

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

IN RE: PENNSYLVANIA BAYCOL	:	
THIRD PARTY PAYOR LITIGATION	:	SEPTEMBER TERM, 2001
	:	
	:	
	:	NO. 1874
	:	
	:	
	:	
	:	
	:	
	:	

ORDER AND MEMORANDUM

AND NOW, this 4th of April, 2005, upon consideration of Plaintiffs' Motion for Class Certification, all responses in opposition, the respective memoranda, all matters of record, and in accordance with the contemporaneous Memorandum Opinion, it hereby is **ORDERED** and **DECREED** as follows:

1. Plaintiffs Motion for Class Certification is **GRANTED**.
2. A Class is hereby certified and defined as follows: "All Third-Party Payors, throughout Pennsylvania and the United States (excluding all governmental entities, Defendants and Defendants' respective subsidiaries and affiliates) who have purchased Baycol, or reimbursed their beneficiaries/insureds for their purchases of Baycol, that is unusable and/or have incurred additional expenses associated with Baycol's withdrawal."
3. Philadelphia Firefighters Local 22 Health Fund, AFL-CIO District Council 47, and the National Conference of Fireman and Oilers Local 1201 Fund are the class

representatives.

4. Plaintiffs counsel is appointed as counsel for the Class.

5. The parties shall submit proposals for a notification procedure and proposed forms of notice for class members within thirty days from the date of this Order.

Discovery for trial, if needed, shall commence. All discovery shall be completed not later than August 1, 2005.

BY THE COURT:

MARK I. BERNSTEIN, J.

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

IN RE: PENNSYLVANIA BAYCOL	:	SEPTEMBER TERM, 2001
THIRD-PARTY PAYOR LITIGATION	:	
	:	
	:	No. 1874
	:	
	:	
	:	

MEMORANDUM OPINION

.....

Presently before this court is plaintiffs' motion for class certification arising from the defendants' decision on August 8, 2001 to cease distribution of Baycol, also known as Cervistatin, and advise all known users to immediately cease using Baycol. This action is brought on behalf of all third-party payors ("TTP's") nationwide who purchased or paid for Baycol on behalf of users. Plaintiffs assert claims for breach of warranty and unjust enrichment only. Plaintiffs' claim for damages is all sums paid for Baycol by class members which pursuant to manufacturer instruction should not have been used, together with medical costs associated with transferring patients to a different cholesterol reducing drug.

FINDINGS OF FACT

1. Plaintiffs are third party payors who paid defendants on behalf of their subscribers for Baycol prescribed and purchased before August 2001.
2. Defendant individually or as part of joint marketing efforts engaged in the business of testing, manufacturing, labeling, licensing, marketing, distributing, promoting and selling

Baycol also known as Cervistatin.

3. Cerivastatin was originally approved by the FDA for sale on June 26, 1997.
4. Baycol is a statin drug. Statin drugs are cholesterol lowering drugs that operate by blocking a liver enzyme involved in the synthesis of cholesterol.
5. Defendants marketed Baycol to physicians and directly to class member TPP's requesting that the medication be listed upon insurance company formulary in order to encourage physicians to prescribe Baycol.
5. Approximately 700,000 consumers have used Baycol.
7. The use of Baycol and particularly the change in medication to a different statin medication requires careful medical monitoring and repeat physician visits and lipid, liver function and CPK tests.
8. A pharmaceutical company which markets a medication approved by the FDA warrants that the medication should be used.
9. On August 8, 2001 defendants voluntarily and without any FDA requirement withdrew Baycol from the market and informed physicians:

“Effective immediately Bayer has discontinued the marketing and distribution of all dosage strengths of Baycol. Patients who are currently taking Baycol should have their Baycol discontinued and be switched to an alternative therapy.”
10. The purpose and intent of this notification and other activity subsequent to August 8, 2001 was to stop all further patient use of the medication, including the use of already purchased Baycol.
11. Patients who had unused Baycol were refunded out of pocket costs to the full extent of any co-pay requirements.

12. Defendant has refused and continues to refuse to refund TPPs the purchase price paid for Baycol rendered unusable by defendant's voluntary actions and advice.

13. Defendant has refused and continues to refuse to refund TPPs for increased costs rendered medically necessary in order to safely switch patients to a different medication.

14. Plaintiffs filed this class action on behalf of the following proposed classes: "All Third-Party Payors, throughout Pennsylvania and the United States (excluding all governmental entities, Defendant and Defendant's respective subsidiaries and affiliates) who have purchased Baycol, or reimbursed their beneficiaries/insureds for their purchases of Baycol, that is unusable and/or have incurred additional expenses associated with Baycol's withdrawal."

15. The Class brings claims for breach of warranty and unjust enrichment.

16. The class meets all the requirements for certification as more fully set forth below.

DISCUSSION

The sole issue before this court is whether the prerequisites for certification as stated in Pa. R. C. P. 1702 are satisfied. The purpose behind 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 and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate". DiLucido v. Terminix Intern, Inc., 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (Pa. Super. 1996). For a suit to proceed as a class action, Rule 1702 of the Pennsylvania Rules of Civil Procedure 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;
- (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Rule 1708 of the Pennsylvania Rules of Civil Procedure requires:

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth [below]

a) Where monetary recovery alone is sought, 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 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.

(b) Where equitable or declaratory relief alone is sought, the court shall consider

- (1) the criteria set forth in subsections (1) through (5) of subdivision (a), and
- (2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief

appropriate with respect to the class.

(c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

The burden of showing each of the elements in Rule 1702 is initially on the moving party. 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 635, 637 (Pa. Super. 1985). The moving party need only present evidence sufficient to make out a *prima facie* case “from which the court can conclude that the five class certification requirements are met.” Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d 137,153-154 (2002)(quoting Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 451 A.2d 451, 455 (Pa. Super. 1982).

In other contexts, the *prima facie* burden has been construed to mean “some evidence,” “a colorable claim,” “substantial evidence,” or evidence that creates a rebuttable presumption that requires the opponent to rebut demonstrated elements. In the criminal law context, “the *prima facie* standard requires evidence of the existence of each and every element.” Commonwealth v. Martin, 727 A.2d 1136, 1142 (Pa. Super. 1999), *alloc. denied*, 560 Pa. 722, 745 A.2d 1220 (1999). However, “The weight and credibility of the evidence are not factors at this stage.” Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa. Super. 2001).

In the family law context, the term “‘*prima facie* right to custody’ means only that the party has a colorable claim to custody of the child.” McDonel v. Sohn, 762 A.2d 1101, 1107 (Pa. Super. 2000). Similarly, in the context of employment law, the Commonwealth Court has opined that a *prima facie* case can be established by

“substantial evidence” requiring the opposing party to affirmatively rebut that evidence. See, e.g., Williamsburg Community School District v. Com., Pennsylvania Human Rights Comm., 512 A.2d 1339 (Pa. Commw. 1986).

Courts have consistently interpreted the phrase “substantial evidence” to mean “more than a mere scintilla,” but evidence “which a reasonable mind might accept as adequate to support a conclusion.” SSEN, Inc., v. Borough Council of Eddystone, 810 A.2d 200, 207 (Pa. Commw. 2002). In Grakelow v. Nash, 98 Pa. Super. 316 (Pa. Super. 1929), a tax case, the Superior Court said: “To ordain that a certain act or acts shall be *prima facie* evidence of a fact means merely that from proof of the act or acts, a rebuttable presumption of the fact shall be made;...it attributes a specified value to certain evidence but does not make it conclusive proof of the fact in question.”

Class certification is a mixed question of fact and law. Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d,137 (Pa. Super. 2002). The court must consider all the relevant testimony, depositions and other evidence pursuant to Rule 1707 (c). In determining whether the prerequisites of Rule 1702 have been met, the court is only to decide who shall be the parties to the action and nothing more. The merits of the action and the plaintiffs’ right to recover are excluded from consideration. 1977 Explanatory Comment to Pa. R. Civ. P. 1707. Where evidence conflicts, doubt should be resolved in favor of class certification. In making a certification decision, “courts in class certification proceedings regularly and properly employ reasonable inferences, presumptions, and judicial notice.” Janicik, 451 A.2d at 454,455. Accordingly, this court must refrain from ruling on plaintiff’s ultimate right to achieve any recovery, the credibility of the witnesses and the substantive merits of defenses raised.

“The burden of proof to establish the five prerequisites to class certification lies with the class proponent; however, since the hearing on class certification is akin to a preliminary hearing, it is not a heavy burden.” Professional Flooring Co. v. Bushar Corp., 61 Pa. D&C 4th 147, 153, 2003 WL 21802073 (Pa. Com. Pl. Montgo. Cty. Apr. 14, 2003), (citing Debbs v. Chrysler Corp., 810 A.2d 137, 153-54 (Pa. Super. 2002); Janicik v. Prudential Inc. Co. of America, 451 A.2d 451, 455 (Pa. Super. 1982)); See also Baldassari v. Suburban Cable TV Co., 808 A.2d 184, 189 (Pa. Super. 2002); Cambanis v. Nationwide Insurance Co., 501 A.2d 635 (Pa. Super. 1985). The *prima facie* burden of proof standard at the class certification stage is met by a qualitative “substantial evidence” test.

Our Superior Court has instructed that it is a strong and oft-repeated policy of this Commonwealth that decisions applying the rules for class certification should be made liberally and in favor of maintaining a class action. Weismer by Weismer v. Beech-Nut Nutrition Corp., 615 A.2d 428, 431 (Pa. Super. 1992). See also Janicik, 451 A.2d at 454, *citing and quoting* Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968) (“in a doubtful case . . . any error should be committed in favor of allowing the class action”).

Likewise, the Commonwealth Court has held that “in doubtful cases any error should be committed in favor of allowing class certification.” Foust v. Septa, 756 A.2d 112, 118 (Pa. Commw. 2000). This philosophy is further supported by the consideration that “[t]he court may alter, modify, or revoke the certification if later developments in the litigation reveal that some prerequisite to certification is not satisfied.” Janicik, 451 A.2d at 454

Within this context, the court will examine the requisite factors for class

certification.

I. Numerosity

To be eligible for certification, plaintiffs must demonstrate that the class is "so numerous that joinder of all members is impracticable." [Pa.R.C.P. 1702\(1\)](#). A class is sufficiently numerous when "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 should plaintiffs sue individually." [Temple University v. Pa. Dept. of Public Welfare](#), 30 Pa.Cmwlth. 595, 374 A.2d 991, 996 (1977) (123 members sufficient); [ABC Sewer Cleaning Co. v. Bell of Pa.](#), 293 Pa.Super. 219, 438 A.2d 616 (1981) (250 members sufficient); [Ablin, Inc. v. Bell Tel. Co. of Pa.](#), 291 Pa.Super. 40, 435 A.2d 208 (1981) (204 plaintiffs sufficiently numerous). Plaintiffs need not plead or prove the actual number of class members, so long as they are able to "define the class with some precision" and provide "sufficient indicia to the court that more members exist than it would be practicable to join." [Janicik](#), 451 A.2d at 456.

Approximately 700,000 consumers have ingested Baycol, 10.6 million new and refilled prescriptions were dispensed in the year 2000. Many if not most of these prescriptions were paid by TPP's. Defendant does not contest numerosity.

The plaintiffs have satisfied the numerosity requirement for class certification of all proposed classes.

II. Commonality

The second prerequisite for class certification is that "there are questions of law or fact common to the class." Pa. R. Civ. P. 1702(2). Common questions exist "if the

class members' legal grievances arise out of the 'same practice or course of conduct on the part of the class opponent.'" Janicik, supra. 133, 451 A.2d at 457. Thus, it is necessary to establish that "the facts surrounding each plaintiff's claim must be substantially the same so that proof as to one claimant would be proof as to all."

Weismer by Weismer v. Beechnut Nutrition Corp., 419 Pa. Super. 403, 615 A.2d 428 (Pa. Super. 1992)). However, where the challenged conduct affects the potential class members in divergent ways, commonality may not exist. Janicik , supra. 457 fn. 5

"While 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." D'Amelio v. Blue Cross of Lehigh Valley, 414 Pa. Super. 310, 606 A.2d 1215 (Pa. Super. 1992). In examining the commonality of the class' claims, a court should focus on the cause of injury and not the amount of alleged damages. "Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification." See Weismer by Weismer v. Beech-Nut Nutrition Corp., 419 Pa. Super. 403, 409, 615 A.2d 428, 431 (Pa. Super.). Where there exists intervening and possibly superseding causes of damage however, liability cannot be determined on a class-wide basis. Cook v. Highland Water and Sewer Authority, 108 Pa. Cmwlth. 222, 231, 530 A.2d 499, 504 (Pa. Cmwlth.1987).

Plaintiffs argue that questions of law and fact common to the class exist. Defendants claim that individual issues of law and fact exist and predominate. After reviewing the class action record created at the certification hearing in this matter, the court finds that the claims presented by the Class do satisfy the commonality

requirement of Rule 1702 (a)(2). The common issue is the liability to a third party payor for the costs of medication sold to consumers who were subsequently advised it was unsafe to use and the attendant costs for a patient to safely switch medications.

Defendants argue a conflict of law exists as to plaintiffs' claims for unjust enrichment precluding commonality. Defendants do not claim any conflict with respect to the claim of a breach of the implied warranty of usability. Plaintiffs' warranty claim arises under section 2-314(3) of the Uniform Commercial Code which has been adopted in forty-nine states and the District of Columbia. The one remaining state, Louisiana, has a similar provision. Defendants raise the issue of privity of contract, however no state has expressly extended this requirement to a breach of an implied warranty under the U.C.C. "[I]f there is no pertinent decision or statute, or if there is a very substantial doubt about the law of a sister state, the law of a common law sister state in such a situation and at the time in question is presumed to be the same as that of this Commonwealth." In Re: Trust of Pennington, 421 Pa. 334, 219 A.2d 353 (1966). Herein, defendants specifically told purchasers to stop using the purchased product and took affirmative and reasonable steps including refund of all individual out of pocket costs, to insure that their product was not used. The law of every state, in one form or another, clearly requires any seller of a product to warrant that the product should be used.

Additionally, even if minor variations of law do exist it is neither inequitable nor improper under the facts of this case to apply Pennsylvania law to all claims. Defendants maintain their principle places of business in Pennsylvania. They directed and controlled their national sales strategies with regard to TPP's from within

Pennsylvania. Their refund policy was designed or coordinated within Pennsylvania. The Commonwealth of Pennsylvania has a strong interest in the conduct of the execution of contract rights and the business expectations in the uniformity of interpretation in commercial and insurance reimbursement contracts controlled from within the state.

As to the alternative claim of unjust enrichment, Plaintiffs' claim no significant conflict of law exists or if a conflict does exist, the Pennsylvania choice of law analysis requires this court to apply Pennsylvania law. As discussed below no significant conflict of law is relevant to the fair adjudication of this case as a class action. If indeed the defense persists in its contention that relevant differences do exist, the Court is confident that the "ingenuity of counsel" can craft specific subclasses which allow for the easy management of trial while preserving all claims for appellate review.

Pennsylvania choice of law analysis entails a determination of whether the laws of the competing states actually differ. If the laws of the competing states do not differ, no further analysis is necessary. If a conflict is present, Pennsylvania courts utilize the approach set forth in the Restatement (Second) of Conflicts Section 145. Troxel v. A.I. duPont Institute, 431 Pa. Super. 464, 468, 636 A.2d 1179, 1181 (1994). The relevant inquiry under this standard is not the number of contacts each litigant has with a state but the extent to which one state rather than another has demonstrated by reason of its policies and their connection and relevance to the matter in dispute a priority of interest in the application of its rule of law. The following factors may be considered in the analysis: 1) the place where the injury occurred; 2) the place where the conduct causing the injury occurred; 3) domicile, residence, nationality, place of incorporation, and place

of business of the parties; 4) and the place where the relationship between the parties is centered. Laconis v. Burlington County Bridge, 400 Pa. Super. 483, 492, 583 A.2d 1218, 1222-23 (1990). The conflicting interests of each state must be analyzed within the context of the specific facts at issue in a particular case. Additionally, the weight of a particular state's contact must be measured on a qualitative rather than a quantitative scale. Cipolla v. Shaposka, 439 Pa. 563, 566, 267 A.2d 854 (1970).

The law of unjust enrichment does vary from state to state. See Clay v. American Tobacco Co., 188 F. R. D. 483, 500 (S.D. Ill. 1999). A conflict of law exists for plaintiffs' national claim for unjust enrichment but the conflict is not relevant to this lawsuit. All state laws commonly find unjust enrichment when a defendant wrongfully retains the money received from a sale when the defendant thereafter advises the consumer not to use the product because it may be unsafe. Essentially, the law everywhere requires proof that the defendant has kept what a plaintiff paid for a product under circumstances in which retention is inequitable.

As Judge Charles B. Kornmann of the District Court for the District of South Dakota, Northern Division said in Schumacher v. Tyson Fresh Meats, Inc., 2004 DSD 5, 221 F.R.D. 605; 2004 U.S. Dist. Lexis 11666:

"Certification of the unjust enrichment claims is more complicated. Defendants contend that class certification of the pendent state law claims for unjust enrichment should be denied because these claims involve varying state common law standards of liability."

In looking at claims for unjust enrichment, we must keep in mind that the very nature of such claims requires a focus on the gains of the defendants, not the losses of the plaintiffs. That is a universal thread throughout all common law causes of action for unjust enrichment. What is the practical difference between a practice that is "unfair" and a practice that results in "unjust enrichment"? What is the difference between "unfair" and "unjust"? The answers are probably very little."

“Failure to certify the claims for unjust enrichment would or could result in class members having to file virtually thousands of individual suits wherein the discovery and factual issues would be nearly identical.”

“There are some differences between or among the states. There are also many states where the common law is the same. Sub-classes can be identified, if necessary, to group residents of various states with identical common law requirements into sub-classes. In other words, the problems are manageable....The claims for unjust enrichment should also be certified.”

Id.

Unjust Enrichment is essentially an equitable doctrine. The elements of unjust enrichment are “benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant and acceptance and retention of such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.” AmeriPro Search, Inc. v. Fleming Steel Co., 2001 Pa. Super. 325, 787 A.2d 988 (2001) (citing Schenck v. K.E. David, Ltd., 446 Pa. Super. 94, 666 A.2d 327, 328 (Pa. Super. 1995)). The application of this doctrine in this matter does not depend on the particular factual circumstances of the case at issue. An unjust enrichment class requires answers to the following common questions of fact: (1) did plaintiffs confer a benefit upon defendants, (2) did the defendants appreciate the benefit. These questions must be answered in the affirmative since the plaintiffs’ present a claim only to the extent that they paid defendants for Baycol which the company thereafter strongly urged consumers not to use. An unjust enrichment claim further requires proof of (3) whether the defendant accepted and retained the benefits under the circumstances that would make it inequitable for the defendant to retain the benefit without payment for value. The response to this remaining factual question will be uniform as to every class

member. Determination of the equitable claim of unjust enrichment will not require any individualized determination, all class members stand in precisely the same relation to defendant. Either it would be inequitable for defendants to retain the payments made to them by TPPs while refunding the deductible or co-pay for the same purchase or it is acceptable. No individualized issues are significantly involved in the unjust enrichment claim.

Plaintiffs have sustained their burden of demonstrating that common issues of fact and law exist to satisfy the requirement of commonality.

III. Typicality

The third step in the certification test requires the plaintiff to show that the class action 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 pursuit of their interests will advance those of the proposed class members.

DiLucido v. Terminix Intern, Inc., 450 Pa. Super. 393, 404, 676 A.2d 1237, 1242 (Pa. Super. 1996).

The named plaintiffs are typical of those class claimants for both the warranty and unjust enrichment claims since they made payments on behalf of individuals who purchased Baycol but were advised by the defendant on August 8, 2001 to cease taking the medication and have incurred additional, otherwise unnecessary costs, when their insureds were told not to use the medication. Clearly class members suffered monetary loss for unused Baycol purchased prior to August 8, 2001. The fact that different class members may have different damage claims does not defeat the typicality of the class

representative. The requirement of typicality has been met.

IV. Adequacy of Representation

For the class to be certified, this court must also conclude that the plaintiffs “will fairly and adequately assert and protect the interests of the class.” Pa. R. Civ. P. 1702

(4). In determining whether the representative parties will fairly and adequately represent the interests of the class, the court shall consider the following:

- “(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 financial resources to assure that the interests of the class will not be harmed.”
- Rule 1709.

“Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession.” Janicik, 305 Pa. Super. at 136, 451 A.2d at 458. Here, defendants do not challenge plaintiffs’ counsels’ skill and therefore, the court presumes that counsel is skilled in their profession.

“Courts have generally presumed that no conflict of interest exists unless otherwise demonstrated, and have relied upon the adversary system and the court’s supervisory powers to expose and mitigate any conflict.” Janicik, 305 Pa. Super. at 136, 451 A.2d at 458. Defendants argue that the interests of the named plaintiffs conflict with the interests of other class members. This Court concludes that the named class representatives’ interests do not conflict with those of the proposed putative class even though some class members may have additional monetary claims. All claims derive from the same liability and are attendant together. Accordingly, the

court finds that no conflict of interest exists and the adequacy of representation has been demonstrated.

V. Fair and Efficient Method of Adjudication

The final criteria under Pa. R. Civ. P. 1702 is a determination of whether a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708. Since the court has determined that the claims satisfy the requirements of Pa. R. Civ. P. 1702 and no form of equitable relief is requested, it is not necessary to consider both subdivisions (a) and (b) of Rule 1708.

1. Predominance of Common Questions of Law and Fact

The most important requirement in determining whether a class should be certified under 1702 (a) (5) and 1708 (a) (1) is whether common questions of law and fact predominate over any question affecting only individual members. In addition to the existence of common questions of law and fact, plaintiffs must also establish that the common issues predominate. The analysis of predominance under Rule 1708 (a) (1) is closely related to that of commonality under Rule 1702(2). Janick, supra. 451 A.2d at 461. The court adopts and incorporates its analysis of commonality and concludes that the requirement of predominance has been satisfied.

2. The Existence of Serious Management Difficulties

Under Pa. R. Civ. P. 1708 (2), a court must also consider the size of the class and the difficulties likely to be encountered in the management of the action as a class action. 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 (1st Cir. 1972). 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. Id. (citing Buchanan v. Brentwood Federal Sav. and Loan Ass'n, 457 Pa. 135, 320 A.2d 117, 131 (Pa. 1974)). The Court sees no serious management difficulties in the trial of this case.

Whatever management problems remain, this court will rely upon the ingenuity and aid of counsel and upon the court's plenary authority to control the action. Janicik, 305 Pa. Super. at 142, 451 A.2d 462.

3. Potential for Inconsistent Adjudications

Pennsylvania Rule 1708 (a) (3) also requires a court to evaluate whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class. In considering the separate effect of actions, the precedential effect of a decision is to be considered as well as the parties' circumstances and respective ability to pursue separate actions.

While there is no significant risk of inconsistent adjudications herein because of the straightforward nature of the issues and facts involved, as a single certified class one case will determine liability and one verdict will establish all obligations. Any possibility for inconsistent verdicts is eliminated by certification.

4. Extent and Nature of any Preexisting Litigation and the Appropriateness of this Forum

Under Pa. R. Civ. P. 1708 (a) (4) and (a) (5), a court should consider the

extent and nature of any litigation already commenced by or against members of the class involving any of the same issues. The Court is advised that numerous claims of the type presented herein by former class members have already been amicably resolved. The Court is aware of no litigation which would conflict with this case. This court finds that this forum is appropriate to litigate the class claims. This Court has a demonstrated record of excellence in managing Complex Litigation and Class Action Litigation.

5. The Separate Claims of the Individual Plaintiffs are Insufficient in Amount to Support Separate Claims or their Likely Recovery.

Rule 1708 also requires the court to consider the amount of damages sought by the individual plaintiffs in determining the fairness and efficiency of a class action. Thus, a court must analyze 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. Pa. R. Civ. P. 1708 (a) (6).

Alternatively, the rules ask the court to analyze whether it is likely that the amounts 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 a action. Pa. R. Civ. P. 1708 (a)(7). This criteria is rarely used to disqualify an otherwise valid class action claim. See Kelly v. County of Allegheny, 519 Pa. 213, 215, 546 A.2d 608, 609 (Pa.1988)(Trial court erred in refusing to certify a class on the grounds that the class members' average claim was too small in comparison to the expenses incurred.).

However, in Klusman v. Bucks County Court of Common Pleas, 128 Pa. Cmwlth. 616,

564 A.2d 526 (1989) the Court said: “Where the issue of damages does not lend itself to a mechanical calculation, but requires separate mini-trials of a large number of individual claims, courts have found that the staggering problem of logistics make the damage aspect of the case predominate and renders the class unmanageable as a class action.” State of Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309 (5th Cir. 1978).

While the amounts of recovery may vary widely by individual class members, none are likely to be so small as to dissuade class treatment. Plaintiffs have prima facie demonstrated that damages can be calculated and tried on a class basis. The plaintiffs’ herein have satisfied the criteria for class under Pa. R. Civ. P. 1702 (a) (6) and (7).

CONCLUSIONS OF LAW

1. The class is sufficiently numerous that joinder of all its members would be impracticable.
2. There are questions of law and fact common to the Class.
3. Plaintiffs will fairly and adequately assert and protect the interests of the Class under the criteria set forth in Pa. R. Civ. P. 1709.
4. A class action provides a fair and efficient method for adjudication of the criteria set forth in Pa. R. Civ. P. 1708.

CONCLUSION

For these reasons, this court grants Plaintiffs’ Motion for Class Certification as follows:

1. A Class is hereby certified and defined as follows: “All Third-Party Payors, throughout Pennsylvania and the United States (excluding all governmental entities,

Defendants and Defendants' respective subsidiaries and affiliates) who have purchased Baycol, or reimbursed their beneficiaries/insureds for their purchases of Baycol, that is unusable and/or have incurred additional expenses associated with Baycol's withdrawal."

2. Philadelphia Firefighters Local 22 Health Fund, AFL-CIO District Council 47, and the National Conference of Fireman and Oilers Local 1201 Fund are designated as class representatives.

3. Plaintiffs counsel are appointed as counsel for the Class.

4. The parties shall submit proposals for a notification procedure and proposed forms of notice for class members within thirty days from the date of this Order.

A contemporaneous order consistent with this Opinion is filed.

BY THE COURT:

MARK I. BERNSTEIN, J.

