

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

MICHAEL F. POWE
Debtor.

Case No. 98-10935-MAM-13

MICHAEL F. POWE
Plaintiff,

THERESA MOORE BALLARD,
Intervenor,

Case No. 98-13377-WSS-13

v.

Adv. No. 99-1121

CHRYSLER FINANCIAL CORPORATION, L.L.C.
Defendant.

**ORDER DENYING CHRYSLER'S MOTION TO DETERMINE THAT NAMED
PLAINTIFFS HAVE NO STANDING TO BE CLASS REPRESENTATIVES
AND TO DISMISS ALL FURTHER CLASS PROCEEDINGS**

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This matter came before the Court on the motion of Chrysler Financial Corporation (“CFC”) to determine that named plaintiffs have no standing to be class representatives and to dismiss all further class proceedings. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is denying the motion.

Chrysler alleges that the named plaintiffs in this class action suit have no standing to pursue claims against Chrysler because of the Court’s ruling of May 10, 2002. That ruling, after

a trial of the case on the merits, held that the claims of the named plaintiffs against CFC were due to be denied. The named plaintiffs were the class representatives for a class certified by the Court on June 1, 2001. Other members of the class may still have viable claims against Chrysler as outlined in the Court's order of July 3, 2002 and an order issued on August 23, 2002 on Chrysler's motion to reconsider the July 3, 2002 order. Specifically, if any debtors had proofs of claim filed in their cases which did not disclose that attorneys fees (postpetition) were being charged as part of the claim and that fact was not otherwise disclosed or a fee approved by the Court, then a claim against Chrysler is viable. *Slick v. Norwest Mortgage, Inc. (In re Slick)*, Case No. 98-14378, Adv. No. 99-1136, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala., May 10, 2002); *Harris v. First Union Mortgage Corp. (In re Harris)*, Case No. 96-14029, Adv. No. 99-1144, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala., May 10, 2002).

Chrysler's position is that once the named plaintiffs' claims were denied in a judgment on the merits, the lawsuit needs to be dismissed. Since the class representatives, at judgment, lack standing, the case cannot survive regardless of the existence of other viable claims.

Chrysler supports its position with two Eleventh Circuit cases: *Franze v. Equitable Assurance*, --- F.3d ---, 2002 WL 1482778 (11th Cir. 2002) and *Piazza v. Ebsco Industries, Inc.*, 273 F.3d 1341 (11th Cir. 2001). Chrysler asserts that these cases conclude that if named class representatives suffer no injury in fact, they have no standing to pursue their claims and cannot be class representatives. If they cannot be class representatives (and no other Alabama debtors can be class representatives because they are in the same position), then the case cannot survive. Chrysler asserts that this is not a situation in which a class representative's claim became moot. In this case, no Southern District of Alabama debtor ever had a viable claim from the beginning.

In the *Franze* and *Piazza* cases, the Eleventh Circuit held that the cases could not be certified when the named class representative had a claim that was barred by a statute of limitations. In *Piazza*, the bar date for a malpractice claim had passed over one year before suit was filed. In *Franze*, the named plaintiffs commenced the suit in 2001, more than six years after the expiration of the limitations bar.

The Court concludes that these cases are not dispositive of the issue of standing in this case. The situations of Powe and Ballard were very different from that of Franze and Piazza. Powe and Ballard had viable claims under the classes as defined by the Court in the class certification order in the case. The class was:

All bankruptcy debtors who have filed a Chapter 13 petition on or after January 1, 1994 (1) who had proofs of claim filed in their cases by Defendant Chrysler Financial that included attorneys fees in the total amount claimed but which (a) did not disclose postpetition fees at all, or (b) did not disclose them with sufficient specificity; (2) in whose cases Defendant Chrysler Financial did not file a specific application for these fees which was approved by the United States Bankruptcy Court; and (3) in all districts in which Chrysler Credit Corporation has not been sued in a class action suit which pertains to the issues raised in this suit.

Powe and Ballard's claims were not void from the beginning because of a clear bar to their claims such as a statute of limitations. Powe and Ballard's claims became void because of a later ruling on the merits of the plaintiff class' case that significantly narrowed the viable class. The case, at its inception, was broadly conceived by the plaintiffs to include cases with disclosed and undisclosed bankruptcy attorneys fees that were not approved by court order. As narrowed by the Court after a trial on the merits, the viable claims were only those of debtors with proofs of claim filed by Chrysler that contained undisclosed attorneys fees. This is not like the *Franze* and *Piazza* cases in which the claims were ineligible from the start.

The Court found no cases directly on point. The cases the Court concludes are more analogous to this case involve the situation in which a named plaintiff's case becomes moot. *E.g., United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980). In *Geraghty*, the class representative in a class action suit was released from prison during his appeal of a district court's denial of certification of a class of prisoners challenging the validity of parole release guidelines. The Parole Commission argued that, upon release, Geraghty lacked standing due to the expiration of his claim. The Supreme Court held that Geraghty had sufficient standing to appeal the denial of class certification. "When the claim on the merits is 'capable of repetition, yet evading review,' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation." *Id.* at 398 (cites omitted). The Court further stated:

[W]here the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake.

Id. at 398. Powe or Ballard could certainly file other chapter 13 cases and could file them in places other than Alabama. The issue could reoccur for them even if that possibility is remote. This is exactly what *Geraghty* required to prevent mootness.

A Fifth Circuit decision also spoke to a similar situation. In *Thurston v. Dekle*, 531 F.2d 1264 (5th Cir. 1976), the Court was faced with a class action suit by discharged city employees. The district court awarded back pay to the employees under 42 U.S.C. § 1983. The Fifth Circuit reversed because, at that time, employees could not sue "individual members of a municipal board or agency for restitution or damages where the practical effect was to use those defendants as conduits to the city treasury." *Id.* at 1269. Furthermore, the court had to decide whether the named plaintiff, Thurston, had standing to raise other issues that the suit could validly raise when

his only claim was for back pay. The court held that Thurston did have standing even though he did not, after the Fifth Circuit's ruling, have any back pay claim.

Thurston's standing was not factually mooted; it fell away because of a subsequent legal interpretation Use of the conventional form of standing analysis leads to the conclusion that this case should be [dismissed] because no named plaintiff had standing. However, to do so exalts form over substance because such a formalistic approach never pauses to look past the usual procedural requisites to test for the basic substance these procedures seek to enforce. [The case of] *Muzquiz*, which denied subject matter jurisdiction to Thurston, and thereby took away his standing, was unknown to the parties and the lower court throughout the trial Throughout this case Thurston believed (as did the lower court) that he had real stake in the outcome Thus it would not serve standing's ultimate purpose to hold that the adversary context that truly prevailed throughout the cause was somehow lost even before Thurston, or the court knew it was gone. To [dismiss] this case on the ground of lack of standing will predictably result in another attack on these same ordinances A decision which would accomplish no more than relitigation of a controversy already adequately litigated can serve no jurisprudential purpose.

Id. at 1270-71. This decision was subsequently vacated and the above language deleted from the opinion. *Thurman v. Dekle*, 578 F.2d 1167 (1978). The deletion was made, not because the Fifth Circuit changed its mind about its statement, but because the U.S. Supreme Court had given Thurston standing by reviving his back pay claim right in *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978) and the discussion was unnecessary. Whether part of a vacated decision or not, the reasoning is still sound.

Powe and Ballard were thought to be viable named plaintiffs at the institution of this suit. The plaintiffs and Court believed that Powe and Ballard presented colorable claims. It was only after certification of a class and trial on the merits that their claims were denied. Believing their claims to be valid, they prosecuted the suit appropriately. Other class claims may still be viable. If this suit was dismissed, a new suit would likely be commenced to deal with the same issues. Putting form over substance in this standing issue would not be equitable or sensible.

Chrysler raises other issues in conjunction with the standing issue that will be addressed briefly. First, Chrysler asserts that the Rule 23(a) standards are not met as to the remaining plaintiffs. The Court disagrees to the extent the class members have cases in which undisclosed attorneys fees have been assessed in Chrysler proofs of claim. The Court's opinions in the Slick and Harris cases indicate why the Court concludes this is true. *Slick v. Norwest Mortgage, Inc. (In re Slick)*, Case No. 98-14378, Adv. No. 99-1136, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala., May 10, 2002); *Harris v. First Union Mortgage Corp. (In re Harris)*, Case No. 96-14029, Adv. No. 99-1144, Order Awarding Judgment to Plaintiffs (Bankr. S.D. Ala., May 10, 2002).

Chrysler makes an issue of the fact that the class has been decertified. This was due to the Court's erroneous understanding of the claims produced at trial. The Court concluded that there were no undisclosed fees. As the evidence now stands based upon the Court's reconsideration of its ruling, there may be undisclosed fees. If there are, those claims are part of the previously certified class. The Court is reconstituting the class in this order.

Second, Chrysler alleges that there is no commonality because Chrysler's outside attorneys used different procedures in preparation and filing of proofs of claim. The Court concludes that if any of the attorneys included undisclosed claims for attorneys fees, those claims have sufficient commonality to constitute a class. The same is true of typicality.

Third, Chrysler asserts that a Rule 23(b)(2) class is improper since damages have been assessed in other similar cases decided by this Court. Chrysler also asserts that in settled cases, the parties are converting the cases to Rule 23(b)(3) cases for settlement purposes. The Court concludes its prior rulings on this issue are correct and will not be changed. The main relief granted in all of the cases is expungement of the fees from debtors' accounts and an injunction

against future charges of undisclosed fees. Damages are a de minimis adjunct—refunds of fees to the debtors who actually paid them. The other amount awarded is a sanction for actions under § 105 of the Bankruptcy Code because there actions have been an abuse of the process. That award is separate and apart from the class relief. The posture of the settled cases as Rule 23(b)(3) cases is irrelevant. What happened in the settlement negotiations is not known. The relief agreed to is also different that what this Court ordered in its own orders.

Therefore, Chrysler’s motion is due to be denied in all respects.

IT IS ORDERED that the motion of Chrysler Financial Corporation to determine that named plaintiffs have no standing to be class representatives and to dismiss all further class proceedings is DENIED.

IT IS FURTHER ORDERED that the order of July 3, 2002 stands unamended in all respects except:

1. A status hearing will be held on September 26, 2002 at 9:00 a.m. in Courtroom 2, United States Bankruptcy Court, 201 St. Louis Street, Mobile, AL 36602.
2. The class of claimants previously certified on July 27, 2001 is reconstituted based upon the Court’s ruling in its order of July 3, 2002 and this order.

Dated: August 23, 2002

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE