

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

EVELYN MORSE, individually and on )  
behalf of all others similarly situated, )  
 )  
Plaintiff, )

**v.**

No. 99 C 0193

)  
BANKERS LIFE & CASUALTY COMPANY )  
and PCS, INC., )  
Defendants. )

MEMORANDUM OPINION AND ORDER

Plaintiff Evelyn Morse has brought suit against defendants Bankers Life and Casualty Co. and PCS, Inc., claiming breach of contract, breach of duty of good faith and fair dealing, violation of the Illinois Uniform Deceptive Trade Practices Act, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, civil conspiracy, and violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act. Morse has also moved for class certification. Both defendants have moved to dismiss the complaint. For the reasons stated below, the defendants' motions to dismiss are denied and Morse's motion for class certification is granted with modification.

I. Background

Defendant Bankers Life sells a Medigap policy which provides a prescription drug benefit. The policy promises to pay 100% of the cost of prescription drugs that are generic and 80% of the cost of brand name drugs. Bankers Life entered into a contractual relationship with defendant PCS Inc., under which PCS processes Bankers Life's policyholders' prescription drug

claims. PCS has established a system whereby the policyholder's pharmacy, before releasing the prescription drug to the policyholder, accesses PCS' system and finds out whether PCS will provide 100% of the cost or whether the policyholder must copay 20% before receiving the prescription. Under this system, the pharmacy releases generic drugs to the patient with no exchange of money, since PCS' approval of the drug as generic means that the pharmacy will be paid 100% by PCS, which is then reimbursed by the insurer. If the drug is a brand name drug, though, the pharmacy will be paid only 80% by PCS and must collect the additional 20% from its customer, the policyholder, before releasing the drug.

According to the complaint, Morse, who suffers from breast cancer, was prescribed tamoxifen by her physician. Morse alleges that tamoxifen is a generic drug. However, since her enrollment in the PCS system by Bankers Life in 1997, Morse has been charged a 20% copay for each prescription. To avoid these copayments, Morse asked her physician to prescribe a generic drug rather than tamoxifen, but her physician informed her that tamoxifen was a generic drug. Morse then contacted Bankers Life, which told her that PCS' system classified tamoxifen as a brand name drug and "[t]hey aren't going to change their system in the near future." Bankers Life told Morse that she should continue to pay the 20% copay and, if she then contacted Bankers Life, "we will see that you get the payment for the 20% that you paid."<sup>1</sup>

Bankers Life seeks dismissal of plaintiff's RICO claim, arguing that at most, Morse was inconvenienced by having to seek reimbursement for the amount she overpaid: "[R]ather than

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<sup>1</sup>The court, as it must, takes as true the allegations of the complaint. It also infers, based on those allegations and on Bankers Life's letter to plaintiff in response to her complaint about the misclassification, that Bankers Life did not disagree that tamoxifen is generic. Bankers Life's letter also strongly suggests that PCS was aware of a problem with its classification.

trying to snooker plaintiff out of 20 percent of the cost of her prescriptions, Bankers Life reimbursed her for past co-payments and offered to pay for future co-payments-hardly the signs of a ‘scheme to defraud.’” Memorandum in Support of Motion to Dismiss at 5.

## II. Standard of Review

A motion to dismiss tests the sufficiency of a complaint, not its merits. *Weiler v. Household Finance Corp.*, 101 F.3d 519, 524 n. 1 (7th cir. 1996). Dismissal of a complaint for failure to state a claim will be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995). In order to withstand a motion to dismiss, a complaint must allege facts sufficiently, setting forth the essential elements of the cause of action. *Gray v. County of Dane*, 854 F.2d 179, 182 (7th Cir. 1988). All well-pleaded allegations are presumed to be true and all reasonable inferences are drawn in favor of the plaintiff. *Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 468 (7th Cir. 1997).

## III. Motion to Dismiss

“To show a violation of § 1962(c), a RICO plaintiff must allege “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). The plaintiff must allege sufficient facts to support each element. *Goren v. New Vision Int’l, Inc.*, 156 F.3d 721 (7th Cir. 1998). Bankers Life contends that Morse has failed to allege that it engaged in a pattern of racketeering activity as required under RICO, and that she has also failed to allege fraud with the particularity required by Rule 9(b) of the Federal

Rules of Civil Procedure.<sup>2</sup> Moreover, Bankers Life argues that Morse has failed to allege that it conducted or participated in the affairs of a RICO “enterprise.” PCS has also moved to dismiss the RICO claims against it, claiming that Morse’s complaint contains no facts demonstrating predicate acts of fraud by PCS, and that the complaint does not identify the existence of a RICO enterprise.

The correspondence Morse has attached to her complaint strongly suggests, at least, that Bankers Life agrees that PCS is classifying tamoxifen as a brand name drug when it in fact is generic; this is inferable from Bankers Life’s willingness to reimburse plaintiff for the amount she copaid. The correspondence also demonstrates that when Morse brought the matter to Bankers Life’s attention, it told her that PCS was not going to change its system. For Morse, that means that she will have to advance 20% of the cost of the tamoxifen and file reimbursement. This is for her little more than an inconvenience and a temporary loss of her funds, assuming that she is-and remains able to-come up with the cash to advance (although the cost of such an inconvenience for the elderly and infirm is not trivial). But presumably, numerous Bankers Life policyholders other than Morse are prescribed tamoxifen. It defies common sense to believe that all of them, having been required to pay 20% which Bankers Life was contractually obligated to provide, realize that they have gotten less than they bargained for and have sought reimbursement. If Bankers Life had to respond to all this correspondence and issue all those monthly checks for \$18, it can be presumed that dealing with PCS’ system’s misclassification would become so expensive that something would be done about it. It is far more likely that

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<sup>2</sup>Rule 9(b) of the Federal Rules of Civil Procedure requires RICO plaintiffs, like any other plaintiffs pleading fraud in the federal courts, to plead all averments of fraud with particularity. *McDonald v. Schencker*, 18 F.3d 491, 495 (7th Cir. 1994).

some very large number of the Bankers Life policyholders needing tamoxifen are paying 20% of its cost out of ignorance that Bankers Life is contractually obligated to pay that 20% for them, and that Bankers Life is realizing considerable savings from PCS' misclassification.

The facts pleaded in Morse's complaint are consistent with a scheme to defraud by Bankers Life and PCS and satisfy the requirement of Rule 9(b).<sup>3</sup> Plaintiffs' allegations are consistent with proof that however the misclassification problem began, Bankers Life and PCS continue to administer their prescription drug program in a manner which deprives policyholders of a benefit to which they are entitled and does so knowingly. The circumstances of the alleged fraud, the letters to Morse from Bankers Life and the wire communications between PCS and the pharmacy, are pleaded in specific detail. The only thing that Morse cannot plead with particularity-and she is not required to do so-are the defendants' knowledge and intent. However, given, that when Morse complained to Bankers Life about the misclassification, Bankers Life agreed that tamoxifen was misclassified but told Morse that the misclassification would not be corrected, it is readily inferable that Morse may be able to prove knowledge and intent.

The court further believes that under the circumstances alleged here, the two mailings Morse references are sufficient to satisfy RICO's pattern requirement as to Bankers Life; the

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<sup>3</sup>"Under RICO, 'racketeering activity,' also referred to as 'predicate acts,' is defined 'as acts indictable under any one of several federal or state offenses, including mail fraud under 18 U.S.C. § 1341, and wire fraud under 18 U.S.C. § 1343.'" *American Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534, 542 (7th Cir. 1999)(quoting *McDonald v. Schencker*, 18 F.3d 491, 494 (7th Cir. 1994). To state a claim for mail fraud under 18 U.S.C. § 1341 or wire fraud under 18 USC. § 1343, the plaintiff must allege that (1) the defendant engaged in a scheme to defraud, (2) with an intent to defraud, and (3) that the defendant used the mails or interstate wires in furtherance of that scheme. *Id.* at 542.

many wire communications between PCS and Walgreens are clearly sufficient to allege a pattern as to PCS.<sup>4</sup> The misclassification of a commonly-prescribed drug, and the decision of Bankers Life to pay the one complaining policyholder rather than take steps to correct the misclassification, strongly suggests that there are a large number of victims and many predicate acts. Morse has also successfully alleged an ongoing RICO enterprise in the form of the Prescription Processing Network, comprised of the defendants and Morse's pharmacy. With respect to the conduct element, Morse will be able to determine, only after discovery, the responsibility, if any, Bankers Life has for the misclassification; however, since Bankers Life chooses to employ PCS to administer its drug benefit program, Bankers Life's response to Morse's complaint-that nothing would be done to correct the situation-suggests at the very least Bankers Life's knowing participation in the operation and management of an enterprise which results in its receipt of large amounts of money to which it is not entitled.

In light of the foregoing, the defendants' motions to dismiss are denied.

#### IV. Class Certification

Morse seeks to have a class of individuals certified pursuant to Rule 23 of the Federal Rules of Civil Procedure. Morse seeks to have certified the following Proposed class:

All persons who are part of PCS' network, who are using generic prescription drugs, such as tamoxifen, who are being charged for such drugs as though they are brand name drugs.

Defendants oppose certification of the class, arguing that Morse has failed to meet the requirements of numerosity, commonality, and typicality. The court will address each of these in turn.

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<sup>4</sup>The required "pattern" can be established by proof of at least two acts of racketeering activity within a ten-year period. 18 U.S.C. § 1961(5).

Rule 23 of the Federal Rules of Civil Procedure provides a two-step analysis to determine whether class certification is appropriate. First, the plaintiff must meet the four requirements of Rule 23(a): (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. Failure to meet any one of these elements precludes certification of a class. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993).

Second, the action must satisfy one of the conditions of Rule 23(b). Morse contends that she has satisfied Rule 23(b)(3), which states 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.” Factors that are pertinent to the predominance and superiority criteria 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.” Rule 23(b)(3). The plaintiff bears the burden of showing that the proposed class meets the requirements for certification. *Retired Chicago Police Ass'n*, 7 F.3d at 596. In evaluating a motion for class certification, the court does not examine the merits of the case. *Id.* at 598.

If the party seeking class certification meets each of the certification requirements, the

court must certify the proposed class. *Jefferson v. Windy City Maintenance, Inc.*, 1998 WL 474115, at ¶2 (N.D.Ill. 1998). The court has broad discretion concerning whether a proposed class satisfies certification requirements, but should err in favor of maintaining class actions. *Id.*

#### A. Numerosity

The defendants contend that Morse has failed to satisfy the numerosity requirement of Rule 23(a)(1). They argue that the complaint contains only conclusory allegations and speculation about the alleged existence of a class of similarly situated persons. Morse counters that her allegations are sufficient for Rule 23(a)(1) purposes.

The court is entitled to make “common sense assumptions” in order to support a finding of numerosity. *Grossman v. Waste Management, Inc.*, 100 F.R.D. 781, 785 (N.D.Ill. 1984)(in securities fraud case, “an assumption that the class members are not so numerous as to make joinder impracticable would be, in light of the number of shares traded during the class period, ridiculous.”). Morse is aware of a number of people in her building alone who use tamoxifen, and given the scope of the PCS network, it is reasonable to assume at this stage that there are sufficient insureds of Bankers Life similar to Morse to meet the numerosity requirement. In any event, the court notes “that defendants’ contention may be a proper subject for a later motion to alter the class definition if developments so warrant.” *Id.* See Fed.R.Civ.P. 23(c)(1). The court finds that Morse has satisfied the numerosity requirement.

#### B. Commonality

Because Rule 23(a)(2) and Rule 23(b)(3) raise the same issue, they will be addressed at

the same time. The defendants contend that Morse has failed to meet the requirement of either part of Rule 23 because she has failed to demonstrate the existence of others subject to the same harm as her, or that questions of law or fact common to the class members predominate over any questions affecting only individual members. Morse claims that she has met the requirements of commonality.

Rule 23(b)(3) requires that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. This standard is met when there exists generalized evidence that proves or disproves an element on a simultaneous basis, since such proof obviates the need to examine each class member's individual claim. *Golon v. Ohio Savings Bank*, 1999 WL 965533, at ¶4 (N.D.Ill. 1999). In order to satisfy the requirement of predominance, the plaintiff must show that common issues not only exist but outweigh the individual questions. The common questions must be central to all claims. *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 529 (N.D.Ill. 1998). When individual issues that cannot be resolved on a class-wide basis dominate, the litigation should not proceed as a class action. *Id.* at 530.

The court has evaluated Morse's proposed class and finds that it fails to satisfy the commonality requirements of Rule 23(a)(2) and Rule 23(b)(3) for several reasons. First, it is not limited to Bankers Life policy holders. Morse states in her motion that "Although the claim of each class member may involve a different generic drug and the amount of their individual

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<sup>5</sup>"[The] commonality requirement of Rule 23(a) is subsumed under the 'more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions.'" *Golon v. Ohio Savings Bank*, 1999 WL 965593, at ¶4 (N.D.Ill. 1999)(citing *Anchem Prods., inc. v. Windsor*, 521 U.S. 591, 609 (1997)).

monetary damages may differ, their claims all arise from the same course of conduct by defendants.” However, this is not true with regard to potential class members who are not Bankers Life policy holders. Plaintiffs who are not Bankers Life policy holders would have to allege different sets of facts relating to their own insurance carriers to support a RICO violation or a civil conspiracy. Furthermore, Bankers Life’s actions are central to Morse’s claims relating to the Illinois Deceptive Trade Practices Act and the Illinois Consumer Fraud and Deceptive Business Practices Act. Morse’s proposed class certification is even less appropriate for claims II and III, which deal with Bankers Life exclusively. Any non-Bankers Life policy holders would have to allege different facts regarding the courses of conduct of their own insurance companies, so the common claims would not predominate over the individual claims.

Second, the failure to limit the class to tamoxifen users is problematic. PCS disputes the designation of tamoxifen as a generic drug. This is a question of fact that is not central to all claims of the class sought to be certified by plaintiff because a finding that tamoxifen is a generic drug does not obviate the need for users of other drugs to prove that their drug was also misclassified. Accordingly, each non-tamoxifen user would have to demonstrate that his or her drug was also misclassified. Requiring analysis of every potentially misclassified drug would threaten to make the present action unmanageable.

The court has broad discretion in determining whether to certify a class. Therefore, the court limits the proposed class as follows:

All persons insured by a policy of insurance with Bankers Life & Casualty Company who obtained tamoxifen prescriptions from pharmacies that are part of the PCS network and who were charged for tamoxifen as though it is a brand name drug.

This narrowed class satisfies the commonality requirements of Rule 23(a), as well as the

requirements of 23(b)(3).<sup>6</sup>

### C. Typicality

Bankers Life argues that the motion fails to satisfy the typicality requirement of Rule 23(a)(3) because defenses unique to Morse make her an atypical and inadequate class representative. In particular, Bankers Life points to her acceptance of a reimbursement check for claimed overpayments, and her receipt and understanding of Bankers Life's offer to reimburse her for any future co-payments she might make for tamoxifen.<sup>7</sup>

A class representative's claim is typical if it arises from the same event, practice or course of conduct that gives rise to the claims of other class members, and if the claims are based on the same legal theory. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). The Seventh Circuit has held that a named plaintiff is not a proper class representative where "it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass. *Koos v. First Nat'l Bank*, 496 F.2d 1162, 1164 (7th Cir. 1974). However, the fact that there are defenses unique to the named plaintiff does not mean that a finding of typicality is automatically precluded, because Rule 23(a)(3) mandates the typicality of the named plaintiff's claims, not defenses. It is only when a unique defense "will consume the merits of a case" that a class should not be certified. *In re Synthroid Marketing Litigation*, 188

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<sup>6</sup>PCS also raises the issue of applicable statutes of limitations, stating that Morse's failure to include a proper time frame in her proposed class definition is a reason to deny her motion. However, the court declines to address the issue at this time. This contention may be a proper subject for a later motion to alter the class definition if developments so warrant. *See* Fed.R.Civ.P. 23(c)(1).

<sup>7</sup>Morse stated in her deposition that she understood that she could request and receive reimbursement for any copayments. Under the advice of an attorney, she has not requested reimbursement since the first check.

F.R.D. 287, 291 (N.D.Ill. 1999)(citations omitted).

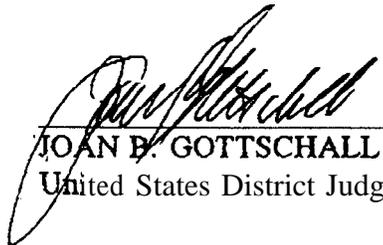
In this case, there is no indication that the defenses raised by Bankers Life in its response will “consume the merits” of the present action. Before evaluating Morse’s defenses, the court must evaluate Morse’s claims relating to the defendants’ course of conduct, and this course of conduct gives rise to the claims of other class members. Furthermore, such claims are based on the same legal theories. The court therefore finds that Morse has satisfied the typicality requirement. The court does not make any finding as to whether Bankers Life’s reimbursement offer constitutes a defense to plaintiffs claim. The court is skeptical that it does.

**V. Conclusion**

Defendant Bankers Life’s motion to dismiss [13], and defendant PCS’s motion to dismiss [15], are denied. Morse’s motion for class certification [22] is granted with modification, and the court certifies the following class:

All persons insured by a policy of insurance with Bankers Life & Casualty Company who obtained tamoxifen prescriptions from pharmacies that are part of the PCS network and who were charged for tamoxifen as though it is a brand name drug.

ENTER:



JOAN B. GOTTSCHALL  
United States District Judge

DATED: February 23, 2000