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Judge: HON. JOHNNY HARDWICK

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

LISA NIX GREEN ET AL v. KAY IVEY ET AL
03-CV-2010-900013.00

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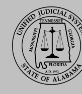
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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

LISA NIX GREEN, individually and as next friend of Brent A. Green and Blake A. Green, et al.	)	
Plaintiffs,	)	
Vs.	)	CASE NO: CV-2010-900013
KAY IVEY, et al.,	)	
Defendants.	)	

AMENDED ORDER OF CLASS CERTIFICATION

This matter came before this Court for hearing on certification of this case as a class action under Rule 23 ARCP.

As will be explained below, the Court, after applying the rigorous analysis required by Ala. Code 1975 § 6-5-641, and after a full consideration of all briefs, evidence and arguments presented, finds that this case is an appropriate case for class certification for the Plaintiffs under Rule 23(b)(2) ARCP and for the Defendants on their Counterclaim under Rule 23(b)(1)(A)(B).

I. General considerations as to class certification.

The Court has been ever mindful of the general principle that one who seeks class certification has the burden to establish that the requirements of Rule 23 have been met. *Ex Parte Green Tree Financial*, 723 So.2d 6, 10 (Ala 1998). That burden requires the presentation of sufficient evidence, and a mere assertion that the requirements are met is not enough. *Nelson v United States Steel*, 709 F.2d 680 (11th Cir 1983). While the class certification process is not a "mini-trial" of the merits, it is nonetheless often necessary for the Court to "probe behind the pleadings before coming to rest on the certification question". *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

Class certification is a procedural tool distinct from the merits of the underlying claims. *Mitchell vs. H & R Block, Inc.*, 783 So.2d 812, 816 (Ala. 2000). In fact, the Alabama Supreme Court has condemned a class certification order which in fact, made determinations on the merits as to certain issues. *Mayflower National Life Ins. Co. v. Thomas*, 894 So.2d 637 (Ala. 2004).

In conducting the statutorily required rigorous analysis, this Court must be guided by the requirement that each of the four requirements of Rule 23(a) must be met and that at least one of the requirements of Rule 23(b) be met.

However, § 6-5-641(3) Ala. Code 1975 provides that the Court may treat any of the factors necessary for class certification to have been satisfied if all parties to the action so stipulated on the record, and the Court is satisfied that the same could be proved. In this case there is such a stipulation.

With these principles in mind the Court now turns to the provisions of Rule 23, and analyzes the Plaintiffs' case with regard thereto.

II. Factual Findings

Plaintiffs Lisa Nix Green ("Green") and Kim Franklin ("Franklin") move this Court to certify the following class A:

> All persons who, prior to May 9, 2001, purchased a PACT Contract, as well as the designated beneficiaries of those contracts.

Plaintiffs Brian A. McVeigh, Nina McGinnis and Allen R. Hudson move this Court to establish the following class B:

> All persons who, on or after May 9, 2001, purchased a PACT Contract, as well as the beneficiaries of those contracts.

In the Defendants' Counterclaim, the Defendants move that this Court render instruction and guidance pursuant to § 19-3B-101, et seq. of the Code of Alabama 1975 as amended as such relief shall apply to the members of class A and class B. The Court considers such Counterclaim to request that this Court certify a class action under Rule 23(b)(1)(A)(B) ARCP as such guidance applies to the members of class A and class B as a whole.

The Court notes that certain stipulations have been made by the parties and their attorneys in support of the motion and cross-motions for class certifications. However, the Court, mindful of the rigorous analysis required under our statutes and court decisions, shall consider such stipulation along with all of the other evidence submitted by depositions, exhibits and arguments in order to satisfy the Court that the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) have been met.

a. Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of the individual members of the class is impracticable. Under this initial analysis, the Court finds as follows:

Plaintiff Green filed an application for PACT contracts for her sons Brent and B.J. with the understanding that if she completed her contract payments, she would be prepaying the tuition and fees for her children to go to college. (Green Depo pp. 8 – 11). At the time she received the application, she also received a brochure that explained to her in writing the benefits that she could expect to receive under the contract. (Green pp. 11, 12; PX1-A, PX2-A, PX4). Specific language relied upon in Exhibit 4 was as follows:

> The P.A.C.T. Program will allow parents, grandparents, friends, or any other sponsor, to purchase a contract from the Trust Fund to guarantee a child four years of fully paid undergraduate tuition and mandatory fees at any of the State's public junior colleges, colleges, or universities.

(Green pp. 16, PX4).[1]

In reliance upon the written explanation of benefits, Green enrolled her two children and received a Master PACT that confirmed that her beneficiaries were qualified to participate in the PACT Program. (Green, pp. 19 – 21). Green understood that the contract would pay full tuition if her child attended an in-state school and part of the tuition if her child attended out-of-state or private institution of higher learning. (Green, pp. 23, 24, 25). Green did not expect PACT to pay fees for room and board, books, and meals. (Green, pp. 24, 26). However, she understood that mandatory fees were those fees to which she had no option to pay. If her son wanted to attend college, those fees would have to be paid. (Green, p. 26).

Green completed her payments on the coupon book option plan. She made regular payments and eventually received notice that she had completed all payments. (Green, pp. 31, 32).

Both of Ms. Green's sons matriculated from high school to a public, in-state institution of higher learning. (Green, pp. 37 – 40). To this date, PACT has paid all tuition. Ms. Green has never been billed by any institution of higher learning for any tuition payments for either of her sons. (Green, pp. 39 – 41). However, Green complains that certain mandatory fees such as a student activity fee (Green, p. 41), a geography course fee, an arts and science college fee and a B.A. college fee were not paid by PACT. Ms. Green had to pay them. (Green, p. 50). There were other fees that the college told her were mandatory and a condition of enrollment that were not paid by PACT. (Green, p. 50). In reference to the fees described that were charged to her son, Brent, that she paid, she stated that she paid them because "otherwise, he could not have attended college." (Green, p. 52).

[1] The Court notes that other Plaintiffs made similar applications, entered into identical contracts and received written explanation of the PACT Program upon which they relied. To the extent that testimony is duplicative of other Plaintiffs, the Court will omit such testimony from its opinion.

Green's complaint is twofold. First, she complains that PACT announced that the Fund was in financial trouble, and she fears that PACT will not pay some future tuition on behalf of her two children. (Green, pp. 55 – 57). Green also received a letter which indicated that PACT was working hard to consider options to maintain the viability of PACT. That letter from PACT caused her concern because the letter stated that due to the drop in the stock market "...it has had a significant, negative impact on the invested assets of the PACT Trust Fund..." (Green, pp. 59, 60). She thought she had tuition and fees taken care of for her children. Now, she was reading that PACT was in financial trouble and certain "options" were being discussed. Such options were inconsistent with the literature upon which she relied to purchase the contract, a part of which read as follows:

> Part of the passage of the Wallace-Folsom Prepaid College Tuition Fund, or P.A.C.T. Program, is...well, the goal is simple. It will help families to send their children to college, and it will guarantee a child four years of fully paid undergraduate tuition and mandatory fees.

(Green, pp. 61 – 63, 64; PX4).

Ms. Green reiterated that she had to pay additional fees that if not paid, would have prevented her children from attending that particular school. She considers such fees to be mandatory. (Green, p. 69). She considers herself as a representative of those persons who purchased a PACT contract like hers which states that you "...are guaranteed prepaid tuition and mandatory fees." (Green, pp. 71, 72). If her child was accepted and attended an out-of-state school, PACT would pay the current average of tuition and mandatory fees charged by public four-year colleges and universities in Alabama. (Green, p. 73). Green believes that PACT should honor its agreements. (Green, p. 73). Green vigorously asserts that she and other members of the class should be treated fairly by PACT and that all beneficiaries who have paid

the contract price should see their beneficiaries attend a college or university without further payment of tuition and fees. She expects that she and other class members should get what they paid for regardless of whether it is by the taxpayers or wherever. (Green, pp. 78, 79).

Plaintiff Kim Franklin purchased a PACT contract for her son, John, which she understood was to pay tuition and fees for college. (K. Franklin, pp. 6 – 8). She made monthly payments for five years and received statements from PACT that payment had been completed. (K. Franklin, pp. 9 – 12; PX41).

Her son has not matriculated to college yet, but she expects that upon acceptance to college, that PACT will uphold the contract and pay his tuition and fees. She is concerned because the news reports indicate that PACT may not be able to meet its financial obligations and pay her son's tuition and fees. (K. Franklin, pp. 14, 15). She intends to represent all class members to see that PACT or State of Alabama upholds its obligation to pay tuition and fees. (K. Franklin, pp. 18, 19). She is not concerned where the money comes from to pay the tuition and fees, but she wants them paid. She asserts that if the PACT Program does not have sufficient funds to pay her child's tuition and fees, then it is the "State's problem." (K. Franklin, pp. 19, 20).

The Court finds from the testimony of Ms. Green and Ms. Franklin that they applied for, received and paid for a PACT contract which promised to pay their children's tuition and mandatory fees to public and private colleges (under limited conditions), and in the event their children matriculate and are accepted into such institutions for higher learning, without being required to make any further payment for tuition and mandatory fees. As class representatives of class A, Green and Franklin contend that certain mandatory fees are not being paid by the PACT Program and, regardless of any future funding deficiencies of the PACT Trust Fund, their

children, if properly accepted in a particular public college or university, should be allowed to attend without further payment of tuition and mandatory fees. Both Plaintiffs purchased their contracts before May 9, 2001. (Green, p. 10; K. Franklin, p. 7).[2]

Plaintiffs contend that the other PACT contract holders are so numerous that it would be impracticable to join them in this litigation. The Defendants stipulate that the numerosity requirement has been met. However, the Court must also analyze the factual basis upon which the stipulations are made in order to determine whether the numerosity requirement of Rule 23(a) has been met, and could be proved to have been established. (§ 6-5-641(e), Alabama Code.)

Ms. Brenda Emfinger testified about her familiarity with the PACT Program. She has been employed at the State Treasurer's office for over 24 years. She was the first director of the PACT Program and has remained in that position since the inception of the PACT Program. (Emfinger, pp. 6 – 9). Ms. Emfinger is quite familiar with the administrative records of PACT. She estimated that as of August 19, 2010, there were approximately 42,000 outstanding PACT contracts. This number includes persons who have completely paid for the PACT contract and those people who are still making periodic payments on the contract. (Emfinger, pp. 38 – 40). Ms. Emfinger was able to testify from records the number of accounts opened by year, the value of the invested assets at the end of a fiscal year, the funded status at the end of each fiscal year and other administrative and Trust information. (Emfinger, pp. 40, 41). The PACT administrative system is capable of determining the number of contracts purchased in a particular year that are still outstanding. (Emfinger, p. 42). Ms. Emfinger's records can provide the numbers of the total contracts that were purchased before and after 2001. (Emfinger, pp. 45, 46).

[2] Plaintiff Brian A. McVeigh purchased a PACT contract after May 9, 2001. (McVeigh, pp. 13, 14; PX43, PX44). Plaintiff Allen R. Hudson purchased a PACT contract on October 29, 2008. (Hudson, pp. 5, 6; PX55). And Nina McGinnis purchased a PACT contract in the fall of 2008. (McGinnis, pp. 7 – 9; PX49). Plaintiffs McVeigh, Hudson and McGinnis purport to be class representatives of class B.

Records exist to retrieve this information. (Emfinger, p. 46). On each contract, there is at least one contract holder or owner and at least one beneficiary. Thus, on 42,000 contracts, there would be approximately 84,000 people involved. (Emfinger, pp. 46, 47).

Based upon the testimony of Ms. Emfinger, who helped establish the PACT Program and who is intimately familiar with the records of the PACT Program, the Court finds that the number of contract holders and beneficiaries are too numerous to be joined in one lawsuit. The Court further finds that there is a sufficient basis in the recordkeeping system and retrieval system of the PACT Program upon which this Court could determine the actual amount of contract holders at any one time, the amount of contracts purchased by year, the amount of contracts that lapse due to completion of benefits or nonpayment and such other information on numbers of contract holders and beneficiaries as allow the Court to grant any classes or subclasses under 23(b)(2) or 23(b)(1)(A)(B). *See* Rule 23(a)(1) ARCP, and other court citations too numerous to list.

b. Commonality

Rule 23(b)(2) requires that there be at least one question of law or fact common to the class. The proof requirement as to this element is not high. *In re School Asbestos Litigation,* 104 F.R.D. 422, 429 (E.D.Pa1984), affid in part, and vacated on other grounds, 780 F.2d 996 (3d Cir.1985). Rather than requiring that common questions predominate in the case, the Rule 23(a)(2) requirement is only that there be a common nucleus of operative facts, for instance. *Rosario v. Littleton, 963 Fed 1013, 1018 (7th Cir. 1920).*

This case involves the rights and obligations of parties to contracts authorized by statute, for prepayment of college tuition. The original statutory authority came in Act #89-862. The

statutory scheme for PACT has been amended by Acts #90-570, 97-547, 2001-427, and 2010-725. Each of these subsequent acts, to one degree or another, have made changes to the statute.

Two common threads run through the claim of the class members of both class A and class B: (1) The Plaintiffs want a declaration and assurance from this Court that when their child matriculates to college, he or she will be entitled to attend any college to which he or she is accepted, without further payment of tuition and mandatory fees, regardless of the funding status of the PACT Program/Trust; and (2) Plaintiffs share a concern that the PACT Fund has not been paying, and will in the future not pay, those mandatory fees required to be paid by colleges as a condition of enrollment and attendance.

All potential class members express concern about what the media described as a financial meltdown with the PACT Trust Fund. Ms. Franklin expressed her fear that the PACT would not be able to meet its future obligations. (K. Franklin, pp. 14, 15). Mr. Hudson understood that the Trust Fund lost about 50% of its assets. (Hudson, p. 17). Ms. McGinnis said her father got a letter and she read a headline in the newspaper that PACT had lost some money, and she is afraid that the funds may not be there for her child's benefit. (McGinnis, pp. 23 – 25). Others heard about the problems from legislative meetings and town meetings where public officials expressed the concern that there was not going to be any money when his child attended college. Brian McVeigh said he heard about the lack of funds through the media, newspaper articles and multiple town-hall type meetings. Different people opined as to when the money would run out. McVeigh asked if the Trust Fund loses 50% of the money in 14 months, then who is to say the other 50% won't be gone before his child attends college. (McVeigh, pp. 53, 54). Ms. Green, after discussing how she learned about the financially troubled PACT Fund from the newspaper, actually received a letter from PACT which expressed concerns that

sufficient money would not be in the Fund necessary to prepay her children's tuition and fees. (Green, pp. 55, 58 – 60).

In addition to concern over the very existence of the Fund itself, potential class members have expressed concern that PACT has not paid mandatory fees in addition to tuition as required by the statute and their contracts. Ms. Green claims that she is paying fees in addition to tuition that the colleges require as a condition for her son's attendance. These fees are variously referred to as activity fees, course fees, college fees, and others. (Green, pp. 41 – 51). All Plaintiffs seek payment for their beneficiaries of all mandatory fees required as a condition of attending college. (McVeigh, pp. 33, 34; K. Franklin, pp. 8, 13, 15; McGinnis, pp. 21, 23).

Ms. Emfinger explained that each college receives a tuition and fee grid from PACT. The college then completes those grids by stating their tuition costs and any "qualified" fees. The college then certifies to PACT that the tuition charges and fee charges listed on the grid are correct. (Emfinger, pp. 79, 80). PACT has always considered tuition and fees to be two separate things. The Board has adopted a definition of a mandatory fee as that fee that is certified by the college. (Emfinger, pp. 80, 81). Until recently, the PACT referred to the fees as "mandatory fees," but now refer to them as "qualified fees." According to the definition, a qualified fee is whatever the university certifies to PACT as a qualified fee. The fee certified by the university is paid on behalf of a PACT student without regard to which year his contract was purchased. (Emfinger, pp. 81, 82). PACT has promulgated a form document which PACT sends to all colleges to obtain information for the payment of qualified fees. (Emfinger, p. 124). PACT relies upon the certification from the school that the school certifies to PACT for payment of the fees. Those fees are certified to PACT based upon the form supplied by PACT. Ms. Emfinger

states that the administrative interpretation of mandatory fees since the beginning of the PACT Program is as follows:

> From inception, a mandatory fee has been defined as a fee required as a condition of enrollment for every student that attends that institution and is certified by that college or university, and exclusions apply.

(Emfinger, pp. 126, 127). Ms. Emfinger agrees that Act No. 89-862 defines tuition as follows:

> The quarter, semester, or term charges imposed by a State college or university and/or mandatory fees that is required fees required as a condition of enrollment.

(Emfinger, pp. 127, 128). Ms. Emfinger testified that the Board has the authority under the statute to define the terms and conditions of the contract and to promulgate rules concerning the payment of tuition and fees. She agrees that the rule adopted by PACT and the practice of PACT in regards to payment of tuition and mandatory fees is applied commonly to all students in the PACT Program. (Emfinger, pp. 133, 134). She adds that the definition in the current rules of PACT are applied uniformly to all PACT contract holders and beneficiaries. (Emfinger, pp. 134, 135). The Court finds that the claims of the Plaintiffs of both classes A and B are common to the claims of each other and to the claims of all potential claim members. First, all Plaintiffs seek clarification and declaratory relief that regardless of the financial condition of the PACT Trust Fund at the time their beneficiaries matriculate and qualify for college, that their children shall be allowed to attend without further payment of tuition and mandatory fees. Second, class members vigorously assert that they are being required to pay fees as a condition to enrollment in college which should be declared mandatory fees under the statute and thus paid by PACT or absorbed by the college. PACT admits that the method for obtaining information on fees assessed by colleges is obtained from a unified, common form. PACT agrees that the information is gathered pursuant to a rule promulgated by PACT that applies to all PACT contract holders. PACT's

practice is to pay those fees certified by the college as a condition to enrollment. However, class members assert that either PACT is not getting the correct information or that the colleges are failing to include fees which class members consider to be mandatory and which are required to be paid by them as a condition of enrollment of their children and which are not being paid by PACT. Accordingly, the concerns and issues raised by the Plaintiffs, as well as the evidence of the practice by PACT in administering the solicitation of information from colleges and payment of tuition and mandatory fees applies uniformly throughout all colleges, universities and more importantly, is applied uniformly to all contract holders and their beneficiaries. Accordingly, these common questions of law and fact apply to all class members of both class A and class B. The parties have so stipulated, and the Court finds that the commonality prong could be proved by either party. Thus, the second prong of Rule 23(a) is met in that the Plaintiffs present questions of law or fact common to all members of the class.

c. Typicality

The claims of the class Plaintiffs must also be typical of the claims of the class under Rule 23(a)(3).

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature of the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patters which underlie individual claims.

1 Newburg §3-13 at 3-76 to 3-77.

The Alabama Supreme Court has observed that "the typicality" requirements "...focus less on the relative strengths of the named and un-named plaintiffs' cases than on the similarity of the legal and remedial theories behind their claims." *CIT Communications Finance Corp. vs. McFadden, Lyon & Rouse, LLC,* 37 So.3d 114, 124 (Ala. 2009). Thus it seems that the typicality inquiry looks to the claims and remedies sought in this case and asks whether these are the kind of claims and remedies that each class member would bring in an individual action. If the answer is "yes", then the claims are typical.

A sampling of the Plaintiffs' claims here, and the remedies they seek, shows that Rule 23(a)(3) is satisfied. For example, the named Plaintiffs ask this Court to declare their rights under the applicable statutes and contracts. If a class member brought an individual action, would he ask for the same thing? It seems reasonable that he would. The named Plaintiffs ask for a declaration that with payment of the required amount to "purchase" a PACT contract, that he or she has prepaid their child's college tuition and therefore is not affected by investment losses of the PACT fund. If an individual PACT contract holder filed a separate suit would he or she likely make the same claim? Reason would say "yes". Further, the named Plaintiffs claim that the PACT Board is not paying everything that is required by applicable law and the contracts. It seems certain that any individual class member, who has evidence of that, would also make that claim in their own lawsuit.

As to class A, the Court first looks to the PACT statutes beginning in 1989 and going through 2001.

In 1989, the Alabama Legislature passed Act No. 89-862 which established the Wallace-Folsom Prepaid College Tuition Trust Fund to assist individuals in paying costs and expenses of

attending colleges and universities through the PACT Program. (Said Act was originally codified as § 16-33c-1 Code of Alabama 1975).

The PACT Program, Act No. 89-862, was created as an agency and instrumentality of the State of Alabama, for the express purpose "to establish an educational trust fund through which many of the costs associated with attending a state college or university may be paid in advance for the full term of undergraduate enrollment." (See Act No. 89-862, Sec. 1). The Act further provides for the PACT Board to enter into contracts for the prepayment of tuition for a qualified beneficiary "to attend any state college or university to which the qualified beneficiary is admitted, without further tuition costs or mandatory fees." (Emphasis added).

On April 19, 1990, Act No. 90-570 became the law of this State. This Act amended the provisions of Act No. 89-862 (then codified as § 16-33c-1 et seq. Code of Alabama 1975) to some extent. For instance, Act No. 90-570 constitutes the PACT Trust Fund as an "agency and instrumentality of the State of Alabama." Additionally, the 1990 Act provides that the assets of the PACT Trust are "public funds of the state." The express, stated purpose and intent of the act is to provide a method by which students "pay in advance the tuition costs."

The PACT statutes were again amended in 1997 by Act No. 97-547 and finally amended in a substantial way by Act No. 2001-427 (the 2001 Act) effective May 9, 2001.

The PACT statute codified at § 16-33C-1 et seq. as they existed at the time class A Plaintiffs entered into their PACT contracts authorized class A member to enter into a contract with the PACT Board as follows:

> **Section 7.(a) The board, or its authorized officer, agent or employee, is hereby authorized to contract with a purchaser for the lump sum or installment prepayment of tuition costs by the purchaser for a qualified beneficiary to attend any state college or university to which the qualified beneficiary is admitted, without further tuition costs or mandatory fees.**

Class A members maintain that regardless of any benefits bestowed upon members of class B, that the above quoted Section 7 is a statutory right embedded in their contracts which allow their beneficiaries to attend college to which the qualified beneficiary is admitted without further tuition costs or mandatory fees. Since this statute was in existence during the period of time in which members of class A contracted with the PACT Board, then a judicial declaration or determination of the rights of contract holders under Section 7 would typically apply to all members of the Plaintiff class. The typical contract entered into between contract holders and the PACT Board do not contain the express language contained in Section 7 of the above act. Typically, such contracts specify a number of semester hours or equivalent to which the beneficiary is entitled rather than containing language which entitles the contract holder's beneficiary to attend a college to which the qualified beneficiary is admitted without further tuition costs or mandatory fees. Any declaration or interpretation of this statute would typically apply to all members of the Plaintiff class A since the statute was in full force and effect at the time their contract was purchased. The Court reaches no conclusion on whether the omission of the statutory language in any way changes or impairs the obligation of contract, but finds as a matter of fact and conclusion of law that any such interpretation or declaration would typically apply to all members of class A.

Similarly, any declaration or interpretation of the definition of mandatory fees under the statute or the validity or not of the administrative interpretations and promulgations, rules and regulations regarding the payment of mandatory or certified fees would typically apply to each member of class A. As stated in the analysis of the commonality of fact and law, the Court has already concluded that the PACT Program typically handles the solicitation of information and

payment of tuition and fees, typically distributes the request for information to the various colleges and typically pays the fees and tuition certified by the colleges on a uniform basis.

The above-referenced statute was amended effective May 9, 2001, and deleted the above-referenced Section 7. Therefore, the effect, if any, of the existence of Section 7 and the later deletion of Section 7 when declared and interpreted by this Court will apply typically to members of class B. Any interpretation of the payment of past, present and future tuition and mandatory fees will apply typically to all members of class B.[3]

PACT argues that in addition to statutory changes made in May 2001, written disclosures beginning in 1995 made it clear to contract purchasers that payment of tuition and mandatory fees was not guaranteed, that contract purchasers were put on notice that their money would be invested as a supplement to the payment of any tuition and mandatory fees and warns potential purchasers that the Fund's obligations are not backed by the full faith and credit of the State of Alabama. (*See* Plaintiffs' Exhibit 3 to the Emfinger Deposition.) Subsequent disclosure statements made similar disclaimers from 1996 through the present. (*See* Exhibit 3 to the Emfinger Deposition.) PACT further contends and the Court finds that the PACT rules and regulations were amended from time to time beginning in 1995 to correspond to the information contained in those disclosures. PACT contents that these disclosures, rules and regulations disclose that projections on future rates of return and the availability of funds for the payment of tuition and fees are based on actuarial assumptions rather than guarantees. (*See* Plaintiffs' Exhibit 3 to Emfinger Deposition.) The Court finds that any declaration or interpretation of such disclosures as they apply to the PACT contract and existing statutes would be a common question of fact and typically applied only to those contract holders who purchased PACT

[3] For the same reasons discussed above under the section of commonality, the Court finds that there are sufficient common questions of law and fact that meet the requirements of Rule 23(a) for the members of class B.

contracts after the 1995 disclosures began. The Court makes no determination as to the effect, if any, of such disclosures. However, in an abundance of caution, the Court feels that subclass A-1 should be created from class A and will be designated as those contract purchasers who purchased PACT contracts beginning January 1995 and up and through May 8, 2001.

Based upon the foregoing findings of fact and conclusion of law, the Court is satisfied that the Plaintiffs have met their burden of proof to establish a class action for class A (with subclass A1) and class B in that the requirements of numerosity, commonality and typicality under Rule 23(a) ARCP have been met, and that the PACT has acted or refused to act on grounds generally applicable to class A and class B, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each class as a whole under Rule 23(b)(2) ARCP and therefore certifies class A (together with subclass A1) and class B as class actions under Rule 23(b)(2) ARCP.

The parties have stipulated and the Court finds that the typicality prong could be proved by either party. The Court further finds and concludes that the defenses typically raised by the Defendants are defenses typically raised by defendants in a similar case. The Court also finds that such defenses are typical of such defenses that would be asserted against individual plaintiffs should they bring individual actions.

d. The last requirement of Rule 23(a) is the "adequacy of representation" requirement. Rule 23(a)(4) requires that the plaintiff, or plaintiffs, fairly and adequately represent the class.

The adequacy standard is met if: (1) the named plaintiffs have interests common with, and not antagonistic to, those of absent class members; and (2) the plaintiffs' lawyers are qualified, experienced and generally able to handle the litigation. *Sosna v Iowa*, 419 U.S. 393, 403 (1975). See also *Cutler v Orkin*, 770 So.2d 67 (Ala. 2000). In order to satisfy the adequacy

test, the named plaintiffs must show that there is no conflict of interest between the plaintiffs or their counsel and the absent class members and that they will vigorously prosecute the claims. *Ex parte Russell Corp*, 703 So.2d 953 (Ala. 1997).

This Court has before it the deposition testimony of the various named Plaintiffs. That testimony reveals that these Plaintiffs are well informed as to the nature of their claims, and of the class itself. These Plaintiffs clearly are prepared to vigorously prosecute and defend this case and the Court sees no evidence of any antagonistic positions among these Plaintiffs and the class. In simple terms it is the claim of these named Plaintiffs that they have prepaid their children's college tuition, that those children may therefore attend any public college or university to which they are admitted without further tuition costs, and that the PACT Board has failed to meet its obligations to them. The Court is satisfied that these claims are wholly consistent with the interests of all class members.

Furthermore, the Plaintiffs in this case contend that with the 2001 amendments to the PACT statute embodied in Act #2001-427, a material change was made in the nature of the PACT program. Without addressing the merits of that claim, to the extent such a claim creates any conflict among class members, that conflict has been adequately addressed by the Plaintiffs having designated two classes, with separate named Plaintiffs and separate counsel.

The Court must also consider whether the named Plaintiffs in this case can adequately defend against the counterclaims. The parties have stipulated that the named Plaintiffs can adequately represent the class in this case. From a review of the evidence presented on that issue the Court also concludes that the named Plaintiffs are adequate to defend as well as prosecute this case.

The final consideration in the adequacy inquiry is addressed to class counsel. The lawyers representing the Plaintiffs in this case are well known to this Court as well as the Bar all over this state. Each of them are highly skilled and experienced lawyers who are more than capable of handling this case. Indeed, the Defendants have not argued otherwise.

Hence the Court finds the requirements of Rule 23(a)(4) to be met.

III. **Definition of the Classes**

The Plaintiffs have contended the Act #2001-427, which became effective on May 9, 2001, rendered significant changes in the nature of the PACT program. According to the Plaintiffs, the 2001 jAct makes it necessary to establish two classes in this case. Interestingly, the defendants, in their answer, deny that Act 2001-427 changed the nature of the PACT program. Given the disagreement, the Court has studied the statutory scheme before and after the passage of Act #2001-427. Without deciding, at this point, which side is correct, this Court concludes that there is enough evidence that the law did change significantly in 2001, that caution weighs in favor of creating two classes in this case. It should be noted that any class certification is subject to change at any time before judgment on the merits. See Rule 23(c)(1).

Thus, the Court certifies two Plaintiffs' classes, Class A and Class B, pursuant to Rule 23(b)(2), in this case. Class A is defined as:

> All persons who purchased a PACT contract before May 9, 2001 and all designated beneficiaries of those contracts.
>
> The designated class representatives of Class A are Lisa Nix Green and Kimberly Franklin. Counsel for Class A is J. Doyle Fuller and the firm of Fuller and Copeland.

The parties agreed at the class certification hearing that Class A should further have within it two subclasses. This is based upon the claim of the Defendants that beginning in 1995 certain disclosures of investment risks were made to PACT participants. Without deciding the issue of what impact, if any, this disclosure has in these cases there is hereby created with Class A the following subclasses:

a. Subclass A1 – All those members of Class A whose PACT contracts were purchased before September 1, 1996. The representative of this subclass is Lisa Nix Green and counsel is J. Doyle Fuller and the firm of Fuller and Copeland.

b. Subclass A2 – all those members of Class A whose PACT contracts were purchased on or after September 1, 1996. The representative is Kimberly Franklin, and counsel is J. Doyle Fuller and the firm of Fuller and Copeland.

Class B is defined as:

All persons who purchased a PACT contract after May 9, 2001 and all designated beneficiaries of those contracts. The class representatives of Class B are Brian McVeigh, Nina McGinnis and Allen Hudson. Counsel for Class B are Andrew P. Campbell and Gregory A. Brockwell of Leitman, Siegle, Payne & Campbell and Donald W. Stewart and Taylor Stewart of Stewart & Stewart.

IV. Counterclaim

1. General

PACT denies the interpretation, construction and application of the statutes as contended by the Plaintiff classes. Additionally, the Defendants counterclaim for instruction and

guidance pursuant to the Trust Code of Alabama (§ 19-3B-101, et seq.). PACT claims that the PACT Program is a State agency and that PACT members are serving in an official capacity as an agent of the State of Alabama when performing their duties and functions as board members or trustees as provided under the PACT statutes and under the Alabama Trust Code. (PACT Counterclaim ¶¶ 1, 2). As of August 2009, the actuarial consultants employed by PACT concluded that the current value of the PACT Trust Fund, although no fault of the Board or its trustee members, would not be sufficient to make full tuition payments past the year 2015. Therefore, the Board closed the PACT Program to new applicants in 2009. However, Counter Plaintiffs allege and testimony supports that based upon the ages of the beneficiaries and the ten-year span within which a student can enroll in undergraduate colleges and universities, the PACT Program is projected to have obligations until the year 2029. (Counterclaim ¶¶ 4, 5; Emfinger, p. __).

However, in PACT's Amended Counterclaim, PACT cites the passage of Act No. 2010-725 ("Act") in which the Alabama Legislature makes a finding that through future appropriation of tax dollars, that the PACT Program will be 100 percent fully funded. The PACT Board then adopted new rules and regulations in order to comply with the legislative mandates of the Act. (Amended Counterclaim, ¶¶ 3 – 6).

Section 16-33C-5, as amended by the Act, gives the following powers to the PACT Board:

> In addition to the powers granted by any other provision in this chapter, the Board shall have, as agents of the State of Alabama, ***the powers necessary or convenient to carry out the purposes and provisions of this chapter*** and the powers delegated by any other law of the State or any executive order thereof, including, but not limited to, the following express powers:

(Emphasis added.) Further, § 16-33C-5(11) specifically authorizes the Board "to establish other policies, procedures, and criteria necessary to implement and administer the provisions of this chapter."

Act No. 2010-725 provides in relation to the rule-making authority of the Board as follows:

> Section 12. The Legislature hereby strongly encourages the PACT Board to make any financially beneficial changes to PACT rules, procedures, or policies, to the extent that the PACT Board is authorized or permitted to make such changes and to the extent that such changes would not violate the contractual relationship existing between a PACT contract holder and the PACT Board. Any such changes made prior to July 1, 2011, require the prior approval of the Legislative Council.

Among other things, the Act created a disparity in the amount of tuition and fees eligible for PACT payment between constitutionally created colleges and those colleges created by act of legislature. For example, § 4(a) of the Act provides in pertinent part as follows:

> Except as provided in subsection (b), no public institution of higher education shall charge the PACT plan or a PACT plan contract owner mandatory fees or tuition per credit hours in an amount exceeding the cost of mandatory fees or tuition per credit hour as of September 30, 2009, except that an annual increase of the lesser of the actual annual tuition or mandatory fee increase or an annual tuition or mandatory fee increase of two and one-half percent (2.5%) shall be allowed for each thereafter.

Additionally, Plaintiff Eldridge M. Franklin, in his Amended Complaint contends that purported appropriations made by the legislature do not take effect until 2015, which may or may not provide adequate funding for the Trust and, which may be subject to amendment, change, or deletion by subsequent legislatures not so inclined to support the PACT Program. Furthermore, specific statutes give the board of trustees of various public institutions of higher education, the

power to set the rates of tuitions at their respective institutions. (Amended Complaint of Eldridge M. Franklin, ¶¶ 10, 24, 25 and 19).

The Court finds that the PACT statutes as amended create an ambiguity as to the amount of benefits to which the class members are statutorily and contractually entitled and for which the PACT Trust is obligated. The PACT seeks guidance on the administration of rules and regulations adopted pursuant to the Act and seeks declaratory relief to reconcile any conflict between the statutory rights given to contract holders at the time of the execution of their contract and any subsequent amendments to the PACT statutes, and rules and regulations active pursuant thereto.

All parties agree and, the Court finds that the PACT Trust Fund is a statutory trust created by the Alabama Legislature and subject to the Alabama Uniform Trust Code, §§ 19-3B-101, et seq. The legislature gives this Court jurisdiction to provide instructions to the members of the PACT Board and to modify Trust provisions to protect the corpus and purposes of the Trust. § 19-3B-201.

The PACT seeks instructions or guidance with respect to the following issues:

(1) As to whether the proposed rule changes referenced in Exhibit A, or any one of them, violate the statutory, constitutional or contractual rights of the members of any potential class of PACT Contract holders/beneficiaries;

(2) As to how the Board should make payments to colleges and universities on behalf of PACT Contract holders/beneficiaries consistent with actuarially sound principles:

a. With regard to institutions of higher education under the oversight of the Boards of Trustees established in § 264 and § 266 of the

Constitution of Alabama of 1901, now appearing as §§ 264 and 266 of Official Recompilation of the Constitution of Alabama of 1901, as amended; and

b. With regard to all other institutions of higher education within the State of Alabama except those institutions referenced in subsection a. above; and

c. With regard to such institutions of higher education that are not public institutions; and

d. With regard to such public and private institutions that exist outside the State of Alabama.

(3) As to whether the Board has the authority to dissolve, close, terminate and/or liquidate the PACT Program and/or PACT Trust Fund and, if so, upon what basis can distribution of assets be made; and

(4) If the Board finds itself without sufficient funds to pay tuition and mandatory fees on behalf of contract holders, how should the PACT Trust Fund equitably administer the funds so as to protect the contract holders and comply with the wishes of the Alabama Legislature?

(See Amended Counterclaim, ¶ 10).

The Court finds that in addition to its findings of fact that lead to the certification of class A (including subclass A1) and class B above, PACT, as a Counter Plaintiff, is entitled to declaratory relief under the declaratory judgment act and guidance, instructions and, if necessary, modification of the Trust pursuant to the Alabama Trust Code. The Court finds that in absence of a class, Trust instructions and guidance awarded to the Counter Plaintiffs may result in the

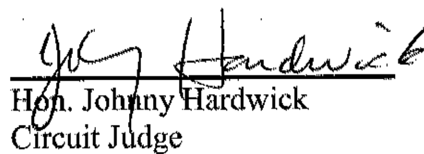
prosecution of separate actions by individual members of a class that would create a risk of inconsistent or varying adjudications with respect to those individual members which would establish incompatible standards of conduct for the PACT or might result in inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the PACT or any adjudications made by this Court with respect to individual members of the class would as a practical matter be dispositive of the interest of the other members who are not parties to the adjudications or would substantially impair or impede individual class members to protect their interest. Therefore, the Court finds and so orders a certification of a class under Rule 23(b)(1)(A)(B) in favor of the Counter Plaintiff composed of all class members described above in class A (including subclass A1) and class B. For the "same reasons" indicated above, the Court finds that the named Plaintiffs, other than Plaintiff Eldridge Franklin, are appropriate class representatives of the Defendant class herein certified under Rule 23(b)(1)(A)(B) and that PACT counsel are qualified to pursue and adjudicate claims consistent with the relief requested herein by the Counter Defendant PACT Board and PACT members.

CONCLUSION

It is therefore ORDERED by the Court that the above-referenced Plaintiff and Defendant classes be and are hereby certified as stated. The Court further finds that the best notice practicable under the circumstances is that each class member be sent individual notice by first-class mail directed to the contract holder or beneficiary according to the most reliable records maintained by PACT. Additionally, PACT is directed to place a copy of this Court's Order in its

entirety on its currently maintained webpage. The individual notice specified above shall conform to Exhibit A attached hereto.

ORDERED this the 2nd day of March, 2010.



Hon. Johnny Hardwick
Circuit Judge

EXHIBIT A

The Circuit Court of Montgomery County, Alabama, in the case of *Green v. Ivey,* Case No. CV-2010-900013, has certified that the case shall proceed as a class action. For a copy of the Complaint, the Defendants' Answer and Counterclaim, and the Court's Order, you are invited to visit the State Treasurer's website at www.treasury.alabama.gov/pact.