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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CITY OF PARMA OHIO
Plaintiff

OHIO BUREAU OF WORKERS' COMPENSATION
Defendant

Case No: CV-13-814017

Judge: JOHN P O'DONNELL

JOURNAL ENTRY

THE PLAINTIFF CITY OF PARMA, OHIO'S MOTION FOR CLASS CERTIFICATION, FILED 08/08/2014, SUPPLEMENTED 11/7/2016 AND ARGUED 6/14/2017, IS GRANTED. O.S.J.

Judge Signature

Date 6/11/2018

FILED
2018 JUN 11 P 3:30
CLERK OF COURTS
CUYAHOGA COUNTY

06/11/2018

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CITY OF PARMA, OHIO	)	**CASE NO. CV 13 814017**
	)	
	)	**JUDGE JOHN P. O'DONNELL**
Plaintiff,	)	
	)	**JUDGMENT ENTRY GRANTING THE PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND APPOINTING CLASS COUNSEL**
vs.	)	
	)	
THE OHIO BUREAU OF WORKERS' COMPENSATION	)	
	)	
Defendant.	)	

John P. O'Donnell, J.:

This is a lawsuit by the City of Parma claiming that the Ohio Bureau of Workers' Compensation overcharged the city for workers' compensation premiums for many years through the January 1, 2009, policy year. The plaintiff seeks to certify as a class all other public employers in Ohio that are similarly situated.

This case is not the first of its kind. It follows *San Allen v. Buehrer*, Cuyahoga App. No. 99786, 2014-Ohio-2071, and *Cleveland v. Bur. of Workers' Comp.*, Cuyahoga App. No. 105604, 2018-Ohio-846.[1] Both of those lawsuits were successful in disgorging from the Bureau of Workers' Compensation premiums the bureau overcharged the plaintiffs in essentially the same fashion as alleged by the plaintiff here. *San Allen* was a class action consisting of private

[1] I will refer in this judgment entry to case number 99786 as *San Allen* and to case number 105604 as *Cleveland*. *San Allen* arose from consolidated cases in the Cuyahoga County Court of Common Pleas filed as *San Allen, Inc. v. Bur. of Workers' Comp.*, case number CV 07 644950, and *Nick Mayer Lincoln-Mercury v. Bur. of Workers' Comp*, case number CV 09 689611. *Cleveland* arose from *City of Cleveland v. Bur. of Workers' Comp*, case number CV 13 809883 in the Cuyahoga County Court of Common Pleas.

employers overcharged by the bureau through its since reformed group rating program. The case was tried and the plaintiff class was awarded $859,440,258.79 in restitution. The Eighth District Court of Appeals affirmed the trial court's finding of the bureau's liability on a theory of unjust enrichment and mostly sustained the restitution judgment. *Cleveland* involved a single public employer that obtained a summary judgment against the bureau on its claim for unjust enrichment and, after a trial, won a judgment of $4,524,392 representing the restitution of excessive premiums.

The current operative pleading in this case is an amended complaint filed on March 13, 2014. Plaintiff Parma's motion for summary judgment on the elements of its claim for unjust enrichment – the conferring of a benefit on the defendant and knowing retention of the benefit by the defendant under circumstances where such retention is unjust – was granted on March 8, 2018, leaving for trial only a determination of the correct amount of restitution. But before a trial can be held on the issue of restitution, the plaintiff's motion to certify this case as a class action must be decided.

The proposed class definition

Parma's motion for class certification seeks to certify the following class:

> All public employers as defined by R.C. 4123.01(B)(1) subscribing to the Ohio Workers' Compensation State Fund, that paid an inflated premium upon any policy up to and including policy year January 1, 2009, which in any of those policy years were rated on a nongroup basis and who reported payroll and paid premiums in a manual classification for which the base rate was 'inflated' due to experience modifications under the group experience rating plan.

The following are excluded from the class: (i) any class member who timely elects to be excluded; (ii) all state employers for which premiums were paid by General Assembly appropriations pursuant to R.C. 4123.39; (iii) the City of Cleveland; and (iv) any employer that did not pay an inflated premium after September 17, 2007.[2]

The motion has been exhaustively briefed, including supplements, and an evidentiary hearing was held on June 14, 2017. This judgment follows.

The bureau's calculation of premiums and its group rating program

The motion to certify the proposed class cannot be discussed without generally detailing the bureau's premium rating system and, specifically, its program to divide employers into "group" and "nongroup" rating categories, ultimately overcharging the nongroup rated employers to subsidize undeserved discounts given to group rated employers. The precis that ensues is based upon the evidence of record on summary judgment and class briefing, and much of it is a verbatim recitation, or paraphrase, of the appellate court's decision in *Cleveland*, condensed to only that which is necessary for a coherent analysis of the merits of the class certification motion.

Parma participates as a public employer – referred to as a PEC in the jargon of workers' compensation insurance – in Ohio's statutory workers' compensation system under Chapter 4123 of the Ohio Revised Code. The BWC administers the program, including calculating, assessing and collecting insurance premiums. Parma and the rest of the proposed class members are

[2] Most of this proposed definition comes from the plaintiff's August 8, 2014, motion for class certification and its November 7, 2016, supplement to the original motion for class certification. On April 28, 2017, in its reply brief, Parma added the exclusion for employers who didn't pay an inflated premium on or after September 18, 2007, to comport with the statute of limitations ruling in this case, and then at the oral hearing on the motion the plaintiff modified the definition once more to eliminate a start date for the payment of any inflated premium, again because of the statute of limitations ruling.

required by R.C. 4123.38 to contribute the amount of premium calculated by the bureau to the public insurance fund. By contrast, private employers contribute to the private insurance fund, and the public and private funds are administered, and their solvency maintained, separately. The amounts collected as premiums are meant to be revenue-neutral, i.e. the premiums charged and collected should equal the BWC's projected claims costs and administrative expenses plus a reasonable surplus.

In order to figure a premium, the bureau separates PECs into 14 separate categories, known as manual classifications, primarily based on the type of entity – e.g., county, city, village, township, school district, etc. – the employer is. Each of these classifications has its own base rate that serves as the foundation for an individual employer's premium calculation. The base rate for a class is the bureau's projection of the average costs of claims expected to be filed against all employers in that class for the applicable policy year. The base rate takes into account historical loss experience across a class and also applies a catastrophic loss factor, a statewide rate level factor, a percentage to cover the operation of the division of safety and hygiene, and an off-balance factor. The purpose of the off-balance factor is to adjust the base rate to account for the effect that experience rating, including group rating and its associated discounts, has on the overall amount of premium collected. The final premium for public employers without a sufficient claims history is the base rate of the employer's class, modified by the off-balance and other factors, multiplied by its payroll in the class.

Larger employers with a history of past claims are experience rated. This rate involves applying an experience modification factor to raise or lower the premium from the base rate: higher than the base rate for employers with claims experience higher than average in their class, and lower for employers with claims experience lower than average in their class.

A third method of calculating an employer's insurance premium is retrospective rating. This calculation is akin to self-insurance and requires individual employers to assume more of the risk of loss in exchange for a lower premium. The employer pays a premium lower than it would have if assessed under base rating or experience rating, but retains responsibility for actual paid claims costs over the succeeding ten years, subject to limits chosen by the employer. The annual premium for a retrospectively rated employer starts with the employer's experience-modified premium multiplied by a minimum premium percentage established by the BWC.

Ohio's legislature amended the workers' compensation statute in 1989 to require the BWC to develop and implement a plan that groups employers for rating purposes, and pools the risk of the employers within the group. In response to this change, the BWC began offering group rating plans to private employers beginning July 1, 1991, and to public employers in the policy year beginning January 1, 1992. The group rating plans were all prospectively rated until 2009, when private employers could get retrospective group rates. Public employers were offered retrospective group rating in 2010.

Group rating had the effect of allowing employers with good safety records, but who could only get base rating because they were statistically too small to be individually experience rated, to qualify for experience rating by joining with other employers to combine the experience of all members to become statistically suitable for experience rating. To encourage employers to take advantage of group rating the BWC offered substantial discounts to premiums. Yet, since the BWC is revenue-neutral, the overall premium collected still had to meet the annual target, and the discounts reduced the amount that group rated employers were contributing toward that target. The shortfall was made up by increasing the off-balance factor applied to the base rates,

effectively requiring nongroup rated employers to pay extra premium to cover the discounts given to group rated employers.

The inequities in the group rating system were predicted before it ever went into effect and then observed by repeated actuarial studies after it was implemented. As just one example, a 2009 study by Deloitte Consulting LLP found "substantial inequity in the premiums paid by different employers" in Ohio and the "primary driver of this inequity is the current approach to group rating" because of "a substantial lack of actuarial soundness with respect to equitable rating."[3]

The class certification motion

Parma has moved to certify the class under Rule 23 of the Ohio Rules of Civil Procedure. The prerequisites to all class actions are set forth in Civil Rule 23(A)(1) through (A)(4) as follows: the class must be so numerous that joinder of all members is impracticable; there must be questions of law or fact common to the class; the claims or defenses of the representative parties – namely, Parma in this case – have to be typical of the claims or defenses of the class; and the representative parties need to fairly and adequately protect the interests of the class. Implicit in the express conditions of the rule is that the class must be identifiable and the representative party must be a class member.

In addition to the four explicit requirements – which, in order, have come to be known as numerosity, commonality, typicality and adequacy of representation – and the two conditions implied by them, a plaintiff seeking to certify a class must satisfy one of the three provisions of Civil Rule 23(B). Parma claims that it meets the Civil Rule 23(B)(2) criteria that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a

[3] Hearing exhibit 18, pages 1-2.

whole" and the Civil Rule 23(B)(3) criteria that common questions of law and fact predominate over individual questions and that a class action is a superior means of adjudicating the controversy.

A trial court considering a motion for class certification is obligated to conduct a "rigorous analysis" and may only grant the motion if the moving party has demonstrated that all the factual and legal prerequisites to class certification have been satisfied. *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70 (1998).

Identifiable class

In order to satisfy the identifiability requirement, the representative plaintiff must show that an identifiable class exists and that the definition of the class is unambiguous. *Felix v. Ganley Chevrolet, Inc.*, Cuyahoga App. No. 98985, 2013-Ohio-3523, ¶17. The identifiable class requirement "will not be deemed satisfied unless the description of [the class] is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. Thus, the class definition must be precise enough to permit identification within a reasonable effort." *Id.*

Parma's proposed class is set forth on page two of this judgment and does not need to be repeated, but it is worth breaking the definition into pieces to determine whether it meets the identifiability test. First, the class members must have been charged an inflated base rate premium because of the BWC's group rating plan. That is undeniably the situation for Parma here, based not only on the evidence and the judgments and appellate affirmations in *San Allen* and *Cleveland* but also on the record of this case and the summary judgment already granted to Parma.

Second, such a premium must have been paid at least as late as September 18, 2007. The evidence shows that Parma paid nongroup premiums since then and establishing whether any prospective class member paid during that same period should be an administrative task which can probably be accomplished through the creation of a simple computer program designed to include nongroup premium payers and to exclude all others for the specified time period. And third, the premium payer must be a public employer. There are apparently about 2,333[4] such employers in Ohio and they too should be readily identifiable through the use of the bureau's records.

The BWC argues that Parma's class is not identifiable because the use of the word "inflated" in the definition to describe premiums paid by the prospective class members makes it ambiguous. I take "inflated" to mean a nongroup employer's premium determined upon a base rate modified by an off-balance factor calculated to take into account the reduction of total premiums collected as a result of the discounts given to group employers. Inflated means the premium was higher than it should have been. In this case I have found, on summary judgment, that Parma's nongroup premium was inflated to make up for the excessive discounts given to group premium payers. Two other trial courts and the court of appeals have found the same to be true for the City of Cleveland and all private employers in *Cleveland* and *San Allen*, respectively. In the context of this case the word "inflated" is a reasonable description that is understood by all parties and does not preclude the easy identification of class members.

In its opposition brief the bureau also criticized the class definition as overbroad by including employers who did not pay nongroup premiums less than six years before the September 18, 2013, filing of this lawsuit, i.e. employers who did not confer a benefit on the

[4] This number comes from footnote 20 to the defendant's March 31, 2017, brief in opposition to class certification, not including Cleveland.

BWC within the applicable six-year statute of limitations. At this point it is worth mentioning that on January 4, 2016, I denied the defendant's motion for partial summary judgment based on the statute of limitations. But in the course of denying the motion I found that 1) the applicable statute of limitations on Parma's unjust enrichment claim is six years and 2) the accrual date for the cause of action is the last date that Parma paid an excess premium regardless of the first date such a premium was charged and paid. Now, in the context of the class certification motion, that reasoning must be extended so that a class member is not barred by the application of the six-year statute of limitations so long as at least one inflated premium was paid after September 17, 2007.

As an example of a class member who would be included in Parma's originally proposed class but whose claim is barred by the statute of limitations, the BWC cites a public employer known as the Ashland County West Holmes Joint Vocational School District. The JVSD was charged group premiums from 2006 through 2009, but paid nongroup premiums before then. Under Parma's theory of unjust enrichment, only the nongroup premiums may constitute the benefit conferred and unjustly retained. Since JVSD did not confer a benefit within the six-year statutory limit on filing an unjust enrichment claim its claim would be barred by the statute of limitations.

The BWC is correct that a class member who didn't overpay within six years of the lawsuit is barred from recovering on an unjust enrichment claim, but Parma has already provided the solution: amending the proposed class definition to exclude public employers that otherwise satisfy the class definition who did not pay an inflated premium since the statute of limitations accrual date of September 18, 2007. With the amendment of the class definition to exclude public employers who did not pay an inflated premium after September 17, 2007, the defendant's

objections to the class definition on the basis that it precludes identifying who is in the class are overruled.

Questions of law or fact common to the class

A plaintiff must show that there are questions of law or fact common to the class. *Musial Offices, Ltd. v. County of Cuyahoga*, Cuyahoga App. No. 99781, 2014-Ohio-602, ¶31. Commonality requires that the class members' claims depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke. *Id.* But it is important to note that the commonality provision does not demand that all the questions of law or fact raised in the dispute be common to all the class members. *Marks v. C.P. Chemical Co.*, 31 Ohio St. 3d 200, 202 (1987). What is necessary is a common nucleus of operative facts. *Id.*

The defendant asserts that the claims of the public employers who would fall within the class definition here do not depend on common contentions but instead would necessitate individualized inquiries taking into account each employer's: 1) "unique rating history"[5] to determine if it has conferred a benefit to its detriment or, if the employer was group rated for some of the years in question, has actually paid fewer premium dollars than it would otherwise have owed; 2) payment of retrospectively rated premiums based on a contention that such premiums were actually undercharged; 3) payment of premiums within the statute of limitations accrual date; and 4) susceptibility to the voluntary payment doctrine defense.

The first reason cited by the BWC arises because of the *San Allen* appellate court's remand to the trial court to receive evidence to determine any offsets to restitution for private employer class members who paid premiums as group members for any of the years at issue, since their overpayments in nongroup years would be reduced by their underpayments in group

[5] Defendant's 3/31/2017 brief in opposition, page 15.

years due to their receipt of plump discounts. The fact that class members may have "migrated" from nongroup to group status during the class period was not sufficient to prevent a commonality finding in *San Allen* and it is not sufficient here. A migrating employer's fair restitution can be calculated by subtracting from its total overcharge during nongroup years the amount of discounts it received in group years.

The BWC's second objection to commonality – the need for individualized inquiry of class members who paid retrospectively rated premiums so that they may be excluded because they were ultimately undercharged – is not sufficient to prevent class certification for essentially the same reason, and because it appears to be factually incorrect. According to the evidence and legal precedent here, all premiums, including for retrospectively rated group employers, were calculated on a base rate adjusted by an off balance factor that was too high because it needed to account for the group employers' exorbitant discounts.[6] Since the members of the group got discounts, they wound up paying less than they should have even with the inflated base rate as part of the computation of their charged premiums. Thus every nongroup employer paid more than they equitably should have. Accordingly, the fact that a class member was retrospectively rated does not mean the employer can't have conferred an unjustly retained benefit – i.e., a too-high premium – on the defendant. This objection to commonality is overruled.

The statute of limitations objection has been solved by modifying the class definition as already discussed.

And the voluntary payment doctrine objection has been effectively decided by the *Cleveland* decision, which was rendered after briefing and argument on the class certification motion. As noted by the appellate court in *Cleveland*, the voluntary payment doctrine provides

[6] See, generally, the deposition of Elizabeth Bravender at pages 37-43 and plaintiff's exhibit 46, the affidavit of Allan I. Schwartz at ¶14.

that in the absence of fraud, duress, compulsion or mistake of fact, money voluntarily paid by one person to another on a claim of right to such payment cannot be recovered merely because the person who made the payment mistook the law as to his liability to pay. *Id.*, ¶91. A mistake of law happens only when a person has full knowledge of pertinent facts and makes a mistaken judgment on their legal effect. *Id.* For the voluntary payment doctrine to apply to Parma and the other putative public employer class members, the "fact" they must have known when paying the charged premium was not just that group rated employers were getting discounts but that nongroup payers were actually subsidizing those discounts by paying higher premiums than they otherwise should have in a revenue-neutral system. In *Cleveland*, even evidence that the plaintiff's risk manager knew that group rated employers were getting "humongous discounts" was not enough to show that the city knew that it was being overcharged. It is difficult to imagine that any of the 2,333 prospective class members here knew that fact, and the possibility that a few of them did does not negate the overwhelming common questions of law and fact at the heart of this case. The BWC's objection to commonality on the basis of the potential application of the voluntary payment defense to a tiny minority of class members is overruled.

Typicality

The Ohio Supreme Court has summarized Civil Rule 23(A)(3)'s typicality requirement as follows:

> [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. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and

> the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.
>
> *Baughman v. State Farm Mut. Auto Ins. Co.*, 88 Ohio St.3d 480, 485 (2000).

The requirement for typicality is met where there is no express conflict between the class representatives and the class. *Hamilton*, supra, 77.

Parma has alleged that it and all other prospective PEC class members were treated inequitably in the same way, namely by being charged a premium calculated by using a base rate that was inflated from what it should have been to force them to subsidize discounts given to group premium payers. It is the same inequitable treatment found actionable in *Cleveland* and found suitable for class certification in *San Allen*. But the BWC opposes class certification on the grounds that Parma's claim is not typical because the bureau has unique defenses to Parma's claims that do not apply to all class members. Those unique defenses are: Parma was retrospectively rated from 2006 forward, so its claims will be barred by the statute of limitations which, under the law of this case, will bar claims of class members who were not experience rated beyond 2006; during the period Parma paid $2.1 million in premium it incurred claims costs of $3.2 million, thus it could not have been overcharged as alleged; and Parma paid rates under only two of the 14 manual classifications, and the other 12 used different off-balance factors in the computation of their rates.

For a class representative's claim to be typical of the claims of other class members does not mean every particular of the parties' claims must be identical. Or, to put it as the *Baughman* court did, varying fact patterns underlying individual claims will not defeat typicality since the claims are based on similar conduct by the defendant toward the individual plaintiffs. Second, retrospectively rated nongroup public employers paid premiums calculated using a base rate that

was higher than it fairly should have been because the bureau needed to pay for discounts given to group rate payers. The inequity was committed at the time the rate was calculated and charged. The fact that later Parma had claims that exceeded its premiums might affect how much restitution, if any, it is entitled to but it doesn't change the fact that it conferred on the bureau a benefit that, under the circumstances then present, was unjustly retained. Third, for that same reason – the premium shouldn't have been charged in the first place and unjust enrichment, in some amount, happened when the premium was billed and paid – the statute of limitations defense does not operate to make Parma's claim unique. Indeed, it is more likely that the BWC's statute of limitations defense to Parma's claim is going to be asserted against every class member, an eventuality that works in favor of certifying a class so that the defense has to be decided only once. Finally, the *San Allen* certification of a class of private employer rate payers was upheld even though the private employers had exponentially more manual classifications than the 14 for PECs, and there is no reason to think the application of different off-balance factors to different manual classifications will make certification unworkable here, especially since the class definition rests on whether a member of the class was charged an inflated premium without regard to the specific off-balance factor used to calculate the premium.

The defendant's objections to class certification on the grounds that Parma's claims are not typical of the other class members' claims are overruled.

Adequacy of representation

The representative party in a class action must fairly and adequately protect the interests of the class. Civil Rule 23(A)(4). In making this determination, courts must consider two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action

vigorously on behalf of the class? *Musial Offices, Ltd.*, supra, ¶¶27-28. A class representative is adequate if his interest is not antagonistic to that of the prospective class members. *Id.* The representative's counsel is adequate if the lawyers are qualified, experienced and generally able to conduct the proposed litigation. *Id.* Typicality and adequacy of representation are intertwined insofar as both necessitate a representative plaintiff whose interests do not diverge from those of the other members of the prospective class.

The bureau erects two roadblocks to Parma's ability to adequately represent the other class members. The first hurdle is including rate payers back to the beginning of group premiums because, according to the BWC, that beginning date is useful to Parma since it did not pay rates as a group member during the class period, but other prospective class members who did pay group rates in the early years of the class period will necessarily have their restitution reduced by the subsidy offset applied to those entities migrating from group to nongroup rates during the class period. As an example, the bureau names Tri-Rivers JVS as a public employer who was group rated from 2001-2006 but then individually experience rated from 2007 through 2009. Since Tri-Rivers got the group discounts during the 2001-2006 period, a computation to determine what restitution it is owed will have to include the amount of excess premium it paid for all years, offset by the subsidy it received as a group member for 2001-2006. In that event, by the bureau's telling, if Tri-Rivers pursued recovery on its own it would only claim unjust enrichment in 2007, 2008 and 2009 to avoid being subject to the offset.

Putting aside the incongruity of a defendant arguing that class members deserve more restitution than Parma is motivated to get them, this argument ignores the nature of the equitable claim. To do justice in Tri-Rivers's hypothetical individual case the amount of restitution owed would be equal to the amount of benefit unjustly retained, and that decision must necessarily take

into consideration any subsidy offset that Tri-Rivers, as an individual plaintiff, received regardless of which year the discount was given.

The bureau's second impediment to adequacy of representation is that Parma did not suffer harm because 1) it actually underpaid premiums for the years in question and 2) its claim is barred by the statute of limitations. These objections were discussed and overruled in connection with the typicality requirement and are insufficient to defeat adequacy of representation for the same reasons.

Besides asserting that Parma itself is not an adequate class representative, the bureau claims, generally, that no public employer can be party to a class action because public employers are not legally allowed to be represented by outside counsel and, particularly, that Bashein & Bashein, a firm that has represented Parma in past litigation, is too closely tied to Parma to loyally serve the interests of the remaining class members. Other than observing that by its nature a class action certified under Civil Rule 23(B)(2) decides the rights of plaintiffs who might not have voluntarily chosen to participate, the only thing I can say about this objection is that, if a class is certified, I will leave it to the individual members to assess for themselves the legality and propriety of being represented by proposed class counsel.

The BWC's objections to class certification based on the inadequacy of Parma as a class representative and proposed class counsel as inadequate counsel for all class member public employers are overruled.

The named plaintiff as a class member and numerosity

The named representative must be a member of the class and the class must be so numerous that joinder of all members is impracticable. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, ¶12.

Parma has sufficiently demonstrated that it falls within the proposed class definition. Indeed, it has obtained a partial summary judgment. Additionally, it is self-evident that a 2,333 plaintiff lawsuit is impracticable, especially in comparison with a one plaintiff lawsuit that will protect the interests of the other 2,332. Parma has satisfied these two requirements of Civil Rule 23(A).

Civil Rule 23(B)(2)

Civil Rule 23(B)(2) provides that a class action may be maintained when the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

The key to the Civil Rule 23(B)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). In other words, Civil Rule 23(B)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. *Id.*

Parma's complaint seeks a declaratory judgment that the BWC's conduct in subsidizing group members' discounts by requiring nongroup public employers to pay premiums in excess of what they would otherwise be charged violated its statutory duties under R.C. 4123. Since the rating system has been reformed to eliminate the inequitable assessment of premiums, the BWC

argues that class certification under Civil Rule 23(B)(2) is improper because the declaratory relief will not be directed to any ongoing harm. The bureau supports its position by citing to the Ohio Supreme Court's reversal of class certification in *Cullen* where the complaint did "not allege that any ongoing practice continues to injure all class members." *Cullen*, supra, ¶24.

Cullen involved a class of State Farm Insurance policyholders who made claims for broken windshields where the glass was repaired with a chemical filler instead of being replaced. In reversing the appellate court's affirmance of class certification the supreme court noted, among other reasons, that the declaratory judgment sought in the lawsuit – that State Farm's glass claims practices were illegal and in violation of its insurance contract – would not have any prospective application to many of the class members because they were no longer State Farm policyholders. Accordingly, the proponent of the class could not demonstrate that all class members would benefit from the declaratory relief.

But Civil Rule 23(B)(2) contains no explicit requirement that the party opposing the class must still be acting or refusing to act as alleged in the lawsuit at the time a judgment is entered for the class to qualify under the rule. Moreover, the rule doesn't mandate that a plaintiff must seek both a declaratory judgment and an injunction for the class to fit within 23(B)(2). All it requires is that "declaratory relief is appropriate respecting the class as a whole." And that will be the case here: a declaration that the bureau acted inequitably beyond the bounds of its statutory authority by assessing excess premiums would provide relief to every class member. Indeed, such a declaration would comport with the explicit holding in *Cullen* that "claims for declaratory relief that merely lay a foundation for subsequent determinations regarding liability" do not fall within Civil Rule 23(B)(2) because the declaration would actually establish the bureau's unjust enrichment at the class members' expense. *Id.*, syllabus 4.

And to the point of the bureau's objection, while it is true that the defendant's active conduct in violation of its legal duty to treat the members of the proposed class equitably has stopped – because the rates charged since 2010 are not figured so that nongroup employers are subsidizing the discounts of group rated employers – each of the class members continues to be harmed by the BWC's ongoing unjust retention of benefits, i.e. excess premiums. In that respect, this case is analogous to *Cirino v. Ohio Bureau of Workers' Comp.*, Cuyahoga App. No. 104102, 2016-Ohio-8323.

Cirino involved a class action lawsuit on behalf of injured workers who received workers' compensation benefits by electronic transfers to debit cards issued to the workers. The BWC mandated the program and selected the bank that issued and administered the debit cards. The workers were assessed fees by the bank which they would not have had to pay if their benefits had been disbursed by check. The lawsuit alleged that the BWC violated 1) statutory provisions requiring employers and the state, not workers, to cover the BWC's costs and mandating that compensation shall be paid only to the employee and 2) Article II, section 35 of the Ohio Constitution concerning workers' compensation. Among the complaint's causes of action was one for a declaratory judgment to the effect that the practice by the BWC of withholding fees from debit card payments is contrary to statute. In connection with the declaratory judgment the plaintiff sought equitable restitution.

The class was certified by the trial court, in part, under Civil Rule 23(B)(2). The BWC appealed class certification. Germane to Civil Rule 23(B)(2), the bureau argued that the declaratory judgment claim was not proper because, assuming a finding in favor of the plaintiff class, such a judgment would only lay a foundation for a future award of damages instead of according final relief. The court of appeals disagreed, saying:

The injunctive and declaratory relief sought in this case falls squarely within Civ.R. 23(B)(2). The relief sought relates to actions by the BWC "on grounds generally applicable to the class," seeks to resolve the legality of that conduct as to all class members and would "affect the entire class at once." Civ.R. 23(B)(2); *Cullen* at ¶ 21.

Unlike in *Cullen*, the conduct at issue involves "ongoing" benefits payment practices that continue to affect all class members, i.e., the continued withholding of portions of class members' workers' compensation benefits that were assessed as fees. . . . The relief sought would not merely "lay a foundation for subsequent individual determinations of liability," it would in and of itself determine liability. *Cirino*, supra, ¶92-93.

These observations apply with equal force to this case, and the defendant's objections to certification under Civil Rule 23(B)(2) are overruled.

Civil Rule 23(B)(3)

Parma's motion for class certification and its reply brief offer arguments in favor of certification under Civil Rule 23(B)(3). But in closing argument at the hearing on class certification Parma's counsel acknowledged that certification under Civil Rule 23(B)(2) is preferable. Since I have found that Civil Rule 23(B)(2) has been satisfied I will not omit a rigorous analysis of the appropriateness of Civil Rule 23(B)(3) class certification, but I will use less ink in explaining my analysis.

Civil Rule 23(B)(3) applies where:

the court finds 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.

These elements are commonly referred to as predominance and superiority. All that needs to be said about them is that, despite all of the impediments to a class action hypothesized by the defendant, a virtually identical lawsuit has already been litigated as a class action in *San Allen.* Although the result in that case might not have been to the bureau's liking, the prosecution and defense of that lawsuit were no less vigorous and thorough than if it had been litigated employer by employer hundreds or thousands of separate times. After having rigorously analyzed the requirements of Civil Rule 23(B)(3) in the context of the claims and defenses in this case, I find that the questions of law or fact common to the members of the proposed class 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. Accordingly, the bureau's objections based on a failure to satisfy Civil Rule 23(B)(3) are overruled.

Class certification and appointment of class counsel

For all of the reasons given here, the plaintiff's motion for class certification is granted and the following class, with the listed exceptions, is certified:

> All public employers as defined by R.C. 4123.01(B)(1) subscribing to the Ohio Workers' Compensation State Fund, that paid an inflated premium upon any policy up to and including policy year January 1, 2009, which in any of those policy years were rated on a nongroup basis and who reported payroll and paid premiums in a manual classification for which the base rate was 'inflated' due to experience modifications under the group experience rating plan.

The following are excluded from the class: (i) any class member who timely elects to be excluded; (ii) all state employers for which premiums were paid by General Assembly appropriations pursuant to R.C. 4123.39; (iii) the City of Cleveland; and (iv) any employer that did not pay an inflated premium after September 17, 2007.

Civil Rule 23(C)(1)(b) requires this class certification order to include the appointment of class counsel under Civil Rule 23(F). Having considered the evidence and arguments of record and the mandatory factors set forth in Civil Rule 23(F)(1)(a) as well as the discretionary factors under Civil Rule 23(F)(1)(b), I appoint the following as class counsel: the law firm of Bashein & Bashein Co., L.P.A. and its lawyers W. Craig Bashein, Esq. and John P. Hurst, Esq.; the law firm of Paul W. Flowers Co., L.P.A. and its lawyer Paul W. Flowers, Esq.; and the law firm of Plevin & Gallucci and its lawyer Frank Gallucci, Esq. These firms and lawyers are appointed on a co-equal basis. If they desire that the appointment be on something other than a co-equal basis then a stipulation or motion to that effect should be filed.

Class counsel is ordered to propose, within 45 days of the date of this judgment, appropriate text for a notice to the class under Civil Rule 23(C)(2). Since the class has been deemed to satisfy both Civil Rule 23(B)(2) and (B)(3), counsel will have to elect the provision under which the litigation will proceed because of the different 1) notice requirements and 2) ability of a class member to opt in or out under each 23(B) subdivision. Class counsel is ordered to confer with the defendant's counsel in an effort to reach a stipulated form of notice. Such participation by defendant's counsel will not connote agreement with the decision to certify the class. R.C. 2505.02(B)(5) provides that an order determining class certification is a final appealable order. If the bureau appeals this decision then Parma's filing of a form of notice and

election of which Civil Rule 23(B) subdivision will govern the proceedings may be deferred until after the appeal, as needed.

IT IS SO ORDERED:

_____	June 11, 2018
Judge John P O'Donnell	Date

SERVICE

A copy of this journal entry was sent by email on June 11, 2018, to the following:

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Judge John P. O'Donnell

6/11/2018