IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

THOMAS D. DOMONOSKE, individually and on behalf of all those similarly situated,	)	
Plaintiff,	)	**Civil Action No. 5:08cv066**
v.	)	
BANK OF AMERICA, N.A., a national banking association,	)	
Defendant.	)	
---	)	
VICTOR RIVERA, individually and on behalf of all those similar situated,	)	
Plaintiff,	)	**Civil Action No. 5:09cv080**
v.	)	
BANK OF AMERICA, N.A., a national banking association,	)	
Defendant.	)	

REPORT AND RECOMMENDATION

This matter is before the court on the motion of plaintiffs Thomas D. Domonoske ("Domonoske") and Victor Rivera ("Rivera") for preliminary approval of a class action settlement of these consolidated actions against Bank of America, N.A. ("the Bank"). (Docket # 67.) The Bank has joined in plaintiffs' motion.

By Order dated October 2, 2009, the question of the appropriateness of class certification and all other matters necessary to insure compliance with Rule 23 of the Federal Rules of Civil Procedure were referred to the undersigned for proposed findings of fact and recommendations for disposition pursuant to 28 U.S.C. § 636.

Plaintiffs and the Bank have filed memoranda supporting certification of the class, detailing the class notice process and seeking approval of the proposed settlement. A hearing was conducted on these issues on November 18, 2009. The court requested certain additional information, which was supplied by December 18, 2009.

For the reasons set forth herein, the undersigned **RECOMMENDS** that the Motion to Certify a Class and for Preliminary Approval of the Class Settlement (Docket # 67) be **GRANTED in part** and **DENIED in part**. As detailed below, the undersigned has myriad concerns regarding whether this case should proceed as a class action. After careful review of the facts and the requirements of Rule 23, however, the undersigned is constrained to **RECOMMEND** preliminary class certification. Nevertheless, there are certain aspects of the proposed settlement that the undersigned cannot recommend. In particular, the undersigned does **NOT RECOMMEND** preliminary approval of the amounts paid to the class representatives, the proposed award of attorney's fees, and the injunctive relief provisions of the proposed settlement.

I.

In these consolidated actions, plaintiffs challenge the legal sufficiency of the notice provided by the Bank of its use of a consumer's credit score in certain residential real estate financing transactions. The Fair Credit Reporting Act ("FCRA") requires the Bank to send a disclosure concerning its "use" of a consumer's credit score "as soon as reasonably practicable." 15 U.S.C. § 1681g(g)(1)(A).[1] Simply put, the liability issue in this case is whether the Bank disclosed its use of a consumer's credit score fast enough.

[1] Section 1681g(g) was one of several amendments to the FCRA enacted in 2003 as part of the Fair and Accurate Credit Transactions Act ("FACTA").

The facts are relatively straightforward and undisputed. The Bank employed two software systems for the purposes of processing real estate loan applications, referred to as ACAPS and Legacy. Home equity loans and lines of credit were primarily processed through the ACAPS system. The remainder of the home equity and line of credit applications were processed through the Legacy system, along with mortgage loans. Domonoske applied for a home equity line of credit with the Bank, and his application was processed through the ACAPS system. Rivera applied for a mortgage loan, which was processed through the Legacy system.

ACAPS and Legacy provided credit score disclosures in different ways. ACAPS triggered the creation and mailing of a credit score disclosure within twenty-four hours of a decision on the loan application. Legacy disclosures were processed on a weekly basis.

As to the ACAPS system, Domonoske asserts that the Bank's processes were intentionally designed to withhold the notice until loan applications were concluded, and in his case, caused his disclosure to be withheld more than a month after the Bank used his credit score. As to Legacy, Rivera maintains that the Bank's processes were specifically designed to facilitate batch processing and bulk mailing, which under normal circumstances could result in a delay of between five and twelve days after use. Domonoske and Rivera contend that under both systems, the Bank had all the information necessary and the ability to send the notices sooner than it did, which they argue the law requires.

With the notice obligations of § 1681g(g) in mind, the Bank's position is that the language of the FCRA allowed for some "reasonable" flexibility in processing time, and did not impose a stringent time frame for the preparation and delivery of the credit score notice. Such a flexible standard provided large lenders with the ability to prepare and send notices in a commercially reasonable fashion that accounted for the convenient and efficient delivery of these notices. Accordingly, the Bank determined to allow some time between the receipt of an application and the triggering of the credit score disclosure to improve its practical ability to provide the required information. A short delay (seven days on Legacy and an average of five days on ACAPS) allowed the Bank to ensure that it had, in fact, pulled a credit score for the borrower, address any inaccuracies in the application information, and follow up on any fraud alerts. Once a notice was triggered, it was printed and mailed by either a separate mail processing facility or a third-party vendor. During the class period, the Bank processed 2.2 million transactions involving 3.5 million persons.

The Bank asserts that these disclosure protocols were established after an enormous compliance effort, including consultation with legal counsel to determine whether the protocols complied with § 1681g(g), including the "as soon as reasonably practicable" standard. The Bank was prepared to present evidence that its legal counsel specifically determined that the Bank's credit score disclosure protocols were fully compliant with § 1681g(g).

The FCRA provides that "[i]f a violation is negligent, the affected consumer is entitled to actual damages. If willful, however, the consumer may have actual damages, or statutory damages ranging from $100 to $1,000, and even punitive damages." Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 53 (2007) (internal citations omitted) (citing 15 U.S.C. §§ 1681n and 1681o).

Punitive damages may be recovered as the court allows. Costs and reasonable attorney's fees as determined by the court are recoverable "in the case of any successful action to enforce any liability under this section." 15 U.S.C. § 1681n(a)(3).

Neither Domonoske nor Rivera has any evidence of actual damages. Thus, the issue in this case, and the risk to the Bank, is a finding of a willful violation giving rise to gigantic statutory damages on a class-wide basis, ranging from $350 million to $3.5 billion. As the

Bank's memorandum notes, however, the standard for finding a willful violation of the FCRA is "quite high." Under the Supreme Court's Safeco decision, a willful violation of the FCRA encompasses both knowing and reckless disregard for the law. In addressing reckless disregard, the Court noted that "[w]hile 'the term recklessness is not self-defining,' the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" Safeco, 551 U.S. at 68 (quoting Farmer v. Brennan, 511 U.S. 825, 836 (1994)). The Safeco Court concluded:

> Thus, a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

551 U.S. at 69. In short, a willful violation of the FCRA requires proof of a knowing violation or conduct that was objectively unreasonable as a matter of law.

The FCRA does not define what it means for a lender to "use" a credit score, nor does it place any definitive parameters on the phrase "as soon as reasonably practicable." Nor has any agency put any regulatory gloss on these terms.

There is no dispute that the Bank was guided by the opinions of legal counsel as to the requirements of §1681g(g), and that it undertook substantial time and effort in designing and implementing the ACAPS and Legacy notification protocols. The Bank's memorandum joining the motion for approval of the class settlement recited the following:

> As demonstrated through the Bank representative depositions and thousands of pages of documents produced to plaintiffs, Bank of America mobilized a multimillion-dollar effort to ensure compliance with FACTA. Indeed, the entire effort was subjected to the Bank's "Six Sigma" management process, the most rigorous methodology

> used to implement wide-scale change within the Bank. A core team was formed, with representation from groups including legal, compliance, fulfillment (individuals responsible for processing applications to completion), and technology. All of this was true with respect to the Bank's efforts to determine the compliance requirements FACTA imposed under section 1681g(g) in particular. Throughout its extensive consideration of the protocols necessary to comply with FACTA's credit score disclosure obligations, and its subsequent testing and streamlining of those protocols, the Bank continually involved both in-house and outside counsel, including to approve of the protocols as compliant with, among other things, the "as soon as reasonably practicable" standard.

Joinder to Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Docket # 75), at 4-5.

In Safeco, the Court noted the argument that good faith reliance on legal advice would render a company immune from a willful violation of the FCRA, but declined to address that argument, stating that "[w]hile we do not foreclose this possibility, we need not address the issue here in light of our present holdings." 551 U.S. at 70 n.20.

II.

The Rivera case was filed in the Eastern District of Virginia on May 28, 2008. Bank of America filed a Motion to Dismiss on statute of limitations grounds, which Rivera opposed. A Protective Order was entered and a limited amount of discovery taken.

The Domonoske case was filed in the Western District of Virginia on August 8, 2008.[2] The parties represent that they "have engaged in extensive written and documentary discovery since the inception of the Actions. Bank of America provided thousands of pages of documents to plaintiffs. Plaintiffs deposed Bank of America representatives, and the Bank deposed Mr.

[2] Domonoske is a member of the Virginia State Bar practicing in Harrisonburg in the area of consumer law. Rivera is not a lawyer.

Domonoske." Joinder to Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Docket # 75), at 3. Given the amounts at stake in this case, however, it is difficult to characterize the discovery taken as being extensive. Instead, it appears to have been rather limited, involving only the production "of almost 10,000 pages of documents, the deposition of April Stoner, a subpoena to a third party vendor of Bank of America, the deposition of Mr. Domonoske, and the deposition of Bank of America through its Rule 30(b)(6) designee, Marty Smith." Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement (Docket # 68), at 8. Indeed, on March 20, 2009, a mere seven months after filing the Domonske suit, the parties filed a Stipulation and Request to Stay Action Pending Mediation (Docket # 46). That document recited that "the parties have now conducted discovery which has informed their positions and both believe that the time is appropriate to explore a possible resolution of this action." Id. at 1. The parties proceeded to mediation before Edward A. Infante, a retired Magistrate Judge of the United States District Court for the Northern District of California. The mediation consisted of two in-person mediation sessions in San Francisco, the first of which was held on April 29, 2009, with subsequent follow-up telephone discussions with the mediator and "countless discussions between counsel. Ultimately, based on the progress made before the mediator, the parties were able to conclude their negotiations in the private sessions." Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Docket # 68), at 8.

On May 29, 2009, Rivera filed his own Motion to Dismiss the case, referencing the pending mediation in the Domonoske case. On October 1, 2009, the parties to the Rivera case filed a Stipulation for Transfer to the Western District of Virginia, citing the global settlement reached to resolve both cases.

Plaintiffs' Motion for Approval of the Class Action Settlement was filed on September 30, 2009. All of the parties move for preliminary approval of the proposed settlement, including the Bank, which expressly represents the following: "Bank of America believes the proposed settlement of these actions is fair, reasonable, and adequate." Joinder to Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Docket # 75), at 7.

The proposed settlement contains the following salient provisions:

- The proposed class will include two subclasses, defined as follows:
    - ACAPS Class – all natural persons who applied to the Bank for a loan subject to § 1681g(g) whose loan application was processed on the ACAPS platform between August 8, 2006 and September 12, 2008 where the credit score disclosure was triggered more than three days after receipt of the application.
    - Legacy Bank of America Class – all natural persons who applied to the Bank for a loan subject to § 1681g(g) whose loan application was processed and booked on the Legacy platforms between May 28, 2006 and July 11, 2009.[3]

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[3] The parties justify the start and end dates for the class periods as follows: "The separate start dates for the respective platforms reflect the two-year anniversary from the filing date of the Domonoske and Rivera actions, respectively. The separate end dates reflect the day before Bank of America changed the respective platforms to trigger the provision of credit score disclosures under 15 U.S.C. § 1681g(g) three business days from receipt of a loan application." Bank of America, N.A.'s Supplemental Submission Regarding Class Periods (Docket # 84), at 2. The two year period was chosen because the statute of limitations for any violation of the FCRA is the earlier of two years from the date the plaintiff discovers the violation or five years from the date of the violation. 15 U.S.C. § 1681p.

- The Bank will pay to the class a gross settlement fund of $9.95 million, plus costs of administration.
- The net class recovery will be paid on a per loan transaction basis, and each class member will be entitled to share in the recovery for each loan transaction in which the Bank used a credit score.
- Class members will receive their proportionate share of the claims fund up to a maximum of $100.00. The amount each class member receives is dependent upon the number of claims received.
- Domonoske and Rivera, the Class Representatives, will each receive an incentive award of $5,000.00, plus reimbursement of expenses incurred on behalf of the class. Counsel represent that the September 30, 2009 Settlement Agreement is the entire agreement and that there are no other agreements proposed or reached between the parties.
- Plaintiffs' counsel propose to receive, and the Bank agrees not to oppose, a fee of up to 25% of the first $9.4 million of the class recovery, to a maximum of $2.35 million.
- Rust Consulting will serve as class action Claims Administrator and will handle all notices and disbursements. The Bank will undertake various efforts ensure the accuracy of the class list. Class counsel will establish a website for the purpose of providing the notice and accepting the claims, which may be done online.
- The balance of the settlement fund not paid to class members or plaintiffs' counsel will be disbursed to the Center for Responsible Lending for use in programs of its choosing, to assist Bank of America consumers faced with

foreclosure or seeking housing following a foreclosure, so long as they are not used for litigation.

- Class members will only release legal claims arising from the violations of § 1681g(g) or comparable state law.
- Class members will be notified of their ability to opt out of the class settlement and be given clear instructions how to do so. The Bank may withdraw from the settlement if more than 5% of the class members opt out.
- The Bank agrees to the entry of an injunction requiring it to trigger credit score disclosures for any real estate secured loan transaction subject to § 1681g(g) within three days and to mail such disclosures within four days of the receipt of an application.
- The proposed injunction provides that such notice "shall be deemed to be in compliance with the FCRA, and Bank of America shall not be subject to further liability for such conduct." Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Docket # 68), Exhibit D to Settlement Agreement (Exhibit A), at 2.

III.

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action may be settled only with court approval. There are a number of important benefits served by allowing claims to proceed as a class action. "Class certification enables courts to treat common claims together, obviating the need for repeated adjudications of the same issues." In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 783 (3d Cir. 1995) (citing 1 Herbert Newberg & Alba Conte, Newberg on Class Actions § 1.06 (3d ed. 1992) and General

Tel. Co. v. Falcon, 457 U.S. 147, 149 (1982)). In addition to efficiency, there are other important objectives served by class actions. Class actions achieve "the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980). Likewise, "the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." In re GM Pick-Up Truck Fuel Tank, 55 F.3d at 784.

A countervailing consideration raised in class actions is the fact that most class members are absent, yet their interests must be protected. The court has an important role to play in protecting the interests of absent class members. The In re GM Pick-Up Truck Fuel Tank court identified another area of concern for courts dealing with class actions:

> Another problem is that class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth. Because absentees are not parties to the action in any real sense, and probably would not have brought their claims individually, attorneys or plaintiffs can abuse the suit nominally brought in the absentees' names. As one court has noted, "[t]his fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems. . . ."

55 F.3d at 784-85 (internal citations omitted) (quoting Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co., 834 F.2d 677, 678 (7th Cir. 1987)).

Accordingly, a court considering proposed class action settlements is required by Rule 23(e) to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished." 2 Newberg & Conte, supra, § 11.41 at 11-88 to 11-89. The Manual for Complex Litigation devotes substantial attention to the preliminary approval of class action settlements. Manual for Complex Litigation (Fourth) §§ 21.132, 21.632 (2004). As the Manual for Complex Litigation indicates, the "judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." Id. § 21.632. The Supreme Court has held that while "[s]ettlement is relevant to a class certification," Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619 (1997), certification of a class for settlement purposes still requires that the provisions of Rule 23 be met.[4] Id. at 619-22.

A.

Rule 23(a) contains four requirements for proceeding as a class action: numerosity, commonality, typicality, and adequacy of representation. As the Supreme Court has said, the final three requirements of Rule 23(a) "tend to merge," with commonality and typicality "serv[ing] as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982); see Brown v. Nucor Corp., 576 F.3d 149, 152 (4th Cir. 2009); Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 337 (4th Cir. 1998).

[4] In Anchem, the Court granted review to decide the role settlement plays in determining the propriety of class certification pursuant to the requirements set forth in Rule 23. 521 U.S. at 619. The Court acknowledged the circuit split over the question of whether settlement obviates the need to measure a proposed class against the Rule 23 requirements. Id. at 618-19. It held, "[t]he safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments – checks shorn of utility – in the settlement-class context." Id. at 621.

1. Numerosity.

As to numerosity, Rule 23(a)(1) requires that the class "be so numerous that joinder of all members is impracticable." In determining whether the proposed class and subclass contains a sufficient number of members, the court is permitted to "make common sense assumptions in order to find support for numerosity." Abbott v. Lockheed Martin Corp., No. 06-cv-0701, 2009 WL 969713, at *4 (S.D. Ill. Apr. 3, 2009) (quoting Cannon v. Nationwide Acceptance Corp., No. 96C113, 1997 WL 139472, at *2 (N.D. Ill. Marc. 25, 1997)). Plaintiffs assert that the class consists of approximately 3.5 million individuals involved in 2.2 million transactions. The parties claim that it is an open question whether the class should be organized on a per transaction or per individual basis. Regardless, the numbers are sufficiently large such that the numerosity inquiry is easily met. Cf. Williams v. Henderson, 129 F. App'x 806, 811 (4th Cir. 2005) (finding 8 class members insufficient to support a class action and citing 7A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure § 1762 (2d ed. 1986), for the proposition that while no bright-line rule exists, many courts require class actions to include more than thirty members).

2. Commonality.

To satisfy the commonality requirement, plaintiffs must demonstrate that there are questions of law or fact common to the entire class. Fed. R. Civ. P. 23(a)(2). "The typicality and commonality requirements of the Federal Rules ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class." Broussard, 155 F.3d at 340 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997)). In general terms, "[t]he threshold requirements of commonality and typicality are not high." Brown, 576 F.3d at 153 (quoting Shipes v. Trinity Industries, 987 F.2d 311, 316

(5th Cir. 1993)). Further, "it is not necessary that all questions of law and fact be common." In re Theragenics Corp. Sec. Litig., 205 F.R.D. 687, 694 (N.D. Ga. 2002). Instead, "[t]ypicality, along with the related requirement of commonality, focuses on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification." Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1346 (11th Cir. 2001). "Certification is only concerned with the commonality (not the apparent merit) of the claims and the existence of a sufficiently numerous group of persons who may assert those claims. . . ." Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 332-33 (4th Cir. 1983).

The Manual for Complex Litigation provides that "[i]dentifying common questions typically requires examining the parties' claims and defenses, identifying the type of proof the parties expect to present, and deciding the extent to which there is a need for individual, as opposed to common, proof." Manual for Complex Litigation, supra, § 21.141. The issue in this case is whether the Bank's method for notifying customers that it had requested, obtained, and used a credit score from a credit reporting agency was "as soon as reasonably practicable." The Bank asserts that the average processing time was in the 5 to 7 day range, but others could take longer or shorter periods. Joinder to Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Docket # 75), at 6. On brief, Domonoske asserts "[i]n most cases those notices were delivered within 14 days of their use by Bank of America," Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Docket # 68), at 21, although his notice was not provided for more than 30 days.

On the one hand, this case involves a common question of statutory interpretation – what period is reasonably practicable for the provision of notice under § 1681g(g) – arguing for a finding of commonality as to a question of law. As to the core factual issues in this case, however, commonality is a much closer question.

The concern over factual commonality arises out of the spotty evidence presented as to the notification delay experienced by the loan applicants. Domonoske claims to have received his notice more than thirty days after his application. Rivera contends that he never received notice.[5] The Bank presents only average figures as to notification, asserting notices were provided between 5 to 7 days from the time of the application. Plaintiffs counter that the notices generally were received within 14 days. Applying the concept of commonality relatively loosely, the Bank arguably treated the proposed class members in the same way by applying the ACAPS and Legacy protocols to the loan applications, resulting in, on average, delayed notification of the use of a credit score beyond five days. To this extent, the class members share common facts.

However, given the fact that liability only exists for an unreasonable delay of the required notification, the court has concerns about whether lumping all loan applicants together without regard to the actual notification delays they experienced is sufficient to establish commonality as to the facts of this case. One could argue that a person receiving notice that his credit score had been used by the Bank within 5 to 7 days of his application does not share a

[5] Rivera's complaint does not allege when he received notice that the Bank had used his credit score. In a supplemental submission requested by the Court, Rivera claims never to have received a credit score disclosure. Rivera applied for a home loan with the Bank through a mortgage broker on April 18, 2006, and his loan closed on May 2, 2006. The Bank contends that his mortgage broker provided him with the FCRA-prescribed written credit score disclosure at the outset of the application process, and the Bank provided notice per its then-existing Legacy electronic sweep protocol. Although the Bank has not retained individual disclosures, it indicates that Rivera's disclosure would have been mailed by a third party vendor by May 3, 2006. Bank of America, N.A.'s Supplemental Submission Regarding The Timing of Credit Score Disclosures to Plaintiffs (Docket # 87), at 7.

common issue of fact with a person whose notice was delayed 14, or even 30, days after the loan application. Cf. Perry v. FleetBoston Financial Corp., 229 F.R.D. 105, 112 (E.D. Pa. 2005) (finding commonality requirement had been satisfied in FCRA case where class members were treated in standardized fashion, noting "there seems to be no question that Fleet's conduct toward the individual class members was uniform").

The scant evidence as to the delays experienced by the loan applicants gives the undersigned some concern as to commonality. At the same time, this case involves a common question of statutory interpretation: what period is reasonably practicable for the provision of notice under § 1681g(g). Given the low threshold for establishing commonality, the undersigned finds at this preliminary stage that the commonality requirement set forth in Rule 23(a)(2) has been met.

3. Typicality.

"The typicality inquiry centers on whether the interests of the named plaintiffs align with the interests of the absent members." Stewart v. Abraham, 275 F.3d 220, 227 (3d Cir. 2001). Various courts have held that "a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." Piazza, 273 F.3d at 1351 (quoting Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279 n.14 (11th Cir. 2000)); see Stewart, 275 F.3d at 227; Barel v. Bank of Am., 255 F.R.D. 393, 398 (E.D. Pa. 2009); Campos v. ChoicePoint, Inc., 237 F.R.D. 478, 486 (N.D. Ga. 2006).

As with the issue of commonality, the claims asserted by Rivera and Domonoske typify the rough outlines of the legal theory, i.e., the Bank provided notice too late. But given the fact that the legal issue is whether the notice provided was reasonable, are the delays experienced by Domonoske and Rivera typical of the proposed class?

Domonoske's credit score disclosure was very slow in coming. Indeed, it arrived many weeks after the averages asserted by the Bank. In response to the court's request, the Bank provided details regarding the processing of Domonoske's two loan applications. The facts surrounding Domonoske's claim, as set forth below, are far from typical:

> Mr. Domonoske first applied for an increase to his existing home equity line of credit ("HELOC") on October 4, 2007. That transaction was at least arguably outside of the parameters of the Fair Credit Reporting Act's ("FCRA") credit score disclosure requirement, which, in relevant part, applies to applications for "the establishment of an open end loan," rather than applications to expand pre-existing open-end loans. 15 U.S.C. § 1681g(g). Likely for that reason, Mr. Domonoske's arguments about the timeliness of his disclosure run from his subsequent application for a new HELOC from the Bank on November 2, 2007. That transaction took an unusually long time to close. Consistent with the protocol in place at the time, Mr. Domonoske's credit score disclosure was triggered for mailing at the time of his closing on December 12, 2007. A rare processing glitch then postponed the actual mailing of the disclosure until December 18, 2007.
>
> Mr. Domonoske entered a Harrisonburg branch of Bank of America on October 4, 2007, to request an increase to his existing HELOC. <u>Immediately after contacting Bank of America about increasing his home equity line, Mr. Domonoske purchased his credit score from Experian – one of the three major credit bureaus – for $6, and engaged counsel to advise him about the Bank's credit score disclosure obligations under the FCRA.</u> On October 5, 2007, Experian provided Mr. Domonoske with a copy of his credit report and credit score. According to Mr. Domonoske, in the course of numerous calls he thereafter made to the Bank, he came to understand that it was the Bank's practice at the time to provide his written credit score disclosure either at or after the closing of the loan transaction. In late October 2007, during one of Mr. Domonoske's telephone conversations with Bank of America representatives, Mr. Domonoske was informed of his FICO score that the Bank was using to process his application.
>
> On November 2, 2007, after his request for a line increase had been processed and was nearly ready for closing, Mr. Domonoske decided to apply for a new home equity line, which called for the start of a new application. In the ordinary course, an application for

a home equity line under $500,000, such as Mr. Domonoske's, required only an automatic, computerized valuation. But, starting with his October 4 application and continuing after his November 2 application, Mr. Domonoske requested multiple re-evaluations, which the Bank undertook, including time-consuming "drive-by" and "walk-through" appraisals, consideration of comparable residential values, and subsequent assessments and reconsiderations. Each of these valuations required additional time (and was done at the Bank's expense).

> Mr. Domonoske's HELOC transaction ultimately closed on Wednesday, December 12, 2007. Per the Bank's then-existing protocol, his credit score disclosure was automatically triggered for processing the same day as his closing. Approximately 99% of the time, it takes two days to drop the disclosure letter in the mail once triggered (in Mr. Domonoske's transaction, that would have been Friday, December 14). Unfortunately, there was a glitch with Mr. Domonoske's envelope, due to either a faulty bar code or other printing error, which caused it to be rejected by the automated mail processing system. As a result, his disclosure was sent overnight to a third party vendor for special processing. With the intervening weekend, this meant Mr. Domonoske's disclosure was processed for mailing the following Monday, December 17, and mailed Tuesday, December 18, 2007.

Bank of America, N.A.'s Supplemental Submission Regarding the Timing of Credit Score Disclosures to Plaintiffs (Docket # 87), at 2-6 (emphasis added) (internal citations omitted).

On the question of whether this long period was reasonable, it is difficult to see how Domonoske's series of transactions with the Bank are typical of the claims of other class members who may have received delayed notice of the use of their credit scores. The undersigned has additional concerns about whether Domonoske is a typical class member based on details of the circumstances surrounding his dealings with the Bank, as set forth in a memorandum supporting a motion to compel Rule 30(b)(6) depositions filed on February 25, 2009:

> Bank of America used Mr. Domonoskes' [sic] credit score on two separate occasions in the year preceding suit. Bank of America

> sent a single notice, but only after Mr. Domonoske had unsuccessfully requested this notice from a number of Bank of America agents. As part of his efforts to understand why Bank of America had failed to provide him with timely notice, Mr. Domonoske directed an email to the office of Timothy Mayopoulos who was identified as General Counsel for Bank of America. Mr. Mayopoulos, did not respond. Instead, a paralegal from the office of the General Counsel – Ms. April Stoner – responded and indicated that she had been assigned the task of addressing Mr. Domonoske's concerns. Ultimately, Ms. Stoner wrote to Mr. Domonoske that Bank of America's policy was to send the required notice to persons who had been approved for a loan only after closing.

Plaintiff's Memorandum In Support of Motion to Compel Deposition of Agents of Bank of America, N.A. (Docket # 24), at 2. How can Domonoske be considered a typical class member when, at the outset of this matter, he retained counsel regarding the Bank's obligations to provide notice under the FCRA and communicated with the General Counsel of the Bank about the timing of the credit score notice? Rather than reflecting a typical consumer loan transaction, such conduct suggests that Domonoske was pursuing a litigation strategy from the outset of his dealings with the Bank. These facts give the undersigned some pause as to the issue of typicality.

Rivera, on the other hand, appears to present a typical class claim. Unlike Domonoske, Rivera was an ordinary consumer who, through a mortgage broker, entered into a typical home loan transaction with the Bank and claims never to have received notice of the use of his credit score in connection with his loan application. Bank of America, N.A.'s Supplemental Submission Regarding the Timing of Credit Score Disclosures to Plaintiffs (Docket # 87), at 6. The Bank refutes Rivera's claim that he never received notice, contending that he received notice from both his mortgage broker at the time of his application and from the Bank pursuant to its Legacy seven day electronic sweep protocol. There is a factual dispute as to the timing of any notice provided to Rivera, and his claims as to any notification delay are typical of the class at large.

Despite concerns about the typicality of Domonoske's peculiar circumstances, the undersigned finds plaintiffs' representations as to typicality sufficient to meet the requirement of Rule 23(a)(3). Plaintiffs' FCRA claims are based on the same legal theory and arise out of the same course of conduct alleged by other members of the proposed class, namely that the Bank provided notice of use of their credit scores too late. See Anderson v. Capital One Bank, 224 F.R.D. 444, 451 (W.D. Wisc. 2004) ("A named plaintiff's claim is typical if it is based on the same legal theory and arises from the same course of conduct alleged by other members of the proposed class, even though there are factual differences between the named plaintiff's claim and the claims of other class members." (citations omitted)). Given that the threshold requirements for typicality, like commonality, are not high, Brown v. Nucor, 576 F.3d 149, 153 (4th Cir. 2009), the undersigned finds that the requirements have been met for preliminary certification in this case.

4. Adequacy of Representation.

The final Rule 23(a) requirement, adequacy of representation, appears on its face to be met. Adequacy of representation analysis "serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 594 (1997). Class counsel are qualified and experienced, and by all accounts, the class representatives are interested in prosecuting the action vigorously. There appears to be no issue as to adequacy of representation.

Therefore, at this preliminary stage of the proceedings, the undersigned finds that the four requirements of Rule 23(a) have been satisfied.

B.

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2) or (3)." Amchem, 521 U.S. at 614. Plaintiffs assert that Rule 23(b)(3) is met in this case. Federal Rule of Civil Procedure 23(b)(3) requires that "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

1. Predominance.

Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem, 521 U.S. at 623. Although similar to commonality, the predominance requirement is much more stringent. Ward v. Dixie Nat'l Life Ins. Co., 257 F. App'x 620, 628 (4th Cir. 2007) (quoting Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 319 (4th Cir. 2005)), cert. denied, 129 S.Ct. 82 (2008); see Amchem, 521 U.S. at 623 n.18.

The problem in assessing predominance in this case is that the evidence as to the delay experienced by the loan applicants is so sketchy. Because the standard for establishing liability necessarily involves an assessment of reasonableness, there can be significant differences in findings of liability based on relative periods of delay for certain applicants. All that has been presented by plaintiffs is Domonoske's history of a greater than 30 day delay, and the Bank provides only average figures. The court is completely in the dark as to whether there were large numbers of persons having relatively small delays and a few outliers like Domonoske that skewed the average, or whether most of the applicants experienced the same relative delay. Indeed, some class members may have received notification within three days, a period of time that is arguably reasonable. Others, however, may not have received notice for fourteen or more days. A case could be made that this longer period is not reasonable. In other words, because the parties lump together all loan applicants, without regard to the actual notification delays they experienced, and because liability only exists for an unreasonable delay, it is difficult for the court to know whether common issues of fact and law predominate over issues affecting individuals.

The issue of damages also raises predominance concerns. Unless a willful finding is made, a violation of § 1681g(g) requires proof of actual damages. No such damage evidence has been presented to the court for consideration. Indeed, neither Domonoske nor Rivera sustained any actual damages. Domonoske obtained his own credit score at the same time he made his loan application, and, as such, can prove no damages from the Bank's delay in providing him a credit score disclosure notice. Plaintiffs stipulate that Rivera has no actual damages. Moreover, no evidence has been presented as to any actual damages sustained by potential class members other than the $6 cost of obtaining one's own credit score. For example, there has been no evidence to show how many of the 2.2 million loan applications were rejected or the terms of their loans affected because the Bank did not provide the credit score disclosure quicker. Simply put, there is scant evidence of actual damages in this case.

Nor has there been any showing of willfulness. The court in Anderson v. Capital One Bank, 224 F.R.D. 444 (W.D. Wis. 2004), recognized such a predominance obstacle to the certification of a proposed FCRA claim. There the court observed:

> At this stage of the proceedings, plaintiffs have not advanced any reasons why defendant might be found to have acted wilfully, other than to allege that defendant wanted to protect and foster its relationship with the consumer reporting agencies. It is a toss up at this point whether plaintiffs can make a showing of wilfulness. If they cannot, each and every class member will be required to prove actual damages in order to recover any amount from defendant.

Id. at 452. In another FCRA case, Summerfield v. Equifax Information Services LLC, No. 08-1450, 2009 WL 3234191, at *8 (D.N.J. Sept. 30, 2009), the court disagreed, concluding that "although willfulness is necessarily a fact-bound inquiry, individual issues will not predominate because the Defendant's conduct was consistent with its own policy and practice from one consumer to the next."

On balance, while there are likely to be some factual difference as to the actual delays experienced by individual consumers, these individual issues ought not predominate here, as in Summerfield. The Bank's processing of the credit score notices was consistent from consumer to consumer, as it was done according to the ACAPS and Legacy protocols. The issue of predominance, therefore, does not pose an insurmountable obstacle to preliminary class certification.

2. Superiority.

Rule 23(b)(3) also calls upon the court to find that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Superiority requires the court to balance, in terms of fairness and efficiency, the class action method of proceeding against alternative available methods of adjudication. Rule 26(b)(3) sets forth four factors that are relevant to the superiority inquiry:

(A) the class members' interests in individually controlling the prosecution or defense in separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). In addressing these factors, courts have split as to whether class actions such as this are a superior vehicle for resolving the sort of issues presented in this case.

Some courts have denied class certification of potential FACTA or FCRA claims, reasoning that superiority is not met given the enormity of a statutory damage award where there is no evidence of any actual harm. See, e.g., Bateman v. Am. Multi-Cinema, Inc., 252 F.R.D. 647, 651 (C.D. Cal. 2008) ("Plaintiffs have therefore failed to show that the potential award of statutory damages is justified and proportional to any actual injury suffered by potential class members."); Anderson, 224 F.R.D. at 453 ("The potential damages for such a class are wholly out of proportion to the harm done to any of the class members or to all of them together, particularly if plaintiffs cannot show that defendant acted wilfully . . . ."). Likewise, in Campos v. Choicepoint, Inc., 237 F.R.D. 478 (N.D. Ga. 2006), the court found a portion of a proposed class action not to meet the superiority requirement, reasoning that because of the statutory damages provision in the FCRA, ranging from $100 to $1,000, and the size of the proposed class, the Bank's potential liability "would be enormous and completely out of proportion to any harm suffered by the plaintiff." Id. at 489 (quoting London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 n.5 (11th Cir. 2003)). The Campos court concluded that "here there exists substantial danger that 'plaintiffs are attempting to obtain a windfall based on minor or technical violations. . . .'" 237 F.R.D. at 490 (quoting Klay v. Humana, Inc., 382 F. 3d 1241, 1272 (11th Cir. 2004)).

As the court noted in Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693, 698 (S.D. Fla. 2009), "[t]hese courts generally reason that FACTA certification would permit potentially annihilating statutory damages to be awarded against a defendant business, without any requirement or proof of actual harm." Weighing the lack of evidence of actual harm against the risk of a huge statutory damages award, the court noted that "at least in this matter, it appears that the sole benefit of certification would be the *threat* of ruinous damages for purposes of settlement." Id. at 699 (emphasis in original). The court reasoned that because the statute provided for statutory damages between $100 and $1,000, plus attorney's fees and costs, a plaintiff and his counsel would be fully compensated and the purposes of the statute would be served by allowing the FACTA claims to be pursued individually. Id. at 699. The court concluded:

> On the other hand, to grant the requested class relief would allow this Plaintiff, and his counsel, to dangle the Sword of Damocles over Defendant, without any showing of actual economic harm. And while there is no indication of misconduct or malicious intent in this dispute, the threat of annihilation associated with certification does not serve the purpose of the legislation, and moreover, is simply unnecessary to effectively enforce the Act and compensate victims of identity theft. As such, the Court finds, based on the facts presented in this matter, that individual actions against Mama Mia are a superior method to adjudicate any remaining FACTA disputes.

Id. at 699. The same concerns are present in the instant case. Neither of the proposed class representatives sustained any actual harm. This is true notwithstanding the fact that Domonoske's notification was delayed more than 30 days.

Further, because the statute provides for statutory damages along with an award of attorney's fees and costs, a sufficient incentive exists for consumers to bring individual actions for violation of the FCRA. Id. at 699; see Anderson, 224 F.R.D. at 453 ("[A] class action is not necessary to give injured parties an opportunity for relief that would be too expensive to obtain if they were limited to individual suits. . . . Not only can they receive up to $1,000 in statutory damages or any amount of actual damages they incurred plus punitive damages if they can prove wilfulness and actual damages if they prove only negligence, but their suits are essentially costless because they are entitled to an award of the attorney fees and costs they incur in bringing suit."); see also Klotz v. Trans Union, LLC, 246 F.R.D. 208, 217 (E.D. Pa. 2007) ("These financial incentives [the FCRA's attorney's fees and punitive damages provisions] might not encourage each putative class member to bring suit, but they dispel the notion that a class action is the only way to adjudicate the lawfulness of the defendant's practices."); Campos, 237 F.R.D. at 490 ("The FCRA provides sufficient motivation for adversely affected individuals to bring suit and for attorneys to represent them."); Pendleton v. Trans Union Sys. Corp., 76 F.R.D. 192, 198 (E.D. Pa. 1977).

The same rationale has been applied to reject certifications of proposed class actions for violations of a number of other federal and state statutes. Wilcox v. Commerce Bank, 474 F.2d 336, 347 (10th Cir. 1973) (Truth in Lending Act); Saulie v. Symantec Corp., 596 F. Supp. 2d 1323, 1328 (C.D. Cal. 2009) (California credit card statute); Helms ConsumerInfo.com, Inc., 236 F.R.D. 561, 568-70 (N.D. Ala. 2005) (Credit Repair Organizations Acts); Ratner v. Chem. Bank New York Trust Co., 54 F.R.D. 412, 416 (S.D. N.Y. 1972) (Truth in Lending Act).

Certainly, therefore, an argument can be made that a class action is not a superior vehicle in cases such as this where (a) there is no evidence of actual harm, and (b) the statute provides an adequate incentive, both in terms of statutory damages and an award of attorney's fees, for individuals to bring claims.[6]

On the other hand a growing number of federal district courts, including three in 2009, have rejected this approach in FCRA cases and held that a class action is a superior means of adjudicating these cases involving many consumers having very small claims. Following the Seventh Circuit's holding in Murray v. GMAC Mortgage Corp., 434 F.3d 948, 953-54 (7th Cir. 2006), five district courts recently have concluded that the "presence of a fee shifting provision in the FCRA does not per se defeat class certification." Chakejian v. Equifax Info. Servs. LLC, 256 F.R.D. 492, 501 (E.D. Pa. 2009); see Barel v. Bank of Am., 255 F.R.D. 393, 399-400 (E.D. Pa. 2009); Summerfield v. Equifax Info. Servs. LLC, No. 08-1450, 2009 WL 3234191 (D.N.J. Sept. 30, 2009); White v. E-Loan, Inc., No. C05-02080SI, 2006 WL 2411420 (C.D. Cal. Aug. 18, 2006); In re Farmers Ins. Co., Inc., FCRA Litig., No. CIV-03-158-F, 2006 WL 1042450 (W.D. Okla. Apr. 13, 2006). In Murray, the Seventh Circuit rejected the argument that the availability of large statutory damage awards under the FCRA renders the class action remedy unavailable. The Seventh Circuit concluded, "[m]aybe suits such as this will lead Congress to

[6] Further, as noted in the discussion of commonality and predominance, because the statute employs a reasonableness test and because the evidence as to the timing of the notices provided to class members is so vague, it is difficult to see how a class action is a superior vehicle for adjudicating such claims. Whether the Bank provided notice as soon as reasonably practicable is wholly dependent on the timing of the notice provided to each consumer. The same is true on the issue of any actual harm sustained. Finally, the Bank maintains that Rivera's claim is barred by the statute of limitations, and plaintiffs concede that "[t]he parties strongly disagree as to whether the possibility of such a defense would pose manageability (superiority) problems for certification under Rule 23(b)(3)." Plaintiffs' Supplemental Memorandum and Submission in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Docket # 83), at 10.

amend the Fair Credit Reporting Act; maybe not. While a statute remains on the books, however, it must be enforced rather than subverted." 434 F.3d at 954.

Following Murray's lead, the court in Chakejian continued:

> Although the availability of attorney's fees to litigants is indicative that a class action is by no means the "only" feasible route for litigants, it remains the superior mechanism here, where there is an inverse relationship between the cost of an individual action relative to the potential recovery, and where meaningful enforcement of the statute through individual consumer litigation is unlikely. Although it could have done so, Congress has not chosen to preclude class actions under the FCRA, and the availability of attorney's fees does not undermine the advantages of class certification in this case.
>
> . . . Given the slight potential recovery of each individual claim relative to the aggregate injury, as well as the judicial inefficiency that would accompany individual resolution of the claims Mr. Chakejian seeks to prosecute on behalf of the proposed class, the Court finds by preponderance of the evidence that a class action presents the best method of adjudicating the instant litigation.

256 F.R.D. at 501-02 (internal citations omitted).

Similarly, in Barel v. Bank of America, 255 F.R.D. 393 (E.D. Pa. 2009), the court approved the settlement of a class action against the Bank for violating the FCRA by obtaining the credit reports of non-customers who were given power-of-attorney status by customers of the Bank. The court reasoned as follows:

> A class action is superior here because it provides a forum for class members unlikely to bring separate claims. The claims of the individual class members here are small. Since class members are free to opt-out and pursue their own actions, if they wish, and because managing this class action presents far less difficulty than managing each individual case, the settlement class meets the requirements of the superiority in Rule 23(b)(3).

255 F.R.D. at 400; accord Summerfield, 2009 WL 3234191, at *9-10; White, 2006 WL 2411420, at *7-8; In re Farmers Ins., 2006 WL 1042450, at *9-12.

The undersigned agrees. While the potential statutory damages available in a class action for violation of the FCRA are enormous, Congress has not seen fit to cap those damages as it has done with other statutes. See White v. E-Loan, Inc., 2006 WL 2411420, at *8 ("Certainly Congress could have done so; following a spate of TILA class action lawsuits it amended that statute to cap the amount that could be recovered in class actions."); see also Murray, 434 F.3d at 953. Nor has Congress chosen to remove FCRA cases from the ambit of Rule 23. See Chakejian, 256 F.R.D. at 502.

In sum, while the undersigned has reservations about the appropriate use of a class action remedy in this setting, those concerns are for Congress to resolve. As the law presently is constituted, and following the rationale of the five FCRA cases deciding this issue after Murray, the undersigned concludes that the superiority requirement has been met for preliminary certification purposes.

IV.

Preliminary approval of a settlement class next requires an assessment of the fairness and adequacy of the class action settlement. See Fed. R. Civ. P. 23(e)(2). The Manual for Complex Litigation provides as follows:

> The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing. In settlement classes, however, it is often prudent to hear not only from counsel but also from the named plaintiffs, from other parties, and from attorneys who represent individual class members but did not participate in the settlement negotiations.

Manual for Complex Litigation (Fourth) § 21.632 (2004).

At the hearing on November 18, 2009, counsel for the named plaintiffs and the Bank maintained that the settlement was the product of a hard fought, arm's length negotiation and was fair, adequate, and reasonable under the circumstances. Counsel for the named plaintiffs represented their clients' satisfaction with the terms of the proposed settlement and further advised that they were not aware of any competing or overlapping actions. By Order dated December 1, 2009, the court requested additional information, which reaffirmed these representations.

A. Fairness.

"Because of the danger of counsel's compromising a suit for an inadequate amount for the sake of insuring a fee, the court is obliged to ascertain that the settlement was reached as a result of good-faith bargaining at arm's length." In re Montgomery Co. Real Estate Antitrust Litig., 83 F.R.D. 301, 315 (D. Md. 1979) (citing Percodani v. Riker-Maxson Corp., 50 F.R.D. 473, 477 (S.D.N.Y. 1970)). Factors to be considered in the fairness calculus include: (1) the posture of the case at the time settlement was proposed; (2) the extent of the discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in class action litigation. In re Jiffy Lube Sec. Litig., 927 F.2d 155, 159 (4th Cir. 1991).

The Domonoske suit was filed on August 8, 2008. The docket sheet reflects that the parties had sparred over the timing and sequence of discovery, the adequacy of Rule 26 disclosures and discovery responses, the terms of a confidentiality order, and the scope of Rule 30(b)(6) depositions. No dispositive motions had been filed and limited discovery was undertaken, consisting of three depositions, one third-party subpoena, and the production of approximately 10,000 pages of documents. The parties represented at the November 18, 2009 hearing that there was little additional discovery that needed to be taken regarding the Bank's compliance with § 1681g(g). The parties litigated this case for a relatively short period, as the motion to stay the case pending mediation was filed only seven months after suit was filed.

The Rivera case was filed in the Eastern District of Virginia on May 28, 2008. The Bank filed a Motion to Dismiss on statute of limitations grounds, which was pending at the time the case was transferred to this district to effectuate a global settlement.

On March 20, 2009, the parties in the Domonoske case filed a Stipulation and Request to Stay Action Pending Mediation. Two mediation sessions were held in San Francisco before a retired United States Magistrate Judge, Edward A. Infante, and Judge Infante talked with the parties subsequently on the telephone. While no settlement was reached during such the sessions with Judge Infante, those sessions precipitated settlement that was ultimately reached directly by counsel for the parties. Under these circumstances, there is nothing to suggest that the settlement was collusive or the product of anything but arm's length negotiations.

The parties represent that they have substantial experience in class action litigation, which is borne out by the declarations executed by counsel and attached as exhibits to the Plaintiffs' Motion for Preliminary Approval of Class Settlement.

In short, there is nothing to suggest that this settlement was collusive or anything but the product of good faith arm's length negotiations.

B. Reasonableness and Adequacy.

1.

The Manual for Complex Litigation provides that the preliminary fairness review should address "reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys." Manual for Complex Litigation, supra, § 21.632.

The proposed class settlement appears to involve an adequate dollar figure, especially given the vagaries of the ultimate legal issue presented in this case, i.e., whether the Bank's disclosure of credit score requests was done "as soon as reasonably practicable." This is particularly true considering the fact that actual damages will be immensely difficult to prove and are likely to be insignificant. Thus, in order to prevail, plaintiffs will have to prove a willful violation, which is no easy task given the level of attention the Bank devoted to compliance with § 1681g(g), including involvement and advice of counsel.

On the other hand, the consequences to the Bank of a finding of a willful violation on a class-wide basis are enormous. The statutory damages for a willful violation range from $100 to $1,000. The statute does not specify whether the statutory damages are payable on a per consumer or per transaction basis. Rather, it simply provides that "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of – (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n. Thus, it is open to interpretation as to whether the potential statutory damages are based on the 2.2 million transactions or the 3.5 million consumers involved in those transactions. As to the former, the Bank faces statutory class action damages ranging from $220 million to $2.2 billion dollars. On a per consumer basis, the Bank faces damages ranging from $350 million to $3.5 billion dollars. While the Bank stated that it would mount a due process challenge to statutory penalties in that range, the stakes are staggering. Thus, it is easy to understand why the Bank would be interested in paying a substantial sum to settle this case on a class-wide basis.

In addition, the proposed mechanism of the settlement appears reasonable. The form of the notice is clear in its terms, and the parties propose to use a website for online claims administration and an experienced independent firm for settlement administration.

2.

The court must next assess the proposed payments to both the class representatives and their counsel. Under the proposed settlement, Domonoske and Rivera each receive $5,000 and their lawyers reap $2.35 million. At the same time, individual class members will receive far less, as the proposed settlement notice explains:

> The amount you will receive will depend on how many other class members submit claims. For example, if 15% of Class Members submit claims, you will get approximately $14. If 10% submit claims, you will get approximately $21. If 2% submit claims, you will get $100. If all Class Members submit claims, you would get at least $2.00. Eligible Class Members are entitled to one payment per loan transaction during the class period. Eligible Class Members may not receive payment of more than $100 per loan transaction during the class period.

Plaintiff's Motion for Preliminary Approval of Class Settlement (Docket # 68), Exhibit B to Settlement Agreement (Exhibit A), at 3.

Thus, while Domonoske and Rivera each are to receive $5,000, the other class members may receive settlement proceeds ranging from as little as $2 to a maximum of $100, depending on the number of claims filed. The Seventh Circuit in Murray v. GMAC Mortgage Corp., considered such a settlement to be "untenable":

> Here the proposed award is $3,000 to the representative while other class members are frozen out. The payment of $3,000 to Murray is

> three times the statutory maximum, while others don't get even the $100 that the Act specifies as the minimum. . . .
>
> Such a settlement is untenable. We don't mean by this that all class members must receive $100; risk that the class will lose should the suit go to judgment on the merits justifies a compromise that affords a lower award with certainty. But if the reason other class members get relief worth about 1% of the minimum statutory award is that the suit has only a 1% chance of success, then how could Murray personally accept 300% of the statutory maximum? And, if the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny? If, however, the chance of success is materially greater than 1%, as the proposed payment to Murray implies, then the failure to afford effectual relief to any other class member makes the deal look like a sellout. Thus it may well be that Murray is not a good champion, that her law firm . . . is not an appropriate counsel, or both.

434 F.3d 948, 952 (7th Cir. 2006) (internal citation omitted). The tension noted in the Seventh Circuit's opinion between the amount paid to the class representatives and the much smaller amount to class members applies with equal force to this proposed settlement.

3.

Of further concern is the magnitude of the fees proposed to be paid to class counsel. Under the Federal Rules of Civil Procedure, "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The court is required to conduct a "thorough judicial review" of class counsel's request for attorney's fees. In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 (3d Cir. 1995). The party requesting fees must demonstrate the reasonableness of its request and must submit evidence that supports its request. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

At the court's direction, all counsel provided detailed attorney's fee and cost billing information to support the proposed $2.35 million fee. Counsel for plaintiffs assert they have billed 1948.44 hours on this matter to date, a figure they represent is conservative. Plaintiffs' Supplemental Memorandum and Submission in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Docket # 83), at 2.

Of these hours, only approximately 565, representing just over one-quarter of the total, were billed before the parties moved to stay the case pending mediation. Thus, it appears that roughly three-quarters of the plaintiffs' attorneys' time was spent negotiating settlement of this case.[7]

Plaintiffs' counsel, citing § 14.121 of the Manual for Complex Litigation, argue that a percentage award of up to 25% of the first $9.4 million of the settlement proceeds is warranted under the case law, as this is a "common fund" case. The Supreme Court "has recognized that a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. The common-fund doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees." Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1984) (internal citations omitted). "In common fund cases the fees paid to class counsel come directly out of the recovery of the class, as opposed to statutory fee-shifting cases where the plaintiffs' recovery and counsel's fees are distinct. In those situations, every additional dollar given to class counsel means one less dollar for the class, regardless how a total settlement package is formally structured." In re Cedant Corp. Litig., 264 F.3d 201, 256 (3d Cir. 2001). In calculating attorney's fees in common fund cases, courts generally have employed two different methods: (1) the lodestar method, and (2)

[7] In contrast, the Bank's attorneys billed a total of 5,106 hours, nearly three-quarters of which was billed before the motion to stay the case pending mediation was filed.

the percentage of recovery method. In re Microstrategy, Inc. Sec. Litig., 172 F. Supp. 2d 778, 786 (E.D. Va. 2001).

Under the lodestar method, the court multiplies the number of hours worked on a case by a reasonable hourly billing rate for such services based on the given geographical area, the nature of the services provided, and the experience of the attorneys. A court may decide to adjust the award based on a multiplier intended to account for a number of factors, such as the benefit achieved for the class and the complexity of the case. See id. at 786.

Under the percentage of recovery method, a fee is awarded as a percentage of the common fund. The court in Jones v. Dominion Resources Services, Inc., 601 F. Supp. 2d 756 (S.D. W.Va. 2009), described this approach as follows:

> The percentage of fund method operates similarly to a contingency fee arrangement in that the attorneys receive a percentage of the final monetary value obtained for their clients. Unlike contingency fees, however, the percentage fee award is determined ex post, at the end of the litigation, rather than by an ex ante arrangement. In making this ex post determination of a reasonable percentage, courts consider many of the same factors used to adjust the lodestar figure.

Id. at 758 (citing In re Microstrategy, 172 F. Supp. 2d at 786).

As Jones recognized, although the Fourth Circuit has not indicated its preference for either the lodestar or percentage of recovery approach, the majority of courts addressing this issue have followed the percentage of recovery method. 601 F. Supp. 2d at 760. The Eastern District of Virginia has noted that "[i]ndeed, in recent years, two circuits have mandated, and seven circuits have explicitly approved, the use of the percentage-of-recovery approach in common fund cases." In re Microstrategy, 172 F. Supp. 2d at 787; see also In re The Mills Corp. Sec. Litig., No. 1:06cv00077, 2009 WL 5091931, at *15 (E.D. Va. Dec. 23, 2009); Strang v.

JHM Mortgage Sec. Ltd. P'ship, 890 F. Supp. 499, 502-03 (E.D. Va. 1995); Manual for Complex Litigation (Fourth) § 14.121 (2004).

The Third Circuit requires district courts to consider seven factors when analyzing a fee award in a common fund case:

> (1) [T]he size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 301 (3d Cir. 2005) (quoting Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000)).

While consideration of the Gunter factors is not mandated in this Circuit, they are helpful in framing the fee request in this case. See In re The Mills Corp., 2009 WL 5091931, at *16. Nonetheless, they "need not be applied in a formulaic way . . . . and in certain cases, one factor may outweigh the rest." Gunter, 223 F.3d at 195 n.1. Certain of these factors weigh in favor of the proposed fee. First, although plaintiffs' counsel assert that this is the fourth largest settlement in a FCRA case, it is not a mega-fund case involving hundreds of millions of dollars. In mega-fund cases, many courts reduce the percentage fee award to avoid a large windfall to counsel. At this stage, of course, no objections have been filed, and there is no issue with regard to the skill or efficiency of plaintiffs' counsel. Certainly, there is a substantial risk that plaintiffs would not be able to prove a willful violation of § 1681g(g), such that the risk of nonpayment is significant. On the other hand, this litigation has been neither complex nor enduring. The legal issue is relatively simple, whether the Bank provided notice as soon as reasonably practicable, and the litigation phase of the Domonoske case lasted a mere seven months.

Even when the percentage of recovery method is employed, however, the lodestar method has a role to play. Courts incorporate the lodestar method into the percentage method in two ways. First, courts apply lodestar factors when assessing the reasonableness of attorney's fees under the percentage method. In re The Mills Corp., 2009 WL 5091931, at *13; Jones, 601 F. Supp. 2d at 759; In re Microstrategy, 172 F. Supp. 2d at 786-87 (explaining that courts using the percentage of recovery method reference "the same case-specific factors used to adjust, or determine a multiplier for, a lodestar figure."). Second, many courts consider it "sensible" for district courts to cross-check the percentage fee award against the lodestar method. See, e.g., In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 333 (3d Cir. 1998). "The lodestar cross-check is performed to 'ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple.'" Stop & Shop Supermarket Co. v. SmithKline Beecham Corp., No. Civ. A 03-4578, 2005 WL 1213926, at *15 (E.D. Pa. May 15, 2005).

As the Microstrategy court explained:

> In the end, it is important to recognize that neither method of arriving at a fair and reasonable fee is limited to a mathematical computation yielding a precise result; neither method is simply a matter of arithmetic. Instead, both methods contemplate the exercise of sound judgment by the trial court in adjusting the lodestar figure after a qualitative assessment of various factors or in selecting an appropriate percentage figure after a qualitative assessment of essentially the same factors. In short, arithmetic calculations aid the fee-setting process, but ultimately a trial court's judgment is centrally important and may trump the calculations. It is also important to recognize that in the final analysis, neither the lodestar method nor the percentage method, by itself, is adequate to all circumstances; both are useful tools for trial courts to use to inform and calibrate a judgment as to a fair and reasonable . . . fee award.

172 F. Supp. 2d at 787.

The Manual for Complex Litigation notes that a typical benchmark employed in common fund cases is an award of attorney's fees of 25%. Manual for Complex Litigation, supra, § 14.121. In this case, however, applying the lodestar cross-check to the common fund methodology, the attorney's fees requested appear excessive. Plaintiffs' counsel have documented a total of approximately 565 hours before moving to stay the case pending mediation, and 1,383 hours thereafter. The Bank's attorneys, in contrast, billed 3,771 hours prior to the stay, and 1,335 thereafter, at an average hourly rate of $310 per hour. Applying the Bank's hourly rate to plaintiffs' counsel's documented 1,948.44 hours yields a lodestar of $604,016, roughly one-quarter of the fees requested. Therefore, to arrive at the $2.35 million figure, a lodestar multiplier of four must be applied.

Before moving to settlement mode, the Domonoske case pended for only seven months, and no dispositive motions were filed. Discovery involved a mere three depositions, one third-party subpoena, and ten thousand pages of document production. It was neither complicated, lengthy, nor time consuming. Indeed, it appears that the bulk of the plaintiffs' effort was spent on settlement, rather than development of the facts and law relating to this case. Under these circumstances, the undersigned does not believe that a lodestar multiplier of four is warranted in this case. Rather, given the relative simplicity of the legal issues, the limited amount of discovery taken, and the brevity of the litigation, the undersigned believes that the attorney's fee figure at the lodestar level ($604,106), without any multiplier, should amply account for the risk, burden, time, and expense of conducting this litigation.

"Regardless of which method [of calculating attorney's fees] the Court chooses, it must be mindful that it acts as a fiduciary that must protect the interests of the class and must also be certain of avoiding even the appearance of providing windfall fees to attorneys." Perry v.

FleetBoston Fin. Corp., 229 F.R.D. 105, 119 (E.D. Pa. 2005); see also In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 307-08 (3d Cir. 2005) ("At the fee determination stage, the district judge must protect the class's interest by acting as a fiduciary for the class."); City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974) ("For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the court should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so."), abrogated in part by Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000); Stop & Shop Supermarket Co., 2005 WL 1213926, at *7-8 ("In examining a motion for award of attorneys' fees from a common fund, the Court also seeks to protect the public interest and, with it, the integrity of the judicial system . . . ."). At the end of the day, therefore, whether the common fund or lodestar test be employed, the touchstone is reasonableness. Given the fact that the Domonoske case involved only a limited amount of discovery and no dispositive motions, while the Rivera case lay dormant at the motion to dismiss stage, the undersigned is unable to conclude that attorney's fees of $2.35 million are reasonable.

C. Availability of Injunctive Relief under FCRA.

There is an additional problem with the proposed settlement which was not addressed by the parties in their submissions. That issue concerns the inability of the court to enter the injunctive relief requested by the parties.

As part of the proposed settlement, the parties propose that the court enter an injunction requiring the Bank to "trigger the Credit Score Disclosures within three business days after its receipt of [a real-estate secured loan] application, and shall mail the Credit Score Disclosures within four business days after its receipt of the application." Memorandum in Support of Plaintiff's Motion for Preliminary Approval of Class Settlement (Docket # 68), Exhibit D to

Settlement Agreement (Exhibit A), at 2. The Proposed Injunction and Consent Order further provides that:

> 4. In light of the uncertainty raised by plaintiff regarding the proper application of the FCRA to Bank of America's practices, and Bank of America's agreement to the terms of this Order as part of the relief provided under the Court-approved Settlement Agreement, to the extent that Bank of America engages in conduct in conformity with this Order, such conduct shall be deemed to be in compliance with the FCRA, and Bank of America shall not be subject to further liability for such conduct.

Id.

Two circuit courts have addressed the issue of the propriety of injunctive relief for private plaintiffs under the FCRA, and only one has made a definitive ruling. In Washington v. CSC Credit Services, Inc., 199 F.3d 263 (5th Cir. 2000), the Fifth Circuit noted that the FCRA's civil liability provisions, 15 U.S.C. §§ 1681n-o,[8] "expressly refer to damages and attorney fees without mentioning injunctive relief. This omission is significant because the Act elsewhere expressly grants the power to obtain injunctive relief to the [Federal Trade Commission]." Id. at 268 (internal citations omitted). After reviewing an existing split in district court opinions on this subject,[9] the court concluded as follows:

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[8]The published version of this particular paragraph of the Fifth Circuit's opinion apparently contains a typographical error, erroneously reversing two digits in the United States Code reference to the FCRA. Plainly, where the published opinion refers on page 268 to 15 U.S.C. 1861n-1861o, it mistakenly reverses the 6 and 8. The proper citation to the civil liability provisions of the FCRA is 15 U.S.C. §§ 1681n-o. There is no provision of the United States Code at 15 U.S.C. § 1861, as that section, concerning definitions for a 1980 Chrysler Corporation Loan Guarantee, was omitted from the Code on December 31, 1983.

[9]One such decision was a 1998 opinion by the Eastern District of Virginia, which concluded:

(continued...)

> We hold that the affirmative grant of power to the FTC to pursue injunctive relief, coupled with the absence of a similar grant to private litigants when they are expressly granted the right to obtain damages and other relief, persuasively demonstrates that Congress vested the power to obtain injunctive relief solely with the FTC.

Id. at 268. In addition, the court also concluded that consumers could not maintain a class action for declaratory relief under the FCRA. Id. at 269-70.

Since Washington was decided in 2000, the "majority of federal district courts . . . to consider the issue have also found that private plaintiffs have no right to injunctive or declaratory relief under the FCRA." Daniels v. Experian Info. Solutions, Inc., No. CV 109-017, 2009 WL 1811548, at *4 (S.D. Ga. June 24, 2009); see Miller v. Sunoco, Inc., No. 07-1456, 2008 WL 623806, at *2 n.1 (E.D. Pa. Mar. 4, 2008) ("[T]he vast majority of district courts that have addressed the issue of injunctive relief have followed the Fifth Circuit's decision in Washington v. CSC Credit Services, Inc." (citation omitted)); Owner-Operator Indep. Driver Ass'n, Inc. v. Usis Commercial Servs., Inc., 410 F. Supp. 2d 1005, 1007 (D. Colo. 2005) ("[C]ourts that have considered this same issue have overwhelmingly concluded that the FCRA precludes private litigants from seeking equitable relief."); see also Anderson v Capital One Bank, 224 F.R.D. 444, 448 (W.D. Wisc. 2004); In re Trans Union Corp. Privacy Litig., 211 F.R.D. 328, 338-40 (N.D. Ill. 2002), appeal dismissed sub nom., Albert v. Trans Union Corp.,

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[9](...continued)

> [W]hile the FCRA does not expressly prohibit injunctive relief, Congress's failure to include injunctive relief as a potential remedy, combined with Congress's express delegation of enforcement of the FCRA to the FTC, clearly indicates that Congress did not intend injunctive relief as a remedy. The Court finds the [Fair Debt Collection Practices Act] cases to be persuasive, as the courts in those cases found that they had no authority to provide equitable relief, even though such a restriction was not expressly stated in the statute.

Bumgardner v. Lite Cellular, Inc., 996 F. Supp. 525, 527 (E.D. Va. 1998).

346 F.3d 734 (7th Cir. 2003). This majority includes two decisions by district courts in the Fourth Circuit. See Betts v. Commonwealth of Virginia, No. 3:06cv753, 2007 WL 515406, at *5 (E.D. Va. Feb. 2, 2007); McCullough v. Trans Union LLC, No. 3:06cv432-W, 2006 WL 3780536, at *3 (W.D.N.C. Dec. 21, 2006).[10]

Recently, the Sixth Circuit weighed in, noting that "the answer to the question is far from self-evident." Beaudry v. Telecheck Servs., Inc., 579 F.3d 702, 709 (6th Cir. 2009). The Sixth Circuit explained:

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[10] In Presley v. Equifax Credit Info. Servs., Inc., No. Civ. A. 05-114-WOB, 2006 WL 2457978, at *1-2 (E.D. Ky. Aug. 21, 2006), plaintiffs argued that the holding in two Seventh Circuit decisions suggested that injunctive relief may be available, but the Presley court rejected this argument and found defendant's argument based on Washington v. CSC Credit to be compelling. The Presley court distinguished the Seventh Circuit decisions as follows:

> The case law does reveal two Seventh Circuit decisions that raise but do not directly address the injunction issue. The cases are Crabil v. Trans Union, LLC., 259 F.3d 662 (7th Cir. 2001), and Albert v. Trans Union Corp., 346 F.3d 734 (7th Cir. 2003). Crabil mentions, in dicta, that a plaintiff may be able to obtain injunctive relief, but does not analyze the issue in any way. Id. at 665. In Albert, the plaintiffs raised the issue, and the court recognized the issue, but the court did not address the issue specifically because it was determined that it lacked jurisdiction to hear the interlocutory appeal. Albert, 346 F.2d at 736.
>
> The district court cases that find injunctive relief is available under the statute, and those cited by the Plaintiff, do so on the basis of liberally interpreting the statute and finding that where there is no clear statement in the statute that such relief is not available, consequently, it is available. See Andrews v. TransUnion Corp., 7 F. Supp. 2d 1056, 1083-4 (C.D. Cal. 1998). Moreover, most of the cases cited by the Plaintiff were decided prior to the decision in Washington.
>
> The arguments of the defendant herein are compelling. Based upon the above status of the law on this issue, the more direct approach is to follow the reasoning of the Fifth Circuit in Washington, which determined that injunctive relief was not available to private litigants.

Id. at *2; see also Weiss v. Regal Collections, 385 F.3d 337, 341 (3d Cir. 2004) (favorably citing Washington v. CSC Credit in the context of Fair Debt Collection Practices Act).

> Washington may be right, and the district court thus may have been right to rely on it. But the answer is not free from doubt. Califano v. Yamasaki, 442 U.S. 682, 705, 99 S. Ct. 2545, 61 L.Ed.2d 176 (1979), points out that a district court should start with the assumption that, in actions over which it has jurisdiction, it has authority to issue injunctive relief. In the absence of "the clearest command to the contrary from Congress," the plaintiff may seek injunctive relief. Id.; see also Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 19, 94 S. Ct. 1028, 39 L.Ed.2d 123 (1974) (holding that the enumeration of specific types of equitable authority in the Freedom of Information Act did not preclude district courts form granting non-enumerated injunctive relief); Porter v. Warner Holding Co., 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L.Ed. 1332 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."); United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750, 761 (6th Cir. 1999). Further complicating the picture are the conflicting negative inferences created by other parts of the statute. Compare 15 U.S.C. § 1681s(c)(1)(A) (explicitly allowing state Attorneys General to pursue injunctive relief – suggesting that such injunctive relief would not otherwise be available); id. § 1681u(m) (explicitly allowing injunctive relief under that section – suggesting it would not otherwise be available), with id. § 1681u(*l*) (limiting remedies in that section to those explicitly provided – suggesting that other remedies would otherwise be available implicitly).

Id. at 709. At the end of the day, the Beaudry court did not reach this issue, deciding to "save its resolution for another day." Id. at 709.

Accordingly, given the large number of courts, including two district court decisions from this circuit, that have followed Washington v. CSC Credit and have held that private parties are not entitled to injunctive relief under the FCRA, the undersigned is compelled to do likewise. Consequently, the undersigned concludes that the proposed settlement, containing a consent order providing for injunctive relief, is contrary to law and cannot be approved, even preliminarily.

V.

While the undersigned has concerns over commonality, typicality, predominance and superiority, on balance the requirements of Rule 23 appear to be met at this preliminary stage. The settlement itself and the mechanics of claims administration are fair and adequate in most respects. However, the undersigned believes the amount of the proposed payment to the class representatives and the attorneys to be unreasonably high, and the proposed settlement inappropriately calls for injunctive relief. As such, the undersigned **RECOMMENDS** that preliminary approval of the proposed class action be **GRANTED** and preliminary approval of the settlement be **GRANTED in part** and **DENIED in part**.

The Clerk is directed to transmit the record in this case to Hon. Samuel G. Wilson, United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note any objections to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned that is not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 637(b)(1)(C) as to factual recitations or findings as well as to the conclusion reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of Court is directed to send certified copies of this Report and Recommendation to counsel of record for the parties.

Enter this 27th day of January, 2010.

/s/ Michael F. Urbanski
United States Magistrate Judge