IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

McFADDEN, LYON & ROUSE, L.L.C.,	*	
Plaintiff,	*	
vs.	*	**CASE NO. 03-2072-HYT**
AVAYA FINANCIAL CORP.,	*	
Defendant.	*	

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

This matter came before the Court on Plaintiff's motion to certify a class composed of all persons and entities who have or had a lease agreement with the Defendant, and who incurred insurance charges within six (6) years of the filing of this Complaint (the "Class"), divided into two subclasses: (1) those customers who paid insurance charges for insurance placed through Lease Insurance Services Corp., or its successors; and (2) those customers who paid insurance charges for insurance placed with American Bankers Insurance Co. Excluded from the Class are the Defendant, any subsidiaries, and any affiliated entities; any employees, officers, or directors of any of them, and any of their legal representatives, heirs, successors and assigns; and Plaintiff's class counsel.

Because this motion was opposed, a hearing was conducted pursuant to *Ala. Code* § 6-5-641. In connection with this hearing, the parties conducted discovery pertaining to class issues and submitted evidence in support of, or in opposition to, the pending motion. The parties submitted evidence through the introduction of deposition testimony, exhibits and affidavits. This order comes after full consideration of the evidence and arguments presented by the parties. Based on the

findings of fact and conclusions of law set out below, the Court grants Plaintiff's motion, in part, as follows:

FINDINGS OF FACT

For the purposes of certification, the Court should not conduct a mini trial on the merits of the litigation. Consequently, the Court finds the following facts only to the extent that they aid the Court in deciding the issues concerning certification. The Plaintiff set out certain facts in support of its motion, and none of those facts were contested by the Defendant, although the Defendant did take issue with the inferences drawn from certain facts.

During the class period, Defendant utilized two (2) similar, but somewhat different, insurance programs. Plaintiff was involved with each program, and allegedly suffered damage from each.

Defendant is in the business of leasing office equipment and related products. For example, Plaintiff leased a telephone system from the Defendant. Thus, the relationship between Defendant and the Plaintiff, as well as the members of the class, is one of lessor/lessee.

Throughout the class period, Defendant used substantially uniform lease language to require its customers to maintain insurance on the leased equipment. The pertinent lease language states:

> 6. INSURANCE. You will provide and maintain at your expense (a) property insurance against the loss, theft or destruction of, or damage to, the Equipment for its full replacement value, naming us as loss payee, and (b) public liability and third party property insurance, naming us as an additional insured. You will give us certificates or other evidence of such insurance when requested. Such insurance will be in a form, amount and with companies acceptable to us, and will provide that we will be given 30 days advance notice of any cancellation or material change of such insurance. If you do not give us evidence of insurance acceptable to us, we have the right, but not the obligation, to obtain insurance covering our interest in the

> Equipment for the term of this Lease, including any renewals or extensions, from an insurer of our choice, including an insurer that is our affiliate. We may add the costs of acquiring and maintaining such insurance and our fees for our services in placing and maintaining such insurance (collectively, "Insurance Charge") to the amounts due from you under this Lease. You will pay the Insurance Charge in equal installments allocated to the remaining Lease Payments. If we purchase insurance, you will cooperate with our insurance agent with respect to the placement of insurance and the processing of claims. Nothing in this Lease will create an insurance relationship of any type between us and any other person. You acknowledge that we are not required to secure or maintain any insurance, and we will not be liable to you if we terminate any insurance coverage that we arrange. If we replace or renew any insurance coverage, we are not obligated to provide replacement or renewal coverage under the same terms, costs, limits, or conditions as the previous coverage.

By including that language, Defendant's stated objective was to allow itself to procure insurance in the event the customer failed to provide proof of insurance coverage. To enforce the requirements of the leases, Defendant engaged in two insurance programs involving the named Plaintiff.

Prior to November 1998, Defendant entered into a contract with a company known as Lease Insurance Services Corp., which was later known as Premier (hereinafter collectively referred to as "Premier"). While the Premier program was being used, it was uniformly used for all leases involved in the Defendant's business.

The relationship between Defendant and Premier was governed by a written agreement. Under that program, Defendant agreed that Premier would manage Defendant's insurance program, including placement of the insurance coverage. Defendant appointed Premier as the manager of the program to place the insurance, bill the customer for the insurance, and administer the insurance program. Premier charged a fee for this service, and that fee was passed on to the customer.

Premier then subcontracted back to Defendant some of its contractual obligations. For example, Defendant billed the customer by adding a line item to its bill for insurance. The customer was billed the actual premium the insurance company charged Premier to insure the equipment, a finance charge by a third party lender, and the Premier fee. Premier, however, did not actually collect the vast majority of its fee. Instead, Premier allowed the Defendant to retain most of the fee. The Defendant retained $4.00 per month per lease for billing the customer for the insurance charge, and Premier was only paid $.125 per month ($1.50 per year). The $4.00 subcontract fee paid to the Defendant had no direct relationship with Defendant's costs of performing any duties.

The Defendant profited from the insurance program in an additional way. Prior to 1998, the insurance was underwritten by National Union Fire Insurance Co. National Union did not retain the risk, rather it entered into a re-insurance agreement with Equipment Insurance Co. ("EIC") for the entire risk. EIC was a wholly owned subsidiary of the Defendant. EIC also did not retain any of the risk. EIC returned the majority of the risk back to National Union, so that EIC retained only a small part of the risk. What EIC did retain was a large part of the premium paid. The Premier program continued to be uniformly employed until November 1998.

In 1998, Defendant changed the insurance program and moved the insurance to American Bankers. No potential insurers other than American Bankers were approached during the change-over process. Defendant's customers were not informed of the change. Plaintiff was also put into the American Bankers program.

The American Bankers program was different from the Premier program in several respects. The customer was charged the same amount Premier had been charging per month. However, the entire charge was designated as "premium." No separate "fee" was included in the charge. No

attempt was made to test the amount of the premium to see whether it was reasonable in the marketplace.

In October of 2001, Defendant told American Bankers to reduce the premium by $6.00 and to pay the $6.00 directly to the Defendant. This event evidences the extent of the control that the Defendant had over the insurance program and the amount charged to its customers for the insurance.

Like the Premier subcontract fee, the $6.00 fee was not based on any cost study and was not designed to bear any relationship to Defendant's actual costs. The Defendant acknowledged a $6.00 fee was "impossible to justify."

American Bankers did not retain the risk; American Bankers transferred the risk to a wholly owned subsidiary of Defendant, Highlands Insurance Co. American Bankers retained none of the risk. Highlands then returned the majority of the risk back to American Bankers, but Highlands retained the majority of the premium.

While the premiums charged by American Bankers were comparable to the premium charged by Premier, no analysis was attempted comparing rates charged by American Bankers to rates available in the market place.

CONCLUSIONS OF LAW

It is the duty of this Court to undertake a rigorous analysis of the requirements of Rule 23 to determine whether a class should be certified. *Ex parte Mayflower Nat. Life Ins. Co.*, 771 So. 2d 459, 462 (Ala. 2000); *Ex Parte Citicorp Acceptance Corp.*, 715 So. 2d 149 (Ala. 1998). Plaintiff bears the burden of proving the requisite elements of Rule 23 to support certification. *Id.* However,

the certification process does not involve a mini trial on the merits. *Ex Parte American Bankers*, 715 So. 2d 186, 192 (Ala. 1997) (Cook, J. concurring); *Mayflower National Life Ins. Co. v. Thomas*, 894 So. 2d 637, 641 (Ala. 2004) (merits analysis inappropriate at class stage).

At the certification hearing, counsel for the Defendant argued that the Court should test the merits of Plaintiff's claim, and particularly apply Defendant's affirmative defenses to determine the merits. Prior to the hearing on class certification, the Defendant had filed a motion for summary judgment. Plaintiff filed a motion to continue any argument on the summary judgment motion, arguing in part that because the court had limited discovery to class issues it was not appropriate to hear the summary judgment motion. This court agreed and continued the summary judgment hearing.

At the class hearing, counsel for the Defendant argued for the first time that the Court should consider its merits arguments at the certification stage because if the Plaintiff is subject to a defense, or the Complaint fails to state a claim, lack of standing would prevent certification. Counsel is correct that a trial court may consider the standing of the named plaintiff in a certification analysis. *Griffin v. Dugger,* 823 F.2d 1476, 1482 (11th Cir.1987). However, standing is satisfied if the named plaintiff alleges an injury in fact. There is a critical distinction between constitutional standing and plaintiff's claim being subject to one or more defenses. *See In re Lorazepam and Clorazpate Antitrust Litigation*, 289 F.3d 98, 107 (D.C. Cir. 2002). The cases cited by the Defendant do not alter the long-standing principle that the trial court should not resolve the merits at certification. In fact, those cases state the contrary. *See Carter v. West Publishing Co.*, 225 F.3d 1258, 1262 (11th Cir. 2000).

The Alabama Supreme Court has made it clear that merits conclusions have no place in the certification process. *Thomas*, 894 So. 2d at 641; *Mitchell v. H & R Block*, 783 So. 2d 812, 815 (Ala. 2000). While the Court must look at the causes of action, and the available evidence, to consider whether the claims can be proven on a class basis, that "peek" into the merits is far different from conducting a summary judgment hearing. At this stage, the Court expresses no view on the merits of Plaintiff's claims, nor the merits of Defendant's defenses. The defenses raised by the Defendant are not of the nature to deprive the Plaintiff of standing to assert the class claims. Consequently, the Court will address the Rule 23 issues.

The Court has performed a rigorous analysis, and concludes that class treatment, as limited herein, is the most superior method for adjudicating this case.

Plaintiff seeks class certification of this case pursuant to Ala. R.Civ. P. 23(a) and 23(b)(3). Pursuant to Rule 23(b)(3), certification is proper if the plaintiff meets its burden of showing that each of the four elements of Rule 23(a) and those of Rule 23(b)(3) apply. Rule 23(a) establishes four requirements for the maintenance of a class action: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must fairly and adequately protect the interests of the class.

Plaintiff's burden is met if it produces "substantial evidence satisfying the requirements of Rule 23." *Thomas*, 894 So. 2d at 640, citing *Ex parte Green Tree Fin. Corp.*, 684 So. 2d 1302 (Ala. 1996). The Court therefore proceeds to analyze whether Plaintiff has met its burden with regard to each of these elements.

Rule 23(a) – Requirement of Numerosity

The first requirement under Rule 23(a) is numerosity. More specifically, there must be substantial evidence that the class is "so numerous that joinder of all members is impracticable." For purposes of Rule 23(a)(1), impracticability does not require a showing of impossibility, but instead relates to the difficulty or inconvenience in joining all class members. *Cheminova America Corp. v. Corker*, 779 So. 2d 1175, 1179 (Ala. 2000). The numerosity requirement imposes no absolute minimum number, but is subject to examination of the specific facts of each case. *Id.*, quoting, inter alia, *General Tel. Co. v. EEOC*, 446 U.S. 318, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980).

The court can accept common sense assumptions in order to support a finding of numerosity, and estimates of the class size suffice for the purpose of this rule. The proposed class in this case consists of thousands of customers of the Defendant who had insurance placed during the class periods. From the period beginning July 1, 1997 through June 30, 2003, Defendant placed insurance for 1,589 Alabama customers and for 152,634 customers outside of Alabama. (See Defendant's Responses to Plaintiff's First Interrogatories.) Each of the class members may be readily identified using the computer records of the Defendant. (See Defendant's Response to Plaintiff's Request for Admissions, No. 1.). The Defendant did not contest numerosity, and that element is clearly met.

Rule 23(a) – Requirement of Commonality

Commonality is the second requirement under Rule 23, which means that Plaintiff must show that there exist common issues of law or of fact. A "common nucleus of operative facts is usually

enough to satisfy the commonality requirement of Rule 23(a)(2)." *Cheminova*, 779 So. 2d at 1180. Where "the complaint alleges that the Defendants have engaged in a standardized course of conduct that affects all class members, the commonality requirement will generally be met." *In re Terazosin Hydrochloride Antitrust Litigation*, 220 F.R.D. 672, 685 (S.D. Fla. 2004), citing *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1113 (5th Cir. 1978); *see also In re Synthroid Marketing Litigation*, 188 F.R.D. 287, 291 (N.D. Ill. 1999) ("(t)he allegations involve standardized conduct by the defendants toward the potential class members, and in such a situation, courts have readily found a common nucleus of operative facts") (citations omitted).

Rule 23(a)(2)'s commonality requirement does not require that all questions of law or fact be common. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir.), cert. denied, 107 S. Ct. 274, 479 U.S. 883 (1986); *Echols v. Star Loan Co.*, 274 So. 2d 51, 59 (Ala. 1973). A common nucleus of operative facts is usually enough to satisfy the commonality requirement of Rule 23(a)(2).

On the issue of whether the Defendant owed a duty to obtain the "best" insurance available, the individual circumstances of each customer would need to be examined such that commonality is not presented. Also, that claim would require an analysis of the law of fifty states to determine the existence and scope of that duty. Such a nationwide class is not sustainable. *See Green Tree Fin.*, 723 So. 2d 6, 10. Consequently, the Court denies the motion to certify that class.

Plaintiff's claims for breach of contract and breach of the implied covenant of good faith do not depend on the laws of each state. The leases at issue all contain a choice of law provision specifying New Jersey law. (See Defendant's Responses to Plaintiff's Request for Admissions.) Consequently, those claims may be resolved by the application of a single jurisdiction's law. *Cf. Ex*

parte Green Tree Financial Corp., 723 So. 2d 6 (Ala. 1998) (application of multiple states laws make certification inappropriate.)

Plaintiff's claim for breach of contract does present sufficient common issues. First, did the Defendant breach the contract by retaining most of the fee "charged" by Premier. Second, did the Defendant breach the contract by charging a fee greater than allowed under New Jersey law for the failure of the customer to provide proof of insurance. Those issues are answered by construing a uniform contract and present sufficient common claims.

The Defendant maintains its contract allows for every charge it made, and that it is not liable under the contract. However, that is merits inquiry, which the Court may not consider at this stage of the proceedings. *Thomas*, 894 So. 2d at 640; *Mitchell* at 816. In other words, the Defendant may be correct, and if so, it may prevail at trial. However, for purposes of certification, common issues of fact and law exist.

In its brief, the Defendant argued that Plaintiff claimed the contracts at issue were ambiguous, and that the alleged ambiguity would have to be resolved by individual proof. In its reply brief, and at the class certification hearing, Plaintiff stated that it does not claim the contract is ambiguous for resolution of either of the contract claims. At the class hearing, the Defendant acknowledged that it did not consider the lease to be ambiguous. The fact that one party claims ambiguity does not make it so. The Court has reviewed the subject language; and based on the evidence presented, the Court finds no ambiguity. Therefore, those Alabama cases which hold that a contract ambiguity may, in certain circumstances, prevent certification do not apply.

In *Avis Rent-A-Car Systems, Inc. v. Heilman*, 876 So. 2d 1111 (Ala. 2003), the Court affirmed the certification of a breach of contract class where, like here, the plaintiff alleged a breach

of a uniform contract. It will be the Court's responsibility to determine the meaning of the contract language in this case, and the Defendant has not suggested what type of evidence will be needed from absent class members on the issues involved. The meaning of the contract presents a common issue, which may be uniformly decided under New Jersey law.

Plaintiff's claim that the covenant of good faith and fair dealing was breached in this case also presents common issues of law and fact. This claim focuses on the uniform conduct of the Defendant in how it established and ran the insurance program. This claim is brought under New Jersey law, which differs from Alabama law on the scope of the covenant of good faith and fair dealing. The New Jersey Supreme Court has held that "[g]ood faith is a concept that defies precise definition," but concluded good faith conduct is that which "does not violate community standards of decency, fairness, or reasonableness." *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assoc.*, 182 N.J. 210, 224, 864 A.2d 387, 395 (2005) (internal quotations omitted.) The New Jersey Supreme Court has held that, "[a]s a general rule, subterfuges and evasions in the performance of a contract violate the covenant of good faith and fair dealing even though the actor believes his conduct to be justified." *Id.* at 225, 864 A.2d 396 (internal quotations omitted.). Finally, under New Jersey law, the covenant permits inquiry into a party's exercise of discretion expressly granted by a contract. *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 250, 773 A.2d 1121 (2001); *R. J. Graydos Ins. Agency v. National Consumer Ins. Co.*, 168 N.J. 255, 281, 773 A.2d 1132 (2001). The last aspect may require proof of improper motive on the part of the Defendant, but that can be presented on a classwide basis since it involves the conduct of the Defendant. Plaintiff has met its burden of showing sufficient common evidence of the Defendant's alleged manipulation of the insurance program so that the covenant of good faith and fair dealing might have been violated. The Defendant

advanced at the class hearing the business reasons for the structure of the program. Again, the Court expresses no opinion on the merits, but finds that a common course of conduct exists. The court finds the claim of the named Plaintiff is sufficiently common to justify class treatment.

Rule 23(a) – Requirement of Typicality

The third requirement under Rule 23(a), typicality, "focuses on the interests of the class representatives." *Ex parte Government Employees Ins. Co.*, 729 So. 2d 299, 304 (Ala. 1999). "If the party advancing the class can establish that the same unlawful conduct was directed at or affected both the class representatives and the class itself, then the typicality requirement is usually met irrespective of varying fact patterns which underlie the individual claims." *Cheminova*, 779 So. 2d at 1181. A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. *Warehouse Home Furnishing Distributors, Inc. v. Whitson*, 709 So. 2d 1144, 1149 (Ala. 1997) ("(t)ypicality exists when a plaintiff/class representative's injury arises from or is directly related to a wrong to a class and that wrong to the class includes the wrong to the plaintiff").

Plaintiff has allegedly been injured in the same manner and by the same conduct as the class it seeks to represent. Plaintiff's claims and the class claims arise out of the same conduct by the Defendant. The claims of the named plaintiff and the proposed class are based on the same legal theories.

This Court finds that the requisite element of typicality is present here. Where, as here, "the party seeking certification alleges that the same unlawful conduct was directed at the class representatives and the class itself, the typicality requirement is usually met irrespective of the

varying fact patterns which underlie individual claims." *See Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985). In this case, the varying fact patterns relating to why each class member was in the insurance program, or the status of each class member's insurability do not change the result. Particularly with the elimination of any claim dealing with the selection of the most appropriate insurance coverage, the specific differences highlighted by the Defendant are distinctions without a difference.

Rule 23(a) – Requirement of Adequacy

The Alabama Supreme Court has explained the "adequacy-of-representation" requirement of Rule 23(a) as follows:

> The adequacy-of-representation requirement "is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class." *General Tel. Co. v. EEOC*, 446 U.S. at 331, 100 S. Ct. 1698. It also involves questions regarding whether the attorneys representing the class are "qualified, experienced, and generally able to conduct the proposed litigation." *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985). Adequacy of representation requires that the class representative "have common interests with unnamed members of the class" and that the representative "will vigorously prosecute the interests of the class through qualified counsel." *American Med. Sys.*, 75 F.3d at 1083 (*quoting Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976)); *see also General Tel. Co. v. Falcon*, 457 U.S. at 157, 102 S. Ct. 2364.

Cutler v. Orkin Exterminating Co., Inc., 770 So. 2d 67, 71 (Ala. 2000).

Thus, the test for adequacy of representation has two aspects: (1) whether the named plaintiff has interests antagonistic to those of the rest of the class; and (2) whether plaintiff's counsel are

qualified, experienced and generally able to conduct the proposed litigation. *See Kirkpatrick v. J. C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987).

Adequacy of both the named Plaintiff and counsel is clearly met here. Counsel for Plaintiff are knowledgeable and possess extensive experience in complex litigation. The Court is personally familiar with counsel for the class, and finds them to be adequate. Defendant has not raised any issue as to adequacy. Plaintiff has no interest adverse to the class so as to make it inadequate.

Rule 23(b) Requirements

After establishing that the requirements of Rule 23(a) have been met, Plaintiff must also satisfy one or more of the elements enumerated in Rule 23(b). Plaintiff seeks class certification pursuant to Rule 23(b)(3), which is appropriate if the Court finds that (1) common questions of fact or law predominate over individual questions, and (2) class treatment of Plaintiff's claims is superior to other available methods for the fair and efficient adjudication of the controversy. For the reasons stated below, the Court finds that both the predominance and superiority requirements are met in this case.

Rule 23(b)(3) – Requirement of Predominance

The Alabama Supreme Court has described the requirements of Rule 23(b)(3) as follows:

> . . . Rule 23(b)(3) requires a finding that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. This requirement tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation . . . . In making this determination, courts examine the substantive law

> applicable to the claims and determine whether the plaintiffs presented sufficient proof that common questions of law or fact predominate over individual claims.

University Federal Credit Union v. Grayson, 878 So. 2d 280, 286 (Ala. 2003) (citations omitted).

To predominate, common issues must constitute a significant part of individual class members' cases. *In re School Asbestos Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd in part, and vacated in part on other grounds*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d at § 1778. Where, as here, a common course of conduct has been alleged arising out of a common nucleus of operative facts, common questions predominate. *Id.* Jury findings on common questions of fact and Court rulings on common issues of law will significantly advance the resolution of identical or substantially similar questions and issues which would require resolution in connection with individual claims.

In testing predominance pursuant to Rule 23(b)(3), as well as testing superiority, the trial court should consider: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action. Each of these factors strongly weighs towards class certification.

There is little interest in the members of the class in individually controlling the prosecution of separate actions because of the relatively small amounts of the damage claims to be asserted. Further, should any member of the class desire to control the prosecution of their own lawsuit, they may opt out of this class. It certainly promotes the interest of judicial economy to concentrate this

litigation in a single forum. This Court's determination as to the meaning of the contract as it relates to the disputed charges will determine each class member's breach of contract claim. Further, the covenant of good faith claim focuses on the conduct of the Defendant, particularly where, as here, the class is not informed nor aware of the specifics of the program. The Court's discussion of the commonality, and the basis of each of the claims above, applies equally to the predominance inquiry.

There should not be any difficulty encountered in the management of this class action. The central issues involved concern the conduct of the Defendant, uniformly applied across the class. While issues may arise which may require separate treatment for certain segments of the class action, by far the common issues predominate over any of these individual issues.

In *Ex parte Green Tree Financial Corp.*, 723 So. 2d 6 (Ala. 1998), the Court stated that in determining whether questions of law and fact are common to the class and whether these common elements predominate over individual issues, the Court should identify the substantive law applicable to the case and the proof required to establish the claim. In this case New Jersey law applies to each of the claims to be certified. Therefore, there is no variation of applicable law.

Defendant asserts that individual issues predominate in this case, relying heavily on *Reynolds Metals Co. v. Hill*, 825 So. 2d 100 (Ala. 2002). In *Reynolds Metals*, the alleged contract was oral, and even the various class representatives could not even agree on what was said to create the contract. Thus, the Court held that individualized issues involving the formation of the oral contract were such that the class issues did not predominate. Here there are no contract formation issues to deal with. The duties and rights of the parties are set out in a uniform contract which either does or

does not allow for the disputed charges. The Defendant has not provided the court with any evidence it proposes to introduce from individuals that would prevent certification.

The Defendant also maintains that it has asserted certain affirmative defenses, and that the existence of those defenses establishes that the class issues do not predominate. The Defendant has not produced any evidence that the defenses will require individual testimony. Contrary to Defendant's position, affirmative defenses that apply to the class may be well suited for certification. See *Smilow v. Southwestern Bell*, 323 F.3d 32 (1st Cir. 2003) (waiver defense can be tried on a class basis where claim based on uniform contract). While the court must evaluate the existence of affirmative defenses in deciding the certification issue, "courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses." *Id.* at 39. The *Smilow* court explained that if the evidence shows it is necessary to deal with some members who are barred by defenses, the court may create subclasses or exclude the barred members altogether. *Id.* at 40. Thus, merely pleading certain affirmative defenses will not defeat certification.

For example, the Defendant places great emphasis on the voluntary payment doctrine, and the related defenses of waiver, estoppel, etc. However, no facts have been presented which show that application of these defenses will require individual proof so that individual inquiry of class members will be needed. Without such a showing, the mere assertion of the defense is not an impediment to certification.

At the class certification hearing, counsel for the Defendant suggested that the voluntary payment defense applied to the named plaintiff because it was billed each month for a stated insurance charge, and knew exactly the amount it was paying. If paying the charge after being billed for it is enough to give rise to the defense of waiver, or voluntary payment, then the court may apply

that defense across the board to each class member. Each class member received a bill for the charge and paid it. However, the court notes that under New Jersey law, the voluntary payment doctrine only applies if one pays money to a defendant under a claim of right, and with full knowledge of all of the facts at issue. Plaintiff maintains that the class was not informed of how the program was run, so that full knowledge did not exist. In this case, the Defendant has not maintained that any class member, or a group of class members, knew the details of the program. It is undisputed that the class was not told when the insurance program was charged. Thus, this is not a case where some class members have greater knowledge than others, and the level of knowledge of each class member will have to be proven by individual testimony. A legal issue will be presented as to whether the billing statements are enough to give rise to the defenses. That issue can be determined on a class basis. The Plaintiff claims the defenses would only apply if all the details of the program were known. Again, the determination of that legal issue can be determined on a class basis.

The Defendant also argued that the particular circumstances of each class member matters to determine if the insurance was a good or bad choice. None of those facts are pertinent to the claims certified, as discussed above. The breach of contract claims will be resolved based on the language of the contract and the application of New Jersey law. The breach of the covenant of good faith will focus not on the class members, but on the Defendant's conduct and motives.

Superiority

Rule 23(b)(3) directs the Court to determine that a "class action is superior to other available methods for fair and efficient adjudication of the litigation." Ala. R. Civ. P. 23(b)(3). In determining whether the class action device is superior here, the Court has considered what other

procedures, if any, exist for disposing of the dispute. The most obvious, and perhaps only, alternative to a class action is to force the class members to file individual actions. Treatment of this action on a class basis is far more desirable and practical than the individual adjudication of even a small fraction of the class members' claims. In the absence of class certification, it is probable that many claims would not be pursued because litigation costs would be prohibitive. The use of the class device in this action will serve the goals of economies of time, effort and expense by preventing the same issues from being litigated and adjudicated in multiple courts.

A class action is the superior method of adjudicating this controversy for, among other reasons, those contemplated by Rule 23(b)(3)(A)-(D): (1) any interest of Class members in individually controlling the prosecution of separate actions is outweighed by the potential for the comprehensive and expedient resolution of this class action; (2) the number and type of individual lawsuits commenced by members of the Class would not result in relief to the overwhelming majority of the Class members; (3) it is desirable to concentrate the litigation in a single forum, to prevent repetitive pre-trial discovery, trial preparation and trial, and to avoid inconsistent adjudications; and (4) no insurmountable difficulties are likely to be encountered in the management of this action. The Court finds each of the above elements to be present in this case.

Counsel for Plaintiff shall file a proposed notice and suggested methods of notification as soon as possible.

Done this 3 day of Jan, 2007.

HERMAN Y. THOMAS
CIRCUIT JUDGE

cc: Steven L. Nicholas
Douglas L. McCoy
Gregory J. Digel