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

ROBERT PARSKY and ANN ROANTREE, Plaintiffs	:	February Term, 2000
	:	No. 771
v.	:	
	:	Commerce Case Program
FIRST UNION CORPORATION, Defendant	:	

OPINION

This Opinion addresses the proposed class notice procedure ("Procedure") and proposed notice of pendency of class action ("Notice") submitted by Plaintiffs Robert Parsky and Ann Roantree. For the reasons set forth in this Opinion, the Procedure and Notice are approved.

BACKGROUND

The background in this matter is set forth in detail in the Court's opinion on the Plaintiffs' motion for certification, Parsky v. First Union Corp., February Term, 2000, No. 771 (C.P. Phila. May 8, 2001),[1] in which the Court granted the Plaintiffs' motion and certified the Plaintiffs' proposed class ("Class"). In brief, the Class consists of investors in common trust funds ("Funds") managed by Signet Banking Corporation ("Signet") and CoreStates Financial Corporation ("CoreStates"), both of which were acquired by Defendant First Union Corporation ("First Union"). After the acquisition of Signet and CoreStates, First Union converted the Funds into First Union common trust funds, allegedly causing the Plaintiffs to incur sizable tax liabilities.

[1] Opinion available at http://courts.phila.gov/cptcvcomp.htm.

The Parties have agreed on all aspects of the Notice and Procedure with the exception of whether nonresidents of Pennsylvania should be required to "opt in" to or "opt out" of the Class. It is this issue that the Court addresses in this Opinion. There are no Pennsylvania decisions on this point.

DISCUSSION

The Plaintiffs argue that Pennsylvania class action rules and law extend to the limits of the United States Constitution, under which a court complies with due process requirements by sending a notice to nonresident class members informing them of their right to "opt out" of the class. In the alternative, the Plaintiffs assert that Pennsylvania has the most significant relationship to the transactions at issue in this suit, allowing the use of an "opt out" procedure. The Court finds both arguments persuasive and approves of the Notice, in which nonresidents will be permitted to "opt out" of the instant action.[2]

[2] It is worth noting that the use of an "opt in" or "opt out" procedure affects only those nonresidents who do not have the perspicacity and experience necessary to review whatever notification is sent to them, to decide whether to participate in this action and to effect their decision accordingly. Ordinarily, it is on these persons that any proper discussion must focus. See, e.g., Phillips Petroleum v. Shutts, 472 U.S. 797, 813 (1985) (a plaintiff may be "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"); 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) ("requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people - especially small claims held by small people - who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step"). Given the nature of those who are likely to have invested in the Funds, however, the Court finds it improbable that any of the Class members are uneducated and unfamiliar with business and the law so as to require an analysis that centers on them. Furthermore, consideration of these persons would merely support the conclusions reached in this Opinion.

The key case addressing the requisite constitutional due process accorded nonresidents in a state class action is Phillips Petroleum v. Shutts, 472 U.S. 797 (1985). In Phillips Petroleum, the United States Supreme Court considered whether a Kansas class action rule that automatically included nonresident class members in a class but allowed them to "opt out" of the class comported with the Due Process Clause of the Fourteenth Amendment. Ultimately, the Court concluded that the Kansas rule was constitutional and that a nonresident need not have even the "minimum contacts" required for the proper exercise of personal jurisdiction so long as the state rule provided "minimal procedural due process protection":

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise [sic] interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

472 U.S. at 811-12 (citations and quotation marks omitted).[3]

Shutts thus set the constitutional boundaries for nonresident notification and allows an "opt out" procedure with regards to all nonresident plaintiffs, assuming that the other notice requirements are met. State class action rules may go up to these boundaries and allow for maximum exercise of jurisdiction over nonresident class members, or they may dictate a more limited exercise of jurisdiction, either

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[3] The Court found that the Constitution does not require additional protections for "what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so." 472 U.S. at 813.

through an "opt in" requirement or otherwise. The appropriate question then is whether Pennsylvania law and the Pennsylvania Rules of Civil Procedure mandate a more stringent procedure than that required by the United States Constitution.

The first Pennsylvania case to address the inclusion of nonresident class members was Klemow v. Time, Inc., 466 Pa. 189, 353 A.2d 12 (1976), which preceded Phillips Petroleum by nine years. In a footnote, the Klemow court reasoned that, "[b]ecause the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents. The class may also include non-residents who submit themselves to the jurisdiction of the state courts." 466 Pa. at 197 n.15, 353 A.2d at 16 n.15. It has been argued that this footnote limits the right of Pennsylvania state courts to entertain national class actions and to include nonresident class members in class action suits.

The impact of Klemow was blunted one year later when Pennsylvania's class action rules were substantially revised and Rule 1711 was adopted:

> Except as provided in subdivision (b) or as otherwise provided by the court, in certifying a plaintiff class or subclass the court shall state in its order that every member of the class is included unless by a specified date a member files of record a written election to be excluded from the class.

Pa. R. Civ. P. 1711(a).[4]

It is unclear to what extent the Klemow footnote survived the 1977 revisions. In an explanatory note, the rules' drafters noted that Klemow "would require non-residents in [a] 'national' consumer

[4] Rule 1711(b) allows an "opt in" procedure where either "the individual claims are substantial, and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation" or "other special circumstances" exists.

class action to intervene or to appear through an opt-in procedure which is provided for by Rule 1711(b)(2)." Pa. R. Civ. P. 1701 - Explanatory Note. See also Pa. R. Civ. P. 1711 - Explanatory Note (as "suggested in Klemow, supra, which indicated that the court will have no jurisdiction over nonresidents unless they voluntarily appear," Pennsylvania Rule of Civil Procedure 1711's "opt-in" procedure "would provide a simple method of doing this"). At the same time, however, the drafters noted Klemow's limitations:

> Klemow does not definitely decide the status of nonresidents where the subject matter of the action is a res or fund within Pennsylvania or is an attack on corporate action of a Pennsylvania corporation involving only bondholders or creditors in other jurisdictions. Nor did it involve a situation where Pennsylvania has the most significant relationship to all aspects of the transaction, so that Pennsylvania might assume jurisdiction over non-resident members of the class in a manner parallel to long-arm jurisdiction over non-resident defendants.

Id. See also Weinberg v. Sun Co., 740 A.2d 1152, 1164 (Pa. Super. Ct. 1999), rev'd in part on other grounds, __ Pa. __, __ A.2d __ (2001) (citing Phillips Petroleum and noting that Klemow did not resolve jurisdictional questions where Pennsylvania has the most significant relationship to the transaction). Given this opaque language that predates Phillips Petroleum, the Court is left without any clear Pennsylvania law on whether and under what circumstances the Commonwealth allows an "opt out" procedure for nonresident class members.

Nevertheless, the Court is comfortable finding that it is not necessary to employ an "opt in" procedure where Pennsylvania has the most significant relationship to all aspects of the transaction.[5] In this case, Pennsylvania satisfies the "most significant relationship" test with regard to most of the Class

[5] There are broad hints to this effect in both the Explanatory Notes and Weinberg.

members. Over 96 percent of the Class members invested in common trust funds governed by Pennsylvania law and managed by CoreStates, a Pennsylvania institution.[6] The CoreStates Funds were located within Pennsylvania, and the majority of Class members investing in these Funds were Pennsylvania residents who opened their individual accounts with Pennsylvania banks in Pennsylvania.[7] Given the dominant connections to Pennsylvania, it is clear that Pennsylvania has the most significant relationship with regard to those Class members who invested in the CoreStates Funds and that such members should be subject to an "opt out" procedure.

The true dilemma arises with regard to treatment of those few Class members who did not invest in the CoreStates Funds.[8] The Plaintiffs have failed to present any evidence that the Signet Members have any relationship to Pennsylvania, let alone a "most significant relationship," or that the Signet Funds were located in Pennsylvania. This would prevent the application of any of the explicit exceptions set forth in the Explanatory Note to Pennsylvania Rule of Civil Procedure 1701.

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[6] An additional 17 Class members were investors in CoreStates Funds governed by New Jersey law.

[7] As an aside, the Court notes that this alone might satisfy the "minimum contacts" and "substantial justice and fair play" test for due process. This could allow Pennsylvania to exercise personal jurisdiction over such investors in the event they were defendants. See Kubik v. Letteri, 532 Pa. 10, 17, 614 A.2d 1110, 1114 (1992) (discussing exercise of personal jurisdiction by Pennsylvania courts). It would be a peculiar result if Pennsylvania law supported personal jurisdiction over a defendant under the Long Arm Statute but required a class member plaintiff to "opt in" due to jurisdictional concerns.

[8] These Class members are referred to as the "Signet Members." It is unclear if any of the Signet Members, who number 273 and comprise 3.4 percent of the Class, are residents of Pennsylvania.

Even so, however, the Court does not believe that an "opt in" procedure is appropriate or required for the Signet Members. First, 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.[9] 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."[10]

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[9] 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).

[10] 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).

To the extent that the Klemow footnote was not entirely superseded by Phillips Petroleum, it is doubtful that it survived the 1977 revision of Pennsylvania's class action rules. Pennsylvania's current rules on class actions were modeled after Federal Rule of Civil Procedure 23, which generally provides for "opt out" procedures. Explanatory Note - 1977 preceding Pa. R. Civ. P. 1701; F.R.C.P. 23. The rules analyzed in Klemow, in contrast, were based on the old federal rules, which required class members to "opt in." Moreover, the revised rules accompanied a broadening of Pennsylvania's Long Arm Statute, under which personal jurisdiction was extended to the limits permitted by the Constitution of the United States. 42 Pa. C.S. § 5307(1). This supports the Plaintiffs' assertion that the Pennsylvania class action rules provide for "opt out" notification of a nonresident defendant.

The reasons for which Pennsylvania allows class actions bolster this conclusion. One of the primary goals of class actions is the advancement of judicial economy:

> To thrust numerous members of a class into separate actions would be an intolerable waste of judicial resources when the claims of all plaintiffs may be expeditiously settled in one suit. Class actions can be a fair and efficient method of resolving disputes and to subject the parties and the court system to the hazards of expensive separate litigation in this context would eviscerate the purpose of the class action as a "procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims."

Cambanis v. Nationwide Ins. Co., 348 Pa. Super. 41, 50, 501 A.2d 635, 640 (1985) (quoting Nye v. Erie Ins. Exch., 307 Pa. Super. 464, 467, 453 A.2d 677, 678 (1982)). See also Lilian v. Commonwealth, 467 Pa. 15, 21, 354 A.2d 250, 253 (1976) ("[t]he class action in Pennsylvania is a

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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.

procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims"). This goal will be impeded by imposing an "opt in" procedure, which would promote the institution of separate claims. See Phillips Petroleum, 472 U.S. at 814 (noting the "obvious advantages in judicial efficiency resulting from the 'opt out' approach"). In the instant matter, the threat of individual suits is even more likely because Virginia, the only state in which Signet operated, generally does not permit class action suits. Almeter v. Virginia Dept. of Taxation, No. LL-821-4, 2000 WL 1687589, at *1 n.1 (Va. Cir. Ct. Nov. 6, 2000) (observing that "[c]lass actions are not generally allowed in Virginia").

In addition, the Court finds it unlikely that any Signet Member will be adversely affected by an "opt out" procedure. It is improbable that there exists among the Signet 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 813-14 (noting that a plaintiff with a "sufficiently large or important that he wishes to litigate it on his own . . . will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to 'opt out,'" and describing such a class member who is incapable of exercising the "opt out" right as a "rara avis" for whom the Constitution does not afford protection). For these reasons, the Court concludes that an "opt out" procedure should be applied to all Class members and that the Notice is appropriate.

CONCLUSION

Pennsylvania allows the use of an "opt out" procedure with regard to nonresident class members under the circumstances present here. As a result, the Notice sent to all members of the

Class shall be identical and shall include the "opt out" provision set forth in the Plaintiffs' proposed notice.

BY THE COURT:

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JOHN W. HERRON, J.

Date: August 17, 2001

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FIRST UNION CORPORATION, Defendant	:	

ORDER

AND NOW, this 17th day of August, 2001, upon consideration of Plaintiffs Robert Parsky and Ann Roantree's Proposed Class Notice Procedure and Proposed Notice of Pendency of Class Action, Defendant First Union Corporation's response thereto and all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Proposed Class Notice Procedure and Proposed Notice of Pendency of Class Action are APPROVED.

BY THE COURT:

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JOHN W. HERRON, J.