

STATE OF OHIO )  
 ) SS:  
CUYAHOGA COUNTY )

IN THE COURT OF COMMON PLEAS  
CASE NO. CV-644950

SAN ALLEN dba Corky & Lenny's et al., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
MARSHA P. RYAN )  
Adm., Ohio BWC, )  
 )  
Defendant. )

**ORDER**

**Richard J. McMonagle, J:**

After full consideration of the parties' briefs and oral arguments regarding class certification, the Court hereby GRANTS Plaintiffs' Motion for Class Certification.

Class certifications present significant issues such as efficient case management and allocation of judicial resources, simplifying complex litigation, monetary liability, and providing court access to class members. Accordingly, the Ohio Supreme Court has noted the importance of a trial court's detailed findings and specified reasoning with respect to its certification of a particular class. *See Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67 (1998).

**I. Requirements for Class Certification**

Civil Rule 23 holds seven requirements for class certification:

- (1) an identifiable class must exist and the definition of the class must be unambiguous;
- (2) the named representatives must be members of the class;
- (3) the class must be so numerous that joinder of all members is impracticable;
- (4) there must be questions of law or fact common to the class;
- (5) the claims or defenses of the representative parties must be typical of the claims or defenses

of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met.

*Hamilton*, 82 Ohio St.3d at 71 (citing Civ.R. 23(A)). If a requirement is not met, the trial court may deny class certification. The decision to certify a class or deny certification is up to the sound discretion of the trial court.

## **II. Identifiable Class**

The very nature of certifying a class action requires there to be a reasonably identifiable class. The class's description must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Hamilton*, 82 Ohio St.3d at 71-72. Thus, the class definition must be precise enough "to permit identification within a reasonable effort." *Warner v. Waste Mgt. Inc.*, 36 Ohio St.3d 91, 96 (1988).

In *Gottlieb v. City of South Euclid*, 810 N.E.2d 970, 973 (Ohio Ct. App. 8 Dist. 2004), the court of appeals accepted the trial court's decision to certify a class when the class definition was provided after the trial court issued its class certification order, even though the appeals court ultimately denied class certification. Because the city maintained records of the activity engaged in by proposed class members, the class was "readily identifiable." *Id.* The instant situation is similar. The BWC communicates with the proposed class members, stores each employer's payment history, and assigns a policy number to each employer. The BWC's own records regarding employer payments make the class readily identifiable.

## **III. Named Plaintiffs are Members of the Class Providing Fair and Adequate Representation of Class Interests**

The class membership prerequisite requires that "the representative have proper standing. In order to have standing to sue as a class representative, the plaintiff must possess

the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent.” *Hamilton*, 82 Ohio St. 3d at 74 (citing 5 Moore's Federal Practice at 23–57, Section 23.21[1]).

The foundational injury asserted by Plaintiffs is inflated policy payments incurred by employers in non-group rated policies. Plaintiffs therefore assert common claims for the restitution of funds wrongfully collected. The named Plaintiffs and the proposed class members possess the same interest, and have allegedly suffered the same injury.

Additionally, a “representative is deemed adequate so long as his interest is not antagonistic to that of other class members.”<sup>1</sup> *Marks v. C.P. Chemical Co.*, 31 Ohio St.3d 200, 203 (1987). The Ohio Supreme Court held the same in *Hamilton* where some borrowers in a proposed class had “understated” interest rates and others had “properly stated” interest rates. The court held that such a situation did not present a conflict between class members because the class members’ underlying claims were typical. *Hamilton*, 82 Ohio St.3d at 77–78 (typicality requirement met where no express conflict exists between class representatives and class).

In the instant case, all proposed members of the class seek restitution for over-charges on workers compensation policies issued by the BWC to non-group rated employers. The typical underlying claim is for damages.

Moreover, the Plaintiffs do not seek to terminate the group rating system itself—a rating system that some Plaintiffs find highly beneficial. *See* Def’s. Mem. in Opp. to Pltfs.’ M. for Class Cert. at 13–14. Defendant’s intra-class antagonism claim is one relating simply to

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<sup>1</sup> It should also be noted that Civ.R. 23(A)’s fair and adequate representation requirement considers the adequacy of counsel. Counsel is familiar with the legal and factual issues and has proven to be a strong advocate on behalf of Plaintiffs. The Court is unconcerned about Plaintiffs’ counsel’s fair and adequate representation.

damages. The damages issue is now premature, but the class action process allows the Court to establish sub-classes. That the named Plaintiffs might have received benefits during some of the challenged policy periods is of no consequence regarding an intra-class conflict because the proposed class consists of employers seeking restitution for over-charges during at least one covered policy period. The Court does not perceive any intra-class antagonism sufficient to deny class certification.

Based on the above, the Civ.R. 23(A)(2) requirement of commonality is also satisfied. According to the *Hamilton* court, where “there is a common nucleus of operative facts, or a common liability issue,” the commonality requirement is satisfied. 82 Ohio St.3d at 77; *see also Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313 (1984) (“[T]he common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication.”).

#### **IV. Numerosity—Impracticable Joinder**

Joinder is more likely to be impracticable if the class members can be assumed to lack the ability or the motivation to institute individual actions. For example, if [a] class member's individual claims involve only a small amount of damages, class members would be unlikely to file separate actions. Courts have concluded their joinder is impracticable in such circumstances.

*Hamilton*, 82 Ohio St.3d at 75.

Plaintiffs have asserted “Without class certification a large segment of the victimized employer population will go uncompensated.” The annual premiums paid by many of the proposed class members might not justify the time and expense of bringing an individual suit to recover over-charges. The Court finds that the individual employer financial harm might be relatively minor in some instances. Individual actions by all potentially aggrieved members are

unlikely. Additionally, the number and location of employers paying for BWC policies in the covered period suggests that joinder is impracticable.

#### V. Civ.R. 23(B) Requirement

The Civ.R. 23(A) threshold requirements are satisfied. The Court must finally determine whether Civ.R. 23(B) is met. Civ.R. 23(B)(3) is satisfied 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.” Plaintiff asserts that certification is proper under Civ.R. 23(B)(3). Defendant counters that the case law requires “necessity” to certify a class under (B)(3).

Defendant’s citation to the *State ex rel. Davis v. Public Employees Retirement Bd.*, 111 Ohio St.3d 118 (2006) (hereinafter *Davis*), line of cases is inapposite to the instant situation. *Davis* analyzed the “necessity” requirement in class action certifications—whether an action would accomplish the same result without resorting to class certification. With respect to Civ.R. 23(B)(3) actions, “necessity” is a *relevant* factor when determining the superiority of the class action to other forms of adjudication. *Davis*, 111 Ohio St.3d at 125 (emphasis added).

*Davis* addressed a situation where a single court ruling would automatically apply uniformly to all parties and nonparties to the decisive action. *Davis* affirmed the appellate court’s denial of a motion for class certification because “a determination in favor of [appellants] would *automatically* accrue to the benefit of others similarly situated.” 111 Ohio St.3d at 123 (citing the court of appeals) (emphasis added). The class certification was therefore unnecessary. A single court ruling that BWC’s group experience rating system

unlawfully over-charged an employer would not automatically inure to the benefit of other employers claiming to have been over-charged. BWC put forth in brief and oral arguments a set-off argument, indicating BWC's position that some class members' over-payments are not compensable. If BWC lost on the merits of an individual claim, BWC's decision to compensate other similarly situated employers pursuant to the court ruling would be discretionary, not automatic. The *Davis* line of cases addresses court rulings that are automatically instituted, not discretionary application by a losing party. The Court cannot reasonably conclude that a ruling in one employer's case against the BWC for restitution would be applied to similarly situated employers.

One question predominates in this case: the restitution owed to Plaintiffs because of Defendant's over-charges of employers outside the group-rating plan. The question is identical to the proposed class members.

Class adjudication is superior to individually adjudicated actions. Some, or many, individual class members are likely disinterested in individually controlling the litigation because of relatively low individual recoveries. Administration of the case and determining damages are relatively straightforward given BWC and employer records. Here, the interests of efficiency and economy in common adjudication outweigh the interests of individualized adjudication.

The Court therefore finds that Civ.R. 23(B)(3) is satisfied.

## **VI. Conclusion**

The Court is faced with certifying a class of similarly harmed Plaintiffs. As this Court stated in its November 18, 2008 Order restraining the BWC from enacting its group-rating plan for the policy year beginning July 1, 2009, "the group premiums were based

on an unlawful enactment by the Bureau.” Plaintiffs’ have satisfied the requirements for class certification in Civ.R. 23. Combining potentially thousands of claims throughout the State of Ohio into a single action holds benefits of efficiency and common resolution. Plaintiffs’ proposed class aligns with the purpose of class actions: “to simplify the resolution of complex litigation, not complicate it.” *Davis*, 111 Ohio St.3d at 128 (citing *Warner*, 36 Ohio St.3d at 97). Therefore, the Court hereby certifies Plaintiffs’ proposed class, and orders that the instant action be maintained as a class action on behalf of the following class:

Ohio private employers subscribing to the Ohio workers’ compensation State Fund, for any policy year from July 1, 2001 through and including policy year July 1, 2008, who in any one or more of those policy years were rated on a non-group basis and who reported payroll and paid premiums in a manual classification for which the non-group effective base rate was “inflated” due to application of the group experience rating plan.

Within seven days of this Order, class counsel shall confer with defense counsel regarding the proper manner and form of notification to the class.

**IT IS SO ORDERED.**

January \_\_, 2010

RICHARD J. McMONAGLE, JUDGE

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