UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

HOWARD'S REXALL STORES, INC. AND DOWNEAST PHARMACEUTICAL SERVICES, INC., D/B/A LUBEC APOTHECARY,	)	
Plaintiffs	)	
v.	)	**CIVIL NO. 00-CV-31-B**
AETNA U.S. HEALTHCARE, INC. AND EXPRESS SCRIPTS, INC.,	)	
Defendants	)	

RECOMMENDED DECISION

Plaintiffs move for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. For the reasons stated in this decision, I recommend that the Court **DENY** the motion.

RULE 23 STANDARD

In order to qualify for class action certification, the plaintiffs must show that they, and the prospective members of the class they wish to represent, meet the four requirements of Fed. R. Civ. P. 23(a) and at least one of the requirements of Fed. R. Civ. P. 23(b). Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-14 (1997). Rule 23 does not concern the merits of the underlying case. Rather, it serves the limited purpose of determining whether a class action is the most appropriate means of adjudicating the plaintiffs' claims. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) (citing with approval Miller v. Mackey Int'l Inc., 452 F.2d 424, 427 (5th Cir. 1971) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.")). Nevertheless, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the . . . cause of action.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963)). Thus, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982).

BACKGROUND

Plaintiffs Robert Witt and Donald DeGolyer are registered Maine pharmacists. Witt is the owner of the Howard's Rexall Drug Store in Farmington. DeGolyer is the owner of the Lubec Apothecary. Defendant Aetna provides pharmacy benefits plans that allow its insureds, or members, to purchase pharmaceuticals at reduced prices. To receive these price reductions, members must purchase pharmaceuticals at pharmacies that agree to join Aetna's pharmacy network. As of at least 1996, Howard's Rexall and the Lubec Apothecary have participated in the Aetna network and have provided pharmaceuticals to Aetna members pursuant to Pharmacy Service Agreements entered into with Aetna.[1] Defendant Express Scripts, Inc. ("ESI") also serves as a pharmacy for Aetna. Among its many enterprises, ESI operates a nationwide mail order pharmacy. Aetna provided its members with incentives to use ESI for their prescription drug needs. If a member of one of Aetna's pharmacy benefits plans ordered a prescription from ESI, that member was able to receive a 90-day prescription and make one co-payment for that period. If a member filled a prescription with a local, network pharmacy, on the other hand, that member could only purchase a 30-day prescription and would have to fill three prescriptions and

[1] In July 1998, Aetna purchased NYLCare Health Plans of Maine, Inc. Conduct attributed to Aetna between 1996 and July 1998 was actually engaged in by NYLCare.

make three co-payments in order to maintain a prescription over a 90-day period. Aetna also offered to many chain pharmacies and certain rural pharmacies isolated from competition better reimbursement rates for filling member prescriptions than were extended to many independent pharmacies, including Howard's Rexall and the Lubec Apothecary. According to the plaintiffs, ESI received the most favorable reimbursement rate of all pharmacies. In compliance with a consent agreement entered into with the Maine Bureau of Insurance on February 2, 2000, Aetna discontinued the varied reimbursement rate structure and the refill period discrepancies as of August 2000.

In addition to serving as a network pharmacy, between 1996 and 1998, ESI also managed Aetna's pharmacy benefit plan. In this capacity, ESI processed reimbursement claims submitted to Aetna by network pharmacies and also assumed responsibility for general plan administration, such as assuring that Aetna's plans complied with Maine law. Thus, for instance, during this period ESI's contract with Aetna specified that ESI would ensure compliance with Maine's Third Party Prescription Program Act, 32 M.R.S.A. §§ 13771-13777. In November 1998, ESI and Aetna agreed that Aetna would establish its own network of pharmacies through direct contacts with retail pharmacies, but that ESI would continue to process reimbursement claims submitted by the network pharmacies. In February 2000, these prior agreements were terminated and ESI and Aetna agreed that ESI would provide Aetna with nationwide mail order pharmacy services and that Aetna would process its own reimbursement claims. As of that date, ESI's only involvement with Aetna has been as a mail order pharmacy.

The plaintiffs allege that Defendants Aetna and ESI violated the Third Party Prescription Program Act ("TPPPA") by permitting Aetna's plan members to receive larger prescriptions if they filled their prescriptions through ESI and by giving chain pharmacies and certain rural pharmacies more preferable reimbursement rates for the pharmaceuticals they provided to plan members. See 32 M.R.S.A. § 13776. The plaintiffs also complain that the defendants violated the TPPPA by not informing them of the existence of the preferential terms. See 32 M.R.S.A. § 13773.

Based on these statutory violations, Plaintiffs filed a five-count complaint seeking declaratory and injunctive relief pursuant to the TPPPA and the Maine Insurance Code (Counts I and II); injunctive relief and fees pursuant to Maine's Uniform Deceptive Trade Practice Act (Count III); and monetary damages and fees, interest, and costs on claims of fraudulent misrepresentation and interference with a business expectancy/advantageous relationship (Counts IV and V). By amended order dated November 29, 2000, the District Court affirmed my revised recommended decision of October 27, 2000, in which I granted Aetna's motion to dismiss in part, dismissing Counts I and II, but denying the motion with respect to Counts III through V, on the ground that although the TPPPA and the Insurance Code do not support an implied private right of action, violations of the TPPPA could support the three remaining claims.

Plaintiffs now seek an order from the Court permitting them to prosecute the three remaining claims as a class action. Their certification motion does not provide a concise class description. Various references to the class contained in the plaintiffs' motion describe a putative class of approximately 65 "independent pharmacists throughout the State of Maine who had contracts with Defendants as participating providers of Defendants' pharmacy benefits plan." According to the plaintiffs, none of these pharmacists received the most favorable terms that Aetna offered or the notice that such terms were made available to others. The deposition testimony of plaintiff DeGolyer and materials submitted by the defendants suggests a somewhat more limited class. In his deposition testimony, DeGolyer stated that he estimated there were about 43 independent pharmacies in Maine. (Aetna's Opp. Mot. Exh. B at 122:25-126:6.) Prior to filing suit, the named plaintiffs and their counsel wrote separate solicitation letters and mailed them under the same cover to roughly 43-49 independent pharmacies throughout Maine, asking them to commit themselves to the potential class action and to make contributions of $1000 toward the cost and expense of litigation. (DeGolyer Depo. Exs. 22 & 23, appended to Aetna's Opp. Mot.) Twenty-five of the recipients signed "authorization forms"[2] enclosed with the letters and made individual contributions of $1000 to Witt and DeGolyer. (Id. Ex. 25.) These funds were placed in escrow and have been partially drawn down as of this date to pay costs and fees associated with this litigation.

DISCUSSION

The challenges raised by the defendants largely overlap. Aetna begins its memorandum by focusing on Rule 23(b), which it clearly considers to be the weakest link in the certification motion. Aetna also opposes certification under three of the four elements of Rule 23(a). ESI primarily argues that the plaintiffs fail to present facts that could support a claim against it and, because no one can state a claim, argues that the plaintiffs cannot meet the numerosity or typicality requirements of 23(a) or the commonality requirement of 23(b). In addition to this line of argumentation, which I do not consider to be relevant to the class certification question, ESI largely challenges the same aspects of the plaintiffs' motion as Aetna.

I conclude that the fraud claims advanced in Counts IV and V are inappropriate for class action certification pursuant to Rule 23(b), but that the UDTPA claim advanced in Count III would, on its own, satisfy the requirements of Rule 23(b)(2). Because Rule 23(b) removes two of the three claims from consideration, I begin my discussion there, and then turn to the question

[2] The authorization forms are not part of the record.

of whether the remaining claim satisfies the requirements of Rule 23(a) as well. My conclusion is that it does not because joinder of independent deceptive trade practice claims would not be impracticable given the relatively small size of the putative class and the straight-forward nature of this claim.

A. Rule 23(b) requirements

Pursuant to subsection (b), the plaintiffs must satisfy one or more of three alternative tests in order to "maintain" a class action lawsuit. Fed. R. Civ. P. 23(b)(1)-(3). The plaintiffs have elected to proceed pursuant to subsections (b)(2) and (b)(3).

1. Rule 23(b)(2)

The plaintiffs argue that they are primarily seeking injunctive relief in this suit and that the damages claims connected to Counts IV and V are incidental to the primary claim for injunctive relief contained in Count III. Aetna counters that the recovery of money damages is the plaintiffs' true intent and that the claim for injunctive relief is moot because Aetna is currently in compliance with the TPPPA. (Aetna Opp. Mot. at 16.) ESI argues that Counts IV and V, in any event, are not maintainable as a class action pursuant to Rule 23(b)(2) because they are for money damages. (ESI Opp. Mot. at 16.) I conclude that Count III is "maintainable" as a class action pursuant to Rule 23(b)(2), but not Counts IV and V.[3]

The requirement of subsection (b)(2) will be met if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The advisory committee notes accompanying Rule 23 indicate that

[3] Aetna argues that a claim for injunctive relief is moot because it has come into compliance with the TPPPA since this suit was filed. ESI also argues that the claim is moot and that the facts, as they pertain to ESI, fail to support any of the claims. I do not consider these defenses to be germane to the certification question. They would be a proper subject for a motion for summary judgment.

subsection (b)(2) is designed for suits primarily seeking injunctive or declaratory relief, not money damages. "The sub[section] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23 advisory committee's note. This Court recently adopted the Fifth Circuit standard for addressing whether a case relates predominantly to money damages: "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. . . . By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998) (citations omitted) (quoted in Ramirez v. DeCoster, 194 F.R.D. 348, 352 (D. Me. 2000)).

In my assessment, the alleged statutory violation in this suit constitutes a failure to act "on grounds generally applicable to the class," but only Count III otherwise meets the requirements of Rule 23(b)(2). Count III of the complaint recites the following claim for relief, "Wherefore, Plaintiffs pray that this Court award them injunctive relief, enjoining Defendants from continuing to make false or misleading statements of fact and engaging in discriminatory pricing[,] and award reasonable attorneys' fees pursuant to 10 M.R.S.A. § 1213." So stated, Count III is clearly limited to obtaining injunctive relief and attorney fees incidental to success on the claim. The pertinent allegations also clearly describe conduct on Aetna's part that pertains generally to every member of the putative class: restricting the most preferable terms to ESI, misrepresenting statutory disclosure obligations, and engaging in discriminatory pricing. However, Aetna's liability on Count III would not give rise to an award of damages under Count IV or V because the latter claims involve additional elements of proof. Furthermore, Count IV and V seek only monetary damages. For this reason, certification of all three claims pursuant to

23(b)(2) would be inappropriate. Only Count III is "maintainable" pursuant to Rule 23(b)(2). In order for Counts IV and V to be maintainable in a class action, they must meet the requirements of 23(b)(3).

2. Rule 23(b)(3)

The requirement of subsection (b)(3) will be met if "the court finds that the 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." Fed. R. Civ. P. 23(b)(3).

Aetna clearly considers Rule 23(b)(3) to be the Achilles' heal of the certification motion. ESI also attacks this ground for certification. They argue that the plaintiffs' two claims for damages, Counts IV and V, both require individualized proof of reliance in order to support the allegations of fraud. (Aetna's Opp. Memo at 13; ESI's Opp. Mot. at 20-21.) According to the defendants, individual questions of reliance overwhelm the common issues of law and fact, so that the entire class cannot be represented by the plaintiffs' claims alone. Aetna contrasts the allegations found in paragraph 69 of the second amended complaint, where the plaintiffs allege that they "would not have entered into the contracts with Defendants under disadvantageous terms if they had known that other providers were receiving preferential terms," with Witt's deposition testimony that, in fact, he still would have signed the less favorable contract with Aetna because he would not have wanted to lose Aetna's insureds as customers. (Aetna Opp. Mot. at 14-15, citing Witt Depo. at 158:22-159:4.) Similarly, Aetna offers evidence that some members of the class entered into contracts with Aetna despite having knowledge that they were entitled to better rates than Aetna offered them. (Id.) Aetna contends that because many members of the putative class, including one of the named plaintiffs, will be unable to prove reliance, common questions of fact do not predominate.

The plaintiffs respond that the defendants are inappropriately attacking the merits of their claims rather than the certification issue. They cite numerous securities litigation cases holding that individualized questions of reliance will not preclude certification. (Plaintiffs' Reply Memo at 2, 3-4.) These cases are not clearly on point because they all involve the "fraud on the market" presumption of reliance that arises in certain claims concerning securities-related fraud or misrepresentation. See, e.g., Cooperman v. One Bancorp (In re the One Bancorp Sec. Litig.), 136 F.R.D. 526, 532-33 (D. Me. 1991); Randle v. SpecTran, 129 F.R.D. 386, 393 (D. Mass. 1988).

The advisory committee notes for Rule 23 recognize that claims of fraud, "although having some common core, . . . may be unsuited for treatment as a class action if there was material variation in . . . the kinds or degrees of reliance." Id. In my view, this case presents that problem. Although I agree with the plaintiffs that Aetna's alleged noncompliance with TPPPA obligations constitutes a "common course of conduct," this fact alone would not establish liability on the fraud claims. Pursuant to Maine law, "[s]ubstituting nondisclosure for false representation, a party with a fiduciary duty to another commits fraud when he (1) intentionally does not disclose; (2) a material fact to the other; (3) for the purpose of inducing the other to act or refrain from acting in reliance on the failure to disclose; and (4) the other justifiably relies on the nondisclosure and acts upon it to his or her damage." Glynn v. Atlantic Seaboard Corp., 1999 ME 53, ¶ 12, 728 A.2d 117, 120. Central to every putative class member's claim is proof of reliance. Because it does not appear that the plaintiffs could effectively litigate every member's fraud-based claims by litigating their own, I do not consider Counts IV and V to be well suited for class certification. See, e.g., In re the One Bancorp, 136 F.R.D. at 532-33; Patterson v. Mobil Oil Corp., 241 F.3d 417 (5th Cir. 2001); Andrews v. AT&T Co., 95 F.3d 1014, 1025 (11th Cir. 1996); Castano v. American Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996). For this reason, I recommend that the Court not certify Counts IV and V against Aetna.

B. Rule 23(a) requirements

Although Counts IV and V do not satisfy either 23(b)(2) or 23(b)(3), Count III does. Certification of Count III may be called for in this case if Count III can comply with the four requirements of Rule 23(a). Fed. R. Civ. P. 23(c)(4)(A). In order to meet the requirements of Rule 23(a), the plaintiffs must establish that the putative class has all of the following qualities:

> (1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and, (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class').

Amchem Prods., 521 U.S. at 613.

1. Numerosity-impracticability

In order to satisfy Rule 23(a)(1), a putative class must be "so numerous that joinder of all members is impracticable." In addition to class size, federal courts have recognized a number of additional factors relevant to the practicability of joinder. Among these factors are "the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1038 (5th Cir. 1981). Thus, for example, a class action involving nationally traded securities is typically presumed to meet the numerosity requirement because of the size of the class and its dispersion nationwide. Id. at 1039. Classes of comparable size to the putative class described in this action require more involved consideration. Some courts have certified much smaller classes. See, e.g., Dale Elec., Inc. v. R.C.L. Elec., Inc., 53 F.R.D. 531 (D. N.H. 1971) (certifying class of thirteen defendants based on nationwide dispersion and because of the nature of patent litigation). Others have denied certification to significantly larger classes. See, e.g., Universal Calvary Church v. City of New York, 177 F.R.D. 181 (S.D. N.Y. 1998) (denying class certification to 217 individually identifiable putative class members living in close geographical proximity where a class action would be as burdensome for the court as joinder).

The plaintiffs contend that their projected class contains 65 members and that this group is sufficiently large to make it impracticable to join all members of the class for purposes of trial. They argue that joinder is not a viable alternative because of a "diminished likelihood that individual class members would be motivated to press forward with individual litigation based on the relatively small amount of monetary damages per . . . member in relation to the enormous cost of litigation." They also observe that the putative class includes entities geographically distributed throughout the state, which adds to the inconvenience of joinder. (Plaintiffs' Motion at 9.)

Aetna and ESI, focusing on the limited response to the plaintiffs' class solicitation, whittle the putative class to approximately 25 members and argue that 25 is not a sufficient class size to make joinder impracticable. (Aetna Opp. Mot. at 13; ESI Opp. Mot. at 12-14.) The defendants also extract from the solicitation letter a "concession" that joinder is feasible because the letter expresses the willingness to go forward "by joining multiple named plaintiffs."

To begin, I acknowledge that the plaintiffs are not bound to provide an exact number of class members. In re the One Bancorp, 136 F.R.D. at 529. Obviously, the plaintiffs wish to portray as large a class as possible given the relatively small size of the putative class in question. The defendants, conversely, want the Court to hold the plaintiffs to the 25 pharmacies that have contributed funds to the litigation in order to weaken the numerosity-impracticability showing. I am not persuaded that a finding of 25 or 65 members would be dispositive one way or the other. "Numerosity" is more than a numbers game. On balance, I think that three factors weigh against a finding of numerosity-impracticability. First, every potential member of the class is readily identifiable. Second, the potential class members are all located in this district. I believe that they could be marshaled before the Court without great inconvenience to the Court or great expense to them. Third, the deceptive trade practices claim presented in Count III is a very straight-forward claim with regard to both proof and discovery.[4] In my view, the Court could efficiently manage litigation of this claim through the device of joinder, whether the number of litigants be 25 or 65, assuming that the claim is otherwise trial-worthy. I acknowledge that this route places a greater financial burden on putative class members who wish to proceed, but I do not consider this fact alone to be sufficient to overcome the foregoing considerations, particularly given the appearance that cost sharing arrangements appear to be likely given the statements contained in the solicitation letter and given the fact that this Court can manage discovery in a coordinated manner to lessen the burden imposed on the plaintiffs.

2. Commonality

Aetna and ESI do not dispute that the putative class meets the commonality requirement. Unlike Rule 23(b)(3), the commonality requirement of Rule 23(a) is not concerned with whether common questions predominate, only with whether they exist. Fed. R. Civ. P. 23(a)(2). Common questions clearly exist in this case.

[4] Count III is grounded on 10 M.R.S.A. § 1212(1)(k) & (l). Each of these subsections only requires proof of one thing: either "false or misleading statements of fact concerning the . . . existence of . . . price reductions" or "conduct which similarly creates a likelihood of confusion or of misunderstanding" within the meaning and scope of the Deceptive Trade Practices Act. With regard to the latter alternative, the plaintiffs "need not prove . . . actual confusion or misunderstanding." 10 M.R.S.A. § 1212(2).

3. Typicality

Aetna contends that the typicality element is not satisfied because not all members of the putative class were deceived by Aetna's failure to disclose. (Aetna's Opp. Mot. at 21.)

In order to satisfy the typicality element, the claims must "arise from the same series of events and [be] based on the same legal theories as the claims of all class members." In re the One Bancorp., 136 F.R.D. at 530. I am satisfied that this requirement is met and that the challenge Aetna raises is not a relevant consideration at this stage. Whether or not the plaintiffs, like all members of the putative class, can succeed on the theory of liability they advance is a different inquiry than whether they all advance the same theory. The former question remains to be answered, but the latter is clear from the pleadings. See Lamphere v. Brown Univ., 553 F.2d 714, 718 n.11 (1st Cir. 1977) ("We note also that Rule 23(a) requires common *questions* of law or fact, and that a representative's *claim* be typical of the class: how the questions will be answered, and whether any claim will be proved, are irrelevant to the class determination.")

4. Adequacy of representation

Rule 23(a)(4) requires the plaintiffs to show that they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." AmChem, 521 U.S. at 625. It also concerns the "competency and conflicts of class counsel." Id. at 626 n.20.

Aetna argues that the plaintiffs and their counsel are not adequate representatives of the class because they are not shouldering the entire financial burden of the class action and have inappropriately solicited funds from prospective members. According to Aetna, "Unless they are prepared to give that money back to the class members, [they] can hardly even begin to establish that they are adequate class representatives. . . ." (Aetna's Opp. Mot. at 22-23.) Aetna argues that an unworkable conflict has arisen because prospective members who have "invested" in the suit now have a cause of action against the named plaintiffs and their counsel for negligent misrepresentation based on allegedly false statements made in the class solicitation letter. (Id. at 24.) Aetna also expresses concern that the described class includes members who may have benefited from Aetna's violation of Maine law (insofar as they received better terms from Aetna than the named plaintiffs, though evidently not the 90-day prescription refill periods extended only to ESI). According to Aetna, "[t]heir interests . . . are hardly advanced by this suit." (Id. at 23.)

The cases cited by Aetna in its brief are not authority for the proposition that litigation funds may not be solicited from prospective class members or that unnamed class members may not contribute funds to a class action. In re ML-Lee Acquisition Fund II concerns the issue of whether a named plaintiff can adequately represent his class if his true intent is to maintain a strike suit. 149 F.R.D. 506, 508 (D. Del. 1993). That issue is not raised in the instant case. Schaffer v. Timberland Co. simply supports the proposition that a class may be certified in circumstances where the named plaintiffs cannot independently sustain the costs of litigation if plaintiff counsel agrees to carry the costs. No. 94-634-JD, 1996 U.S. Dist. LEXIS 5372, at *26-*27 (D. N.H. March 19, 1996). Finally, Phillips Petroleum Co. v. Shutts merely catalogues some of the benefits of being an unnamed class member, including the fact that one "need not hire counsel or appear," or, in most cases, be "subject to . . . liability for fees or costs." 472 U.S. 797, 810 (1985). The Court's opinion plainly recognizes that the payment of costs by unnamed plaintiffs may be appropriate in certain circumstances. Id. n.2. Thus, the question remains unanswered whether such an arrangement is appropriate under the circumstances of this case.

In a post-certification context, it has been said that "it would seem better policy to permit rather than deny fund solicitation from members of the class. The alternative to allowing such communication may be to preclude meritorious suits by . . . plaintiffs solely on account of their individual financial limitations." Norris v. Colonial Comm. Corp., 77 F.R.D. 672, 673 (S.D. Ohio 1977) (requiring prior court approval of solicitation materials). Here, pre-certification conduct is at issue and there has been no court approval of the solicitation materials. Solicitations of class action clients and funding have been proscribed by the local rules of various districts and were described as inappropriate in the second edition of the Manual for Complex Litigation. See, e.g., Williams v. United States Dist. Court, 658 F.2d 430, 432-33 (6th Cir. 1981) ("Attorney solicitation of clients, funds, and fee agreements are among the most prevalent perceived evils of the class action procedure."). These rules and the prejudices underlying them have been undermined by cases recognizing that gag orders issued pursuant to proscriptive rules may constitute prior restraints on protected speech. Id.; see also Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980), aff'd on other grounds, 453 U.S. 89 (1981) (holding that a gag order prohibiting any communication by plaintiff counsel with potential class members without prior court approval constituted prior restraint on protected speech).

> In at least some situations the collection or solicitation of funds to defray litigation costs is a necessary adjunct to obtaining meaningful access to the courts. Such activity is therefore deserving of constitutional protection in appropriate cases. The degree of protection would vary according to the use to which the funds are to be put. If they are to be used to pay lawyers, the solicitation is closer to the heart of gaining access to the courts.

Bernard, 619 F.2d at 472, n.25 (quoting United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971) ("[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.")). These cases rebut Aetna's highly moralistic condemnation of the solicitation letter. In my assessment, without conducting a more searching analysis of this issue, an order denying class certification on this ground would be subject to a strong First Amendment challenge.

With respect to Aetna's argument that the class description includes entities that may have benefited from Aetna's conduct, I note that Aetna here only addresses the reimbursement rates. It omits reference to the preferential, 90-day refill periods made available exclusively to ESI. In other words, every member of the putative class, defined to include both those receiving less preferential reimbursement rates and/or those receiving less preferential refill periods, has cause to complain of Aetna's alleged violation of the TPPPA. I consider the named plaintiffs, as recipients of what appears likely to be the least favorable reimbursement rates, as well as the 30-day refill periods, to be most likely to vigorously represent the class as a whole.[5] On balance, I consider the named plaintiffs would be adequate representatives of the putative class.

CONCLUSION

Because Counts IV and V seek money damages exclusively they are not suited for certification pursuant to Rule 23(b)(2). Because they each require proof of individualized reliance as an element of fraud, an issue that would be the central focus at trial, they are also not suited for certification pursuant to Rule 23(b)(3). Count III, on the other hand, would be maintainable pursuant to 23(b)(2), but given the small to moderate size of the class and the limited nature of the deceptive trade practices claim, joinder of individual claims would not be impracticable. For these reasons, I recommend that the Court **DENY** the plaintiffs' motion for class certification.

[5] If Rule 23(a)(4) were the only obstacle and this the defendants' only argument, the more practical alternative would be to restrict the scope of the putative class, not necessarily to deny certification.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten days of being served with a copy thereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: May 8, 2001

Margaret J. Kravchuk
U.S. Magistrate Judge

STNDRD

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-31

WITT, et al v. AETNA U S HEALTHCARE, et al   Filed: 02/28/00

Assigned to: JUDGE GENE CARTER

Demand: $0,000   Nature of Suit: 791

Lead Docket: None   Jurisdiction: Federal Question

Dkt # in FRANKLIN SUPERIOR : is CV-2000-1

Cause: 28:1441 Notice of Removal-Insurance Contract

ROBERT WITT   LEE H. BALS

plaintiff   [term 03/14/01]

[term 03/14/01]   [COR]

BARBARA G. SHAW, ESQ.

[term 03/14/01]

MARCUS, GRYGIEL & CLEGG, P.A.

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DONALD DEGOLYER   LEE H. BALS

plaintiff   [term 03/14/01]

[term 03/14/01] (See above)

BARBARA G. SHAW, ESQ.

[term 03/14/01]

(See above)

v.

AETNA U S HEALTHCARE, INC WILLIAM J. KAYATTA, JR.

defendant 773-6411

[COR LD NTC]

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PIERCE, ATWOOD

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HOWARDS REXALL STORES, INC, LEE H. BALS

for themselves and on behalf [COR]

of all others similarly BARBARA G. SHAW, ESQ.

situated [COR LD NTC]

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DOWNEAST PHARMACEUTICAL LEE H. BALS

SERVICES, INC, for themselves (See above)

and on behalf of all others [COR]

similarly situated BARBARA G. SHAW, ESQ.

dba (See above)

LUBEC APOTHECARY [COR LD NTC]

plaintiff