UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-268-H

KATHY CORUM, ET AL. PLAINTIFFS

V.

FIFTH THIRD BANK OF KENTUCKY, INC., ET AL. DEFENDANTS

MEMORANDUM OPINION

Plaintiffs brought this action against Fifth Third Bank of Kentucky, Inc., and Fifth Third Bancorp (collectively "Fifth Third") alleging that the late fees they imposed on their automobile leases are unreasonable under the Consumer Leasing Act, 15 U.S.C. § 1667(b)b. Plaintiffs re-assert their Motion for Class Certification. Fifth Third opposes class certification because mere notice of it could create significant harm to its business interests. Therefore, the Court and the parties have considered alternatives to immediate certification and notice, including the use of the "test case" approach.

I.

The Court must first decide whether Plaintiffs' class can be certified. The burden is upon the party seeking certification. *See Senter v. General Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976). Plaintiffs must satisfy all four prerequisites of Rule 23(a), and then demonstrate that the proposed class falls within one of the subcategories of Rule 23(b). *Id.* Plaintiffs seek certification under Rule 23(b)(3). *See Williams v. Lane*, 129 F.R.D. 636, 640 (N.D. Ill. 1990). Plaintiffs' proposed class definition is:

> (1) All individuals in the United States who entered a lease agreement for one or more cars from a Fifth Third Bancorp affiliate bank and which is presently, or was,

administered by a Fifth Third Bancorp entity**;**
(2) Whose lease is governed by Consumer Leasing Act; [1]
(3) Who were charged late fees which were paid by the class member within 60 days of due date; and
(4) Who do not owe Fifth Third Bancorp, or any Bancorp entity, post lease termination or repossession charges.

The four threshold requirements for a class action are: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See* Fed.R.Civ.P. 23(a). For the following reasons, Plaintiffs appear to easily satisfy all four preliminary requirements.

A.

Joinder is impracticable because there are potentially thousands of plaintiffs. *See Senter*, 532 F.2d at 523. Moreover, the central and predominate legal issue in all of these cases is whether the late fees imposed by Fifth Third, under its consumer automobile leases, are reasonable under 15 U.S.C. § 1667b(b).

Fifth Third does argue that the putative class is impossible to certify due to factual differences within the class. The Court will address one aspect of this analysis now and save another for later. As to this requirement of certification, the factual differences involve primarily

[1] The term "consumer lease" means a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $25,000, primarily for personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, except that such term shall not include any credit sale as defined in section 1602(g) of this title. Such term does not include a lease for agricultural, business, or commercial purposes, or to a government or governmental agency or instrumentality, or to an organization. 15 U.S.C. § 1667(1).

identification of consumers who fit within the objective criteria of the class definition.[2] This is not a reason to preclude class certification under Rule 23(a). Differences also exist as to the amount of damages as between putative plaintiffs. These also can be easily overcome and do not bar against class certification, especially when there are a number of procedures to assist the court in damage determination. *See Windham v. American Brands, Inc.*, 565 F.2d 59, 67 (4th Cir. 1977); *In re Folding Carton*, 75 F.R.D. 727, 735 (N.D. Il. 1977).[3] Finally, in deciding whether to certify the class, the Court should not address the merits of Plaintiffs' claims but should only determine whether the requirements of Rule 23 have been met. *See Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974) (stating that courts should caution against conducting a preliminary inquiry into the merits of the suit to determine whether it could be maintained as a class action); *see also Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1201 (6th Cir. 1974).

The third criteria is satisfied because the named Plaintiff signed the same lease as the other class members, and her claims are typical of those of the entire class. The injuries of the named Plaintiff arise out of a practice or course of conduct engaged in by Fifth Third, and the

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[2] Fifth Third asserts that because the task of identifying putative class members is so difficult, class certification should be precluded. Fifth Third argues that the putative class has too many variations within the individual members' claims including: varying fee amounts, different lease forms, and leases given by an assortment of Fifth Third entities in a number of different states. Additionally, Fifth Third asserts that due to the structure of its lease forms and its computer database records, there is no way to identify the specific leaseholders who satisfy both the class definition and the Consumer Leasing Act (consumer leases by natural persons whose total contractual obligation is less than $25,000) without examining, by hand, thousands of its auto leases potentially in the class. However, difficulties in identifying the class members is not a reason to refuse certification of a class action. It is not a prerequisite to class certification under Rule 23(a) that the class be easily identifiable.

[3] In *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977), the Fourth Circuit discussed whether difficulties in establishing injury and damages should prevent class certification. The court held that in cases where the fact of injury and damages may be characterized as a mechanical task, capable of mathematical or formula calculations, the existence of individualized claims for damages is no barrier to class certification. *See Windham*, 565 F.2d at 68. However, where damages do not lend to a mechanical calculation, and individual claims require separate mini-trials, forcing the damages aspect of the case to dominate, class action is not the appropriate forum. *See id.* The current case falls into the former, rather than the latter, characterization.

injuries are similar in type, even if damages may vary. *See East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977); *see also Basile v. Merrill Lynch*, 105 F.R.D. 506, 508 (S.D.Oh. 1985); *see Walton v. Franklin Collection Agency, Inc.*, 190 F.R.D. 404, 409 (N.D. Miss. 2000). The legal claims asserted as class claims involve similar legal theories for all members of the class. *See Basile*, 105 F.R.D. at 508. Finally, the named Plaintiff is an adequate class representative, her attorneys have vigorously prosecuted this action, and there is no reason to believe that the named Plaintiff will not fairly and adequately protect the interests of the class. *See Cross v. National Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977).

B.

Plaintiffs pursue this action under Rule 23(b)(3), "which encompasses those cases in which a class action would achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated." Adv. Comm. Notes, Fed.R.Civ.P. 23. Certification under this provision requires that questions of law or fact common to the class members predominate over any questions affecting only individual members (predominance), and the class action is superior to other available methods of adjudication (superiority). *Haroco, Inc. v. American Nat. Bank and Trust Co. of Chicago*, 121 F.R.D. 664, 668 (N.D.Ill.1988). Usually, individual damage issues and minor differences in liability do not prohibit class certification under Rule 23(b)(3). *See Fogie v. Rent-A-Center, Inc.*, 867 F.Supp. 1398, 1404 (D.Minn. 1993).

Here, the common issues of law and fact generally predominate. All potential class members signed a common form lease. The legal obligations arising from it present common issues of law. The purpose of standardized leases, such as the automobile leases here, is to give

standardized treatment to numerous transactions by eliminating individual differences as between customers. *See Haroco*, 121 F.R.D. at 668. Additionally, predominance is a test readily met in certain cases alleging consumer fraud or violations of the antitrust laws. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *see also* Adv. Comm. Notes, 28 U.S.C.App., p. 697.

Nevertheless, at least one factual difference could directly impact and separate class members. That difference is the varying amount of the late fee charged.[4] Should liability exist as to each subclass of fees, the varying amount of damages could be easily calculated. What cannot be known now, however, is whether a different result on liability might pertain to the various late fees. Without hearing the evidence, the Court has no inkling whether the same result will pertain to all the late fee arrangements. Notwithstanding these considerations, class actions provide a good remedy when individual claims are relatively small, or the cost of litigation prohibits individual actions. *Fogie*, 867 F.Supp. at 1404. Such is the case here. Management of this case will not be exceedingly burdensome. A class action provides a generally fair and efficient adjudication of Plaintiffs' claims. *See id.*

II.

The Court is not quite certain as to the best process for resolving the various issues in these cases. Fifth Third argues that a possible alternative to immediate class certification is the

[4] The single cause of action is that the late fee in Fifth Third's standardized lease forms violates the Consumer Leasing Act's requirement that all charges for delinquency or default be reasonable in light of actual or anticipated harm caused by delinquency, the difficulties of proof of loss, and the inconvenience and non-feasibility of obtaining adequate remedy. There were four different fees imposed: 20$ fee (named Plaintiff's fee), 25$ fee, the increased 35$ fee in October 1997, and 15$, the statutory fee in Indiana. The range of fees may have different results as to liability (whether a 15$ fee is reasonable under the Consumer Leasing Act versus whether a 20$ fee is reasonable) and are likely to differ as to damages.

"test case" approach. This procedure allows parties to proceed in the manner of a class action without triggering the problems associated with early class notification. *See Williams*, 129 F.R.D. at 647. Fifth Third business could face substantial risk if class action notices were sent to its customers. This sort of disruption justifies a test case approach. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747, 762 (3rd Cir. 1974). A test case could determine if Fifth Third is liable to the named Plaintiff for its alleged violations of the Consumer Leasing Act, i.e. whether the late fee imposed on her automobile lease was reasonable under 15 U.S.C. § 1667b(b). *See Fogie*, 867 F.Supp. at 1404.

However, before imposing a test case, the Court must take into account the point of view (1) of the judicial system, (2) of the potential class members, (3) of the named Plaintiff, (4) of the attorneys of the litigants, (5) of the public at large and (6) of Fifth Third. *See Carte Blanche Corp.*, 496 F.2d at 760. The Court, by postponing class action treatment until a violation is proven, avoids the time and expense it may have wasted with a non-liability class action. *Id.* More important, the "test case" allows the Court to obtain some sense of whether the factual differences among class members is material to their common legal issues.

Postponement of class action determination does not prejudice potential class members. If the named Plaintiff loses on liability, potential plaintiffs will not be bound but are discouraged from wasting time and effort pursuing claims against Fifth Third because of stare decisis. *See Perez v. Virgin Islands*, 109 F.R.D. 384, 390 (D.C.V.I. 1986). If liability is established, then a class member's decision to opt in will be a more informed one. *See Carte Blanche Corp.*, 496 F.2d at 760. The named Plaintiff is not affected with respect to the amount of her recovery or with respect to the trial of the case, and she may even be protected from the expense of mailing

out notice to parties who may in fact have no rights. *Id.* at 761. If liability is established in the test case, the Court may conclude that Fifth Third, rather than Plaintiff, should bear the initial cost of notice. *Id.*

The last consideration is that of Fifth Third. By utilizing a test case approach, Fifth Third becomes bound under the principles of collateral estoppel, in favor of a potential class members, by an adverse determination of liability in the test case. *See id.* at 747. If liability is proven, Fifth Third declines the protection against one-way intervention. *See id.* at 762. Fifth Third waives objection to deferment of the final class action determination until the issue of the reasonableness of its fees has been determined in the test case. It is implicitly understood by all the parties that if a determination is made adverse to Fifth Third on the issue of liability, class certification will then be granted as to liability. *Id.* at 747. If Fifth Third is held liable in the test case it has essentially lost nothing, except that the class may be larger than before the test case.

In many cases which utilize the test case approach, defendants must explicitly waive their defense of one-way intervention. *Id.* at 762; *see also In re Folding Carton*, 75 F.R.D. at 731-32.[5] Other cases extend the test case approach beyond the purely consensual situation to instances where defendants implicitly waive the one-way intervention defense. *See Williams*, 129 F.R.D. at 647; *see also Perez*, 109 F.R.D. at 390 (holding that since defendant opposed the class certification, it should support the test case decision despite not explicitly waiving the one-way intervention defense); *see also O'Neill v. Cty. of Philadelphia*, 1992 WL 301261 (E.D. Pa. 1992)(predicting that since defendant opposed class certification it will find a test case to be

[5] Defendants risk being bound to the class by an adverse decision, rather than sending out notification immediately, because there is a chance they are not liable in the test case. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747, 760 (3rd Cir. 1974).

superior to class action). Defendants do this by arguing against class certification or by filing summary judgment motions on the merits prior to class certification. *See Williams*, 129 F.R.D. at 647. Fifth Third did both.

Before deciding on the use of the "test case," the Court will need further consultation with the parties, concerning the extent to which the results are binding and concerning the use of subclasses. Assuming everyone agrees to the test case as set out above, the Court would reserve certification of the class and defer notice to that tentatively defined class until the issue of liability is tried. The Court would intend to accept the class definition propounded by Plaintiffs, but reserves the right, after the issue of liability has been tried for the named Plaintiff, to alter the definition appropriately. Depending on the outcome of the test case, the Court may alter the class definition, change its holding on certification, or the parties may reconsider the virtues of going forward with such an action.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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ORDER

Plaintiffs moved to certify their claims as a class action. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' motion for class action certification is RESERVED until the Court schedules another conference to discuss the issues raised in the accompanying Memorandum Opinion.

This ___ day of March, 2004.

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JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record