

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

HERBERT W. BROWN III, et. al.,  
Plaintiffs

v.

COLEGIO DE ABOGADOS DE PUERTO  
RICO,  
Defendant

CIVIL NO. 06-1645 (JP)

OPINION AND ORDER

The Court has before it Plaintiffs' motion for class certification (No. 54), Defendant's opposition thereto (No. 56), and Plaintiff's reply brief (No. 59). Plaintiffs Herbert W. Brown III, José L. Ubarri, and David W. Román filed this action pursuant to 42 U.S.C. § 1983 for violations of their rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution. Plaintiffs alleged that Defendant Colegio de Abogados, an integrated bar association<sup>1</sup> in Puerto Rico, used forty percent of each attorney's annual dues to purchase a compulsory life insurance policy. Plaintiffs claim that this use of their dues is unconstitutional because it is not germane to the purposes of an integrated bar association.

---

1. An integrated bar association is defined as a bar association in which membership is statutorily required of attorneys in order to practice law in a particular jurisdiction. See Black's Law Dictionary 158 (8th ed. 2004).

Plaintiffs seek certification of two separate classes of attorneys. The first class ("declaratory class") includes all attorneys practicing in the local courts of the Commonwealth of Puerto Rico now and in the future. The second class ("damages class") includes all attorneys practicing in the local courts of the Commonwealth of Puerto Rico between 2002 and 2006 who were required to pay annual dues to Defendant. For the reasons stated herein, Plaintiffs' motion (No. 54) is hereby **GRANTED**.

**I. STANDARD FOR CLASS CERTIFICATION**

Rule 23(a) of the Federal Rules of Civil Procedure states that one or more members of a class may sue or be sued as representative parties on behalf of all class members only if certain following prerequisites are met, including numerosity, commonality, typicality, and adequate representation. Fed. R. Civ. P. 23(a). A plaintiff bears the burden of establishing the necessary Rule 23 requirements. See Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003) ("to obtain class certification, the plaintiff must establish the four elements of Rule 23(a) and one of several elements of Rule 23(b)"). When evaluating whether class certification is appropriate, courts must engage in a "rigorous analysis of the prerequisites established by Rule 23." Smilow, 323 F.3d at 38. Courts must also exercise their "power to test disputed premises early on if and when the class action would be proper on one premise

but not another." Tardiff v. Knox County, 365 F.3d 1, 4-5 (1st Cir. 2004). In so doing, "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982). Courts are under an independent obligation to test for "actual, not presumed, conformance with Rule 23(a)." Gen. Tel. Co., 457 U.S. at 160.

If all of the 26(a) requirements are met, the plaintiff must establish that the action is maintainable under one of the three subsections of Rule 23(b). Smilow, 323 F.3d at 38. Rule 23(b) (1) covers cases in which individual actions by or against class members might "establish incompatible standards of conduct for the party opposing the class" or would "as a practical matter . . . be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b) (1); see Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997). Such cases typically include those in which the opposing party must treat all members alike as a matter of law or where there is a limited fund from which members seek recovery. Amchem Prod., Inc., 521 U.S. at 614.

Rule 23(b) (2) covers cases in which declaratory or injunctive relief is sought and the opposing party "has acted or refused to act

on grounds that apply generally to the class . . .” Fed. R. Civ. P. 23(b)(2). Civil rights cases are a prime example. Amchem, 521 U.S. at 614.

Lastly, Rule 23(b)(3) covers cases in which “class-action treatment is not as clearly called for” as in situations governed by subsections (1) and (2), but where a class action is nevertheless “convenient and desirable.” Id. Such cases typically arise when each individual’s recovery is too minimal to compel members to bring individual claims. Id. at 617.

## II. ANALYSIS

In support of their motion for class certification, Plaintiffs argue that the two classes they seek to certify are so numerous that joinder of all members would be impracticable. Defendant opposes Plaintiffs’ request for class certification, arguing first that the Court cannot consider the requirements for class certification while a motion challenging jurisdiction is pending. While not argued with specificity in Defendant’s opposition, Defendant also disputes that Plaintiffs satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure to be certified as a class. The Court will now consider Defendant’s arguments in turn.

### A. Defendant’s Jurisdictional Challenge

The Court need not labor long over Defendant’s first objection to Plaintiffs’ motion for class certification because the

jurisdictional challenge to which Defendant refers has been resolved, thereby establishing this Court's jurisdiction over Plaintiffs' action. Specifically, the Court denied Defendant's motion to dismiss on June 18, 2008. No. 62. As such, Defendant's opposition to class certification based on the pending jurisdictional challenge is moot.

Furthermore, the cases cited by Defendant in support of its argument that the Court must resolve the jurisdictional motion before considering Plaintiffs' motion for class certification merely stand for the proposition that a party seeking class certification must independently satisfy the constitutional prerequisites for bringing the action in the first place. This proposition is not in dispute. See O'Shea v. Littleton, 414 U.S. 488, 494 (1974) ("if none of the named plaintiffs purporting to represent a class establishes the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class"); See also Allee v. Medrano, 416 U.S. 802, 828-29 (1974) (explaining that a class representative must independently have standing).

The Court will now consider whether Plaintiffs' proposed classes meet the requirements of Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

**B. Plaintiffs Meet the Requirements of Rule 23(a)**

Rule 23(a) of the Federal Rules of Civil Procedure sets forth the following prerequisites for class certification:

(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.

Fed. R. Civ. P. 23(a). The Court will now analyze whether Plaintiffs' proposed classes meet the aforementioned pre-requisites of Rule 23(a).

**1. Numerosity of Plaintiffs' Proposed Classes**

Although numbers alone do not determine numerosity, case law suggests that a class numbering in the hundreds typically satisfies the requirement. See e.g., Adver. Specialty Nat'l Ass'n v. FTC, 238 F.2d 108, 119 (1st Cir. 1986) (holding that a class of 300 members appears to "fall within the accepted legal test of . . . 'impracticability' . . ."); Andrews v. Bechtel Power Corp., 780 F.2d 124, 132 (1st Cir. 1985) (indicating that a proposed subclass of forty-nine plaintiffs might satisfy the numerosity requirement if the members did not live in the same geographic area). Furthermore, the party instituting the action need not show the exact number of potential members in order to satisfy the numerosity prerequisite, but also cannot rely on mere speculation. Collazo v. Calderón, 212 F.R.D. 437, 442 (D.P.R. 2002).

In this case, the members of Plaintiffs' two proposed classes number in the thousands and practice law throughout Puerto Rico.

Joinder of such a large number of Plaintiffs would be impracticable and thus Plaintiffs have satisfied the numerosity requirement of Rule 23(a).

**2. Commonality of Plaintiffs' Proposed Classes**

The commonality element of Rule 23(a) requires Plaintiffs to show that there is "at least one question of law or fact common to the class." Collazo, 212 F.R.D. at 442. When the question of law presented by a proposed class arises out of standardized conduct by the defendant, the commonality element generally is satisfied. Smilow, 323 F.3d at 39; Collazo, 212 F.R.D. at 442. Here, Defendant's alleged constitutional violation is based on a standard fee to which Plaintiffs and all proposed class members were or would be subject as practicing attorneys in Puerto Rico. Thus, the central questions of law and fact are identical for Plaintiffs and the proposed class members, thereby satisfying the commonality requirement.

**3. Typicality of Plaintiffs' Proposed Classes**

The typicality requirement is satisfied if the class representative's claims are typical of the claims of the proposed class members. Rivera v. Amer. Home Prod. Corp., 191 F.R.D. 45, 47 (D.P.R. 1999); Collazo, 212 F.R.D. at 442. Factual differences between claims will not defeat class certification unless they predominate and require a court to engage in "highly fact-specific

or individualized determinations" to assess the defendant's liability to each class member. Collazo, 212 F.R.D. at 442-43.

In this case, Plaintiffs are attorneys currently practicing in Puerto Rico who also were practicing between 2002 and 2006. Plaintiffs' claims are thus identical to those of all declaratory class members, who seek assurance that Defendant will not re-institute the compulsory life insurance program, and all damages class members, who seek recovery for Defendant's violation of their constitutional rights based on Defendant's collection of dues for the compulsory life insurance program between 2002 and 2006. Therefore, Plaintiffs satisfy the typicality requirement.

#### **4. Adequate Representation of Class Interests**

The final prerequisite for acquiring class status requires Plaintiffs to show that the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). In analyzing this requirement, the United States Court of Appeals for the First Circuit has devised a two-part test: "the moving party must show first that the interests of the representative party will not conflict with the interests of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." Andrews, 780 F.2d at 130.



Part one of the two-part test requires Plaintiffs to have the same interest and suffer the same injury as the class members. Amchem Prod., Inc., 521 U.S. at 625. In this case, Plaintiffs, like all declaratory class members, are members of Defendant association and have an interest in ensuring that Defendant will not re-institute the compulsory life insurance policy in the future. Plaintiffs, like damages class members, were members of Defendant association between 2002 and 2006, and suffered the same alleged injury through the compelled payment of dues for the life insurance policy during that time period. Plaintiffs' interests in this litigation are consistent with those of the proposed class members.

Part two of the test is satisfied where Plaintiffs' attorneys combined have over forty years of litigation experience and have not shown indifference or undue delay in pursuing this litigation. See Andrews, 780 F.2d at 130 (stating that the class representative and his counsel showed indifference where there was an "inexcusably long delay" in prosecuting the plaintiffs' case). The Court is presented with no reason to believe that Plaintiffs' counsel will not adequately represent their clients. As such, the Court finds that Plaintiffs satisfy the class certification prerequisites of Rule 23(a).

**C. Plaintiffs Meet the Requirements of Rule 23(b)**

Having determined that Plaintiffs have satisfied the requirements set forth by Rule 23(a), the Court will analyze both the proposed declaratory and damages classes separately to determine whether they satisfy the requirements of Rule 23(b).

**1. *Proposed Declaratory Class***

The proposed declaratory class encompasses "[a]ll attorneys practicing in the Commonwealth of Puerto Rico local courts now and in the future" and seeks declaratory judgment: (1) stating that the compulsory life insurance policy violates the First Amendment, and (2) enjoining Defendant from compelling any attorney to purchase the policy. No. 54. The Court finds that the declaratory class should be certified under Rule 23(b)(2) because Defendant has "acted or refused to act on grounds that apply generally to the class, so that . . . relief is appropriate respecting the class as a whole . . . ." Fed. R. Civ. P. 23(b)(2).

Though class certification may properly be denied under Rule 23(b)(2) when the declaratory or injunctive relief sought by an individual plaintiff would necessarily benefit the proposed class as a whole, certification may be approved "where other considerations may render a denial of certification improper." Dionne v. Bouley, 757 F.2d 1344, 1356 (1st Cir. 1985). One such consideration is "where the good faith of the loser cannot be fairly presumed." Id.

In the case at hand, Defendant continued its policy of requiring its members to purchase the life insurance policy even after such requirement was found to violate the First Amendment with respect to Attorney Carlos Romero. See Romero v. Colegio de Abogados, No. 94-2503 (No. 113). Just as the injunction with respect to Attorney Carlos Romero did not prevent Defendant from charging other members the unconstitutional fee for life insurance, granting declaratory relief to Plaintiffs alone may be insufficient to ensure that Defendant does not violate the rights of all proposed declaratory class members. Therefore, declaratory relief may be appropriate respecting the declaratory class as a whole, and therefore the Court certifies the declaratory class pursuant to Rule 23(b)(2).

## **2. Proposed Damages Class**

The proposed damages class encompasses "[a]ll attorneys practicing in the Commonwealth of Puerto Rico local courts from 2002-2006, who were obligated to pay the [Defendant] Colegio de Abogados their yearly annual membership renewal fee in order to practice law in this jurisdiction." No. 54. The relief sought for the damages class includes damages for breach of First Amendment rights and for temerity.

Plaintiffs' arguments fail under 23(b)(1) because, *inter alia*, although it is possible that lawsuits by individual members of the

proposed damages class would lead to differing outcomes in terms of Defendant's liability to each member, this is an insufficient basis to satisfy the "inconsistent or varying adjudications" requirement of Rule 23(b)(1)(A). See In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987). Plaintiffs arguments under Rule 23(b)(2) also fail because this section is typically restricted to cases involving declaratory or injunctive relief. See Tilley v. TJX Cos., 345 F.3d 34, 40 (1st Cir. 2003). However, the Court finds that class certification is proper pursuant to Rule 23(b)(3).

Rule 23(b)(3) provides for certification of a class for which "questions of law or fact common to class members predominate" and for which adjudication as a class action is a superior method for deciding members' individual claims. In determining whether these requirements are satisfied, the court should consider the following non-exclusive factors: (A) class members' interest in individually controlling the litigation; (B) the "extent and nature" of any ongoing litigation governing the controversy by or against class members; (C) the desirability of concentrating the litigation in the particular forum; and (D) manageability of the class action. Fed. R. Civ. P. 23(b)(3).

In this case, the predominance requirement is satisfied because the ability of all members to recover damages from Defendant is based on a single common issue: whether it was a violation of the damages

class members' constitutional rights to subject them to the mandatory life insurance policy after the practice had been declared unconstitutional with respect to Attorney Carlos Romero. Though some individualized damages determinations may be necessary if Defendant returned the life insurance dues to some class members, the need for a few individualized determinations does not defeat predominance where Defendant's liability to all members remains subject to common proof. See In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 28 (1st Cir. 2008); Smilow, 323 F.3d at 40; Tardiff, 365 F.3d at 6.

Further, a class action is the superior method for resolving members' claims. As the United States Supreme Court has explained, the purpose of the superiority prong of Rule 23(b)(3) is to "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated . . . ." Amchem Prod., Inc., 521 U.S. at 615. If Plaintiffs prevailed in the current action, it is likely that other class members would bring suit in this Court alleging identical claims, resulting in repetitive, time-consuming, and wasteful litigation. The likelihood of this scenario finds support in the extent to which the current litigation mirrors that involving Attorney Romero, in which this Court issued a final decision in 2002. Romero v. Colegio de Abogados, No. 94-2503 (No. 113). Since the factual differences among the damages class

members are so slight and the legal issues are common among all members, justice is best served if all claims are adjudicated consistently through a class action. Lastly, the Court is not aware of any manageability problems that would arise if Plaintiffs' motion with respect to the damages class is granted. The Court finds that the damages class meets the requirements for class certification in Rule 23(b)(3).

### **III. CONCLUSION**

In conclusion, the Court holds that Plaintiffs have satisfied the requirements for class certification for both proposed classes. As such, Plaintiffs' motion for class certification is hereby granted.

**IT IS SO ORDERED.**

In San Juan, Puerto Rico, this 31<sup>st</sup> day of July, 2008.

s/Jaime Pieras, Jr.  
JAIME PIERAS, JR.  
U.S. SENIOR DISTRICT JUDGE