52,504-A

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

ELIZA KIRKLAND, individually, and on behalf of all other persons similarly situated,	*	
Plaintiff,	*	
vs.	*	CV198-083
MIDLAND MORTGAGE COMPANY,	*	
Defendant.	*	

O R D E R

On September 29, 1997, Plaintiff filed the captioned class action in the Superior Court for Richmond County, Georgia. Defendant, however, chose to remove the case to this Court in April 1998. Plaintiff moved to remand the case to state court. Before the Court ruled on the motion to remand, the parties entered into a Consent Order dated May 29, 1998. Pursuant to this Consent Order, Defendant agreed not to transfer the case to another federal district court and agreed that the case would remain in the Southern District of Georgia.

Plaintiff timely filed a motion for class certification under Local Rule 23.2. A hearing thereon was conducted on October 5, 1998. In a bench ruling on October 8, 1998,

Plaintiff's motion to certify a plaintiff class was granted in part and denied in part. A written Order was to follow. However, the parties thereafter requested a delay in the proceedings so that they could pursue settlement negotiations. Accordingly, this case was closed for statistical purposes.

The settlement negotiations proved unfruitful. The case was reopened in May 1999. Defendant then moved for summary judgment. Defendant's summary judgment motion was denied in the Order of July 27, 1999. Later, Defendant moved for reconsideration of the Order denying summary judgment. Defendant also moved to certify the Order denying summary judgment for interlocutory review. Defendant's motion for reconsideration and for interlocutory review is now pending. An Order of even date will deny Defendant's motion for reconsideration but will grant Defendant permission to apply for interlocutory review of the July 27 Order, which denied Defendant's summary judgment motion.

If the United States Court of Appeals for the Eleventh Circuit accepts Defendant's application for interlocutory review of the Order denying summary judgment, it would be helpful to have interlocutory review of the Order certifying a plaintiff class. To facilitate interlocutory review, this Order formally states the reasons for certifying a plaintiff class.

I. Background

Eliza Kirkland ("Kirkland") filed this class action, alleging that Midland Mortgage Company ("Midland") breached fiduciary duties in the servicing of her mortgage. In 1985, Kirkland bought a house at 1917 Boykin Place in Augusta, Georgia. Kirkland purchased hazard insurance from Allstate Insurance Company ("Allstate") and entered into a loan agreement with Cameron-Brown Company, which later became First Union Mortgage Corporation ("First Union"). Kirkland's recorded deed to secure debt states that she will maintain and pay for fire and hazard insurance.

Midland is a large mortgage servicing company headquartered in Oklahoma City, Oklahoma. Midland services over 325,000 mortgages with property valued at over 15 billion dollars. Midland performs these services for lenders. Specifically, Midland collects payments from the homeowner, remits those payments to the mortgagee, and pays insurance premiums and taxes from an escrow fund. Midland is part of a larger conglomerate which includes MidFirst Bank and MidFirst Insurance Agency, Inc ("MidFirst"). MidFirst shares office space with Midland.

As part of its servicing responsibilities for the mortgagee, Midland monitors fire and hazard insurance policies on mortgaged properties. Virtually all deeds to secure debt, including Kirkland's, require the borrower to maintain fire and hazard insurance. Under Federal Housing Authority

regulations, lenders are permitted to "force-place" insurance when borrowers fail to maintain coverage. U.S. Dept. of Housing & Urban Dev. Handbook for Admin. of Insured Home Mortgages (4330.1 Rev-5), Chap. 2, § 11:A (09/01/94). When Midland determines that a mortgagor no longer has fire and hazard insurance, it force-places insurance through its sister company, MidFirst.

MidFirst obtains the hazard insurance from Balboa Insurance Company ("Balboa"). Balboa then pays a substantial commission to MidFirst. Through the efforts of three employees and a part-time supervisor and with annual expenses of no more than $250,000, MidFirst has generated income of approximately $1,500,000 a year by ordering forced-placed insurance from Balboa. The resulting one-and-a-quarter-million dollar profit is made possible by the substantial commissions from Balboa, at one point reaching thirty-two percent of premiums. Kirkland's primary complaint against Defendant is that it generates this commission through self-dealing.

Midland force-placed hazard insurance on Kirkland's property as a result of a mistake. Midland contends that Allstate issued a cancellation notice on Kirkland's hazard insurance before Midland received the right to service Kirkland's mortgage.[1] Midland claims that Allstate issued

[1]In October 1995, Midland acquired from Norwest Mortgage, Inc., ("Norwest") the rights to service Kirkland's mortgage. Directly or indirectly, Norwest obtained the rights from First

this cancellation on September 29, 1995 but that it did not receive the notice until January 1996. Kirkland denies knowledge of this cancellation notice. Pursuant to this cancellation, Midland contends that it ordered hazard insurance from Balboa on January 27, 1996. No one seems to know why Allstate canceled Kirkland's policy. All agree that the cancellation was in no way due to any act or omission by Kirkland.

Kirkland does not contest Midland's right to force-place hazard insurance to protect the mortgaged property. Instead, Kirkland claims that Midland does not have a right to reap such profits from the placement. Moreover, Kirkland contends that Midland does not have the right to use her escrow funds to generate this profit.

Three notices are sent to mortgagors before hazard insurance is force-placed. Midland contends that on April 3, 1996, it sent a notice to Kirkland informing her that it would order insurance from Balboa at an annual rate of $708.00 unless she provided evidence of acceptable insurance. Midland claims that this notice also informed Kirkland that she should have her insurance agent send an original policy if she wanted to provide an acceptable replacement policy. Kirkland does not recall receiving this April 3 notice. Midland, however, asserts that on April 9, 1996, Kirkland asked Midland to call her insurance agent, Robert O'Neal ("O'Neal"). Kirkland does

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Union.

not remember calling Midland on that date. Regardless, Midland asserts that it called O'Neal and learned that Allstate no longer had a homeowner's insurance policy for Kirkland's property.[2]

Interestingly, once Midland sends this first notice, Balboa is responsible for sending out the second and third notices. Copies of the second and third notices are not retained by either Midland or Balboa. Moreover, Midland does not require verification that these notices are actually mailed to the homeowner. The homeowner never receives an actual policy or certificate of insurance because Midland maintains that the third notice, which notifies the homeowner that insurance has been force-placed, is the certificate of insurance. The only things to change hands are the notice, some money, and computer entries.

On July 10, 1996, Midland paid Balboa $708.00 for the force-placed insurance for the period from September 29, 1995, through September 29, 1996. Midland also asserts that it sent Kirkland an escrow statement on July 29, 1996, which reflected a $126.50 increase in her monthly mortgage payment due to the force-placed insurance assigned to her for the 1995-96 period and the upcoming 1996-97 period. Kirkland denies that the statement explained that the escrow shortage resulted from the

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[2]Midland claims that it learned that Allstate no longer had insurance on Kirkland's Boykin Place property when it called O'Neal in April 1996 but also admits that it received a cancellation notice in January 1996.

1995-96 insurance payment to Balboa.

Midland alleges that on August 9, 1996, Kirkland called and asked for an explanation of the increased mortgage payment. Midland claims that it sent a letter to Kirkland on August 21, 1996, explaining that the shortage in the escrow account and the increase in her monthly payments were a result of the hazard insurance purchased from Balboa. Kirkland began to pay the increased payment on September 1, 1996. Kirkland alleges, however, that the letter was brought to her by her agent, O'Neal, not sent to her by Midland.

On September 26, 1996, Midland allegedly received two faxes from O'Neal containing declarations of insurance for the period from September 29, 1996, to September 29, 1997. Midland asserts that a handwritten note attached to the second fax stated that "Kirkland's policy has been continuous." Midland contends, however, that neither fax mentioned the cancellation or reinstatement of the Allstate policy from September 1995 to September 1996. Midland insists that it canceled the Balboa policy only for the 1996-97 (C576166) period. Kirkland counters that Midland also canceled the 1995-96 policy (C546997).

In April 1997, Midland issued a refund check in the amount of $104.70 to Kirkland after it reviewed her escrow account. Midland was served with notice of Kirkland's suit in October 1997. After notice of the suit, Midland contends that it discovered, in a telephone conversation with Allstate, that

Kirkland had continuous coverage including the 1995-96 period. Midland alleges that it then canceled the 1995-96 policy and asked Balboa to refund the excessive amount paid by Kirkland.

In her Revised Motion for Class Certification, Kirkland moved to certify a class consisting of:

> all persons, firms, corporations, or other entities who have executed security deeds and promissory notes in favor of Midland Mortgage Company, whose security deeds and promissory notes have been assigned to the Midland Mortgage Company, or whose indebtedness secured by security deeds and evidenced by promissory notes are being serviced by Midland Mortgage Company and for whom Midland Mortgage Company purchased hazard insurance since January 1, 1990.

On behalf of this class, Kirkland claims that by obtaining hazard insurance from an entity affiliated with itself, Defendant has engaged in self-dealing which violates its alleged fiduciary duties as an escrow agent.

In the Order of September 9, 1998, a hearing was scheduled on Kirkland's motion to certify a class. This hearing was later rescheduled. On October 5, 1998, the hearing was conducted. The parties presented witness testimony and introduced documentary evidence. The hearing was continued, and closing arguments were heard on October 8, 1998.

In a bench ruling at the October 8 hearing, I granted Kirkland's motion in part. I will certify a class only on the issue of whether Defendant breached its fiduciary duties under Oklahoma law by force-placing hazard insurance obtained by MidFirst Insurance Agency.

II. Whether Kirkland Has Standing

In response to Kirkland's motion for class certification, Midland argues that Kirkland has no standing to sue. Whether Kirkland has standing must be considered before proceeding to analyze the requirements of Rule 23. Andrews v. American Telephone & Telegraph Co., 95 F.3d 1014, 1022 (11th Cir. 1996).

To have constitutionally sufficient standing, Kirkland must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Department of Commerce v. United States House of Representatives, 119 S. Ct. 765, 772 (1999) (internal quotation marks omitted). Midland argues that Kirkland cannot satisfy the standing requirements because her claim for damages is moot.[3] Specifically, Midland points out that it tendered a refund of the force-placed premiums and that Kirkland's claims for damages have therefore been satisfied.

Kirkland has standing to sue. Kirkland alleges that when Midland wrongfully force-placed hazard insurance on her property, she suffered an injury at the hands of Midland in the form of increased premiums. In addition to recovering the purportedly excessive premiums, Kirkland also seeks punitive

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[3]Midland also argues that because Kirkland has no standing, she is neither a typical nor an adequate representative of the class.

damages and attorney's fees. The requested relief would redress Kirkland's injuries.

Midland's tender of a check to Kirkland did not moot her claim for damages. Midland mailed its own check to Kirkland shortly after she filed this class action.[4] (Ex. A. to Pl.'s Reply Br. in Supp. of Her Mot. for Class Certification.) The parties agree that Kirkland has not yet negotiated Midland's check. Therefore, Kirkland never accepted the check as a satisfaction of the debt. 1 C.J.S. Accord and Satisfaction § 58, at 552 (1985). Kirkland still has a personal stake in recovering her attorney's fees and in recovering punitive damages. This personal stake satisfies the standing requirements of Article III. Sosna v. Iowa, 419 U.S. 393, 402 (1975).

III. Requirements For Class Certification

The analysis now turns to Kirkland's motion for class certification. The requirements for class certification are set forth in Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a) establishes the prerequisites for a class action, specifically allowing a representative class member to bring an action on behalf of all only if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions

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[4]The check lists "Eliza M. Kirkland" as the payee, "Midland Mortgage Co." as the payor, and "MidFirst Bank" as the drawee bank.

> 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.

These four elements are commonly abbreviated as numerosity, commonality, typicality, and adequacy of representation.

In addition to the four prerequisites just discussed, a class action must satisfy at least one of the subsections of Rule 23(b). Amchem Prod., Inc. v. Windsor, 117 S. Ct. 2231, 2245 (1997). Thus, the class must qualify as (a) an incompatible standards class; (b) as a limited fund class; (c) as an injunctive class; or (d) as a predominance class. Fed. R. Civ. P. 23(b).

Whether class certification lies under Rule 23 is a matter left to the considered discretion of the district court. Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1386 (11th Cir. 1998). The proponent of the class bears the burden of proof on the propriety of class certification. Heaven v. Trust Co. Bank, 118 F.3d 735, 737 (11th Cir. 1997).

IV. Class Certification Analysis

The requirements of Rule 23 will be addressed separately.

A. Rule 23(a)

The class satisfies all the requirements of Rule 23(a).

1. Numerosity

The parties agree that the class is sufficiently numerous. Midland has force-placed hazard insurance on an estimated four or five thousand homeowners. (Peterson Dep. at 22.) Joinder of all these putative class members would be impracticable if not impossible. Therefore, the class satisfies the numerosity requirement. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986).

2. Commonality

There are questions of law and fact common to the class. Most notably, the question of whether Midland owes fiduciary duties to the homeowners whose mortgages it services is a question of fact common to all class members. See First Nat'l Bank & Trust Co. of Vinita v. Kissee, 859 P.2d 502, 510-11 (Okla. 1993) (explaining that the existence of a fiduciary relationship is a factual question). Whether Midland breached this duty by self-dealing with its affiliate, MidFirst, is another question of fact common to the class. See Lundgaard v. Baxter, 849 P.2d 421, 428-31 (Okla. Ct. App. 1992) (treating the question of breach of fiduciary duty as a question of fact); Dockum v. Lloyd, 647 P.2d 459, 461 (Okla. Ct. App. 1982) (same). Whether a mortgage servicer can ever owe fiduciary duties to the homeowners whose mortgages it services is a question of Oklahoma law common to all class

members.[5] Therefore, the commonality requirement is satisfied.

3. Typicality

Kirkland's claim is typical of the claims of other class members. The typicality requirement is satisfied if Midland has "committed the same unlawful acts in the same method against an entire class." Kennedy v. Tallant, 710 F.2d 711, 717 (11th Cir. 1983). Here, Kirkland claims that Midland breached its fiduciary duties to her by self-dealing in its force-placement of hazard insurance on her property. Because this is the same theory of recovery on which the claims of the putative class members are based, the typicality requirement is satisfied.

Midland points out various differences between Kirkland and the class members,[6] but none of these differences renders Kirkland's claims less than typical. For example, Midland

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[5]Midland argues that this question depends on the law of the state where each class member lives. This contention will be considered as an argument that the class does not satisfy the superiority requirement of Rule 23(b)(3).

[6]Midland argues that there are defenses and counterclaims unique to each individual class member. The issue, however, is whether Kirkland's claim is essentially the same as the claims of the class members. Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985), disapproved on other grounds, Green v. Mansour, 474 U.S. 64, 67-68 (1985); Kennedy, 710 F.2d at 717. Strong similarities of legal theories will satisfy the typicality requirement despite factual differences. Appleyard, 754 F.2d at 958. Thus, Midland's references to counterclaims and unique defenses are better considered as arguments that the class does not satisfy the superiority requirement of Rule 23(b)(3).

points out that Kirkland did not receive the warning letters that other class members may have received.

Kirkland's claim, however, is that Midland breached fiduciary duties arising from its status as her escrow agent. (First Am. Compl. ¶ 29.) This claim does not depend on whether Kirkland received any warning letters. In fact, the escrow arrangement from which Midland's fiduciary duties allegedly derive is typical of the escrow arrangement involving Midland and the other class members. (Christman Aff. ¶ 10(e), attached as Ex. R to Pl.'s Br. in Supp. of Her Am. Mot. for Class Certification; see also Dickson Dep. at 19-22.) If Midland is liable to Kirkland, it is liable to all class members. Therefore, Kirkland's claims are typical.

Midland's counsel suggested at oral argument that Kirkland cannot represent a class which seeks punitive damages. This argument is rejected. Under Oklahoma law, breach of fiduciary duty can give rise to punitive damages. Majors v. Good, 832 P.2d 420, 421 (Okla. 1992). Kirkland can recover the maximum amount of punitive damages if she proves by clear and convincing evidence that Midland acted intentionally and with malice toward her. Okla. Stat. Ann. tit. 23, § 9.1(D). The Oklahoma punitive damages statute directs the jury to consider a list of factors to decide whether punitive damages are appropriate. Okla. Stat. Ann. tit. 23, §§ 9.1(A), (E). These factors concern only the

defendant's conduct.[7] None of them concerns the plaintiff's conduct. Here, Midland's conduct is the same with respect to all class members. Therefore, Kirkland is a typical plaintiff who can represent the class members' claims for punitive damages.

4. Adequacy of Representation

Kirkland and her lawyers will adequately represent the class. The adequacy requirement concerns both Kirkland and her lawyers. At issue is whether Kirkland will vigorously represent the class, whether Kirkland has any interests antagonistic to the interests of the class, and whether Kirkland's lawyers have the experience and competence necessary to conduct the class litigation. Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir. 1987).

It appears that Kirkland will vigorously represent the class. In her testimony at the certification hearing, Kirkland demonstrated extensive knowledge of the facts and issues involved in her claim, indicated her willingness to serve as a class representative, and demonstrated knowledge of

[7]These factors are the seriousness of the hazard to the public arising from the defendant's misconduct; the profitability of the misconduct to the defendant; the duration of the misconduct and any concealment of it; the degree of the defendant's awareness of the hazard and of its excessiveness; the attitude and conduct of the defendant upon discovery of the misconduct or hazard; the number and level of employees involved in causing or concealing the misconduct; and the financial condition of the defendant. Okla. Stat. Ann. tit 23, § 9.1(A). Clearly, Kirkland's conduct has no bearing on the weight of any of these factors.

what a class action is and what it involves. (Tr. of Hr'g on Oct. 5, 1998 at 32-45.)

Kirkland does not have interests antagonistic to the class. If Kirkland has a conflict of interest with other class members, class certification is inappropriate. Amchem, 117 S. Ct. at 2250-51. Midland argues that Kirkland's deposition testimony tends to negate elements of the class claim. Midland observes that Kirkland's reliance on her Allstate agent tends to defeat the confidential relationship needed to generate fiduciary duties.[9] Kirkland's reliance on Allstate might hinder her claim, but it does not render her an inadequate representative.[10] Kirkland does not have an economic interest contrary to the interests of the class members. See generally Amchem, 117 S. Ct. at 2251 (discussing economic conflicts that can render a representative

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[9]Midland also points out that Kirkland admitted that she was satisfied with the amount of coverage provided by the force-placed insurance. This observation is irrelevant. The issue is not whether Kirkland was satisfied with the coverage provided but instead whether she was satisfied with Midland's use of her escrow funds to generate a profit for itself. In any case, Kirkland's satisfaction with the Balboa insurance does not show that her interests are aligned against the interests of the class.

[10]In any event, reliance on Allstate does not necessarily defeat Kirkland's claim. Section 2(b) of the rider to Kirkland's security deed provides that hazard insurance premiums will "be held by [mortgagee] in trust to pay said ground rents, premiums, taxes, and special assessments." (Ex. 2 to Def.'s Statement of Material Facts.) This promise to hold Kirkland's money in trust could be the reliance on Kirkland's part from which a jury might infer a fiduciary relationship. See, e.g., Crockett v. Root, 146 P.2d 555, 559 (Okla. 1943) (explaining that a fiduciary relationship arises where one party "reposes special confidence in another").

inadequate). Because her interest is aligned with the class members against Midland's alleged self-dealing, Kirkland is an adequate representative.

It is undisputed that Kirkland's lawyers are adequate. They have litigated other class actions before this Court. They are experienced, competent lawyers who will adequately represent the plaintiff class. Therefore, the adequacy requirement is satisfied.

B. Rule 23(b)

A class can be maintained only if it satisfies the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Amchem, 117 S. Ct. at 2245. The four requirements of Rule 23(a) having been satisfied, the analysis now turns to Rule 23(b). Rule 23(b) requires a class to proceed under one of four possible labels: (a) as an incompatible standards class under Rule 23(b)(1)(A); (b) as a limited fund class under Rule 23(b)(1)(B); (c) as an injunctive class under Rule 23(b)(2); or (d) as a predominance class under Rule 23(b)(3). This suit can proceed as a class action where common issues predominate under Rule 23(b)(3).

Kirkland seeks certification under Rule 23(b)(3).[11] Rule 23(b)(3) provides that a class can be certified if:

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[11]The First Amended Complaint also asks for certification of an injunctive class under Rule 23(b)(2). The class is certified only as a damages class under Rule 23(b)(3). If appropriate, equitable relief will be awarded as an incident to the award of money damages.

> 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. The matters pertinent to the findings include: (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.

A far more demanding requirement than the commonality requirement of Rule 23(a)(2), this kind of class requires that "issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir. 1997) (internal quotation marks omitted). The two primary questions are whether common issues predominate and whether the class action is superior.

1. Whether Common Issues Predominate

Although there are differences among the class members, common issues predominate. To determine whether common questions predominate, "it is necessary to examine the issues and nature of the proof required at trial." White v. Deltona Corp., 66 F.R.D. 560, 562 (S.D. Fla. 1975). Here, the primary issue at trial involves questions of fact and law common to all class members. In particular, the predominate issues are

whether Midland owes the class members any fiduciary duties and whether Midland breached these purported duties. Resolving these questions turns on a nucleus of facts common to all class members. In force-placing this hazard insurance, Midland follows the same procedure with respect to all class members. (Christman Aff. ¶ 10, attached as Ex. R to Pl.'s Br. in Supp. of Her Am. Mot. for Class Certification; see also Pl.'s Ex. I.) MidFirst receives a uniform commission percentage for each force-placed hazard policy it purchases. (Christman Aff. ¶ 10(h), attached as Ex. R to Pl.'s Br. in Supp. of Her Am. Mot. for Class Certification; Pl.'s Ex. M.) The force-placed policy is uniform except for a few small variations from state to state. (Peterson Dep. at 47.) Whenever Midland force-places hazard insurance, it uses the homeowner's escrow funds to pay the premium. (Dickson Dep. at 19.) From this nucleus of common facts, the primary question--whether Midland is liable to the class members--can be determined.

Midland urges that there are differences in each homeowner's mortgage that defeat predominance. Midland likewise contends that the reasons for force-placing insurance vary from one class member to another. These minor factual differences are irrelevant to the question on which the class is certified--whether Midland breached any fiduciary duties by allegedly self-dealing with its affiliate, MidFirst. The answer to this question does not depend on why insurance is

force-placed or on the exact terms of each homeowner's mortgage. Therefore, these minor factual differences do not defeat the predominance of the other common factual questions.

The class features some individualized questions. The computation of damages and the adjudication of counterclaims may be unique to each class member. The general rule, however, is that the question of liability predominates over individual questions if it is common to all class members. In re Sumitomo Copper Litig., 182 F.R.D. 85, 90-91 (S.D.N.Y. 1998). Because Midland's force-placing scheme is common to all class members, this case is particularly appropriate for class action treatment. Kennedy, 710 F.2d at 718. The question of Midland's liability is an overriding question which precedes any counterclaims or damages computations. Especially in light of the fact that calculating damages may be perfunctory, I conclude that common issues predominate over individualized issues.

2. Whether a Class Action is Superior

To determine whether a class action is superior, Rule 23(b) directs courts to consider four factors.[12] These four factors are the interest of the class members in prosecuting

[12]Rule 23(b)(3) implicitly requires a comparison of a class action with other forms of dispute resolution. 7A Charles Alan Wright et al., Federal Practice and Procedure (Civil) § 1779, at 551-52 (2d ed. 1986). The parties have tried unsuccessfully to settle this dispute. Thus, the only question is whether a class is superior to thousands of individual lawsuits.

separate actions, the extent and nature of litigation already commenced, the desirability of the particular forum, and the difficulty of managing the class. On balance, these factors show that a class action is superior to other means of resolving this dispute.

Because each class member's recovery may be small, this case is the paradigmatic example of a case that should proceed as a class action. As the Supreme Court recently noted:

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem, 117 S. Ct. at 2246 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

Here, it is in the interest of the class members to litigate this dispute as a class action. The expense of litigation might compel many class members to forego their claims.[13] See Fed. R. Civ. P. 23(b)(3), advisory committee's note (suggesting that economic incentives are relevant). Aggregating these claims in a class action, however, avoids

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[13]Kirkland, for example, stands to recover only about $1500 in actual damages. (See Dickson Aff. ¶¶ 23-24, attached to Def.'s Statement of Material Facts.)

The possibility of punitive damages might make individualized litigation cost-effective. Andrews, 95 F.3d at 1025. Unlike the RICO claims in Andrews, however, where the recovery of treble damages and attorney's fees necessarily accompanies a finding of liability, id. (citing 18 U.S.C. § 1964(c)), the recovery of punitive damages in this case is not guaranteed.

repetitious discovery and other litigation expenses and can efficiently resolve the question of Midland's liability in one proceeding. See generally Kennedy, 710 F.2d at 718 (declaring that separate actions in a common fraud scheme would be wasteful and would burden the courts). Therefore, class certification serves the interests of the class members. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (explaining that class actions make possible the resolution of otherwise cost-prohibitive claims); 7A Charles Alan Wright et al., Federal Practice and Procedure (Civil) § 1780, at 564 (2d ed. 1986) (explaining that class certification is appropriate where the advantages of class certification outweigh the individual members' interest in separate adjudications).

Neither party has called attention to a multitude of independent lawsuits already commenced by individual class members. The general absence of other litigation suggests that class members do not have a strong interest in pursuing separate actions.[14] Fed. R. Civ. P. 23(b)(3), advisory committee's note.

The parties agreed in the Consent Order of May 29, 1998 to litigate the case in this district. Litigation in Augusta, Georgia would be more convenient for Kirkland, O'Neal, and

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[14]Some decisions hold that the absence of litigation already commenced suggests that the dispute should not proceed as a class. E.g., Plekowski v. Ralston Purina Co., 68 F.R.D. 443, 453 (M.D. Ga. 1975).

other Plaintiff's witnesses. The Plaintiff's choice of forum also deserves considerable deference. Cf. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (requiring deference to the plaintiff's choice of forum for purposes of forum non conveniens). Although an Oklahoma forum might be more convenient for Midland's witnesses, it is not so much more desirable as to require decertification of the class. Also, as I stated at the hearing on October 8, 1998, class certification might benefit the Defendant. Litigation in all fifty states would burden Midland as well as the courts. Litigating in one forum would conserve public and private resources. See Fed. R. Civ. P. 23(b)(3), advisory committee's note (suggesting that the burden of separate suits is relevant). As the parties have agreed to try the case here, this district is a desirable forum for the class action.

The most important question is whether a class action would be manageable. Midland offers several reasons for its contention that a class action would be unmanageable. Most notably, Midland argues that whether it owes fiduciary duties depends on the law of the state in which each class member lives. Midland services mortgages in all fifty states. (Dickson Dep. at 12-13.) Midland concludes that processing the laws of all fifty states makes the class action unmanageable. Midland also argues that the prospect for counterclaims and defenses unique to each class member defeats the superiority of the class vehicle.

Contrary to Midland's assertions, only Oklahoma law governs the class members' claims for breach of fiduciary duty. Georgia law determines where Midland's allegedly tortious conduct took place. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that a federal court sitting in diversity must apply the forum state's choice of law rules).

Under Georgia law, Midland's allegedly tortious conduct took place in Oklahoma. Cf. Taeger Enter., Inc. v. Herdlein Tech., Inc., 213 Ga. App. 740, 748 (1994) (holding that the tort of conversion takes place in the state where the relevant financial decisions are made and where the money is misdirected). The evidence tends to show that Oklahoma is the nerve center of Midland's operations. Payments are sent to Balboa from Midland's office in Oklahoma. (Williams Dep. at 13.) Escrow accounts are debited by Midland employees working in Oklahoma. (Id. at 14-16.) Information regarding lapsed insurance is sent from Midland's office in Oklahoma to Balboa. (Peterson Dep. at 25.) Midland's principal place of business is in Oklahoma. (Answer to First Am. Compl. ¶ 2.) The Balboa master policy is issued in Oklahoma. (Peterson Dep. at 47.) When homeowners' insurance lapses, notices are mailed from Oklahoma. (Dickson Dep. at 13.)

Under Georgia choice of law rules, the substantive law of the place where the tort is committed determines the defendant's liability, Young vs. W.S. Badcock Corp., 222 Ga.

App. 218, 218-19 (1996), unless that state's law is contrary to Georgia public policy, Alexander v. General Motors Corp., 267 Ga. 339, 341 (1996). Accordingly, only Oklahoma law governs the class members' claims.

The individualized issues in this case do not defeat class certification. Midland argues that it may have compulsory counterclaims against some class members and that these counterclaims will complicate the litigation. Counterclaims do not necessarily preclude class certification. E.g., Partain v. First Nat'l Bank of Montgomery, 59 F.R.D. 56, 59 (M.D. Ala. 1973) (certifying a class despite the possibility of 2500 counterclaims). Midland anticipates that it will have counterclaims against class members for foreclosure and for acceleration of their mortgages. Midland has not yet filed any counterclaim, and Midland's speculation about possible counterclaims, however reasonable, is only speculation at this point. It is therefore inappropriate to deny class certification at this stage of the litigation. Heaven, 118 F.3d at 738 (explaining Roper v. Consurve, Inc., 578 F.2d 1106, 1116 (5th Cir. 1978) (holding that counterclaims do not necessarily preclude class certification)). If necessary, subclasses could be created to adjudicate compulsory counterclaims. Fed. R. Civ. P. 23(c)(4)(B).

Likewise, Midland argues that it may have third-party claims against class members' insurance companies. Thus far,

the existence and the extent of such claims are only speculative. Just as counterclaims should be manageable, third-party claims should be manageable if they arise.

Computing damages, if any, may require individualized inquiries. This case, however, is not like a mass tort class action where the computation of damages requires highly individualized proof. Instead, damages are capable of straightforward mathematical calculation. Each class member's award would consist of reimbursement of any excessive premiums paid plus interest, costs, and any punitive damages. Because calculating damages should be somewhat mechanical, individualized damages do not render the class unmanageable. Roper v. Consurve, Inc., 578 F.2d 1106, 1112 (5th Cir. 1978);[16] Wilcox Dev. Co. v. First Interstate Bank of Oregon, N.A., 97 F.R.D. 440, 447 (D. Or. 1983).

Midland appears to have exhaustive computer records that should aid damage computations.[17] Policy information is kept on a database. (Dickson Dep. at 7-8.) From this database, it could readily be determined on whom hazard insurance was

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[16]The Eleventh Circuit adopted as binding precedent all Fifth Circuit cases decided before September 30, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

[17]Midland also has computer records that detail each homeowner's insurance, (Dickson Aff. ¶ 7, attached to Def.'s Statement of Material Facts.), which transmit information to Balboa, (Williams Dep. at 12), and which monitor each homeowner's loans, (Peterson Dep. at 19). Midland analyzes homeowners' escrow accounts, presumably with the aid of computer records. (Dickson Aff. ¶¶ 13, 21, attached to Def.'s Statement of Material Facts.)

force-placed. (Id. at 27-28; Bellotti Dep. at 39.) Force-placed premiums are computed automatically, (Smith Dep. at 68), and any excessive premiums might be the basis of individual damage awards. These computer records can probably be used to compute damages without too much difficulty. Also of note, Midland should have records of class members' addresses. (See Christman Aff. ¶ 10(f), attached as Ex. R to Pl.'s Br. in Supp. of Her Am. Mot. for Class Certification.) These stored addresses should facilitate mailing individual notice to the class members.

On the whole, I am satisfied that a class action is manageable despite whatever individual issues may arise.

C. Class Definition

Because the requirements of Rule 23 are met in this case, a plaintiff class is certified consisting of all persons, firms, corporations, and other entities:

> (1) which have mortgage loans or other deeds of indebtedness serviced by Midland Mortgage Company or by one of its affiliates;
>
> AND
>
> (2) which pay money that is held in escrow by Midland Mortgage Company or by one of its affiliates;
>
> AND
>
> (3) whose escrow funds have at any time after September 29, 1993 been used by Midland Mortgage Company or by one of its affiliates to pay for force-placed insurance;
>
> AND

(4) which have not made any claim against a force-placed insurance carrier.

In no other way is a class certified.

In her Revised Motion for Class Certification (Doc. No. 22), Kirkland asked for a class consisting of homeowners upon whom Midland has force-placed insurance as far back as 1990. This class definition would violate the applicable statute of limitations.

The date September 29, 1993 comes from Georgia's four-year statute of limitations for conversion actions. Georgia choice of law rules determine the applicable statute of limitations. See Klaxon, 313 U.S. at 496. Under Georgia choice of law rules, the Georgia statute of limitations governs a common law tort action brought in Georgia. Baron Tube Co. v. Transport Ins. Co., 365 F.2d 858, 860 (5th Cir. 1966); Crites v. Delta Air Lines, Inc., 177 Ga. App. 723, 724 (1986). As Kirkland's claim most closely resembles a claim for conversion of property,[18] the period of limitation is four

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[18]Kirkland is suing for breach of fiduciary duty. In one suit alleging breach of fiduciary duty, the Georgia Court of Appeals applied a two-year statute of limitations to a breach of fiduciary duty claim in Reaugh v. Inner Harbour Hospital, Ltd., 214 Ga. App. 259, 260 (1994). That case is inapposite. The claim in that case arose from personal injuries, and the court applied the two-year statute of limitations "[t]o the extent that [the breach of fiduciary duty claim] seeks recovery for [physical offenses committed against the plaintiff]." Id.

The two-year statute of limitations for personal injuries, O.C.G.A. § 9-3-33, applies to physical injuries. Daniel v. American Optical Corp., 251 Ga. 166, 168 (1983). Because the nature of the injury, not the legal theory of recovery, determines the applicable statute of limitations, id., it would be inappropriate to apply § 9-3-33.

years. O.C.G.A. § 9-3-32. Kirkland filed her Complaint in the Superior Court for Richmond County, Georgia on September 29, 1997. Thus, any homeowner whose cause of action accrued on or after September 29, 1993 is eligible to sue for breach of fiduciary duty.

Oklahoma law determines when each class member's cause of action accrued. Baron Tube, 365 F.2d at 860. Under Oklahoma law, a claim for breach of fiduciary duty arises when the plaintiff becomes aware of the breach. Goodall v. Trigg Drilling Co., 944 P.2d 292, 294-95 (Okla. 1997); see also Resolution Trust Corp. v. Grant, 901 P.2d 801, 817 (Okla. 1995) ("'Generally, where the cause of action is not based upon a statute, the cause of action begins to run from the time of the alleged wrongful act . . . .'") (quoting Bilby v. Morton, 247 P. 384, 387 (Okla. 1926)). Under these circumstances, a cause of action accrues each time money is paid from a class member's escrow account for force-placed hazard insurance. Therefore, if Midland has used someone's escrow funds to purchase force-placed insurance on or after September 29, 1993, he or she may qualify for membership in the class.

The underlying injury over which the class is suing is the alleged misappropriation of the class members' funds held in escrow. Therefore, the four-year statute of limitations in O.C.G.A. § 9-3-32 is applicable.

D. Injunctive Relief

In addition to damages, Kirkland seeks injunctive relief. Specifically, the First Amended Complaint seeks to enjoin Midland from purchasing force-placed insurance from Balboa and any other companies with whom it has side agreements. (First Am. Compl. ¶ 86.) A damages class certified under 23(b)(3) may also seek incidental injunctive relief. Nguyen Da Yen v. Kissinger, 70 F.R.D. 656, 667 (N.D. Cal. 1976) (declaring that there is no language in Rule 23(b)(3) which precludes injunctive relief); 5 Herbert B. Newberg and Alba Conte, Newberg on Class Actions § 24.116 (3d ed. 1992) ("Rule 23(b)(3) classes are broad enough to include suits that do not predominantly seek legal damages, and a Rule 23(b)(3) suit may be superior to other categories in certain circumstances.") Because the force-placement procedures which the class seeks to enjoin are common to all class members, (Christman Aff. ¶ 10, attached as Ex. R to Pl.'s Br. in Supp. of Her Am. Mot. for Class Certification), it is appropriate to litigate this equitable issue along with the other legal issues common to the class. Holmes v. Continental Can Co., 706 F.2d 1144, 1155-56 (11th Cir. 1983). The same issue that determines Midland's liability can also determine whether injunctive relief is available.

This class is not certified as an injunctive class under Rule 23(b)(2). If the class successfully shows that Midland is liable to the class members, however, injunctive relief may

also be appropriate.

V. Interlocutory Review

I also find that this class certification order is appropriate for interlocutory review. Pursuant to 28 U.S.C. § 1292(b),[19] I am of the opinion that the Order certifying a plaintiff class "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." An immediate appeal from this class certification order would avoid the waste of judicial resources associated with an erroneously certified class action. United States v. Fleet Factors Corp., 724 F. Supp. 955, 962 (S.D. Ga. 1988).

I am aware that interlocutory review of class certification orders is not necessarily favored. Armstrong, 138 F.3d at 1386-87. If the United States Court of Appeals for the Eleventh Circuit accepts Midland's application for an interlocutory review of the Order denying summary judgment, however, contemporaneous review of this class certification order would be efficient and helpful to the litigants.

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[19]Interlocutory review might also be appropriate under Fed. R. Civ. P. 23(f). I have certified the class certification order for interlocutory review pursuant to 28 U.S.C. § 1292(b) in case a Rule 23(f) appeal is untimely.

VI. Conclusion

Accordingly, a plaintiff class is certified as defined herein. This Order certifying a plaintiff class is certified for interlocutory review.

ORDER ENTERED at Augusta, Georgia, this 4th day of January, 2000.

CHIEF UNITED STATES DISTRICT JUDGE