

STATE OF MICHIGAN
COURT OF CLAIMS

KELLIE SAUNDERS, *et al.*,

Plaintiffs,

No. 2022-000007-MM

v

HON. BROCK A. SWARTZLE

MICHIGAN UNEMPLOYMENT
INSURANCE AGENCY AND JULIA
DALE,

Defendants.

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**DEFENDANTS' OCTOBER 12, 2022 RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	ii
Introduction	1
Procedural history	1
I. A court should consider a class certification motion in conjunction with the complaint.....	3
A. Parties seeking class certification must demonstrate they meet all requirements.	3
B. This Court should only consider Plaintiffs’ procedural due process claims alleging deprivation of property as set forth in their second amended complaint and ignore their newly raised substantive due process claims in their class certification motion.	5
II. Plaintiffs fail to establish all the factors necessary for class certification.....	7
A. Numerosity	7
B. Commonality	8
C. Typicality	9
D. Fair and adequate representation	9
E. Class action superiority	10
Conclusion and Relief Requested.....	12

INDEX OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>A & M Supply Co v Microsoft Corp</i> , 252 Mich App 580 (2002)	9
<i>Duskin v Dep’t of Human Services</i> , 304 Mich App 645 (2014)	7, 8, 9, 10
<i>Goldberg v Kelly</i> , 397 US 254 (1971)	6
<i>Grimes v Van Hook-Williams</i> , 302 Mich App 521 (2013)	5, 6
<i>Henry v Dow Chemical Co</i> , 484 Mich 483 (2009)	4
<i>King v Oakland County Prosecutor</i> , 303 Mich App 222 (2013)	7
<i>Mettler Walloon, LLC v Melrose Twp</i> , 281 Mich App 184 (2008)	6
<i>Michigan Ass’n of Chiropractors v Blue Care Network of Michigan, Inc</i> , 300 Mich App 577 (2013)	5
<i>Northview Const Co v City of St Clair Shores</i> , 395 Mich 497 (1976)	10
<i>Polkton Charter Twp v Pellegrom</i> , 265 Mich App 88 (2005)	5
 Rules	
MCR 2.116(C)(4)	1
MCR 2.118(A)(1)	1
MCR 3.501(A)(1)	3
MCR 3.501(A)(1)(e)	3
MCR 3.501(A)(2)	4

INTRODUCTION

Plaintiffs brought this action, alleging in part that Defendants deprived Plaintiffs of property (money) without procedural due process of law. In furtherance of their action, they seek class certification of their cause of action. Class certification requires that the proposed class representatives meet all the requirements as set forth by court rule. Because Plaintiffs have not met all five requirements, their motion should be denied.

PROCEDURAL HISTORY

In January 2022, five plaintiffs filed this action.¹ In their complaint, they alleged that Defendants violated their procedural due process rights under article 1, paragraph 17 of the Michigan Constitution by: (1) issuing monetary redeterminations more than one year after the issuance of the initial monetary determination, (2) failing to conduct reviews of overpayment accounts to determine if overpayment should be waived due to “agency error,” and (3) engaging in collection activity where a timely protest or appeal had been filed. (*See* January 28, 2022 Complaint, ¶¶ 162–189.)

In response, Defendants filed a Motion for Summary Disposition. (*See* March 14, 2022 Motion.) Defendants sought dismissal under MCR 2.116(C)(4)(lack of subject matter jurisdiction) and (C)(8)(failure to state a claim). (*Id.*)

¹ On March 24, 2022, Plaintiffs filed their first amended complaint (MCR 2.118(A)(1)) which added five plaintiffs but did not change the general allegations or counts.

On June 13, 2022, this Court issued an Opinion and Order regarding Defendants' Motion for Summary Disposition, which granted Defendants' motion as to Count I (to all Plaintiffs except Kellie Saunders) and to Count II in its entirety. (See June 13, 2022 Opinion and Order.)

This Court granted Plaintiffs' Motion for Leave to file a Second Amended Complaint and Plaintiffs filed their Second Amended Complaint one month later. (See August 5, 2022 Order; September 6, 2022 Second Amended Complaint.)

Regarding Count III, Plaintiffs allege that Defendants deprived them of their property without adequate procedural due process. (See September 6, 2022 Second Amended Complaint, ¶¶ 197, 199, 211–221, 241.) Specifically, they allege the following with respect to the Count III proposed class representatives²:

- Plaintiff Varga alleges that Defendants sent him monthly statements and a notice of intent to garnish his wages and stopped collection after this action was filed. (September 6, 2022 Second Amended Complaint, ¶¶ 51–53, 57.)
- Plaintiff Shephard alleges that Defendants continued collection, sent her a notice of intent to intercept her tax refund, intercepted her tax refund, refunded the intercepted money, and later paid the remaining weeks on her unemployment claim. (September 6, 2022 Second Amended Complaint, ¶¶ 66, 68, 72.)
- Plaintiff Larke alleges that Defendants sent her notices of delinquency, a notice of intent to garnish her wages, and recouped a portion of her overpayment from her weekly benefit amount. (September 6, 2022 Second Amended Complaint, ¶¶ 88–90.)

² Plaintiffs infer that Plaintiff Saunders is a proposed representative, but she is not listed as a proposed representative in the second amended complaint. (September 21, 2022 Motion for Class Certification, p 3; September 6, 2022 Second Amended Complaint, ¶¶ 211–221.)

- Plaintiff Logan alleges that Defendants undertook collection activity against her and sent her notices of intent to garnish her wages and intercept future tax refunds. (September 6, 2022 Second Amended Complaint, ¶¶ 98–99.)
- Plaintiff Eggleston alleges that Defendants initiated collection, sent him a notice of intent to garnish his wages and intercept his tax refund, and as a result, he voluntarily made payments towards his overpayment. (September 6, 2022 Second Amended Complaint, ¶¶ 109–110, 112.)
- Plaintiff Hillebrand alleges that Defendants initiated collection activity. (September 6, 2022 Second Amended Complaint, ¶ 120.)
- Plaintiff Scarantino alleges that Defendants sent her monthly collection statements that resulted in her making voluntary payments. (September 6, 2022 Second Amended Complaint, ¶ 131.)

I. A court should consider a class certification motion in conjunction with the complaint.

A. Parties seeking class certification must demonstrate they meet all requirements.

One or more class members may sue or be sued as representative parties if all the following exist:

- (a) the class is so numerous that joinder is impracticable;
- (b) there are common questions of law or fact among class members that prevail over questions affecting only individual members;
- (c) the claims or defenses are typical of the class’s claims or defenses;
- (d) the representative parties will fairly and adequately state and defend the class’s interests; and
- (e) class action maintenance is superior to other available adjudication methods in promoting the convenient administration of justice. MCR 3.501(A)(1).

With respect to MCR 3.501(A)(1)(e), class action maintenance superiority, this Court must consider:

(a) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or

(ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) whether final equitable or declaratory relief might be appropriate with respect to the class;

(c) whether the action will be manageable as a class action;

(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions. MCR 3.501(A)(2).

A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action. *Henry v Dow Chemical Co*, 484 Mich 483, 500 (2009). A court should only certify a class in circumstances where the court has shown that all the prerequisites for class certification have been met. *Henry*, 484 Mich at 500. Plaintiffs must show that the facts are uncontested or admitted by the opposing party. *Id.* Strict adherence to the requirements is necessary. *Id.* Finally, a certifying court may not simply “rubber stamp” a party’s allegations that the class certification prerequisites are met.

Michigan Ass'n of Chiropractors v Blue Care Network of Michigan, Inc, 300 Mich App 577, 587 (2013).

B. This Court should only consider Plaintiffs' procedural due process claims alleging deprivation of property as set forth in their second amended complaint and ignore their newly raised substantive due process claims in their class certification motion.

In their motion for class certification, Plaintiffs seek class certification as to Count III (the unauthorized early collection class) arising from their second amended complaint. (See September 6, 2022 Second Amended Complaint, ¶¶ 211–221; September 21, 2022 Motion for Class Certification, pp 1, 5–6.) Unlike the second amended complaint, Plaintiffs assert that Defendants violated the Plaintiffs' substantive due process rights (by subjecting them to overpayment collection) as part of the class certification motion. (See September 21, 2022 Motion for Class Certification, pp 5–6.) However, the second amended complaint is devoid of any allegations regarding alleged violations of substantive due process. Because Plaintiffs failed to adequately allege or argue substantive due process in their second amended complaint, this Court should not consider these arguments.

Polkton Charter Twp v Pellegrom, 265 Mich App 88, 95 (2005).

Due-process allegations can, of course, contain both procedural and substantive components. *Grimes v Van Hook-Williams*, 302 Mich App 521, 531 (2013). The purpose of substantive due process is to secure individuals from arbitrary excises of government power or authority. *Id.* Substantive due process provides heightened protection against governmental interference with certain

fundamental rights and liberty interests. *Id.* Further, in the context of governmental actions, a substantive due process violation is established only when the conduct is so arbitrary and capricious that it shocks the conscience. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197–198 (2008).

A review of the Plaintiffs’ second amended complaint makes it clear that their due process allegations were of a procedural, as opposed to a substantive, nature. (See September 6, 2022 Second Amended Complaint, ¶¶ 188–192, 237.) The second amended complaint cites a case in support of procedural due process – *Goldberg v Kelly*, 397 US 254 (1971). (See September 6, 2022 Second Amended Complaint, ¶ 188.) There are no such citations to case law supporting a substantive due process allegation in the second amended complaint. (See September 6, 2022 Second Amended Complaint.)

Further, both pleadings refer to the notice, process, or alleged lack thereof. (See September 6, 2022 Second Amended Complaint, ¶¶ 164, 187, 233.) In addition, Plaintiffs’ second amended complaint only mentions the word “substantive” once. (See September 6, 2022 Second Amended Complaint, ¶ 238.) The second amended complaint does not contain any of the following words typically associated with a substantive due process cause of action – substantive due process, arbitrary, fundamental rights, or “shocks the conscience.” (See September 6, 2022 Second Amended Complaint; *Mettler Walloon, LLC*, 281 Mich App at 197–198.)

Plaintiffs have failed to cite any authority that allows them to raise a new cause of action in a class certification motion. This Court should therefore consider

arguments in favor of them abandoned. *King v Oakland County Prosecutor*, 303 Mich App 222, 236 (2013). In *King*, this Court declined to be responsible for finding the authority to support a party's position. *Id.* If a party failed to cite sufficient authority, the position would be abandoned on appeal. *Id.* Thus, this Court should not consider any arguments regarding substantive due process.

II. Plaintiffs fail to establish all the factors necessary for class certification.

A. Numerosity

To satisfy the numerosity requirement, a plaintiff must adequately define the class so potential members can be identified and must present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members. *Duskin v Dep't of Human Services*, 304 Mich App 645, 653 (2014). Plaintiffs have attempted to demonstrate numerosity by relying on affidavits from other attorneys who purportedly represent unemployment claimants that Defendants are engaged in unspecific collection activity. (See Class Certification Motion, pp 9–10; Exhibits 7–10.) It should be noted that the second amended complaint asserts that Defendants are depriving the Plaintiffs of property (money) without procedural due process of law. (See September 6, 2022 Second Amended Complaint, ¶¶ 197, 199, 211–221, 241).

However, the class certification motion is vague as to how many of the claimants are subject to the deprivation of property. (See Class Certification motion, pp 9–10; Exhibits 7–10.) While the pleadings and affidavits discuss

improper collection in general terms, it is unclear how many claimants were subject to the taking of property (money). There are references to claimants who felt coerced into making voluntary payments in lieu of involuntary collection activity, but minimal detail as to how many have made such “coerced” voluntary payments or how many have been subject to involuntary taking of property (money). As such, Plaintiffs have failed to meet their burden of demonstrating a reasonable number of potential class members who have allegedly had their property (i.e., money) taken without adequate due process of law.

B. Commonality

Commonality requires plaintiffs to demonstrate that the proposed class members have suffered the same injury. *Duskin*, 304 Mich App at 654–655. Here, based on the pleadings, the proposed representative members have not all suffered the same injury. For example, some of the proposed class representatives assert that Defendants improperly took their property, i.e., money (Shephard and Larke). Yet others assert that Defendants only sent them monthly statements or notices of intent to take property in the future, but did not actually take any property (Varga, Logan, Hillebrand). Even others assert that they voluntarily made payments towards alleged overpayments (Eggleston and Scarantino). The wide variety of alleged injury (loss of money, worry or concern about the possible loss of future money, or coercion to pay money) are all vastly different and do not establish commonality. Plaintiffs have failed to meet their burden of demonstrating

commonality because the proposed representatives have all suffered different injuries.

C. Typicality

Typicality is whether the claims of the named representatives have the same essential characteristics of the claims of the class at large. *Duskin*, 304 Mich App at 656–657. The typicality requirement for class certification requires that the class representatives share a common core of allegations with the class as a whole.

Duskin, 304 Mich App at 657. Here, the proposed Plaintiffs have not demonstrated typicality. Again, while all the claims start at the same spot (improper collection after a timely protest or appeal), the characteristics of the claims vary. Some of the proposed representatives received monthly statements only, some received monthly statements and notices of intent to garnish or intercept, some had tax refunds intercepted and later refunded, one had an overpayment recouped from future benefit payments, and some made voluntary payments. There is no common core of allegations among the proposed class representatives. As such, Plaintiffs have failed to demonstrate that the typicality requirement has been met.

D. Fair and adequate representation

Plaintiffs who cannot maintain the cause of action as individuals are not qualified to represent the proposed class. *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 598 (2002). Courts must determine if representatives are members of the class and capable of properly representing it when making determinations

regarding the adequacy of representation. *Northview Const Co v City of St Clair Shores*, 395 Mich 497, 508 (1976). Here, proposed class representatives Varga, Logan, and Hillebrand are not qualified to represent the proposed class because they have not been deprived of property (money) without due process of law. Further, it is questionable whether Eggleston and Scantino can adequately represent the class where they voluntarily made payments. While they may attempt to argue that their payments were under duress, any argument that Defendants would eventually take their property would be speculative at best. As such, only two of the Plaintiffs have alleged or shown that they were deprived of property (money) without adequate procedural due process.

E. Class action superiority

The superiority and commonality requirements for class certification are related because if individual questions of fact predominate over common questions, the case will be unmanageable as a class action. *Duskin*, 304 Mich App at 658–659. Here, individual questions of fact would predominate over common questions, making the class unmanageable.

Individual inquiries would have to be made regarding the proposed case to determine the extent of injury to individual members, assuming that there was a taking of property: 1) what type of alleged improper collection activity occurred (monthly statements, notices of intent to garnish wages, or intercept tax refunds), 2) if property was taken, how did it occur (voluntary payment, wage garnishment, recoupment from future benefits, tax refund interception, etc.). Such extensive

factual investigation is counterintuitive to the benefits of class representation, which is to streamline the process where the individual members suffer the same distinctive injury. As a result, a representative action would not be superior.

CONCLUSION AND RELIEF REQUESTED

Upon review of the second amended complaint and the motion for class certification, this Court should deny the motion. Plaintiffs have the burden to demonstrate that they meet all requirements for class certification: numerosity, commonality, typicality, fair and adequate representation, and superiority. Because of the varied claims and injuries, many of which do not comport with the cause of action, class certification is inappropriate.

For these reasons, the Defendants respectfully request that this Court deny the motion.

Respectfully submitted,



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