

STATE OF MAINE  
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT  
CIVIL ACTION  
DOCKET NO. CV-10-53

("In Re Possibilities Counseling Services,  
Inc. Provider Payment Litigation") )  
)

NICOLE RICHMAN, JULIE )  
HOWARD, JOHN THIBODEAU, and )  
MARYANN CARROLL, )  
on behalf of themselves and )  
others similarly situated, )

Plaintiffs, )

v. )

POSSIBILITIES COUNSELING )  
SERVICES, INC., WENDY L. )  
BERGERON, AFFILIATE FUNDING, )  
INC., EMILE L. CLAVET, KEVIN )  
DEAN, and FOSTER CARE BILLING, )  
LLC d/b/a/ PROVIDER FINANCIAL )

Defendants. )

**ORDER GRANTING CLASS  
CERTIFICATION**

**INTRODUCTION**

The named Plaintiffs have moved to certify a class in this matter,<sup>1</sup> and for the reasons stated in this order the court grants the motion in part and denies the motion in part.

Pursuant to Maine Rules of Civil Procedure 23(a) and 23(b)(3), the following Class is certified:

All social service providers licensed in Maine with written agreements as independent contractor affiliates of Possibilities Counseling Services, Inc. in effect at any time from November 1, 2009 through October 31, 2010 ("the Class Period"), whose claims are limited to damages for (i) unpaid claims for payment submitted by the provider (including any claim that no processing fee should be deducted from the face amount of the claim), interest and costs. Any providers

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<sup>1</sup> The Plaintiffs defined the class thusly: "All social service providers licensed in Maine with written agreements as independent contractor affiliates of Possibilities Counseling Services, Inc. in effect at any time from November 1, 2009 through October 1, 2010." (M. Class Cert. 2; Amend. Compl. ¶ 17.)

whose claims for damages extend beyond the just-stated limitation are hereby excluded from the class because their claims are not typical of those of the Class.

The court has written extensively on the facts and procedural history of this case in other orders and does not repeat that background; the court moves directly to the issue at hand.

## DISCUSSION

Class actions are governed by M.R. Civ. P. 23, and a putative class must meet all the requirements of Rule 23(a) and one of the requirements of Rule 23(b). Because M.R. Civ. P. 23 is nearly identical to Fed. R. Civ. P. 23, “[courts] value constructions and comments on the federal rule as aids in construing our parallel provision.” *Bean v. Cummings*, 2008 ME 18, ¶ 11, 939 A.2d 676, 680 (quotation marks omitted). The United States Supreme Court has stated that “[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met,” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quotation marks omitted), but has also recognized that a class determination “generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action,” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

### A. The Rule 23(a) Requirements<sup>2</sup>

Rule 23(a) states:

**(a) Prerequisites 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 interests of the class.

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<sup>2</sup> In addition, Defendants have raised two threshold issues: mootness and ambiguity in the proposed class definition. Although payment has been made to most if not all of the Plaintiffs and the proposed class, the amount of any statutory interest on contract claims is still in question, and thus the litigation is not moot. *See Halfway House v. City of Portland*, 670 A.2d 1377, 1379 (Me. 1996). Because the court is certifying a narrower class than Plaintiffs initially requested, the court sees no need to address the ambiguity issue, which has become effectively mooted.

M.R. Civ. P. 23(a). The only Rule 23(a) requirement that is not challenged by one of the Defendants is the commonality requirement.

1. *Numerosity*

The numerosity requirement is met when “the class is so numerous that joinder of all members is impracticable.” M.R. Civ. P. 23(a)(1). “There is no threshold number of class members that automatically satisfies this requirement,” *Van Meter v. Harvey*, No. 1:09-cv-00633-JAW, 2011 U.S. Dist. LEXIS 8769, at \*19 (D. Me. Jan. 31, 2011), and “[t]he number of potential class members alone does not dictate whether the class is sufficiently numerous that joinder is impracticable,” *Smart v. R.C. Moore*, No. CV-01-264, 2002 Me. Super. LEXIS 237, at \*5 (Me. Super. Ct. Jan. 15, 2002). “Additional factors impacting the practicability of joinder include: (1) whether the class members live in the same geographic area, (2) whether they can be easily identified, (3) the nature of the action, and (4) the size of each potential member’s claim.” *Smart*, 2002 Me. Super. LEXIS 237, at \*5.

The court is satisfied that the requirement of numerosity has been met. Plaintiffs estimate that the class size is 550 members, and those potential class members reside within several counties in the State. Further, the small amounts in controversy and the dissipation of the class members across the state convinces the court that joinder would be impracticable.

2. *Typicality*

The typicality requirement is met when “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” M.R. Civ. P. 23(a)(3). Typicality means that the claim raised by the representative party is

one which should reasonably be expected to be raised by members of the proposed class. Where it is alleged that the defendants have engaged in a common scheme relative to all members of the class, courts have determined that there is a strong presumption that the claims of the representative parties will be “typical” of the class members. Typicality does not mean that the claims of class members must be identical.

*Karofsky v. Abbott Labs*, 1997 Me. Super. LEXIS 316, at \*24 (Me. Super. Ct. Oct. 15, 1997) (citations omitted). “The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quotation marks omitted). The typicality requirement overlaps substantially with the class representatives requirement embodied in M.R. Civ. P. 23(a)(4).

Plaintiffs assert that their claims are typical of the class because they are in the same situation as the potential class and have been denied payment for services rendered. Specifically, Plaintiffs allege that PCS breached their contract with the Plaintiffs by assigning rights in the contract to AFI and failing to pay the Plaintiffs both timely and fully. PCS objects that the lead Plaintiffs intend to press for a broad range of compensation for their injuries that are not typical to the class as a whole. The court agrees that the claims that are typical to the class are not claims for consequential damages for breach of contract or emotional distress damages in tort. Such claims are unique to the individual providers and are not suitable for certification within the class action. As discussed further in the order, the court concludes that only the claims that are truly common to all the Providers are suitable for certification, but that the certified claims satisfy the typicality requirement of Rule 23(a)(3).

### 3. *Class Representatives*

The final requirement of Rule 23(a) in dispute deals with the capacity of the named plaintiffs and their counsel to represent the class, and requires that “the representative parties will fairly and adequately protect the interests of the class.” M.R. Civ. P. 23(a)(4).

In order to prevail in their demonstration that they are adequate representatives of the class, plaintiffs must demonstrate that (1) the representatives and their attorneys are able and willing to prosecute the action completely and vigorously

and (2) each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge.

*Karofsky*, 1997 Me. Super. LEXIS 316, at \*26-\*27 (quotation marks omitted). A plaintiff with interests that conflict with the class members cannot serve as lead plaintiff.<sup>3</sup> See 1 Alba Conte & Herbert Nerberg, *Nerberg on Class Actions* § 3:23 at 415 (4th ed. 2002). Neither PCS nor AFI challenge the ability of Plaintiffs' counsel to pursue the case, and thus the only question is whether the named Plaintiffs are able to act as class representatives.

Based on the depositions of the named Plaintiffs, Defendants raise several objections to the proposed class representatives. First, Defendants argue that Plaintiffs are not adequately acquainted with the details of the litigation, including the appointment and work of the referee, specific legal allegations in the complaint, and the types of damages that are recoverable. Plaintiffs are not required to be legal experts, nor do they need to understand all the legal intricacies of the case. See *Everest v. Leviton Mfg. Co.*, No. CV-04-612, 2007 Me. Super. LEXIS 111, at \*8 (Me. Super. Ct. June 5, 2007); accord *Lerner v. Harimsohn*, 126 F.R.D. 64, 67 (D. Colo. 1989) ("Generally, as long as the plaintiffs, as class representatives, know something about the case, even though they are not knowledgeable of the complaint's specific allegations, the class should be certified."); see also 1 *Nerberg on Class Actions* § 3.34. Although there are portions of each named Plaintiff's deposition that could indicate unfamiliarity with the case, the depositions reveal that each Plaintiff has a basic understanding of the legal claims and his or her role as a

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<sup>3</sup> Defendants also assert that Plaintiffs' fee agreements with counsel and their understanding of those agreements conflict with the interests of the proposed class because Plaintiffs have a different interest in the litigation than the putative class. The court concludes, however, that AFI's concern is largely overstated. The existence of contingent fee agreements between the named Plaintiffs and their counsel is standard practice in class action litigation and required by M.R. Prof. Cond. 1.5(c). To the extent that there is any confusion regarding those agreements, some confusion does not defeat the adequacy of the representatives. See *Everest v. Leviton Mfg. Co.*, 2007 Me. Super. LEXIS 111, at \*8. In addition, Defendants aver that because several potential class members have unambiguously expressed their unwillingness to pursue the litigation, Plaintiffs are not adequate representatives. The alleged unwillingness of individuals not identified to the court is not grounds for denying class certification. See *Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986) (explaining that several putative class members' satisfaction with defendant's services did not preclude certification).

class representative and is willing to pursue the case until its conclusion. No more knowledge is required of the Plaintiffs.

Defendants also contend that Plaintiffs seek damages that are unique to their circumstances and not compatible with the injuries to the proposed class. On this point the court agrees. As discussed further in this order, the Plaintiffs' appointment as class representatives will be provisional until Plaintiffs verify that they are in fact limiting their claims so as to qualify for inclusion in the Class.

B. The Rule 23(b) Requirements

Rule 23(b) states, in relevant<sup>+</sup> part:

**(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

....

(3) 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.

M.R. Civ. P. 23(b)(3). "The predominance element is closely related to the commonality requirement in subdivision (a)(2) in that both require an inquiry into whether there are questions of law or fact common to the class[, but] the predominance requirement is far more

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<sup>+</sup> Plaintiffs assert that their action falls within Rule 23(b)(1) and (b)(3). M.R. Civ. P. 23(b)(1) allows an action to be pursued as a class action when the requirements of M.R. Civ. P. 23(a) are met and:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

demanding than the commonality requirement.” *Everest Mfg. Co.*, 2007 Me. Super. LEXIS 111, at \*13 (quotation marks omitted). Factors pertinent to deciding these issues are

(A) the interest of 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.

M.R. Civ. P. 23(b)(3). When appropriate, “an action may be brought or maintained as a class action with respect to particular issues.” M.R. Civ. P. 23(c)(4).

Plaintiffs have brought both breach of contract claims and fraud claims against the Defendants. The court concludes that the common questions in this litigation revolve around whether Defendants are liable for breaching the contracts at issue and that those common questions predominate over any issues affecting only individual members of the class. In this regard, a class action is also a superior method of resolution to the class members claims against PCS and AFI. The liability issues are common to all of the class members and a single, concentrated action to determine those issues will be more manageable than 550 individual actions. The court is not aware of any competing class actions that have been filed or any cases filed by individual putative class members. The court thus determines that class certification is warranted in this case.

### ORDER

Upon consideration of Plaintiffs’ Motion for Class Certification, all memoranda filed in support of and opposition thereto, the pertinent portions of the record, and having heard

argument on Plaintiffs' Motion for Class Certification on April 26, 2011, the court hereby ORDERS the following:

1. Plaintiffs' Motion for Class Certification is GRANTED in part and DENIED in part.
2. Pursuant to Maine Rules of Civil Procedure 23(a) and 23(b)(3), the following Class is

certified:

All social service providers licensed in Maine with written agreements as independent contractor affiliates of Possibilities Counseling Services, Inc. in effect at any time from November 1, 2009 through October 31, 2010 ("the Class Period"), whose claims are limited to damages for (i) unpaid claims for payment submitted by the provider (including any claim that no processing fee should be deducted from the face amount of the claim), interest and costs. Any providers whose claims for damages extend beyond the just-stated limitation are hereby excluded from the class because their claims are not typical of those of the Class.

3. Pursuant to Maine Rule of Civil Procedure 23(a)(1) the Court determines that the Class consists of hundreds of individual providers, and is therefore so numerous that joinder of all providers individually would be impracticable.

4. The court determines that the class-wide claims and issues, within the meaning of Maine Rule of Civil Procedure 23(a)(2) may be summarized as follows:

- what amounts are due to members of the Class from any one or more of the Defendants, to the extent Defendants have received funds from third party payers (including without limitation, MaineCare, Medicare, Medicaid, private third party payers, and one or more factors who make advance payments to providers and/or agencies secured by receivables from third party payers) reflecting payment for services rendered by members of the Class, and should be required to pay Class members;
- what amounts in interest should be awarded to members of the Class;
- what amounts in costs (including but not limited to the costs of reference) should be assessed as between members of the Class and any one or more the Defendants; and



- how should the amounts held in escrow be allocated among the Class members and the Defendants.

All of the Class members share a common interest in the claims and issues set forth in this section and sections 2 of this Order. Any Class member who wishes to opt out of this litigation will be given the opportunity to do so.

Thus, the Class is defined to exclude any providers who wish to assert damages claims that require proof of a more individualized nature, such as tort damages and consequential damages for breach of contract. Such claims involve issues of duty, breach, reliance, causation and damages that cannot be adjudicated on a collective, class-wide basis.<sup>5</sup> Therefore, Plaintiffs' Motion for Class Certification is DENIED in part insofar as Plaintiffs and the Class seek to recover any damages beyond payments due under the Possibilities contracts, interest and costs.

5. Pursuant to Maine Rule of Civil Procedure 23(a)(4), the court determines that the named Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs Nicole Richman, Julie Howard, John Thibodeau, and Maryann Carroll are hereby provisionally appointed as Class Representatives for the following reasons:

- the Class Representatives allege on behalf of the class the same manner of injury from the same course of conduct that they complain of for themselves; and
- the Class Representatives assert on their own behalf the same legal theories they assert on behalf of the Class.

The appointment is provisional because the court is not clear on whether all of the named Plaintiffs are in fact limiting their claims so as to qualify for inclusion in the Class. Each named Plaintiff is hereby ordered to file a statement in writing within 20 days of this Order

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<sup>5</sup> For example, damages for emotional distress; consequential damages resulting from nonpayment and/or late payment of reimbursement to members of the Class--late fees charged by creditors for nonpayment and/or late payment; foreclosure of residential property as an alleged result of nonpayment and/or late payment.

indicating whether the named Plaintiff chooses to limit his or her damages claims so as to be within the definition of the Class at section 1, *supra*.<sup>6</sup>

6. Because every Class Representative is asserting claims within the scope of the definition of the Class set forth above, the court provisionally determines that those claims asserted by Class Representatives are typical of the claims of the Class within the meaning of Maine Rule of Civil Procedure 23(a)(3).

7. Pursuant to Maine Rule of Civil Procedure 23(b)(3), and given that the class is certified only for purposes of direct damages, interest and costs, the court determines that common questions of law and fact predominate over questions affecting only individual class members in this action. In light of the class-wide claims, and the issues and defenses set forth in the parties' briefing on Plaintiffs' Motion for Class Certification, the issues in this action that are subject to generalized proof and thus applicable to the Class as a whole predominate over any issues that are subject to individualized proof. Specifically, the court determines that:

- All of the providers in the proposed Class have common claims—namely, a claim for amounts for professional services, interest on those amounts, and costs incurred in this litigation.
- The relevant proof of Defendants' liability for payments of services due to Class members, interest and costs will not vary among members of the class.
- The referee appointed by the court in this matter and/or any expert retained in this matter will provide the basis for the court to determine the amounts due to members of to the Class.

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<sup>6</sup> Admittedly, the Plaintiffs' pleadings are framed to suggest that all of the named Plaintiffs are asserting claims beyond those the court deems common to all members of the Class. However, like any other Class members, the individual named Plaintiffs have a choice as to whether to waive claims to further damages by electing to be included in the certified Class, or whether to opt out of the Class. If all named Plaintiffs opt out of the Class in the statements they are required to file within 20 days, the action cannot proceed unless additional named Plaintiffs join.

Also pursuant to Maine Rule of Civil Procedure 23(b)(3), the court determines that a class action is superior to other available methods for the fair and efficient adjudication of this action. For purposes of judicial and litigation efficiency, it is desirable to concentrate Class claims in a single action. The court determines that there are few, if any, manageability problems presented in this case.

8. Preti Flaherty Beliveau, & Pachios, LLP, One City Center, P.O. Box 9546, Portland, ME 04112-9546 and Taylor, McCormack & Frame, 4 Milk Street, Suite 103, Portland, ME 04101 are appointed as Class Counsel. Class counsel are well qualified to represent the Class in this matter given their experience in prior matters and the vigor with which they have prosecuted the matter thus far.

9. The Clerk will schedule a further conference to establish a procedure and schedule for future phases of this case, including:

- what amounts from the escrow funds should be released to Defendants;
- whether the court should entertain an application for an interim award of attorney fees based on the amounts already paid over to the provider Class;
- the status of claims submitted and paid;
- deadlines for jury demand, discovery and pretrial and trial proceedings.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this Order in the docket.

Dated: 12 July 2011



Justice, Business and Consumer Court

Entered on the Docket: 7.13.2011  
Copies sent via Mail  Electronically