

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
Donald Stanley and Sean Reiter, )  
Individually and as Class )  
Representatives, )  
 )  
v. )  
 )  
Southern States Police Benevolent )  
Association, Inc. )  
 )  
Defendant. )

FOR THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO: 2016-CP-10-4062

**ORDER CERTIFYING PLAINTIFF  
CLASS**

**RECEIVED**

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SC Court of Appeals

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This matter is before the Court on the motion of Plaintiffs Donald Stanley and Sean Reiter to certify this matter as a class action pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. Plaintiffs seek certification of the following class:

All residents of South Carolina who participated in the Defendant's Legal Defense Benefit Plan by paying member dues to the Defendant in exchange for benefits of said Plan from August 4, 2013 to August 4, 2016.

Excluded from the class are Defendant's current and former executive and local board members or executive level officers, employees, and persons that timely and properly exclude themselves from the class. Based on the foregoing, the Court certifies the class.

**FACTUAL ALLEGATIONS**

Defendant Southern States Police Benevolent Association, Inc. ("PBA") is a corporation organized and existing under the laws of the State of Georgia. Plaintiff Stanley is a Lieutenant with the Charleston County Sheriff's Department and is a member in good standing of the PBA and has been such for over 21 years. Plaintiff Reiter was at all times relevant a law enforcement officer with the Charleston County Sherriff's Department and/or the City of North Charleston. Plaintiffs allege the PBA invites police officers in the States of Georgia, South Carolina, North Carolina, Virginia, West Virginia, Arkansas, Tennessee, and Louisiana to become members of the PBA.

There are approximately 42,000 members of the PBA in all states. In 2016, the PBA had 2,575 members in South Carolina.

The Plaintiffs allege that members of the PBA pay monthly dues to the PBA in exchange for several benefits, but primarily a "Legal Defense Benefit Plan" (sometimes referred to as the "Plan"). Plaintiffs contend the monthly dues for South Carolina members are \$23.00, and that Plan promises to provide a legal defense and cover related costs to an officer member who is accused of a crime while performing his or her official duties as police officers. Plaintiffs further contend the Legal Defense Benefit Plan is actually a policy of insurance which the PBA was not licensed to sell in any of the States in which it transacts business. Alternatively, Plaintiffs claim that the Legal Defense Benefit Plan is a prepaid legal services plan which the PBA was not licensed to sell in any of the States in which it transacts business.

After this suit was filed, the PBA applied to the South Carolina Department of Consumer Affairs to become licensed as a prepaid legal benefits plan pursuant to S.C. Code § 37-16-10, *et seq.* Although the Department of Consumer Affairs granted this request, Plaintiffs' claims are primarily focused on the actions of Defendant PBA in the years leading up to the filing of the Complaint and prior to the PBA seeking licensure. Plaintiffs assert that during that time, the Defendant PBA not only failed to have a license to operate as an insurer or prepaid legal benefits plan, it also was not in compliance with the statutory requirements of such plans, namely that the plan had to allow members to choose their own attorneys. S.C. Code § 37-16-50. The PBA assigned attorneys to its members from a panel chosen by the PBA. The PBA has denied these allegations.

Plaintiffs also claim that the PBA failed to disclose the terms of the Plan to its members, including a clause that purportedly allows the PBA to withhold the benefits that its members pay

for if it determines that the member “has committed an intentional, deliberate and/or illegal act.” Plaintiffs also assert that by selling the Plan, the Defendant PBA never revealed it lacked proper licensure and authority to sell insurance. The PBA has also denied these allegations. Plaintiffs seek injunctive relief and damages, namely a rescission of the Plan and a refund of member dues or premiums paid, together with additional relief.

Plaintiffs have alleged causes of action against the Defendant PBA for breach of contract, negligence, breach of fiduciary duty, unjust enrichment, fraud in the inducement, negligent misrepresentation, and injunctive relief. In addition to alleging that the PBA has operated as an insurer without appropriate authority or oversight and that it failed to disclose the terms of the Plan to its members, Plaintiffs have also alleged that PBA has violated other duties, including: (1) the duty to maintain sufficient reserves, capital, and surplus; (2) the duty to maintain adequate records and be subject to supervision and regular audits by appropriate state authorities; (3) the duty to prepare and submit reports to state authorities to demonstrate adherence to reserve, capital, and surplus requirements; (4) the duty to handle and account for premiums paid by insureds; (5) the duty to renew policies and not cancel policies in bad faith; (6) the duty to conduct its business in a fair and honest manner; (7) the duty to act in good faith in the solicitation, sell, negotiation and issuance of policies; (8) the duty to act in good faith and in the best interests of the class members in the handling and adjustment of claims made against those policies; and (9) the duty to comply with other laws, statutes and regulations enacted for the benefit of insureds as discovery may show.

Defendant PBA made a motion to dismiss the Amended Complaint for failure to state a claim under Rule 12(b)(6), SCRCF, primarily arguing that Plaintiffs did not have standing to bring a suit for the failure to obtain appropriate licenses as an insurer or prepaid legal benefit plan and that Plaintiffs had not suffered any legally cognizable damages. The Honorable J.C. Nicholson

denied this motion by order dated July 27, 2017. Defendant PBA thereafter made a motion for summary judgment on similar grounds, which Judge Nicholson denied by order dated November 15, 2017.

### **LEGAL FINDINGS**

Rule 23(a) of the South Carolina Rules of Civil Procedure governs certification of classes:

- (a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds
- (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 protect the interests of the class, and
  - (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

“The class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23.” Grazia v. SC State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197, 204 (2010) (quoting Califano v. Yamasaki, 442 U.S. 682, 701, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176 (1979)). The South Carolina Supreme Court has expressed the viewpoint that class actions are favored in this state:

Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 523 S.E.2d 781, 784 (1999).

Moreover, the South Carolina Supreme Court has affirmed the certification of a class of insurance policyholders to protect the interests of those policyholders in the insurance reserves held by a fraternal benefit association, Ex parte Rowley, 200 S.C. 174, 20 S.E.2d 383, 387-88

(1942) (“The interests and claims of the policyholders sought to be protected and preserved in this action are principally against the reserve funds of the association and it seems to us that all the policyholders form a most appropriate class for application of the statute.”).

Upon a motion for class certification, it will be incumbent on the circuit court to determine whether or not the action meets each of the five prerequisites that proponents of class certification are required to prove. Grazia, 703 S.E.2d at 204. It is within a trial court's discretion whether a class should be certified. Tilley v. Pacesetter Corp., 333 S.C. 33, 508 S.E.2d 16, 21 (1998). Additionally, “[a] court may not look to the merits when determining whether to certify a class.” Id.; King v. Am. Gen. Fin., Inc., 386 S.C. 82, 687 S.E.2d 321, 324 (2009).

Proponents of the class certification have the burden of proving the prerequisites of class certification have been met. Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 467–68, 388 S.E.2d 799, 801 (1990). Defendant PBA has suggested that this is an evidentiary burden, but the Court in Waller considered the pleadings in reaching its class certification decision. See also 2 H. Newberg, Newberg on Class Actions, §7.20 (3d Ed. 1992) (The initial class determination should usually be made on the well-pled allegations of the Complaint.). Allegations of class facts usually constitute a prima facie showing of entitlement to maintain a class action. Id. Once a plaintiff has demonstrated a preliminary showing that the legal requirements of Rule 23 have been met, the burden of proof is upon the defendant to demonstrate otherwise. Newberg, §7.22 at 7.74–75. Accordingly, Plaintiffs do not have to prove their substantive claims as part of the class certification procedure.

#### **I. THE ACTION SATISFIES THE NUMEROSITY REQUIREMENT.**

Pursuant to Rule 23(a)(1), the proposed class must be so numerous that joinder of all individual members as parties would be impractical. The minimum number required for class certification has been held to be between 20 and 40. See Swanson v. American Consumer

Industries, 415 F.2d 1326, 1333 (7th Cir. 1969) (40 class members sufficient); Bates v. Tenco Services, Inc., 132 F. R. D. 160, 162 (D.S.C. 190) (180 Plaintiffs in one subdivision satisfied numerosity requirement); Damerson v. Sinai Hosp. of Baltimore, 595 F. Supp. 1401, 1408 (D.Md. 1984) (a class with as few as 25 to 30 members raises a presumption that joinder would be impractical). The proposed class herein clearly satisfies this requirement. Defendant PBA has acknowledged in its discovery responses that it had over 2,500 members in South Carolina in 2016. This plainly satisfies the numerosity requirement.

## II. THERE ARE QUESTIONS OF LAW AND FACT COMMON TO THE CLASS.

Rule 23(a) next requires that a class action include sufficient common questions of law and fact between the class members.

It is important to note that the subsection does not demand that all questions of law and fact be common, only that there be common issues among the class. In fact, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status.

McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154, 158 (Ct.App. 1986) (quoting H. Lightsey & J. Flanagan, South Carolina Civil Procedure at 19 (2d ed. 1985)); Central Wesleyan College v. W.R. Grace & Co., 143 F.R.D. 628 (D.S.C. 1992), aff'd, 6 F.3d 177 (4th Cir. 1993).

Critically, “[n]ot every issue in the case must be common to all class members.” Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 21–22, 577 S.E.2d 190, 200–01 (2003) (quoting O'Connor v. Boeing North Amer., Inc., 184 F.R.D. at 311, 329 (C.D.Cal.1998)).

Courts also look favorably upon class action treatment where, as here, standardized conduct is directed uniformly to all of the class members. Mitchell-Tracey v. United General Title Insurance, 237 F.R.D. 551, 557 (D.Md. 2006); Chisolm v. TranSouth Fin. Corp., 194 F.R.D. 538, 559 (E.D.Va. 2000) (“[C]ourts have consistently found a common nucleus of operative facts when the defendants are alleged to have directed standardized conduct toward the putative class

members, or where the class claims arise out of standard documents.”) (internal quotations omitted); see also Blackie v. Barrack, 524 F.2d 891, 902-905 (9th Cir. 1975) (holding that common questions of law and fact abound where alleged claim involves uniform written documents like news releases). Additionally, “[t]he existence of routine and standardized practices giving rise to numerous claims weigh in favor of finding commonality, as well as typicality.” Mitchell-Tracey v. United Gen. Title Ins. Co., 237 F.R.D. 551, 557 (D.Md. 2006); see also Williams v. Empire Funding Corp., 183 F.R.D. 428 (E.D.Pa. 1998) (finding commonality among class members for claims involving standardized contracts and sales and referral practices).

In the current matter, there are several common issues of law and/or fact that pervade the Plaintiffs’ class. All class members are similarly situated to the Plaintiffs in that the proposed class members are all current or former members of Defendant and have paid Defendant membership dues to receive benefits under the Legal Defense Benefit Plan. Defendant PBA’s Policy, which governs the terms of the Plan, applies to all members, but Plaintiffs contend the limitations contained in the Policy remained unknown by all members. The members were all presented with the same marketing pitch and the same documents and forms. The members even pay the same dues to the Defendant PBA, \$23.00 a month.

Issues of law that are common to the entire class and can be decided on a class-wide basis include, but are not limited to: (1) whether Defendant is acting as an unregistered and unlicensed insurance company in South Carolina; (2) whether Defendant is acting as an unregistered and unlicensed prepaid legal benefit in South Carolina; (3) whether proposed class Plaintiffs have standing to bring a cause of action in this matter; (4) whether the proposed class Plaintiffs have suffered legally compensable damages; (5) whether Defendant, as an unauthorized insurer, has the right to file an answer in this matter pursuant to S.C. Code § 38-25-550(a); (6) whether Defendant

has maintained sufficient reserves to fulfill its obligations to the class; (7) whether Plaintiffs are entitled to injunctive or declaratory relief; and (8) whether Defendant has created and followed appropriate standards and acted in good faith.

Defendant PBA has not identified any differences among class members that would overcome this list of common issues that can and should be decided on a class-wide basis. Defendant has consistently argued in this matter, both before this Court and before Judge Nicholson, that Plaintiffs and the putative class members lack standing to bring these claims and have not suffered legally cognizable damages. Both of these issues are common to all class members and can and should be decided on a class-wide basis. Certainly, the class certification stage is not the time to make rulings on the substance of any claims or defenses, Tilley, 508 S.E.2d at 21, and the strength or weakness of any particular defense or claim is not a factor in determining class status.

Defendant PBA has argued that damages in this matter would require individual assessments. This argument overlooks two facts. First, every member paid the same amount to Defendant PBA, \$23.00 a month. “The measure of damages is not based upon the benefits named in the policy but upon the premiums paid.” Ross v. Am. Income Life Ins. Co., 232 S.C. 433, 440, 102 S.E.2d 743, 746 (1958). Second, even if there is some divergence among class members in their damages, either due to length of time as a member or due to the receipt of benefits under the plan, such damages or deductions are easily calculated on a class wide basis and certainly do not predominate over the common factors cited about that bind the class.

As in many class action matters, the liability issues that are common to the class far outweigh the damage issues that might separate the class. As stated by the Fourth Circuit Court of Appeals, “[t]he possibility that individualized inquiry into Plaintiffs' damages claims will be

required does not defeat the class action because common issues nevertheless predominate.”

Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 427-29 (4th Cir. 2003)

In summary, this matter is well-suited to class action status. Defendant PBA has argued several defenses that apply equally to all class members, and it would appear that these defenses are going to be the primary issues in this litigation. Accordingly, commonality is present and supports class certification.

### **III. PLAINTIFFS' CLAIMS ARE TYPICAL OF THE CLAIMS OF THE CLASS.**

Rule 23(a)(3) requires that the claims of the class representatives be "typical of the claims of the class." SCRPC, 23(a)(3). For the purposes of Rule 23(a), the representative party's claims are "typical" if they arise from the same conduct that gives rise to the claims of the class members and if the claims of the claimants are based on the same legal theories. Central Wesleyan College v. W.R. Grace & Co., 243 F.R.D. 628, 637 (D.S.C. 1992); see also 1 H. Newberg, Newberg on Class Actions §3.13 at 167 (2d Ed. 1985).

The test focuses on similarity of legal and remedial theories of claims of named and unnamed plaintiffs. Bates v. Tenco Services, Inc., 132 F.R.D. 160, amended, 132 F.R.D. 165 (D.S.C. 1990). To some extent, the analysis of the typicality requirement coincides with the court's determination of the commonality issue. The claim of a plaintiff is to be considered "typical" of the claims of the class members if the claim arises from the same event, facts or conduct which has given rise to the claims on behalf of the other class members. As stated by Judge Sol Blatt Jr.:

The typicality test does not require that the representatives have identical claims which other members of the class might present. The question of typicality focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs . . . Whether each potential member of the class has suffered the same degree of harm, or each and every type of harm, does not preclude a finding of typicality.

Bates v. Tenco Services, Inc., 132 F.R.D. 160, 163 (D.S.C. 1990).

Plaintiffs' claims are not only similar to but also typical of the claims of all class members. Each class member is a former or present dues paying member of Defendant PBA. One of the named Plaintiffs is a current member of the PBA, and the other is a former member of PBA. Each class member was covered by Defendant PBA's Legal Defense Benefit Plan. Each class member also has an interest in the resolution of the common questions of fact and law set forth above. Since there is no significant difference between the claims of the Plaintiffs and the other class members, typicality is satisfied.

**IV. PLAINTIFFS WILL FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS.**

Rule 23(a) also requires that the Plaintiffs be able to fairly and adequately represent and protect the interests of all class members in proceeding with prosecution of the matter as a class action. In determining whether Plaintiffs are adequate class representatives, the court should look at two criteria: (1) the representative must have common interests with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel. Runion v. U.S. Shelter, 98 F.R.D. 313 (D.S.C. 1983), cited with approval in Waller v. Seabrook Island Property Owners Ass'n, 300 S.C. 465, 388 S.E.2d 799 (1990). "The adequacy of plaintiffs' counsel, like that of the individual plaintiffs, is presumed in the absence of specific proof to the contrary." S.C. Nat. Bank v. Stone, 139 F.R.D. 325, 330-31 (D.S.C. 1991). Furthermore, Courts generally hold that the employment of competent counsel assures vigorous prosecution. Id. at 331.

Plaintiffs' claims are identical to the claims of the other proposed class members. Plaintiffs have no interests that are antagonistic to the class. There is no evidence that the Plaintiffs or their attorneys would not be adequate representatives of the class. Indeed, in their depositions, both named Plaintiffs have stated that they are pursuing this action in the interests of all PBA members.

Counsel for Defendant PBA has speculated that some class members are opposed to this action. Such speculation, if relevant, would destroy every class certification effort. Instead, South Carolina encourages the use of opt-out classes to address this issue. Here, Plaintiffs have requested an opt-out class, and this Court is certifying an opt-out class to allow any members opposed to the action to opt-out of the class. Plaintiffs have therefore satisfied the adequacy element.

**V. THE AMOUNT IN CONTROVERSY REQUIREMENT HAS BEEN MET.**

Rule 23(a)(5), SCRCF provides that: "in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class." Rule 23(a)(5) does not require \$100 in damages, but that the *amount in controversy* exceed \$100. The proposed class seeks recovery for all dues paid by class members to Defendant. Class member dues are \$23.00 per month. Thus, anyone who has been a member of Defendant for five months or more has paid more than \$100. This is the *amount in controversy*, and, consequently, this factor is satisfied. Therefore, the Court finds that Plaintiffs have met the amount in controversy requirement.

**VI. DEFENDANT'S ARGUMENTS DO NOT PRECLUDE CLASS CERTIFICATION.**

Defendant's arguments against class certification, which were laid out in detail in their Memorandum in Opposition to Class Certification, focused on the merits, an alleged lack of evidence supporting the Rule 23 factors, and the purported insufficiency of Plaintiffs' claims, namely arguing that for class adjudication, and Plaintiffs lacked standing to bring this suit and also lacked damages. These arguments have already been rejected by Judge Nicholson, and Tilley makes it clear that class certification is not grounded on a consideration of the merits. Indeed, the arguments and defenses presented by Defendant are common to the entire class and, therefore, support class certification and a class-wide determination of these legal issues.

## CONCLUSION

IT IS THEREFORE ORDERED THAT:

a. the Court certifies this matter as a class action and certifies the following class of plaintiffs:

All residents of South Carolina who participated in the Defendant's Legal Defense Benefit Plan by paying "member dues" to the Defendant in exchange for benefits of said Plan from August 4, 2013 to August 4, 2016.

Excluded from the class are Defendant's current and former executive and local board members or executive level officers, employees, and persons that timely and properly exclude themselves from the class. Based on the foregoing, the Court certifies the class.

b. Counsel for the Plaintiffs are appointed as class counsel for the Plaintiff class.

c. Any notices required by the law and the South Carolina Rules of Civil Procedure shall be given to the class in a form and manner to be determined by the Court upon application by Plaintiffs or Defendants. In the interim, no party shall communicate with the class members regarding this class action and the allegations contained herein.

IT IS SO ORDERED.

  
THE HONORABLE EDWARD W. MILLER

December 31, 2018  
Charleston, South Carolina