

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 14-30550

United States Court of Appeals
Fifth Circuit

FILED

November 18, 2014

ROBERT TICKNOR, et al.,

Lyle W. Cayce
Clerk

Plaintiffs-Appellants

v.

ROUSE'S ENTERPRISES, L.L.C., a Louisiana Limited Liability Company,

Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:12-cv-1151

Before REAVLEY, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Three plaintiffs filed a motion to certify a class action against a grocery store chain for alleged violations of the Fair and Accurate Credit Transactions Act. The district court denied certification on predominance and superiority grounds. We conclude the district court did not abuse its broad discretion, and therefore we AFFIRM.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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FACTS AND PROCEDURAL BACKGROUND

The plaintiffs, Robert Ticknor, Matthew Russell, and Daniel Cutler, brought suit in the United States District Court for the Eastern District of Louisiana. They claimed that Rouse’s Enterprises, L.L.C., a New Orleans-based grocery store chain, willfully violated Section 1681c(g) of the Fair and Accurate Credit Transactions Act (“FACTA”) by allowing credit card expiration dates to be printed on its store receipts.

The FACTA provision relevant to this case states that “no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.” 15 U.S.C. § 1681c(g)(1). Rouse’s did not violate the restriction about card numbers; the only claim is that it printed expiration dates. A willful violation of FACTA entitles a plaintiff to recover actual damages or statutory damages of between \$100 and \$1,000, attorney’s fees, and potentially punitive damages. § 1681n(a). The plaintiffs concede that none of Rouse’s customers suffered actual harm as a result of a FACTA violation. Therefore, they seek to recover the statutory penalty plus punitive damages and attorney’s fees.

After discovery relevant to class issues, the plaintiffs moved under Rule 23(b)(3) to certify a nationwide class of “[a]ll persons who made in-store purchases from the Defendant using a debit or credit card, in a transaction occurring from May 8, 2010, through May 10, 2012, at one of the [specified] Rouses stores” Rouse’s opposed class certification.

The district court held an evidentiary hearing on the class certification motion. After receiving briefing regarding the class’s manageability, the court denied certification. Although it concluded that liability was a common issue across the class, the court determined that the plaintiffs had not “satisfied

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their burden of establishing that common issues predominate” because it would be necessary to determine “whether each class member is a ‘cardholder,’ a ‘consumer,’ and received a receipt.” Furthermore, the court held that the “individual mini-trials” necessary to resolve each class member’s claims would “be impracticable and a waste of judicial resources” and that, therefore, the plaintiffs had “not carried their burden of showing a class action is a superior method for adjudicating this case.” This interlocutory appeal followed.¹

DISCUSSION

“We review a denial of class certification for abuse of discretion and legal questions implicated by that decision are reviewed *de novo*.” *Funeral Consumers Alliance, Inc. v. Serv. Corp. Int’l*, 695 F.3d 330, 344–45 (5th Cir. 2012) (citations omitted). “Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court’s inherent power to manage and control pending litigation.” *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 408 (5th Cir. 1998) (citation omitted).

Certification of a class under Rule 23(b)(3) requires that: (1) “the questions of law or fact common to class members predominate over any questions affecting only individual members,” and (2) “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3). Pertinent to these questions are “the

¹ The plaintiffs devote a significant portion of their facts section to evidence intended to show that Rouse’s willfully violated FACTA. That effort was misguided. “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013) (citations omitted). Our review is circumscribed by this same standard. Consequently, we omit mention of the facts pertaining to the merits of the plaintiffs’ claim.

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likely difficulties in managing a class action.” FED. R. CIV. P. 23(b)(3)(D). Such difficulties “encompass[] the whole range of practical problems that may render a class action format inappropriate for a particular suit.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974).

The district court determined that the plaintiffs needed to prove that they: (1) were not using someone else’s card to make their purchases, (2) were consumers rather than business purchasers, and (3) took their receipts. *See* 15 U.S.C. § 1681c(g)(1). Rouse’s argued that these factors differed among the putative class members. First, it noted one instance in which an individual had used his mother’s credit card to make a purchase, suggesting there would be many similar situations. Second, Rouse’s observed that it markets to professional chefs and other business customers who shop at its stores. These customers are not “consumers” protected under FACTA. Finally, Rouse’s showed that numerous customers leave its stores without their receipts.

The district court relied on these considerations in determining that, because the FACTA elements were not subject to class-wide proof, common issues did not predominate. The court also concluded that, due to the large number of transactions (over 14 million) involved in the suit and the availability of attorney’s fees and punitive damages in individual lawsuits, class relief was not superior to individual actions.

We have held that class issues do not predominate when “transaction-by-transaction” determinations are required. *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 307 (5th Cir. 2009). In *Mims*, an inquiry into each transaction’s reasonableness would have been required. *See id.* at 306. The individualized inquiries in this case might not need to be as detailed, but the general principle of *Mims* applies. The plaintiffs contend that post-trial mechanisms, such as claims forms requiring plaintiffs to attach their credit card statements and

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store receipts, would eliminate the burdens of a transaction-by-transaction analysis. Credit card statements, though, would not demonstrate that the cardholder made the purchase. Additionally, determining whether a purchase was for consumer or business purposes would often not be possible from the card statements, because personal credit cards may be used to make business purchases. Because these elements must be proven to recover on a FACTA claim, and because Rouse's demonstrated that these elements differed as to the plaintiffs, the district court did not abuse its discretion in determining that these issues created predominance and manageability problems.

As to superiority, we have suggested that class size is a relevant, though not dispositive, consideration weighing on superiority. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747 (5th Cir. 1996). Additionally, we have recognized that the availability of attorney's fees and punitive damages is a common basis for finding non-superiority, as the aggregation of claims is not necessary to facilitate suits in such instances. *See id.* at 748; *Boggs v. Alto Trailer Sales, Inc.*, 511 F.2d 114, 117-18 (5th Cir. 1975). In fact, the presence of these forms of relief prompted us to hold that "[t]he most compelling rationale for finding superiority in a class action — the existence of a negative value suit — is missing in this case." *Castano*, 84 F.3d at 748 (citations omitted). Although the plaintiffs in *Castano* asserted claims for actual damages, attorney's fees equally facilitate the bringing of claims for statutory damages. Indeed, it is difficult to categorize prevailing plaintiffs whose costs are covered and who are guaranteed more than nominal damages as negative-value plaintiffs merely because they did not assert a larger actual-damages claim. Accordingly, the district court did not abuse its discretion by relying on these factors to find that superiority was lacking.

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Critically important here is the broad discretion enjoyed by district courts regarding certification. That discretion may lead to disparate results. In fact, the parties' briefs make clear that district courts have both allowed and refused certification of classes in the FACTA context.² Nevertheless, we concur with the Tenth Circuit's conclusion that "inconsistent results" regarding certification are "no insurmountable objection" and must be permitted "until, if ever, some more acceptable and general solution by amendments to the Rules or clarification by statute emerges." *Wilcox v. Commerce Bank of Kan.*, 474 F.2d 336, 347 (10th Cir. 1973) (discussing certification in the context of the Truth in Lending Act).

The district court did not abuse its discretion by denying certification on the basis of predominance and superiority.

AFFIRMED.

² Compare *Shurland v. Bacci Café & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139, 148 (N.D. Ill. 2010) (certifying class); *Bush v. Calloway Consol. Gp. River City, Inc.*, No. 3:10-cv-841-J-37MCR, 2012 WL 1016871, at *15 (M.D. Fla. Mar. 26, 2012) (same); *Armes v. Sogro, Inc.*, No. 08-C-0244, 2011 WL 1197537, at *8 (E.D. Wis. Mar. 29, 2011) (same); *Rogers v. Khatra Petro, Inc.*, No. 2:08-CV-294, 2010 WL 3894100, at *6 (N.D. Ind. Sept. 29, 2010) (same); *Tchoboian v. Parking Concepts, Inc.*, No. SACV 09-422 JVS (ANx), 2009 WL 2169883, at *10 (C.D. Cal. Jul. 16, 2009) (same) with *Rowden v. Pac. Parking Sys., Inc.*, 282 F.R.D. 581, 588 (C.D. Cal. 2012) (denying certification); *Friedman-Katz v. Lindt & Sprungli, Inc.*, 270 F.R.D. 150, 161 (S.D.N.Y. 2010) (same); *Grimes v. Rave Motion Pics.*, 264 F.R.D. 659, 669-70 (N.D. Ala. 2010) (same); *Hammer v. JP's Sw. Foods, L.L.C.*, 267 F.R.D. 284, 290-91 (W.D. Mo. 2010) (same); *Leysoto v. Mama Mia I, Inc.*, 255 F.R.D. 693, 699 (S.D. Fla. 2009) (same); *Pezl v. Amore Mio, Inc.*, 259 F.R.D. 344, 349 (N.D. Ill. 2009) (same); *Gist v. Pilot Travel Ctrs.*, No. 5:08-293-KKC, 2013 WL 4068788, at *9 (E.D. Ky. Aug. 12, 2013) (same).

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See FED. R. APP. P. & 5TH CIR. R. 39.* Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

_____ v. _____ No. _____

The Clerk is requested to tax the following costs against: _____

COSTS TAXABLE UNDER Fed. R. App. P. & 5 th Cir. R. 39	REQUESTED				ALLOWED (If different from amount requested)			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket Fee (\$500.00)								
Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other:								
Total \$ _____					Costs are taxed in the amount of \$ _____			

Costs are hereby taxed in the amount of \$ _____ this _____ day of _____, _____.

LYLE W. CAYCE, CLERK

State of _____
 County of _____

By _____
 Deputy Clerk

I _____, do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This _____ day of _____, _____.

 (Signature)

*SEE REVERSE SIDE FOR RULES
 GOVERNING TAXATION OF COSTS

Attorney for _____

FIFTH CIRCUIT RULE 39

39.1 Taxable Rates. *The cost of reproducing necessary copies of the brief, appendices, or record excerpts shall be taxed at a rate not higher than \$0.15 per page, including cover, index, and internal pages, for any for of reproduction costs. The cost of the binding required by 5th CIR. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(D). See 5th CIR. R. 26.1.*

FED. R. APP. P. 39. COSTS

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise;

- (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
- (2) if a judgment is affirmed, costs are taxed against the appellant;
- (3) if a judgment is reversed, costs are taxed against the appellee;
- (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of costs: Objections; Insertion in Mandate.

- (1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs.
- (2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.
- (3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must – upon the circuit clerk's request – add the statement of costs, or any amendment of it, to the mandate.

(e) Costs of Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

- (1) the preparation and transmission of the record;
- (2) the reporter's transcript, if needed to determine the appeal;
- (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
- (4) the fee for filing the notice of appeal.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 18, 2014

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 14-30550 Robert Ticknor, et al v. Rouse's
Enterprises, L.L.C.
USDC No. 2:12-CV-1151
USDC No. 2:12-CV-2964

Enclosed is a copy of the court's decision. The court has entered judgment under FED R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

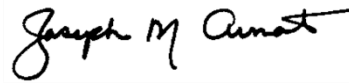
Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

The judgment entered provides that plaintiffs-appellants pay to defendant-appellee the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in black ink that reads "Joseph M. Armato". The signature is written in a cursive style with a long horizontal flourish extending to the right.

By: _____
Joseph M. Armato, Deputy Clerk

Enclosure(s)

Mr. Jason W. Burge
Mr. Soren E. Gisleson
Mr. Russ M. Herman
Ms. Loretta Gallaher Mince