IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Corrected order

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No. 18-90011
Non-Argument Calendar

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D.C. Docket No. 8:16-cv-00690-SDM-AEP

OCWEN LOAN SERVICING, LLC,

Petitioner,

versus

TIMOTHY J. BELCHER,

Respondent.

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Appeals from the United States District Court
for the Middle District of Florida

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Before ROSENBAUM, JORDAN and WILLIAM PRYOR, Circuit Judges.

PER CURIAM:

Pursuant to Federal Rule of Civil Procedure 23(f), Ocwen Loan Servicing, LLC ("Ocwen"), petitions this Court for leave to appeal a district-court order certifying a plaintiff class against it.

I.

The allegations in this case are as follows. Plaintiff and class representative Timothy Belcher bought a home in Tampa, Florida, in May of 2006. It is unclear when exactly, but some time before March of 2015, he defaulted on his mortgage-loan payments, at which point his lender transferred the loan to Ocwen. At the time, Ocwen participated in a federal program known as the Home Affordable Loan Modification Program, or HAMP. The now-defunct program gave banks incentives to let borrowers on the brink of default refinance their mortgages. Each borrower would get an initial trial period to make payments at a new, lower rate than before. If successful for three months, the borrower could refinance the mortgage permanently under the new rate.

In March of 2015, Ocwen agreed to a HAMP refinancing arrangement with Belcher. He made all his payments on time in full compliance with the program and, after completing his trial period, refinanced his mortgage permanently. An agreement between Ocwen and several state and federal government entities prohibited the company from foreclosing on any borrower's home as long as that borrower made timely payments under a HAMP plan.

Belcher, however, alleges that during his trial period, Ocwen sent him a number of letters stating that he was delinquent on his mortgage loan and that his "[f]ailure to bring [his] loan current may result in fees and foreclosure . . . ." He also says that during the same period, Ocwen called his attorney demanding payment of the unmodified installments.

Belcher sued in federal district court under provisions of both federal and state law: the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C § 1692, and the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.72(9). Each statute prohibits debt collectors from threatening to take actions against borrowers that they cannot legally take. Belcher's lawsuit alleges that Ocwen threatened fees and foreclosure against him during his HAMP trial period despite lacking the legal authority to follow through with either.

After filing suit, Belcher moved to turn his lawsuit into a class-action under Federal Rule of Civil Procedure 23(b)(3) by asking the district court to certify a class of similarly situated plaintiffs. Under the FCCPA, he sought to certify the following class:

> All individuals in the State of Florida who: (1) were offered a HAMP loan modification by Defendant (2) for a debt incurred for personal, family, or household purposes[;] (3) accepted that offer by making a payment[;] (4) successfully completed the HAMP trial period for permanent loan modification of the debt my making three requisite monthly payments[;] and (5) during the HAMP trial period received collections

> communications from Defendant threatening the individual with foreclosure or the incurrence of additional fees if the individual failed to pay his or her unmodified loan amount, (6) on or after March 18, 2014.

Belcher then sought to certify a subclass (which the district court noted was more properly characterized as a second, separate class) under the FDCPA defined by the same criteria, plus an additional criterion: Ocwen must have acquired each class member's debt after it was already in default. Belcher sought to designate himself as class representative for both and to designate his counsel as class counsel.

A magistrate judge recommended both classes be certified. Over Ocwen's objections, the district court adopted the report and recommendation and certified both the class and the subclass. Ocwen now petitions this Court for leave to appeal that decision.

II.

Federal Rule of Civil Procedure 23(f) provides that courts of appeals "may permit" a party to bring an interlocutory appeal challenging the grant or denial of class certification. We have emphasized that there are no "bright-line rules or rigid categories for accepting or denying Rule 23(f) petitions." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000).

Our precedent makes clear, however, that granting them "should be an avenue of last resort." *Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1064 (11th

Cir. 2001). We have noted that, among other things, doing so routinely "is simply not practicable" given our heavy case docket, risks "micro-manag[ing] complex class action litigation as it unfolds in the district court," and "may short-circuit the district court's ability—or at least willingness—to exercise its power to reconsider its certification decision." *Prado-Steiman*, 221 F.3d at 1273-74. Even where interlocutory review would allow us to rule on a "fundamental" or "unsettled" legal question, we have expressed our hesitation over "encouraging a flood of Rule 23(f) petitions claiming that such a question is in dispute," since, in the class-action context, "many routine issues have the potential to take on substantial proportions and assume an importance they otherwise might not." *Id.* A question must "create[] a compelling need for resolution of the legal issue sooner rather than later" to warrant immediate interlocutory review. *Id.*

We have nevertheless laid out five factors potentially relevant to deciding whether or not to grant a Rule 23(f) appeal: (1) whether the district court's decision (here, to certify the plaintiff classes) "is likely dispositive of the litigation by creating a 'death knell' for either plaintiff or defendant"; (2) "whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion"; (3) "whether the appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself"; (4) the nature and status of the

litigation before the district court"; and (5) "the likelihood that future events may make immediate appellate review more or less appropriate." *Id.* at 1274-76 (emphasis in the original) (internal quotation marks omitted).

III.

Having considered all of these factors, as well as the arguments raised by the parties, we conclude that leave to file an interlocutory appeal is not warranted here. Our assessment of each of the five factors, taken out of order, is as follows.

A.

We begin with the importance of the legal questions this case raises. Ocwen identifies two main questions we could clarify on a full appeal: to what extent class members in any class action must be "ascertainable," and whether class actions under either the FDCPA or the FCCPA can meet Rule 23(b)(3)'s "predominance" requirement. But on this record, we find neither of these compelling enough to warrant interlocutory review.

We have said that a plaintiff class should not be certified unless membership therein is "adequately defined and clearly ascertainable." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016) (internal quotation marks omitted) (quoting *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012)). Our sister circuits are split over whether this means a plaintiff must demonstrate an "administratively feasible" method for determining class membership over and

above Rule 23's express requirements. *Compare Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (stating "ascertainability" requires showing "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition"), *and Brecher v. Republic of Argentina*, 806 F.3d 22, 24-25 (2d Cir. 2015) ("A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."), *with Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015) (declining to read an unstated administrative feasibility requirement into Rule 23), *and Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017) (same). Ocwen correctly points out that our circuit has yet to address this split in a published opinion.

True as that may be, resolving the question would be of no consequence to this case. The district court certified Belcher's proposed class despite adopting the magistrate's recommendation to apply an administrative feasibility requirement—the highest standard among the various circuits. *See* R. & R. at 11 (requiring Belcher to show "that his class and subclass definitions contain 'objective criteria that allow for class members to be identified in an administratively feasible way'"). If Belcher's class passed muster under that standard, articulating any other, necessarily less demanding one would produce the same result. The issue is

therefore not "important to [this] particular litigation." *See Prado-Steiman*, 221 F.3d at 1275.

Ocwen, however, calls the unresolved ascertainability standard a "recurring and important question" that is likely to evade review even in other cases, "in part because of the tremendous settlement pressure that follows class certification," and in part because ascertainability will cease to be a live issue after a final judgment. But that argument assumes only defendants would ever seek interlocutory review. Plaintiffs can also seek review under Rule 23(f) after being denied class certification. And they would at that point have little to lose (and thus face limited pressure to settle), since many would-be class-action lawsuits lack sufficient value for an individual plaintiff to pursue alone. Circumstances such as those would favor granting leave to appeal. *See Prado-Steiman*, 221 F.3d at 1274 (explaining interlocutory appeal might be warranted "where a denial of class status means that the stakes are too low for the named plaintiffs to continue the matter"). We are therefore not persuaded that the ascertainability standard "creates a compelling need for resolution of the legal issue sooner rather than later." *See id.*

Ocwen also contends that we should grant interlocutory review to resolve whether the district court correctly applied the so-called "predominance" requirement. Class certification under Rule 23(b)(3) requires that "the questions of law or fact common to class members predominate over any questions affecting

only individual members." Fed. R. Civ. P. 23(b)(3). Ocwen acknowledges that a common legal question—whether a hypothetical "least sophisticated consumer" would have been misled by Ocwen's debt collection practices—will apply to every class member. But Ocwen argues that individualized plaintiff-by-plaintiff inquiries into the written and oral correspondences each one received will overshadow any inquiries common to them all. Ocwen adds that this question "is necessarily implicated in each of the more than 100 FDCPA class actions pending in this Circuit."

But whether common issues predominate in this specific case is not an issue of broad applicability. It is, rather, a "case-specific matter[] of fact and district court discretion," which is precisely the kind of issue that "generally will not be appropriate for interlocutory review." *See Prado-Steiman*, 221 F.3d at 1275-76. Beyond its conclusory assertion, Ocwen has not explained how this issue is "necessarily implicated" in any other FDCPA case, and we see no obvious answer. We therefore have no ground for granting leave to appeal on that basis.

B.

Second, while we express no opinion as to whether every aspect of the district court's decision was objectively correct, we see no "substantial weakness" that would "likely constitute[] an abuse of discretion." *See id.* at 1274-75.

Ocwen urges that the district court's prescriptions will require arduous individualized record sifting, contravening the requirements of Rule 23. Specifically, Ocwen points to significant difficulties related to (1) identifying class members and (2) determining whether each putative class member's loan was acquired for "personal, family, or household purposes" as required under the applicable statutes.

While nothing in the district-court record reflected which borrowers received delinquency letters and which did not, the court certified the class on the basis that prospective class members could self-identify as having received loan-delinquency letters while participating in HAMP; Ocwen could then verify (or contest) each one by consulting its own records.[1] *See* R. & R. at 14-15. From Ocwen's perspective, marshaling evidence to contest specific membership claims will force a "file-by-file, plaintiff-by-plaintiff review," essentially resulting in "individualized mini-trials."

But the district court was within its discretion to reason, as it did, that "file-by-file review" does not necessarily amount to "file-by-file trial." *See* R. & R. at 15. The mere possibility that some individual disputes might arise does not show the clear abuse of discretion necessary to make out "*substantial* weakness" in the district court's decision. *See Prado-Steiman*, 221 F.3d at 1274 (emphasis in the

[1] The district court noted that "Ocwen does not deny that the delinquency notice records are in its possession." R. & R. at 14-15 n. 4.

original). We cannot say that the district court clearly abused its discretion in approving the system it did for discerning class membership.

Nor do we find an abuse of discretion in the method the district court approved for determining whether class members obtained their loans "for personal, family, or household purposes." The district court again permitted class members to self-identify and observed that various records, some held by Ocwen and others available in the public domain, could rebut class membership in particular cases. *See* R. & R. at 15-16. The court noted that certain records could corroborate class membership on their face, since, for example, Belcher's own loan documentation from Ocwen stated that he "live[s] in the property as [his] principal residence." *See id.* at 16 (district court's alterations).

Instances might of course arise where the parties in good faith dispute the purpose of a putative class-member's loan. But that, without more, does not mean that class certification went beyond the district court's discretion. We are unpersuaded that the district court's conclusions exhibited substantial weakness, and we therefore do not conclude an interlocutory appeal is warranted on this basis, either.

C.

Third, it is clear to us—largely because Ocwen fails to argue otherwise—that the district court's decision does not sound the "death knell" for either party.

Our precedent urges us to ask whether either party would suffer "irreparable harm" from continuing the litigation, and, of particular relevance in this case, whether "the grant of class status raises the cost and stakes of the litigation so substantially that a rational defendant would feel irresistible pressure to settle." *Prado-Steiman*, 221 F.3d at 1274.

In this case, each statute under which Belcher has sued caps total class-wide damages at $500,000, limiting Ocwen's total exposure to $1 million (plus any awards of costs, fees, etc.). *See* 15 U.S.C. § 1692(k)(a)(2)(B); Fla. Stat. § 559.77(2). And as we have noted, Ocwen has not argued this is so much for it to bear as to render continued litigation a practical absurdity. That leaves us no basis to conclude class certification will mark the effective end of this case. Because we have called this factor the "most important" consideration, *see Prado-Steiman*, 221 F.3d at 1274, we give it especially great weight here.

D.

Finally, the remaining two factors—the nature and status of the litigation before the district court, and the likelihood that future events may make immediate appellate review more or less appropriate, *Prado-Steiman*, 221 F.3d at 1276—also fail to justify an interlocutory appeal.

As we have pointed out, "a limited or insufficient record may adversely affect the appellate court's ability to evaluate fully and fairly the class certification

decision." *Id.* Class certification, of course, happens early enough in litigation that the parties will generally have just begun the discovery process. But that is all the more reason interlocutory appeals should remain a rarity, and this case further illustrates why. Ocwen complains that confirming or challenging class membership will require it to consult each self-identified member's individual files—loan agreements, phone-call records, mailed correspondences, etc. But Belcher and the district court have expressed reason to believe that many questions will be resolved simply by looking at the face of one or two documents per putative class member. That may or may not be correct, but the current record unlikely could give rise to a certain conclusion one way or the other upon full interlocutory review. An appeal at this juncture, therefore, could leave us unable to resolve the relevant issues, anyway.

That does not mean, as Ocwen argues, that it is consigned to suffer the expense of any and all class-membership disputes that arise henceforth. Ocwen can still raise specific concerns as they come up, and the district court can refine the class as it deems appropriate through the course of litigation. *See* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."). This, we have said, is preferable to preemptively cracking open the district court's class-certification order from the outset. *See Shin*, 248 F.3d at 1064 ("[A] motion for reconsideration of a class

certification order is a better way to correct any errors in the certification order or to recognize the importance of new facts.").

We also note that neither party has pointed to any impending events, such as upcoming settlement negotiations "or the prospect of an imminent change in the financial status of a party," that would "make appellate review more or less appropriate. *See Prado-Steiman*, 221 F.3d at 1276. And so we remain unpersuaded that interlocutory review ought to be granted.

IV.

For all these reasons, we decline to grant Ocwen's Rule 23(f) petition.

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
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Appeal Number: 18-90011-C
Case Style: Ocwen Loan Servicing, LLC v. Timothy Belcher
District Court Docket No: 8:16-cv-00690-SDM-AEP

The enclosed order has been entered. No further action will be taken in this matter.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-4 Multi-purpose dismissal letter