IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

DAVID W. VENESS and
JULIE K. VENESS, on behalf of
themselves and others similarly situated,

Plaintiffs,

v.

HEYWOOD, CARI & ANDERSON, S.C.,

Defendant.

OPINION AND ORDER

17-cv-338-bbc

- -

Plaintiffs David and Julie Veness bring this action on behalf of themselves and other similarly-situated individuals, alleging that defendant Heywood, Cari & Anderson, S.C. served validation notices on them and other consumers at the same time that it served a summons and complaint to collect a consumer debt, in violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692g(a)(3) and 1692e(10). Specifically, plaintiffs contend that because the deadlines for responding to a complaint in many state courts are often shorter than the deadlines for disputing a debt under § 1692g, serving the validation notice with a summons and complaint is likely to confuse consumers about when and how they need to respond to the complaint. Defendant denies that its practices violated the Act.

However, the parties have reached an agreement to resolve this case under which defendant will create a non-reversionary settlement fund in the amount of $3,000.00 to be

divided among the 49 proposed class members, $1,000 as incentive compensation to each of the named plaintiffs, plaintiffs' attorney fees and costs up to $22,500 and the costs of administering the settlement and providing direct mail notice to each class member. Defendant also has agreed to stop the practice that is the subject of this lawsuit. Jurisdiction is present under 15 U.S.C. § 1692k and 28 U.S.C. § 1331.

Now before the court is plaintiffs' unopposed motion for preliminary approval of the class action settlement agreement, in which they seek preliminary certification of a class, the appointment of themselves as class representatives, the appointment of their attorneys as class counsel, preliminary approval of the class settlement agreement negotiated by the parties and approval of a written notice of class action settlement. Dkt. #15. For the reasons explained below, I will grant the motion and set a fairness hearing for 1:00 p.m. on May 16, 2018.

OPINION

A. Class Certification and Appointment of Class Representatives and Class Counsel

Plaintiffs seek to recover monetary damages on behalf of the following proposed class members:

> All persons in the state of Wisconsin on whom, between May 5, 2016 and May 5, 2017, Heywood, Cari & Anderson, S.C. served a "Notice Required by the Fair Debt Collection Practices Act (The Act), 15 U.S.C. Section 192 as Amended" as part of a lawsuit it filed against such person in connection with the collection of a consumer debt.

Defendant represents that there are 49 class members, including plaintiffs.

To obtain certification of the proposed settlement class, plaintiffs must satisfy the prerequisites of numerosity, commonality, typicality and adequacy of representation under Fed. R. Civ. P. 23(a), as well as one of the requirements of Fed. R. Civ. P. 23(b). Chapman v. Bowman, Heintz, Boscia & Vician, P.C., 2015 WL 9478548, at *2-3 (N.D. Ind. Dec. 29, 2015) (certifying FDCPA class action); Selburg v. Virtuoso Sourcing Grp., LLC, 2012 WL 4514152, at *2 (S.D. Ind. Sept. 29, 2012) (same). Applicable in this case is Rule 23(b)(3), which requires a showing that common issues predominate over other issues, and that the class action method provides the best way to resolve those issues. Jefferson v. Ingersoll International Inc., 195 F.3d 894, 898 (7th Cir. 1999) ("When substantial damages have been sought, the most appropriate approach is that of Rule 23(b)(3), because it allows notice and an opportunity to opt out."). In a settlement context, the court must rigorously examine whether the class meets the requirements of Rule 23 and to identify potential conflicts of interest. Redman v. RadioShack Corp., 768 F.3d 622, 629 (7th Cir. 2014).

1. Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder is impracticable. There is no explicit cut-off, but the Court of Appeals for the Seventh Circuit has noted that a class with 40 members is sufficient. Swanson v. American Consumer Industries, Inc., 415 F.2d 1326, 1333 n.9 (7th Cir. 1969). See also Beard v. Dominion Homes Financial Services, Inc., 2007 WL 2838934, at *4 (S.D. Ohio Sept. 26, 2007) (finding numerosity satisfied with 41 class members). The parties represent that there are 49 members of the

proposed class, which is large enough to make joining them all impracticable. Therefore, I find that the proposed class satisfies the numerosity requirement.

2. Commonality

Rule 23(a)(2) requires "questions of law or fact that are common to the class," but the more apt analysis is whether there are common answers to those questions. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). Here, the class members all suffered from the same conduct on the part of defendant, which sent each of them a validation notice along with the summons and complaint in the state court action against them to recover a consumer debt. Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998) ("Common nuclei of fact are typically manifest where . . . the defendants have engaged in standardized conduct towards members of the proposed class."). The class also shares common questions of law, including whether defendant's conduct violated the requirements of the Fair Debt Collection Practices Act. Chapman, 2015 WL 9478548, at *3 (commonality present because all class members suffered from defendant's common practice of issuing standardized initial debt collection letters that did not contain proper disclosures under FDCPA). Because the answers to these factual and legal questions would resolve the class members' claims without individualized determinations, the proposed class satisfies the commonality requirement.

3. Typicality

Typicality is satisfied if the class representatives' claims have "the same essential

characteristics" as the class members' claims. Muro v. Target Corp., 580 F.3d 485, 492 (7th Cir. 2009) (citation omitted). David and Julie Veness, who seek appointment as class representatives, are members of the class and have the same claims as the rest of the class members. Accordingly, they satisfy the typicality requirement and will be appointed class representatives.

4. Adequacy of representation

The question of adequate representation involves two inquiries: (1) whether the class representatives' interests are aligned with those of the class; and (2) whether class counsel is capable of litigating the case. Gomez v. St. Vincent Health, Inc., 649 F.3d 583, 592 (7th Cir. 2011). As members of the class, the Venesses have no apparent conflicts with the rest of the class. Their interests in resolving the matter are the same as those of the class. The only added benefit that the Venesses seek is an extra $1,000 for their service, as provided in the settlement agreement. That amount is reasonable. Groshek v. Great Lakes Higher Education Corp., 2016 WL 4690318, at *2 (W.D. Wis. Apr. 13, 2016) (approving $7,200 as reasonable amount for class representative's service). Accordingly, I find that David and Julie Veness are adequate class representatives.

Lawyers from two law firms seek appointment as class counsel: James L. Davidson of Greenwald Davidson Radbil PLLC and Matthew C. Lein of Lein Law Offices. The court must consider the work that counsel did to identify and investigate the claims, their experience in similar cases, their knowledge of the law and the resources that they will

commit to the representation. Fed. R. Civ. P. 23(g)(1)(A). Davidson and Lien have represented David and Julie Veness since they filed the case and have investigated the claims and conducted legal research and extensive discovery. They engaged in motion practice and negotiated the proposed settlement agreement in this case.

The lawyers' history with this case suggests that they have competently and vigorously represented the class thus far. Davidson says that courts across the country have appointed members of his firm as class counsel in more than three dozen consumer protection class actions in the past several years, including those brought under the Fair Debt Collection Practices Act. In addition to the significant resources that Davidson and Lien have already expended in this case, they represent that they will dedicate sufficient resources to see the case through the administration of the settlement. Accordingly, Davidson and Lien have satisfied the Rule 23 requirements and will be appointed class counsel.

5. Rule 23(b)(3)

Rule 23(b)(3) requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." To determine whether that is the case, courts consider the class members' interests in individually controlling their own claims, the nature and extent of any other litigation about the controversy, the desirability of concentrating the litigation in this court and any management challenges that the case may present. Rule 23(b)(3).

First, although class members have an interest in controlling their own claims, they also have an interest in the efficient resolution of their claims, which the class action and proposed settlement provide. Individually litigating each class member's claims would be expensive and time consuming. Second, there is no indication that any of the class members have other litigation related to the claims at issue in this case. Third, consolidating the issues into one case and resolving them is efficient. Finally, the case presents no management difficulties because the parties have reached a settlement. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems."). The goal is to "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Id. at 615 (citing Fed. R. Civ. P. 23 Advisory Committee Notes). Because consolidation of the class members' claims into a class action would accomplish that goal, a class action is the best way to proceed. Therefore, the court will certify the proposed class for the purpose of settlement.

B. Preliminary Approval of Settlement Agreement

The settlement agreement provides for a fund of $3,000.00 to compensate 49 class members. Attorney fees, costs and incentive compensation for the class representatives are not included in the amount. The agreement also lays out the procedures for notifying the class, getting final approval of the settlement and administering it. To be approved, the

settlement must be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(C).

At this point, the parties seek only preliminary approval. After preliminarily approval, the parties will send notice to the class, provide the opportunity for opting out of the class and opposing the settlement and attend a final fairness hearing to determine whether the proposed settlement is fair, reasonable and adequate. Fed. R. Civ. P. 23(e)(3). In deciding whether to give preliminarily approval to the settlement, the court considers the strength of plaintiffs' case compared to the settlement amount; the complexity, length and expense of the litigation; any opposition to settlement; the opinion of competent counsel; and the stage of the proceedings (including the amount of discovery completed) at the time of settlement. Synfuel Technologies, Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 653 (7th Cir. 2006).

1. Strength of plaintiffs' case compared to settlement amount

The most important settlement-approval factor is "the strength of plaintiffs' case on the merits balanced against the amount offered in the settlement." Id. (citations omitted). The Fair Debt Collection Practices Act limits statutory damages to a maximum of one percent of the defendant's net worth. 15 U.S.C. § 1682k(A)(2)(B). The parties represent that the settlement fund of $3,000.00 in this case exceeds one percent of defendant's book value net worth. Further, each participating class member stands to receive more than $61. Extra money from uncashed checks or from class members opting out will be distributed among class members or donated to charity. Appropriately, costs, including the cost of administering the fund, attorney fees and incentive compensation have been excluded from

the settlement amount for approval purposes. Redman, 768 F.3d at 630 ("[A]dministrative costs should not have been included in calculating the division of the spoils between class counsel and class members.").

On the other hand, litigation always presents challenges that present a real risk for the class. Settlement insures payment against the risk that the class may not recover any money at all. Accordingly, this factor favors preliminary approval of the settlement.

2. Length, expense and complexity of litigation

The potential length, expense, and complexity of litigating these claims through trial weigh in favor of settlement. Although litigation of these issues would not be particularly complex, prompt settlement benefits all parties by avoiding long, drawn-out litigation. It gives plaintiffs and the class members a meaningful amount of compensation and it spares defendants the cost of continuing to pay their attorneys through a trial.

3. Opposition

The proposed settlement agreement provides for class members to file objections to the settlement within 75 days of the entry of this order. At this point, court consideration of opposition is premature because the members have not yet had the chance to voice it.

4. Opinion of counsel

In deciding whether to approve the settlement, the court is "entitled to give

consideration to the opinion of competent counsel." Isby v. Bayh, 75 F.3d 1191, 1200 (7th Cir. 1996). In this instance, counsel have experience in litigating similar cases to settlement. They support the terms of the settlement agreement and represent that it is the result of arm's-length negotiation. For the purpose of preliminarily approving the settlement. I accept counsel's opinion in favor of approval.

5. Amount of discovery and stage of proceedings

Plaintiffs filed their complaint on May 5, 2017. Since then, the parties have engaged in informal discovery. Although they have not engaged in extensive motions practice, the parties have had an opportunity to consider the merits and risks of litigating compared to settling. Accordingly, this factor weighs in favor of approval.

In sum, I find preliminarily that the terms and conditions set forth in the settlement agreement reached by the parties and submitted to the court are fundamentally fair, reasonable, adequate and in the best interest of the class members, especially in light of the benefits to the class members; the strengths and weaknesses of plaintiffs' case; the anticipated complexity, duration and expense of additional litigation; the risk and delay inherent in possible appeals; the limited amount of any potential total recovery for the class, given the cap on statutory damages for claims brought under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq.; and the opinion of class counsel, who are experienced in this area of class action litigation.

C. Class Notice and Settlement Procedure

The parties have moved for approval of their proposed notice to the class, which is attached to the settlement agreement as exhibit C. Dkt. #15, exh. 1 at 34. They also recommend that I appoint First Class, Inc. as a third-party class administrator to mail the class action notice and settlement checks to the class members. All costs of administration will be paid by defendant separate and apart from the settlement fund.

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances." It must plainly state the nature of the action, the definition of the certified class, the issues, the option for members to appear through counsel, the option to be excluded from the class and the binding effect of judgment on participating class members. The proposed notice submitted by the parties describes the case and settlement procedures in plain language and explains the options open to class members, including the process by which to object and to exclude themselves. The parties propose mailing a copy of the notice to each class member via United States Mail. Because the proposed notice satisfies the Rule 23 requirements, I will approve it and appoint First Class, Inc. as the class administrator.

In accordance with the settlement agreement, class counsel shall insure that First Class, Inc. mails the notice to the class members as expeditiously as possible, but no later than January 19, 2018, or 21 days after the entry of this order. Class counsel's motion for attorney fees shall be filed on or before February 27, 2018. Defendant's response is due March 29, 2018, and class counsel's reply is due April 5, 2018. Requests by class members to opt out of the class must be postmarked on or before March 20, 2018, and any objection

to the settlement agreement must be filed on or before March 20, 2018. Plaintiffs' motion for final approval must be filed on or before April 10, 2018. Defendant's response is due April 24, 2018, and plaintiffs' reply is due May 1, 2018. The final fairness hearing shall be held on May 16, 2018 at 1:00p.m.

ORDER

IT IS ORDERED that

1. The unopposed motion for preliminary approval of class action settlement and class certification filed by plaintiffs David and Julie Veness, dkt. #15, is GRANTED.

2. David and Julie Veness are appointed class representatives.

3. James L. Davidson of Greenwald Davidson Radbil PLLC and Matthew C. Lein of Lein Law Offices are appointed class counsel.

4. First Class, Inc. is appointed the class administrator and shall send notice to the class on or before January 19, 2018.

5. The following filing deadlines are set in this case:

a. Class counsel's motion for attorney fees shall be filed on or before February 27, 2018. Defendant's response is due March 29, 2018, and class counsel's reply is due April 5, 2018.

b. A class member's request to opt out of the class must be postmarked on or before March 20, 2018.

c. A class member's objection to the settlement must be filed on or before

March 20, 2018.

d. Plaintiffs' motion for final approval must be filed on or before April 10, 2018. Defendant's response is due April 24, 2018, and plaintiffs' reply is due May 1, 2018.

6. The final fairness hearing is scheduled for May 16, 2018, at 1:00 p.m.

Entered this 29th day of December, 2018.

BY THE COURT:

/s/

_____
BARBARA B. CRABB
District Judge