lilian v. Commonwealth, 467 Pa. 15, 21, 354 A.2d 250, 253 (1976) ("[t]he class action in Pennsylvania is a procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims"); DiLucido v. Terminix Int'l, Inc., 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (1996) (Pennsylvania's class action rules are designed, in part, to provide "small claimants with a method to seek compensation for claims that would otherwise be too small to litigate"). It is precisely these small claims that are likely to be negatively impacted by establishing an "opt in" procedure:

> [R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people - especially small claims held

---

[8] In Parsky, the Court also noted that there was little likelihood that an "opt out" procedure would harm the interests of any non-resident class member:

> It is improbable that there exists among the [non-resident class members] a person who has a significant claim that he or she is interested in pursuing separately but who is unable to follow the "opt out" directions set forth in the Notice. Cf. Phillips Petroleum, 472 U.S. at 814 ("we do not think that the Constitution requires the State to sacrifice the obvious advantages in judicial efficiency resulting from the 'opt out' approach for the protection of the rara avis portrayed by petitioner").

Slip op. at 9.

> by small people - who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government.

Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 397-98 (1967).

These concerns were echoed by the Supreme Court in Phillips Petroleum, in which the Court noted the harm to small claimants and the adverse effect on judicial economy arising from an "opt in" mandate:

> Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution. If, on the other hand, the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to "opt out."

472 U.S. at 812-13 (footnote and citation removed).

In Parsky, the Court found it "improbable that any of the [c]lass members are uneducated and unfamiliar with business and the law" and assessed each class member's claim at approximately $50,000. 2001 WL 987764, at *2 n.2. Here, the value of each Class member's claim is much smaller, and Class members are not likely to have the business acumen possessed by the class members in Parsky, all of whom were common trust fund investors. Moreover, it is even more unlikely in the instant case that any Class member who has a significant claim is incapable of following the "opt

out" directions and pursuing an independent action. Consequently, the reasons set forth in Parsky for using an "opt out" procedure are even more persuasive in the instant matter.

The Attorney General's Office has requested that an "opt in" procedure be used with respect to Texas Class members. Rule 1711 allows a court to require class or subclass members to opt in when there are "special circumstances." Rule 1711(b). There is no evidence that such circumstances exist here. As a result, all Class members, including Texas residents, are to be subject to an "opt out" procedure.[9]

XII. The Class Should Be Notified of the Settlement

Under Pennsylvania law, a class action may not be settled without a hearing and court approval. Rule 1714(a). In Dauphin Deposit Bank and Trust Co. v. Hess, 556 Pa. 190, 727 A.2d 1076 (1999), the Pennsylvania Supreme Court noted that "settlements are favored in class action lawsuits" and held that the following seven factors should be considered when evaluating the propriety of a proposed class action settlement:

1. the risks of establishing liability and damages;
2. the range of reasonableness of the settlement in light of the best possible recovery;
3. the range of reasonableness of the settlement in light of all the attendant risks of litigation;
4. the complexity, expense and likely duration of the litigation;

[9] This is not to say that the Parties' interpretation of Rule 1711 as barring "opt in" procedures for all consumer class actions is correct. As the Parties point out, the 1977 Explanatory Rule to Rule 1711 states that the "special circumstances" provision "may never be applied to conventional consumer class actions involving numerous members of a class claiming only small amounts who could not conduct their own litigation." The effect of this statement as to national class actions, however, remains unresolved. In the instant case, it is only because the absence of special circumstances is so evident that the Court need not explore the term's definition in any greater depth.

5. the state of the proceedings and the amount of discovery completed;
6. the recommendations of competent counsel; and;
7. the reaction of the class to the settlement.

Dauphin Deposit, 556 Pa. at 197, 727 A.2d at 1076 (citing Buchanan v. Century Fed. Sav. & Loan Ass'n, 259 Pa. Super. 37, 393 A.2d 704 (1978)). In considering these factors, there is no exact calculus or formula for the court to use:

> In effect the court should conclude that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights. As with valuation problems in general, there will usually be a difference of opinion as to the appropriate value of a settlement. For this reason, judges should analyze a settlement in terms of a "range of reasonableness" and should generally refuse to substitute their business judgment for that of the proponents.

Buchanan, 259 Pa. Super. at 46-47, 393 A.2d at 709 (citations and footnotes omitted).

Given the nature of the factors set forth supra, it is clear that a Pennsylvania court may not make a final determination as to the propriety of any settlement plan without waiting to hear and weighing the class members' positions. See Dauphin Deposit Bank & Trust Co. v. Hess, 698 A.2d 1305 (Pa. Super. Ct. 1997), aff'd, 556 Pa. 190, 727 A.2d 1076 (1999) ("Buchanan requires that a court know the class members' reaction to the proposed settlement in advance of making a determination as to the 'reasonableness' of the plan"). It remains unclear, however, exactly what procedure a Pennsylvania court should follow in reviewing a proposed class action settlement after certification.

In the absence of such binding rule or case law, the Court believes that the procedure used for proposed settlements in federal class action suits brought under Federal Rule of Civil Procedure 23 ("Rule 23") is instructive:[10]

> Approval of class action settlements involves a two-step process. First, counsel submit the proposed terms of settlement and the court makes a preliminary fairness evaluation. In some cases this initial evaluation can be made on the basis of information already known to the court, supplemented as necessary by briefs, motions, or informal presentations by the settling parties. The court may want to hear not only from counsel but also from the named plaintiffs, from other parties, and from attorneys who did not participate in the negotiations. The judge may also, at this preliminary stage or later, hear the views of the parties' experts or seek the advice of a court-appointed expert or special master. If the court has reservations, it may advise the parties, who may wish to resume negotiations in an effort to remove potential obstacles to approval.
>
> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Manual for Complex Litigation, 3d § 30.41 at 237. See also In re Nasdaq Market-Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (noting that "[p]reliminary approval of a proposed settlement is the first in a two-step process required before a class action may be settled" and

[10] While not binding, federal cases interpreting the federal class action rules, as well as the federal rules themselves, can have persuasive value in Pennsylvania courts. McMonagle v. Allstate Ins. Co., 460 Pa. 159, 167, 331 A.2d 467, 471-72 (1975). Looking to Rule 23 is especially justified here, as Rule 1714 "incorporates the provisions of present Federal Rule 23(e)," which governs the dismissal of federal class actions. Rule 1714 Explanatory Note–1977.

summarizing the test described supra); Hefty v. All Other Members of the Certified Settlement Class, 680 N.E.2d 843, 851 (Ind. 1997) (citing the Manual for Complex Litigation, 3d for the principle that "[a] trial court's approval of a class action settlement as fair is a two step process: (1) a preliminary evaluation of the fairness of the settlement and (2) a formal fairness hearing where arguments for and against settlement are put forth"). Hence, the Court must undertake a preliminary examination of the Settlement with an eye toward the seven factors set forth in Dauphin County. If the Settlement falls within the "range of possible approval," the Court will schedule a formal fairness hearing.

The Court admits to having concerns about the Settlement. Effectively, the Settlement does little more than allow Class members to purchase more insurance from the Defendant, albeit at a reduced and discounted rate. Those Class members who choose not to purchase additional insurance may be reimbursed for premiums paid but remain, from what the Complaint alleges, uninsured and insurable. The Plaintiff is excepted from these limits on compensation, as she is entitled to up to $10,000 as an "incentive award." Meanwhile, the Plaintiff's attorneys will receive up to $4.5 million.[11]

Nevertheless, the Settlement does offer some obvious benefits to the members of the Class. Many of the Class members are advanced in age and have an interest in seeing this matter resolved as promptly as possible. In addition, the Settlement allows Class members a range of options and may allow certain members of the Class access to insurance benefits that would otherwise be unavailable. It

[11] It is asserted that this value represents approximately 15 to 18 percent of the Settlement's value. This approximation, however, appears to assume that each Class member will take full advantage of the offers made in conjunction with the Settlement and may be significantly higher if all Class members do not purchase additional insurance or receive other compensation from the Defendants.

is also significant that the Settlement appears to be the result of arms' length negotiations among the Parties after extensive discovery. Because the Settlement may fall within the range of reasonableness and possible approval and because of Pennsylvania's heavy emphasis on the judgment of Class members, the Court has directed that the Class be notified of the Settlement.

XIII. The Notice, as Modified at the Court's Direction, Is Appropriate

Pennsylvania courts have addressed the elements required in a notice of settlement in a class action:

> Notice in a class suit must present a fair recital of the subject matter and proposed terms and inform the class members of an opportunity to be heard. It may consist of a very general description of the proposed settlement, including a summary of the monetary or other benefits that the class would receive and an estimation of attorneys' fees and other expenses. The notice need not provide a complete source of settlement information, and class members are not expected to rely upon the notices as such.
>
> . . . It is enough that the notice contain facts sufficient to alert interested persons to the terms of the proposed settlement and also the means by which further inquiry can be made and objection recorded.

Fischer v. Madway, 336 Pa. Super. 289, 293-94, 485 A.2d 809, 811 (1984) (citations and quotations marks omitted).

The Notice, as proposed by the Parties, generally meets these requirements. The Notice describes the Settlement in relatively simple terms, informs Class members of the fairness hearing and the proposed attorneys' fees and sets forth the ways in which additional information about the Settlement can be obtained. The Parties and the Attorney General's Office have also agreed to the insertion of language in the notice to be sent to Texas Policyholders informing them of the opposition of the Attorney General's Office to the Settlement.

The Court has instructed that certain changes to the Notice be made. All references that speak or hint of the Court's "preliminary approval" have been eliminated, so as not to sway any Class members into accepting the Settlement or to imply that the Court is substituting its judgment for theirs. With these changes, the Notice meets Pennsylvania's requirements and may be sent to Class members.

CONCLUSIONS OF LAW

1. The Class is sufficiently numerous that joinder of all members is impracticable.

2. There are questions of law and fact common to the Class.

3. The claims or defenses of the representative plaintiff are typical of the claims or defenses of the Class.

4. The representative plaintiff will fairly and adequately assert and protect the interests of the Class.

5. The attorneys for the representative plaintiff will adequately represent the interests of the Class.

6. There is no conflict of interest between the representative plaintiff and the Class members that would impede the maintenance of a class action.

7. The representative plaintiff have or can acquire adequate financial resources to assure the Class interests will not be harmed.

8. The class action will provide a fair and efficient method for adjudicating this controversy.

9. Common questions of law or fact predominate over any question affecting only individual members.

10. There are no difficulties in case management which would preclude litigating this matter as a class action.

11. Prosecution of separate actions by Class members would create a risk of inconsistent and varying adjudications and might confront First Union with incompatible standards of conduct.

12. Individual adjudications would, as a practical matter, dispose of the interests of other Class members not parties to the adjudication, or would substantially impair their ability to protect such interests.

13. This particular forum is appropriate for the litigation of the entire Class's claim.

14. The complexities of the issues, the expenses of litigation and the small amount of each individual Class member's claim make it impossible to support or justify the presentation of separate claims.

15. The Settlement may fall within the range of range of reasonableness and possible approval.

16. The Notice, as modified in compliance with the Court's instructions, is sufficient to notify the Class of the Settlement.

For these reasons, the Court is satisfied that the instant case is appropriate for disposition as a class action and has certified the Class. The Court has also directed that the Notice, as modified, be sent to Class members to inform them of the Settlement and to solicit their response thereto.

BY THE COURT:

_____

JOHN W. HERRON, J.

Dated: November 26, 2001