Private Enforcement under the Fair Debt Collection Practices Act

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PRIVATE ENFORCEMENT UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

The Fair Debt Collection Practices Act provides an aggrieved debtor with a private remedy against an abusive debt collector in order to deter unfair debt collection practices. The author compares the Act with the comparable provisions of the Truth in Lending Act and concludes that private enforcement will be ineffective since the Act lacks sufficient incentives for debtors to bring individual actions and few class actions will proceed because collection practices are rarely uniform as to large numbers of affected debtors.

ON SEPTEMBER 20, 1977, President Carter signed into law the Fair Debt Collection Practices Act, amending the increasingly comprehensive Consumer Credit Protection Act. The express purpose of the FDCPA is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." The Act is aimed primarily at debt collection abuses by independent collection agencies.

1. 13 WEEKLY COMP. OF PRES. DOC. 1382 (Sept. 20, 1977).
5. The provisions of the FDCPA apply to any person engaged "in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another," or to "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." Id. § 803(6). Because the Act does not apply to finance companies, banks, thrift institutions, department stores, or in-house collectors, it covers less than 1% of all debt collections in the United States. The Debt Collection Practices Act: Hearings on H.R. 11969 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking, Currency and Housing, 94th Cong., 2d Sess. 26 (1976) (remarks of Rep. Wylie) [hereinafter cited as H.R. 11969 Hearings]. The rationale for such limited coverage was "that independent debt collectors are the prime source of egregious collection practices." 123 CONG. REC. S13,513, S13,854 (daily ed. Aug. 5, 1977) (remarks of Sen. Riegle). Most creditors collecting past due accounts are generally restrained from using abusive collection practices by their desire to protect their good
Illegal collection practices and limitations on collection procedures are clearly enumerated "within the four-corners" of the Act. In general terms the FDCPA restricts the contacts a collector can make to acquire information about a consumer, restricts communication with the consumer, prohibits harassment or abuse, and prohibits false or misleading representations. The collector must communicate specific information concerning the debt being collected, validate the debt if that is requested, and must not furnish deceptive forms. Legal actions by debt collectors are also restricted. The provision on unfair practices demonstrates the breadth of some of the statutory language. Six specific unfair practices are enumerated, but the statute specifically states they are not to limit the general rule that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." Regulatory agencies are expressly denied the power to promulgate regulations with respect to debt collection practices, but some of the provisions may still be subject to broad judicial interpretation.

To ensure compliance with the provisions of the Act, Congress established two vehicles for enforcement. The first is a specific civil remedy to induce private consumer enforcement of the Act. The will. Independent collectors, on the other hand, "are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." A thorough study of defaulting debtors, however, indicates that even though independent collection agencies use coercive tactics most frequently, small loan companies, direct sellers, general retailers, and finance companies also use abusive tactics. D. CAPLOWITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 183 (1974) (interviews with 1,331 debtors).

6. "The Federal Trade Commission has no rulemaking power, no regulatory authority, so there will not be a shelf full of regulations promulgated by the Federal Trade Commission to enforce the law. The law is within the four corners of this bill now before the Members, and if there is not a sanction found therein, the Federal Trade Commission has to come back to this Congress to find out what they are supposed to do in the case of a practice which they find or think should be declared to be an unethical or unlawful practice. In other words, Congress is the final authority.


8. Id. § 805.
9. Id. § 806.
10. Id. § 807.
11. Id. § 809.
12. Id. § 812.
13. Id. § 811.
14. Id. § 808.
15. "Neither the [Federal Trade] Commission nor any other agency referred to in subsection (b) may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this title." Id. § 814(d).
16. "(a) Except as otherwise provided by this section, any debt collector
second enforcement mechanism is administrative, with the greatest responsibility resting with the Federal Trade Commission. Unlike other subchapters of the Consumer Credit Protection Act, the FDCPA contains no provision for criminal liability. As in the other

who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of—

"(1) any actual damage sustained by such person as a result of such failure;

"(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

"(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

"(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

"(b) In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors—

"(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

"(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

"(c) A debt collector may not be held liable in any action brought under this title if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

"(d) An action to enforce any liability created by this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

"(e) No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

Id. § 813.

subchapters, however, private attorneys general actions by consumers are clearly intended to be the primary enforcement tool.

It is the purpose of this Note to determine, after briefly examining the need for the FDCPA, whether private individual and class actions by harassed debtors will successfully deter abusive debt collection practices. In many ways the private enforcement provisions of the FDCPA mirror the private enforcement provisions of the Truth in Lending Act. In other important aspects, however, the FDCPA provisions are innovative. In evaluating the private enforcement mechanisms under the FDCPA, this Note will draw upon judicial responses to enforcement actions under the Truth in Lending Act, with particular emphasis on consumer class actions.

I. THE NEED FOR FEDERAL LEGISLATION

The variety of abusive debt collection tactics used by creditors and the lack of uniform and effective remedies available to harassed consumers have been widely documented. Debt collectors

21. "The committee views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance." S. REP. No. 382, 95th Cong., 1st Sess. 5 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 2967, 2971. "[T]he chief means of obtaining compliance with the act has always been meant to be by way of the civil liability Section, that is, by enabling the consumer to sue whenever there has been a violation of the act." 123 CONG. REC. H8996 (daily ed. Sept. 8, 1977) (remarks of Rep. Annunzio).


23. See notes 67 & 117 infra and accompanying text.

24. Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.


were encouraged to use abusive collection practices because of the inconsistent results reached under common law tort theories and the general inefficiency of state and federal legislation in providing adequate remedies for collection abuse. The tort theories of intentional infliction of emotional distress, defamation, invasion of privacy, intentional interference with contractual relations, malicious prosecution, and abuse of process were not developed with a view toward the debtor-creditor relationship. Therefore, suits for debt collection abuse do not conform well to these theories.

The principal problem debtors face in most tort actions is the heavy burden of proof placed on those seeking compensation for emotional and/or mental distress. Although harassed debtors have often met these

26. See notes 29–40 infra and accompanying text.
27. See notes 41–44 infra and accompanying text.
28. See notes 45–48 infra and accompanying text.
30. Ragland v. Household Fin. Corp., 254 Iowa 976, 119 N.W.2d 788 (1963) (to obtain recovery a debtor must show either that the imputation affects him in his business, trade, or profession, or that he should be awarded special damages); Schieve v. Cincinnati & Suburban Bell Tel. Co., 71 Ohio L. Abs. 350 (1955); W. Prosser, supra note 29, at 737–51; Restatement, supra note 29, at § 559.
31. An actionable invasion of privacy arises where there is a wrongful intrusion into one's private activities so as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956). This standard protects creditors from unduly sensitive (and feigning) debtors. Goldman-Taber Pontiac, Inc. v. Zerbst, 213 Ga. 682, 100 S.E.2d 881 (1957). See W. Prosser, supra note 29, at 812–18; Restatement, supra note 29, at §§ 652 A–I.
33. Avco Delta Corp. v. Walker, 22 Ohio App. 2d 61, 258 N.E.2d 254 (1969) (plaintiff must allege and prove termination of prior proceedings; lack of probable cause to institute civil suit is not sufficient to support an action for malicious prosecution). See W. Prosser, supra note 29, at 834–56; Restatement, supra note 29, at §§ 653–73.
34. Gore v. Gorman's Inc., 148 F. Supp. 241 (W.D. Mo. 1956), appeal dismissed, 244 F.2d 716 (8th Cir. 1957) (to maintain action for abuse of process, some benefit must have accrued to guilty party and some collateral disadvantage to other party). See W. Prosser, supra note 29, at 856–58.
35. Recognizing the deficiencies of traditional tort theories, Texas courts have developed a new tort theory of "unreasonable collection efforts" which provides aggrieved debtors with another avenue of relief. See Martin, A Creditor's Liability for Unreasonable Collection Efforts: The Evolution of a Tort in Texas, 9 S. Tex. L.J. 127 (1967).
heavy burdens, recovery has been too infrequent to deter collectors from using such tactics. Furthermore, this ad hoc approach has failed to develop standards delimiting unreasonable collection practices, leaving collectors and debtors uncertain about borderline tactics. For example, a plaintiff bringing a tort action for intentional infliction of emotional distress must demonstrate that his emotional distress was the result of extreme and outrageous conduct on the part of the debt collector. Some courts have required the distress suffered to be severe, and some older decisions have refused to allow recovery without proof of physical injury.

Opponents of the FDCPA argued that state legislatures should solve the problem of debt collection abuse. Although many states have enacted legislation in this area, over one-third of the United States' population resides in states where regulation is either ineffective or completely lacking. Even in states which have enacted effective legislation, consumers are still subject to harassment by collectors from other states who use interstate channels for collection purposes.

43. [T]here are 13 States, with 40 million citizens, that have no debt collection laws. These states are Alabama, Delaware, Georgia, Kansas, Kentucky, Mississippi, Missouri, Montana, Ohio, Oklahoma, Rhode Island, South Carolina, and South Dakota. Another 11 States (Alaska, Arkansas, Indiana, Louisiana, Nebraska, New Jersey, Oregon, Pennsylvania, Utah, Virginia, and Wyoming), with another 40 million citizens, have laws which in the committee's opinion provide little or no effective protection.
44. H.R. 11969, Hearings, supra note 6, at 216-30 (statement of Sherry Chenoweth); 134 CONG. REC. H2926 (daily ed. Apr. 4, 1977) (remarks of Rep. Vento). Congress was careful in drafting the FDCPA not to preempt state legislation, so comprehensive and effective state regulation can continue to function. FDCPA, Pub. L. No. 95-109, §§ 816-17, 91 Stat. 874 (1977). These sections describing the relation of the FDCPA to state law were the outgrowth of strong congressional belief that states should be allowed to enact and enforce their own legislation regarding debt collection:

The [Senate] Committee believes that this law ought not to foreclose the States from enacting or enforcing their own laws regarding debt collection. Accordingly, this legislation annuls only "inconsistent" State laws, with stronger State laws not regarded as inconsistent. In addition, States with substantially similar laws may be exempted from the act's requirements (but not its remedies) by applying to the Federal Trade Commission.
Finally, existing federal legislation provides no adequate remedy for injuries suffered by harassed debtors, nor does it effectively deter unreasonable collection practices. Although several federal laws relate to debt collection practices, they were not written with a view to debt collection abuse and they have not been successful in stopping such abuse. In the debt collection area, the Federal Trade Commission has the only set of guidelines delimiting unfair collection practices. Furthermore, none of these federal statutes contain an express private recovery provision so the debtor cannot recover for the harm he suffered.

II. INDIVIDUAL PRIVATE ENFORCEMENT ACTIONS UNDER THE FDCPA

The primary mechanism for inducing compliance with the FDCPA is private litigation. Because the principal aim of the Act is to encourage debt collectors to comply with its provisions, Congress developed incentives to sue within the provisions of the statute in order to make the legislation self-enforcing. As in other modern remedial legislation, notably the Truth in Lending Act, the FDCPA encour-

S. REP. No. 382, 95th Cong., 1st Sess. 6 (1977). A similar view was expressed in the House Report:

The Committee does not intend to preclude legislative experimentation by the States in the area of debt collection practices. Any State wishing to so experiment in passing strong legislation in this area will have a free hand to do so and may apply for an exemption under Section 817.


47. FTC Guides Against Debt Collection Deception, 16 C.F.R. § 237.0-.6 (1977).


49. See note 21 supra and accompanying text.


51. Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any persons is liable to such person in an amount equal to the sum of...

... in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per
ages private attorneys general actions by permitting a harassed debtor to obtain recovery above and beyond compensatory damages.\textsuperscript{52} The civil liability provision of the FDCPA allows injured debtors to collect actual damages, statutory damages, and reasonable attorney's fees from a violator.\textsuperscript{53} It differs from its Truth in Lending counterpart in that the FDCPA does not provide a minimum recovery for a successful individual action.\textsuperscript{54}

It is doubtful that many debtors will recover actual damages under the FDCPA. Nothing suggests that courts will be less stringent in their demand for proof under the statute than they have been in traditional tort actions.\textsuperscript{55} Unless violations are extreme and outrageous, permitting the plaintiff to overcome these evidentiary hurdles, the potential recovery of actual damages will not be a strong inducement for a debtor to bring an individual civil action. The actual damage provision of the Truth in Lending Act\textsuperscript{56} presents similar problems. The typical Truth in Lending violation does not involve actual damages,\textsuperscript{57} and in instances where actual damages are a possibility the proof requirement is prohibitively strict.\textsuperscript{58}

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\textsuperscript{53} FDCPA, Pub. L. No. 95-109, § 813, 91 Stat. 874 (1977). Statutory damages for individual actions are "such additional damages as the court may allow, but not exceeding $1,000." \textit{Id.}


\textsuperscript{55} See notes 36-40 supra and accompanying text for a discussion of proof requirements under traditional tort theories.


\textsuperscript{57} In a typical case involving a violation of the Truth in Lending Act, individual damages are likely to be quite small, if not nonexistent. \textit{E.g.}, \textit{Evoldi} v. First Nat'l Bank, 57 F.R.D. 545, 548 (N.D. Ill. 1972); \textit{Ratner} v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 416 n.7 (S.D.N.Y. 1972).

\textsuperscript{58} McCoy v. Salem Mfg. Co., 74 F.R.D. 8, 13 (E.D. Mich. 1976) ("The scheme of Truth in Lending is clear: actual damages must involve a showing that the plaintiff could have gotten credit on better terms but for the breach. Because such a showing is so difficult, statutory damages are available to a plaintiff who can prove a technical violation.")

Congressional debates leading to the 1974 amendments of the civil liability provision stressed the difficulty or impossibility of proving actual damages in a Truth in Lending action. \textit{See} 119 CONG. REC. 25,419 (1973) (remarks of Sen. Hart); \textit{id.} at 25,418
Failure to prove actual damages, however, does not preclude recovery. Under both Acts additional statutory damages are recoverable merely on the showing of a violation. The driving force behind most individual actions under the FDCPA will probably be the enforcement provision providing for the recovery of "such additional damages as the court may allow, but not exceeding $1,000."

In determining the amount of the statutory damages in an individual action, the Act instructs the court to consider "among other relevant factors . . . the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional . . . . "

Under the FDCPA, as originally proposed, debtors could recover a minimum statutory damage award of $100, with a maximum recovery of $1,000. Under this early version, no factors were set forth to guide the courts' discretion in determining the appropriate damages to be awarded. The proposal was amended to its present form because of congressional concern that the minimum award of $100 would encourage nuisance law suits by consumers.

The validity of the nuisance argument in the context of the FDCPA is questionable. The fear of nuisance suits grows out of experience under the Truth in Lending Act, where creditors were unable to keep abreast of complex and constantly changing regulations. In this situation debtors could, and did, initiate suits for minor technical violations of Regulation Z to recover the $100 minimum award. The FDCPA, however, is clearly distinguishable from the Truth in Lending Act because prohibited debt collection practices and limitations on collection procedure are expressly enumerated within the four corners of the


60. Id. § 813(b)(1).


62. Id.


64. E.g., Kasey v. Albin, 5 CONS. CRED. GUIDE (CCH) ¶ 98,709 (W.D. Ky. 1974) (use of term "time balance" rather than required term "total of payments" held to violate Regulation Z). In general, Regulation Z, 12 C.F.R. § 226 (1977), requires "that lenders state specifically and in uniform language what their charges are to lend money or credit in practically all consumer transactions of less than $25,000, and in all real estate transactions, regardless of the amount." Macey, Award of Attorney Fees as a Stimulant to Private Litigation Under the Truth In Lending Act, 27 Bus. LAW. 593, 594 (1972).
Therefore, it will be relatively easy for even a small collector to become familiar with the requirements of the FDCPA. Although some provisions of the FDCPA lend themselves to broad interpretation, debt collectors should still be protected from nuisance suits by the court’s power to award the defendant collector reasonable attorney’s fees when “an action . . . [is] brought in bad faith for the purpose of harassment.” For these reasons nuisance suits should not be a problem under the FDCPA, and a minimum damage award would be desirable as an additional incentive to encourage individual enforcement of the Act.

The final inducement for private enforcement of the FDCPA, as under the Truth in Lending Act, is that a successful plaintiff may collect “the costs of the action, together with a reasonable attorney’s fee as determined by the court.” Under the Truth in Lending Act the fees generally granted by the court after a successful individual action have proven to be inadequate to attract sufficient numbers of competent lawyers and the burden of providing counsel has fallen on a few public-spirited lawyers who are already overcommitted. Since the language of the two Acts is the same, it is doubtful that the fees awarded under the FDCPA will be enough to attract lawyers to bringing actions under the Act. Many actions brought by debtors, particularly in cases where the debtor complains of tactics not specifically set forth in the Act, will be lost unless the debtor can find an attorney willing to take the case who is conversant with the FDCPA. Moreover, it is unlikely that a debtor pro se or one with the aid of an unproficient or overburdened attorney will be able to meet the heavy burden of proof necessary to recover actual damages under the Act. Because the FDCPA will usually be violated when the collector seeks to recover on unpaid bills, indicating that the plaintiff debtor has no funds to pay counsel, it is unlikely that an attorney can expect more

65. See note 6 supra and accompanying text.

66. E.g., FDCPA, Pub. L. No. 95-109 § 806, 91 Stat. 874 (1977) (“A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person.”); id. § 807 (“A debt collector may not use any false, deceptive, or misleading representation or means.”); id. § 808 (“A debt collector may not use unfair or unconscionable means.”).

67. Id. § 813(a)(3).


70. For example, § 806 states: “A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt.” The section proceeds, “without limiting the general application of the foregoing,” to specify particular conduct in violation of the section. Since the language is not exhaustive, the attorney will have to delineate the scope of liability under this section.
than the statutory fee for his services. Thus, the fees awarded under the Act must be realistic or it will severely impair the private enforcement scheme.

Aside from problems of incentive, it has generally been found that individual actions have not been instrumental in ensuring compliance with the Truth in Lending Act as was originally hoped. Most debtors were not sufficiently familiar with the complex regulations under the Truth in Lending Act to know that they had not received full disclosure.\(^7\) However, a debtor's knowledge of the terms of the Act does not appear to be as crucial under the FDCPA as it is under the Truth in Lending Act. Debtors subjected to harassment or abuse by a debt collector will probably believe instinctively that their rights are being violated regardless of their knowledge of the FDCPA. Some of the conduct prohibited by the FDCPA, however, is defined technically.\(^7\) In these instances, as with the Truth in Lending Act, a debtor would have to be familiar with the FDCPA to be aware that the collector violated the Act.

Even though a harassed debtor may know his rights have been violated, he may not initiate an action if the recovery is insufficient to outweigh the costs in time and effort. Although individual actions under the FDCPA will probably be brought with greater frequency than individual tort actions because the incentives to sue are greater, still, the threat of individual actions may not be enough to encourage conformity with the Act. Under the Truth in Lending Act, individual actions have not proved significant in effecting compliance by creditors because they do not pose a sufficient threat to the financial well-being of the creditors. Defendants under the FDCPA are likely to be small operations,\(^7\) and individual actions may be a more effective threat to them. On the other hand, a debt collector's livelihood depends upon the efficient collection of debts. Those collectors who engage in abusive but efficient collection practices will be discouraged only if the recovery and litigation costs of private individual actions outweigh the amounts so collected. Thus, unless the magnitude of individual recoveries or the frequency of civil suits increases dramatically under the FDCPA, when viewed in light of experience under the Truth in

\(^7\) See Note, supra note 69, at 104.

\(^7\) For example, a debtor would have to be familiar with the FDCPA's prohibitions to know that a debt collector in his collection efforts can not employ "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company or organization." FDCPA, Pub. L. No. 95-109, § 807(14), 91 Stat. 874 (1977).

\(^7\) The average size of the more than 5,000 collection agencies across the country is 8 employees. S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977).
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Lending Act, individual actions will probably not cause collectors to modify their abusive and unfair debt collection techniques.

III. CLASS ACTION ENFORCEMENT UNDER THE FDCPA

A. The Truth in Lending Background

A FDCPA civil liability suit brought as a class action allows the representative plaintiff to recover the amount he would have recovered under an individual action and allows other class members to recover an amount determined by the court "without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector." The Act also sets forth factors to be considered by the court in determining the amount of a collector's liability in such an action. These guidelines (with one exception) and the ceiling imposed on class action recovery under the FDCPA are similar to the class action provisions of the Truth in Lending Act.

As originally enacted, the Truth in Lending Act contained no provision dealing with creditor liability in a class action. As in other lawsuits, however, the class action device was available if the requirements of Rule 23 were met. Courts, however, disfavored class suits based on violations of the Truth in Lending Act, and by April 1974, certification had been denied in 40 of the 51 reported decisions where the plaintiff sought to bring a class action. The typical rationale for denying class status in the Truth in Lending context was set forth in Ratner v. Chemical Bank New York Trust Co.


75. Id. § 813(b)(2). See note 16 supra.

76. In determining the award in a class action under the Truth in Lending Act, the court must consider the the amount of any actual damages awarded. 15 U.S.C. § 1640(a) (1976). This is not a factor in a FDCPA class action. Id.


78. The legislative history was also silent on this point. "[T]here is nothing in the Act itself, the rule, or the Notes of the Advisory Committee on the Rules of Civil Procedure with respect to it which expressly or impliedly precludes class actions in a Truth in Lending case." Wilcox v. Commerce Bank, 474 F.2d 336, 343 (10th Cir. 1973).

79. Although the Court of Appeals for the Ninth Circuit stated in December, 1973 that the "clear trend of authority" was that class actions were inappropriate in Truth in Lending actions, LaMar v. H&B Novelty & Loan Co., 489 F.2d 461, 467-68 n.17 (9th Cir. 1973), virtually every other court that denied class action status in a Truth in Lending case pointed out that nothing in the congressional history of the Act justified a conclusion that class actions were prohibited. E.g., Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1165 (7th Cir. 1974); Kristiansen v. John Mullins & Sons, 59 F.R.D. 99 (E.D.N.Y. 1973).


Ratner sought to initiate a class action to recover the $100 minimum statutory damages for each of 130,000 potential class members. Judge Frankel reasoned that the "broad open-ended terms" of Rule 23 "called for the exercise of some considerable discretion of a pragmatic nature" on the part of the judiciary. He agreed with the defendant that the proposed minimum recovery of $100 for each class member would be "a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act." Judge Frankel concluded that allowing a class action in the case was essentially inconsistent with the civil remedy specifically provided in the Act. He ruled, therefore, that the 23(b)(3) class action was not superior to the individual action for the fair and efficient adjudication of the controversy.

In order to eliminate this judicial barrier to certification, Congress amended the civil liability provision of the Truth in Lending Act to limit class action recovery. The legislative history of this amendment demonstrates that Congress intended the class action to be an effective deterrent against Truth in Lending violations and, consequently, an inducement to encourage compliance with the Act. Moreover, Congress recognized that if the ceiling on recovery was too low, it would discourage class suits, and Congress further amended the civil liability provision in 1976 by raising the ceiling from $100,000 to

82. Id. at 414.
83. Id. at 416.
84. Id.
85. Id.
86. Id. For a discussion of the "superiority" requirement in 23(b)(3) Truth in Lending and FDCPA class actions, see notes 153-167 infra and accompanying text. For further examples of cases where courts denied class certification based on fear of a debilitating recovery, see Alsup v. Montgomery Ward Co., 57 F.R.D. 89, 93 (N.D. Cal. 1972) (damage claims aggregating eight billion dollars); Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S.D. Fla. 1972) (damages sought in excess of one billion dollars); Rogers v. Coburn Fin. Corp., 34 F.R.D. 417, 419 (N.D. Ga. 1972) ("minimum total recovery would be in the neighborhood of $30,000, exclusive of costs and attorney fees. This could well put defendant out of business."); Wilcox v. Commerce Bank, 55 F.R.D. 134, 138 (D. Kan. 1972) (the potential recovery calculated to be at least $18,000,000 for each alleged violation of the Act).
$500,000. Although the amendments eliminated the concerns about potentially massive recovery voiced in the early decisions regarding class action certification, they could not alter the requirements of Rule 23 which must be satisfied before a class action can be certified.

The class action recovery provision of the FDCPA appears to be the result of experience under the Truth in Lending Act. Keeping this historical background in mind, the Note will now examine whether the class action provision will encourage debt collectors to comply with the provisions of the FDCPA, thus realizing the intent of Congress.

89. Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (1976). Still, Congress retained the provision which would limit recovery to 1% of the net worth of the creditor if that amount was less than $500,000. Id. Referring to the amendment, the Senate Committee stated:

The setting of any ceiling on class action liability is meant to limit the exposure of creditors to vast judgments whose size would depend on the number of members who happened to fall within the class. The risk of any ceiling on class action recoveries is that, if it is too low, it acts as a positive disincentive to the bringing of such actions and thus frustrates the enforcement policy for which class actions are recognized. Under the present Truth in Lending Act, where the class action ceiling is $100,000, several courts have noted the incompatibility of that ceiling with the effective use of the class action device.

The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device. The recommended $500,000 limit, coupled with the 1% formula, provides, we believe, a workable structure for private enforcement. Small businesses are protected by the 1% measure, while a potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor.


90. "The amendment represents a legislative response to those judicial decisions denying the availability of class actions in Truth in Lending cases. . . . [The] aggregate limitation on class action liability minimized the potential for the enormously large recoveries that lead to the denial of class action treatment." Postow v. Oriental Bldg. Ass'n, 390 F. Supp. 1130, 1140 (D.D.C. 1975). "Congress, in so amending the civil liability provision, recognized that courts were not certifying class actions and that there was a need to encourage voluntary creditor compliance via potential class liability." Agostine v. Sidcon Corp., 69 F.R.D. 437, 447 (E.D. Pa. 1974) (citation omitted).

91. "[A]lthough Congress may have intended not to foreclose the possibility of class actions for the statutory penalty, it cannot be said that such a class action is essential to the deterrent operation of the statute, and the court should not dilute the requirements of Rule 23 to permit it." McCoy v. Salem Mfg. Co., 74 F.R.D. 8, 11 (E.D. Mich. 1976) (quoting Weathersby v. Fireside Thrift Co., 22 FED. R. SERV. 2d 44, 48, 5 CONS. CRED. GUIDE (CCH) § 98,640, at 88,181–82 (N.D. Cal. 1975).

For a discussion of the additional problems created by the 1974 amendment, see notes 113–16 infra and accompanying text. See also Note, supra note 87, at 774; Note, Truth in Lending and the Federal Class Action, 22 VILL. L. REV. 418 (1977).

92. The legislative history of the 1974 amendment to the Truth in Lending Act indicates that class actions are important for encouraging compliance with that Act:

The [Federal Reserve] Board believes that potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosure. . . . [The threat of class action exposure] elevates a possible Truth in Lending lawsuit from the ineffec-
B.: The Prerequisites of Rule 23(a)

The basic purpose of the class action is to provide a mechanism to aid in the more efficient administration of justice by permitting a representative to sue where a large group of persons are interested in a matter. Rule 23 of the Federal Rules of Civil Procedure designates situations where class actions are appropriate. Clause (a) of Rule 23 lists four prerequisites which must be satisfied in order to bring a class action: "(1) the class is so numerous that joinder is impracticable [numerosity], (2) there are questions of law or fact common to the class [commonality], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality] and (4) the representative parties will fairly and adequately protect the interests of the class [fair and adequate representation]." While failure to satisfy these conditions relegates the representatives and members of the class to enforcement by means of individual actions, compliance does not mean that a class will be certified. The class must also fit within the provisions of Rule 23(b).

Courts have encountered few problems in finding that the requirements of numerosity, commonality, and typicality are satisfied in Truth in Lending class actions. Since the essence of a Truth in Lending suit is the creditor’s failure to accurately disclose finance charges in an understandable manner, it follows that where disclosures are made on standardized forms which are widely distributed claims will be numerous and, in most cases, identical between members. In addition to the numerosity and commonality requirements assured in cases involving widely distributed standardized forms, claims for statutory damages will also be uniform in cases where a standard finance charge has been used, thus permitting an easy apportionment...
of damages among the class members. The typicality and commonality requirements may be difficult to satisfy under the FDCPA. While Truth in Lending class action suits are likely to involve the use of standardized forms which violate the Act, under the FDCPA, a violator may use a variety of prohibited techniques against a large group of debtors, with variations in the manner and/or degree of abuse used.\textsuperscript{100}

Although a group of debtors seeking class action status may have suffered from a variety of collection abuses, the issue of whether questions of law or fact are common to the group should not be summarily dismissed. According to Professor Newburg:

Rule 23(a)(2) does not require that all questions of law or fact raised in the litigation be common. The test or standard for meeting the (a)(2) prerequisite is qualitative rather than quantitative—that is there need be only a single issue common to all members of the class. Therefore, this requirement is easily met in most cases. When the party opposing the class has engaged in \textit{some course of conduct that affects a group of persons} and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.\textsuperscript{101}

Thus, a representative plaintiff would argue that the general pattern of unfair collection practices used on all members of the proposed class constitutes a course of conduct sufficient to satisfy the commonality requirement of 23(a)(2). Since the Rule requires only a single common question of fact or law, the existence of other issues which concern only certain members of the class should not prevent a finding of commonality.\textsuperscript{102}

The typicality requirement assures that the class representative shares claims and defenses characteristic of those of the other class members. Thus, to some extent, it overlaps with the requirement that there be questions of fact or law common to the class. Because of this overlap, the typicality and commonality issues are often decided together.\textsuperscript{103} Mere factual differences between the treatment individual

\begin{itemize}
  \item 100. See note 24 \textit{supra} and accompanying text.
  \item 102. In Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo. 1971), a Truth in Lending class action, the court noted: "[M]inor variations which may exist among the members of the class do not outweigh the common issues of law and fact." \textit{Id.} at 318–19.
  \item The question of commonality recurs under 23(b)(3): "Questions of law or fact common to the members of a class [must] predominate over any questions affecting only individual members." \textit{See} notes 134–152 \textit{infra} and accompanying text.
  \item E.g., Butkus v. Chicken Unlimited Enterprises, Inc., 15 \textit{Fed. R. Serv.} 2d 1067,
class members and the representative received from a debt collector should not render that representative’s FDCPA claims or defenses atypical if they arose from the same practice or course of conduct which gave rise to the class claims. Although the typicality requirement is generally satisfied in Truth in Lending actions, class certification was denied when the representative plaintiff had dealt with only one of six defendants. In LaMar v. H & B Novelty & Loan Co., the court held that the representative’s claim was not typical of those against the other five defendants. Under the FDCPA, it can be expected that class status will be denied for lack of typicality if the representative initiates the action against a group of collectors who allegedly used prohibited tactics against members of the class when the representative was only contacted by some of the collectors.

Nonetheless, because typicality refers to the nature of the claim or defense of the class representative and not to the specific facts from which it arose or to the relief sought, factual differences between the treatment of individual class members that will arise in a FDCPA class action should not render the representative’s claim atypical if it arises from a general practice or course of conduct and is based on the same legal theory as the claims of the other class members.

The representative must also demonstrate that he can “fairly and adequately protect the interests of the class.” The factors a court should consider in making this decision are: first, whether the representative’s interests are compatible with the interests of the class members; second, whether the representative is able to adequately protect the interests of the absent class members. 

The typicality requirement is also closely aligned with the 23(a)(4) prerequisite which requires that “the representative parties fairly and adequately protect the interests of the class” members:

[T]he ultimate purpose of both [23(a)(3) and (a)(4)] is to protect absent class members. Subsection (a)(3) focuses on the consideration of whether the representative’s interests are truly aligned and consistent with the interests of the class members; subsection (a)(4) goes more to the subjective consideration of the legal ability of plaintiff’s counsel to represent the class as well as the adequacy of the individual representative himself to pursue a course of conduct beneficial to absent members.


104. See note 98 supra and accompanying text.

105. LaMar v. H&B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973).

106. Id.


108. FED. R. CIV. P. 23(a)(4).
members;\(^{109}\) second, whether the representative is willing to vigorously prosecute the action; \(^{110}\) and finally, whether the attorney selected by the representative party is competent. \(^{111}\) The issue of the attorney's competence does not turn on any feature unique to a consumer credit class action, and is to be determined by the court with a view toward the general welfare of the unnamed class members. \(^{112}\) The first two factors, however, have posed problems unique to the amended Truth in Lending Act because of the statutory ceiling on class recovery.

In situations where the statutory ceiling comes into play, the pro rata portion of the class award available to each class member will be less than the $100 he could have recovered in an individual action. If the representative plaintiff is willing to accept the smaller award, then his interests remain compatible with those of the other class members. \(^{113}\) Some class representatives have sought an award in the class action equal to their potential recovery if an individual action had been instituted. In *Weathersby v. Fireside Thrift Co.* \(^{114}\) the representative plaintiff and an intervenor proposed that the order certifying the class contain a provision assuring that the amount of their individual recovery would not be affected by the certification of the proposed class. \(^{115}\) The court concluded that this proposal was unsatisfactory because

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\ldots \text{the court would raise the possibility that it would award to plaintiffs money that would otherwise go to unnamed members of the class. Defendant properly argues that, under these circumstances, the court cannot conclude that plaintiff and intervenor "will fairly and adequately protect the interests of the class" as required by Rule 23(a)(4) } \ldots \]

This problem should not arise under the FDCPA. In a successful action under the FDCPA the plaintiffs can recover "such amount for each named plaintiff as could be recovered [in an individual action, and]


\(^{110}\) Id. at 633.

\(^{111}\) Id. at 632.

\(^{112}\) Id.

\(^{113}\) Chevalier v. Baird Savings Ass'n, 72 F.R.D. 140, 152–53 (E.D. Pa. 1976). This may create new problems. *Compare* Rollins v. Sears Roebuck & Co., 71 F.R.D. 540, 545 (E.D. La. 1976) (lesser recovery for the representative plaintiff "creates serious doubts whether plaintiff would be an adequate class representative because we cannot understand why plaintiff wishes to pursue this as a class action. On this ground alone we refuse to certify this suit as a class action without some adequate explanation for plaintiff's altruism.") with Sarafin v. Sears Roebuck & Co., 73 F.R.D. 585, 589 (N.D. Ill. 1977) ("Absent some evidence of impropriety (which is not present in this case), we do not require an explanation of plaintiffs' choice of a more effective deterrent to a creditor over greater personal gain for themselves.").

\(^{114}\) 22 Fed. R. Serv. 2d 44 (N.D. Cal. 1975).

\(^{115}\) Id. at 47.

\(^{116}\) Id.
such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector."\textsuperscript{117} This would appear to be a legislative response to judicial application of the requirements of Rule 23 to the Truth in Lending Act as observed in \textit{Weathersby}. Not only does this statutory provision relieve a fundamental antagonism between the interests of the named plaintiffs and the unnamed class members, thus allowing the named plaintiff to fairly and adequately represent them, it also provides an incentive for the plaintiff to initiate a FDCPA class action.\textsuperscript{118}

Although possible problems may arise in satisfying the 23(a) prerequisites of typicality and commonality under the FDCPA, it is still likely that these two requirements and the requirement of fair and adequate representation can be met. Assuming that a large group of debtors has been subjected to abusive debt collection practices so as to make joinder impractical and satisfy the numerosity prerequisite, the court must next address the issue whether the proposed class fits within the parameters of subdivision 23(b).\textsuperscript{119} If any one of the three categories of Rule 23(b) can be satisfied, then the plaintiff class will be certified.

\textbf{C. The Maintenance Requirements Under Rule 23(b)}

1. \textit{Rule 23(b)(1)}

A class action is maintainable under Rule 23(b)(1) when individual suits would create the risk of inconsistent results which would prejudice the party opposing the class or when adjudications with respect to


\textsuperscript{118} Aside from alleviating judicial barriers to the certification of class actions, the FDCPA places plaintiff's counsel in a more comfortable position than the attorney prosecuting a claim under the Truth in Lending Act. The Code of Professional Responsibility suggests that a lawyer exercise his professional judgment "solely for the benefit of his client and free of compromising influences and loyalties. . . ." ABA Code of Professional Responsibility, EC 5-1. Thus, if the named plaintiff's pro rata share of potential class recovery will be less than his recovery in an individual action, the attorney should recommend the individual action. However, the attorney may be tempted to recommend the class action route since attorney's fees resulting from a class action may be substantially greater than those from an individual action. The possibility of such professional misconduct has been cited as a reason why the Truth in Lending class action is not superior to other methods of adjudication. \textit{E.g.}, Buford v. American Fin. Co., 333 F. Supp. 1243, 1251 (N.D. Ga. 1971). Under the FDCPA, an attorney will not be placed in a position where he may be tempted to compromise his professional judgment because the plaintiff can recover identical amounts as representative in a class action or in an individual action.

\textsuperscript{119} For a general discussion of the three subdivisions of Rule 23(b), see \textit{Advisory Committee Note, supra} note 96, at 100-04; Note, \textit{Rule 23: Categories of Subsection (b)}, 10 B.C. IND. & COM. L. REV. 539 (1969).
individual members of the class would "as a practical matter" prejudice absent members of the class.\textsuperscript{120} Courts have not been receptive to requests for certification of Truth in Lending class actions under Rule 23(b)(1). In \textit{Ratner v. Chemical Bank New York Trust Co.},\textsuperscript{121} the court refused to allow a class to be maintained under Rule 23(b)(1)(A) explaining that "there is no suggestion that some perverse plaintiff might sue . . . to compel less disclosure than defendant is now supplying. The prospect of ‘varying adjudications’ is in a word imaginary."\textsuperscript{122} The court in \textit{Rodriguez v. Family Publications Service, Inc.}\textsuperscript{123} found Rule 23(b)(1)(A) inappropriate in a Truth in Lending action to establish a monetary judgment. Although the defendant might have to pay some class members and not others, this kind of incompatible conduct did not fall within (b)(1)(A). In \textit{Goldman v. First National Bank},\textsuperscript{124} the court found that (b)(1)(B) was not appropriate. For the same reasons as set forth in these Truth in Lending cases, it would seem that a FDCPA class action could not be maintained under Rule 23(b)(1).

2. \textit{Rule 23(b)(2)}

A class action cannot be premised on Rule 23(b)(2) where the relief sought is exclusively or predominantly money damages.\textsuperscript{125} Because subdivision 23(b)(2) is only to be applied in situations where injunctive or declaratory relief is the primary reason for bringing the action,\textsuperscript{126} courts in the Truth in Lending context have held the subdivision

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  \item \textsuperscript{120} \textit{Fed. R. Civ. P. 23(b)(1).}
  \item \textsuperscript{121} 54 F.R.D. 412 (S.D.N.Y. 1972).
  \item \textsuperscript{122} \textit{Id.} at 415 (footnote omitted).
  \item \textsuperscript{123} 57 F.R.D. 189 (C.D. Cal. 1972). The court in \textit{Rodriguez} also denied the plaintiff's contention that 23(b)(1)(B) applied:
    Contrary to plaintiff's contentions, the Advisory Committee's Note to clause (B), demonstrates that the clause was intended to apply to situations, not present here, where the members of the class each have rights in a common organization, fund or contract which ought to be adjudicated together in order to avoid unfair legal or practical advantage by one over another member of the class . . . . Application here of clause (B) would make meaningless the requirements set forth for an action under subdivision (b)(3) because any action meeting the prerequisites of Rule 23(a) would be a precedent in a later action involving similar questions. . . .

57 F.R.D. at 92-93 (citations omitted).

In \textit{Ratner}, Judge Frankel also rejected the plaintiff's attempt to maintain a class action under 23(b)(1)(B): "[C]lause (B) has even less plausibility for plaintiff's purposes. Nothing has happened or can happen in the foreseeable course of this lawsuit that could be 'dispositive of the interests of the other members not parties . . . or substantially impair or impede their ability to protect their interests. . . ."" 54 F.R.D. at 415 (footnote omitted).

\item \textsuperscript{124} 56 F.R.D. 587, 591 (N.D. Ill. 1972).
\item \textsuperscript{125} \textit{See generally Advisory Committee Note, supra} note 96, at 102 (1966).
\item \textsuperscript{126} \textit{Id.}
inappropriate when a monetary recovery is sought.\footnote{127}{E.g., Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99, 105 (E.D.N.Y. 1973); Alsup v. Montgomery Ward & Co., 57 F.R.D. 89, 92 (N.D. Cal. 1972); Eovaldi v. First Nat'l Bank, 57 F.R.D. 545, 547 (N.D. Ill. 1972); Shields v. Valley Nat'l Bank, 56 F.R.D. 448, 451 (D. Ariz. 1971).} Even when the representative has joined a demand for injunctive relief with a demand for the civil remedy, certification has been denied because the members were not seeking predominantly injunctive relief.\footnote{128}{Graybeal v. American Sav. & Loan, 59 F.R.D. 7 (D.D.C. 1973).} But, if a plaintiff elects to waive the civil remedy and seeks only to halt the practices violative of the Act, a Truth in Lending class action can be maintained under Rule 23(b)(2).\footnote{129}{Manning v. Princeton Consumer Discount Co., 390 F. Supp. 320, 324-25 (E.D. Pa. 1975).} In most Truth in Lending cases, however, damages are sought; the plaintiff must then look to subdivision (b)(3) to justify class action treatment.\footnote{130}{E.g., Goldman v. First Nat'l Bank, 56 F.R.D. 587, 592-93 (N.D. Ill. 1972). In this regard the \textit{Goldman} court stated: \begin{quote} Rule 23(b)(3) is concerned primarily with class actions where damages have been demanded. Thus, as a general rule, each member of a 23(b)(3) [class] has suffered an individual wrong and is entitled to recover individual damages. In the instant case, each member of the class would be entitled to recover a minimum amount of $100 damages if liability is found. Under Rule 23, each member of a Rule (b)(3) class is protected by special notice provisions, a right to opt out from the class within a reasonable time and a right to enter an individual appearance through counsel.

None of the rights given to members of a Rule 23 (b)(3) class are given to members of a Rule 23(b)(2) class. The reason for this is obvious. An injunction granted at the request of one or a few members of a class effectively precludes the defendant from engaging in the enjoined conduct as to others as well. Moreover, active participation of all class members as parties in an injunction proceeding is unnecessary.

Accordingly, this Court is of the opinion that where the predominant reason for instituting a suit is the recovery of damages, as is obviously the case here, a Rule 23(b)(2) class is not appropriate. \end{quote} Id. at 592-93 (citations omitted).}

It is unlikely that an argument for maintenance of a (b)(2) class action under the FDCPA would receive a different judicial response than similar proposals under the Truth in Lending Act. Although plaintiff may be subject to continuing harassment and have a sincere interest in halting the abuse, he is suing under a statutory provision that provides for money damages. So, even if the representative in a FDCPA action joins a demand for injunctive relief with a demand for the civil remedy, courts will probably deny certification under 23(b)(2) as has been done under the Truth in Lending Act.\footnote{131}{See note 128 supra and accompanying text.} While it is unlikely that FDCPA suits will be certified as class actions under Rule 23(b)(1) and (b)(2), FDCPA suits may still be able to meet the maintenance requirement of subdivision (b)(3).
3. **Rule 23(b)(3)**

Rule 23(b)(3) permits a class action to be maintained where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."\(^{132}\) As the Advisory Committee has explained:

In the situations to which this subdivision relates, class-action treatment is not as clearly called for as [under subdivisions (b)(1) and (b)(2)], but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.\(^{133}\)

The first of the two requirements,\(^{134}\) the predominance requirement, has usually been easily met in Truth in Lending cases. Since most Truth in Lending lawsuits involve disclosures made on printed forms and calculations made by computers or obtained from rate books, the questions of fact and law relating to the issue of liability will be, for the most part, identical for all persons with claims arising out of a similar transaction with the defendant.\(^{135}\) Since large scale violation of the FDCPA by a collector may involve a variety of prohibited practices, differing in kind and in degree,\(^{136}\) a representative for a FDCPA class action may encounter greater difficulty satisfying the predominance requirement than under the Truth in Lending Act.

Although a collector may have engaged in some course of conduct that affects a group of debtors so as to meet the Rule 23(a)(2) commonality prerequisite, this does not assure satisfaction of the predominance requirement.\(^{137}\) It has been suggested that if it appears likely that the

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132. FED. R. CIV. P. 23(b)(3).
133. Advisory Committee Note, supra note 96, at 102–03.
134. See note 132 supra.
135. See note 99 supra and accompanying text.
136. See note 24 supra and accompanying text.
137. The Advisory Committee has recognized that a common course of conduct may not be enough to satisfy the predominance requirement:

[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.

Advisory Committee Note, supra note 96, at 103 (citation omitted).
class action will splinter into individual trials to determine the defendant's liability with regard to each class member, then "common questions do not predominate, and a class action is inappropriate." In a typical FDCPA suit brought as a class action, if the class members allege they were victimized by a variety of illegal collection practices, it might be necessary for the court to examine independently each alleged incident of collection abuse. Since this result would hardly be conducive to achieving "economies of time, effort, and expense," a court would probably deny certification in such a case. Alternatively, the court could divide the class, pursuant to Rule 23(c)(4)(B), into subclasses comprised of debtors who claim they were subjected to the same unfair collection practice. This tactic, however, does not overcome the underlying difficulty of a FDCPA class action because in order for a class member to recover he must demonstrate by individual proof that he was the victim of a prohibited practice.

There may be cases in which the predominance requirement can be satisfied for purposes of maintaining a FDCPA class action under 23(b)(3) depending on the kind of evidence underlying the alleged violation. In *Polimeros v. National Account Systems*, a state class action based on tort law, the representative alleged that the defendant had willfully and maliciously sent a form letter to the class members' employers informing them of the members' indebtedness and requesting certain information concerning each class member. The court


139. See text accompanying note 133 supra.

140. In Rogers v. Coburn Fin. Corp., 53 F.R.D. 182 (N.D. Ga. 1971), reinstated, 54 F.R.D. 417 (1972), a Truth in Lending suit was denied class certification for lack of predominance. The court explained that no economy would be gained by a class action, since it would still be necessary for the court to examine several thousand disclosure statements to determine if each complied with the disclosure requirements imposed by the act. The court feared that the suit would "rapidly degenerate into multiple lawsuits separately tried, which is precisely what Rule 23(b)(3) prohibits." 53 F.R.D. at 183. On rehearing, the court held common questions of law and fact did predominate. However, the court denied class action treatment for lack of superiority. 54 F.R.D. at 418–19.

141. If subclasses are established by the court, a damage apportionment problem may arise. Rule 23(c)(4)(B) states that "each subclass [shall be] treated as a class, and the provisions of this rule shall then be construed and applied accordingly." If a subclass is to be treated as a class, the court must decide whether each subclass may receive a statutory class action damage award or whether the original class as a whole may receive one statutory damage award. If several small classes, originally one large class, were each granted relief in an amount equal to the maximum statutory damages, the collector could be subjected to the very liability which the statutory damage ceilings were intended to protect. This problem has not yet arisen in the Truth in Lending context. Comment, *Truth in Lending and the Federal Class Action*, 22 Vill. L. REV. 418, 429, 440–42 (1977).

certified the class pursuant to Ohio Rule 23(B)(3)\textsuperscript{143} because the members' claims of invasion of privacy, originating from the form letter, were identical. Therefore, in cases where the class members' claims arise from this kind of evidence—documentary evidence, readily produced, which permits the court to easily compare the claims of the individual class members, the predominance requirement should be satisfied.

Even though the source of the class claims is identical, if class members seek actual damages the common questions may not predominate over individual questions.\textsuperscript{144} The proof required to show actual damage (most often intangible mental or emotional injury) will be just as involved and time-consuming as if a separate tort action were brought by each class member. The principal purpose of Rule 23(b)(3) is to litigate at once many similar claims that would otherwise require numerous, repetitive individual suits.\textsuperscript{145} If a FDCPA class consists of one hundred members, each claiming actual damages, it is apparent that this objective would be frustrated. The predominance problem raised by actual damages, however, is not insurmountable. The trial court has broad discretion under Rule 23(c)(4)(A) to sever issues when appropriate. Thus, the court could certify a class to determine the FDCPA violation and hold separate hearings as to the actual damages sustained by each member.\textsuperscript{146} Moreover, unlike the Truth in Lending Act, the factors to be considered by a court in awarding civil penalty damages to a class under the FDCPA do not include the amount of

\textsuperscript{143.} Ohio Civ. Prac. R. 23(B)(3). The language of Ohio Rule 23(B)(3) is the same as Federal Rule 23(b)(3).

\textsuperscript{144.} Several Truth in Lending cases have alluded to this problem. E.g., Boggs v. Alto Trailer Sales, Inc., 511 F.2d 114 (5th Cir. 1975) (district court decision to sever issue of actual damages and liability remanded in part because of questions of predominance).

\textsuperscript{145.} Advisory Committee Note, supra note 96, at 102-03.


While the statute itself and the legislative history both suggest that Congress intended actual damages as a class action remedy for Truth in Lending Act violations, this Court is convinced that the actual damage claims of class members must be resolved on an individual basis. The "common issues of law or fact" which make a class action superior for resolving issues of liability are not present in the claims for actual damages. Since each plaintiff will have to show that damages were sustained as a result of the failure to properly disclose, i.e., that he or she would have gotten credit on more favorable terms but for the violation, the proofs will necessarily be different for each class member. Id. at 12 (footnote omitted). In certifying the class as to the issue of liability only, Judge Freeman concluded that: "[T]he determination of liability would then be res judicata in any action the class members desire to bring individually on the issue of actual damages." Id. at 13-14. In the context of the FDCPA it is reasonable to assume that courts will follow the approach set forth in McCoy since each FDCPA individual member will have to demonstrate that he sustained actual damages as a result of the violation.
actual damages to be awarded. A special master can later determine the actual damages sustained by the class members without affecting the court’s award.

Plaintiffs seeking certification of Truth in Lending class actions under Rule 23(b)(3) have also encountered difficulties when the defendant creditor asserts a counterclaim against one or more members of the class. The defendant’s counterclaim for the balance due on the debt should not prevent a FDCPA class from satisfying the predominance requirement. In the Truth in Lending cases the courts struggled to decide whether the defendant’s claim for the balance due on the debt was a compulsory or permissive counterclaim under Rule 13. If a compulsory counterclaim, it would have to be litigated with the Truth in Lending claim, thereby destroying the predominance of common issues. In a FDCPA class action, the debtors will not have received the credit or loan from the independent collector. The collector’s counterclaim, therefore, should be held permissive because it does not arise from the same transaction or occurrence as the unfair collection practices which are the subject of the plaintiff’s claim. Permissive counterclaims would not have to be litigated with the FDCPA liability issue and therefore common issues would predominate.

Finally, in order to obtain class certification the class representative must demonstrate "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In the Truth in Lending context, particularly in the early cases, the superiority requirement presented the greatest obstacle to class certifi-
Rule 23(b)(3) lists four factors for the court to consider in determining whether a class action is superior to other available methods:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The courts in FDCPA cases will probably be most concerned with the interest of individual class members in controlling their own litigation and the manageability of the suit as a class action.

Because the class action may in theory result in a smaller recovery for the class members than a series of individual suits, individuals may have a great interest in controlling their own lawsuit. It has been argued in the Truth in Lending context that the reduction in potential recovery must be considered an "undesirable result" that renders the class action inappropriate for lack of superiority. The problem is less acute in a class action under the FDCPA because there is no minimum statutory award in an individual action. While the FDCPA class members can never be assured in advance that they will receive awards equal or greater than the award they could expect in an individual action, it is likewise never certain they are receiving less. In a (b)(3) class action the court can effectively let the potential class members themselves determine their interest in controlling the prosecution of a separate action. When notice is given under Rule 23(c)(2) those concerned about the possibility of a smaller award can withdraw, and thereafter the court can assume the remaining class members are satisfied with a class action suit.

The manageability of the suit as a class action is another element
for the finding of superiority.\textsuperscript{158} Two considerations are likely to render a FDCPA class unmanageable: first, the difficulties in identifying class members and second, the costly notice provisions of clause (c)(2) of Rule 23. Under the Truth in Lending Act, these two factors have not proven to be major barriers to the manageability of class actions. Creditors must maintain records of credit transactions for two years;\textsuperscript{159} allowing potential class members to be easily identified within the one year statute of limitations.\textsuperscript{160} The FDCPA, however, does not require a debt collector to maintain records of his contacts with debtors. It will thus be difficult for a representative desiring to initiate a class action to identify potential class members who are victimized by prohibited debt collection practices. Identification will be relatively easy if the debt collector makes a record of the debtors contacted and the collection practices used. However, because collection practices vary in relation to individual debtors depending on such variables as whether the debtor is employed, has a phone, or lives with family or friends,\textsuperscript{161} and because it is unlikely that such records will be kept, class identification will require a great deal of time, money, and effort—the very items the rule seeks to economize.

If the problem of identifying class members is overcome, notice of the action must be sent to them pursuant to Rule 23(c)(2) to ensure that each class member is given the opportunity to withdraw from the class and thus avoid being bound by the action.\textsuperscript{162} Individual notice must be sent to each member of the class whose name and address can be ascertained through reasonable effort,\textsuperscript{163} and the representative plain-

\textsuperscript{158} One commentator has listed five factors that a court should consider in determining whether a Truth in Lending class is manageable: (1) the size of the class; (2) whether class members may be identified with ease or only after the expenditure of considerable time, effort, and money; (3) whether actual damages are recoverable by individual class members or whether recovery would be limited solely to the statutory civil remedy; (4) whether counterclaims against individual members of the class are present which may result in excluding them from the action (or in separate trials); and (5) whether only miniscule benefits would accrue to individuals in a class even from a very large dollar recovery in which the only benefits of the litigation would inure to the attorneys. Knepper, \textit{The Superiority Requirement of Rule 23(b)(3) in Class Actions Under The Truth in Lending Act}, 37 OHIO ST. L.J. 291, 302 (1976).

\textsuperscript{159} 12 C.F.R. § 226.6(f) (1977).


\textsuperscript{161} See note 21 \textit{supra} and accompanying text.

\textsuperscript{162} The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. \textit{Fed. R. Civ. P. 23(c)(2)}.

tiff must bear the cost of sending notice. In a Truth in Lending action the plaintiff may be able to take advantage of the defendant's regular billing schedule and thus avoid paying postage for notice to many class members. In a FDCPA class action, however, the representative will probably not have recourse to communication channels between the collector and debtor to convey notice of the action, and thus will have to bear the full cost of notice himself. And since the class representative is usually in default due to a lack of funds (and not because he is withholding payments to contest the validity of the debt), it is unlikely that he will be able to pay for notice to class members. Although the cost of notification can be recovered by the plaintiff if the suit is successful, the requirement that he initially meet this burden can be expected to reduce the number of FDCPA class actions.

Although courts will undoubtedly recognize that the threat of a class action under Rule 23 will have a potent deterrent effect on collectors who employ practices prohibited by the FDCPA; it is likely, in view of the judicial response to Truth in Lending class actions, that only a few special FDCPA classes will be certified. Generally, the nature of the substantive issues that will be raised by a FDCPA class claim, particularly the individual fact patterns which give rise to the class members' claims, will not be capable of satisfying the requirement that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Furthermore, even if the predominance requirement is satisfied, it is unlikely that an FDCPA class representative will be able to convince a court that the class suit is superior to individual actions due to the potentially higher recovery with private actions, and prob-

164. Id. at 177-79.
167. 53 F.R.D. at 546.
168. In the Truth in Lending context it has been found that the "threat of a class action has a potent deterrent effect. Eliminating that deterrent . . . would emasculate the enforcement provisions of the Act." Sarafin v. Sears Roebuck & Co., 73 F.R.D. 585, 588 (N.D. Ill. 1977). Since the provisions of the FDCPA parallel those of the Truth in Lending Act, it is reasonable to assume that the courts will find the FDCPA class action to be an important deterrent to violative conduct.
169. The special case in which an FDCPA class probably will be certified is where a collector utilizes a standardized collection procedure thus rendering questions of law and fact identical among class members, and where the problems of manageability can be overcome. See note 142 supra.
lems of manageability.171 Thus, even though it appears as though Congress desired to provide the FDCPA with provisions compatible with the class action device, in practice courts will probably find that the substantive provisions of the FDCPA and the procedural standards and tests of Rule 23 do not jibe, resulting in the denial of class certification. Without the potential for successful class actions under the FDCPA, its remedial and deterrent effect will be blunted.

IV. CONCLUSION

The FDCPA is limited not only in its application to independent debt collectors, but also in its power to curtail prohibited collection practices. While Congress intended that private remedial action be the primary vehicle for enforcement of the FDCPA, as it is under the Truth in Lending Act, it is unlikely that this goal will be realized. In the area of individual actions, the incentives to sue are inadequate due to the absence of any guaranteed minimum recovery. Therefore, individual recoveries will be too infrequent under the FDCPA to encourage compliance with its provisions. In the area of class actions, experience under the Truth in Lending Act suggests that class certification under the FDCPA will also be infrequent. Classes satisfying the prerequisites of Rule 23(a) will probably falter on the maintenance requirements of Rule 23(b)(3). Thus, while it appears that the FDCPA will provide relief to some debtors, relief otherwise unavailable under common law tort theories or existing state and federal legislation, it is unlikely that the private enforcement mechanism of the FDCPA will stop unfair debt collection practices. In this regard it has been suggested that Congress reconsider the limitation imposed on administrative power under the FDCPA, so that the purpose of the Act may be better realized.172

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171. See notes 153–67 supra and accompanying text.