The Effect of the FDCPA's Class-Action Penalty Cap on Class Certification

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I. Introduction

The "alphabet soup" of consumer protection legislation and regulation can be a boon for consumer class action litigants because many laws, like the Fair Debt Collection Practices Act (FDCPA),[1] provide "bounty-like relief in the form of statutory damages to which a plaintiff is entitled without proof of injury," and often, without limit.[2] But some "bounty-like" consumer protection laws trade off this bounty against clear limits on class liability.[3] The FDCPA is such a scheme.

The FDCPA permits individual plaintiffs[4] to recover actual damages, plus "such additional damages as the court may allow, but not exceeding $1,000."[5] In a class action, however, putative class members must share in a fund that cannot exceed the lesser of $500,000 or one percent of the defendant's net worth.[6]

1. Title VIII. of the federal Consumer Credit Protection Act, codified at 15 U.S.C. §§ 1692 - 1692*o*.

2. *See, e.g.* Gillespie v. Blitt & Gaines, P.C., 2015 WL 4498743, at *4 (N.D. Ill. 2015) ("But the Seventh Circuit has held that "the [FDCPA] does not require proof of actual damages as a precursor to the recovery of statutory damages. In other words, the [FDCPA] is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not[,]" *citing* Schlueter v. Latek, 683 F.3d 350, 356 (7th Cir.2012) ("There are….plenty of statutes that provide bounty-like relief in the form of statutory damages to which a plaintiff is entitled without proof of injury.")); *see also* Robins v. Spokeo, Inc, 742 F.3d 409 (9th Cir. 2015), *cert. granted sub nom* Spokeo, Inc. v. Robins, 135 S.Ct. 1892 (2015).

3. *See, generally*, Sayles, *Class Action Litigation: The Significance and Role of a Party's Net Worth*, 56 No. 9 DRI for Def. 84 (Sept. 2014).

4. Statutory damages under the FDCPA are awarded per case, rather than per claim. *See, e.g.*, Nelson v. Equifax Information Services, LLC, 522 F.Supp.2d 1222, 1238 - 1239 (C.D. Cal. 2007). This is in keeping with Ninth Circuit precedent which limits statutory damages under the FDCPA to "one set of circumstances." *See, e.g.*, Clark v. Capital Credit & Collection Services, Inc., 460 F.3d 1162, 1178 (9th Cir. 2006).

5. 15 U.S.C. § 1692k(a)(2)(A).

6. *Id.* § 1692k(a)(2)(B). California's Rosenthal Act has virtually identical damages provisions for individual claims, and incorporates federal law on putative class claims. *See* Cal. Civ. Code § 1788.17 ("Notwithstanding any other provision

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Thus, in an FDCPA class action, as the class-size increases, and/or the FDCPA defendant's net worth decreases or the $500,000 cap remains constant, putative class members' potential recovery dwindles or, sometimes, becomes nonexistent.[7] Thus, in many FDCPA class actions, the putative class member's recovery will be miniscule, often significantly less than if the putative class member filed an individual action and recovered the $1,000 statutory penalty.

Does, or should, this inverse relationship between class size and statutorily capped recovery affect class certification? Most courts evaluating this question examine it within the context of the Federal Rule of Civil Procedure 23(b)(3) (Rule 23) "superiority" requirement – *i.e.*, the Rule 23 requirement that the class action device be "superior to other available methods for fairly and efficiently adjudicating the controversy" at issue to warrant class certification.[8] Neither the FDCPA nor Rule 23 prescribes a specific or dogmatic formula for evaluating the effect of the FDCPA's class action liability cap on class certification. Courts take widely different approaches in conducting their analyses of class superiority in FDCPA cases, even within federal circuits.[9]

Regular patterns and issues emerge as to the factors courts consider, including: (1) the relative recovery of putative class members versus what individual claims might yield; (2) whether the relative recovery of putative class members would be dwarfed by the cost of having to litigate on an individual basis; (3) the existence of procedural mechanisms designed to protect putative class members' interests; and (4) the named class plaintiff's interest in controlling the litigation. This article examines the procedural bases for the emergence of these patterns, how the courts have applied the factors in determining the effect of the FDCPA's class action liability cap on class certification,[10] and how the courts have exercised their considerable discretion to weigh the interests of putative class members against the burden on the judicial system in deciding whether class certification is superior to the alternative.[11]

II. The Effect of Putative Class Members' Miniscule Recovery on Superiority Requirements

A. Procedural Framework

Rule 23 requires that a class action satisfy four criteria: numerosity, commonality, typicality, and adequacy of representation. Additionally, Rule 23 requires that "the court find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

The "predominance" and "superiority" inquiries under Rule 23 require analysis of: "(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."[12] As explained below, these factors, in particular, tend to guide courts addressing the effect of the FDCPA's statutory liability cap on class certification.

B. Analysis of Factors Affecting Judicial Interpretation of the Effect of the FDCPA's Liability Cap on Class Certification

1. Relative Recovery of Putative Class Members versus Individual Claimants

Federal courts' analyses of the "superiority" of the class action device differ widely where the potential recovery in an individual action may be greater than is available in a class action. Courts agree that the fact that a plaintiff would recover less as a putative class member than as an individual litigant is a factor.[13] Courts disagree, however, on the weight to be applied to this factor.

Logistical and policy concerns can impede a clear analysis. For example, the absence of proof of the defendants'

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of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code. However, subsection (11) of Section 1692e and Section 1692g shall not apply to any person specified in paragraphs (A) and (B) of subsection (6) of Section 1692a of Title 15 of the United States Code or that person's principal."; *see also* Cal. Civ. Code § 1788.30(b) ("…[H]is additional liability therein to that debtor shall be for a penalty in such amount as the court may allow, which shall not be less than one hundred dollars ($100) nor greater than one thousand dollars ($1,000).").

7. Powers v. Credit Management Services, Inc., 776 F.3d. 567, 572 (8th Cir. 2015) ("Because total damages are capped in an FDCPA class action, a smaller class…would hold out the prospect of higher recoveries for those with the strongest claims.").

8. California state courts, by contrast, recognize that the showing of "substantial benefits" to the court and litigants is akin to the "superiority" prong of Rule 23(b)(3). *See, e.g.*: Bell v. Farmers Ins. Exchange, 15 Cal.App.4th 715, 741 (2004); Newell v. State Farm Gen. Ins. Co., 118 Cal.App.4th 1094, 1101 (2004) ("'Generally, a class suit is appropriate "when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer." [Citations.]' "); Dean Witter Reynolds, Inc. v. Super. Ct., 211 Cal.App.3d 758, 773 (1989) ("This 'superiority' criterion has been held to be 'manifest' in the…requirement that the class mechanism confer 'substantial benefits.' ").

However, while there is a wealth of federal jurisprudence on this issue, only a handful of California state courts of appeal have addressed it. *See, e.g.*: Sav-on Drugs, Inc. v. Superior Court, 34 Cal.4th 319, 340 (2004) ("'By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.'"); Bufil v. Dollar Financial Group, Inc., 162 Cal.App.4th 1193, 1208 (2008). Accordingly, this article will largely discuss federal standards, except where noted.

9. California state courts tend to be in step with Ninth Circuit jurisprudence on this issue, although the elements of each jurisdiction's procedural framework vary somewhat.

10. 15 U.S.C. § 1692k(a)(2)(B).

11. *See, e.g.*, Tripp v. Berman & Rabin, P.A., 2015 WL 5704075 *1 (D. Kan. 2015) ("The Court has considerable discretion when deciding whether to certify a class action.").

12. *See generally*, Kaye, *Satisfaction of Superiority Requirement for Class Actions under the Fair Debt Collection Practices Act, 15 U.S.C.A. §§ 1692 et. seq.*, 51 A.L.R.Fed.2d 1 (2010 and Supp.).

13. *Tripp*, 2015 WL 5704075 at *9 ("The potential recovery of class members is but one factor that guides the evaluation of a putative [FDCPA] class action's superiority."); *see also* Campion v. Credit Bureau Servs., Inc., 206 F.R.D. 663 (E.D. Wash. 2001) (net worth information was useful, but not determinative, in considering a motion for class certification).

net worth[14] or concern that an offending FDCPA defendant is purchasing a broad, class-wide release on the cheap[15] can cloud the inquiry. Nevertheless, when the question is properly presented, most courts find that a potential *de minimus* recovery is not, by itself, determinative. "[A] class action may be the superior method of adjudicating FDCPA claims even if the amount of potential recovery by each class member is small or negligible."[16] Indeed, courts have held that miniscule recovery by a putative class member does not negate class certification, even if each putative class member would have recovered more in separate, individual actions.[17] This may be true even when the putative recovery is virtually non-existent[18] or, even, negative.[19]

Durham[20] is illustrative. There, the plaintiff sued on behalf of herself and a purported class of similarly situated individuals, alleging violations of the FDCPA and Rosenthal Act. By its own estimation, the defendant credit company's net worth was approximately $1,000,000. Assuming the class would include about 100 people, each class member could receive a maximum of roughly $100.00 (*i.e.*, one percent of $1,000,000, divided by 100).[21]

The *Durham* court agreed "with the courts that recognize that a class action may be the superior method of adjudication even if the potential individual recovery may be greater in an individual action." In so holding, the court noted that "many of the potential class members may not be aware of their rights or willing or able to find a competent attorney willing to take their case." It also found "no evidence that any other members of the potential class have filed or expressed a desire to file their own lawsuits" and determined that common issues of fact warranted class certification to "[promote] judicial efficiency and [ensure] consistency of rulings."[22]

In *Abels*,[23] the potential recovery per class member was an even more paltry $0.25. Nevertheless, like in *Durham*, the court held that a class action was the superior method for adjudicating the FDCPA lawsuit. The court explained:

> [A] class action is the superior form of adjudication for this case. Many plaintiffs may not know their rights are being violated, may not have a monetary incentive to individually litigate their rights, and may be unable to hire competent counsel to protect their rights. A class action is judicially efficient in lieu of clogging the courts with thousands of individual suits. The FDCPA itself recognizes the propriety of class actions by providing special damages sections for class action cases.[24]

When coupled with other factors, however, courts have found an absence of superiority due to the disparity in recovery between putative class members and individual litigants. First, where the court concludes that the named plaintiff still has a significant interest in directing the litigation despite the miniscule recovery for the putative class members,[25] "[s]ome courts have held that class litigation is not the superior means of adjudication in these cases where the potential recovery in individual actions is significantly greater than the individual recovery that may be obtained in a class action."[26] As

14. *See, e.g.*: Jacobson v. Persolve, LLC, 2015 WL 3523696 *7 (N.D. Cal. 2015) ("Here, Plaintiff has introduced evidence indicating that Defendant Persolve has acquired substantial assets. Accordingly, at this stage the Court is not persuaded that Defendants' professed negative net worth would render a class action inferior to individual litigation"); Kalkstein v. Collecto, Inc., 304 F.R.D. 114, 123 - 124 (E.D.N.Y. 2015) ("On the record before it, the Court cannot conclude that each individual class member would recover more if they proceeded individually than if they proceeded as a class"); Hartley v. Suburban Radiologic Consultants, Ltd., 295 F.R.D. 357, 378 (D. Minn. 2015) ("Therefore, even if Colletch's net worth is vastly understated, the Court is still confronted with the fundamental question of whether a relatively small class recovery, especially in comparison with the potential recovery should each class member bring his or her own action, renders class certification inappropriate").

15. Gallego v. Northland Grp. Inc., 2016 WL 697383, at *5 (2d Cir. Feb. 22, 2016) ("The conclusion is reasonable that absentee class members' interests would not be best served by a settlement that required them to release any and all claims relating to similar letters from Northland in exchange for as little as 16.5 cents – or for no money at all, if they succumbed to the mass indifference predicted by Gallego himself."); Gallego v. Northland Group, Inc., 102 F. Supp.3d 506, 511 (S.D.N.Y. 2015), *aff'd in part, vacated in part, remanded*, 2016 WL 697383 (2d Cir. Feb. 22, 2016) ("Because I find that certifying a class would do little more than turn NGI's settlement with Mr. Gallego into a general release of liability from all similarly situated plaintiffs at minimal extra cost while furthering a cottage industry among enterprising lawyers, class certification is denied.").

16. *See, e.g.*: *Jacobson*, 2015 WL 3523696 at *8 (*see supra* note 14) ("as Plaintiff correctly notes, the likelihood of *de minimus* class recovery under the FDCPA is not a bar to class certification"); Durham v. Continental Cent. Credit, 2010 WL 2776088 at *6 - 7, *citing* Abels v. JBC Legal Group, P.C., 227 F.R.D. 541 (N.D. Cal. 2005) (holding that class adjudication was superior in light of "issues common to the class…and the efficiency of trying the legality of the collection letters in one action" even though potential recovery per class member was only $0.25); Gomez v. Rossi Concrete, Inc., 270 F.R.D. 579, 596 (S.D. Cal. 2010) (holding that class adjudication was superior in the absence of evidence that class members had a strong interest in individually prosecuting claims or that they were already litigating claims in other forums); Sledge v. Sands, 182 F.R.D. 255, 259 (N.D. Ill. 1998); Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) ("True, the FDCPA allows for individual recoveries of up to $1000. But this assumes that the plaintiff will be aware of her rights, willing to subject herself to all the burdens of suing and able to find an attorney willing to take her case.").

17. *See, e.g.,* Harris v. D. Scott Carruthers & Assoc., 270 F.R.D. 446, 456 (D. Neb. 2015) ("Even though FDCPA class members may not recover as much in FDCPA statutory damages as they *(Continued in next column)*

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could potentially recover from bringing individual claims, the FDCPA class members would still enjoy the recovery benefits of being a part of a class action without incurring the substantial costs of filing individual suits.").

18. *See e.g., Abels,* 227 F.R.D. 541 (*see supra* note 16) (recovery $0.25 per class member); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, 2010 WL 5140850 (N.D. Ohio 2010) (recovery of $3.10 per class member); Hicks v. Client Serv., Inc., 257 F.R.D. 669 (S.D. Fla. 2009) (recovery in the range of $1 to $5 per class member); Gaalswijk-Knetzke v. Receivables Mgmt. Servs. Corp., 2008 WL 3850657 (M.D. Fla. 2008) (recovery of $3.20 per class member); Kalish v. Karp & Kalamotousakis, LLP, 246 F.R.D. 461 (S.D.N.Y. 2007) (recovery of $2.50 per class member).

19. Lemire v. Wolpoff & Abramson, LLP., 256 F.R.D. 321, 331 (D. Conn. 2009) ("[E]ven if [defendant's] net worth turns out to be negative, a class action will still be superior to individual litigation"); Barkouras v. Hecker, 2006 WL 3544585 *4 (D. Ill. 2003) (class action was the superior device even though the defendant was insolvent).

20. *Durham*, 2010 WL 2776088, *6 (*see supra* note 16).

21. *Id.* at *1.

22. *Id.* at *7.

23. *Abels*, 227 F.R.D. 541 (*see supra* notes 16 & 18).

24. *Id.* at 547, quoting *Sledge*, 182 F.R.D. at 259 (*see supra* note 16) (recognizing the importance of the class action remedy when the predominate legal issue was whether collection form letters violated the FDCPA).

25. *See, e.g.*: *Durham,* 2010 WL 2776088, *6, *citing* Sonmore v. Checkrite Recovery Services, Inc., 206 F.R.D. 257, 260 - 61 (D. Minn. 2001) (finding that the interest of class members in individually controlling the prosecution of their claims prevailed where the class members were eligible for a maximum pro rata recovery of merely $25); Mendoza v. Home Depot, U.S.A. Inc., 2010 WL 424679 (C.D. Cal. Jan. 21, 2010) ("[B]ecause individual recovery is potentially significant, class certification may not be a superior method, at least for individuals in the Class."); Jones v. CBE Group, Inc., 215 F.R.D. 558 (D. Minn. 2002) (holding that the class action was not the superior means of resolving the dispute because the potential recovery for class members was, at most, "de minimus"); Wilson v. Transworld Systems, Inc., 2002 WL 1379246 (M.D. Fla., Mar. 29, 2002) (holding that denial of class certification for damages, as opposed to equitable and injunctive relief, was appropriate in a case under the FDCPA, to preserve the rights of individuals to "pursue collection of actual damages rather than some arbitrary and miniscule participation in a global award").

26. *Gallego*, 2016 WL 697383 (*see supra* note 15) ("The conclusion is reasonable that absentee class members' interests would not *(Continued on next page)*

a corollary, although "class actions can be useful for cases with small individual recoveries because they create an incentive to litigate the dispute," "where a statute already provides for the defendant to pay the prevailing parties attorneys' fees, as the FDCPA does,"[27] the incentive for a plaintiff (named or putative) to pursue and individual action already exists, and no class action is necessary.

2. Putative Class Members' Potential Recovery versus Individual and Overall Litigation Cost

Courts also consider the economies of scale relative to the benefit of larger individual recoveries in determining whether the class action device is the superior method to adjudicate an FDCPA class action. "Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification."[28] Stated another way, "other considerations include…whether those members would be willing to pursue individual actions, and whether those members have the means or ability to retain legal counsel."[29] This may be particularly true in FDCPA class actions, where recovery is *de minimus* anyway, or where each debtor suffered no actual damages (*e.g.*, as in "dunning letter" cases).

Additionally, courts may factor their own costs in weighing the merits of class certification. Here, "[t]he overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy."[30] This may particularly be the case in consumer cases, or where mere "technical" statutory violations are alleged.[31] Thus, some courts find that the class action device is not the superior method to adjudicate an FDCPA class action when the logistical cost to distribute anything to the class efficiently would exceed the amount of the class settlement.[32]

3. The Existence of Procedural Mechanisms to Protect Putative Class Members' Interest

Courts have held that the relative paucity of a class recovery in FDCPA cases is of little concern where other procedural mechanisms serve to protect class members, unless the class already might have knowledge about the potential FDCPA violation.[33] For example, interested putative class members can object to the settlement as insufficient, so long as the objection requirements are not too onerous.[34] Rule 23's mandatory notice and opt-out provisions also protect putative class members and allow them to pursue individual claims in lieu of participating in the class.[35] Or, a class settlement can be structured as a "claims-made" settlement to increase each putative class member's respective share against the total recovery.[36] Nevertheless, divvying up a class on a county-by-county basis to reduce the size of the class in order to increase putative class members' recovery is not a permissible method to try to increase putative class members' relative recoveries.[37]

4. The Named Plaintiff's Interest in Controlling the Class Action Litigation

Some Courts have found that Rule 23(b)(3)(A)'s requirement that "the

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be best served by a settlement that required them to release any and all claims relating to similar letters from Northland in exchange for as little as 16.5 cents – or for no money at all, if they succumbed to the mass indifference predicted by Gallego himself."); *Gallego,* 102 F. Supp.3d at 511 (*see supra* note 15) ("Because I find that certifying a class would do little more than turn NGI's settlement with Mr. Gallego into a general release of liability from all similarly situated plaintiffs at minimal extra cost while furthering a cottage industry among enterprising lawyers, class certification is denied").

27. *Gallego*, 102 F. Supp.3d at 510 (*see supra* note 15).

28. Wolin v. Jaguar Land Rover North America, LLC, 617 F.3d 1168, 1175 - 1176 (9th Cir. 2010), *citing* Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1190 (9th Cir. 2001) (opinion amended on denial of reh'g, 273 F.3d 1266) (9th Cir. 2001); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1023 (9th Cir. 1998); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions…may permit the plaintiffs to pool claims which would be uneconomical to litigate individually."). *See generally*, 7AA Charles Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure (3d ed. 2005) § 1779, at 174 ("[A] group composed of consumers or small investors typically will be unable to pursue their claims on an individual basis because the cost of doing so exceeds any recovery they might secure. When this is the case it seems appropriate to conclude that the class action 'is superior to other available methods for the fair and efficient adjudication of the controversy.").

29. *Tripp*, 2015 WL 5704075 at *9 (*see supra* note 11).

30. Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 946 (9th Cir. 2009); Delarosa v. Boiron, Inc., 275 F.R.D. 582 (C.D. Cal. 2011) ("[E]ach member of the class pursuing a claim individually would burden the judiciary, which is contrary to the goals of efficiency and judicial economy advanced by Rule 23."); Ballard v. Equifax Check Servs., Inc., 186 F.R.D. 589, 600 (E.D. Cal. 1999) ("Class action certifications to enforce compliance with consumer protection laws are 'desirable and should be encouraged.' ").

31. *See* Bateman v. American Multi-Cinema, Inc., 623 F.3d 708, 714 (9th Cir. 2010) (TILA case: "[T]he allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement.").

32. *See, e.g.*: Fainbrun v. Southwest Credit Systems, L.P., 2008 WL 750550 (E.D.N.Y. 2008) (1% of defendant's net worth was around $5,000, which would be distributed to 140,000 class members at an estimated cost of mailing of $100,000); Leyse v. Corporate Collection Services, Inc., 2006 WL 2708451 (S.D.N.Y. 2006); Sonmore v. CheckRite Recovery Services, Inc., 206 F.R.D. 257, 263 (D. Minn. 2003); Jones v. The CBE Group, Inc., 215 F.R.D. 588, 570 (D. Minn. 2003).

33. *Tripp*, 2015 WL 5704075 at *9 (*see supra* notes 11 & 29) ("Other considerations include whether class members are aware of the alleged FDCPA violation.").

34. *See, e.g.*, Rhodes v. Olson Associates, P.C., 2015 WL 3657586, at *3 (D. Colo. 2015) ("However, the Proposed Notice outlines several problematic requirements for class members who wish to object to the Settlement Agreement. Specifically, the Proposed Notice requires that, in order for class members to object, they must provide 'a detailed statement of the specific legal and factual basis for each objection, and a list of the legal authority you will present at the settlement approval hearing,' in addition to providing the 'specific reasons' they object to the settlement. This requirement is too onerous for lay class members, whose objections may be valid notwithstanding the fact that they cannot provide the 'specific legal…basis' or a 'a list of the legal authority' that supports their objections.").

35. *See, e.g.*: *Tripp*, 2015 WL 5704075 at *9 (*see supra* notes 11, 29 & 33) ("the Court must notify all putative class members about a class action and exclude from the class any member who requests exclusion."); *Jacobson*, 2015 WL 3523696 at *9 (*see supra* note 14) ("Furthermore, mandatory notice and opt-out provisions under Rule 23(c)(2) will protect the interests of those proposed class members that may wish to pursue individual claims"); Harris v. D. Scott Carruthers & Assoc., 270 F.R.D.446, 456 (D. Neb. 2015) ("in the event individual class members have a concern about their relative recovery from a class action as opposed to individual litigation, they will have an opportunity to opt out of the class upon receipt of the class action notice."); Wright v. Linkus Enterprises, Inc., 259 F.R.D. 468, 474 (E.D. Cal. 2009), citing *In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534 (3rd Cir. 2004); *Mace*, 109 F.3d 338 (*see supra* note 16); *Kalish*, 246 F.R.D. 461 (*see supra* note18); Whitten v. ARS Nat. Services, Inc., 2001 WL 1143238 (N.D. Ill. 2001) (objectors to the small recovery in a class action as compared to an individual action can opt out). *See also* Hobbs *et al*., Fair Debt Collection, Nat'l Cons. Law Center § 6.6.2.7.1, at 379 - 380 (7th ed. 2011) ("Although a class member may receive less than if an individual action had been brought, the ability to opt out of the class action and pursue an individual claim protects the individual's rights.").

36. *See, e.g.* Cundiff v. Verizon California, Inc., 167 Cal.App.4th 718, 723 (2008) ("The settlement agreement required legacy and changing customers to file a claim in which they declared, under penalty of perjury, they were unaware of the rental charge until they changed their rental service or the rental charge ceased. Legacy and changing customers who did not submit a claim form received a $50 Verizon coupon.").

37. Fariasantos v. Rosenberg & Associates, LLC, 303 F.R.D. 272, 278 (E.D. Va. 2014); Campos v. Western Dental Services, Inc., 404 F. Supp.2d 1164, 1172 (N.D. Cal. 2005).

class members' interests in individually controlling the prosecution or defense of separate actions" can affect class certification where a statutory liability cap exists. The conventional assumption seems to be that "the size of any individual damages claims under the FDCPA are usually so small that there is little incentive to sue individually."[38] In other words, in the view of these courts, "*de minimis*" recovery is better than no recovery at all.[39] Class certification may therefore be appropriate in order to protect those consumers who may have been victimized but lack a compelling monetary incentive to pursue litigation on their own.[40]

III. Conclusion

Courts consider a number of factors in determining whether a putative FDCPA class action should be certified when the FDCPA's liability cap renders a putative class member's potential recovery less than what the class member might recover in an individual suit. While most courts find that *de minimus* recovery does not itself preclude class certification, that does not end the inquiry. Courts still must evaluate the various factors applicable to whether the class action is a superior device to individual claims, including: whether the defendant is purchasing a general class-wide release on the cheap; whether the benefit of judicial economy and consistency of rulings outweighs the potential recovery of putative class members; whether adequate procedural mechanisms exist to protect objecting class members if a class is certified; and whether the putative class members' interests in individually controlling the prosecution or defense of separate actions outweighs the benefits of the class action device in a particular case.

38. *Ballard*, 186 F.R.D. at 600 (*see supra* note 30); *see also* Rhodes v. Olson Associates, P.C., 83 F. Supp.3d 1096, 2015 WL 1136176 (D. Colo. 2015), *citing Abels*, 227 F.R.D. at 547 (*supra* notes 16, 18 & 23) ("[T]he potential recovery for an individual plaintiff is unlikely to provide sufficient incentive for individual members to bring their own claims. Moreover, courts have held that FDCPA class actions are usually superior for reasons of judicial economy."); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

39. *See, e.g.*, Fosnight v. LVNV Funding, LLC, 2015 WL 6394334, at *5 (S.D. Ind. 2015), *citing Mace*, 109 F.3d at 344 (*see supra* notes 16 & 35) ("The Court is not persuaded that the monetary recovery is the touchstone of the adequacy of a class action. As Plaintiff points out, there is a relatively few number of putative class members who will realize they have a claim or be willing to pursue a claim with all the attendant requirements of being available for depositions, conferences, or even a trial….Even if the recovery is *de minimis*, there is value in allowing class treatment here to address potentially unlawful behavior that would not otherwise be addressed because the barriers to bringing suit are too high.").

40. *See Jacobson,* 2015 WL 3523696 *9, *citing Kalish*, 246 F.R.D. at 464 ("Ultimately, the unfortunate reality…that most of Defendant's…FDCPA violations would probably go unnoticed absent this lawsuit" must be balanced against the possibility that any class recovery may be relatively minimal."); Mitchell v. LVNV Funding, LLC, 2015 WL 7016343, at *10 - 11 (N.D. Ind. 2015), *citing* Miller v. McCalla, 198 F.R.D. 503, 506 (N.D. Ill. 2001) ("[I]f class actions can be said to have a main point, it is to allow the aggregation of many small claims that would otherwise not be worth bringing, and thus to help deter lawless defendants from committing piecemeal highway robbery, a nickel here and a nickel there, that adds up to real money, but which would not be worth the while of an individual plaintiff to sue on."); *see also* Hobbs *et al.*, *supra* note 35, § 6.6.2.7.1, at 379 ("Neither the FDCPA nor [Rule 23] require that the recovery per class member be significant for the class suit to go forward.").