

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

DAVID C. AND HOLLY E. McLEAN,
et al.,

Plaintiffs,

v.

FIRST HORIZON HOME LOAN
CORPORATION (f/k/a McGUIRE
MORTGAGE COMPANY)

Defendant.

Case No. 00-CV-228530

Division 16

ORDER CERTIFYING PLAINTIFF CLASS

This matter is before the Court on Plaintiffs’ Motion for Order Determining that this Action May be Maintained as a Plaintiffs’ Class Action. In support of this Order to certify the class, the Court finds as follows:

Plaintiffs’ Allegations in Support of Certification

Plaintiffs seek certification of a statewide plaintiff class consisting of all those persons who obtained a second mortgage loan from Defendant First Horizon Home Loan Corporation (f/k/a McGuire Mortgage Company) (“McGuire Mortgage”), secured by Missouri residential real estate, and who may claim damage by McGuire Mortgage’s practice of charging its numerous Missouri borrowers loan discount, origination and other fees allegedly in violation of Missouri law, specifically Missouri’s Second Mortgage Loans Act, §§ 408.231 RSMo., et seq. (the “MSMLA”).

A. David and Holly McLean

On or after November 18, 1997, Plaintiffs David and Holly McLean (the McLeans) obtained a Forty-five thousand two hundred fifty dollars (\$45,250.00) mortgage loan from McGuire Mortgage, which replaced an earlier loan. Plaintiffs allege that this loan was a “Second Mortgage Loan” within the meaning of the MSMLA and that McGuire Mortgage charged the McLeans interest at a rate that subjects the loan to the MSMLA. Plaintiffs also allege that McGuire Mortgage charged the McLeans a One thousand one hundred thirty-one dollars and 25/100 (\$1,131.25) “loan discount fee,” which equals 2.5% of the total loan amount. Plaintiffs

allege that McGuire Mortgage violated the MSMLA in that the “loan discount fee” either (1) was prohibited by § 408.231.3(3) RSMo. or (2) constituted a non-refundable origination fee of greater than the Nine hundred and five dollars (\$905.00) (2%) amount allowed at the time by § 408.233.1(5) RSMo.

B. Roger and Eugenia Jones

Plaintiffs allege that on or after May 20, 1998, Plaintiffs Roger and Eugenia Jones obtained a Twenty-five thousand dollars (\$25,000.00) mortgage loan from McGuire Mortgage. Plaintiffs claim the loan was a “Second Mortgage Loan” within the meaning of the MSMLA and that McGuire Mortgage charged the Joneses interest at an annual rate that subjects the loan to the MSMLA. In addition, Plaintiffs allege that McGuire Mortgage charged the Joneses a Seven hundred twenty-four dollars and 65/100 (\$724.65) “loan discount fee,” which equaled 2.89% of the total loan amount. Plaintiffs further allege that McGuire Mortgage violated the MSMLA in that the “loan discount fee” either (1) was prohibited by § 408.233.1.(3) RSMo, or (2) constituted a non-refundable origination fee of greater than the Five hundred dollars (\$500.00) (2%) amount allowed at the time by § 408.233.1.(5).

C. The Petition and Plaintiffs’ Claims

Plaintiffs Holly and David McLean filed a pro se lawsuit against McGuire Mortgage on November 16, 2000, based on the alleged violations of the MSMLA. On January 25, 2001, before McGuire Mortgage answered, the McLeans amended their petition and, by and through counsel, asserted claims both individually and on behalf of all other Missouri homeowners similarly aggrieved by McGuire Mortgage’s allegedly unlawful acts (i.e., those Missouri borrowers who were similarly charged the same type of allegedly unauthorized and/or excessive fees and costs by McGuire Mortgage in violation of the MSMLA). On May 10, 2001, the Joneses joined the case as party plaintiffs via the Second Amended Petition. The McLeans and the Joneses currently seek to recover all of the fees and costs they were charged that are found to be unlawful, as well as all of the interest they have paid on their second mortgage loans, and a forfeiture of any interest not yet due, a remedy that Plaintiffs claim is made available to them under the MSMLA. § 408.236 RSMo. Plaintiffs seek the same relief and remedies for the proposed plaintiff class, both under the MSMLA and § 408.562 RSMo.

II. Standards for Determining Class Action

Missouri Rule of Civil Procedure 52.08 sets forth the requirements for a class action lawsuit. Rule 52.08(a) provides:

(a) Prerequisite to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (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 interest of the class.

Once the requirements of Rule 52.08(a) are satisfied, an action may be maintained as a class action under Rule 52.08(b)(3) if:

[T]he 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. The matters pertinent to the findings include:

- (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.

III. Class Action Analysis

The analysis required in this case is divided into two parts, which correspond to the separate requirements of Rule 52.08 (a) and (b)(3):

Part I

A. Numerosity

Rule 52.08(a)(1) requires that the proponent of a class action demonstrate that “the class is so numerous that joinder of all members is impracticable.” The rule does not require that joinder be impossible; rather, joinder of all members is impracticable when the procedure “would be difficult or inconvenient.” Jackson v. Rapps, 132 F.R.D. 226, 230 (W.D. Mo. 1990); Esler v. Northrop Corp., 86 F.R.D. 20, 33-34 (W.D. Mo. 1979). “A showing of strong litigational inconvenience in the prosecution of claims separately or jointly by the proposed class members is sufficient.” Esler, 86 F.R.D. at 34.¹

Rule 52.08(a) does not contain any explicit numerical limitations. See Bradford v. Agco Corp., 187 F.R.D. 600, 604 (W.D. Mo. 1999). Nor does the rule require precise enumeration of the class size before the action can proceed as a class action. Morgan v. United Parcel Service of America, Inc., 169 F.R.D. 349, 355 (E.D. Mo. 1996); see Jackson, 132 F.R.D. at 230. It is permissible to estimate class size. Fielder v. Credit Acceptance Corp., 175 F.R.D. 313 (W.D. Mo. 1997) (between 120 and 160 members). However, impracticability of joinder has generally been found where the class is composed of more than 40 persons. Esler, 86 F.R.D. at 33 (“the difficulty inherent in joining as few as 25 or 30 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of 23(a)(1) on that fact alone”) (quoting H. Newberg, Class Actions § 1105b (1977 & Supp. 1978)); Senn v. Manchester Bank of St. Louis, 583 S.W.2d 119, 132-33 (Mo. banc 1979) overruled on other grounds, Harman v. Davis, 651 S.W.2d 134, 136 (Mo. 1983) (trial court properly permitted cause to proceed as class action with class comprised of approximately 80 members); Paxton v. Union Nat. Bank, 688 F.2d 552 (8th Cir. 1982) (16 members); Bradford, 187 F.R.D. at 600 (W.D. Mo. 1999) (65 members); Morgan, 169 F.R.D. 349 (possibly 19 members).²

The Court may also consider a number of additional factors in its determining

¹ Mo.R.Civ.P. 52-08 is identical to Federal Rule 23. Consequently, Missouri courts consider interpretations of Rule 23 in interpreting Rule 52.08. Ralph v. American Family Mut. Ins. Co., 809 S.W.2d 173, 174 (Mo.App. 1991).

² Though a specific number is not required, Professor Newberg’s survey of court rulings on the numerosity issue concludes that any class consisting of 40 or more members presumptively fulfills the numerosity requirements. Newberg on Class Actions § 3.05 (3d Ed. 2001).

impracticability of joinder, including the nature of the action, the inconvenience of trying individual suits, geographical distribution, the size of the claims of the individual class members, the ability of individual litigants to institute an action on their own behalf “and any other factor relevant to the practicability of joining all the putative class members. Paxton, 688 F.2d at 559-60; Esler, 86 F.R.D. at 33. The fact that all class members are located in the same state does not defeat certification. In fact, having all the plaintiffs in close proximity actually substantiates the need for certification. Bradford, 187 F.R.D. at 604 (“If the same witnesses traveled to the same courthouse to testify about the same [facts] in multiple cases, then judicial resources would be wasted”).

Rule 52.08(a)(1) is Satisfied

The Court finds that since November 16, 1997, McGuire Mortgage has made hundreds of second mortgage home loans, secured by real estate in Missouri, that may be subject to the MSMLA. These loans may well cover property in a number of counties throughout the state of Missouri, making joinder of all class members problematic and costly. Moreover, McGuire Mortgage in its brief admits that “[it] cannot deny that there may be *hundreds* of borrowers who will fit in some class depending on the nature and extent of the class certified by this court.” (Def’t.’s Memo. in Opp. at p. 16) Despite the number of loans, the parties and the Court can identify the particular members of the Class by name and address using the business records that McGuire Mortgage has or will produce. For these reasons, the Court finds that the numerosity requirement of Mo. Rule 52.08(a) is satisfied.

B. Commonality

Mo. Rule 52.08(a)(2) requires a showing of the existence of “questions of law or fact common to the class.” This threshold of “commonality” is not high. Winkler v. DTE, Inc., 205 F.R.D. 235, 240 (D. Ariz. 2001) (“[t]he standard for commonality is minimal because ‘all that is required is a common issue of law or fact’”). This prong of the rule is satisfied when the “legal question ‘linking the class members is substantially related to the resolution of the litigation.’” Fielder v. Credit Acceptance Corp., 175 F.R.D. 313, 319-20 (W.D. Mo. 1997) (quoting Paxton, 688 F.2d at 561); see Senn, 583 S.W.2d at 132 (commonality existed where legal theory and underlying agreements were the same).

Rule 52.08(a)(2) is Satisfied

The causes of action stated in the Second Amended Petition allege claims common to the members of the class. These claims raise questions of law or fact common to the class because they all pertain to each member's loan and the application of the MSMLA to such loans. The Court further finds that the class issues sufficiently predominate so as to justify use of a class action in this case under Mo. Rule 52.08.

It is not for the Court to determine on certification whether the common questions guarantee a determination of liability. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S.Ct. 2140 (1974). The question, instead, is whether the legal issues and the factual underpinnings of any decision are common to all members of the class. Id.; Jackson v. Rapps, 132 F.R.D. 226, 230 (W.D. Mo. 1990) ("The Court may go beyond the pleadings in determining whether class action prerequisites have been met, but may not review the sufficiency or substantive merits of [the plaintiff's claims and factual] allegations"). Here, both the liability and the damages issues presented by Plaintiffs' claims have a common nucleus.

The MSMLA claims that Plaintiffs advances are statutorily based, thus providing common questions of law with respect to the interpretation of the statute. Violation of the statute grants specific remedies and carries specific penalties. Neither the interpretation of the statute, which the parties dispute, nor the methodology for application of the statutory remedy will vary between class members. Should there be a finding of liability, each class member may receive a different amount based upon his or her loan, but the *method* of determining the amount will not vary. Plaintiffs have alleged that it was a common procedure of McGuire Mortgage to charge the same type of "loan discount and brokers" fees to all its borrowers, thus further reducing the prospect of differences among class members' claims. Plaintiffs' claims are based upon a common interpretation of the limits imposed on such fees by the MSMLA. The determination of that issue will effect the named and unnamed class members the same. If, as alleged, McGuire Mortgage employed a common practice with respect to the "loan discount" fees costs it charged its many borrowers, the question of whether those fees violated the MSMLA will be common to all class members.

The Court has also carefully considered the issue of damages in this action. As many courts recognize, when a plaintiff establishes an issue of law common to all class members, the possibility of individualized damages cannot bar class certification. In re Visa Check/Master Money Antitrust Litigation, 280 F.3d 124, 139 (2nd Cir. 2001); Bertulli v. Indep. Ass'n of Cont'l

Pilots, 242 F.3d 290, 298 (5th Cir. 2001); Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975); Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 796,798 (10th Cir. 1970). The issue of damages, therefore, must be considered in the context of whether the common issues of law or fact predominate over any collateral issue as to individualized damages. Id. Thus, individualized issues of damages are relegated to secondary status in making the decision on whether or not common issues predominate. To the extent that each borrower may have a claim for a different amount depending on the amount of his or her loan, that distinction is not sufficient to outweigh the predominance of the common elements of the damage issues; nor will the calculation of those different damage amounts pose an insurmountable problem for management of the action as a class action.

C. Typicality

Rule 52.08(a)(3) requires that the claims of the class representatives be “typical of the claims ... of the class.” The threshold for establishing typicality is also low. DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1174 (8th Cir. 1995). “The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff.” Id. Typicality does not require that the claims of the class members be identical. Id.; Fielder, 175 F.R.D. at 320. Typicality is frequently demonstrated by showing that the plaintiff has the same or similar grievances as the other members of the class. Paxton, 688 F.2d at 562; Donaldson v. Pillsbury Co., 554 F.2d 825, 830 (8th Cir.), cert. denied, 434 U.S. 856 (1977)). “The court must be shown that the representative is not alone.” Paxton, 688 F.2d at 562.

Rule 52.08(a)(3) is Satisfied

The action also satisfies the typicality requirement. Plaintiffs’ claims arise out of the same course of conduct as the class claims, they have no known conflict of interest, and their claims are based upon the same legal theories that will apply to the class in general. Plaintiffs’ claims arise out of the same course of conduct, i.e. the alleged violation of the MSMLA, and are based on the same legal theories as those of the members of the class. Plaintiffs, like the members of the class, allege that they are aggrieved by the conduct of McGuire Mortgage in precisely the same way; they allegedly were all charged unauthorized or excessive fees in connection with their second mortgage loans. Notably, McGuire Mortgage does not dispute that the named Plaintiffs’ claims are “typical” of the class. As a result, the Court concludes that the typicality requirement of Rule 52.08(a) is also met.

D. Adequacy of Representation

The requirement of Rule 52.08(a)(4) is satisfied if it appears that (1) the named plaintiffs' interests are not antagonistic to those of the class they seek to represent and (2) the named plaintiffs' attorneys are qualified, experienced and generally able to conduct the litigation. Paxton, 688 F.2d at 562-63; Bradford, 187 F.R.D. at 605; Fielder, 175 F.R.D. at 320. The existence of these elements is to be presumed, absent proof to the contrary. See Morgan, *supra*, 169 F.R.D. at 357. As the court explained in Cook v. Rockwell Int'l Corp., 151 F.R.D. 378 (D. Colo. 1993):

[A]dequate representation presumptions are usually invoked in the absence of contrary evidence by the party opposing the class. On the issue of no conflict with the class, one of the tests for adequate representation, the presumption fairly arises because of the difficulty of proving negative facts. On the issue of professional competence of counsel for the class representative, the presumption fairly arises that all members of the bar in good standing are competent. Finally, on the issue of intent to prosecute the action vigorously, the favorable presumption arises because the test involves future conduct of persons, which cannot fairly be prejudged adversely.

Id. at 386 (quoting from Newberg on Class Actions, § 7.24 at 7-80)

Rule 52.08(a)(4) is Satisfied

The requirement of Rule 52.08(a)(4) is satisfied. if it appears that (1) the named plaintiffs' interests are not antagonistic to those of the class they seek to represent and (2) the named plaintiffs' attorneys are qualified, experienced and generally able to conduct the litigation. No evidence has been presented that overcomes the presumptions of the adequacy of representation element of Rule 52.08(a). Given the similarity of claims, there appears to be no potential for conflicting interests in this action. Accordingly, the Court concludes that the requirement is met. The named Plaintiffs and plaintiff class seek money damages and injunctive relief from and against McGuire Mortgage as a result of its alleged acts. Plaintiffs have also retained counsel experienced in class action and other complex litigation to prosecute their claims and the claims of the class.

Part II

Having determined that the requirements of Mo. Rule 52.08(a), the Court must determine whether, in its discretion, the class action constitutes a superior method of adjudication of Plaintiffs' claims under Mo. Rule 52.08(b)(3).

A. Rule 52.08(b)(3)

The Court finds as a fact and concludes as a matter of law that the class action mechanism is the superior method for adjudication of the claims in this case. In making this determination, the Court, in the exercise of its discretion, reaffirms its conclusions above that there are common issues of fact and law which predominate in this action and that Plaintiffs are adequate class representatives. These two factors substantially support the superiority of adjudication as a class action.

The Court also finds that the useful purposes of class actions in preventing multiplicity of lawsuits and inconsistent verdicts is served in this instance. See Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455 (1994).

The Court has also considered the nature of the damages in this case. They are not *de minimus*. If Plaintiffs prevail they stand to recover all of the illegal fees and interest they have thus far paid on the loan obtained through McGuire Mortgage, together with a forfeiture of any future interest not yet due. §§ 408.236, 408.562 RSMo. The fees and interest could total millions of dollars. Statutory penalties and punitive damages could also increase that amount. Mo. Rev. Stat. § 408.562. The damages are significant in amount and significant to Plaintiffs and the class of homeowners they will represent since their mortgages and the equity in their homes could be affected. It is therefore likely that class members would make claims if Plaintiffs prevail and a claims process is invoked.

Next, the Court has considered whether there are any individualized issues that adversely impact the superiority of the class mechanism. The Court finds no such issues based upon its understanding of Plaintiffs' claims. Were such issues to exist, however, the Court would be required to give them little weight. When there has been established an issue of law common to all class members, the fact that there will be individualized damages is a collateral matter and no bar to certification. See, e.g., In re Visa Check/Master Money Antitrust Litigation, 280 F.3d at 139-140.

A class action will foster economies of time and effort and expense, and uniformity of decisions will be ensured. The only alternative to a class action is for Plaintiffs and the members

of the Class to file hundreds of individual claims. To do so would be time consuming and redundant, as each claimant would be required to conduct discovery into Defendants' business practices to prove exactly the same allegations and proffer exactly the same evidence. Each claimant would then be required to brief and argue the same questions of law. Moreover, the individual members may not be aware of their rights. Nor may they be in a position (through lack of experience or financially) to commence individual lawsuits against McGuire Mortgage. As a result, the many members of the Class likely would not proceed individually against the Defendants.

The Court also notes that it has been widely recognized that a class action is superior to other available methods -- particularly, individual lawsuits -- for the fair and efficient adjudication of a suit that affects a large number of persons injured by violations of consumer protection laws or the common law. Prudential Insurance Co. of America Sales Practices Litigation v. Prudential Insurance Co. of America, 148 F.3d 282, 316 (3rd Cir. 1988). Consumer class actions such as the case at bar typically satisfy the superiority requirement of Rule 52.08. See, e.g., Lozada v. Dale Baker Oldsmobile, Inc., 197 F.R.D. 321, 332 (W.D. Mich. 2000) (consumer class actions are recognized as particularly efficient where individual claims are small"); Lake v. First Nationwide Bank, 156 F.R.D. 615, 626 (E.D. Pa. 1994) (public interest in seeing that rights of consumers are vindicated favors disposition of claims in a class action).

The Court has also considered the nature and extent of other similar litigation desirability or undesirability of concentrating the claim in this forum and concludes that it is desirable to proceed with a class action.

The Court concludes that based on the evidence and arguments before it, the class action mechanism is a superior method for adjudication of the claims in this case. Further, there is a possibility that numerous parties will want to make claims if plaintiffs prevail on the liability issues and a claims process is invoked.

The Court further finds that at this stage of the proceedings there are no individual issues that will mitigate against using the class action method of adjudication. In sum, the Court finds no factors which it believes would render the class action mechanism an inferior method of adjudicating this dispute.

V. Definitions: For purposes of the class.

1. "Second Mortgage" Loan shall mean "a loan secured in whole or in

part by a lien upon any interest in Residential Real Estate created by a security instrument, including a mortgage, deed of trust, or other similar instrument or document, which Residential Real Estate was then subject to one or more prior mortgage loans.”

Said loans do not include those made where part or all of the proceeds were used for business purposes or to improve the real estate taken as security on the loan.

2. “Residential Real Estate” shall mean “any real estate used or intended to be used as a residence by not more than four families, and which is situated within the state of Missouri.”

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that Plaintiffs’ motion for certification of a plaintiff class is granted and the Court hereby certifies a class of plaintiffs under Rule 52.08(b)(3) defined as follows:

All individuals who, on or after November 16, 1997 executed a promissory note and deed of trust for a “Second Mortgage Loan” loan on “residential real estate” from First Horizon Home Loan Corporation (f/k/a McGuire Mortgage Company), provided such promissory note is not for a business loan as defined by § 408.015(2) and in an amount of five thousand dollars or greater as set forth in §408.035(2); and paid:

1. An origination fee exceeding 2% of the principal loan amount for loans having a loan date before August 28, 1998; or
2. An origination fee exceeding 5% of the principal loan amount for loans having a loan date on or after August 28, 1998; or
3. Any other fees or costs paid or financed as a part of the principal loan balance including, without limitation, the fees and costs

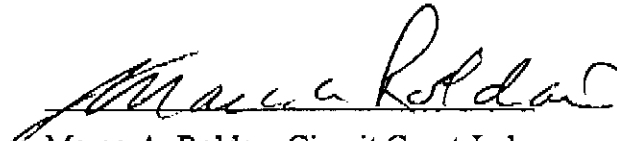
identified in subparagraph a below, but excluding the fees and costs identified in subparagraph b:

a. Fees and Costs Included

- LOAN DISCOUNT FEES
- BROKERS FEES
- POINTS/POINTS TO LENDER
- DOCUMENT SIGNING FEES
- UNDERWRITING FEES
- PROCESSING FEES
- ADMINISTRATION FEES

b. Fees and Costs Excluded

- Fees and charges paid for perfecting, releasing, or satisfying a security interest related to the second mortgage loan
- Taxes
- Fees or premiums for title examination, title insurance, or similar purposes including survey
- Fees for preparation of a deed, settlement statement, or other documents
- Fees for notarizing deeds and other documents
- Appraisal fees
- Fees for credit reports
- Charges for insurance (i) protecting the lender against the borrower's default or other credit loss (ii) against loss of or damage to the property, where no such coverage then existed or (h) providing life, accident, health or involuntary unemployment coverage.



Marco A. Roldan, Circuit Court Judge

Dated: December 17, 2002

I certify that a copy of this order
Was mailed first class, postage
Prepaid, on this ___ day of December, 2002 to:

Kip Richards, Attorney for Plaintiff
Richard L. Martin, Attorney for Defendant

Toiy Phanich
Judicial Administrative Assistant