

**IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA**

DANIEL S. KAHN, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

FORTIS INSURANCE COMPANY;
ASSURANT, INC. d/b/a ASSURANT
HEALTH f/k/a FORTIS HEALTH;
FORTIS BENEFITS INSURANCE
COMPANY; ROGERS BENEFIT
GROUP, INC.; SUBURBAN GENERAL
AGENCIES, INC., ROBERT MARCUS
and MARLA NELSON,

Defendants.

CIVIL ACTION FILE

NO.: 2004-VS-074998-F

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

This matter is before the Court on Plaintiff's Motion for Class Certification against Fortis Insurance Company, Inc. ("FIC"), Assurant, Inc. ("Assurant"), Rogers Benefit Group ("RBG"), and Fortis Benefits Insurance Group ("FBIC"). After considering the record, briefs of the parties and extensive oral argument by counsel, the Court GRANTS in Part, and DENIES in part, the Motion.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a dispute over the health insurance renewal premiums charged to more than 5,757 Georgia residents who had health insurance under an Upper Midwest Employer's Group Individual Members Plan ("UMEG IMP") policy of insurance issued

by FBIC. Plaintiff Daniel Kahn, for himself and others similarly situated, alleges that because he was issued a "Certificate of Group Insurance," Georgia law prevents the consideration of certain rating factors at renewal, including individual health status, claims experience, medical condition and the length of time the policy was in effect. Although not disputing that a "Certificate of Group Insurance" was issued, FBIC argues that Plaintiff did not have group insurance but instead had individual coverage and, as such, the renewal rating factors applied to his UMEG IMP policy were authorized under Georgia law.

While FBIC provided small employer group coverage ("EMP") and an individual members' plan ("IMP") under a Master Group Policy held by the Upper Midwest Employers Group ("UMEG") Trust, Plaintiff seeks only certification of Georgia policyholders who were issued coverage under the UMEG IMP.

Plaintiff has filed a comprehensive complaint containing the following counts: Count I: Private Right of Action for Breach of Statutory Duty (Violation of Small Group Insurance Laws); Count II: Breach of Contract; Count III: Breach of Implied Covenant of Good Faith and Fair Dealing; Count IV: Unjust Enrichment/Money Had and Received; Count V: Conspiracy and Count VI: Fraud Through Uniform, Written Misrepresentations.

Plaintiff seeks to certify the class defined as follows:

All persons or entities of all persons in Georgia who received a "UMEG IMP" certificate of group insurance issued by Defendants from May 1, 2996 to the date of class certification and whose renewal premiums included an assessment or rating factor based on health status, medical condition, policy duration and/or tiering methodology;

In addition to class certification against FBIC, Plaintiff also seeks class certification against FIC, the actual insurer which insured Plaintiff; RBG, the marketing company that assists in marketing FBIC products; and Assurant, a holding company that is alleged to be the parent company of FIC.

The record does not seem to be in material dispute as to the Plaintiff and reveals that he was thirty-five (35) years of age, a resident of Marietta, Georgia and a licensed chiropractor, seeking to open a new chiropractic office in Kennesaw, Georgia.

Effective May 1, 1996, defendant FBIC issued or issued for delivery a "Certificate of Group Insurance" bearing a Group Policy number affording major medical coverage to Plaintiff, his wife Jill, and their two dependent children. The certificate of coverage also provided \$15,000 in life insurance to Plaintiff. The parties mutually denominate this coverage as a UMEG IMP policy and concede that Plaintiff procured it through Defendant Marla Nelson, an insurance agent associated with Defendants Suburban General Agencies, Inc., and Robert Marcus (collectively referred to as the "Agency Defendants").¹

In issuing the UMEG IMP to Plaintiff, Defendants provided several written, standardized and uniform documents, including among others, a Certificate of Group Insurance, a Group Insurance Premium Statement, a UMEG IMP policy, claim instructions, an IMP Supplemental Group Claim Transmittal form, and a UMEG insurance card (hereinafter "the policy documents"). In renewing the policies, Defendants also sent standardized, uniform and written premium renewal notices.

¹ Plaintiff does not seek to certify a class against the Agency Defendants.

Various references in these policy documents identify Plaintiff and other potential class members, respectively, as an “employee” and/or “employer.”

In July 1996, Plaintiff was diagnosed with a brain tumor and seizure disorder, and subsequently rendered disabled because of it.

During the period from May 1, 1996 to May 1, 2004, Plaintiff’s monthly premiums for the UMEG IMP coverage increased from \$233.44 to approximately \$1,447.00. During this time, to reduce the amount of the premiums, Plaintiff dropped his spouse and children from the plan, increased the deductible and reduced the available benefits. Plaintiff was eventually migrated to a different insurance coverage, issued through Defendant FIC, where he presently remains insured. Plaintiff contends that because he now has a pre-existing condition, he is unable to find affordable coverage through other insurers.

Defendant FBIC admits that in 1996 there were 5,757 Georgia policyholders with the “type of insurance purchased by Mr. Kahn.” Defendants do not dispute that all UMEG IMP policyholders received the same or substantially similar documents when the UMEG IMP policy was issued and renewed. The policy documents and renewal notices provided to Plaintiff and the proposed class members in connection with the UMEG IMP contain no material variation in their content.

In deciding premium renewal rates for the UMEG IMP during the class period, Defendants implemented plan-wide changes to the pricing structure that affected the renewal rates in 17 states, including Georgia. The pricing structure changes included, among other uniform rating factors, a premium discount review process that resulted in renewal premium differentials based on the UMEG IMP policyholder’s health status and

a rating factor for the length of time the policy was in force. This new pricing structure for the UMEG IMP was effective as to Plaintiff by at least May of 1999. Defendants contend that Plaintiff never received group insurance, never thought he was purchasing it and was not the victim of improper rating factors for his renewal premiums.

STANDARD OF REVIEW

In determining whether an action satisfies O.C.G.A. § 9-11-23, the Court is obliged to presume and accept the substantive allegations of the complaint as true and may consider the merits of the litigation only to the degree necessary in determining whether the requirements are satisfied. Sta-Power Industries, Inc., v. Avant, 134 Ga. App. 952 (1975); Gay v. B.H. Transfer Co., 287 Ga. App. 610, 612 (2007). A well-pleaded complaint generally constitutes a prima facie showing for class certification, thereby shifting the burden to a party opposing the class. A. Conte, Newberg on Class Actions § 7.23 (4th Ed. 2002) (“The burden shifts to the defendant to disprove common questions and typicality of claims when the plaintiff has made a prima facie showing thereof in its complaint and the complaint is specific in its showing that resolution of the named plaintiff’s claim will necessarily encompass the claims of others alleged to be within the class.”)

Georgia courts invite citation to federal cases as an aid in the certification of class actions. Sta-Power Industries, Inc., 134 Ga. App. at 953. In addition, the court may consider evidentiary submissions of the parties. Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975), cert denied, 429 U.S. 816 (1976).

The Court is required to conduct a rigorous analysis to determine whether the following prerequisites of class certification are met:

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 of the representative party are typical of the claims of the class;
4. The representative party will fairly and adequately protect the interests of the class.

See Life Ins. Co. of Ga. v. Meeks, 274 Ga. App. 212, 215 (2005), citing Hooters of Augusta v. Nicholson, 245 Ga. App. 363, 368 (2000). If these prerequisites are met, the court must then determine whether the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy O.C.G.A. § 9-11-23(b)(c).

ANALYSIS

A. Numerosity under O.C.G.A. § 9-11-23(a)(1)

In order for a class action to be certified, the membership in the proposed class must be so numerous that joinder of all members is impracticable. Class actions have been approved by courts involving as few as 25 persons in the class.² Defendant FBIC acknowledges that in 1996, there were at least 5,757 Georgia residents who had the “same kind of coverage” as Plaintiff. In this case, the proposed class is sufficiently numerous to allow class certification.

B. Commonality Under O.C.G.A. § 9-11-23(a)(2)

² Sta-Power Industries, Inc., 134 Ga. App. at 955.

In order for a class action to be certified, questions of law and fact common to the members of the proposed class must not only be present but also predominate over any questions affecting individual members. The issue of predominance will be addressed below under § 9-11-23(b)(3).

Paragraph 80 of Plaintiff's Complaint identifies 31 common questions of law or fact which he claims are applicable to the action and, in his brief, identifies among them at least the following principal questions common to all UMEG IMP policyholders in Georgia and the claims raised in this lawsuit:

1. Whether Georgia UMEG IMP policyholders received group coverage;
2. Whether Georgia's group health insurance rating laws apply to the UMEG IMP;
3. Whether Defendants misrepresented the UMEG IMP as a group health insurance coverage; and
4. Whether Defendants were prohibited from considering a UMEG IMP policyholder's individual health status or duration of insurance in calculating renewal premiums.

Defendants contend that while there may be common questions, in accordance with the holding in Carnetts Inc. v. Hammond, that "a common question is not enough when the *answer* may vary with each class member and is determinative of whether the member is properly part of the class." 279 Ga. 125, 129 (2005). However, where Defendants engage in standardized conduct, utilizing the same written standardized forms and processes, commonality under Rule 23 is generally established. See UNUM Life Ins.

Co. of America v. Crutchfield, 256 Ga. App. 582 (2002)(holding trial court has discretion to certify class where insurer's conduct with regard to insurance policies with substantially similar terms is at issue). This requirement is relatively easy to satisfy and the prevailing view is that a single common question is sufficient. See, Newberg On Class Actions § 3.10; Ga. St. Conference of Branches of NAACP v. Ga., 99 F.R.D. 16, 25 (1983). There is no requirement of complete identity of legal claims among class members, and

[M]inor differences in the underlying facts of individual class members' cases do not defeat a showing of commonality where there are common questions of law. ... An alleged scheme to defraud which affects a class of people is a common questions of law and/or fact, regardless of the characteristic of the scheme's intended victims.

Buford v. H&R Block Tax Services, Inc., 168 F.R.D. 340, 349 (1996)(citations omitted).

Defendants' arguments in this regard more properly address whether common questions predominate over questions affecting individual members, which will be dealt with in turn. The Court finds that there are questions of law and fact common to the class so that this requirement is satisfied.

C. Typicality Under O.C.G.A. § 9-11-23(a)(3)

Rule 23 (a)(3) requires that the claims of the class representative be "typical" of the claims possessed by the other class members. Life Ins. Co. of Ga. v. Meeks, 274 Ga. at 615. Generally, the typicality requirement focuses on the relationship between the class representative and the class itself and requires that the proposed representative's claims typify those of the proposed class.

Defendants strongly contest and dispute that Plaintiff satisfies the typicality requirement. Specifically, they argue that the following “highly individualized facts” make Plaintiff’s claim atypical:

1. Plaintiff used a company check to pay his premium, thereby showing he qualified for group coverage;
2. Plaintiff was never eligible for group coverage because he did not meet the statutory definition since he was never a full time employee of the chiropractic clinic;
3. Plaintiff testified that he did not rely on written representations but instead on oral representations of his agent and believed he was in a large group.

In response, Plaintiff points out that perfect identity and alignment are not required as long as the proposed class representative’s claims share the same legal theories, based on the same practice or course of conduct giving rise to the class claims, in search of the same legal result. In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244, 248 (S.D. Texas 1979); Morgan v. Laborers Pension Trust Fund for North California, 81 F.R.D. 669, 677 (1979). “[T]here must be a nexus between the class representative’s claims or defenses and the common questions of fact or law which unite the class.” Buford, 168 F.R.D. at 350 (citation omitted).

In Meeks, it was held that the plaintiff’s claims were not typical of those of the class members where his claim for insurance reimbursement for treatment is the only out patient facility in his zip code area was untrue of the claims of many other class

members. 274 Ga. at 218; see also Duffy v. The Landings Ass'n, 254 Ga. App. 506 (2002), wherein class certification was denied in part due to the presence of defenses unique to class members other than the proposed class representative.

In this case, Plaintiff brings a legal challenge to Defendants' alleged unlawful renewal premium calculations arising from an allegedly illegal tiered rating methodology for small group insurance policies. In this regard, Plaintiff's claims are typical of the class, as there is a sufficient nexus between his claims and those of the class.

D. Adequacy of Representation Under O.C.G.A. § 9-11-23(a)(4)

Rule 23 requires that the named plaintiff provide fair and adequate protection for the interests of the class. That protection involves two factors:

- (1) that the plaintiff's attorneys must be qualified, experienced, and generally able to conduct the proposed litigation; and
- (2) that the plaintiff must not have interests antagonistic to those of the class.

The Court finds, and Defendants have not challenged, that Plaintiff has retained experienced and qualified counsel who possess extensive experience in class action litigation and the ability to handle complex litigation, particularly involving insurance matters. Accordingly, the Court finds that Plaintiff's proposed counsel are qualified, experienced, and abundantly capable of representing the proposed class.

The second relevant consideration under O.C.G.A. §9-11-23(a)(4) is whether the interests of the named plaintiff coincide with the general interests of the class. Both Plaintiff and the potential class members seek the same thing: a legal determination that the small group pooling laws and regulations apply to the UMEG IMP policies, an

accounting of the renewal premiums charged and, if applicable, a refund. That Plaintiff may have been diagnosed with a medical condition and been classified as unhealthy does not make his interests antagonistic to other UMEG IMP policyholders who may have received a premium discount because they were healthy. As there are no longer any UMEG IMP policies in force in Georgia, whatever other interests an unhealthy policyholder could possibly have are certainly not antagonistic to interests of healthy policyholders. Defendants urge that Plaintiff 1) has the conflict of interest because some of the members of the proposed class benefited from downward premium adjustments; 2) admitted he did not rely on written representations; 3) admitted that he had individual coverage; 4) used a chiropractic clinic check to pay his initial premium; and 5) his claims are potentially barred by the applicable statute of limitations.

Demonstrated by the content of his deposition testimony and by his presence at the class certification hearing, there is no evidence and the parties do not otherwise suggest that Plaintiff's medical condition physically prevents him from adequately representing the interests of the absent class members. Plaintiff has demonstrated his desire and ability to protect the interests of the proposed class members by seeking and retaining counsel experienced in prosecuting the claims, and by filing and vigorously prosecuting this lawsuit. While these factual distinctions may be important for liability purposes, they do not negate the fact that Plaintiff is part of the class and "possess[es] the same interest and suffer[s] the same injury as the class members." Buford, 168 F.R.D. at 347. Moreover, under the adequacy prong it is required only that the class representative has a "working knowledge of the case" and it is "unrealistic to expect the class

representative to “possess either a considerable amount of legal knowledge or a seamless knowledge of the facts of the case.” Buford, 168 F.R.D. at 353 (citations omitted).

In this case, Plaintiff has testified as to this understanding of the claims giving rise to this action, and the Court finds that his knowledge is sufficient to make him an adequate representative. Adequacy of representation is satisfied in this case.

Having determined that the requirements of Rule 23(a) have been met, the Court now looks to whether the class should be certified under Rule 23(b). The Court must examine whether the common questions of law or fact predominate and whether class certification is a superior manner of adjudication.

E. Predominance

O.C.G.A. § 9-11-23(b)(3) requires that before claims can be certified for class adjudication, a plaintiff must show that there are common questions of law and fact which will predominate over individual questions. In Rollins v. Warren, the Court held that:

Common issues of fact and law predominate if they have a direct impact on every class member’s effort to establish liability and on every class member’s entitlement to injunctive and monetary relief. Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish more or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3).

288 Ga. App. 184, 187 (2007). In Buford, the Court stated:

The predominance issue focuses on the number and significance of common, as opposed to individual, issues. However, “the predominance requirement is not a numerical test that identifies every issue in the suit as suitable for either common or individual treatment and determines whether common questions predominate by examining the resulting

balance of the scale.” 1 NEWBERG ON CLASS ACTIONS § 4.25. The district court must engage in a qualitative rather than quantitative analysis to ascertain whether the predominance requirement has been satisfied. *Id.* “A single common issue may be the overriding one in litigation, despite the fact that the suit also entails numerous remaining individual questions,” *Id.* This Circuit has chosen to follow the mainstream approach by stressing that, though common issues must predominate, they do not need to be homogeneous throughout the class. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 (11th Cir. 1987), cert. denied, 485 U.S. 959 (1988).³

168 F.R.D. at 356.

Defendants have articulated three primary issues which they contend cause individual issues to predominate over class wide relief: fraud, small group eligibility and damages. Plaintiff responds by asserting that the claims involve standardized, printed and uniform documents and are readily certified and that their damages model does not require individualized proof.

With respect to eligibility for small group coverage, such eligibility is to be presumed to the extent that class members demonstrate that they were issued insurance policies by Defendants and that such policies were renewed. With respect to the damages model articulated by Plaintiff, it appears that the model for damages would be the same for each class member in that premium calculations would be made on a standardized basis by calculating what the premiums would have been without consideration of the alleged prohibited factors. Therefore, while each proposed class members’ damages would be a different amount, the manner of calculation of each would be mathematical, and applied in the same manner to each member. It is not necessary that each class members’ damages be the same. “Minor variations in amount of damages, or location

³ *Kirkpatrick* was superceded by statute according to *In re Vesta Ins. Group, Inc. Secs. Litig.*, 1999 U.S. Dist. LEXIS 23541 (N.D. Ala.).

within the state, do not destroy the class when the legal issues are the same.” Sta-Power Industries, Inc., 134 Ga. App. at 954. “[T]he fact that there may be differences in the damages for the members of the class does not prevent certifications.” UNUM Life Ins. Co. of America v. Crutchfield, 256 Ga. App. at 583 (citation omitted).

State Farm Mutual Auto. Ins. Co. v. Mabry, 274 Ga. 498 (2002) is virtually on point. Each class member was issued the same policy of insurance, and State Farm did not pay the diminution of value of the automobile claims. Clearly the amount of damages as to each class member was different. The Court held that the character of the right sought to be enforced was common, and the relief sought was common so that class certification was proper. In this case, the documents are the same, the right sought to be enforced is the same and the relief sought is the same. The fact that damages may be different does not prevent class certification. Plaintiff “need only come forward with plausible statistical or economic methodologies to demonstrate impact on a class-wide basis[,]” and where damages can be “computed according to some formula, statistical analysis, or other mechanical methods,” there is no impediment to class certification even though damages must be calculated on an individualized basis. Klay v. Humana, Inc., 382 F.3d 1241, 1259-1260 (11th Cir. 2004)(citations omitted).

The issue of reliance however, which is central to Plaintiff’s fraud claims, presents a more difficult question with respect to predominance and class certification. Several decisions in this state have expressly held that claims of fraud based on oral misrepresentations are not appropriate for class treatment precisely because reliance must be proved for each individual class member. Stevens v. Thomas, 257 Ga. 645 (1987); Life Ins. Co. of Ga. v. Meeks, supra. Plaintiff urges that reliance can be presumed

inasmuch as the fraudulent misrepresentations were uniform and printed and part of a conspiracy and since the proposed class members all renewed their policies. There does not appear to be any case in Georgia upholding class certification based on **written** fraudulent misrepresentations where reliance was presumed.⁴

Federal courts which have looked at this question have certified classes where fraud on the market is involved. However, the rationale behind such presumed reliance in these cases is that investors rely on the integrity of the market to set the value of securities rather than specific representations so that if there is fraud on the market, such reliance can be presumed.

The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the statements. Basic, Inc. v. Levinson, 485 U.S. 224, 241-42, 108 S. Ct. 978, 989, 99L. Ed. 2d (1988) (quoting Peil v. Speiser, 806 F.2d 1154, 1160-61 (3d Cir. 1986)). The Court's reason for employing a presumption of reliance in *Basic* rested upon the very nature of the market itself and the price as set by the market. An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action. Basic, 485 U.S. at 247, 108 S. Ct. at 992. . . . Our circuit has adopted the theory that the unique nature of the public securities market distinguishes fraud on the market from other claims of garden-variety fraud.

Sikes v. Teleline Inc., 281 F.3d 1350, 1362-1363 (11th Cir. 2002).⁵

⁴ Plaintiff cites Parker v. American Medical Security Group, Inc., (Superior Court of Cobb County, Civil Action File No.: 04-1-1980-4Z, Grubbs, J. presiding) where interlocutory review of class certification was unanimously denied by the Supreme Court of Georgia. While this case involved similar claims and some of the same counsel, the Parker case is not an appellate decision specifically addressing the issue of presumed reliance.

⁵ Sikes was overruled in part by Bridge v. Phoenix Bond & Indemnity Co., 2008 U.S. LEXIS 4703 (June 9, 2008) at * 13.

The Advisory Committee for Rule 23 of the Federal Rules of Procedure has not articulated a single recommended approach but has explained:

[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.

Moore v. Painewebber, 306 F. 3d 1247, 1253 (2002)(quoting Fed. R. Civ. P. 23(b)(3) Advisory Committee Notes 1966 amendment).

Defendants contend that these fraud allegations are unsuited for treatment as a class action inasmuch as the kinds or degrees of reliance on the written representations in the renewal decision for each policy holder is an individual determination. The Court has reviewed a number of cases from various federal jurisdictions on the issue of whether reliance in fraud cases may be presumed or whether individualized proof is required so as to prevent class certification.⁶

In Buford v. H & R Block Inc., supra, the court was faced with a claim involving allegations of fraud in connection with tax preparers and a loan program alleged to have been represented to be a tax refund. The court performed an exhaustive review of case authority and authored a well reasoned opinion which is helpful to this Court in addressing this issue of first impression under Georgia law. In that case, the allegations involved claims that an advertising scheme by the defendant using the term “rapid

⁶ It has been noted that “a presumption is generally employed to benefit a party who does not have control of the evidence on an issue.” Sikes, 281 F.3d at 1362. With this purpose in mind, the Court must examine cases, outside of the fraud on the market context, to determine whether a presumption is appropriate in this case.

refund” in the context of income tax preparations and refunds was simply a refund fee rather than a high interest loan. The court held as follows:

Whether the advertising scheme and use of the term “Rapid Refund” induced any of these class members to believe that this was simply a refund fee rather than a high interest loan is, quite simply, a question which is individual to each class member. Additionally, the question of whether class members who were fully informed of the loan arrangement would have still taken the loan remains an individualized determination.

168 F.R.D. at 360.

After Buford was decided, the United States Court of Appeals for the Eleventh Circuit addressed this issue in several cases. In Sikes v. Teleline, *supra*, the plaintiff sought to certify a class in connection with a RICO action alleging a scheme of mail and wire fraud associated with an automated interactive telephone game. Reliance is a necessary element of a civil RICO claim based on mail/wire fraud, and the district court certified a class of plaintiffs. The defendants appealed the certification order, in part on the grounds that the predominance requirement of Rule 23 (b)(3) had not been satisfied.

The court in Sikes recognized that reliance is a necessary element of the claim but held it was error for it to be presumed and therefore, reversed and remanded the certification order. The rationale articulated for rejecting the presumption of reliance theory was based upon a determination that fraud on the market claims were distinguishable and primarily that, the purpose of a presumption is not met where “the plaintiffs themselves are in control of evidence regarding whether they relied upon the misrepresentations.” Sikes, 281 F.3d at 1362. Allowing that reliance may be proved by circumstantial evidence, the court nonetheless found that reliance may not be presumed

such that a plaintiff does not have to come forward and prove an element of claim. *Sikes*, 281 F.3d at 1363, fn. 32.

In *Klay v. Humana, Inc.*, supra, the same court reached a different result in a case where plaintiffs were physicians claiming their HMO systematically underpaid them under their contract for reimbursement. The physicians brought breach of contract and federal RICO conspiracy claims and sought class certification, which the district court granted. The defendants appealed the certification order on the grounds that individualized questions predominated.

Following precedent in *Kirkpatrick v J.C. Bradford & Co.*, 827 F.2d at 724-25, the court upheld class certification despite the fact that reliance was an essential element of the plaintiff's claims and held as follows:

We follow *Kirkpatrick* here for two reasons. First, the common issues of fact ... concerning the existence of a national conspiracy, a pattern of racketeering activity, and a Managed Care Enterprise, are quite substantial. They would tend to predominate over all but the most complex individualized issues. Second, while each plaintiff must prove his own reliance in this case, we believe that, based on the nature of the misrepresentations at issue, the circumstantial evidence that can be used to show reliance is common to the whole class. That is, the same considerations could lead a reasonable factfinder to conclude beyond a preponderance of the evidence that each individual plaintiff relied on the defendants' representations. ... It does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants' representations and assumed they would be paid the amounts they were due.

Klay, 382 F.3d at 1258-1259.

The court's reconciliation of its holding with the holding in *Sikes* is not helpful as the Court simply stated conclusively "[t]his is a far cry from the type of 'presumed' reliance we invalidated in *Sikes*." *Klay*, 382 F.3d at 1259. It seems that the nature of the misrepresentations at issue were determinative in that,

circumstantial evidence could be used to prove, not presume, reliance. This reading is also consistent with Sikes.

In this case, Plaintiff contends that whether the class members believed that they were procuring a group policy and whether those who procured such policies and who renewed them at higher rates, did so in reliance on representations that these were group policies maybe be proved by common circumstantial evidence. Plaintiffs allege that the written misrepresentations that the policy was group coverage, together with the class wide circumstantial evidence that class members continued to renew these policies demonstrate reliance.

The Court finds that reliance in this case may not be presumed but that, circumstantial evidence of reliance common to the whole class may be used so that such common evidence would predominate and therefore not defeat class certification. Specifically, to the extent that renewal by proposed class members with respect to the policies at issue is the kind of circumstantial evidence relied upon by Plaintiff, then there is not a material variation in the kinds or degrees of reliance.

Such a result reconciles the cases which seem to reach different results. The Court notes however, that once discovery commences if it appears that common circumstantial evidence of reliance is not forth coming but that individual determinations are necessary, the Court will re-examine this issue upon motion by the Defendants to decertify the class.