[Cite as *CACH, L.L.C. v. Young*, 2021-Ohio-4638.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

CACH, LLC, et al.,

Counterclaim Defendants-Appellants

v.

VICKI YOUNG, et al.,

Counterclaim Plaintiffs-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 15 MA 0176, 15 MA 0177

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 09 CV 1674

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed, in part, Reversed in part, Remanded.

Atty. Daniel A. Friedlander, 323 W. Lakeside Avenue, Suite 200, Cleveland, Ohio 44113 for Plaintiffs and Counterclaim Defendants-Appellees and Plaintiff Counterclaim Defendants-Appellants and

Atty. Anand N. Misra, The Misra Law Firm, LLC, 3659 Green Road, Suite 100, Beachwood, Ohio 44122 and *Atty. Robert S. Belovich,* Robert S. Belovich Attorney LLC,

9100 South Hills Blvd., Suite 325, Broadview Heights, Ohio 44147 and *Atty. Boyd Gentry, Atty. Zachary Elliott,* Law Office of Boyd W. Gentry, LLC, 4031 Colonel Glenn Highway, Beavercreek, Ohio 45431 and *Atty. Manuel Newburger,* Barron & Newburger, P.C., 1212 Guadalupe, Suite 104, Austin, Texas 78701 for Defendants and Counterclaim Plaintiffs-Appellant & Defendant and Counterclaim Plaintiff-Appellees and *Atty. Lori Brown*, *Atty. Richard Rezie,* Gallagher Sharp LLP, 1215 Superior Avenue, 7th Floor, Cleveland, Ohio 44114, *Atty. Danielle Cullen,* Weltman, WeinberG & Reis Co., LPA, 965 Keynote Circle, Cleveland, Ohio 44131 for Appellant/Counterclaim Defendant Weltman, Weinberg & Reis Co., LPA

Dated: December 17, 2021

Robb, J.

{¶1} This is the appeal of the Mahoning County Common Pleas Court's decision granting the class certification motion filed by Appellee Vicki L. Young in her action asserting claims under the Fair Debt Collection Practices Act (FDCPA) and the Ohio Consumer Sales Practices Act (OCSPA). Appellant Weltman, Weinberg & Reis Co., LPA et al. argues Appellee failed to prove the seven class certification elements in Civ.R. 23 and failed to demonstrate the additional statutory element for OCSPA claims.

{¶2} We initially find problems with the first "implicit" element in Civ.R. 23, requiring the class members to be readily identifiable and the class to be unambiguously defined without utilizing a fail-safe definition. The Usury Class and the Pre-Judgment Interest Class can be redefined to avoid these problems. Although this shifts additional issues to the seventh element, Civ.R. 23(B)(3) was met as to the interest classes. The class certification of the interest classes as redefined is affirmed.

{¶3} However, the Time-Bar Class is not readily identifiable due to the number of individual inquires required to determine membership. Even if the class could be redefined, the individual inquiries would be shifted to the seventh element where the common questions would not predominate over questions affecting individual class members, and a class action was not shown to be the superior method of disposition. The certification of the Time-Bar Class is reversed.

{¶4} As to the OCSPA claims, Appellee failed to demonstrate the existence of a relevant attorney general rule or state court decision characterizing the specific act as a

violation. The decision allowing the OCSPA claims to proceed as a class action is reversed. The case is remanded for further proceedings.

STATEMENT OF THE CASE

{¶5} On May 7, 2009, CACH filed suit against Appellee, alleging she owed $8,011.01 with interest at a rate of 27.99% per annum from the July 2, 2005 due date reflected in an attached credit card statement from Chase Bank. Also attached to the complaint was a card member agreement referring to a variable interest rate. Appellee made her last payment on the account on November 5, 2004, and the account was "charged-off" by Chase Bank on June 30, 2005. CACH purchased Appellee's debt through a Credit Card Account Purchase Agreement on November 11, 2005 (with a December 23, 2005 closing date). The corresponding Affidavit of Sale and Bill of Sale were attached to the complaint. The complaint was amended to seek "interest at the rate provided for in the Agreement in conformity with applicable law."

{¶6} Appellee filed a class action counterclaim under the FDCPA and the OCSPA for filing time-barred debt collection lawsuits, making false representations as to agreements, and demanding improper interest amounts. She also set forth common law claims including abuse of process, defamation, and civil conspiracy. Appellee's counterclaim named CACH as a defendant as well SquareTwo Financial Corporation (the parent company of CACH) and Weltman, Weinberg & Reis Co., LPA (the law firm representing CACH in the debt collection proceedings).

{¶7} Motions to dismiss the counterclaim and for judgment on the pleadings were overruled. On January 25, 2012, CACH was permitted to dismiss its complaint without prejudice. The case was moved to federal court but remanded back on March 18, 2013. The trial court ordered the parties to brief the issue of class certification.

{¶8} On May 1, 2014, Appellee filed a 37-page motion for class certification reviewing the requirements for class certification in Civ.R. 23(A) and claiming the action fell under (B)(2) and (3). Exhibits were attached with data collected in discovery relevant to prior lawsuits filed against the putative class members. Appellee identified a common class with three subclasses: the Time-Bar Class, the Usury Class, and the Pre-Judgment

Interest Class. Appellant filed a 46-page opposition to Appellee's class certification motion. A reply and surreply were also filed.[1]

{¶9} On September 4, 2015, the trial court granted class certification. The trial court recognized it was to conduct a rigorous analysis to determine whether the movant met its burden to show by a preponderance of the evidence each requirement for class certification, and the court analyzed the requirements.[2] The court concluded Appellee demonstrated class certification of the common class and three subclasses. The common class required each member to be: (1) an individual, (2) against whom CACH filed a lawsuit in Ohio, (3) to collect a debt incurred on or related to a credit card, (4) issued by bank subject to federal law, (5) issued to a natural person for consumer credit purposes, and (6) the lawsuit was filed on or after January 9, 2008[3].

{¶10} The trial court then said the member must fall into one of three subclasses: (1) Time-Bar Class, where the "lawsuit was filed beyond a period of limitation determined under Ohio law, and the period of limitation determined under the laws of the state where the credit issuing bank is headquartered. The analysis includes a determination of the shorter of the two periods of limitation"; (2) Usury Class, where "in said lawsuits, the interest rate claimed exceeds the rate permitted under O.R.C. 1343"; and (3) Pre-Judgment Interest Class, where the members "are individuals from whom the Defendants

[1] On August 1, 2014, Appellant filed a motion for summary judgment which remains pending.

[2] The trial court concluded certification was proper under "Civ.R. 23(A) and Civ.R. 23(B)(2) and (B)(3)." In analyzing (B)(2), the court mentioned the risk that a series of judgments could impose inconsistent judgments or incompatible standards of conduct, language used in (B)(1). Appellee did not raise (B)(1) below, and the parties do not analyze it on appeal. The subdivision applies "where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). "The fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking [Civ.R. 23(B)(1)(a)]." *In re Bendectin Products Liab. Litigation*, 749 F.2d 300, 305 (6th Cir.1984). We also note the Ohio Supreme Court has evaluated division (B)(3) by asking whether "[c]lass action treatment would eliminate any potential danger of varying or inconsistent judgments * * *." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 86, 694 N.E.2d 442 (1998).

[3] This date looked back two years from Appellee's counterclaim. *See* R.C. 1345.10(C) (two-year statute of limitations for OCSPA claims). Appellee's class certification motion acknowledged the FDCPA claims applied to debt collection actions filed against putative members on or after January 9, 2009, under the one-year statute of limitations for FDCPA claims.

sought or claimed interest on balances due, during a time which Defendants were not rightfully permitted to claim such interest on the accounts." (9/4/15 J.E.).

{¶11} The trial court implemented the class certification order by appointing Appellee as the class representative and her attorneys, Robert S. Belovich and Anand N. Misra, as class counsel. (10/1/15 J.E.). On October 2, 2015, timely notices of appeal were filed. *See* R.C. 2505.02(B)(5) ("An order that determines that an action may or may not be maintained as a class action" is a final, appealable order). CACH and SquareTwo filed a notice of appeal resulting in 15 MA 0176, and the law firm filed a notice of appeal resulting in 15 MA 0177. The appeals were consolidated.

Pending Appeal

{¶12} Before briefing, this court granted Appellant's request to hold the appeal in abeyance pending a decision by the Ohio Supreme Court in *Taylor*. (11/17/15 J.E.). The stay was lifted after the Supreme Court's decision was released. Briefing was completed in December 2016. The parties filed 50-page briefs. A March 2017 notice of bankruptcy as to CACH and SquareTwo caused a stay of this appeal. In May 2021, Appellee provided notice of the closing of the bankruptcy and termination of the stay.

{¶13} Also in May 2021, Appellant moved to stay the appeal and remand based on an anticipated amendment of the borrowing statute (effective June 16, 2021) to remove contract actions from its application. This court denied the motion. (7/13/21 J.E.). The amendment to R.C. 2305.03(B) changed "civil action" to "tort action." Uncodified law in section 3(B) states: "Division (B) of section 2305.03 of the Revised Code, as amended by this act, applies retroactively to April 7, 2005, the effective date of S.B. 80 of the 125th General Assembly." At the time suits were filed against the putative class members, the borrowing statute was not limited to tort actions as it applied to any "civil action."

{¶14} Appellant's motion suggests the 2021 amendment means the prior actions it filed against debtors will no longer be considered time-barred, even if they would have been considered time-barred when filed. Nevertheless, the amendment was not in existence at the time the trial court ruled. Moreover, the trial court's decision related to class certification, and Appellant elsewhere considers the issue of whether time-barred actions to collect debt are a merit issue.

{¶15} A court "cannot decide the case on the merits at the certification stage." *Stammco LLC v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 43-44 (*Stammco II*). The ability to use this 2021 statute to retroactively eliminate a prior action's status as time-barred would be an issue for summary judgment where Appellee could respond with arguments on unconstitutional retroactivity. In fact, Appellant's May 2021 motion acknowledges it is an issue for the trial court in the first instance.

Background Law

{¶16} As to the Ohio Supreme Court's *Taylor* case, which Appellant asserted warranted a stay of this appeal (prior to the bankruptcy stay), the Court addressed various issues arising under the FDCPA and the OCSPA during the collection of purchased credit card debt. *Taylor v. First Resolution Invest. Corp.,* 148 Ohio St.3d 627, 2016-Ohio-3444, 72 N.E.3d 573. It was explained the federal FDCPA is a broad remedial statute passed to address abusive practices during consumer debt collection. *Id.* at ¶ 7, citing 15 U.S.C. 1692 a, e. Where the debt arose from a transaction entered into primarily for personal, family, or household purposes, the FDCPA prohibits debt collectors from: employing "any false, deceptive, or misleading representation or means in connection with the collection of any debt" including misrepresenting "the character, amount, or legal status of any debt"; employing a "false representation or deceptive means to collect or attempt to collect any debt"; and using any "unfair or unconscionable means to collect or attempt to collect any debt" such as by collecting "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." *Taylor*, 148 Ohio St.3d 627 at ¶ 7, 9, quoting 15 U.S.C. 1692 a(5), e, f.

{¶17} The FDCPA is a strict-liability statute under which a plaintiff need not prove the debt collector's knowledge or intent. *Id.* at ¶ 10. Still, a debt collector can avoid liability if it is demonstrated "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. 1692 k(c).

{¶18} The Ohio Supreme Court noted first-party creditors engaged in debt collection are not covered by the FDCPA as it aims to cover third-party debt collectors[4] regularly engaged in collection of debt owed by consumers including the filing of a complaint to initiate litigation. *Taylor*, 148 Ohio St.3d 627 at ¶ 11, 72, citing 15 U.S.C. 1692 a(6). And, it can be applied to attorneys filing debt collection lawsuits. *Id.*

{¶19} The Ohio Consumer Sales Practices Act (OCSPA) contained in R.C. 1345.01 et seq. also protects consumer debtors during debt collection and can be applied to attorneys as a result of litigation activities. *Taylor*, 148 Ohio St.3d 627 at ¶ 12, 87. For instance, the OCSPA prohibits "an unfair or deceptive act or practice in connection with a consumer transaction" or "an unconscionable act or practice in connection with a consumer transaction." R.C. 1345.02(A); R.C. 1345.03(A).

{¶20} As to filing a time-barred collection action, the Supreme Court concluded this can form the basis of a violation under both the FDCPA and the OCSPA. *Taylor*, 148 Ohio St.3d 627 at ¶ 35, 59. The Court found the underlying action for credit card default accrued in Delaware, which was the home state of the issuing bank and where the consumer's payments were to be made. *Id.* at ¶ 38, 42. Due to Ohio's borrowing statute, this meant Delaware's shorter three-year statute of limitations applied to ascertain whether the collection action was timely filed. *See id.* at ¶ 37, 41. Ohio's borrowing statute provided:

> No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.

R.C. 2305.03(B) (eff. 4/7/05). Here, Appellee alleged the suit against her was time-barred under the shorter Delaware statute of limitations applicable via Ohio's borrowing statute.

[4] Thereafter, the United States Supreme Court concluded the second definition of debt collector in 15 U.S.C. § 1692a(6), one who "regularly collects or attempts to collect *** debts owed or due *** another," does not include an entity who purchased debt and then attempted to collect it as the debt is no longer the debt of another. *Henson v. Santander Consumer USA Inc.*, __ U.S. __, 137 S.Ct. 1718, 198 L.Ed.2d 177 (2017) (while refusing to address alternative definition in statute).

{¶21} The *Taylor* Court did not issue a majority holding on whether the borrowing statute applied to a cause of action accruing before the April 7, 2005 effective date of R.C. 2305.03(B). The two justices signing the lead opinion believed accrual before the effective date was irrelevant as the borrowing statute specifically states it applies when the action is "commenced and maintained." *Taylor*, 148 Ohio St.3d 627 at ¶ 49, 53-54 ("as a remedial statute, the borrowing statute applies to proceedings conducted after its adoption"). Two concurring justices refused to address the issue as they found the cause of action accrued after the effective date of the borrowing statute because the consumer made an additional payment in June 2006 (or alternatively after she was informed her charging privileges were terminated a day after the statute's effective date), not when she failed to make a minimum payment in January 2005. *Id.* at ¶ 109-121. Another justice concurred in judgment only, and two justices dissented.

{¶22} As to interest demanded in debt collection complaints, the *Taylor* Court held a consumer can file suit under the FDCPA and the OCSPA if the debt collector sought interest which was unavailable. *Id.* at ¶ 62, 72, 76 ("A prayer for 24 percent interest is an intimidating statement to a debtor. * * * Debt collectors borrow the legitimacy of the justice system to back up their claims."). The Court reviewed a Sixth Circuit case where: a credit card user had a contract with a bank calling for a 21.99% interest rate; the bank stopped charging interest on the debt after the user stopped making payments on her credit card; a debt collector sought pre-judgment interest at the statutory rate; and the debtor alleged the debt collector improperly asked for interest between the date of charge-off and the date of sale to the buyer and invoked waiver principles. "By charging off the debt and ceasing to charge interest on it, [the bank] could take a bad-debt tax deduction * * * and could avoid the cost of sending [the debtor] periodic statements on her account." *Id.* at ¶ 66, quoting *Stratton v. Portfolio Recovery Assocs.*, 770 F.3d 443, 445 (2014) (also stating the debt collector "cannot be given a right to collect interest—contractual or statutory—that [the bank] waived").

{¶23} The Ohio Supreme Court then observed the debt buyer sought 24% interest "that it could not legally collect" because it did not possess a written contract, which was the only method to be excepted from the statutory rate of interest under R.C. 1343.03(A). *Taylor*, 148 Ohio St.3d 627 at ¶ 84. Pursuant to R.C. 1343.03(A), the debt buyer was

limited to the statutory rate of interest (under the formula in R.C. 5703.47) unless a written contract provided a different rate of interest. *Id.* at ¶ 77. The Court also held the requirement of a writing cannot be satisfied with an invoice or monthly statement, noting the debt collector "attached only a billing statement to its complaint to support that rate of interest and did not attach a copy of the credit-card agreement that [the debtor] had signed." *Id.* The *Taylor* Court concluded the trial court should not have granted *summary judgment* in favor of the debt collector and its law firm.

{¶24} Notably, *Taylor* did not involve class certification. Nevertheless, Appellant emphasizes the case shows the complicated nature of the issues, including what statute of limitations to apply, accrual dates and locations, and the applicable contracts.

ASSIGNMENT OF ERROR ONE: CIV.R. 23 CLASS CERTIFICATION

{¶25} Appellant's first assignment of error provides:

"The trial court erred by certifying classes that do not meet any of the four prerequisites set out in Civil Rule 23(A) or any of the applicable class types set out in Civil Rule 23(B). Rigorous analysis shows that no class was properly certifiable because, among other things, none of the three classes are ascertainable, each requires individual merits based inquiries, and each are impermissibly fail-safe."

{¶26} There are seven requirements for class action certification under Civ.R. 23. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 12. Four of the requirements are expressly set forth in Civ.R. 23(A): "(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." There are also two implicit prerequisites: there must exist an identifiable class with an unambiguous definition, and the class representative must be a member of the class. *Warner v. Waste Mgt. Inc.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988).

{¶27} As to the seventh element, the suit must satisfy one of the subdivisions within Civ.R. 23(B). Appellee argued she satisfied (B)(2) as "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as

a whole" and (B)(3) as "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

{¶28} The party seeking class certification bears the burden of affirmatively demonstrating by a preponderance of the evidence that the proposed class meets each element or requirement in the rule. *Cullen,* 137 Ohio St.3d 37at ¶ 2, 11, 13 ("A class action is an exception to the general rule"). The certification movant must present adequate evidence on each element (sufficiency) and the evidence as to each element must satisfy the burden of persuasion (weight). *Id.* at ¶ 20. As to the latter decision, the trial court has broad discretion in ruling on a motion for class certification, but the decision can be reversed for an abuse of discretion if the decision was unreasonable, arbitrary, or unconscionable. *Id.* at ¶ 19.

{¶29} The rigorous analysis a court must undertake at the certification stage "may include probing the underlying merits of the plaintiff's claim, but only for the purpose of determining whether the plaintiff has satisfied the prerequisites of Civ.R. 23"; the court "cannot decide the case on the merits at the certification stage." *Stammco II*, 136 Ohio St.3d 231 at ¶ 43-44. When applying Civ.R. 23, Ohio courts can consider non-controlling federal law applying the parallel federal rule. *Id.* at ¶ 18.

Lack of Hearing

{¶30} Initially, Appellant points out the trial court granted class certification without holding a hearing and suggests it is rare to find certification by a preponderance of the evidence in the absence of an evidentiary hearing. Appellee points out the class certification briefing schedule was set as an in-person hearing by agreement of the parties. A journal entry memorializing the due dates for the class certification motion, response, and reply was filed on December 17, 2013, with no mention of a hearing date. Appellant captioned a response with a request for oral argument and evidentiary hearing. Yet, after the certification issue was fully briefed, a March 19, 2015 joint motion to continue a final pretrial was filed, wherein the parties stated the pretrial should not be held until the court renders its decision on the pending class certification motion. The motion contained no indication any party was expecting a hearing to be scheduled on the issue of

certification and conveyed the impression they were awaiting a decision on the certification motion based upon the filings before the court.

{¶31} Furthermore, the Supreme Court has observed: "the fact that there was no live testimony in the trial court is inconsequential as concerns the applicability of the abuse-of-discretion standard to class action determinations." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998). "[T]he appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket." *Id.* Although a defendant is entitled to notice and an opportunity to present facts at a *scheduled* hearing, a trial court is not required to hold an evidentiary hearing for all class certification motions. *Warner*, 36 Ohio St.3d at 98, fn.9. Distinguishable from the case at bar, the Supreme Court was dealing with a situation where a court held a hearing on certification but only provided notice of the hearing to some parties.

{¶32} We also point out the Court observed it was rare the "pleadings" will be so clear to allow a trial judge to rule on certification by a preponderance of the evidence, and the Court said a party is entitled to discover and present *documentary* evidence if the pleadings do not establish Civ.R. 23 requirements were met. *Id* at 98, fn. 9. On this point, the case at bar does not involve a mere review of the pleadings. *See* Civ.R. 7(A) (defining the pleadings). Rather, there was substantial motion practice on the issue of class certification in addition to the pleadings. Finally, this court has concluded a hearing was not required where the court provided a sufficient opportunity for factual development to permit a meaningful determination on class certification. *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, 20 N.E.3d 732, ¶ 62 (7th Dist.). Here, the parties conducted discovery and presented documentary evidence to the trial court, and the lack of a hearing was not indicative of error.

Implicit Requirement 1: Identifiable Members of Unambiguous Class

{¶33} As aforementioned, the first implicit element for certification within Civ.R. 23(A) is an identifiable class with an unambiguous definition. *Warner*, 36 Ohio St.3d at 96. Identification of the members of the class should be possible with a "reasonable effort" meaning the members are "readily identifiable." *Id*. The description of the class

must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Stammco LLC v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 7 (*Stammco I*). "A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible." *Karhu v. Vital Pharmaceuticals Inc.*, 621 Fed.Appx. 945, 948 (11th Cir.2015).

{¶34} A fail-safe class definition is not proper as it requires the trial court to rule on the merits of the claim (at the class certification stage) to determine who is a member of the class. *Stammco II*, 136 Ohio St.3d 231 at fn. 2. The class definition should not incorporate contested elements of liability; otherwise, class membership depends on whether the member has a valid claim on the merits. *Ford v. TD Ameritrade Holding Corp.*, 995 F.3d 616, 624 (2021) (a fail-safe class is often drafted in an attempt to avoid issues with the predominance element in (B)(3) of Civ.R. 23).

{¶35} One problem with a fail-safe class is that a member either (1) wins or (2) loses by being defined out of the class (and is thus not bound by the judgment). *Stammco II*, 136 Ohio St.3d 231 at fn. 2. A fail-safe class impermissibly "allows putative class members to seek a remedy but not be bound by an adverse judgment" and is unmanageable as members are not immediately identifiable. *Ford*, 995 F.3d at 624. For instance, a class definition was fail-safe where it included the language "did not meet the FDCPA requirements to lawfully file suit to collect the debt in its own name." *Unifund CCR Partners v. Piaser*, 2018-Ohio-2575, 116 N.E.3d 675, ¶ 46 (11th Dist.) (another example of a fail-safe class was where the definition said the collection complaints "falsely stated that the plaintiff had taken assignment of the claims").

{¶36} It has been observed the issue of a fail-safe class "often should be solved by refining the class definition rather than by flatly denying class certification on that basis." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 826 (7th Cir.2012). Where a neutral or more readily identifiable class definition seems possible, it has previously been opined that refining is best left to the trial court. *Stammco I*, 125 Ohio St.3d 91 at ¶ 12. However, in that case, the parties had no chance to address an alternate definition. Moreover, when the Supreme Court received that case back after the remand,

the Court seemed to regret the prior remand for reformulation of the definition, concluding the new definition was overly broad and common issues did not predominate under the seventh element. *See Stammco II*, 136 Ohio St.3d 231.

{¶37} Appellant urges there are too many individualized inquiries to determine membership and the classes are improperly fail-safe because membership depends on a liability issue. Appellant argues the basis for each class (filing a time-barred action, charging usurious interest, and seeking improper pre-judgment interest) is the underlying element of each FDCPA claim.

Common Class

{¶38} First, Appellant challenges the portion of the common or preliminary class definition requiring the credit card to have been issued for "consumer credit purposes." Appellee points out: Appellant's prior suits were brought against individuals based on cards issued in the names of individuals; the bank issuing the credit card was required to maintain information as to whether the card was a consumer credit card under a federal regulation, citing 12 C.F.R. 226 (Regulation Z); and SquareTwo filed a Form 10-K regarding CACH's "consumer" debt buying and collecting. Furthermore, the purchase agreement between CACH and Chase (for instance) referred to the accounts as having been charged-off by Chase in compliance with all applicable "consumer credit laws" and CACH was represented to be in the business of buying accounts "of the type being purchased or otherwise deals in the collection of consumer debt * * *." See *Luther v. Convergent Outsourcing Inc.*, E.D.Mich. No. 15-10902 (Apr. 28, 2016) (considering similar items). The common class characteristic of whether a credit card was issued for consumer credit purposes was readily identifiable.

{¶39} Appellant states the threshold liability issue is not whether the card was issued for consumer purposes but whether each member made their purchases "primarily for personal, family, or household purposes." *See* 15 U.S.C. 1692 a(5); R.C. 1345.01(A). Appellant then contends it would not be administratively feasible and would be time-consuming to ascertain whether each putative member made their purchases primarily for personal, family, or household purposes in order to determine class membership. Appellant points to deposition testimony where Appellee could not recall her purchases while Appellee points to an admission by CACH as to the consumer nature of her debt.

As to the other class members, Appellee urges a court can infer a card was used for the purpose for which it was issued.

{¶40} Appellant's argument is based on what the common class definition does not say. Whether the purchases were primarily for consumer purposes was not part of the common class definition adopted by the trial court here. *Compare Riffle v. Convergent Outsourcing Inc.*, 311 F.R.D. 677, 681 (M.D.Fla.2015) (where the class definition referred to debt being primarily for personal, family, or household purposes, and the court found this was not shown to be easily identified through the defendant's records). Rather, the question remained as part of a liability element of the action (and would thus be considered under the final element). Limiting membership in the common class to those who were issued a card for consumer credit purposes eliminated the commercial cards or cards issued to businesses, lessened the individual inquiries for determining class membership, and avoided the fail-safe issue Appellant raises as to the subclasses.

Usury Class; Definition and Identification of Members:

{¶41} For the Usury Class, the class definition included the language, "exceeds the rate permitted under O.R.C. 1343." Appellant states this definition is improperly fail-safe because whether the interest rate was permissible is a merit issue and the individual inquiries for class entry are overwhelming for the membership stage. Appellant points out if the rate is determined to be statutorily permissible due to a person's particular circumstances, then the person is both excluded from the class and not bound by the judgment. To the contrary, Appellee claims the usury issue is not an actual element of her claim (under the FDCPA for example).

{¶42} Among other more general prohibitions, the FDCPA specifically prohibits: "The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. 1692f (1). The FDCPA's "permitted by law" language includes an evaluation of state law. *See, e.g., Johnson v. Riddle*, 305 F.3d 1107, 1118 (10th Cir. 200) ("every circuit court decision that has applied the "permitted by law" standard has asked simply whether state substantive law permitted the FDCPA defendant to collect the money that it demanded"); *Tuttle v. Equifax Check Servs.*, 190 F.3d 9, 13 (2d Cir. 1999) (under § 1692f(1), "[i]f state law expressly prohibits service

charges, a service charge cannot be imposed even if the contract allows it"). And, whether an amount is authorized by the agreement creating the debt is part of the state usury question and answered when determining whether the law was violated. The collection of usurious interest under state law is inextricably connected to an element of the FDCPA claim.

{¶43} The trial court shall amend the class definition to say "exceeding the default statutory rate in Chapter 1343." Entry into the class would then not require a decision on whether the rate was legally "permitted" as to each member. Whether it was permissible to charge interest in excess of that rate would then be an underlying liability question to be answered later; if the rate was permissible, a member would lose this claim and still be bound. This solves the fail-safe problem and minimizes the individual inquires for membership in the Usury Class as one can readily ascertain whether the complaint filed against a putative class member sought more than the statutory default rate (said to be 8%). Various arguments on the individual inquiries would then transfer to the section covering the seventh class certification element discussed infra.

Pre-Judgment Interest Class; Definition and Identification of Members:

{¶44} The trial court's definition for the Pre-Judgment Interest Class included "individuals from whom the Defendants sought or claimed interest on balances due, during a time which Defendants were not rightfully permitted to claim such interest on the accounts." We note the definition proposed by Appellee defined the Pre-Judgment Interest Class by asking whether: (1) interest was sought in the complaint on the amount charged-off by the original creditor (the bank) and the interest was identified as pre-judgment interest or was not limited to post-judgment interest; and (2) the bank did not add interest between the charged-off account closing and the date of sale to the debt collector or the agreement between the bank or the debt collector defined the outstanding unpaid balance on the credit card account to exclude post-charge-off interest.

{¶45} The trial court summarized this proposal by defining the class as those against whom pre-judgment interest was "not rightfully permitted." The question of whether CACH was precluded from collecting post-charge-off interest due to the debt sale agreement corresponding to each member is a liability question and not appropriate for inclusion in the class definition. The issue is similar to the one raised as to the Usury

Class, and we refer to our aforementioned discussion on a class definition requiring pre-determination of whether a charge is legally "permitted." Whether pre-judgment interest was "rightfully permitted" was the underlying basis for an FDCPA claim involving a misrepresentation of the amount due. *See Taylor*, 148 Ohio St.3d 627 at ¶ 7, 9, 66-71. *See also Johnson*, 305 F.3d at 1118 (even if there is no statute, the court views the case law of the state's high court, or predicts how that high court would rule, to see if a charge was permitted by law).

{¶46} As the class definition was intertwined with FDCPA liability and improperly fail-safe, the trial court shall amend the definition to align with the first part of the definition proposed by Appellee which asked if post-charge-off interest was sought in the collection complaints. Such a revision avoids the fail-safe issue in the trial court's definition, makes the members of the Pre-Judgment Interest Class readily identifiable, and transfers various complaints on individual inquiries to the seventh element.

Time-Bar Class; Definition and Identification of Members:

{¶47} The trial court defined a member of the Time-Bar Class as a member of the common class who was sued "beyond the period of limitation determined under Ohio law, and the period of limitation determined under the laws of the state where the credit issuing bank is headquartered [using the shorter of the two]." Appellant says the class members cannot be identified with reasonable effort as the individual inquiries will be too great.

{¶48} Appellee's certification motion said class identification required: identification of the state of the issuing bank's headquarters; identification of the limitations period for credit card accounts under the law of that state; comparison of that period with Ohio's period in order to choose the shorter period; identification of the start date of the limitations period for each member by using the debt collector's data records; and determination of whether the period exceeded the shorter statute of limitations. Appellee suggests the various issues could be addressed after class membership is established. However, Appellant reviews various legal issues to show the individual questions which must be answered in order to identify members of the Time-Bar Class, urging there are more issues than those identified by Appellee and the inquiry is unwieldy.

{¶49} For instance, Appellant refers to possible bankruptcy with its automatic stay applying to some putative members or tolling during imprisonment of putative class

members. Appellee claims these possibilities are speculative. Appellant also contends if Ohio's borrowing statute applies to implicate another state's statute of limitations, then the tolling statute of the foreign state should apply as well; e.g., the statute of limitations should not begin to run if the debtor was absent from the other state. Appellee urges the Ohio Supreme Court has explicitly rejected the application of tolling during a defendant's absence from a foreign state merely because that foreign state's statute of limitations was used under Ohio's borrowing statute. *See Payne v. Kirchwehm*, 141 Ohio St. 384, 48 N.E.2d 224 (1943). Appellant's reply claims *Payne* is distinguishable because it did not interpret Delaware law and cites a federal district court applying Delaware's tolling provision to an action in New Jersey. *See Panico v. Portfolio Recovery Assocs. LLC*, D.N.J. No. 15-1566-BRM-DEA (Sep. 14, 2016). The Ohio Supreme Court's *Taylor* case did not employ Delaware's tolling statute. Notably, "the remedies are governed by the laws of the state where the suit is brought. The limitation of actions relates to the remedy." *Payne*, 141 Ohio St. at 386-388, maintaining *Alropa Corp. v. Kirchwehm*, 138 Ohio St. 30, 33 N.E.2d 655 (1941). "It would indeed be an anomalous bit of logic to hold that although the defendant has been in Ohio and therefore subject to an action by the plaintiff in this forum, nevertheless the statute of limitation has been prevented from running against the plaintiff in Ohio for no other reason than that the defendant has been absent from Florida." *Payne*, 141 Ohio St. at 387.

{¶50} Next, Appellant states there would be many individual inquires required to determine if the statute of limitations for oral or written contracts applied as there may be written credit card agreements signed by some members. Appellee suggests Appellant should be bound by the documents attached to the complaints in prior actions against the potential members. Yet, the issue was not raised in those cases, and it is possible a written contract could be produced.

{¶51} There is also the issue of whether the borrowing statute applies to some members where the claims against them allegedly accrued prior to its effective date. The Time-Bar Class definition implicitly assumes the borrowing statute applies.

{¶52} As to the part of the definition referring to the headquarters of the issuing bank, there are many card issuers involved and the varying states whose statutes of limitations would be applied if the borrowing statute applies to each member. Moreover,

the parties dispute the applicable test for determining which state's statute of limitations is to be borrowed (if the borrowing statute applies). Appellant states the language in the class definition ("the laws of the state where the credit issuing bank is headquartered") lacks legal significance for some members as a debt collection cause of action accrues in the jurisdiction where the debtor was to send payment, which is not necessarily the same as the state where the bank was headquartered.

{¶53} Appellee insists the class definition is proper as accrual of the cause of action on credit card debt depends on the state headquarters of the issuing bank. The disagreement arises from the following statement in *Taylor*: "the underlying cause of action for default on the credit card in this case accrued in Delaware, the home state of the bank that issued the credit card and where the consumer's payments were made * * *." *Id.* at ¶ 1. Notably, the bank in *Taylor* was headquartered in the same state where payments were due. *Id.* at ¶ 38, 42.

{¶54} Appellant focuses on the second half of the Court's statement (the place where payments are to be made), noting it was subsequently repeated without the headquarters portion of the sentence. Appellee asserts a payment address would not cause accrual in a state different from the bank's home state, which is where the bank resides and suffers its economic impact upon failure to pay.

{¶55} The Supreme Court in *Taylor* professed to follow a "directly on point" New York case which held: "[i]f the claimed injury is an economic one, the cause of action typically accrues 'where the plaintiff resides and sustains the economic impact of the loss.'" *Id.* at ¶ 44, quoting *Portfolio Recovery Assocs. LLC v. King*, 14 N.Y.3d 410, 416, 901 N.Y.S.2d 575, 927 N.E.2d 1059 (2010). That case emphasized Delaware was the place *where the bank was located* without reference to where the payments were to be sent, and the Ohio Supreme Court summed up the case by observing: "Since the bank was located in Delaware, that state's statute of limitations applied." *Taylor*, 148 Ohio St.3d 627 at ¶ 44.

{¶56} At the same time, the *Taylor* Court said a federal case was directly on point. In applying Kentucky's borrowing statute, the federal district court held the claim against a Kentucky resident accrued in Virginia, "the location where the bank, Capital One, should have received payment" as that was where the injurious consequences of the alleged

wrongful conduct occurred. *Id.* at ¶ 46, quoting *Conway v. Portfolio Recovery Assocs. LLC*, 13 F.Supp.3d 711, 718 (E.D.Ky.2014). (This may have corresponded to the headquarters of Capital One.)

{¶57} The Supreme Court reviewed another case and concluded: "the court determined that Pennsylvania's borrowing statute required an application of Delaware's statute of limitations because the cause of action for nonpayment on a credit card accrued in Delaware, where the bank failed to receive payment." *Taylor*, 148 Ohio St.3d 627 at ¶ 45, citing *Hamid v. Stock & Grimes LLP*, E.D.Pa. No. 11–2349 (Aug. 26, 2011) ("the damage to Discover Bank occurred when it did not receive the payment due on August 12, 2006 at its post office box in Dover, Delaware").

{¶58} The Court also reviewed its own precedent holding that a contract claim accrues *in the state where it is payable*. *Taylor*, 148 Ohio St.3d 627 at ¶ 43. After these reviews, the *Taylor* Court concluded the cause of action accrued "in the jurisdiction where the debt was to be paid, Delaware." *Id.* at ¶ 48. Appellant's supplemental authority cites a Ninth District case applying *Taylor* and holding a claim against an Ohio credit card debtor accrued in Missouri, where the statement said the payment should be mailed, rather in Virginia, the state where Capital One was headquartered. *Capital One Bank v. Jones*, 9th Dist. Medina No. 18CA0116-M, 2020-Ohio-1204, ¶ 7. Appellant states if the definition were reformulated to refer to place of payment, the individual inquires would be greater.

{¶59} In urging the members of the Time-Bar Class are not readily identifiable, Appellant further points to the determination of the accrual date for each member in order to start the statute of limitations for use in the class definition. Appellant cites a case opining there were too many individual inquires required as to prior time-barred actions in order to identify class members. *See Clavell v. Midland Funding LLC*, E.D.Pa. No. 10-3593 (June 21, 2011). The court observed the calculation of the statute of limitations based on a database showing the last payment due date may not definitely capture the actual expiration date of the statute of limitations, as the particular circumstances of each putative member's debt may call for a different accrual date. *Id. See also Riffle*, 311 F.R.D. at 683-684 (finding the individual inquires on whether time-barred actions were

filed against debtors too great under the predominance element). We agree. The inquiry is overly burdensome for member identification.

{¶60} Finally, we note that although we are permitted to "probe" the merits in considering the elements of class certification, an interlocutory class certification appeal is not the place for answering the legal questions relevant to success on the merits. *Stammco II*, 136 Ohio St.3d 231 at ¶ 43-44 (the court "cannot decide the case on the merits at the certification stage"). The parties recognize this court is not called upon to answer the myriad legal issues briefed in summary judgment motions, which are still pending in the trial court. We are to consider the existence of the issues as evidence there are (or are not) too many individual inquires required to ascertain membership in the class or other elements, such as whether there are too many individual inquires to ascertain liability under the seventh element (dealing with the cohesiveness of the class or the predominance of the common issues over the individual issues).

{¶61} Considering the totality of the circumstances, the members of the Time-Bar Class are not readily identifiable. We also note Appellant states this is a fail-safe class because it is merit-based and if the action was not filed beyond the statute of limitations, then the person is not a class member and is not bound by a final judgment stating the collection action filed against them was timely. The language of the FDCPA does not correspond neatly to the class as it did for the interest classes, and Appellee states the statute of limitations question does not necessarily mean the FDCPA claim will be successful. Still, the class definition includes an underlying issue which is alleged to be the basis for liability as to the Time-Bar class: an action filed beyond the statute of limitations.

{¶62} Redefinition of the class to avoid answering the statute of limitations question during the collection of members would be complex. If the class could somehow be redefined so as to result in a readily identifiable class, the aforementioned individual issues in identifying members would transfer into too many individual issues in determining liability under the seventh element requiring predominance of class issues. *See Stammco II*, 136 Ohio St.3d 231 at ¶ 45, 52, 57, 66 (after remand due to a multitude of individual inquires to determine membership, the Court concluded common questions did not predominate over individual ones); *Ford*, 995 F.3d at 624 (a class is often broadly

defined in an attempt to disguise issues with the predominance element in (B)(3) of Civ.R. 23). This is discussed in the section addressing the seventh element.

Civ.R. 23(A)(1): Numerosity

{¶63} The first prerequisite expressly listed in Civ.R. 23(A) allows class certification only if: "the class is so numerous that joinder of all members is impracticable." Although no specific number of members is required to satisfy the numerosity or impracticality prerequisite, the Supreme Court has observed: "if the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity probably is lacking; if the class has between twenty-five and forty, there is no automatic rule * * *." *Warner v. Waste Mgt. Inc.*, 36 Ohio St.3d 91, 97, 521 N.E.2d 1091 (1988), quoting Miller, *An Overview of Federal Class Actions* (2d Ed.1977).

{¶64} In finding numerosity, the trial court pointed to Appellee's exhibits. On the Time-Bar Class, the court said Exhibit 5 showed 231 qualifying cases were filed by the law firm Appellant for CACH (out of the 883 allegedly time-barred suits filed by CACH). For the Usury Class, the court found Exhibit 6 showed an interest rate above 8% was sought in 75 cases filed by the law firm Appellant for CACH using a one-year look-back period (and in 293 cases using a two-year look-back period). As to the Pre-Judgment Interest Class, the court cited Exhibits 5 and 8 and found numerosity was satisfied even with the small sample researched by Appellee (who claimed discovery requests were still outstanding). An exhibit showed 562 lawsuits filed by CACH involved pre-judgment interest looking back one year.

{¶65} Appellant does not contest the allegation that these numbers would support a finding of numerosity. Instead, Appellant raises defenses against some members of the class in an attempt to diminish the class numbers, contending the class will not be numerous after the court applies: (1) principles expressed in the Ohio Supreme Court's *Lingo* case on the inability of a trial court to void the judgment of another court; and/or (2) principles of res judicata in *Frazier* (a federal district court case).[5]

{¶66} In *Lingo*, a plaintiff filed a class action in the common pleas court claiming a municipal clerk overcharged for court costs. The Supreme Court noted a court can

[5] These arguments are inapplicable to Appellee, who has no judgment against her; she filed this action as a counterclaim to a debt collection lawsuit which was then voluntarily dismissed.

vacate its own void judgment and a reviewing court can vacate a void judgment. *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 48. However, the fact that a court need not enforce a void judgment by another court does not create a justiciable controversy in the second court. *Id.* at ¶ 47. Therefore, the common pleas court had no power to vacate the final sentencing order issued by the municipal court. *Id.* at ¶ 51.

{¶67} Appellee states a suit under the FDCPA does not challenge the judgment in the collection lawsuit as the injury flows from the collection efforts, which happens to involve a complaint here. She distinguishes *Lingo* as: that suit sought to directly recover the court costs notwithstanding a judgment imposing them; the judgments in the case at bar are not alleged to be void or sought to be vacated; and *Lingo* was an attempt to challenge a criminal sentence, not a suit under the FDCPA or the OCSPA, which created actions to challenge debt collection practices.

{¶68} A formal legal pleading can be the basis for a violation of the FDCPA, and a debtor's cause of action based upon items contained in a collection complaint accrues when the collection complaint is filed against the debtor. *See Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 231 (4th Cir.2007); *Tyler v. DH Capital Mgt. Inc.*, 736 F.3d 455, 463-464 (6th Cir.2013). The Supreme Court noted the act protects unsophisticated consumers who were unaware of their defenses when the collection action was filed (and when default judgment was obtained). *See Taylor v. First Resolution Invest. Corp.*, 148 Ohio St.3d 627, 2016-Ohio-3444, 72 N.E.3d 573, ¶ 34-35. Appellee urges: a violation under the FDCPA can be complete upon the filing of a lawsuit against the debtor; post-filing events do not undo a completed violation; the acts (filing a time-barred complaint, demanding usurious interest, and demanding unauthorized pre-judgment interest) all occurred at the filing of a complaint; the violations did not depend on or involve a subsequent judgment; and subsequent judgments in cases against members of the class were irrelevant to the FDCPA violation.

{¶69} In *Frazier*, the defendant obtained default judgment in a state court collection lawsuit, and the plaintiff later sued the defendant under the FDCPA and the OCSPA by complaining the defendant brought a time-barred action against her. The federal district court said these arguments were barred by res judicata as they should

have been brought as defenses and counterclaims in the debt collection action. *Frazier v. Matrix Acquisitions LLC*, 873 F.Supp.2d 897, 902-905 (N.D.Ohio 2012). Distinct from the case at bar, the plaintiff asked to quash the state garnishment proceedings and for a refund of collected amounts. *Id.* at 904-905. As another federal district court observed:

> Plaintiffs' FDCPA claim is not a direct attempt to complain of an erroneous decision by the state court. In fact, for purposes of Plaintiffs' FDCPA claim, the state court judgment is largely irrelevant; the alleged violation of the FDCPA occurred when Defendants filed their state court lawsuit and the fact that judgment was eventually entered in that case does not directly impact the FDCPA claim. Plaintiffs' FDCPA claim is not complaining about the state court judgment but of "an allegedly illegal act" by Defendants (i.e., filing suit on a time-barred debt). * * * In addition, Plaintiffs are not seeking relief from the state court judgment. Plaintiffs make very clear "that the state-court judgment [is] valid" and they are not "attacking the [state court] judgment" nor are they "trying to set it aside." (Doc. 23 at 10, 12). Thus, Plaintiffs concede that regardless of the outcome of their FDCPA claim, the state court judgment will remain in place.

Garduno v. Autovest LLC, 143 F.Supp.3d 923, 927 (D.Ariz.2015). *See also Jones v. LVNV Funding LLC*, E.D.Pa. No. 16-CV-2735 (July 20, 2016) (as the FDCPA was not a compulsory counterclaim to the debt collection action, the FDCPA action was not barred by claim preclusion; the conduct dealt with debt collection, not the debt itself).

{¶70} The claim preclusion arm of res judicata provides "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995) (defining a "transaction" as a "common nucleus of operative facts"). Civ.R. 13(A) governs compulsory counterclaims. Principles of claim preclusion are incorporated into the rule. "All existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit pursuant to Civ.R. 13(A), no matter which party initiates the action." *Rettig Ents. Inc. v. Koehler*, 68 Ohio St.3d 274, 626 N.E.2d 99 (1994), syllabus.

{¶71} "The strong majority view is that FDCPA claims such as Plaintiffs' are not compulsory counterclaims in actions involving the original debt." *Garduno*, 143 F.Supp.3d at 929, fn.3. "Where a cause of action does not arise out of the transaction or occurrence that is the subject matter of the underlying claim, but instead arises from the events that occur during the course of the underlying litigation, that cause of action is not a compulsory counterclaim." *Papadelis v. First American Sav. Bank*, 112 Ohio App.3d 576, 580, 679 N.E.2d 356 (8th Dist.1996), citing *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 299, 626 N .E.2d 115 (1994) (abuse of process is not a compulsory counterclaim). Finally, in a separate case involving Appellee, this court held a claim under the FDCPA is a permissive counterclaim, not a compulsory counterclaim. *Unifund CCR Partners v. Young*, 7th Dist. No. 11-MA-113, 2013-Ohio-4322, ¶ 28-29.

{¶72} In any event, arguments on defenses such as those presented here are premature when used to eliminate class members in an attempt to defeat numerosity (even if they can be considered under another element). "[A]rguments that * * * res judicata bars the claims of [certain class members] are precisely the types of merits arguments that ultimately have no bearing on numerosity. Membership in the classes is not contingent upon [this defense]." *Coleman v. District of Columbia.*, 306 F.R.D. 68, 78 (2015). The number of class members with a valid claim is the issue to be determined *after the class certification*; "[w]hile the [non-movant's] arguments may, if successful, bar certain class members from obtaining relief, that does not remove those individuals from consideration as potential members of the putative class." *Id.*

Civ.R. 23(A)(2): Commonality

{¶73} The second prerequisite listed in Civ.R. 23(A) requires there to be "questions of law or fact common to the class * * *." Civ.R. 23(A)(2). Appellant claims the questions raised do not have common answers. *See Stammco II,* 136 Ohio St.3d 231 at ¶ 32 ("raising common questions is not enough" as it should appear the class action will result in common answers). Appellant refers to the argument on the borrowing statute and claims the laws of six different states will have to be applied on the issue of whether the statute of limitations expired and whether there was a written contract. Appellant says the applicability of Ohio's borrowing statute is not common to all members because the statute was not in effect at the time Appellee defaulted. Appellant also cites

Parkis v. Arrow Financial Servs. LLS, N.D.Ill. No. 07C410 (Jan. 8, 2008), where a federal district court found a lack of commonality because it would have to conduct an individualized inquiry and look into the payment history of each member to determine the last payment date or charge-off date in order to determine if each debt collection suit was filed beyond the statute of limitations. Appellant believes individual fact-finding will have to occur as to each member to determine the accrual date (to see if the collection action against the member was untimely) and to determine the interest permitted in each contract.

{¶74} Notably, Appellant introduces these arguments by contending the trial court erred in finding, "the common questions predominate over the individual ones." However, "[t]he question whether common questions predominate over individual questions is a separate inquiry, distinct from the requirements found in Civ.R. 23(A)(2)." *Musial Offices, Ltd. v. Cuyahoga Cty.*, 2014-Ohio-602, 8 N.E.3d 992, ¶ 32 (8th Dist.). Civ.R. 23(A)(2) merely asks if there are "questions of law or fact common to the class" whereas Civ.R. 23(B)(3) asks if "the questions of law or fact common to class members predominate over any question affecting only individual members."

{¶75} As stressed by the Supreme Court, Civ.R. 23(A)(2) "does not demand that all the questions of law or fact raised in the dispute be common to all the parties. * * * Although there may be differing factual and legal issues, such differences do not enter into the analysis until the court begins to consider the Civ.R. 23(B)(3) requirement of predominance and superiority." *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 202, 509 N.E.2d 1249 (1987). "Courts generally have given this requirement a permissive application." *Id.* It was not unreasonable for the trial court to conclude there were common questions of law or fact under Civ.R. 23(A)(2).

Civ.R. 23(A)(3): Typicality & Implicit Requirement 2: Representative as Member

{¶76} Appellant addresses the membership and typicality requirements together. Civ.R. 23(A) implicitly requires the class representative to be a member of the class. *Warner v. Waste Mgt. Inc.*, 36 Ohio St.3d 91, 98, 521 N.E.2d 1091 (1988). Pursuant to Civ.R. 23(A)(3), a class can be certified only if "the claims or defenses of the representative parties are typical of the claims or defenses of the class * * *." Civ.R. 23(A)(3). The purpose of the typicality requirement is to protect absent class members

and promote the economy of a class action by ensuring the representative's interests are substantially aligned with those of the class. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 484, 727 N.E.2d 1265 (2000). However, the representative need not be "identically situated" with class members. *Id.* at 484-485. "The typicality requirement has been found to be satisfied where there is no express conflict between the representatives and the class." *Warner*, 36 Ohio St.3d at 98.

{¶77} Appellee says she is a member of each class and the typical allegations involve Appellant's routine debt collection practices: ignoring the Ohio borrowing statute (and thereby filing time-barred actions under the statute of the relevant state); demanding usurious interest rates; and seeking pre-judgment interest with no right to do so.

{¶78} Appellant points out the suit against Appellee was dismissed and she is one of the few class members who does not have a judgment against her. Appellee emphasizes abusive debt practices cannot be undone and cites her response to the res judicata argument to show the prior judgments against many members will not negatively affect their claims or render her atypical.

{¶79} As to the Time-Bar Class, Appellant points out Appellee may have to overcome an argument on whether the 2005 borrowing statute applied to her debt while the claims against other members accrued after the statute's effective date. An exhibit shows over forty cases involved claims accruing prior to the effective date of the borrowing statute. Most putative class members made their last payment after the effective date of the borrowing statute and would not be concerned with arguments on the borrowing statute's retroactive application, which Appellant believes would preoccupy Appellee. Yet, as Appellee states, this is not an express conflict between herself and the putative class members.[6]

{¶80} Appellee's situation need not be "identically situated" to the situation of every other class member and an "express conflict between the representatives and the class" must be shown. *Baughman*, 88 Ohio St.3d 480 at 484-485; *Warner*, 36 Ohio St.3d at 98. There is no express conflict where some members rely on distinct theories, such

[6] Citing *Taylor*, Appellee also says Ohio's borrowing statute applied to claims which accrued prior to the borrowing statute's April 8, 2005 effective date but which were asserted after the effective date. As aforementioned, this was the opinion of only two justices, after two justices dissented, one justice concurred in judgment only, and two justices concurred in a manner that did not reach this issue.

as retroactivity of the 2005 borrowing statute, or some members may have to defend against distinct defenses, such as res judicata. And, Appellee is a member of the classes.

Civ.R. 23(A)(4): Adequacy

{¶81} The fourth prerequisite listed in Civ.R. 23(A) provides the class can be certified only if "the representative parties will fairly and adequately protect the interests of the class." The named plaintiff and her attorneys must be deemed adequate. *Warner*, 36 Ohio St.3d at 98. "A representative is deemed adequate so long as his interest is not antagonistic to that of other class members." *Id.* The counsel for the class should be experienced in handling litigation of the type involved in the case. *Id.*; Civ.R. 23(F)(1)(a)(1)-(4).

{¶82} Appellant complains the trial court did not mention the adequacy of class counsel when finding Appellee would adequately represent class interests. Appellant believes Appellee and her attorneys made frivolous arguments and engaged in discovery misconduct, including during Appellee's deposition where she did not answer various questions and counsel objected often. Appellant also refers to a prior case where a statute of limitations was missed by Appellee and these attorneys, citing *Unifund v. Young*, Mahoning C.P. No. 2010 CV 00110.

{¶83} Appellee's attorneys respond by pointing out they did not enter an appearance in that case until two months after the debtor's counterclaim was filed. Appellee accuses Appellant of discovery misconduct as well. Appellee's certification motion cited to counsel's experience in prior consumer class actions and representation of Appellee in the pending case. Appellant's adequacy argument is overruled as the representative's interests are not antagonistic to those of the other putative class members, and there is no indication the trial court should have found counsel inexperienced in this type of action.

Civ.R. 23(B)(2): Injunctive Action

{¶84} The final element for class certification requires the action to satisfy division (B) of Civ.R. 23. Appellee raised (B)(2) (injunctive or declaratory type) and (B)(3) (damages type), and the trial court agreed both could apply here. Civ.R. 23(B)(2) applies where: "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is

appropriate respecting the class as a whole[.]" This provision contains two main premises: (1) the action must seek primarily injunctive relief; and (2) the class must be cohesive. *Wilson v. Brush Wellman Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 13.

{¶85} As to the first premise, "where the injunctive relief is merely incidental to the primary claim for money damages, Civ.R. 23(B)(2) certification is inappropriate." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 22, quoting *Wilson v. Brush Wellman Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, ¶ 17. "[C]laims for declaratory relief that merely lay a foundation for subsequent determinations regarding liability or that facilitate an award of damages do not meet the requirement for certification as set forth in Civ.R. 23(B)(2)." *Id.* at ¶ 27-28 (Civ.R. 23(B)(2) was not satisfied in an action seeking a declaration that an insurer's practices were illegal and violative of fiduciary obligations as this "merely lays a foundation for a subsequent individual determination of liability").

{¶86} This type of action can only be certified "when a single injunction or declaratory judgment would provide relief to each member of the class." *Cullen*, 137 Ohio St.3d 373 at ¶ 21, quoting *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 360, 131 S.Ct. 2541, 180 L.Ed.2d 374. Civ.R. 23(B)(2) does not authorize class certification when different members would be entitled to different injunctions or declaratory judgments or when each would be entitled to individual monetary damage awards. *Id.*

{¶87} The "key" to this type of class action is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that *the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them*." (Emphasis added). *Id.* at ¶ 21, quoting *Dukes*, 564 U.S. at 360. The cohesiveness requirement in Civ.R. 23(B)(2) is considered a more stringent requirement than that of Civ.R. 23(B)(3). *Wilson*, 103 Ohio St.3d 538 at ¶ 24, 29-30 (disparate factual circumstances can preclude (B)(2) class certification).

{¶88} Appellee states the injunctive relief sought would target future conduct, which the trial court observed as well. Yet, Appellant accuses Appellee of improperly framing the injunctive relief in terms of hypothetical, future lawsuits which do not involve class members. Appellant also emphasizes the primary relief sought by Appellee is

monetary damages and points to various individual issues. For instance, most putative class members had prior judgments rendered against them, whereas there was no judgment against Appellee and some other class members. As Appellee concedes, the prior judgments cannot be collaterally attacked in a different court. Assuming the *Lingo* and res judicata principles do not bar a claim for damages for filing collection complaints in violation of the FDCPA or OCSPA, the principles may break cohesiveness when speaking of enjoining collection on a judgment already rendered by another court.

{¶89} The concerns about how there are judgments against most putative class members (as distinguished from Appellee and others who have no judgment against them) tend to show a lack of cohesiveness for injunctive or declaratory relief. The declaration concerning Appellee and some other members could be different than the one involving those members with judgments against them. Appellee (as the representative) and some other putative class members can obtain an injunction precluding a collection lawsuit and garnishment against her, but the members with a judgment against them will face different obstacles in obtaining an injunction. Not all class members would benefit from an injunction. *See Cullen*, 137 Ohio St.3d 373 at ¶ 25.

{¶90} Furthermore, the "primary" relief common to all class members was damages. The requirement for certification as set forth in Civ.R. 23(B)(2) was not met as various aspects of the declaratory or injunctive relief sought by Appellee would merely lay the foundation for later individualized determinations as to liability or damages. *See Cullen*, 137 Ohio St.3d 373 at ¶ 27. This leads to the last question of whether the damage type of class action can be maintained under Civ.R. 23(B)(3).

{¶91} Notably, a negative predominance finding under (B)(3) supports a negative cohesiveness finding under (B)(2) as the cohesiveness requirement in Civ.R. 23(B)(2) is considered a more stringent requirement than that of Civ.R. 23(B)(3). *Wilson*, 103 Ohio St.3d 538 at ¶ 24, 29-31. Under the next section addressing that issue, we find the Time-Bar Class cannot be maintained, which further supports the above holding that Civ.R. 23(B)(2) was not satisfied as to the Time-Bar class.

Civ.R. 23(B)(3): Predominance & Superiority

{¶92} In the alternative to subdivision (B)(2) of Civ.R. 23, Appellee claims the action met the final certification element by satisfying (B)(3): "the questions of law or fact

common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Civ.R. 23(B)(3) contains a non-exclusive list of pertinent considerations:

> (a) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (b) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (d) the likely difficulties in managing a class action.

{¶93} In evaluating predominance, "it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication." *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984). Predominance can be shown where there is generalized evidence proving or disproving an element "on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *Cope v. Metro. Life Ins. Co.*, 82 Ohio St.3d 426, 429-430, 696 N.E.2d 1001 (1998).

{¶94} In evaluating superiority, the court is to compare other available procedures to determine if a class action "is sufficiently effective to justify the expenditure of judicial time and energy involved therein." *State ex rel. Davis v. Public Employees Retirement Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, ¶ 28. A consideration is whether "the efficiency and economy of common adjudication outweigh the interests of individual autonomy." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 80, 694 N.E.2d 442 (1998). Civ.R. 23(B)(3) was enacted in part to enable numerous claimants with claims too small to be worth litigating individually to share their resources and collectively assert their rights. *Id.*

{¶95} Although individual damage issues are to be considered, "a trial court should not dispose of a class certification solely on the basis of disparate damages." *Id.* at 81, quoting *See Ojalvo v. Ohio State Univ. Bd. of Trustees*, 12 Ohio St.3d 230, 232,

466 N.E.2d 875 (1984). Courts have denied certification where "the calculation of damages is particularly complex or burdensome" requiring various trials, but this would not be of concern if "damages may be calculated by a mathematical formula" and calculated using the information from the creditor's records. *Hamilton*, 82 Ohio St.3d at 81-82.

{¶96} Appellant asserts the class questions do not predominate over the various individual issues and urges the class action format is not the superior method of resolving these claims as the non-common issues are too unwieldy. Appellant states "mini-trials" will be required to determine liability.

{¶97} Appellee observes: "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 489, 727 N.E.2d 1265 (2000), quoting *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Additionally, "class action treatment is appropriate where the claims arise from standardized forms or routinized procedures." *See Hamilton*, 82 Ohio St.3d at 80, 84. It is alleged Appellant employed standard procedures which violated the FDCPA and the OCSPA by: filing time-barred actions (based on the failure to apply Ohio's borrowing statute); charging illegal interest rates; and demanding pre-judgment interest when not so entitled.

{¶98} As to the individual queries required to ascertain the consumer nature of the debt, Appellant cites a case where the court denied class certification under the predominance element due to the individual inquiries required to determine the consumer nature of the debt on each card (based on each card's primary use). *Corder v. Ford Motor Co.*, 297 F.R.D. 572 (W.D.Ky.2014). Yet, it has been observed there would be no class actions under the FDCPA if the need to show the consumer nature of the debt made individual issues predominate. *Collins v. Erin Capital Mgt. LLC*, 290 F.R.D. 689 (S.D.Fla.2013) ("a debt collector's lack of information regarding the types of debts it collected does not preclude class certification"). *See also Butto v. Collecto Inc.*, 290 F.R.D. 372, 378, 383 (E.D.N.Y.2013) (where a debt collector argued it could not distinguish between consumer and business debt, the court rejected the argument that the need to separate consumer debts from commercial debts precluded certification).

And, the OCSPA specifically contemplates a civil action if other statutory requirements are met as discussed in the next assignment.

{¶99} As to the Usury and Pre-Judgment Interest Classes, different interest rates were sought in the various collection complaints. Appellant reiterates their arguments about res judicata and the prior judgments against some debtors. Appellant points to decisions opining the common issues did not predominate over individual issues in an FDCPA case involving the attempt to collect post-charge-off interest. *See, e.g., Nepomuceno,* D.N.J. No. 14-05719-SDW-SCM.

{¶100} Appellee notes the issuing bank was permitted to charge interest at rates greater than a consumer's home state due to the National Bank Act but a debt collector cannot claim the statutory privilege of the bank for continuing interest. Appellant states the default statutory rates do not apply if there was a higher rate in a written contract and discovery will be required as to each member to see if there was a written contract with the issuing bank containing the claimed rate. Appellee responds by asserting there are no written contracts because when a card member agreement was attached to a complaint, it was not signed by a cardholder and the demanded interest rate was contained in a monthly account statement. *See Taylor*, 148 Ohio St.3d 627 at ¶ 77 (the requirement of a writing cannot be satisfied with an invoice or monthly statement, noting the debt buyer attached only a billing statement to its complaint to support the interest rate and did not attach a copy of the credit-card agreement signed by the debtor). However, Appellant suggests the attachments to complaints in other cases may not be the only evidence of signed writings as to all members, distinguishing *Taylor* which was not a class action and did not evaluate complaints in past actions.

{¶101} Appellee also insinuates a written contract would still be subject to the limits in R.C. 1343.01(A) and the maximum rate would be 8%. Appellant's reply emphasizes that cases falling under R.C. 1343.03 (after the money becomes due and payable) are not subject to R.C. 1343.01. *See Ohio Receivables LLC v. Dallariva*, 10th Dist. No. 11AP-951, 2012-Ohio-3165, ¶ 39. *See also Taylor*, 148 Ohio St.3d 627 at ¶ 84 (the debt buyer sought 24% interest "that it could not legally collect" because it did not possess a written contract *which was the only method to be excepted from the R.C. 1343.03(A)'s statutory rate of interest*). R.C. 1343.03(A) sets forth a default pre-judgment

interest rate (contained in R.C. 5703.47) for use only where the written contract does not contain a rate. "R.C. 1343.03(A) specifically establishes how parties can agree to an interest higher than the maximum allowed under R.C. 5703.47." *Minster Farmers Coop. Exchange Co. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶ 25 (also holding an invoice is not a written contract).

{¶102} The evaluation of the seventh element appears to be a close call for the interest classes as redefined. However, we conclude the matter lies within the trial court's class certification discretion. It is not unreasonable to find the interest classes have common issues that predominate over the individual ones and a class action is the superior method for fairly and efficiently adjudicating the interest issues. Accordingly, the decision to certify the Usury Class and the Pre-Judgment Interest Class is affirmed.

{¶103} As to the Time-Bar Class, Appellee seeks to apply the laws of different states to different members. As to her own claim, "Delaware law affords only a three-year statute of limitations for actions to collect on debts." *Taylor*, 148 Ohio St.3d 627 at ¶ 25, citing Del.Code Ann., Title 10, 8106(a). Some putative members are also allegedly subject to a three-year statute of limitations borrowed from Delaware or from other states. *See, e.g.,* Va.Code § 8.01–246(4). Other members are allegedly entitled to the benefit of statutes of differing years. Appellant outlines various tolling theories which may apply to different members, while Appellee states these theories are inapplicable or speculative (as set forth in the section on the first implicit element).

{¶104} Appellee also cites a case where a federal district court certified a time-bar class. *See Ramirez v. Palisades Collection LLC*, 250 F.R.D. 366 (N.D.Ill.2008). The court found the common questions predominated because generalized evidence (the failure to attach a written contract to the complaint) could be used to prove the unwritten contract statute applied. *Id.* at 373. However, it is unclear why Appellee assumes Appellant should be prohibited from producing a written contract now that the issue is being raised. Furthermore, all members of the class in the cited case were using the same state's statute of limitations.

{¶105} Appellee also cites the Eleventh District's reversal of a trial court's refusal to certify a time-bar class where the debt collector's internal guidelines called for applying Ohio's 15-year statute of limitations regardless of the choice of law clause in the written

agreement (attached to the complaint in the collection action). *Asset Acceptance LLC v. Caszatt*, 11th Dist. No. 2009-L-090, 2010-Ohio-1449. In finding the predominance test met, the court found the common questions of fact and law represented a significant aspect of the controversy "because the claim underlying the class action arose from similar credit card agreements and standardized procedures and practices employed by Asset, which utilizes Ohio's 15-year statute of limitations instead of the limitations period imposed by the choice-of-law state." *Id.* at ¶ 55.

{¶106} The case is not binding and is distinguishable as the standard form contract being sued upon in that case contained the instruction to apply the other state's law. The choice of law provision in *Caszatt* made the evidence more generalized in contrast to the many card issuers with varying state statutes at issue here and the reliance on a borrowing statute that was not yet enacted at the time of some members' last payments.

{¶107} Appellant cites a case where the court found the predominance element lacking due to the individual inquiries required on the statute of limitations where the movant sued for the practice of attempting to collect debt where an action would be time-barred. *See, e.g., Riffle v. Convergent Outsourcing Inc.*, 311 F.R.D. 677 (M.D.Fla.2015). The court concluded the individual time-bar issues predominated over the class issues due to the extensive individual inquires required, explaining:

> the Court will be required to conduct individualized inquiries to determine when the limitations period actually expired on each class member's debt. Determining whether a debt is time-barred is not always a simple task. In fact, in making such a determination, the Court will be required to consider many factors, such as the charge-off date, tolling issues, revival issues, and any actions between the debtor and creditor that may have modified their original agreement. * * * This is exactly the type of extensive factual inquiry that courts have held to be too administratively burdensome to warrant class certification.

Id. at 683-684.

{¶108} We agree, and in the case at bar, the situation is more complex as the class relies on the statutes of many other states. The putative members had credit cards

from many different banks. Appellant said 18, Appellee's own motion said 33. The banks were headquartered in at least six states. The states have different statutes of limitations to be utilized if Ohio's borrowing statute applies to each member. Inquiries on place of payment as the test for accrual would further complicate the issue to some members and may be irrelevant to other members (where place of payment and headquarters were the same). Thus, only some would benefit from arguing the issue of place of payment versus headquarters.

{¶109} The debt collection claims against some members (including Appellee) accrued prior to the effective date of Ohio's borrowing statute. Appellee's time-bar claim depends on the application of this statute. Other members would have no interest in arguing the borrowing statute applied to claims accruing before the statute's effective date (or in arguing the retroactive shortening of a statute of limitations did not unconstitutionally affect vested rights due to the time remaining after the statute's effective date, which may also require individual queries). In addition to these issues interfering with the class predominance discussed here, we note additional relevant individual issues discussed throughout, including the fact that some members may have to address arguments related to the prior judgments rendered against them.

{¶110} Although the class certification of the interest classes was a close call and fell within the trial court's discretion, the Time-Bar Class appears to cross the line into an unreasonable class certification under the particular circumstances of this case. Appellee failed to prove by a preponderance of the evidence the action meets Civ.R. 23(B)(3). Common questions of law or fact may exist, but they do not predominate over individual questions or questions affecting only some members. The likely difficulties in managing a class action as to the Time-Bar Class appear great, and a class action was not shown to be a superior method of adjudication considering the various distinctive features of Appellee's time-bar case.

{¶111} Conducting an analysis of the first implicit element and the seventh element, the class members are not readily identifiable and any reformulated definition would merely shift the inquiries to the seventh element where the common questions do not predominate over the individual ones. Accordingly, the certification of the Time-Bar Class is reversed.

ASSIGNMENT OF ERROR TWO: OCSPA CLASS

{¶112} Dispositive of the class issue only as to the OCSPA claims, Appellant's second assignment of error provides:

"The trial court erred by certifying class claims under the Ohio Consumer Sales Practices Act (the "OCSPA") because such claims do not meet the requirements for class-action status under the OCSPA."

{¶113} The OCSPA ensures there exists sufficient prior notice of what conduct was already declared to be deceptive before permitting an action to proceed as a class action by adding to the Civ.R.23 requirements for class certification. *Marrone v. Philip Morris USA Inc.*, 110 Ohio St.3d 5, 2006-Ohio-2869, 850 N.E.2d 31, ¶ 8-9. For violations of the OCSPA, a consumer has a cause of action and is entitled to relief as follows:

> (A) Where the violation was an act prohibited by section 1345.02, 1345.03, or 1345.031 of the Revised Code, the consumer may, *in an individual action*, rescind the transaction or recover the consumer's actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages.
>
> (B) *Where the violation was an act or practice declared to be deceptive or unconscionable by rule* adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, *or an act or practice determined by a court of this state* to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief *in a class action* under Civil Rule 23, as amended.

(Emphasis added.) R.C. 1345.09. The OCSPA class action is limited to actual damages (without statutory treble damages). *See Felix v. Ganley Chevrolet Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, ¶ 29-30, 39.

{¶114} Pursuant to the cited R.C. 1345.05(B)(2), the Attorney General can "[a]dopt, amend, and repeal substantive rules defining with reasonable specificity acts or practices that violate sections 1345.02 and 1345.03 of the Revised Code." Under the cited R.C. 1345.05(A)(3), the Attorney General is required to "[m]ake available for public inspection all rules * * * together with all judgments, including supporting opinions, by courts of this state * * * determining that specific acts or practices violate section 1345.02 or 1345.03 of the Revised Code."

{¶115} Therefore, a class action can only proceed under the OCSPA if, before the consumer transaction on which the action is based, either: (1) a rule was adopted by the Attorney General under R.C. 1345.05(B)(2) labeling the disputed act or practice deceptive or unconscionable; or (2) a court of this state declared the disputed act or practice violative of the CSPA in a decision that was available for public inspection by the Attorney General under R.C. 1345.05(A)(3). *Marrone* ,110 Ohio St.3d 5 at ¶ 1, 9, 13-14, 22.

{¶116} In *Marrone*, the plaintiffs sued a tobacco company for: falsely representing cigarettes were "light" to mislead consumers into thinking they were safer; failing to disclose they only delivered lower nicotine and tar when smoked by a machine; and manipulating the design to maximize nicotine delivery. *Id.* at ¶ 3-4. The trial court certified a class under Civ.R. 23 without addressing the additional class certification requirement in the OCSPA. *Id.* at ¶ 5. The appellate court affirmed, concluding the plaintiff cited prior cases establishing the alleged conduct was deceptive; those cases dealt with a defendant representing a product to be of a certain quality or to have certain attributes when it did not. *Id.* at ¶ 6.

{¶117} The Supreme Court accepted a discretionary appeal to "determine how similar the defendant's conduct must be to the conduct that was previously determined to be deceptive in order for a consumer to qualify for class-action certification under R.C. 1345.09(B) for a violation of the CSPA." *Id.* at ¶ 2. The Court concluded a class action cannot proceed under the OCSPA unless there is "a substantial similarity between a defendant's alleged violation of the Act and an act or practice previously declared

deceptive by either a rule promulgated by the Attorney General or a court decision that was publicly available when the alleged violation occurred." *Id.* at ¶ 24. This "means a similarity not in every detail, but in essential circumstances or conditions." *Id.*

{¶118} The Supreme Court found the cases cited by the *Marrone* plaintiffs "involve industries and conduct very different from the defendant's [and] do not provide meaningful notice of *specific* acts or practices that violate the CSPA. Therefore, the plaintiffs have cited no publicly available court decision that would satisfy R.C. 1345.09(B)." (Emphasis added.) *Id.* at ¶ 21. The *Marrone* plaintiffs also cited to an Attorney General rule declaring it deceptive for a supplier to make any representation in the absence of a reasonable basis in fact. The Supreme Court held this general rule was "insufficient to provide prior notice under R.C. 1345.09(B) because it does not refer to any particular act or practice." *Id.* at ¶ 23 (a generic rule is not sufficient to put a reasonable person on notice of the prohibition against a specific practice; otherwise, any previous determination of a deceptive practice could qualify as prior notice).

{¶119} As Appellant notes, Appellee did not rely on a rule promulgated by the Attorney General. Regarding the case option, Appellant emphasizes R.C. 1345.09(B) does not merely require the cited court case to be made available by the Attorney General for public inspection; it also requires the case to be a "decision by a court of this state." Appellee cited some federal cases in her motion for class certification. However, a federal court is not "a court of this state." *See, e.g., Volbers-Klarich v. Middletown Mgt. Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 32 (framing the required case as a decision out of "an Ohio state court"), quoting *Johnson v. Microsoft Corp.*, 155 Ohio App.3d 626, 2003-Ohio-7153, 802 N.E.2d 712, ¶ 21 (1st Dist.). *See also Robins v. Glob. Fitness Holdings LLC*, 838 F.Supp.2d 631, 648 (N.D.Ohio 2012) ("the decision of a federal court sitting in Ohio is insufficient to qualify as an Ohio court decision providing prior notice under the OCSPA"), citing *Kline v. Mtge. Electronic Sec. Sys.*, S.D.Ohio No. 3:08CV408 (Dec. 30, 2010) (attorney general's mere addition of a case to the public inspection file does not meet the statutory test).

{¶120} As for the cited state cases, the question is whether the cases cited by Appellee from the Attorney General's public inspection file covered the *specific* acts alleged in this case. Appellant urges the cases did not specifically address conduct

involving a debt collector filing time-barred actions, seeking a usurious interest rate by relying on the amount in the last credit card statement, or improperly seeking pre-judgment interest after charge-off. Appellee claims the Ohio cases from the Attorney General's public inspection file which she cited below were sufficiently on point and complains Appellant's brief fails to show how they were distinguishable. Her brief then fails to review or cite any qualifying cases, apparently assuming we will collect the citations from her trial court filings. In her class certification motion, Appellee cited three Ohio cases with Attorney General Public Inspection File (PIF) numbers. When Appellant's response urged the cases were not relevant, Appellee listed three additional citations.

{¶121} Appellee cited an Ohio Supreme Court case for the general description of the OCSPA as "a remedial law" prohibiting deceptive or unfair practices in connection with consumer transactions. *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 29, 548 N.E.2d 933 (1990) (ruling on the issue of whether attorney's fees were available if the supplier acted with intent in a case involving the sale of a warranty where the used truck was not eligible for coverage). Appellee then cited three cases for the proposition that certain actions which violate the FDCPA can also result in a violation of the OCSPA.

{¶122} In one case, the entry stated the practice of attempting to garnish a debtor's earnings from a garnishee in a municipal court not located in a county contiguous with the county in which the garnishment was filed (as required by a statute) was a deceptive, unfair, or unconscionable practice under the OCSPA and the FDCPA. *Kidder v. Mapother & Mapother*, Hamilton C.P. No. A9502707 (June 1, 1995) (PIF No. 10001527, June 8, 1995). Notably, the case was terminated in the trial court by a consent decree and entry of dismissal upon settlement, but a consent decree does not qualify as a "determination" by a court. *See Ice v. Hobby Lobby Stores Inc.*, N.D.Ohio No. 1:14CV744 (Sep. 29, 2015); *Pattie v. Coach Inc.*, 29 F.Supp.3d 1051 (N.D.Ohio 2014); *Gascho v. Global Fitness Holdings LLC*, 918 F.Supp.2d 708 (S.D.Ohio 2013). Moreover, the *Kidder* entry specifically stated the defendant did not engage in these practices. In any event, the case did not deal with substantially similar conduct as the conduct involved here.

{¶123} In the second case, a window company representative advised the consumers they could receive unsecured financing for new windows without requiring a

second mortgage on their house. After the project, the company asked the consumers to sign a mortgage and then placed a lien on the property. The municipal court found a violation of the OCSPA for: failure to provide a receipt, estimate, and list of parts; violation of the FDCPA for soliciting checks post-dated by more than 5 days and failing to hold the checks as promised; and placing a lien on the property after promising the financing would be unsecured. *Thomas v. JEL Homes Improvement Co. Inc.*, Hamilton M.C. No. 94CV03486 (Sep. 1, 1994) (adopting report of referee) (PIF No. 10001443, Sep. 15, 1994). The case is not factually relevant. It appears Appellee merely cited the case for the general proposition that an FDCPA violation can be an OCSPA violation.

{¶124} In the third case, the consumer alleged the defendant: promoted the sale of health spa services through prepaid contracts; made claims of "permanent membership"; sold services not yet available; acted improperly as to cancellation rights; and offered prizes without required notices. *State ex rel. Celebrezze v. Scandinavian Health Spa*, Summit C.P. No. CV863-1158 (Mar. 31, 1986) (PIF No. 10000744, Apr. 10, 1986). Appellee's motion below pointed to the trial court's holding in that: a supplier who makes deceptive or misleading representations to consumers in its collection of consumer debts violates R.C. 1345.02(A) and R.C. 1345.02(B)(10); a supplier collecting consumer debts who engages in acts the natural consequence of which is to harass consumer violates O.R.C. 1345.02(A); and the violations of 15 U.S.C. 1692a and 15 U.S.C. 1692e were violations of R.C. 1345.02. Notably, that case also involved a consent decree, wherein the defendant denied participation in violations of the OCSPA. Regardless, the industry and allegations are dissimilar to those in the case at bar. *See Marrone,* 110 Ohio St.3d 5 at ¶ 21 (considering if the cases "involve industries and conduct very different from the defendant's"). Additionally, Appellee merely claimed general statements provided notice, without regard to the specific factual allegations and findings which lacked substantial similarity with the case at bar (as required by *Marrone*).

{¶125} Next, Appellee referred to Appellant's conduct as the commencement of a debt collection lawsuit without the legal right to do so and cited an Eighth District case where the consumer alleged the following acts violated the OCSPA: default judgment was sought against him in the absence of proper service; an invalid dormant judgment was revived even though the consumer's obligation was satisfied; and the revivor action

was not immediately dismissed after information on satisfaction was relayed. *Gatto v. Frank Nero Auto Lease Inc.*, 8th Dist. No. 74894 (Apr. 9, 1999) (PIF No. 10001812, Feb. 15, 2000). The court evaluated the provision prohibiting "a supplier, in the process of collecting or attempting to collect upon a debt arising from a consumer transaction to falsely represent the status of any legal proceeding." *Id.* In reversing the summary judgment entered against the consumer, the court held: "a jury could find that appellees' actions in procuring a default judgment without proper service on appellant, and then some nine years later, attempting to revive and execute on the invalid judgment, even after appellant informed them that the judgment was satisfied, were a violation of the Ohio Consumer Sales Practices Act." *Id.* The conduct in *Gatto* is not substantially similar to the conduct outlined in the case at bar for purposes of class certification. *Gatto* does not represent a previous declaration the particular actions allegedly taken by Appellant were a violation of the OCSPA.

{¶126} Lastly, Appellee cited a case where a trial court found it was an unconscionable act or practice in violation of the OCSPA for a debt collector to make a misstatement of fact designed to exaggerate remedies or consequences or to knowingly misstate the law or the consumer's obligations. The debt collector sent a letter to the consumer falsely stating attorney's fees could be added to her debt, claiming court costs and attorney's fees had been advanced to an attorney, and saying the consumer would be served with process at his workplace; the letter was also sent to the consumer's employer. *Bennett v. Tri-State Collection Service*, Cuyahoga C.P. No. 940002 (Aug. 24, 1976) (PIF No. 1000437, Nov. 5, 1979).

{¶127} The most relevant factual item in *Bennett* would be the debt collector's assertion in a letter that attorney's fees would be added to the debt. The similarity is merely a debt collector generally seeking something it (allegedly) was not entitled to seek. The *Bennett* holding does not appear to qualify as a determination that the OCSPA is violated by the *specific acts* alleged here. Threatening to collect unavailable attorney's fees is not substantially similar to filing a debt collection complaint which allegedly: was subject to a statute of limitations defense; sought interest in the amount contained in the last credit card statement instead of using a statutory rate allegedly applicable due to the

lack of a signed contract; and sought pre-judgment interest where the original creditors allegedly waived their right to post-charge-off interest.

{¶128} In conclusion, the alleged OCSPA violations are not "substantially similar" to an act or practice previously declared to be a violation of the OCSPA in the state cases cited by Appellee and reviewed here. See *Marrone*, 110 Ohio St.3d 5 at ¶ 24 (cases must be similar "in essential circumstances or conditions"). We conclude the cited cases "do not provide meaningful notice of *specific* acts or practices that violate the CSPA. Therefore, the plaintiffs have cited no publicly available court decision that would satisfy R.C. 1345.09(B)." (Emphasis added.) *Id.* at ¶ 21. In accordance, a class action is not permitted under R.C. 1345.09(B) as to Appellee's OCSPA claims, and this assignment of error is sustained.

CONCLUSION

{¶129} For the foregoing reasons, the class certification of the Usury Class and the Pre-Judgment Interest Class is affirmed as redefined (except as to the OCSPA claims), but the certification of the Time-Bar Class is reversed. The decision to allow the OCSPA claims to proceed as a class action is reversed. The case is remanded for further proceedings.

Donofrio, P J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the final judgment and order of this Court is the class certification of the Usury Class and the Pre-Judgment Interest Class is affirmed as redefined (except as to the OCSPA claims), but the certification of the Time-Bar Class is reversed. The decision to allow the OCSPA claims to proceed as a class action is reversed. The case is remanded for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.