

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA



CIVIL MINUTES - GENERAL

Case No.	CV 07-4028 ABC (JCx)	Date	March 25, 2008
Title	Mary Burdick v. Union Security Insurance Company et al		

Present: The Honorable	Audrey B. Collins		
Daphne Alex	Not Present	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
None	None		

Proceedings: PLAINTIFF’S MOTION FOR CLASS CERTIFICATION (In Chambers)

Pending before the Court is Plaintiff’s Motion For Class Certification Pursuant To Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) (“Motion”), filed on February 19, 2008. Defendants filed an Opposition on March 3, 2008, and Plaintiff filed a Reply on March 17, 2008. The Court finds the Motion appropriate for resolution without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. After consideration of the materials submitted by the parties and the case file, the Court hereby **GRANTS** Plaintiffs’ Motion.¹ The Court **VACATES** the March 31, 2008 hearing on the Motion, but **SETS** a status conference on March 31, 2008, at 10:00 a.m. to discuss settlement and other issues.

BACKGROUND

In this action, Plaintiff Mary Burdick (“Plaintiff”) challenges a provision in the Long Term Disability policy issued to her by Defendants Union Insurance Company and Assurant, Inc. (“Defendants”). Plaintiff alleges that when she left her employment, she applied to convert her group Long Term Disability (“LTD”) Insurance, issued by Defendants, to an individual policy. (Compl. ¶ 19.) Defendants’ insurance representative told Plaintiff that her monthly benefits under the individual policy would be \$2083, which was one-half the amount of her prior monthly wages. (Id.) Plaintiff further alleges that Defendants’ insurance representative did not tell her about an offset provision in the policy and did not explain that she would receive only a small percentage of the \$2083 monthly benefit if she qualified for Social Security Disability Income (“SSDI”) or if she did not apply for SSDI benefits. (Id.) Specifically, Plaintiff contends that as a result of this SSDI offset, she receives only \$284 per month in benefits from Defendants. Plaintiff contends that she was not aware of the SSDI offset when she

¹ On March 21, 2008, Defendants filed a Motion to Strike certain declarations Plaintiff submitted with her Reply. The Court did not rely on those declarations in deciding this motion. As such, the Court **DENIES** Defendants’ Motion to Strike as moot.

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converted her policy, and that the SSDI offset provision is illegal and unenforceable. Based on this conduct, Plaintiff is suing Defendants, on her own behalf and on behalf of a class, for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) violations of California Business & Professions Code § 17500, *et seq.*, (4) violations of California Business & Professions Code § 17200, *et seq.*, and (5) declaratory relief. Plaintiff now moves to certify the following class under Fed. R. Civ. Proc 23:

All persons in California (a) who at any time from April 30, 2003 to the present have been insured pursuant to an individual Certificate of Coverage providing long term disability insurance coverage under the policy which Defendant Union Security Insurance Company has entitled Group Policy No. 110000, and/or (b) who in the future will be insured pursuant to an individual Certificate of Coverage under this Group Policy and/or any other converted group or individual policy for Long Term Disability benefits issued by Defendant Union Security Insurance Company with an offset provision for Social Security Disability Insurance benefits.

Mot. 10:23-28

DISCUSSION

The party seeking to certify a class bears the burden of demonstrating that it has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1186 (9th Cir.), *as amended*, 273 F.3d 1266 (9th Cir. 2001). Failure to carry this burden precludes the party from maintaining its complaint as a class action. Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 673 (9th Cir. 1975).

To obtain class certification, the party must provide facts to satisfy these requirements: simply repeating the language of the rules in its moving papers is insufficient. Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1309 (9th Cir. 1977). The court must undertake a “rigorous analysis” to examine whether the requirements of Rule 23 are met. Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982). Although the court should not judge the ultimate merits of the case at the class certification stage, it may consider evidence relating to the merits if such evidence also goes to the requirements of Rule 23. Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).

A. Plaintiff’s Burden Under Rule 23(a)

Under Rule 23(a), a district court cannot certify a class unless the party seeking certification satisfies each of the following four elements: (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

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the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

1. Numerosity

Rule 23(a)(1) requires that a class be so numerous that joinder would be impracticable. No fixed number exists to determine whether a given class satisfies the numerosity requirement, but courts generally find numerosity present when a class is comprised of forty members or more. Ansari v. New York Univ., 179 F.R.D. 473, 483 (S.D.N.Y. 1998); Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2nd Cir. 1995). Here, evidence produced in discovery indicates that the class consists of more than 100 past and current members, and that each year, the class will increase by approximately nine members. (See Mot. 12:17-22.) Courts in the Ninth Circuit have found classes of far fewer than 100 persons sufficiently numerous to render joinder impracticable. See, e.g., Jordan v. Los Angeles County, 669 F.2d 1311, 1319 (C.A.Cal., 1982), *vacated and rem'd on other grounds*, 459 U.S. 810 (1982) (“we would be inclined to find the numerosity requirement in the present case satisfied solely on the basis of the number of ascertained class members, i.e., 39, 64, and 71”); Ahsmus v. Calderon, 935 F. Supp. 1048, 1064 (N.D. Cal. 1996 (52 class members.)) The Court finds that this class of approximately 100 persons is so numerous that joinder would be impracticable.²

2. Commonality

Under Rule 23(a)(2), “class relief is ‘peculiarly appropriate’ when the ‘issues involved are common to the class as a whole’ or when they ‘turn on questions of law applicable in the same manner to each member of the class.’” Gen'l Tel. Co. V. Falcon, 457 U.S. 147, 155 (1982). Not all questions of fact and law must be common in order to satisfy this requirement. Instead, “for the commonality requirement to be met, there must only be one single issue common to the whole class.” Haley v. Medtronic, Inc., 169 F.R.D. 643, 648 (C.D. Cal. 1997). The commonality requirement is met “where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.” Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir. 2001).

Plaintiff challenges Defendants’ SSDI provision and policies regarding disclosure, interpretation, and enforcement of that provision. The SSDI provision in each class member’s policy “is identical with respect to [Defendants’] right to offset SSDI benefits from the Scheduled Monthly Benefit Amount.” (Traber Decl. ¶ 35, Exh. G at ¶ 8.) Defendants purport to have a standard policy and practice regarding disclosure of the SSDI offset provision, and a standard policy and practice enforcing the provision: these facts are both material to Plaintiff’s claims and common to all class members. Finally, the ultimate legal

² Although Defendants contend that only three members of the proposed class are similarly situated to Plaintiff, the Court rejects this argument for the reasons set forth below.

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issue – whether the SSDI offset provisions are legally enforceable – is common to all claims in this lawsuit and class members. Plaintiff’s complaint therefore satisfies the commonality requirement.

3. Typicality

Typicality under Rule 23(a)(3) requires the Court to determine “whether the named plaintiffs’ individual circumstances markedly diverge or whether the legal theories and claims differ as to defeat the purposes of maintaining a class.” Von Collin v. County of Ventura, 189 F.R.D. 583, 591 (C.D. Cal. 1999). “The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so . . . that the absentees’ interests will be fairly represented.” Hodgers-Durgin v. Vina, 165 F.3d 667, 679 (9th Cir.1999). A finding of commonality frequently supports a finding of typicality. See General Tel. Co. v. Falcon, 457 U.S. 147, 157 n. 13 (1982) (noting how the commonality and typicality requirements “merge”). Relatedly, “[i]f the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of . . . factual difference.” In re Heritage Bond Litig., 2004 WL 1638201, 7 (C.D. Cal. 2004).

Here, the claims of the proposed class representative are typical of the claims of the absent class members. With regard to the entire class, the complaint alleges that all members are insured pursuant to an individual Certificate of Coverage providing long term disability insurance coverage that includes the same SSDI offset provision. Defendants urge, however, that the named Plaintiff’s claims are typical only of the three “other individuals who have filed claims for LTD benefits under the Policy, were approved for LTD benefits, were approved for SSDI benefits and whose benefits were offset pursuant to the SSDI offset provision at issue in this action.” (Opp’n 9:6-14.) Because 96 members of the approximately 100-member class have not sought LTD benefits, Defendants argue, Plaintiff’s claims cannot be typical of the class.

The distinction Defendants draw between the class member who have applied for LTD benefits and those who haven’t is unavailing because the same SSDI provision exists in all the LTD contracts. Although the provision has not been triggered for all class members, that eventuality is not necessary to support Plaintiff’s claims. For example, the declaratory relief claim seeks a determination of whether the SSDI offset provision is enforceable. It stands to reason that Defendants’ insureds would benefit from knowing whether this SSDI provision is enforceable before they ever apply for LTD benefits. See, e.g., Wisconsin Power & Light Co. v. Century Indem. Co., 130 F.3d 787, 793 (7th Cir. 1997) (“People buy insurance in part for peace of mind rather than because they expect the insured-against event actually to occur. It would be absurd if insurance companies could deny the justiciability of suits against them by arguing that the insured is foolish to be worrying about ‘going bare.’”) Furthermore, “the practical consequences of a declaratory relief ruling, in advance of an incident,” include that “a ruling against coverage will induce the insured to seek new coverage or take some other legal action.”

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Neely v. Benefits Review Bd., 139 F.3d 276, 280 (1st Cir. 1999).

Defendants also argue that the claims of 96 of the class members are preempted by ERISA. However, this defense goes to the merits of the claims, not to their typicality. Nor is the Court persuaded that Plaintiff's interest diverge from the interests of 96 of the members, let alone diverge in any way material to whether this action may proceed on a class basis. Finally, differences arising out of specific defenses against the named Plaintiff, or differences between class members' damages or remedies, are insufficient to defeat typicality. See, e.g., Blackie v. Barrack, 524 F.2d 891, 901 n. 17 (9th cir, 1975) (stating that "the amount of damages is invariably an individual question and does not defeat class action treatment.") Plaintiff has alleged that an SSDI offset provision common to the insurance policy all class members have is unenforceable, and that Defendants' standard policies concerning the disclosure of the SSDI provision violate California Business & Professions Code § 17200, *et seq.*, and § 17500, *et seq.* Plaintiff's claims and interests in obtaining relief "are reasonably co-extensive with those of the absent class members; they need not be substantially identical." Hanlon, 150 F.3d at 1020. Accordingly, the Court finds that Plaintiff's claims and interests are typical of those of the class members.

4. Adequate Representation

Rule 23(a)(4) requires the Court to determine whether the named Plaintiff will be able "fairly and adequately to protect the interests" of all members of the class. Adequacy "depends on the qualifications of counsel for the representative, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." In re N.D. Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 855 (9th Cir. 1982).

Defendants do not challenge class counsel's adequacy. Indeed, the Court has reviewed the declarations from Plaintiff's counsel demonstrating their experience in similar litigation and finds that class counsel is adequate. Defendants do, however, question the class representative's adequacy, arguing that insofar as her claims are not coextensive with those of the class, a conflict exists and she cannot fairly and adequately represent the class. This argument relies on essentially the same distinction that Defendants relied upon in connection with the typicality requirement. As discussed above, the Court finds these arguments unpersuasive. There appears to be no antagonism between the class representative and potential class members, and there is no apparent reason why their interests would diverge. Nor is there any evidence of collusion between the proposed class and Defendants.

The Court finds that Plaintiff would fairly and adequately represent the interests of the class.

B. Plaintiff's Burden Under Rule 23(b)

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Plaintiff must also satisfy one of the requirements of Rule 23(b). Plaintiff herein moves for certification under Rule 23(b)(2) and, in the alternative, under Rule 23(b)(3).

1. Plaintiff Satisfies Rule 23(b)(2).

Rule 23(b)(2) permits class treatment if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. Proc. 23(b)(2). This provision does not require every class member to have been injured the in the exact same way by the defendant’s conduct. Rather, a class may be certified if the opposing party’s “[a]ction or inaction is directed to a class . . . even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.” Fed. R. Civ. Proc. 23(b)(2) Advisory Committee’s Note. For example, certification under Rule 23(b)(2) is appropriate when a “defendant’s conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct.” Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 57 (3rd Cir. 1994).

The SSDI provision Plaintiff challenges is present in the policies of all class members, and a substantial component of the relief Plaintiff seeks is a declaration that the SSDI provision is unenforceable. Defendants do not dispute Plaintiff’s request under Rule 23(b)(2). As such, the Court finds that Plaintiff has satisfied Rule 23(b)(2) both on the merits of her argument, and because Defendants apparently concede the point.

2. Plaintiff Satisfies Rule 23(b)(3)

In the alternative, Plaintiff seeks certification under Rule 23(b)(3), which requires that (1) “questions of law or fact common to class members predominate over any questions affecting only individual members,” and (2) “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. Proc. 23(b)(3).

a. Common Questions Predominate

Rule 23(b)(3)’s predominance element requires only that questions common to the class predominate over those affecting individual members; it does not require that all questions be identical. See In re Loewen Group Sec. Litig., 233, F.R.D. 154, 167 (E.D. Pa. 2005). In determining whether common issues predominate, the Court conducts a two-step inquiry. First, the Court identifies the substantive issues raised in the claims and the applicable defenses. Simer v. Rios, 661 F.2d 655, 672 (7th Cir. 1981). Second, the Court considers the proof relevant to each issue. Id.

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Here, all of the claims arise out of the SSDI provision common to all of the policies, and entitlement to relief depends on the common question of whether that provision is enforceable. Some of the relief Plaintiff seeks – damages and/or restitution – may require a resort to individualized evidence. However, such damages and/or restitution would be readily ascertainable by consulting Defendants’ account records. Defendants argue that the predominant questions in this case are not common to the class members, but each of these arguments has already been rejected as set forth in the discussion of typicality, *supra*. The Court therefore finds that common issues of fact and law predominate.

b. Superiority

Rule 23(b)(3) requires the Court to determine whether “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” The rule identifies factors relevant to this inquiry, including “(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.” Fed. R. Civ. Proc. 23(b)(3). Having considered these factors, the Court concludes that the class action procedure is superior to other methods of adjudicating the dispute.

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i. Interests of the Class Members to Pursue Individual Actions

“When it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.” In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F.Supp. 450, 507 (D.N.J. 1997). Here, it is not likely that the potential damages claims of individual plaintiffs are sizeable enough to make individual actions feasible; nor is it likely that those plaintiffs who would benefit primarily from declaratory and injunctive relief would have sufficient incentive to seek such relief individually. In short, the Court is not convinced that the amounts any plaintiff could recover are substantial enough to outweigh the heavy costs of litigating individual claims against a corporate defendant. This factor weighs in favor of the class action procedure.

ii. Other Related Litigation

Neither party has provided any information relevant to this factor.

iii. Whether the Litigation Should Be Concentrated In This District

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This factor weighs in favor of certification. The class consists of California residents; as such, it is reasonable to litigate the action in this district. Furthermore, it would serve judicial economy to litigate all of the claims together in one forum rather than in multiple fora.

iv. Manageability

The Court does not foresee any special case management issues that would arise in this action. To the contrary, maintaining the claims in a single forum is likely to facilitate management by avoiding duplicative proceedings in other fora. Litigating this case on a class basis also avoids the risk of inconsistent results. Although the class satisfies the numerosity requirement, it is not so numerous as to be unmanageable. To the extent to which individual issues may arise to complicate case management, that risk is not remarkable in this case. Accordingly, case management weighs in favor of certification.³

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IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff's Motion and certifies the class as defined above.

IT IS SO ORDERED.

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³ Defendants argue that, if the Court is inclined to certify a class, it should do so only as to some claims and not others. (Opp'n 24:16-26:3) However, Defendants' arguments go to the merits of the claims rather than to the requirements of Rule 23. The Court therefore declines the request.