UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-CV-10932-RGS

SHARON PETTWAY and
MARSHA HUBBARD, individually and on
behalf of all others similarly situated

v.

HARMON LAW OFFICES, P.C.

MEMORANDUM AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT AND
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

September 27, 2005

STEARNS, D.J.

On May 16, 2004, Sharon Pettway and Marsha Hubbard brought this putative class action against the Harmon Law Office, P.C. (Harmon), a firm that offers legal services to lenders seeking to foreclose on defaulted mortgages. Plaintiffs allege that the form letter that Harmon uses to transmit payoff and reinstatement terms to homeowners in arrears systematically overstates the amount of attorneys' fees and costs that are owed, a practice prohibited by the Fair Debt Collection Practices Act (FDCPA). Specifically, plaintiffs allege that Harmon violates the FDCPA: (1) by failing to state "the amount of the debt" as required by 15 U.S.C. § 1692g(a)(1); (2) by giving a false impression of the character, amount, and legal status of the debt, 15 U.S.C. § 1692e(2)(A); (3) by engaging in unfair and unconscionable collection methods, 15 U.S.C. § 1692f; (4) by making threats to take unlawful legal action, 15 U.S.C. § 1692e(5); and (5) by using false or deceptive collection methods, 15 U.S.C. § 1692e(10). Plaintiffs assert similar claims under the Massachusetts Debt Collection Statute (MDCS), G.L. c. 93 § 49, and the Massachusetts Consumer Protection Act, G.L. c. 93A, § 2, as well as a common-law claim of intentional misrepresentation and an equitable claim of unjust enrichment.[1]

On February 7, 2005, Harmon moved for summary judgment, arguing that as a matter of law its method and practice of estimating unaccrued attorneys' fees and costs does not violate the FDCPA. On February 28, 2005, plaintiffs filed a motion for class certification, followed on March 10, 2005, by a cross-motion for partial summary judgment. With respect to the latter motion, plaintiffs argue that Harmon's conflating of estimated and actual attorneys' fees and costs constitutes a *per se* violation of the FDCPA.[2] On May 12, 2005, the court heard oral argument on the cross-motions for summary judgment and the motion for class certification.

BACKGROUND

The material facts are not in dispute. Harmon charges its mortgage lender clients a flat fee for its services. The flat fee is based on the assumption that the foreclosure

---

[1]Strictly speaking, unjust enrichment is a theory of recovery, not a separate cause of action. Lopes v. Commonwealth, 442 Mass. 170, 179 (2004). To satisfy the five elements of unjust enrichment, a plaintiff must show: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and the impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law." LaSalle Nat'l Bank v. Perelman, 82 F. Supp.2d 279, 294-295 (D. Del. 2000), citing Jackson Nat'l Life Ins. Co. v. Kennedy, 741 A.2d 377, 393 (Del. Ch.1999). In light of the remedies provided by the FDCPA, the unjust enrichment count is redundant.

[2]Plaintiffs also contend that Harmon's fees are unreasonable, but recognize that this argument entails issues of fact incapable of resolution as a matter of law.

process will be carried to completion. Harmon charges the same fee for its services regardless of whether the ultimate responsibility for payment falls to the lender or the borrower.

Pettway and Hubbard, each after being notified of the initiation of foreclosure proceedings, contacted Harmon to learn the amount, including attorneys' fees and costs, that would be required to reinstate their mortgages. In response, Harmon asked each plaintiff to indicate the date upon which she would be prepared to make payment. The dates supplied were then entered into Harmon's "Landmark" case management system, which generated a "payoff and reinstatement letter" for each plaintiff. The payoff amount included a lump sum consisting of estimated as well as actual attorneys' fees and costs. Harmon's billing of borrowers for estimated fees and costs is at the crux of the Complaint.

In Pettway's case, Harmon began foreclosure proceedings on October 9, 2002. On October 14, 2002, Pettway asked Harmon to calculate the amount that she would have to pay to reinstate her mortgage at the end of the month. Prior to receiving Pettway's request, Harmon had ordered a municipal lien certificate, had paid an abstract company for a current owner title report, and had drafted a Complaint and Order of Notice. On October 23, 2002, Harmon sent Pettway a payoff and reinstatement letter indicating that in addition to the principal and interest owed, Pettway would be required to pay a lump sum of $2,237.25 in costs and legal fees.[3] Harmon's actual legal fees and costs had by

[3]Neither plaintiff disputes the accuracy of Harmon's calculation of the principal and interest owed on their mortgages.

then totaled only $581.25. The lump sum was marked with an asterisk referring Pettway to a footnote that stated:

> [t]he quoted legal fees and costs are estimated through the date you have requested. If you contact this office immediately prior to the time you intend to mail or deliver the funds, we will provide you with the actual legal fees and costs at that time.[4]

Harmon arrived at the lump sum figure by adding the $581.25 in costs and fees that were then due to an estimate of the additional fees and costs that might conceivably come due between October 23 (the date of the payoff letter) and October 31 (the settlement date). These estimates were provided by an internally-devised "Cost Estimation Timeline" (CET), a grid mapping foreclosure "milestones." Harmon's fee was prorated against the milestones. If under the CET it was possible for a milestone to be reached before final payment was made, the borrower was assessed the maximum amount scheduled for any intervening fee or service. Harmon used "high-end" estimates of potential fees and costs "to ensure that [it would] collect sufficient money to pay those costs when the bills come through." Walsh Dep., Vol. II, at 19. Harmon instead relied on an internal refund system to remit to the borrower any excess payment.

Under the CET schedule, Pettway was charged the maximum $100 sheriff's fee for the service of foreclosure documents, although no documents were served on Pettway prior to October 31, 2002. (The foreclosure documents were served on November 15, 2002; the actual sheriff's fee was $21.40). The legal fee quoted in Harmon's October 23,

---

[4]Harmon concedes that it had the ability at any given time to supply an inquisitive borrower with an accurate breakdown of the accrued and estimated fees and costs.

2002 letter was based on the CET projection that $1,100 (88 percent of Harmon's flat fee) could conceivably be earned in the week to come.

Pettway was unable to close on October 31, 2002, and requested that Harmon calculate a new payoff amount for November 29, 2002.[5] On November 22, 2002, Harmon sent Pettway a second payoff and reinstatement letter containing a lump sum assessment of legal fees and costs totaling $3,654.93. This figure included only $933.93 in actual expenses. The bulk of the increase in the bill was explained by the addition of the balance of the flat fee and the costs of three separate publications of a notice of sale.[6] (At the time of the November 29, 2002 closing, only one notice of sale had been published). On December 11, 1002, Pettway paid $12,153.52 to reinstate her mortgage. She was reimbursed for the unaccrued fees and costs only after this lawsuit was filed.

Harmon used the same CET-based methodology to calculate Hubbard's payoff amount. The discrepancy between the lump sum estimate of fees and costs and actual fees and costs in Hubbard's case was even more pronounced. After Hubbard paid off her

[5]Pettway claims that she missed the October 31, 2002 payment in part because she could not raise the $1,600 in unaccrued costs and fees that she had been told were owing.

[6]Publication costs and auction cancellation fees are typically the most expensive components of a foreclosure proceeding.

defaulted mortgage, she discovered that Harmon had billed her $4,220.53 in excess fees and costs.[7] She received a refund only after bringing suit.[8]

DISCUSSION

The FDCPA

The Complaint alleges that Harmon violates the FDCPA by billing borrowers for unearned fees and costs at the maximum amount possible. Section 1692e of the FDCPA prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." The term "debt collector" applies to any person "who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). The effect of these broad statutory prohibitions is to regulate all forms of "communications" with borrowers. See In re Hart, 246 B.R. 709, 729 (Bankr. D. Mass. 2000). "The term 'communication' means the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2).

[7]Harmon in its response to plaintiffs' Statement of Undisputed Facts, at ¶ 77, explains with (perhaps) unintended irony that it has not admitted "that it incorrectly billed Ms. Hubbard but rather that its estimate did not match the amount that it billed [her]."

[8]Most of the excess is explained by the failure of the CET model to accurately predict the time that would be required to resolve a dispute over the validity of Hubbard's title.

> The following practices, among others, violate the Act.
>
> (2) The false representation of –
> (A) the character, amount of legal status of any debt; or
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt. . . .
>
> (5) The threat to take any action that cannot be legally taken or that is not intended to be taken. . . .
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt.

15 U.S.C. § 1692e.

Section 1692f(1) of the FDCPA also makes it unlawful to "use unfair or unconscionable means to collect or attempt to collect any debt," including "[t]he collection of any amount (including any interest, fee, charge, or expenses incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." The FDCPA is a strict liability statute that is to be construed liberally so as to effectuate its remedial purpose. See Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996); In re Hart, 246 B.R. at 729. To recover damages, a consumer-plaintiff is not required to show intentional conduct on the part of a debt collector. Russell, 74 F.3d at 33. Nor must a debtor prove a deceptive act or actual damages. Baker v. G.C. Services Corp., 677 F.2d 775, 779-780 (9th Cir. 1982). Whether the debt is legitimately owed also has no bearing on the validity of the action. Id. at 777.

"When considering whether a particular collection notice violates the FDCPA, courts usually look to whether the objective 'least sophisticated debtor' would find the notice improperly threatening or misleading." Martin v. Sands, 62 F. Supp. 2d 196, 199 (D. Mass. 1999), citing Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993) (the "'least sophisticated debtor 'standard has . . . been adopted by all federal appellate courts that have considered the issue.'"). "[T]he phrase unsophisticated or least sophisticated debtor is used 'to describe the hypothetical consumer whose reasonable perceptions will be used to determine if collection messages are deceptive or misleading.'" In re Maxwell, 281 B.R. 101,118 (Bankr. D. Mass. 2002), quoting Gammon v. GC Services L.P., 27 F.3d 1254, 1257 (7th Cir. 1994). "The basic purpose of the least sophisticated consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." Clomon, 988 F.2d at 1318. Cf. Pettit v. Retrieval Masters Creditors Bureau, Inc., 211 F.3d 1057, 1060 (7th Cir. 2000) (an unsophisticated consumer "possesses rudimentary knowledge about the financial world . . . and is capable of making basic logical deductions and inferences").

A violation of any of the FDCPA's prohibitions is actionable regardless of the size of the debt at issue. Duffy v. Landberg, 215 F.3d 871, 875 (8th Cir. 2000). However, "[a] debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

Harmon's Motion for Summary Judgment

I will first turn to Harmon's motion for summary judgment. Harmon argues that it is entitled to summary judgment on all FDCPA and MDCS claims because its disputed practices are not covered by the FDCPA or qualify as bona fide error. More specifically, Harmon advances three alternative grounds for summary judgment. First, it contends that its activities do not constitute debt collection within the meaning of the FDCPA. Second, it argues that its payoff and reinstatement letters are not debt collection notices, but rather neutral informational responses to inquiries from borrowers. Finally, Harmon argues that even if its conduct falls within the FDCPA, it is entitled to the protection of the Act's affirmative defense.

I will address these arguments in sequence. The essence of the first argument lies in Harmon's contention that its business is not collecting debts, but rather perfecting client security interests. Harmon notes that the FDCPA defines a "debt collector" as a person whose principal business is the collection of debts. Harmon argues that its foreclosure efforts have as their primary goal the repossession of the pledged collateral as opposed to the collection of the secured debt.

Harmon relies on Beadle v. Haughey, 2005 WL 300060 (D.N.H. Feb. 9, 2005), a case holding that a mortgage foreclosure is not governed by the FDCPA because a foreclosure is not a debt collection practice, but instead a legal action undertaken to return property to its rightful owner. "'Security enforcement activities fall outside the scope of FDCPA because they aren't debt collection practices.'" Id. at *3, quoting Rosario v. Taylor, 324 F. Supp. 2d 917, 924 (N.D. Ind. 2004). Plaintiffs insist that Beadle and like-minded cases are wrongly decided. Plaintiffs direct the court to Shapiro and Meinhold v. Zartman, 823 P.2d 120, 124 (Colo. 1992), and its expansive view of activities that amount to debt collection practices under section 1692a(6).

> [T]he attorneys are not exempt merely because their collection activities are primarily limited to foreclosures. The section 1692a(6) definition of the term debt collector includes one who "directly or indirectly" engages in debt

> collection activities on behalf of others. Since a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt, those who engage in such foreclosures are included within the definition of debt collectors if they otherwise fit the statutory definition.

Zartman, as plaintiffs argue, is consistent with cases decided in the Seventh Circuit applying the FDCPA to law firms seeking to collect debts owed to their clients. In Fields v. Wilber Law Firm, P.C., 383 F.3d 562, 565-566 (7th Cir. 2004), the Court held that a law firm's dunning letters omitting any explanation of how attorneys' fees and costs owing under a client's defaulted debt instrument had been calculated fell within the FDCPA. In Miller v. McCalla, Raymer, Padrick, Cobb, Nichols and Clark, LLP, 214 F.3d 872, 875 (7th Cir. 2004), Judge Posner held that the FDCPA applied to the dunning efforts of two associated law firms seeking to collect on a mortgage. Judge Posner faulted the firms' collection letters for failing to accurately state the full amount owed, including attorneys' fees and costs.

I do not see the Beadle and Zartman cases as necessarily inconsistent. Dicta aside, Beadle and similar cases address alleged abuses of the foreclosure process that are only tangentially related to the payment of the underlying debt. See Bergs v. Hoover, Bax & Slovacek, LLP, 2003 WL 22255679 (N.D. Tex. Sept. 24, 2003); Hulse v. Ocwen Fed. Bank, FSB, 194 F. Supp. 2d 1188 (D. Or. 2002); Heinemann v. Jim Walter Homes, Inc., 47 F. Supp. 2d 716 (N.D. W. Va. 1998). These cases do not preclude the possibility that a defendant law firm whose foreclosure activities are beyond reproach might nonetheless be liable under the FDCPA for related but less salubrious efforts to squeeze a debtor into coughing up the underlying debt.

In both Fields and Miller, the defendant law firms were seeking the repayment of various costs, including legal fees, that were authorized by a debt agreement. The fact that the defendants in Miller were also seeking to foreclose on the pledged property did not insulate them from FDCPA liability for making incomplete and misleading statements about the debt owed. In similar fashion, Harmon acted as a debt collector when it solicited borrowers to pay off the underlying mortgages. The fact that Harmon simultaneously undertook legal action to perfect client security interests in the property securing the same debt would seem to have no more significance in Harmon's case than it did in the instance of the law firms whose collection practices were found at fault in Miller.[9]

Harmon next argues that its payoff letters are not debt collection communications but simply informational responses to borrowers' inquiries regarding the payoff status of their mortgages.[10] Harmon concedes that the initial notice of default (sent by Harmon or by the lender) fits within the FDCPA definition of an attempt to collect a debt, but points out that these notices correctly state the amount of principal and interest owed. This, Harmon argues, is sufficient to differentiate its conduct from the types of deceptive practices prohibited by the FDCPA. The reasoning is that having communicated an initially accurate and non-actionable statement of the debt owed, Harmon cannot be held

[9]The lesson of these cases is that law firms should stay out of the debt collection business and debt collection agencies should not attempt to hold themselves out as law firms.

[10]The argument is at odds with the bolded capitalized warning at the bottom of the letters stating: "PLEASE BE ADVISED THAT THIS OFFICE IS ATTEMPTING TO COLLECT A DEBT AND THAT ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE."

liable for subsequent communications responding to borrower-initiated inquiries. This logic reads the FDCPA too narrowly. The FDCPA defines a debt collection "communication" as any "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). Harmon's payoff and reinstatement letters state an amount owing which includes unearned fees and costs and asks the debtor to "[p]lease make your certified check . . . payable to HARMON LAW OFFICES." These letters clearly fall within FDCPA's definition of a debt collection communication, whether or not they are prompted by the borrower, and regardless of the fact that a misleading letter was preceded by one that was not.

Harmon argues in the alternative that no reasonable jury could find that its practice of estimating unaccrued attorneys' fees and costs violates the FDCPA. Whether the practice of lumping unaccrued with accrued costs (revealed only in a buried footnote) constitutes a "false, deceptive, or misleading representation or means in connection with the collection of [a] debt," or "[t]he false representation of the character, amount of legal status of [a] debt," is an issue of disputed fact. In Fields, 383 F.3d at 565, the Court held that an unsophisticated consumer could easily be mislead by a dunning letter which demanded a lump sum attorney's fee. As the Court observed:

> [e]ven if attorneys' fees are authorized by contract, as in this case, and even if the fees are reasonable, debt collectors must still clearly and fairly communicate information about the amount of the debt to debtors. This includes how the total amount due was determined if the demand for payment includes add-on expenses like attorneys' fees or collection costs.

Finally, Harmon argues that it is protected from liability by §1692k(c), which allows a debt collector to avoid liability by proving by a preponderance of the evidence that a violation was unintentional and occurred "notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." See also Caputo v. Professional Recovery Services, Inc., 261 F. Supp. 2d 1249, 1255 (D. Kan. 2003). Harmon may well persuade a finder of fact that its acts constitute bona fide error and that its refund system was reasonably calculated to rectify any resulting harm, but as is typical with affirmative defenses, the decision is one that a jury and not the court must make.

Harmon is, however, correct that it is entitled to summary judgment on plaintiffs' claims under the MDCS. As Harmon points out, mortgages are specifically excluded from the coverage of the statute. As the regulations associated with the MDCS explain: "[m]oney which is, or is alleged to be, owing as a result of a loan secured by a first mortgage on real property, or in an amount in excess of $25,000, shall not be included within this definition of 'debt.'"[11] 940 C.M.R. 7:03.

Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs argue that because Harmon has admitted overestimating the amount due from Hubbard by $4,220.53, she is entitled to judgment as a matter of law on the issue of liability. Plaintiffs also maintain that under the holding of Miller, they are entitled to a judgment that the practice of conflating actual and estimated fees and costs violates the FDCPA. While helpful, the ruling in Miller is not precisely on point. In Miller, the defendants sent a dunning letter stating that:

[11]Harmon's motion to dismiss the Chapter 93A, § 2 claim is premature, as a violation of the FDCPA can constitute a *per se* violation of Chapter 93A. See Martin v. Sands, 62 F. Supp. 2d at 201. I do agree with Harmon that the misrepresentation claim is redundant of the FDCPA claim and should be dismissed for that reason.

> the unpaid principal balance of the loan . . . was $178,844.65, but added that "this amount does not include accrued but unpaid interest, unpaid late charges, escrow advances or other charges for preservation and protection of the lender's interest in the property, as authorized by your loan agreement. The amount to reinstate or pay off your loan changes daily. You may call our office for complete reinstatement and payoff figures." An 800 number is given.

214 F.3d at 875. The letter did not directly reference attorneys' fees, costs, or accrued interest. Chief Judge Posner held that the statement did not comply with the Act because

> [t]he unpaid *principal* balance is not the debt; it is only a part of the debt; the Act requires statement of the debt. . . . It is no excuse that it was 'impossible' for the defendants to comply when as in this case the amount of the debt changes daily. . . . What they certainly could do was to state the total amount due – interest and other charges as well as principal – on the date the dunning letter was sent. We think the statute required this.

Id. at 875-876.

Plaintiffs contend that because Harmon failed to clearly segregate what was owed from would become due and owing, it violated the statute in the same manner as did the defendants in Miller. While plaintiffs' argument is not insubstantial, there is an important difference. In Miller, it was undisputed that the law firms failed to include the entire amount of the debt then due. In Harmon's case, the full amount of the debt was stated, although with unearned charges tacked on. Whether an objective "least sophisticated debtor" would have found the payoff amount listed as improperly misleading will depend on whether Harmon's footnote disclosure that – "[t]he quoted legal fees and costs are estimated through the date you have requested. If you contact this office immediately prior to the time you intend to mail or deliver the funds, we will provide you with the actual legal fees and costs at that time"– is sufficient to make clear to a naive debtor that the lump sum demand includes both accrued and unaccrued charges.[12] This is a quintessential jury issue.

Plaintiffs' Motion for Class Certification

Plaintiffs request that this court enter an order, pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), certifying three classes in this case, as follows:

An "FDCPA class" consisting of:

(i) Massachusetts residents;

(ii) from whom Harmon Law collected or attempted to collect;

(a) Attorneys' fees for legal work purportedly related to collection, default or foreclosure of a mortgage, by sending a reinstatement letter or payoff letter following Harmon Law's standard fee and cost estimation process, or

(b) foreclosure costs in excess of the amounts expended by Harmon Law;

(iii) during the period beginning one year prior to the date on which the complaint was filed in this action.

An "attorney's fees overcharge class" consisting of:

(i) Massachusetts residents;

(ii) from whom Harmon Law collected attorneys' fees for legal work purportedly related to collection, default or foreclosure of a mortgage, by sending a reinstatement or payoff letter following Harmon Law's standard fee and cost estimation process, or

(iii) whose foreclosures were not completed by Harmon Law in accordance with applicable Massachusetts law because the loan was reinstated or paid off prior to the time of sale;

[12] While not dispositive, the court notes that Judge Posner found that FDCPA is not satisfied by directing a borrower to an 800 number for a fuller explanation of an ambiguous or misleading statement.

(iv) during the period beginning four years prior to the date on which the complaint was filed in this action.

A "foreclosure costs and overcharge class" consisting of:

(i) Massachusetts residents;

(ii) from whom Harmon Law collected sheriff service fees or certified mail fees or other costs payable to third parties in excess of the amounts Harmon Law actually paid for these items;

(iii) during the period beginning four years prior to the date on which the complaint was filed in this action.[13]

The proposed classes (or more properly subclasses) are structured on damages. The first class includes debtors from whom Harmon collected or attempted to collect estimated attorneys' fees and costs but who incurred no actual damages.[14] The second and third classes consist, respectively, of those who succeeded in redeeming their property but who in the process paid Harmon's flat or estimated attorney's fee, and those who in the foreclosure process paid Harmon in excess of the actual cost for sheriff's fees and other related expenses.

A class may be certified 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 representatives will fairly and adequately protect the interests of the class.

---

[13]In response to Harmon's argument that the proposed classes were "fail-safe" or "one-way intervention" classes, plaintiffs redrafted the classes to their present language.

[14]The FDCPA authorizes statutory damages for each prohibited debt collection practice regardless of any actual injury.

Fed. R. Civ. P. 23(a). Plaintiffs seek to certify a class pursuant to Rule 23(b)(3). This section provides that a class action may be maintained only if, in addition to the prerequisites of Rule 23(a):

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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

"A district court must conduct a rigorous analysis of the prerequisites established by Rule 23 before certifying a class." Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003). In "determinating the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Waste Mgt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 298 (1st Cir. 2000), quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (internal citation omitted).

(a) Numerosity

Harmon maintains that even though some 15,000 of the disputed collection letters were mailed, the proposed classes do not meet the Rule 23(a) requirement that "the class [be] so numerous that joinder of all members is impracticable." Harmon argues that some of the letters might have been duplicative and others might have been sent to non-debtor parties such as attorneys, junior lien holders, and heirs-at-law. While there may be some overlap, the number of potential plaintiffs overwhelms any workable prospect of joinder. Harmon's additional argument that the plaintiffs should be joined because they are all Massachusetts residents is based more on a drawing of political boundaries than it is on the practicality considerations of Rule 23(a). See Anderson v. Penn. Dept. of Public Welfare, 1 F. Supp. 2d 456, 461 (E.D. Pa. 1998).

(b) Commonality

While at least one common issue of fact or law at the core of the action must shape the class, Rule 23(a) does not require that every class member share every factual and legal predicate of the action. In re General Motors Trucks, 55 F.3d 768, 817 (3rd Cir. 1995). "The threshold of 'commonality,' is not high. Aimed in part at 'determining whether there is a need for combined treatment and a benefit to be derived therefrom,' the rule requires only that resolution of the common questions affect all or a substantial number of the class members." Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir. 1986) (citation omitted). Plaintiffs argue that the proposed class members share common issues of fact and law because each was the recipient of an automated Harmon dunning letter that incorporated a standardized estimate of attorneys' fees and costs. Plaintiffs contend that there are seven discrete issues common to the proposed sub-classes:

> (1) whether Harmon Law failed to state the amount of the debt by demanding a high end estimate of an amount that might be due on some future date without stating the amount due on the date of the demand; (2) whether Harmon Law sought to collect attorney's fees in excess of amounts class members were legally obligated to pay under the loan contract; (3) whether Harmon Law sought to collect sheriff service fees and certified mail fees in excess of the amounts Harmon Law actually pays for these items; (4) whether

> Harmon Law's collection letters falsely represent the nature, character or amount of the debt; (5) whether Harmon Law's communications to class members fail to state "the amount of the debt" as required by 15 U.S.C. § 1692g(a)(1); (6) whether Harmon Law has intentionally misrepresented the amount of debts owed by homeowners to it by including in its collection letters fees which are not legally due and owing; and (7) whether Harmon Law has collected amounts that are not due and owing from class members.

Plaintiffs Memorandum for Class Certification, at 19. Harmon argues that despite these commonalities, the factual dissimilarities among the various foreclosure proceedings require case-by-case consideration. Harmon points to differences among the requirements of the various lenders involved, the variety of the borrowers' obligations under the different mortgages, the complexities of the foreclosure process, the variations between the costs involved, and whether or not the borrowers were represented by an attorney.

As plaintiffs persuasively argue, they are seeking a case-determinative ruling on the propriety of Harmon's practice of billing for estimated attorneys' fees and costs. They are not seeking to undo the mortgage transactions or where they occurred, the foreclosures themselves. While there are certainly differences in class members' individual claims to damages, the calculation of such damages, if warranted, is simply a question of mechanics. "The test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative; that is, there need be only a single issue common to all members of the class." 1 H. Newberg, A. Conte, Newberg on Class Actions, § 3:10 (4th ed. 2002).

(c) Typicality

"A sufficient nexus is established [to show typicality] if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D.

672, 686 (S. D. Fla. 2004) (finding that representatives were typical of plaintiffs subject to an overcharge for a prescription drug despite the fact that class members paid for the overcharge in different ways). "Although [the plaintiffs] may not have suffered identical damages, that is of little consequence to the typicality determination when the common issue of liability is shared." In re Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 28 (D.D.C. 2001). To satisfy the typicality requirement, "plaintiffs need not show substantial identity between their claims and those of absent class members, but need only show that their claims arise from the same course of conduct that gave rise to the claims of absent members." Randle v. Spectran, 129 F.R.D. 386, 391 (D. Mass. 1988). Typicality is not a demanding test. Forbush v. J.C. Penney Co., Inc., 994 F.2d 1101, 1106 (5th Cir. 1993).

Harmon argues that Hubbard and Pettway, as the nominated class representatives, cannot show that their claims meet the typicality requirement because the final demand in their case (unlike the initial payoff letter) correctly stated the costs of the sheriff's services. This seems more a quibble than a distinction as the issue is not the number of billings that were accurate but the number of estimates that were not. It is undisputed that both Hubbard and Pettway were overbilled for attorneys' fees and costs which is the insult to which the alleged injury is attributed.

Harmon also argues that Hubbard's and Pettway's experiences are not typical of the class as a whole. Harmon points out that unlike most members of the proposed subclasses, Hubbard and Pettway were able to pay off their mortgages before foreclosure.[15]

---

[15]Between 2002 to 2003, only 13 percent of the defaulting mortgagors processed by Harmon were able to redeem their homes before foreclosure.

"The individuation of damages in consumer class actions is rarely determinative under Rule 23(b)(3). Where, as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." Smilow v. Southwestern Bell Mobile Systems, Inc., 323 F.3d at 40 (citations omitted). Finally, Harmon argues that Hubbard's case is not typical because the overestimation of her accrued costs and fees is subject to the bona fide error defense. "[W]here common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses. . . . After all, Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class." Id.

(d) Adequacy

"The [adequacy] rule has two parts. The moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced, and able to vigorously conduct the proposed litigation." Andrews v. Bechtel Power Co., 780 F.2d 124, 130 (1st Cir. 1985). Harmon neither identifies an actual conflict of interest on the part of Pettway or Hubbard nor any lack of qualification on the part of their attorneys (who include the not-for-profit National Consumer Law Center).

(e) Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 620 (1997). See also Tardiff v. Knox County, 365 F.3d 1, 6-7 (1st

Cir. 2004) (the certification of a litigation class of individuals subjected to illegal strip searches was not improper despite the fact that individual damages would inevitably vary depending upon each individual's claims of emotional distress, lost wages, and medical bills). Harmon argues that the proposed class does not meet the predominance test because a sampling of forty foreclosures handled by Harmon yielded different overestimations of attorneys' fees and costs and in some cases found an underestimation of the actual fees and costs. As discussed earlier, to the extent that Harmon's sampling shows a potential difference in damage awards, it is not determinative for Rule 23 purposes. (f) Superiority

Rule 23(b)(3) requires a class action to be "superior to other available methods for the fair and efficient adjudication of the controversy."

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

Id. "In adding 'predominance' and 'superiority' to the qualification-for-certification list, the Advisory Committee sought to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" Amchem, 521 U.S. at 615. The requirement of superiority is easily met in this case. The claims of each class member are too small to give an incentive to individual members of the class to pursue separate claims. In contrast, the propriety of

Harmon's system of estimating fees and using high end costs is amenable to a global resolution.

(g) Ascertainability

"The proposed class must be precisely defined and its members must be ascertainable through the application of 'stable and objective factors' so that a court can decide, among other things, 'who will receive notice, who will share in any recovery, and who will be bound by th judgment.'" Van West v. Midland Nat'l Life Ins. Co., 199 F.R.D. 448, 451 (D. R.I. 2001) (finding insufficiently definite a class of persons harmed by the unspecified "wrongful conduct" of defendant's sales agents, whose practices differed from transaction to transaction). Compare Crosby v. Soc. Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986) (finding that a class of disability benefits claimants who did not receive a hearing "within a reasonable time" was impossible to ascertain in any objective fashion); In re Copper Antitrust Litig., 196 F.R.D. 348, 358-360 (W.D. Wis. 2000) (finding that the class was unascertainable where indirect purchasers had no means of knowing if they had been harmed) with Lorazepam, 202 F.R.D. at 22-25 (finding that the complexities of the pharmaceutical market did not make purchasers of drugs unascertainable, and collecting cases certifying classes of direct purchasers in complex markets). Here there is no issue as to the ascertainability of the class through the application of objective factors as each prospective class member can be identified from Harmon's own records.

ORDER

For the foregoing reasons, Harmon's motion for summary judgment as to the MDCS claims is ALLOWED. Plaintiffs' common-law claims of unjust enrichment and intentional misrepresentation are DISMISSED. Harmon's motion for summary judgment is DENIED as to all remaining claims. Plaintiffs' motion for summary judgment is also DENIED. The court will ADOPT the definitions of the FDCPA subclasses proposed by plaintiffs and will ALLOW plaintiffs' motion for class certification. Trial is scheduled for January 30, 2006, at 9:00 a.m. in Courtroom 21.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE