TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

REGULATIONS:

RULES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-6484

ADDIE T. COLEMAN,
on behalf of herself and others similarly situated,

Plaintiff-Appellee

v.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING APPELLEES AND URGING AFFIRMANCE

IDENTITY AND INTEREST OF THE *AMICUS CURIAE* AND THE SOURCE OF THE AUTHORITY TO FILE

The United States files this brief pursuant to Fed. R. App. P. 29(a). This case involves claims under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691-1691f, which prohibits race (and other forms of) discrimination in credit transactions. 15 U.S.C. 1691(a). The United States Department of Justice has authority to bring suit in federal court to enforce ECOA, either upon referral of a complaint by another federal agency or when the Attorney General has reason to believe that a creditor is engaged in a pattern or practice of discrimination. 15 U.S.C. 1691e(g) & (h). Because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the Department of Justice, the United States has a strong interest in ensuring that individuals will act as "private attorneys general" to enforce ECOA in federal court. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

Effective enforcement of ECOA through private litigation depends on the ability of plaintiffs to proceed through class actions. Many ECOA lawsuits are complex and expensive to litigate, and individual monetary claims are often relatively small. Therefore, many discrimination victims will have no incentive to seek redress for ECOA violations in individual lawsuits.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in certifying a plaintiff class in this lawsuit challenging alleged racial discrimination under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691-1691f.[1]

STATEMENT OF THE CASE

Addie T. Coleman filed suit under ECOA against the General Motors Acceptance Corporation (GMAC), alleging racial discrimination. Specifically, she alleged that GMAC created, implemented, and profited from a nationwide lending policy that has a significant disparate impact on African Americans and cannot be

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[1] This issue is similar to the one pending before the Court in *Cason v. Nissan Motor Acceptance Corp.*, No. 00-6483 (6th Cir.).

justified by business necessity (R. 266, Complaint ¶¶ 131-135).[2] The district court denied GMAC's motion for summary judgment in most respects, concluding that there are genuine factual disputes as to whether Coleman has established a *prima facie* case of discrimination under a disparate-impact theory (R. 276, Memorandum at 15-22; R. 277, Order).

At the request of Coleman, the district court certified a plaintiff class that included certain African-American car buyers in Tennessee who allegedly were adversely affected by GMAC's financing policy (*ibid.*; R. 276, Memorandum at 1-13). The court found certification appropriate under Fed. R. Civ. P. 23(b)(2), but declined to certify a class under Rule 23(b)(3) (R. 276, Memorandum at 9-13).

STATEMENT OF FACTS

The parties present dramatically different versions of GMAC's lending practices. The United States takes no position in this brief as to the accuracy of either party's factual allegations. The following statement is based on Coleman's allegations, which the Court must accept as true in deciding the class certification issue (see p. 7, *infra*):

GMAC lends money to individuals to purchase automobiles from local dealers throughout Tennessee and the United States (R. 266, Complaint ¶¶ 3-4). Those dealers effectively serve as loan arrangers by referring customers to GMAC

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[2] "R. __" indicates the record entry number on the district court docket sheet. "Br. __" refers to the page number of GMAC's opening proof brief.

and by submitting credit applications to GMAC on the borrowers' behalf (R. 266, Complaint ¶¶ 45, 48, 83-84).

As part of its lending program, GMAC has adopted a "Finance Charge Markup Policy," which it applies uniformly throughout Tennessee and the United States (R. 266, Complaint ¶¶ 8, 34; R. 183, Amended Memorandum at 8, 10-11; R. 243, Reply Memorandum at 2, 7 n.9, 9 n.12). That policy affects the interest rate that borrowers pay on their GMAC loans. In setting the interest rate, GMAC first assigns applicants to credit risk tiers using a scoring system that takes into account several factors related to creditworthiness (R. 266, Complaint ¶¶ 55-62). For each risk tier, GMAC establishes a "buy rate," the lowest interest rate at which it will approve the loan (*id.* ¶ 29c). Pursuant to its Finance Charge Markup Policy, GMAC authorizes the local dealer to set a borrower's interest rate at a level higher than the risk-based buy rate; this increase is known as the "markup" (*id.* ¶¶ 21-22, 24, 29f). The markup does not reflect the customer's credit risk because creditworthiness is already accounted for in the calculation of the buy rate (*id.* ¶ 80b-c). GMAC imposes limits on the range of the permissible markup and approves only those loans that comply with its Finance Charge Markup Policy (*id.* ¶¶ 29g, 50).

Because a borrower's loan is with GMAC, all payments – including the amount attributable to the markup in the interest rate – are made directly to GMAC (*id.* ¶¶ 29f, 53, 80e). GMAC then pays to the local dealer a portion of the finance charge attributable to the markup (*id.* ¶¶ 29h-j, 80c). Under GMAC's policy, the dealer gets 100% of the markup up to a certain amount (usually 2.5 percentage points) and the remainder of the markup is split evenly between GMAC and the dealer (*id.* ¶¶ 29h-j). GMAC thus provides an economic incentive for dealers to impose markups and often directly profits if they decide to do so (*id.* ¶¶ 77, 80c).

Addie T. Coleman, the named plaintiff, is an African-American consumer who obtained a loan from GMAC to purchase a car from a dealer in Tennessee (*id.* ¶¶ 1, 81-96). The loan included a substantial markup in the interest rate. Coleman qualified for GMAC financing at a buy rate of 18.25%, but the dealer exercised its authority under GMAC's Finance Charge Markup Policy to increase the interest rate to 20.75% (*id.* ¶¶ 85-92). The 2.5-point markup required Coleman to pay an additional $809 in finance charges to GMAC over the life of the loan (*id.* ¶ 92d).

Coleman alleges that GMAC's Finance Charge Markup Policy has a significant disparate impact on African Americans (*id.* ¶¶ 131-135). She asserts, based on a sample of GMAC accounts in Tennessee, that African Americans, on average, are consistently charged higher markups than similarly-situated white customers (*id.* ¶¶ 97-113, 125-126).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in certifying a plaintiff class. This lawsuit satisfies all the threshold requirements for class certification imposed by Fed. R. Civ. P. 23(a). In particular, Coleman's claims are typical of those of the class as a whole and, from all indications, she will adequately represent the class. Her case also meets the criteria for class certification under Rule 23(b)(2), which applies if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The challenged policy allegedly injured all class members and thus is "generally applicable to the class." *Ibid.* Moreover, if Coleman prevails against GMAC, the class members will be entitled to final injunctive or declaratory relief (or both) to redress the ECOA violation. Certification under Rule 23(b)(2) is proper even though the remedies Coleman seeks include monetary relief. She is requesting equitable restitution – not compensatory or punitive damages – and it is well-settled that restitutionary relief is appropriate in 23(b)(2) class actions.

Civil rights actions seeking declaratory or equitable relief for alleged discrimination are prime examples of proper 23(b)(2) class actions. That is especially true where, as here, the plaintiff bases her claims on the disparate-impact theory of discrimination. Disparate-impact claims are particularly appropriate for class certification because, by definition, they focus on the *class-wide* effect of a policy or practice on a protected group. GMAC's sweeping arguments against class certification in this case could threaten the viability of class actions in disparate-impact lawsuits and thereby impede effective enforcement of numerous civil rights statutes.

Although we believe class certification is appropriate, the United States takes no position in this brief on the merits of Coleman's disparate-impact claim because the merits are not properly before the Court. For purposes of the class certification question, this Court must accept Coleman's allegations as true.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING A PLAINTIFF CLASS

To obtain class certification, a plaintiff must satisfy the requirements of Rule 23(a) and then must show that a class action is appropriate under one of the subsections of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-614 (1997). A trial court has broad discretion to certify a class under Rule 23, and its decision will not be overturned absent an abuse of discretion. *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997). The district court in this case did not abuse its discretion in certifying a plaintiff class under Rule 23(b)(2).

A. The Merits Of Plaintiff's Claim Are Not At Issue In This Appeal

At the outset, it is important to clarify the scope of this interlocutory appeal. "[T]he relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action." *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984), cert. denied, 471 U.S. 1125 (1985); accord *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Consequently, in deciding this appeal, the Court "must take the allegations of plaintiff[] as true." *Eddleman v. Jefferson County*, 96 F.3d 1448 (Table), No. 95-5394, 1996 WL 495013, at *3 (6th Cir. Aug. 29, 1996) (unpublished opinion); accord *J.B. v. Valdez*, 186 F.3d

1280, 1284, 1290 n.7 (10th Cir. 1999). Because the merits are not at issue here, the United States takes no position in this brief on the validity of Coleman's claim.

B. This Case Satisfies The Requirements Of Rule 23(a)

A class action is permissible "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Courts often refer to these requirements as "numerosity," "commonality," "typicality," and "adequacy of representation." *Amchem*, 521 U.S. at 613. This case meets each of these requirements, but we will discuss only the two that GMAC challenges: typicality and adequacy of representation.

A plaintiff's claim "is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996). This case satisfies the typicality requirement. Coleman alleges that she, like all class members, suffered injury as a result of defendant's Finance Charge Markup Policy. And she proposes to prove her own claim, and the claims of all the other class members, using the same disparate-impact theory.

Coleman also satisfies the adequacy-of-representation requirement, which focuses on the competency of class counsel, the likelihood that the named plaintiff will vigorously pursue the litigation, and the absence of conflicts with the other class members' interests. See *American Med. Sys.*, 75 F.3d at 1083. We know of no conflict of interest between Coleman and the other class members. Moreover, from all indications, Coleman's attorneys are well-qualified and have vigorously pursued this litigation, as evidenced by their success thus far in compiling a massive database and retaining experts to perform complicated statistical analyses.

GMAC asserts, however, that Coleman is an inadequate class representative because her claims are allegedly time-barred and thus atypical of those of the class as a whole (Br. 15, 18-26, 35). GMAC contends (Br. 20) that ECOA's 2-year limitations period began to run when Coleman entered the contract with GMAC, not when she later discovered the markup in her interest rate. That argument is flawed. Coleman has alleged facts that, if proven, would establish that her claims are timely, as the district court properly recognized in refusing to dismiss the complaint (R. 42, Memorandum at 9-11). Specifically, Coleman has alleged that GMAC deliberately concealed the existence of the markup from her and other class members, and thus they did not know of, and could not reasonably have discovered, the existence of the challenged policy at the time they obtained their GMAC loans (*ibid.*; R. 266, Complaint ¶¶ 21-22, 26-28, 66-69, 92; R. 183, Amended Memorandum at 32-33; R. 246, Plaintiff's Statement of Disputed Facts ¶¶ 72-74; R. 243, Reply Memorandum at 10 n.14).

Coleman's allegations, if proven, would make her claims timely under the "discovery" rule, which this Court typically applies in interpreting limitations periods in federal statutes. See, *e.g.*, *Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 582 n.3 (6th Cir. 2000); *Michigan United Food & Commercial Workers Unions v. Muir Co.*, 992 F.2d 594, 597-598 (6th Cir. 1993). Under the discovery rule, "the statute of limitations begins to run when the reasonable person knows, or in the exercise of due diligence should have known, both his *injury* and the *cause* of that injury." *Campbell v. Grand Trunk Western R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001) (emphasis in original).[3] Contrary to GMAC's suggestion (Br. 20 n.7), the reference to the "occurrence of the violation" in 15 U.S.C. 1691e(f) does not preclude application of the discovery rule in ECOA cases. This Court has applied the rule to another federal law whose statute-of-limitations provision refers to the occurrence of the unlawful conduct. See, *e.g.*, *Nida v. Plant Protection Ass'n Nat'l*, 7 F.3d 522, 525 (6th Cir. 1993) (interpreting 29 U.S.C. 160(b)).[4] The discovery rule logically should apply to ECOA, as well.

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[3] Nothing in the Senate Report cited by GMAC (Br. 22-23) is inconsistent with the discovery rule. At most, the Report suggests that Congress expanded ECOA's statute of limitations from 1 to 2 years to give individuals additional time to determine whether lenders' acts were "[d]iscriminatory" and thus "potential violations" of ECOA. S. Rep. No. 589, 94th Cong., 2d Sess. 14 (1976). The Report does not address a situation where, as here, the credit applicant allegedly is unaware that the conduct itself has occurred (as opposed to whether that conduct is discriminatory). Coleman alleges that she was unaware when she received the loan that a markup had been included in her interest rate.

[4] Compare 29 U.S.C. 160(b) ("no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board"), with ECOA, 15 U.S.C. 1691e(f) ("No such action shall be brought later than two years from the date of the occurrence of the violation [with certain exceptions]").

Coleman also could invoke the equitable doctrine of "fraudulent concealment" if she proves all of her allegations. Under that doctrine, the running of the statute of limitations is tolled if "(1) the defendant took affirmative steps to conceal the plaintiff's cause of action; and (2) the plaintiff could not have discovered the cause of action despite exercising due diligence." *Jarrett v. Kassel*, 972 F.2d 1415, 1423 (6th Cir. 1992), cert. denied, 507 U.S. 916 (1993). If the doctrine is applicable, the limitations period "will begin to run when the borrower discovers or had reasonable opportunity to discover the fraud." *Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037, 1041 (6th Cir. 1984). This equitable doctrine is to be "read into every federal statute of limitation." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

GMAC suggests, however, that the district court should not have certified the class without making factual findings that GMAC engaged in fraudulent concealment or that Coleman was prevented from obtaining information necessary to uncover the alleged practice (Br. 17, 24-25). The district court cannot be faulted for the lack of factual findings on these issues because, as far as we can determine from the record, GMAC did not raise the issue in opposing class certification (see Coleman Proof Br. 22-23; R. 209, Opposition to Plaintiff's Motion for Class Certification; R. 274, 8/7/00 Transcript).[5] At any rate, resolution

[5] The district court addressed the statute of limitations issue in 1998 in denying a motion to dismiss filed by GMAC's co-defendant, Beaman Automotive Group (R. 42, Memorandum at 9-11).

of these questions is premature because they are intertwined with the merits of Coleman's claim; they depend, in part, on disputed factual issues about GMAC's implementation of the Finance Charge Markup Policy. Therefore, even if GMAC had raised the issue in opposing class certification, the district court would not have abused its discretion in declining to resolve the merits of GMAC's statute-of-limitations defense at this stage of the litigation. See *Eisen*, 417 U.S. at 177-178 (court must not decide merits in ruling on class certification).

Alternatively, GMAC suggests (Br. 46, 49) that class certification is inappropriate because, even if Coleman's claim is found to be timely, the district court must conduct individualized hearings into whether the other class members' claims are time-barred. This argument was not raised below and thus is waived. See *United States v. Universal Mgmt. Servs.*, 191 F.3d 750, 758 (6th Cir. 1999), cert. denied, 120 S. Ct. 2740 (2000). At any rate, this issue would not preclude class certification. This Court has held that the possibility that different class members' claims will be subject to different defenses will not foreclose certification under Rule 23. *Bittinger*, 123 F.3d at 884. Consistent with this holding, numerous courts have concluded that class certification can be appropriate even where individual class members are affected differently by a statute of limitations. See *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 & n.4 (1st Cir. 2000); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 924 (3d Cir. 1992); *Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983);

Cameron v. E.M. Adams & Co., 547 F.2d 473, 478 (9th Cir. 1976); accord 1 Newberg & Conte, *Newberg on Class Actions* § 4.26 at 4-104 (3d ed. 1992).[6]

At any rate, it is merely hypothetical at this point whether individualized hearings on statute-of-limitations questions would be needed for most class members. As previously noted, Coleman has alleged that GMAC has a policy of concealing from borrowers that their interest rates include markups, and that such concealment prevented class members from discovering the markups at the time they obtained their GMAC loans (see p. 9, *supra*). Those allegations must be accepted as true for purposes of the class certification decision. If the district court ultimately finds that GMAC enforced such a non-disclosure policy, the court may be able to conclude without individualized hearings that virtually no class members could have reasonably discovered their injury until they learned about the Finance Charge Markup Policy in connection with this lawsuit. Therefore, contrary to GMAC's argument (Br. 55-56), the district court did not abuse its discretion in failing to exclude from the class anyone whose loan was approved more than 2 years prior to the filing of Coleman's lawsuit.

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[6] In support of its argument, GMAC relies (Br. 49) on *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), cert. denied, 526 U.S. 1114 (1999). Although *Barnes* cited the statute-of-limitations issue in rejecting class certification, that case is distinguishable from Coleman's suit. The court in *Barnes* concluded that individualized hearings would be necessary on several issues relating to liability, not just the statute-of-limitations defenses. See *Barnes*, 161 F.3d at 143. As explained below, the district court should be able to resolve liability questions in the present case without individualized hearings. See pp. 19-20, *infra*.

Next, GMAC contends that Coleman has no standing to seek the injunctive relief she requests for the class and thus fails to satisfy the typicality and adequacy-of-representation requirements (Br. 26). GMAC's argument is meritless. Coleman alleges that she was overcharged as a result of racial discrimination and thus suffered a concrete injury. If Coleman's allegations are true, she undoubtedly has standing to seek a declaration that GMAC's Finance Charge Markup Policy is unlawful and an order requiring equitable restitution of the amount she was allegedly overcharged. Such a declaration would benefit the entire class because it would entitle class members to restitution or other forms of equitable relief. All class members' claims, including Coleman's, depend on the same legal determination: whether the alleged Finance Charge Markup Policy violates ECOA. Coleman thus has a strong incentive to vigorously litigate this common legal issue on behalf of the entire class. The possibility that not all class members will be entitled to the same type of relief does not preclude certification because, as this Court has correctly recognized, "[f]actual identity between the plaintiff's claims and those of the class he seeks to represent is not necessary." *Senter v. General Motors Corp.*, 532 F.2d 511, 524 (6th Cir.), cert. denied, 429 U.S. 870 (1976); see also *Bertulli v. Independent Ass'n of Continental Pilots*, __ F.3d __, 2001 WL 121814, at *3-*4 (5th Cir. Feb. 13, 2001) (finding typicality and adequacy of representation despite possible differences in appropriate relief between class representatives and some unnamed class members).

Finally, GMAC asserts that Coleman would not be part of the plaintiff class if it were properly confined to similarly-situated individuals, and thus she cannot satisfy the typicality and adequacy-of-representation requirements (Br. 15, 17, 19, 26-27). Specifically, GMAC asserts that its lending practices did not disadvantage Coleman in comparison to similarly-situated borrowers (Br. 27). That argument is not a proper basis for denying class certification because there is a factual dispute as to whether plaintiff's markup was greater than that of similarly-situated white customers (R. 276, Memorandum at 8-9). GMAC's argument is essentially an attack on the merits of Coleman's claim because it goes to the heart of whether her statistical analysis is sound and whether it shows a racial disparity among similarly situated borrowers after controlling for legitimate variables that would have affected the level of the markup. The district court properly refused to resolve these merits issues at the class certification stage, see *Eisen*, 417 U.S. at 178, and thus did not abuse its discretion in concluding that Coleman satisfied the requirements of Rule 23(a).

C. Class Certification Is Appropriate Under Rule 23(b)(2)

Rule 23(b)(2) permits class certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The claims asserted here fit squarely within Rule 23(b)(2). GMAC's Finance Charge Markup Policy is "generally applicable" because it allegedly injured each of the class members, and

Coleman is seeking equitable and declaratory relief for the entire class (R. 266, Complaint ¶¶ 139, 142).

Civil rights cases alleging racial discrimination are "prime examples" of appropriate Rule 23(b)(2) class actions, *Amchem*, 521 U.S. at 614, because "[r]ace discrimination is peculiarly class discrimination." *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372 (6th Cir. 1977) (citation omitted), cert. denied, 436 U.S. 946 (1978). Indeed, the Advisory Committee Notes to Rule 23(b)(2) cite discrimination cases as "[i]llustrative" examples of 23(b)(2) class actions. Rule 23(b)(2) certification is proper in civil rights cases "even though 'the discrimination may have been manifested in a variety of practices affecting different members of the class in different ways and at different times.'" *Alexander*, 565 F.2d at 1372.

Rule 23(b)(2) certification is particularly appropriate where the discrimination claims are based on a disparate-impact theory. Disparate-impact cases focus on the *class-wide* effect of a policy or practice on a protected group, and thus "by their very nature implicate class-based claims." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998).

Practical considerations also weigh heavily in favor of class certification in complex disparate-impact suits under ECOA. Proving a disparate-impact claim of this sort often requires an expensive and time-consuming compilation of a massive database, as well as the performance of sophisticated statistical analyses. Repeating this process hundreds or thousands of times in separate lawsuits would be a tremendous waste of judicial resources. Moreover, borrowers often have no economic incentive to bring individual actions under ECOA. Individual monetary losses in ECOA cases are often relatively modest (in this case, only a few hundred or a few thousand dollars) and thus are unlikely to justify the potentially enormous litigation expenses inherent in complicated disparate-impact cases of this sort. This disincentive to pursue small claims is the core reason for permitting class actions. *Amchem*, 521 U.S. at 617.

GMAC argues, however, that Coleman's claim for monetary relief precludes Rule 23(b)(2) certification (Br. 16-17, 28-55). Specifically, GMAC asserts that the monetary claim is not merely incidental to the requested injunctive and declaratory relief, but rather is the predominant remedy that Coleman seeks (Br. 16, 35-39). In support of its argument, GMAC cites (Br. 32) the Advisory Committee Notes to Rule 23, which state that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."

The premise of GMAC's argument is flawed. The restriction cited in the Advisory Committee Notes is inapplicable here because the only monetary relief Coleman seeks is equitable restitution, not compensatory or punitive damages.[7]

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[7] GMAC incorrectly suggests (Br. 33-34) that (b)(2) certification might interfere with absent class members' Seventh Amendment rights to a jury trial. This case does not implicate the Seventh Amendment because there is no constitutional right to a jury trial where, as here, the plaintiff seeks only equitable remedies. See *Tull v. United States*, 481 U.S. 412, 417-424 (1987); *Bittinger*, 123 F.3d at 882-883.

Although her complaint requested "money damages" and "damages allowed by law" (R. 266, Complaint at 3, 41), Coleman has clarified that her monetary claims are limited to restitution[8] – *i.e.*, a refund of the amounts that GMAC overcharged as a result of the alleged discrimination (Coleman Proof Br. 36, 39, 41, 50-51; R. 316, Plaintiff's Reply at 2-4; R. 274, 8/7/00 Tr. at 122). Restitution is an equitable remedy and is not equivalent to money damages. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (equitable relief includes "restitution, but not compensatory damages"). "When monetary relief is properly sought as equitable restitution, such cases qualify as Rule 23(b)(2) classes," even where that monetary relief is "as predominant as the injunctive and other equitable relief sought."[9] 1 *Newberg on Class Actions*, *supra*, § 4.14 at 4-48; see also *Allison*, 151 F.3d at 415-416 & n.10, 422, 425.[10]

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[8] Coleman's appellate brief describes the requested monetary relief as "disgorgement and/or restitution" (Coleman Proof Br. 36, 41). We use the term "restitution" to include the equitable remedy of disgorgement, which courts often characterize as "restitutionary." *Chauffeurs, Teamsters & Helpers v. Terry*, 494 U.S. 558, 570 (1990).

[9] This rule is consistent with the unpublished decision in *Butler v. Sterling, Inc.*, No. 98-3223, 2000 WL 353502 (6th Cir. Mar. 31, 2000), on which GMAC relies (Br. 39-40). The plaintiffs in *Butler* sought compensatory damages for emotional distress, not simply restitution. 2000 WL 353502, at *8-*9.

[10] GMAC urges this Court to adopt the Fifth Circuit's "incidental damages" standard for determining the propriety of (b)(2) certification in cases seeking monetary relief (Br. 33, 40-42, citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998)). *Allison* does not support GMAC's position because, as the Fifth Circuit explained, the "incidental damages" standard does not apply in a case involving "only claims for equitable monetary relief." *Allison*, 151 F.3d at 415-416 & n.10; accord *id.* at 422, 425.

It is well-settled, for example, that 23(b)(2) certification is appropriate in civil rights actions seeking monetary relief in the form of back pay, which (like the restitution sought here) is an equitable remedy. See *Alexander*, 565 F.2d at 1372; *Senter*, 532 F.2d at 525; *Allison*, 151 F.3d at 415, 422. GMAC attempts to distinguish these back pay cases by asserting that back pay calculations "do not involve a need for the type of individualized inquiries and determinations required by the Plaintiff's claim for monetary relief" (Br. 39-40 n.14). GMAC is mistaken. Back pay calculations often require an individualized inquiry into whether a discrimination victim made reasonable attempts to mitigate his or her monetary losses. In determining appropriate back pay, courts offset the monetary award by the amount of replacement earnings that the victim actually received (or could have earned with reasonable efforts) from an employer other than the defendant. See *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 623-626 (6th Cir. 1983), cert. denied, 466 U.S. 950 (1984). In light of this duty of mitigation, determinations of appropriate back pay in employment discrimination suits are far more likely to require individualized hearings (see *ibid.*) than would the calculation of the alleged overcharges that Coleman seeks as restitution.

In the present case, the district court should be able to determine liability and calculate appropriate relief without conducting individualized hearings into the circumstances surrounding each individual's loan. Coleman proposes to prove the disparate impact of the Finance Charge Markup Policy using multiple regression analyses, which are designed to isolate the effect, if any, that race had on a borrower's markup by controlling for various legitimate variables that might have affected the size of the markup (see, *e.g.*, R. 248, Cohen Report at 7-14). The variables that Coleman proposes to include in these statistical analyses are in GMAC's business records or otherwise available through public sources (see *ibid.*; R. 266, Complaint ¶¶ 97-106). If Coleman establishes a *prima facie* case of discrimination, GMAC could nonetheless avoid liability by showing that its policy is justified by business necessity. See *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,269 (1994). But that determination would focus on GMAC's needs, rather than on the particular circumstances of each class member. If GMAC is found liable, the district court should be able to calculate appropriate relief for each class member by using a standard formula derived from the same statistical analyses that Coleman used to prove her *prima facie* case. Cases that rely so heavily on statistical evidence are especially well-suited for class certification.

GMAC also contends that Rule 23(b)(2) is inapplicable because Coleman lacks standing to seek injunctive relief (Br. 35-39). That argument is flawed. As previously noted in response to GMAC's argument about typicality and adequacy of representation (p. 14, *supra*), Coleman has standing to seek a declaration that the Finance Charge Markup Policy is unlawful and an order requiring GMAC to reimburse her for the alleged overcharges. Such an order requiring equitable restitution is a type of injunctive relief even though it results in the payment of money. See *Universal Mgmt. Servs.*, 191 F.3d at 760-761 (restitution order was encompassed within court's power to provide "injunctive relief"); *Keck v. Michigan Dep't of Corrections*, 9 F.3d 108 (Table), No. 92-2378, 1993 WL 406378, at **1 (6th Cir. Oct. 12, 1993) (plaintiff sought "injunctive relief in the form of an order for back-pay"); *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1335 (10th Cir. 1998) ("restitutionary injunction" for back wages). Because either declaratory or injunctive relief (or both) would be appropriate if Coleman prevails on the merits, this case meets the requirements of Rule 23(b)(2).

Next, GMAC argues that class certification is inappropriate because local dealers had input in setting the finance charge markups on the class members' loans (Br. 45-48). But Coleman alleges that the cause of the disparate impact was GMAC's *own* "nationally uniform" policy (R. 183, Amended Memorandum at 8). At this stage of the litigation, the Court must accept this allegation as true. Specifically, Coleman alleges that GMAC has adopted a Finance Charge Markup Policy that it administers uniformly throughout Tennessee and the United States, that the policy authorizes local dealers to impose markups in borrowers' interest rates and gives the dealers an economic incentive to do so, that GMAC profits directly from the dealers' decisions to mark-up the interest rates, that GMAC approves loans that contain these markups, and that GMAC imposes limits on the size of the markups. See pp. 3-5, *supra*. Although it is uncertain whether Coleman can prove the existence of a specific nationwide or statewide policy that actually caused the alleged disparate impact, her allegations are sufficient at this preliminary stage of the litigation to justify class certification. If it later appears that Coleman will be unable to prove that a specific GMAC policy or practice caused the alleged disparate impact, the district court can revisit the class certification issue at that point. See *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 (6th Cir. 1997).

GMAC also contends (Br. 13-17, 45-54) that class certification is impermissible because a multitude of non-discriminatory factors may affect the amount of each car buyer's loan markup. At bottom, this argument is nothing more than an attack on the merits of Coleman's claim – essentially an assertion that plaintiff cannot prove disparate impact or causation because her statistical analyses allegedly do not account for legitimate, non-racial factors that might vary among the thousands of borrowers who have loans with GMAC. Contrary to GMAC's suggestion, denying class certification will not resolve this merits issue. Coleman has made clear that if her case proceeds as an individual lawsuit, she will base her disparate-impact claim on the same statistical proof that she proposes to use in the class action (see R. 299, Plaintiff's Response at 2; R. 183, Amended Memorandum at 32). Either way, Coleman will try to prove disparate impact using statistical analyses that include thousands of GMAC customers.

At any rate, GMAC cannot avoid class certification merely by speculating that disparities in the markup are attributable to borrower-specific variables that are not included in the plaintiff's statistical models. Rather, GMAC has the burden of producing specific evidence that those variables do, in fact, undermine plaintiff's statistical analyses. See *Bazemore v. Friday*, 478 U.S. 385, 399-400, 403-404 n.14 (1986); *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 908-909 (6th Cir. 1991). If GMAC were able to produce such evidence in the future, the district court could determine at that point whether obtaining information about those variables for each class member would require cumbersome, individualized hearings. If so, the court could then consider decertifying the class due to changed circumstances. See *Barney*, 110 F.3d at 1214. But the court might find, instead, that all relevant variables can be obtained either from GMAC's own business records or from public sources without individualized hearings.

For the reasons we have explained, the district court did not abuse its discretion in certifying a plaintiff class under Rule 23(b)(2). This Court should therefore affirm the class certification order. In doing so, the Court may wish to encourage the district judge to provide notice to absent class members at the remedial stage of this litigation if it progresses that far. Although notice and opt-out rights are not mandatory under Rule 23(b)(2) – as they are in (b)(3) class actions, see Fed. R. Civ. P. 23(c)(3) – the district court nonetheless has discretion to order such protections for members of a (b)(2) class. See *Penland v. Warren County Jail*, 759 F.2d 524, 531 (6th Cir. 1985) (*en banc*); Fed. R. Civ. P. 23(d)(2). By providing class members with these procedural safeguards, a court "can permit civil rights class actions to proceed under 23(b)(2) without requiring that such actions meet the stiffer substantive requirements of 23(b)(3), yet still ensure that the class representatives adequately represent the interests of unnamed class members." *Allison*, 151 F.3d at 418 n.13; accord *Lemon v. International Union of Operating Eng'rs*, 216 F.3d 577, 582 (7th Cir. 2000).

Notice in a case such as this is advisable because of the possibility that the interests of individual class members may diverge at the remedial stage, even though the monetary relief is purely equitable in nature and can be calculated using a standard formula. There may be more than one acceptable formula for calculating restitution, and individual class members may have an interest in objecting to the formula chosen by the named plaintiffs. But this divergence of interests is unlikely to arise until the remedial phase of the litigation. Therefore, the district court may properly delay notice in a (b)(2) class action "until a more advanced stage of the litigation; for example, until after class-wide liability is proven." *King v. South Cent. Bell Tel. & Tel.*, 790 F.2d 524, 529 (6th Cir.1986) (quoting *Johnson v. General Motors Corp.*, 598 F.2d 432, 438 (5th Cir. 1979)).

CONCLUSION

The district court's class certification order should be affirmed.

Respectfully submitted,

WILLIAM R. YEOMANS
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-3876

CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a), I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 6,286 words of proportionally-spaced text. The type face is Times New Roman, 14-point font.

Greg B. Friel

GREGORY B. FRIEL
Attorney

ADDENDUM

United States Court of Appeals,
Fifth Circuit.

A.J. BERTULLI; Joe Grinder; Larry Douris; Joan Sandstrome; Marc Blackmore, Plaintiffs-Appellees,
v.
INDEPENDENT ASSOCIATION OF CONTINENTAL PILOTS; Continental Airlines, Defendants-Appellants.

No. 99-21170.

Feb. 13, 2001.

Pilots filed action against pilots' association and airline under Railway Labor Act (RLA) and Labor-Management Reporting and Disclosure Act (LMRDA), claiming injury suffered as result of seniority lost when association and airline restored seniority of 11 strike participants, and seeking class certification. The United States District Court for the Southern District of Texas, Melinda Harmon, J., certified class of all pilots whose seniority rank fell when seniority was restored to strike participants. Association and airline appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) pilots had standing to sue; (2) class could be defined as those pilots who suffered loss of seniority as result of restoration; (3) class met numerosity requirement; (4) class met commonality claim; (5) differences in extent of injury between class representatives and unnamed class members did not destroy typicality; (6) class representatives were adequate; (7) common issues predominated with respect to class; and (8) class met superiority requirement.

Affirmed.

[1] Federal Courts ⚿768.1

170Bk768.1

Under the rule governing appeals of grants or denials of class certification, a party may appeal only the issue of class certification; no other issues may be raised. Fed.Rules Civ.Proc.Rule 23(f), 28 U.S.C.A.

[2] Federal Civil Procedure ⚿103.2
170Ak103.2

Standing goes to the constitutional power of a federal court to entertain an action, and the Court of Appeals has the duty to determine whether standing exists even if not raised by the parties.

[2] Federal Courts ⚿543.1
170Bk543.1

Standing goes to the constitutional power of a federal court to entertain an action, and the Court of Appeals has the duty to determine whether standing exists even if not raised by the parties.

[3] Federal Civil Procedure ⚿103.7
170Ak103.7

The constitutional threshold of standing must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by the rule governing class certification. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[4] Federal Civil Procedure ⚿103.7
170Ak103.7

Standing is an inherent prerequisite to the class certification inquiry, and, thus, despite the limited nature of an appeal of a grant or denial of class certification, defendants can raise the issue of standing when bringing such an appeal before the Court of Appeals. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[4] Federal Courts ⚿768.1
170Bk768.1

Standing is an inherent prerequisite to the class certification inquiry, and, thus, despite the limited nature of an appeal of a grant or denial of class certification, defendants can raise the issue of standing when bringing such an appeal before the Court of Appeals. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[5] Federal Civil Procedure ⚿103.2
170Ak103.2

[5] Federal Civil Procedure ⚿103.3
170Ak103.3

The irreducible constitutional minimum of standing is: (1) injury-in-fact; (2) causation; and (3) redressability.

[6] Labor Relations ⚿759
232Ak759

[6] Labor Relations ⚿773.1
232Ak773.1

Pilots had standing to sue pilots' association and airline under Railway Labor Act (RLA) and Labor-Management Reporting and Disclosure Act (LMRDA), in action alleging injury as result of seniority lost when seniority was restored to 11 strike participants, notwithstanding association's and airline's argument that pilots' abilities to get work assignments they desired was not affected; loss of seniority carried possibility of slower promotion, greater likelihood of being laid off, and lower benefits, and alleged loss of fair representation under RLA and alleged loss of voting rights under LMRDA were procedural rights protected by statute. Labor-Management Reporting and Disclosure Act of 1959, § 2 et seq., 29 U.S.C.A. § 401 et seq.; Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.

[7] Federal Civil Procedure ⚿103.2
170Ak103.2

Injury need not be monetary or tangible to support standing; even psychological or aesthetic injury is sufficient.

[8] Federal Civil Procedure ⚿103.2
170Ak103.2

An injury must be personal to support standing.

[9] Federal Courts ⚿817
170Bk817

Class certification decision would be reviewed for abuse of discretion. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[10] Federal Civil Procedure ⚿171
170Ak171

A class should be certified on a claim-by-claim basis. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[11] Federal Civil Procedure ⚿184.5
170Ak184.5

District court did not abuse its discretion in defining class of pilots, with respect to claim that pilots' association and airline violated Labor-Management Reporting and Disclosure Act (LMRDA) by failing to allow pilots to vote on restoration of seniority of 11 strike participants, as those pilots who suffered loss of seniority as result of restoration, rather than as all pilots employed by airline; district court's decision ensured cohesion and commonality of interest that broader class might have lacked. Labor-Management Reporting and Disclosure Act of 1959, § 2 et seq., 29 U.S.C.A. § 401 et seq.; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[12] Federal Civil Procedure ⚿176
170Ak176

A district court may choose one possible class definition over another in order to ensure that the requirements of the class action rule are best satisfied. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[13] Federal Civil Procedure ⚿184.5
170Ak184.5

Class of pilots who suffered loss of seniority as result of restoration of seniority of 11 strike participants met numerosity requirement in LMRDA and RLA action, inasmuch as loss of preferred routes would not affect only 11 pilots but could cascade all the way down seniority list, and loss of seniority itself, not loss of specific work assignment, was the injury to class members. Labor-Management Reporting and Disclosure Act of 1959, § 2 et seq., 29 U.S.C.A. § 401 et seq.; Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

[14] Federal Civil Procedure ⚿184.5
170Ak184.5

Class of pilots who suffered loss of seniority as result of restoration of seniority of 11 strike participants met commonality requirement as to RLA claim, inasmuch as all class members were harmed by single action, and any factual or legal questions as to whether association violated duty of fair representation would affect entire class. Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

[15] Federal Courts ⚷768.1
170Bk768.1

The Court of Appeals does not consider the merits of a case when reviewing class certification. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[16] Federal Civil Procedure ⚷184.5
170Ak184.5

Class of pilots who suffered loss of seniority as result of restoration of seniority of 11 strike participants met commonality requirement as to LMRDA claim, inasmuch as whether association and airline were required to allow the pilots to vote on seniority change was legal question common to all class members that depended not on their individual circumstances but on application of statute. Labor-Management Reporting and Disclosure Act of 1959, § 101(a)(1), 29 U.S.C.A. § 411(a)(1); Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

[17] Federal Civil Procedure ⚷184.5
170Ak184.5

Differences in extent of injury between class representatives and unnamed class members did not destroy typicality, so as to defeat class certification, in pilots' LMRDA and RLA action alleging they suffered loss of seniority as result of restoration of seniority of 11 strike participants; even if only 11 class members lost work assignments, class representatives were typical of remaining 1,700 or so class members whose only injury was loss of seniority, and all class members shared same theories of liability. Labor-Management Reporting and Disclosure Act of 1959, § 2 et seq., 29 U.S.C.A. § 401 et seq.; Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[18] Federal Civil Procedure ⚷184.5
170Ak184.5

District court did not abuse its discretion in finding class representatives adequate in pilots' LMRDA and RLA action alleging they suffered loss of seniority as result of restoration of seniority of 11 strike participants, inasmuch as class representatives' interests were aligned, not antagonistic, to unnamed class members, and dissatisfied class members had right to opt out of class. Labor-Management Reporting and Disclosure Act of 1959, § 2 et seq., 29 U.S.C.A. § 401 et seq.; Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc.Rule 23(a)(4), (c)(2), 28 U.S.C.A.

[19] Federal Civil Procedure ⚷184.5
170Ak184.5

District court did not abuse its discretion in finding that common issues predominated with respect to class of pilots bringing LMRDA and RLA action alleging they suffered loss of seniority as result of restoration of seniority of 11 strike participants; every aspect of liability in case involved issue whether association took single act that caused every plaintiff to lose seniority, and not all relief required individualized determination. Labor- Management Reporting and Disclosure Act of 1959, § 2 et seq., 29 U.S.C.A. § 401 et seq.; Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[20] Federal Civil Procedure ⚷184.5
170Ak184.5

District court did not abuse its discretion in finding that superiority requirement was met by class of pilots bringing LMRDA and RLA action alleging they suffered loss of seniority as result of restoration of seniority of 11 strike participants; any relief received by vast majority of class members would be primarily injunctive, feasibility of individual actions due to availability of attorney fees under LMRDA did not undercut conclusion that class device was superior, and, although some damages calculations might be burdensome, economies weighed in favor of class treatment. Labor-Management Reporting and Disclosure Act of 1959, § 2 et seq., 29 U.S.C.A. § 401 et seq.; Railway Labor Act, § 1 et seq., 45 U.S.C.A. § 151 et seq.; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.
William Randell Wilder (argued), Roland P. Wilder, Jr., Baptiste & Wilder, Washington, DC,

for Independent Ass'n of Continental Pilots.

Jon A. Geier (argued), Paul, Hastings, Janofsky & Walker, Washington, DC, for Continental Airlines.

J. Richard Hammett, Laurence Eliot Stuart (argued), Charlene Hsi-Lin Tsang, Baker & McKenzie, Douglas R. Little, Houston, TX, for Plaintiffs- Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before HIGGINBOTHAM, WIENER, and DENNIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

*1 Pilots filed this class action against their pilots' association and airline claiming injury suffered as a result of seniority lost when the pilots' association and airline changed the seniority rankings of their pilots. The class was certified under Rule 23(b)(3). [FN1] Defendants appeal the certification order under Rule 23(f). [FN2]

The pilots' association and airline argue that the plaintiffs lack standing and that the certification of the class was an abuse of discretion. We hold that standing is reviewable in a Rule 23(f) interlocutory appeal, that the plaintiffs have standing, and that the certification of the class was not an abuse of discretion.

I

Plaintiffs are pilots for Continental Airlines. They filed suit against the defendants, Continental Airlines and the Independent Association of Continental Pilots, alleging that the Pilots' Association violated its duties under the Railway Labor Act [FN3] and the Labor-Management Reporting and Disclosure Act. [FN4] The plaintiffs claim that they were injured when they lost seniority after the Pilots' Association and Continental Airlines agreed to restore the seniority of eleven pilots who had lost their seniority when they participated in a strike in 1983-85. The plaintiff class is composed of all Continental pilots whose seniority fell as a result of the action by the Pilots' Association; the class is alleged to number more than 1,700 pilots. Each class member's seniority rank fell by between one and eleven. The loss of seniority harmed plaintiffs, they claim, because seniority determines the priority of a pilot's bid for a particular work assignment. Assignments differ in terms of pay, benefits, and choice of routes and schedules.

Plaintiffs describe two violations of statutory duties. First, they claim that the Pilots' Association violated the LMRDA when it denied the pilots their right to vote on the changes in seniority that the Pilots' Association negotiated with Continental. Second, they claim that the Pilots' Association violated its duty of fair representation under the RLA because the seniority action was arbitrary, discriminatory, or in bad faith. [FN5] Plaintiffs seek back pay and injunctive relief to undo the change in seniority. [FN6]

II

[1][2][3][4] Defendants first argue that plaintiffs lack standing to bring this suit. We note, initially, that under Rule 23(f), a party may appeal only the issue of class certification; no other issues may be raised. [FN7] Standing, however, goes to the constitutional power of a federal court to entertain an action, [FN8] and this court has the duty to determine whether standing exists even if not raised by the parties. [FN9] As we have held, "[t]his constitutional threshold must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by [Rule] 23." [FN10] Standing is an inherent prerequisite to the class certification inquiry; thus, despite the limited nature of a Rule 23(f) appeal, defendants can raise the issue of standing before this court. [FN11]

[5][6] In addressing the merits of this claim, we begin with Lujan v. Defenders of Wildlife, [FN12] which describes the "irreducible constitutional minimum of standing": (1) injury-in-fact, (2) causation, and (3) redressability. [FN13] Defendants argue that the named plaintiffs have not suffered any injury-in-fact. [FN14] Defendants argue that they presented uncontroverted evidence that the challenged seniority changes did not affect the named plaintiffs' abilities to get the work assignments they desired; each plaintiff has received the assignments bid for. Thus, defendants argue, plaintiffs have demonstrated no monetary loss and lack standing.

*2 [7][8] This cramped view misunderstands standing. First, injury need not be monetary or tangible; even psychological or aesthetic injury is sufficient. [FN15] What courts require, however, is that the injury be personal. [FN16] Loss of seniority is an injury within a commonsense understanding of the term, and one that is suffered by the plaintiffs themselves. It carries with it the possibility of several forms of concrete injury, such as slower promotion, greater likelihood of being laid off, and lower benefits. [FN17] This circuit has entertained RLA actions regarding seniority decisions by unions. [FN18]

Second, the statutory violations that plaintiffs claim describe two specific injuries: first, loss of "fair representation" under the RLA; second, loss of voting rights under the LMRDA. These are "procedural rights" protected by statute, the loss of which is itself an injury without any requirement of a showing of further injury. [FN19] Defenders of Wildlife describes, as examples of procedural rights, the right to a hearing prior to deprivation or the right to an agency completing an environmental impact statement before beginning a project. [FN20] The loss is not merely the subsequent deprivation, but the right not to suffer a deprivation without proper process. In this case, the plaintiffs allege that the Pilots' Association deprived them of seniority without a vote and without the Pilots' Association fairly representing them.

Plaintiffs have standing.

III

[9][10] We review the district court's certification decision for abuse of discretion. [FN21] A class should be certified on a claim-by-claim basis; [FN22] thus, we consider the RLA and LMRDA claims independently under each requirement for certification.

Composition of the Class

[11][12] Defendants first argue that the class definition is underinclusive for the LMRDA claim. [FN23] Plaintiffs allege a denial of the pilots' right to vote on the seniority change. Since all Continental pilots have a procedural right to vote protected by the LMRDA, the district court could have defined the class to include all Continental pilots. But the district court may choose one possible class definition over another in order to ensure that the requirements of Rule 23 are best satisfied. [FN24]

Although all Continental pilots have allegedly been deprived of the right to vote, not all the pilots have the same interest in rectifying that deprivation. If the district court had included all Continental pilots in the class, the class would have included pilots with interests antagonistic to each other: pilots, like the named plaintiffs, who want to vote because they lost seniority; and pilots whose seniority increased as a result of the defendants' action, and who thus benefitted from the action taken without a vote. By defining the class to include only those pilots who also suffered a loss of seniority, the district court ensured that the class maintained a degree of cohesion, a commonality of interest, that a broader class may have lacked.

Further, the interests of the members of the class and those excluded from the class definition are sufficiently distinct to justify the line drawn. While all pilots can claim a loss of procedural rights, those not in the class have no other injury. Drawing the class lines short of persons with no claim for loss of benefits was not an abuse of discretion. [FN25]

Rule 23(a)(1): Numerosity

*3 [13] Defendants argue that both claims fail the numerosity requirement for the same reason: since only eleven pilots had their seniority restored, only eleven class members could possibly have lost work assignments because of their lower seniority. If only eleven pilots were harmed, defendants reason, the class is not sufficiently numerous to merit class treatment.

This argument fails on its own terms. Restoring a single pilot's seniority could cause many pilots to lose their preferred routes. If one pilot is forced to accept her second-choice route, she may in turn displace from that route another, less senior pilot who in turn must take his second-choice route, and so on. A loss of preferred routes could thus cascade all the way down the seniority list.

Moreover, the injury to the class members is not merely loss of a specific work assignment or an identifiable sum of money; loss of seniority is itself a harm, as we explained in finding that the plaintiffs have standing. The district court reasonably concluded that the class exceeded 1,700 members. [FN26] Defendants make no claim that this figure is not sufficiently numerous for class treatment.

Rule 23(a)(2): Commonality

"The threshold of 'commonality' is not high" [FN27] and is met in this case for both claims. Each claim describes common issues of law and fact.

[14][15] Regarding the RLA claim, all the plaintiffs were harmed by a single action taken by the Pilots' Association, the decision to reinstate the seniority of eleven pilots. The RLA claim alleges that this action violated the Pilots' Association's duty of fair representation to the plaintiffs as a group. Resolution of any disputed facts surrounding the action taken by the Pilots' Association, and any factual and legal questions regarding whether the Pilots' Association violated its duty of fair representation, will affect the entire class. [FN28] The RLA claim presents common questions. [FN29]

[16] Regarding the LMRDA claim, whether the defendants were required to allow the pilots to vote on the seniority change is a legal question common to all of the class members that depends not on their individual circumstances, but on the application of the statute [FN30] to the duties of the Pilots' Association under its constitution and the actions of the Pilots' Association and Continental Airlines. The factual questions surrounding the decision of the Pilots' Association and Continental Airlines are common issues for the entire class. [FN31] The LMRDA claim presents common questions.

Rule 23(a)(3) & (4): Typicality and Adequacy

Defendants assert, for both the RLA and LMRDA claims, that the class representatives are not typical or adequate because they suffered no injury. Again, the class representatives have suffered an injury, loss of seniority, that is the same injury suffered by the rest of the class.

[17] Some class members may have lost work assignments, pay, and other benefits. But differences in the extent of injury between class representatives and unnamed class members does not defeat certification in this case. First, if we accept the defendants' argument that only eleven class members lost work assignments, the class representatives are typical of the remaining 1,700 or so class members whose only injury at this point is loss of seniority. Second, although some theories about damages may differ, all plaintiffs share the same theories of liability. [FN32] The district court did not abuse its discretion in finding typicality.

*4 [18] Nor did the district court abuse its discretion in finding the representatives to be adequate. The class representatives' interests are aligned, not antagonistic, to the unnamed class members. [FN33] Further, since this is a 23(b)(3) class, dissatisfied class members have the right to opt out of the class. [FN34]

Rule 23(b)(3): Predominance and Superiority

Defendants argue that common issues do not predominate because damages under both the RLA and LMRDA must be calculated in a highly individualized manner. They further argue that a class action is not superior for either claim. Rule 23(b)(3) lists some of the considerations the predominance and superiority inquiries should include. They are "(A) the interest of members of the class in individually controlling ... separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action." [FN35]

[19] Regarding predominance, defendants argue that the necessity of individualized inquiry into each plaintiff's injury to determine damages means that individual issues predominate over class issues. Although calculating damages will require some individualized determinations, it appears that virtually every issue prior to damages is a common issue. The plaintiffs' suit boils down to one basic factual claim: the Pilots' Association took a single act that caused every plaintiff to lose seniority. Every aspect of liability in the case involves this common issue. [FN36] Further, not all of the relief requires individualized determination. Injunctive relief undoing the restoration of the eleven pilots' seniority levels requires no individualized determinations, except for the recalculation of seniority rankings by the defendants. [FN37]

Determining damages may require the district court to reconsider class treatment of damages, but given the great significance of common issues in this case, we find no abuse of discretion in the district court's determination that common issues predominated. [FN38]

[20] Regarding superiority, defendants argue that the interests of class members in individual actions and the unmanageability of the class means this class fails the superiority requirement. They argue that (1) substantial potential damages make individual actions under both claims feasible, (2) the availability of attorney's fees under the LMRDA claim makes individual actions under that claim feasible, and (3) individualized calculation of damages makes a class action unmanageable. [FN39]

The damages that most members of the class would be entitled to seek are small. According to the plaintiffs, some class members may be entitled to damages of about $29,000 in back pay for lost work assignments, [FN40] but for the vast majority of plaintiffs, their only damages stem from loss of seniority itself and not lost work assignments. For them, damages will be nominal and their primary relief will be injunctive. A large group of plaintiffs, each with small damages, seeking injunctive relief that benefits the group as a whole, is the prototypical class.

*5 Likewise, regarding the LMRDA claim, attorney's fees do not alter the relatively low damages most plaintiffs would receive nor the significance of injunctive relief to the entire class. Defendants essentially argue that the potential for significant damages and the presence of attorney's fees under the LMRDA makes individual actions feasible. But the feasibility of individual actions does not undercut the conclusion that the class device is superior. In order to demonstrate that the district court's finding of superiority was an abuse of discretion, defendants must not merely show that individual actions are feasible; they must show that individual class members have an interest sufficient to make individual actions desirable.

Regarding the manageability of the class action, there is a possibility that some damages calculations would be burdensome. But the economies of class treatment of the numerous common issues weigh in favor of class treatment. We cannot find that the district court abused its discretion in finding certification to be superior for both claims.

IV

The district court did not abuse its discretion in certifying the class with respect to the RLA claim or the LMRDA claim. We AFFIRM the district court's certification of the class.

FN1. Fed.R.Civ.P. 23(b)(3) (2000).

FN2. Fed.R.Civ.P. 23(f) (2000).

FN3. 45 U.S.C.A. § 151 et seq. (2000). The RLA applies to airlines. 45 U.S.C.A. § 181.

FN4. 29 U.S.C.A. § 411 et seq. (2000).

FN5. See Shea v. Int'l Ass'n of Machinists and Aerospace Workers, 154 F.3d 508, 512 (5th Cir.1998).

FN6. The LMRDA authorizes "relief (including injunctions) as may be appropriate." 29 U.S.C.A. § 412. Courts have interpreted the RLA to include the implied duty of fair representation and have held that violation of this duty is susceptible to "the usual judicial remedies of injunction and award of damages." Shea, 154 F.3d at 512.

FN7. See Fed.R.Civ.P. 23(f) (providing for appeal of certification orders); 28 U.S.C.A. § 1291 (2000) (stating general rule that only final judgments may be appealed); see also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (holding that class certification cannot involve inquiry into the merits).

FN8. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

FN9. Christoff v. Bergeron Indus., Inc., 748 F.2d 297, 298 (5th Cir.1984) (duty to determine subject matter jurisdiction); see also Warth v. Seldin, 422 U.S. 490, 502, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("Unless [the class representatives] can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.' ").

FN10. Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. Unit A 1981).

FN11. The Eleventh Circuit has recently reached this same conclusion. See Carter v. West Publishing Co., 225 F.3d 1258, 1262 (11th Cir.2000). This circuit recently considered standing in an interlocutory appeal from a class certification, although under a different procedural posture. See Washington v. CSC Credit Servs. Inc., 199 F.3d 263, 265-68 (5th Cir.2000), cert. denied, --- U.S. ----, 120 S.Ct. 2718, 147 L.Ed.2d 983 (2000). The appeal in Washington was brought under 28 U.S.C. § 1292(b), not Rule 23(f), so it was not limited to issues of class certification. Id. at 265; see also Washington v. CSC Credit Servs., Inc., 180 F.R.D. 309 (E.D.La.1998) (certifying for appeal "all issues fairly presented" in the court's order).

FN12. 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

FN13. Id. at 560-61, 112 S.Ct. 2130.

FN14. Causation and redressability are easily met by the plaintiffs' allegations and evidence that the defendants' actions caused their loss of seniority, and that the relief sought would remedy the harm. Also, this case does not implicate any of the prudential limitations on standing. See Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (describing prudential limits on standing).

FN15. See Defenders of Wildlife, 504 U.S. at 562-63, 112 S.Ct. 2130.

FN16. See id. at 563, 112 S.Ct. 2130.

FN17. In addition, of course, to the possibility that plaintiffs' bidding for routes would be affected.

FN18. See Rogers v. Air Line Pilots Ass'n, Int'l, 988 F.2d 607 (5th Cir.1993). The defendants cite to a Seventh Circuit case, Rakestraw v. United Airlines, Inc., 981 F.2d 1524 (7th Cir.1992), claiming that a loss of seniority is not an injury for which a plaintiff pilot can seek relief. They misread Rakestraw. The Seventh Circuit stated, "[Our precedent] holds that a union may not juggle the seniority roster for no reason other than to advance one group of employees over another." Id. at 1534. The union's duty of fair representation constrains its ability to alter seniority rankings. See id.

FN19. See Defenders of Wildlife, 504 U.S. at 572 n. 7, 112 S.Ct. 2130.

FN20. See id. at 572 & n. 7, 112 S.Ct. 2130.

FN21. See Pederson v. Louisiana State Univ., 213 F.3d 858, 866 (5th Cir.2000).

FN22. See Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 976 (5th Cir.2000).

FN23. Defendants do not challenge the LRA claim on this basis.

FN24. See Fed.R.Civ.P. 23(c)(4) (2000); Lundquist v. Security Pacific Automotive Fin. Servs. Corp., 993 F.2d 11, 14 (2d Cir.1993) (noting that "the court is empowered under Rule 23(c)(4) to carve out an appropriate class--including the construction of subclasses," but that the court "is not obligated to implement Rule 23(c)(4) on its own initiative").

FN25. We note that non-members of the class remain free to assert their rights as they see fit.

FN26. Defendants also claim that since bidding is conducted within distinct groupings of pilots called "subbases," only pilots who share a subbase with one of the eleven pilots whose seniority was restored could have been injured. There are thirty-one subbases. At best, this reduces the class to hundreds of plaintiffs, rather than in excess of 1,700. But the loss of seniority affected more than just bidding, and thus the district court did not clearly err in finding that the class numbered at least 1,700.

FN27. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir.1986).

FN28. The plaintiffs describe the following common issues for the RLA claim: (1) whether the Pilots' Association breached its duty of fair representation by making the seniority changes arbitrarily; (2) whether the Pilots' Association breached its duty of fair representation by making the changes for discriminatory purposes; (3) whether the Pilots' Association breached its duty of fair representation by making the changes in bad faith; and (4) the methodology for calculating back pay.

FN29. See Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 625 (5th Cir.1999). Defendants also argue that common issues do not unite the class, because some members are pilots who worked during the strike, and others are pilots who joined Continental after the strike. This argument goes to the merits of plaintiffs' allegation that the Pilots' Association acted in bad faith to punish pilots who worked during the strike, not to the propriety of certification. We do not consider the merits of a case when reviewing class certification. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). The existence of this difference between class members does not erase the common issues that do exist.

FN30. 29 U.S.C.A. § 411(a)(1).

FN31. The plaintiffs describe the following common issues for the LMRDA claim: (1) whether the Pilots' Association constitution and by-laws granted the pilots a right to vote on the seniority change; (2) whether the union interpreted its constitution in good faith before ordering the changes without a vote; (3) whether any interpretation of the constitution not to require a vote was patently unreasonable; (4) whether the pilots were allowed to vote; and (5) the methodology for calculating back pay.

FN32. See Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 472 (5th Cir.1986) ("The 'typicality' requirement focuses less on the relative strengths of the named and unnamed plaintiffs' cases than on the similarity of the legal and remedial theories behind their claims.").

FN33. See Mullen, 186 F.3d at 625-26. Restoration of seniority would benefit the entire class; the class representatives do not seek relief at the expense of unnamed class members.

FN34. See Fed.R.Civ.P. 23(c)(2); Jenkins, 782 F.2d at 472 n. 5.

FN35. Fed.R.Civ.P. 23(b)(3). Placing the defendants' arguments within the framework these factors provide, we see that defendants focus their attention on (A) and (D). There is no litigation already commenced in other forums, and the defendants identify nothing about the particular forum that makes it undesirable.

FN36. Cf. Mullen, 186 F.3d at 626-27 (affirming certification when most, but not all, liability issues are common). As noted above, this central claim breaks down into numerous common issues of fact and law. See notes 28, 31.

FN37. Another consideration in favor of finding predominance is that if the defendants prevail on the liability issues, damages will be moot. See Mullen, 186 F.3d at 626.

FN38. "In order to 'predominate,' common issues must constitute a significant part of the individual cases." Mullen, 186 F.3d at 626 (quoting Jenkins, 782 F.2d at 472).

FN39. They also argue that the class device cannot be superior because the named plaintiffs have suffered no injury. This final iteration of the standing argument fails because, as we have explained above, the plaintiffs have suffered an injury, and the plaintiffs share that injury with the class.

FN40. Defendants dispute whether any members of the class would be entitled to back pay.

END OF DOCUMENT

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Clyde BUTLER; Faye Butler, Plaintiffs-Appellants,
v.
STERLING, INC.; Sterling Jewelers, Inc., Defendants-Appellees.

No. 98-3223.

March 31, 2000.

On Appeal from the United States District Court for the Northern District of Ohio.

Before RYAN and SUHRHEINRICH, Circuit Judges; and BELL, District Judge. [FN*]

FN* The Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

RYAN, Circuit Judge.

**1 Clyde (a/k/a Gary) and Faye Butler, husband and wife, claim to have been duped into purchasing "credit insurance" when they bought some jewelry at one of the defendants' stores. They sued and lost. They now appeal from several district court orders, claiming that the Racketeer Influenced and Corrupt Organizations Act (RICO), the Truth in Lending Act (TILA), the Ohio Consumer Sales Practices Act (OCSPA), and Ohio common law fraud provided redress to them for the defendants' misdeeds.

Specifically, the plaintiffs raise three issues for our review. They argue, first, that summary judgment on the plaintiffs' common law fraud and OCSPA claims was improper; second, that the district court abused its discretion by refusing to certify two plaintiff classes alleged to qualify for certification under Federal Rule of Civil Procedure 23(b)(2) or (3); and third, that the district court erred in holding that "emotional damages" are not recoverable under TILA.

We conclude that the district court committed no reversible errors and, consequently, affirm all orders appealed.

I.

The defendants are the owners of a large chain of retail jewelry stores. The plaintiffs purchased jewelry on several occasions in one of the defendants' stores in Ohio. They claim they were charged for credit insurance they did not order and that the insurance charges were hidden within the sales slip for purchases using the defendants' in-store credit card. The plaintiffs claim that the defendants' sales people did not explain or even mention the fact that credit insurance could be purchased as part of the credit transaction. They argue that the sales people are encouraged by the defendants to "push" credit insurance on customers using half-truths, innuendo, and prophecies of financial ruin. The plaintiffs next maintain that charges for credit insurance are hidden at the bottom of the monthly bill, apart from other charges listed in the body of the document. Finally, although admittedly not relevant to their personal causes of action (they originally asked the district court to certify a class of fellow customers), the plaintiffs assert that, if a customer would not affirmatively indicate that he or she did not want credit insurance, the defendants would charge the customer for credit insurance anyway. The contention that many of the defendants' customers, although not necessarily the plaintiffs, paid for an unwanted or unrequested product is not wholly spurious as there is substantial evidence, in the form of letters from disgruntled customers, that many people were charged for the unwanted credit insurance.

The allegedly offensive sales slips contain the following provision located below the itemized list of a customer's jewelry purchases:

PAYMENT PROTECTION PLAN--YES
CUSTOMER INITIALS ______ D.O.B.

______ PLEASE PROVIDE ME WITH PAYMENT PROTECTION AT $ ______ PER $100 OF MY AVERAGE DAILY BALANCE EACH MONTH, THE PURCHASE OF CREDIT INSURANCE IS OPTIONAL AND NOT REQUIRED TO OBTAIN CREDIT. THE PLAN PROVIDES CREDIT LIFE, DISABILITY, PROPERTY AND UNEMPLOYMENT COVERAGE. INDIVIDUAL COVERAGES ARE AVAILABLE IN PA. I UNDERSTAND THAT THE AVAILABILITY OF THESE COVERAGES MAY VARY BY STATE, MY CERTIFICATE OF INSURANCE WILL CONTAIN ALL THE DETAILS ABOUT THE PLAN.
**2 NO CUSTOMER INITIALS ______
______________ AUTHORIZATION CODES

______ THE BALANCE DUE ON THIS PURCHASE IS PAYABLE IN INSTALLMENTS UNDER MY CREDIT PLAN CONTRACT AND SECURITY AGREEMENT WHICH IS INCORPORATED HEREIN BY REFERENCE. I AGREE THAT SELLER SHALL RETAIN OWNERSHIP OF THE ITEMS SO PURCHASED UNTIL ENTIRE BALANCE IS FULLY PAID AND THAT I HAVE THE RISK OF LOSS OR DAMAGE TO SUCH ITEMS.

____
CUSTOMER SIGNATURE

A.

After purchasing some jewelry with his Sterling credit card on December 3, 1993, Gary Butler placed his initials below the line labeled "PAYMENT PROTECTION PLAN--YES," thereby purchasing the credit insurance, at least as far as the defendants were concerned. Faye Butler did the same after purchasing some jewelry from the defendants on June 16, 1994.

On December 24, 1993, before he received his first monthly statement, Gary Butler sent an additional form to the defendants explicitly requesting credit insurance for the jewelry he had purchased with the defendants' credit card. The plaintiffs tacitly concede the correctness of the district court's ruling that this action nullified Gary Butler's Ohio claims and TILA claim. Therefore we will consider only the plaintiffs' assertion that the district court erred in disposing of Faye Butler's claims. Any further use of the name "Butler" is in reference to Faye Butler.

B.

Bulter received her first monthly billing statement for purchases at the defendants' store on July 13, 1994. The statement included several categories for insurance charges listed as "CREDIT LIFE," "CREDIT DISABILITY," "CREDIT PROPERTY," and "CREDIT UNEMPLOYMENT." located at the bottom of the bill, apart from the list of other charges. In her deposition, Butler admitted that, on examining this bill, she recognized that she was being charged for credit insurance in addition to her jewelry purchases, but did nothing to correct the perceived discrepancy:

Q [When did you realize] you were being charged for credit insurance?
A I looked at it, the bill, and I saw it on my bill, but I thought that it was part of the agreement that you sign when you get your credit. And I never gave it a thought.
....
Q And how did you know that you were being charged for Insurance?
A It appeared on my bill.
Q Okay. And what, if anything, did you do about the fact that you realized you were being charged for insurance?
A Like I stated to you earlier, I thought that it was part of the agreement that I signed when they approved an account for me.
Q So you thought you had signed up for credit insurance?
A I thought it was part of the terms of the credit agreement.
Q So you thought you had signed up for credit insurance; is that right?
A I didn't say that I signed up for it, I thought it was part of the terms of the agreement.
Q Part of what terms?
A Of the credit agreement.
Q Why did you think that?
A I assumed that. It showed up on my bill: I thought that it was perhaps part of the credit agreement.
**3 Q Did you call the store?
A No, I didn't.
Q Why not?
A Because, like I told you, I thought it was part of the credit agreement.

During the same deposition, Butler acknowledged purchasing credit insurance as part of several previous transactions with different merchants, she also acknowledged that she was aware of the nature and purpose of credit insurance.

II.

On May 31, 1995, the plaintiffs filed their initial complaint, on behalf of all similarly situated customers of the defendants since 1980, alleging violations of TILA, RICO, the OCSPA, and numerous instances of common law fraud. The plaintiffs also moved for class certification on the same date.

After some discovery, the defendants moved to dismiss all of the plaintiffs' claims, aside from the alleged violation of TILA, and moved for summary judgment on the TILA claim. Following a hearing, the district court refused to certify the class proposed, concluding, in effect, that no jury should be forced to consider what would likely be such an overwhelming array of evidence. The court dismissed Clyde Butler's TILA claim as time-barred and the plaintiffs' RICO claims, but denied the remainder of the defendants' motion.

After additional discovery, including Butler's deposition, the defendants filed a second motion for summary judgment on the plaintiffs' OCSPA and common law fraud claims. The motion was granted by the district court for reasons discussed fully below. After this ruling and an order effectuating it, all that remained was Butler's TILA claim.

The plaintiffs then renewed their motion for class certification, now alleging only TILA violations and proposing a class of Ohio residents who had purchased credit insurance from January 1993 to May 1997. The district court refused to certify this class because the question of the defendants' liability to a substantial portion of the class turned on the individual question of when certain class members "discovered" or "should have discovered" the defendants' alleged misconduct, making class treatment inappropriate.

Finally, the defendants filed a motion *in limine* to exclude any evidence of emotional distress Faye Butler allegedly suffered as a result of the defendants' sales practices. The district court granted the motion, ruling that consequential damages were not recoverable under TILA.

Following the district court's rulings on the plaintiffs' second motion for class certification and the defendants' motion *in limine,* the parties signed a stipulation providing Faye Butler with $149.24 for her TILA claim, which was accepted by the district court. Accordingly, final judgment was entered on February 10, 1998, from which the plaintiffs timely filed notice of appeal on February 17, 1998.

III.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R.Civ.P. 56. The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party satisfies its burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986). In ruling on a motion for summary judgment, the district court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). We review *de novo* a district court's summary judgment order. *Moore v. Philip Morris Cos.,* 8 F.3d 335, 339 (6th Cir.1993).

IV.

****4** It is beyond argument that a plaintiff must prove both reliance and proximate causation to sustain an Ohio common law fraud claim. *See, e.g., Kasuri v. St. Elizabeth Hosp. Med. Ctr.,* 897 F.2d 845, 851 (6th Cir.1990). Under Ohio law, proximate cause is that cause which contributes to produce the result in a natural and continued sequence, without which the asserted injury would not have happened. *Segal v. Horwitz Bros.,* 167 N.E. 406, 407 (Ohio Ct.App.1929).

In relevant part, the OCSPA provides:

No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

Ohio Rev.Code Ann. § 1345.02(A). Section 1345.02(B) lists a series of "deceptive" acts, the violation of which provides an aggrieved consumer a right to statutory damages. The state empowers the Ohio Attorney General to adopt rules and regulations defining deceptive, unfair, or unconscionable conduct; it also provides an appropriate case for an award of statutory damages. Ohio Rev.Code Ann. § 1345.05. Finally, under the OCSPA, a consumer has a right to statutory damages, where actual damages cannot be proved or are inadequate, if the conduct complained of was previously declared deceptive or unconscionable by an Ohio court. Ohio Rev.Code Ann. § 1345.09(B).

Despite this rather detailed statutory framework, Ohio courts have yet to precisely define the essential elements of an OCSPA claim where the alleged "deceptive" act is not one found in the statutory list and has not been declared deceptive by the Ohio Attorney General or an Ohio court. The Ohio Court of Appeals has stated:

> The [OCSPA] is designed to prohibit unfair, deceptive or unconscionable acts or practices by sellers engaged in consumer transactions. If a consumer alleges that a seller has engaged in deceptive practices, Ohio courts have consistently construed the applicable provisions of the Consumer Sales Practices Act as only requiring proof "that the conduct complained of 'has the likelihood of inducing in the mind of the consumer a belief which is not in accord with the facts." '

Shaver v. Standard Oil Co., 623 N.E.2d 602, 609 (Ohio Ct.App.1993) (citations omitted). As the plaintiffs suggest, one might construe this and like statements as establishing that a deceptive act, viewed objectively, is all that is required for a successful cause of action under the OCSPA. That is to say neither subjective reliance nor proximate causation are necessary to sustain an OCSPA claim. There is support for this proposition in the Ohio legislature's stated intent, in enacting the OCSPA, to provide a liberal supplement to common law fraud claims. *See, e.g., Thomas v. Sun Furniture and Appliance Co.,* 399 N.E.2d 567, 569-70 (Ohio Ct.App.1978).

We agree with the plaintiffs that part of the relevant inquiry in an OCSPA case-whether a defendant's conduct was "likely to induce" a misperception in the consuming public-is an objective consideration and, therefore, a showing of subjective reliance is probably not necessary to prove a violation of the OCSPA. *See Shaver,* 623 N.E.2d at 610. What we cannot accept, however, is that an OCSPA claim-a type of tort-does not require a plaintiff to demonstrate that damages were proximately caused by the "deceptive" act. We reach this conclusion because a tort claim, without some form of nexus between a defendant's conduct and a plaintiff's alleged injuries, would be a strange cause of action indeed. To illustrate, if we accept Butler's construction of the OCSPA and her claim that the defendants' conduct in this case was "deceptive," Butler would be entitled to compensation for a purported injury every time she purchased jewelry from the defendants after the incident here in question. The obligation to prove proximate cause precludes the possibility of such a potentially enormous and unearned reward and, for this reason, we think Ohio courts would agree that proximate cause is an essential element of an OCSPA claim. Consequently, we hold that, at least where a disgruntled customer is not entitled to statutory damages as provided in the OCSPA, to sustain an OCSPA claim he or she must prove damages were a proximate result of the defendant's deceptive act.

**5 The district court held as to Butler's common law fraud claim, that summary judgment for the defendants was appropriate because, upon receipt of her first bill, Butler, who admitted familiarity with credit insurance, noticed the charges for credit insurance, but did nothing to challenge them. Specifically, the district court concluded that Butler could not claim to have reasonably relied on the defendants' alleged fraudulent omissions or that her damages were proximately caused by the alleged fraud. As to the OCSPA claim, the district court stated that "a reasonable juror could not conclude that [Butler] ... incurred any injury as a *result* of [the defendants' allegedly deceptive] practices." (Emphasis added.) Thus, the district court relied again on a proximate causation analysis, amongst other grounds, to dispose of Butler's OCSPA claim.

While Butler admits that she noticed charges denoted as insurance on her first billing statement, she argues that summary judgment was inappropriate because she filed an affidavit after her deposition, which alleged that she did not understand the nature of the charges. This factual assertion, of course, is directly contradicted by Butler's earlier statements that she had purchased credit insurance in the past and understood the nature of that particular product. We hold that the district court ruled correctly that this latter-day affidavit contradicting Butler's deposition testimony was insufficient to create a factual issue for the jury. *See, e.g., Aparicio v. Norfolk & Western Ry. Co.,* 84 F.3d 803, 814-15 (6th Cir.1996).

We also agree with the district court that there is no genuine issue of material fact as to whether Butler's injuries were proximately caused by the defendants' alleged wrongdoing. Butler made no effort to challenge the credit insurance charges, despite her awareness that she was being charged for insurance. She has produced no evidence that the defendants would not, if asked to do so, have removed the charges. We do not think it unreasonable to expect a customer to report unexpected charges to a merchant and request that the charges be removed. Any damages that Butler suffered did not flow from the defendants' misdeeds, but her own neglect. *See Segal,* 167 N.E. at 407. Consequently, we hold that there is no genuine issue of fact whether Butler's damages (payments for the insurance product of which Butler was aware) resulted in a natural and continued sequence from the defendants' alleged misconduct. We, therefore, affirm the district court's grant of summary judgment to the defendants on Butler's fraud and OCSPA claims.

V.

A.

The decision to certify a class pursuant to Federal Rule of Civil Procedure 23 is left to the sound discretion of the district court. *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 408 (1980). Generally, a class may be an appropriate substitute for multiplicitous litigation if the members of the class are numerous, "there are questions of law or fact common to the class, ... the claims or defenses of the representative parties are typical of the claims or defenses of the class, and ... the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). The Federal Rules provide for three general categories of classes certifiable, two of which are relevant in this case. Rule 23(b)(2) provides:

**6 An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:

....

... the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2). Although the issue has not yet been squarely presented to the Supreme Court, the Court has expressed serious reservations about the propriety of certifying a 23(b)(2) class when compensatory or punitive damages are in issue, due to the lack of notice to class members or the opportunity for those members to "opt out" of the class action. *Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 120-21 (1994). Even accepting the proposition that, in some cases, compensatory and/or punitive damages may be recoverable by a 23(b)(2) class-an issue undecided in this circuit-all other circuits that have considered the issue have held that certification of a 23(b)(2) class turns on whether the injunctive and/or declaratory relief sought on behalf of the class "predominate[s]" relative to any incidental monetary damages requested. *See, e.g., Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 410 (5th Cir.1998).

A 23(b)(3) class-the typical vehicle for a class action when compensatory damages are sought-is certifiable if, in addition to the requirements set forth in 23(a), the district court finds, to its satisfaction, that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to all other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Advisory Committee Notes to Rule 23(b)(3) advise against class certification where a defendant has a defense to liability that will vary with each individual class member. Fed. R. Civ. P. 23(b)(3) (Advisory Committee Notes).

The first class presented to the district court on a motion for certification included all of the defendants' customers nationwide who had purchased jewelry since 1980. The plaintiffs assisted the district court in its deliberations by listing consumer protection statutes from all 50 states that could be relevant if the class were certified. The plaintiffs "concede that the trial court acted within its discretion [in] refus[ing] to certify a class dating back to 1980." We agree.

Undaunted, the plaintiffs later proposed the following class for certification under either Rule 23(b)(2) or (b)(3):

All customers of any retail jewelry store owned by [the defendants] within the State of Ohio who were sold credit insurance at the point of opening up a charge account with such store from 1993 through the present and whose sales slip fails to disclose the cost per $100.00 for such insurance.

After discussing relevant precedent applicable to the issue of the certifiability of a 23(b)(2) class, the district court stated:

**7 In the case sub judice, plaintiff seeks statutory damages in the amount of twice the credit insurance charges, actual damages and attorney's fees. Although plaintiff's prayer for relief also requests a declaration that customers are not obligated to pay for the credit insurance and an order requiring removal of all charges for the insurance, such requests simply lay a basis for a damage award and do not constitute the primary relief sought.... The Court finds that the realities of the litigation demonstrate that the primary relief sought by plaintiff is monetary relief, thus making certification under Rule 23(b)(2) inappropriate.

We believe the district court's analysis of the propriety of certification under 23(b)(2) to be sound and, having little to add, adopt it as our own.

B.

TILA provides for a one year statute of limitations. 15 U.S.C. § 1640(e). This circuit has held the one-year clock for a TILA cause of action begins to run when a plaintiff "discover[ed] or had reasonable opportunity to discover the fraud involving the complained of TILA violation." *Jones v. TransOhio Sav. Ass'n,* 747 F.2d 1037, 1041 (6th Cir.1984). As the plaintiffs had filed their complaint in May 1995 and the proposed class included the defendants' customers dating back to 1993, many of the unnamed plaintiffs' claims are unarguably stale. Given the significant probability that the extent of the defendants' liability would depend on when each class member, who purchased jewelry before May 1994, "discover[ed]" or "had reasonable opportunity to discover" the defendants' alleged misconduct, the district court held that class certification under 23(b)(3) was inappropriate as individualized liability questions would predominate over common questions of law or fact.

We hold that this ruling by the district court was not an abuse of discretion. The district court expressed doubt that the defendants could realistically be expected to argue the applicability of its statute of limitations defense to numerous class members individually at one trial. *See* Fed. R. Civ. P. 23(b)(3) (Advisory Committee Notes). Similarly, the district court appears to have been concerned about whether any jury could be expected to assimilate such overwhelming information. Given these very real shortcomings in the second class proposed, the district court surely did not behave unreasonably in denying certification under Rule 23(b)(3) and, consequently, did not abuse its discretion.

C.

The plaintiffs argue, finally, that, even if the two classes they proposed were defective, the district court should have carved out an acceptable subclass to ameliorate any perceived problems in the previous classes proposed. The defendants respond that, while the district court certainly has the power to certify subclasses, the plaintiffs never requested that the district court do so. We think the defendants have the better of the argument. The Supreme Court has held that a district court may, in its discretion, but need not certify subclasses *sua sponte. Geraghty,* 445 U.S. at 408. We, of course, cannot replicate the district court's intimate involvement with this case and, therefore, would rarely, if ever, conclude that a district court's "decision" to not certify a subclass, without any motion suggesting such action, was unreasonable. It certainly was not plainly unreasonable in this case. We, therefore, affirm the district court orders denying class certification to the plaintiffs.

VI.

**8 Section 1640(a) provides that "any creditor who fails to comply with any requirement imposed under this part ... with respect to any person is liable to such person in an amount equal to the sum of ... any actual damage sustained by such person as a result of the failure." 15 U.S.C. § 1640(a)(1). In general, TILA is to be construed liberally in favor of the consumer. *See TransOhio,* 747 F.2d at 1040.

No federal court has decided whether an "actual damage" provided for in TILA includes consequential damages such as emotional distress and/or humiliation. The defendants have brought a series of cases to our attention which hold that a plaintiff must prove detrimental reliance before actual damages, as opposed to statutory or liquidated damages, may be recovered. *See, e.g., Wiley v. Earl's Pawn & Jewelry, Inc.,* 950 F.Supp. 1108, 1114 (S.D.Ala.1997). While the district court opinions cited by the defendants, which, of course, we are not bound to follow, do present a formula for damage calculation in a typical TILA case, no federal court has foreclosed the recovery of damages for emotional distress in an extreme TILA case, if such cases actually exist.

The district court concluded that the primary purpose of TILA was to allow consumers to "comparison shop" between lenders required to disclose all relevant information to the consuming public. The district court reasoned that construing the term "actual damages" to include consequential damages would do little to serve this purpose and, therefore, the court held that such damages were not recoverable. The plaintiffs argue that this construction is contrary to the unqualified language of the TILA damages provision and the "consumer friendly" rule of construction adopted by this circuit in TILA cases.

Nothing in the plain language of section 1640(a)(1) precludes awarding consequential damages, including damages for severe emotional distress. Given the policy of construing TILA in favor of the consumer, compensation for "actual damages" could certainly encompass psychic trauma with accompanying physical manifestations in extreme cases. In addition, several federal courts that have construed an identical damages provision in the Fair Credit Reporting Act (15 U.S.C. § 1681o), a complement to TILA, have concluded that consequential damages, including those for emotional distress, are recoverable in extreme cases. *See, e.g., Casella v. Equifax Credit Info. Servs.,* 56 F.3d 469, 474 (2d Cir.1995). In short, a persuasive argument exists that the "actual damages" recoverable under TILA include consequential damages.

To recover damages for emotional distress, however, an aggrieved borrower would need to demonstrate at a minimum, considerable embarrassment or humiliation. *See id.* at 474-75. In her deposition, Butler testified to the extent of the psychic trauma alleged to have resulted from the defendants' lending practices:

**9 Q ... How have you been damaged?
A How have I been damaged? I put my trust in your company. When I send--when I get a bill, I trust your company that it's accurate and right, and it wasn't accurate and right. I was charged for things I never asked for. I was charged for things they never even talked to me about. That destroyed my trust with your company.
Q All right. And can you--how were you damaged; were you damaged in any monetary way?
A For the--well, yes, for the charges that they put on my bill that aren't-- weren't supposed to be there that I did not authorize, that nobody talked to me about. And it wasn't just one person in the store, it was several employees in the store when I came in on different occasions
....
Q Have you been damaged in any other way that you can think of?
A Besides monetary, is that what you're asking?
Q I'm just asking you other than what you have testified so far?
A I don't trust your store; I don't trust your company. You know, I'm just one person, but I don't think that--no, I'll just leave it go."

Even under the most liberal formulation of consequential damages, trust lost would not be enough to sustain a request for damages due to emotional distress. Consequently, we affirm the district court's ruling, albeit for a different reason. Because Butler is not entitled to damages for her creative claim of emotional distress, we need not reach the propriety of the district court's construction of section 1640(a)(1).

VII.

For the reasons stated above, the numerous district court orders appealed by the plaintiffs are all AFFIRMED.

END OF DOCUMENT

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

George EDDLEMAN, II; Eugene Helm; Sam Watkins, Jr.; Leonard A. Ciak; Shelley Strong; Lisa Thompson, Plaintiffs-Appellees,

v.

JEFFERSON COUNTY, KENTUCKY; Jefferson County Department of Corrections; Richard A. Frey, Jr., Defendants-Appellants.

No. 95-5394.

Aug. 29, 1996.

On Appeal from the United States District Court for the Western District of Kentucky, No. 91-00144; Edward H. Johnstone, Judge.

W.D.Ky.

AFFIRMED.

Before: MERRITT, Chief Circuit Judge; ENGEL and RYAN, Circuit Judges.

MERRITT, Chief Judge.

**1 This appeal presents two procedural issues for interlocutory review under 28 U.S.C. § 1292(b). The issues for review by this Court are whether the District Court erred in: (1) granting Plaintiffs' motion for class certification pursuant to Federal Rule of Civil Procedure 23, and (2) granting Plaintiffs' motion to amend their complaint. For the reasons discussed below, we affirm both the decision to certify the class and the decision to allow Plaintiffs' to file an amended complaint.

The named Plaintiffs each claim to have been strip searched by the Jefferson County Corrections Department after being arrested for minor, nonviolent offenses, primarily traffic stops, and seek relief under 42 U.S.C. § 1983 for violations of the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments. Plaintiffs allege that the Department of Corrections maintained an unconstitutional blanket policy or custom to strip search all arrestees, regardless of the circumstances or the existence of individualized suspicion necessitating a search. Determination of the merits of the case has been stayed at the District Court pending the outcome in this Court on the question of class certification, and this Court does not decide any issue concerning the merits of the action.

I.

The named Plaintiffs here allege that they were required to remove their socks, shoes and belts, lift their shirts, drop their pants and open the waistbands of their underpants for inspection of their genital area by Corrections Department employees. At least one named Plaintiff was also subject to a hand search of the area below his underpants and a visual body cavity search. The searches of some of the named Plaintiffs were done in an open receiving area of the jail--called a "sallyport" search--in front of male and female corrections officers. All the named Plaintiffs were pre-trial detainees who were either released on their own recognizance or held for a few hours in a holding cell.

In the first six months of 1991, about two dozen individuals sued the County alleging violation of their right to be free of strip searches after arrest for minor offenses without individualized suspicion that they are carrying a weapon or contraband. In September 1991, several months after the complaints were filed by the named Plaintiffs herein, the Defendants moved to stay discovery in the case pending resolution of a dispositive argument by Defendants that the complaints filed against them were precluded by a consent decree into which the Department of Corrections had entered concerning strip searches. The District Court determined that the consent decree did not preclude Plaintiffs' claims and the stay of discovery was lifted in June 1992, nine months later. During this time several more plaintiffs filed similar claims against Defendants.

Two months later, in July 1992, the District Court urged the parties to settle. For the next six months, until the end of 1992, the parties were engaged in settlement discussions. 17 of 22 similarly-situated plaintiffs settled during this time.

**2 In June 1993, Plaintiffs filed a motion to amend their complaints to add class allegations. The motion was granted in a very brief order in September 1993:

> Upon motion, and after consideration of same, it is ORDERED that George A. Eddleman, II, Eugene Helm and Sam Watkins, Jr. be and hereby are granted leave to file their First Amended Complaint.

Joint Appendix [FN1] at 333.

FN1. References to the Joint Appendix filed in this action will be referred to hereinafter as "J.A. at ___."

In August 1993, the District Court entered a permanent injunction against Defendants prohibiting strip searches for minor offenses without reasonable suspicion that the person was carrying a weapon or contraband. (J.A. at 332) The entry of the permanent injunction mooted the Plaintiffs' request for injunctive relief but left their liability and money damages claims intact.

The named Plaintiffs moved to certify the class in January 1994 and the District Court granted class certification on August 11, 1994 (J.A. at 362). The class was certified as follows:

> All individuals who were arrested for non-violent minor offenses between April 25, 1990 and the present that were required by the Defendant to remove their clothing for visual inspection of all or part of their exposed bodies at the Jefferson County Jail, unless there existed reasonable cause to believe that they were carrying or concealing weapons or other contraband.

D.Ct. Opinion at 8, J.A. at 369. Interlocutory appeal was granted. The merits of the case have been stayed in the District Court pending resolution of the class certification issue by this Court.

II.

Plaintiffs' Rule 15(a) Joint Motion to Amend Their Complaints to Assert Class Certification

Defendants first argue that it was an abuse of discretion for the District Court to allow Plaintiffs to amend their complaints to assert class certification. Federal Rule of Civil Procedure 15(a) states that leave to amend a pleading should be "freely given when justice so requires." Reasons to deny leave to amend a complaint include (1) undue prejudice, (2) undue delay in amending, (3) amendment not offered in good faith or (4) that the party has had sufficient opportunity to state a claim and has failed to do so. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Foman v. Davis*, 371 U.S. 178 (1962). Defendants assert that Plaintiffs' two-year delay in moving to amend the complaints (1) constitutes inexcusable delay and (2) caused Defendants to be unduly prejudiced thereby.

There is no bright-line test to determine what is "undue delay." Given the circumstances here--the pendency of a potentially dispositive motion regarding the effect of the consent decree on Plaintiffs' claims followed immediately by settlement negotiations--the delay is not "inexcusable."

Defendants contend that they are prejudiced because class certification allows claims precluded by the statute of limitations to be revived, thereby exposing Defendants to liability from allegedly dead claims and increasing the size of the potential class. Defendants do not convince us that any prejudice to them is significant as a result of amending the complaint to add class certification. The addition of some class members that might otherwise be time barred due to the amendment when the class is already concededly large, if in fact this is the case, a point on which we make no opinion, does not constitute the type of "undue" prejudice that would outweigh the rule that complaints are to be freely amended. Class certification does not preclude a defense based on the statute of limitations as to one or more class members. The statute of limitations defense will be available only against plaintiffs whose claims arose more than one year before the filing of the first intervening complaint, not against plaintiffs whose claims arose more than one year before the amendment but not more than one year before the initial complaint. *See* Fed.R.Civ.P. 15(c). This, of course, does not take into consideration tolling or other circumstances that may bear upon the statute of limitations defense.

****3** The District Corut did not set out its reasons for allowing Plaintiffs to amend their complaints to add class certification. The order simply states that the motion to amend is granted. Despite the lack of analysis in the District Court's order, the facts in the record make clear that the delay in moving for class certification arose from (1) the nearly one-year stay granted in 1992 while the District Court decided whether the consent decree precluded the Plaintiffs' claims and (2) the settlement efforts ordered by Judge Johnstone that occurred from mid- to late 1992. There was then a delay of six months until the motion to amend to add class certification was filed in June 1993. Given the circumstances, the delay does not seem "undue" and any prejudice resulting to Defendants from the delay in certifying the class is minor.

III.
Rule 23 Class Certification

The Supreme Court has held that district courts must conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met before certifying a class. *General Tel. Co. v. Falcon,* 457 U.S. 147, 161 (1982). The district court has broad discretion in certifying class actions, but must exercise the discretion within the framework of Rule 23. *Cross v. National Trust Life Ins. Co.*, 553 F.2d 1026, 1029 (6th Cir.1977). When evaluating whether to certify the class, the district court must take the allegations of plaintiffs as true and any doubts as to certification should be resolved in favor of plaintiffs. *Id.*

A. *Rule 23(a)*

Federal Rule of Civil Procedure 23(a) contains four requirements that the named plaintiffs must meet for certification: numerosity, commonality, typicality and adequacy of representation to certify a class. Rule 23(a) states:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). Plaintiffs carry the burden of demonstrating their proposed class action meets the requirements of Rule 23(a). In addition to meeting the requirements of Rule 23(a), plaintiffs must also meet at least one of the requirements of Rule 23(b), described below.

Defendants concede that Plaintiffs meet the numerosity requirement under Rule 23(a) as there are thousands of potential plaintiffs in the class due to the number of persons that are processed through the Jefferson County Correctional Department each year. However, Defendants argue that Plaintiffs fail to meet the other requirements of Rule 23(a) and the requirement of Rule 23(b).

1. *Commonality.* Rule 23(a)(2) requires that questions of law or fact common to the class be present. Defendants contend that the representative Plaintiffs' claims have "substantive factual differences" and do not meet the commonality requirement of Rule 23(a). Commonality does not require that Plaintiffs' claims be identical. Rule 23(a) requires that the resolution of common questions affect all or a substantial number of the class members. *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir.1996); *Senter v. General Motors Corp.*, 532 F.2d 511, 518 (6th Cir.), *cert. denied,* 429 U.S. 870 (1976).

****4** Here, each of the Plaintiff representatives alleges that he was brought to the jail after a minor, non-violent infraction and was told to remove shoes, socks and belt, then required to lift his shirt and then finally to drop his pants, pull out the waistband to his underwear to allow corrections officials to inspect his genital area and buttocks and, in some instances, subjected to a hand search of the area below his genitals. The only differences in the claims pertain to whether the subject was first handcuffed and exactly where in the jail facility the search took place.

Eighteen of the Plaintiffs who settled with the County before the class was certified were made to disrobe completely. It is possible that certain potential members of the class may have been required to disrobe completely. This fact does not defeat the commonality requirement because Plaintiffs' legal theory is that all members of the class were subject to unconstitutional searches after being arrested for minor offenses pursuant to a blanket policy or custom. Their theory is that both full and partial searches are unconstitutional without reasonable suspicion that the person is carrying a weapon or contraband. Common legal theories therefore bind the class even if some sets of facts are more severe than others. This is true even where the putative plaintiff is subject to a full strip search instead of a partial one, or the fact that some individuals may fail to meet the qualifications for the class because it can be shown that there was reasonable suspicion to search them or the fact that some potential plaintiffs may decide to "opt-out." These isolated instances of non-commonality are not grounds for denying class certification.

In sum, Plaintiffs allege similar conduct by the same Defendants. The legal theory is the same for each Plaintiff: whether the strip search violated the constitutional rights of the Plaintiffs. We find that the commonality requirement is met.

2. *Typicality*. The typicality requirement of Rule 23(a) requires that the claims of the representative plaintiffs be "typical" of the class. A claim is typical if it arises from the same event or course of conduct giving rise to the claims of other class members and is based on the same legal theory. *Senter v. General Motors Corp.*, 532 F.2d at 525.

Like the arguments raised pursuant to the commonality requirement, Defendants contend that the Plaintiff representatives are not "typical" because they had only partial strip searches done while other members of the potential class were subject to full strip searches and body-cavity searches. The "typical" factor possessed by both the named and unnamed plaintiffs that form the class here is that each person was allegedly arrested for a minor violation and strip-searched in violation of their constitutional rights. The key factor for class membership is that the plaintiff must allege that he was subjected to an unconstitutional strip search after arrest for a minor infraction--not the actual scope of the search. The legal theory under which the plaintiff would proceed is the same, regardless of whether a full or partial search is alleged. Because each named Plaintiff herein alleged an unconstitutional strip search after arrest for a minor violation, the named Plaintiffs are representative of the class.

**5 3. *Adequacy of Representation*. As to the adequacy of representation requirement in Rule 23, this Court has specified two criteria for determining whether the named plaintiffs adequately will represent the class: (1) the representatives must have common interests with the unnamed class members and (2) it must appear that the representatives will vigorously prosecute the class action through qualified counsel. *Senter*, 532 F.2d at 525. Defendants argue first on the same ground raised above: that the representative Plaintiffs here cannot "adequately represent" the class of potential plaintiffs because they were subject to a partial strip search only-- not a full one. For the reasons already discussed, this does not present a bar to certification. Second, Defendants argue that the delay in moving to certify the class demonstrates that the representatives and their counsel will not vigorously represent the class. Given the course of the proceedings to date, however, we find no evidence that the Plaintiff representatives and counsel will not vigorously represent the class. Despite Defendants' arguments to the contrary, both adequacy criteria seem to be satisfied in this case. The named Plaintiffs adequately represent the class in that they were subject to the same conduct by Defendants and their claims are based on the same legal theory.

B. *Rule 23(b)*

If the requirement of Rule 23(a) are met, the Plaintiffs still must demonstrate that they meet the requirements of Rule 23(b). Under Rule 23(b), one of three conditions must be met to maintain a suit as a class action: (1) there must be a risk of either incompatible standards of conduct or a risk that interests of prospective class members would be impaired by an adjudication of others' claims; (2) the party opposing the class has acted towards members of the class in a non-uniform way or (3) issues common to the class predominate over issues that are not common to the class and the best method of trying the suit is as a class action. Plaintiffs contend that they meet the criteria of both (b)(1) and (b)(3).

Pursuant to Rule 23(b)(3), a class action may be maintained if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and just adjudication of the controversy.

The District Court found, and we agree, that the criteria for Rule 23(b)(3) are met. The commonality question has already been discussed and the class action mechanism is an efficient and fair way to adjudicate the claims presented here. Defendants argue that because the reasonableness of any search must be examined on a case-by-case basis, the constitutionality of strip searches cannot be properly evaluated in a class action. The basis for the complaint, however, arises precisely because the Defendants did not conduct an individualized assessment of the need for each search. Plaintiffs allege, and that allegation must be taken as true for our purposes here, that their constitutional rights were violated by a policy or custom, written or unwritten, to search every arrestee who entered the jail, regardless of the individual circumstances. Due to the single legal theory and the similar facts for each Plaintiff, a class action would be superior to individual actions.

**6 Defendants rely heavily on *Klein v. DuPage County,* 119 F.R.D. 29 (N.D.Ill.1988), as authority for their arguments against certification in the instant case. Despite Defendants' characterization of *Klein* as "patently analogous," *Klein* is readily distinguishable from the facts of this case. In *Klein,* inmates of a prison challenged the routine strip searches to which they were subject. The district court held that class treatment of the challenge was inappropriate in light of the particularized nature of the court's inquiry into the constitutionality of individualized intrusions and each individual's damages. The district court pointed out the special institutional security concerns, that each plaintiff had been arrested for different crimes, that the plaintiffs may pose a safety threat and may have been searched numerous times in various ways over the course of his prison term in finding lack of commonality and typicality under 23(a) and (b). The district court in *Klein* specifically distinguished a Seventh Circuit case much more similar to the case here, *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir.1983), where the City of Chicago's blanket policy of strip searching all females arrested for traffic violations was held unconstitutional. Although individualized trials were held on damages, the class was certified for liability determination. Accordingly, Defendants' reliance on *Klein* does not help their argument.

Defendants' final argument is that the damages to the class are too disparate to determine in a class action. Varying damage levels rarely prohibit a class action if the class members' claims possess factual and legal commonality. *Mayer v. Mylod,* 988 F.2d 635, 640 (6th Cir.1993) (in securities fraud action, commonality and typicality requirements met even where some investors made money and some lost money because questions of liability are common to all class members regardless of their level of damages); *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188, 1197 (6th Cir.1988) (in mass toxic tort action, even though damages may be disparate, where liability can be determined on a class-wide basis because it arises from a single course of conduct that is identical for each plaintiff, class action suitable for adjudication). Accordingly, this argument is also unavailing.

Plaintiffs also assert that they meet the requirements of Rule 23(b)(1)(a) that states "the prosecution of separate actions by or against individual members of the class would create a risk of ... inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." As we have already determined that Plaintiffs meet the requirement of Rule 23(b)(3), we need not decide whether Plaintiffs also meet the requirements of 23(b)(1)(a).

The District Court issued a thorough and detailed opinion, going through each requirement of Rule 23. The "rigorous analysis" required in *General Tel. Co. v. Falcon,* 457 U.S. 147, 161 (1982), has been met. Accordingly, we find that the District Court did not abuse its discretion and we affirm the granting of the motion to amend the complaint and the motion to certify the class.

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NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

David KECK, Plaintiff-Appellant,
v.
MICHIGAN DEPARTMENT OF CORRECTIONS; Gene Borgert; Dr. Harvey; Palmer, Deputy Warden, Defendants-Appellees.

No. 92-2378.

Oct. 12, 1993.

E.D.Mich., No. 91-76961, Gadola, J.

E.D.Mich.

AFFIRMED.

Before: JONES and SILER, Circuit Judges, and RUBIN, District Judge. [FN*]

ORDER

**1 This pro se Michigan prisoner, David Keck, appeals from the district court's order dismissing his complaint filed pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a).

Seeking $500,000 in damages, injunctive relief in the form of an order for back-pay, and reassignment to his prison job in the food services division, David Keck brought suit against the Michigan Department of Corrections (MDOC); Gene Borgert, Warden of the G. Robert Cotton Correctional Facility (JCF) in Jackson, Michigan; Tony Palmer, Assistant Deputy Warden of JCF; and, Doctor Harvey, the prison's physician. Plaintiff alleged a violation of his constitutional rights under the Fifth and Fourteenth Amendments.

The facts underlying Plaintiff's complaint are not in dispute. Defendant Palmer removed Plaintiff from his assignment as a baker in the prison's kitchen on November 1, 1991. Palmer removed Plaintiff on the recommendation of Dr. Harvey. In a memo to Palmer, Dr. Harvey expressed his concerns about Plaintiff's assignment to food services, in light of Plaintiff's inability to manage his weight. The memo revealed that despite medical advice, a prescribed diet, and the services of a dietician, Plaintiff had steadily gained weight over the preceding six months. At that time (approximately October of 1991), Plaintiff weighed-in at *625* pounds. Dr. Harvey investigated the cause of plaintiff's weight gain and determined that Plaintiff's inability to manage his weight was due to his habit of eating while he worked. Dr. Harvey stated that he could no longer allow Plaintiff to disregard his health by continuing to gain weight. He recommended that Plaintiff be assigned to another job without direct food preparation duties. Based on Dr. Harvey's recommendation, Palmer removed Plaintiff from his job in the kitchen.

The district court dismissed the case against MDOC and Gene Borgert as frivolous, pursuant to 28 U.S.C. § 1915(d). The complaint against Palmer and Dr. Harvey was submitted to a magistrate judge who recommended that Defendants' motions for summary judgment be granted. The district court adopted the magistrate judge's recommendations over Plaintiff's objections, and Plaintiff appealed.

Appellate courts review de novo a grant of summary judgment. *EEOC v. University of Detroit,* 904 F.2d 331, 334 (6th Cir.1990). Summary judgment is appropriate under Fed.R.Civ.P. 56(c) "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.,* 862 F.2d 597, 601 (6th Cir.1988).

Upon review, we find no error. Plaintiff does not possess a constitutional interest in prison employment. *Newsom v. Norris,* 888 F.2d 371, 374 (6th Cir.1989); *Ivey v. Wilson,* 832 F.2d 950, 955 (6th Cir.1987) (per curiam). Plaintiff alleges that he was denied due process by the defendants' refusal to allow him continued employment in the kitchen. However, an inmate's expectation of obtaining or keeping a particular prison job simply does not amount to a property or liberty interest protected by the Constitution. *See Gardner v. Johnson,* 429 F.Supp. 432, 434 (E.D.Mich.1977). Therefore, the Due Process Clause is not implicated when a claim fails to allege a violation of a constitutionally protected right. *Bryan v. Werner,* 516 F.2d 233, 240 (3d Cir.1975) (citing *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972)). Thus, Plaintiff's claim is not cognizable under 42 U.S.C. § 1983.

**2 Plaintiff alleges that he was denied equal protection of the law because Defendants discriminated against him on the basis of his weight. In order to state a claim for the denial of equal protection, Plaintiff must allege some wrong directed toward him as a member of a class or group singled out for discriminatory treatment. *Joyce v. Mavromatis,* 783 F.2d 56, 57 (6th Cir.1986).

Plaintiff attempts to create a class of persons suffering from obesity as a group singled out for discriminatory treatment. However, the record clearly reveals that Plaintiff was not removed from his job because he is grossly overweight, but because he failed to lose or even maintain his weight while working in the prison's kitchen. His failure to maintain his weight, in turn, seriously endangered his health, according to the physician who is responsible for Plaintiff's health. Thus, Plaintiff cannot establish that he was discriminated against based on his membership in the class of obese people. His allegation is meritless.

Accordingly, the judgment of the district court is hereby affirmed pursuant to Rule 9(b)(3), Rules of the Sixth Circuit.

FN* The Honorable Carl B. Rubin, U.S. District Judge for the Southern District of Ohio, sitting by designation.

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2001, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE were served by Federal Express, next business day delivery, on each of the following attorneys for the Appellant:

Stephen G. Anderson, Esq.
Baker, Donelson, Bearman & Caldwell, P.C.
900 Gay Street, S.W.
Suite 2200
P.O. Box 1792
Knoxville, Tennessee 37901

Joseph W. Gelb, Esq.
Jay N. Fastow, Esq.
Peter N. Cubita, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153

In addition, I certify that on March 14, 2001, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE were served by first-class mail, postage prepaid, on each of the following attorneys for the Appellee:

Clint W. Watkins, Esq.
Law Office of Clint W. Watkins
5214 Maryland Way, Suite 402
Brentwood, Tennessee 37027

Michael E. Terry, Esq.
Terry & Gore
209 Tenth Avenue South
Suite 310 Cummins Station
Nashville, Tennessee 37203

Darnley D. Stewart, Esq.
Bernstein Litowitz Berger
& Grossmann LLP
1285 Avenue of the Americas
New York, New York 10019

Wyman O. Gilmore, Esq.
Gilmore Law Office
116 Court Street, P.O. Box 729
Grove Hill, Alabama 36451

Stuart Rossmann, Esq.
National Consumer Law Center
18 Tremont Street, Suite 400
Boston, Massachusetts 02108

Gary Klein, Esq.
Grant & Roddy
44 School Street
Boston, Massachusetts 02108

I further certify that on March 14, 2001, copies of the same brief were sent for filing to the Sixth Circuit clerk's office by first-class mail, postage prepaid.

GREGORY B. FRIEL
Attorney