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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2009 OCT -1 PM 4:05

JEANNE LOCKS, CLERK

BY: ~~Shiranna Kelbaugh~~

6 IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF YAVAPAI

8 JOHN B. CUNDIFF and BARBARA C.
9 CUNDIFF, husband and wife; ELIZABETH
10 NASH, a married woman dealing with her
11 separate property; KENNETH PAGE and
12 KATHRYN PAGE, as Trustee of the Kenneth
13 Page and Kathryn Page Trust,

11 Plaintiffs,

12 vs.

14 DONALD COX and CATHERINE COX,
15 husband and wife,

16 Defendants.

CASE NO. CV 2003-0399

**OBJECTION TO DEFENDANTS'
MOTION FOR ORDER
DENYING CLASS ACTION
CLASSIFICATION AND
CERTIFICATION AND CROSS-
MOTION FOR
DETERMINATION THAT
ACTION MAY PROCEED AS
CLASS ACTION**

(Oral Argument Requested)

17 Plaintiffs, John B. Cundiff, Barbara C. Cundiff, Becki Nash, Kenneth Page and Kathryn
18 Page herein, by and through undersigned counsel, hereby object to defendants' Motion for Order
19 Denying Class Action and Certification and move the Court for a determination and Order,
20 pursuant to the provisions of Rule 23(c)(1), Ariz.R.Civ.P., that this action may be maintained as
21 a class action under Rule 23. This Motion is supported by the accompanying Memorandum of
22 Points and Authorities.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. PREREQUISITES TO A CLASS ACTION**

25 ARCP, Rule 23 governs class actions in Arizona. Rule 23 (a) states:

Prerequisites to a Class Action

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

7 Plaintiffs must satisfy all four elements of Rule 23 (a). In addition to satisfying all of the
8 elements of Rule 23 (a), Plaintiffs must satisfy at least one element contained in Rule 23 (b).

9 Rule 23 (b) states as follows:

10 Class Actions Maintainable

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

13 (1) the prosecution of separate actions by or against individual members of
14 the class would create a risk of (A) inconsistent or varying adjudications with
15 respect to individual members of the class which would establish incompatible
16 standards of conduct for the party opposing the class, or (B) adjudications with
17 respect to individual members of the class which would as a practical matter be
18 dispositive of the interests of the other members not parties to the adjudications or
19 substantially impair or impede their ability to protect their interests; or

20 (2) the party opposing the class has acted or refused to act on grounds
21 generally applicable to the class, thereby making appropriate final injunctive
22 relief or corresponding declaratory relief with respect to the class as a whole; or

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

Plaintiffs will address each of the elements required and the rationale for plaintiffs' belief
that they can satisfy the elements.

A. The Class is so Numerous that Joinder is Impracticable – 23(a)(1)

1 There are more than three hundred (300) property owners in this case. As stated in
2 plaintiffs' motion to amend the complaint, "[I]f instead of proceeding with a class action, the
3 plaintiffs joined all the property owners, appearances from a multitude of lawyers could flood the
4 office of the Clerk and this Court. Answers and motions could mount in such substantial volume
5 that any oral arguments scheduled may have to be handled in an off-site facility, due to the lack
6 of physical capacity of the Yavapai County courthouse. The attorneys stating their appearances
7 for the record alone could take over a half an hour at each hearing. Oral arguments could take
8 days. Even if this Court set page limitations for motions, the amount of paper used could
9 inundate the office of the Clerk and this Court". Courtesy copies to this Court of documents filed
10 with the Clerk would become a storage nightmare.

11 This Court has already recognized that joinder could be impracticable. In its ruling on
12 August 22, 2008, page 2 (middle of second paragraph), this Court stated that plaintiffs' argument
13 regarding the expense of service is best made toward the 'impracticable' requirement of that
14 rule." It is not only the expense of service, but the above-stated possibilities concerning the
15 logistical ability of this court system to process such numbers. Impracticability does not mean
16 impossibility, it simply means that the difficulty or inconvenience of joining all members of the
17 class. *Union Pacific Railroad Company v. Woodahl*, 308 F. Supp. 1002 (D. Mont. 1970). In the
18 *Union Pacific* case, the defendants argued that the class was not sufficiently numerous to
19 maintain a class action since the maximum number of defendants was only fifty-seven. The court
20 held that to demand the joinder of all county attorneys in the state would be a hardship and an
21 inconvenience to all concerned. It would clearly be impracticable. *Id.* at 1008. In this case the
22 potential number of parties and their attorneys would make it very difficult and extremely
23 inconvenient for the court system, the attorneys and the parties involved. Joining all 300 owners
24 would certainly be a hardship and inconvenience for all. It would clearly be impracticable. For
25

1 these reasons, and those set forth in their Motion to Amend the First Amended Complaint, the
2 plaintiffs assert that they have satisfied the requirement of Rule 23(a)(1).

3 **B. There are Questions of Law or Fact Common to the Class - 23(a)(2)**

4 Rule 23(a)(2) requires simply that there exist questions of law or fact common to the
5 class. *Lennon v. First National Bank of Arizona*, 21 Ariz.App. 306, 308, 518 P.2d 1230, 1232
6 (App. 1974)(attached hereto for the Court's convenience). Plaintiffs assert that they have
7 satisfied this element of Rule 23 because the question at issue is whether the Declaration of
8 Restrictions (hereinafter "Restrictions") for Coyote Springs Ranch has been abandoned. As
9 Defendants aptly noted, the Court of Appeals in this case stated, "[A] ruling in this case that the
10 restrictions have been abandoned and are no longer enforceable against the Coxes' property
11 would affect the property rights of all other owners subject to the declaration." Court of Appeals
12 Memorandum Decision at ¶ 32. This statement by the Court of Appeals alone supports the
13 plaintiffs' assertion that there exist questions of law or fact common to the class. This is an issue
14 common to every property owner, whether they reside in Coyote Springs Ranch or not.

15 **C. The Claims or Defenses of the Representative Parties are Typical of the**
16 **Claims or Defenses of the Class- 23(a)(3)**

17 In the *Lennon* case, above, the Court analyzed the requirement contained in Rule
18 23(a)(3). It noted that some courts have held that the typicality requirement is satisfied when
19 common questions of law or fact exist. 21 Ariz.App. at 309, 518 P.2d at 1233. In the present
20 case, as stated above, common questions of law or fact exist because the sole issue is whether or
21 not the Restrictions have been abandoned. This affects all property owners whether they live on
22 site or are absent. Every single property owner will be affected by a determination of whether
23 the Restrictions have been abandoned. Those courts which the Lennon court identified as holding
24 that the typicality requirement is satisfied when common questions of law or fact exist would
25 support such a finding in the present case.

1 The *Lennon* court further noted, “others [courts] have held a representative’s claim
2 typical if the interests of the representative are not antagonistic to those of the absent class
3 members”. *Id.* Once again, individual property owners may differ in terms of what they would
4 like to see the outcome of this case to be – that is – whether they would prefer that the
5 Restrictions be abandoned or prefer that they not be abandoned. However, it is inconceivable
6 that any would be antagonistic to a resolution of the issue one way or the other. It is a common
7 question of fact and law. For this reason Plaintiffs submit that those courts which have held a
8 representative’s claims typical if the interests of the representative are not antagonistic to those
9 of the absent class members would support a finding of typicality in this case.

10 The *Lennon* court commented on yet another body of decisions, noting that other courts
11 require the representative to demonstrate the absent class members have suffered the same
12 grievances of which he complains. *Id.* In the present case, the issue is universal – that is –
13 whether or not the Restrictions have been abandoned. All property owners, whether absent or on
14 site, suffer from the same grievances because either the Restrictions have been abandoned or
15 they have not. As in the *Lennon* case, this Court could reasonably determine that the plaintiffs’
16 claims are typical of the remainder of the asserted class.

17 **D. The Representative Parties Will Fairly and Adequately Protect the Interests**
18 **of the Class- 23(a)(4)**

19 The exclusive issue in this class action is whether the Restrictions have been abandoned.
20 Whether one is opposed to abandonment or in favor of it, the plaintiffs in this case are steadfastly
21 interested in having this Court determine the issue. As the Court of Appeals in this case stated in
22 paragraph 32 of its Memorandum Decision, “A ruling in this case that the Restrictions have been
23 abandoned and are no longer enforceable against the Coxes’ property would affect the property
24 rights of all other owners subject to the Declaration.” This issue is common to all property
25 owners. There are not any indicators in this case, as noted in the *Lennon* case, that there is a

1 “lack of adequate representation in the trial court.” The parties have not raised any doubts as to
2 the qualifications of their attorneys. *Lennon*, 21 Ariz.App. at 309-310, 518 P.2d at 1233-1234.

3 **II. CLASS ACTIONS MAINTAINABLE**

4 Plaintiffs submit that they have established all the elements of Rule 23(a). Once the
5 requirements of Rule 23(a) have been met, the Court may certify the class if it finds that, “The
6 questions of law or fact common to the members of the class predominate over any questions
7 affecting only individual members, and that a class action is superior to other available methods
8 for the fair and efficient adjudication of the controversy.” *ESI Ergonomic Solutions v. United*
9 *Artists Theater Circuit, Inc.*, 203 Ariz. 94, 97, 50 P. 3d 844,847(App. 2002)(attached hereto for
10 the Court’s convenience). If the party seeking class certification establishes the elements of Rule
11 23(a) and any one of the elements in Rule 23(b), then the trial court should certify the class.

12 **A. Prosecution of separate actions – 23(b)(1)**

13 Rule 23(b)(1) concerns the risk which may be created by inconsistent or varying
14 adjudications with respect to individual members of the class. A class action would dispense
15 with such a risk because there would be an adjudication affecting all property owners
16 determining whether the Restrictions have been abandoned. Plaintiffs are advocating against
17 separate lawsuits.

18 **B. Party opposing the class refuses to act on grounds applicable to the class –**
19 **23(b)(2)**

20 Rule 23(b)(2) does not seem to apply to this case. It is the position of Defendants that
21 rather than conduct this as a class action, all the owners, whether on site or absent should be
22 joined in one colossal lawsuit. It is Defendants’ position, as stated in their opposition to
23 Plaintiffs’ motion to amend the complaint, that they want the court’s assistance in “making the
24 plaintiffs suffer the consequences therefore”[sic]. Although Defendants oppose Plaintiffs’ class
25

1 action, their desire to conduct the litigation all at one time is essentially the same. Accordingly
2 Rule 23(b)(2) would not seem to be an element that Plaintiffs could establish.

3 **C. Questions of law or fact common to the members of the class**
4 **predominate over any questions affecting only individual members, and a**
5 **class action is superior to other available methods for the fair and efficient**
6 **adjudication of the controversy – 23(b)(3)**

7 Maintenance of a class action does not depend on commonality of all questions of
8 fact and law, but only that such questions predominate over questions affecting
9 individual members of the class. *Godbey v. Roosevelt School District No. 66 of*
10 *Maricopa County*, 131 Ariz. 13, 18, 638 P.2d 235, 240 (App. 1981) (quoting *Like v.*
11 *Carter*, 448 F.2d 798, (8th Circuit 1971); *Goldstein v. Regal Crest Inc.*, 59 F.R.D. 396
12 (D.C. 1973)). The *Lennon* court, above, found that the question of law and fact common
13 to the members of the class did predominate over any questions affecting only individual
14 members in that case and that a class action was superior to other available methods for
15 the fair and efficient adjudication of the controversy. 21 Ariz.App. 306, 310, 518 P.2d
16 1230, 1234. The court continued, stating:

17 The matters pertinent to the findings include:

- 18 (A) The interests of members of the class in individually controlling the
19 prosecution or defense of separate actions;
20 (B) The extent and nature of any litigation concerning the controversy already
21 commenced by or against members of the class;
22 (C) The desirability or undesirability of concentrating the litigation of the
23 claims in the particular forum;
24 (D) The difficulties likely to be encountered in the management of a class
25 action.

26 The *Lennon* court went on to state that in requiring that common questions predominate
27 over individual questions and that a class action be superior to other forms of relief, Rule
28 23(b)(3) seems to focus on the central question of manageability. In fact, subsection (D) requires
29 that the court consider manageability in making findings as to these two questions. Managing a

1 class action with the assistance of a few attorneys and a few parties seems much more feasible
2 than riding herd with three hundred property owners, their attorneys, their assistants and any
3 friends who care to come along. It seems like an invitation for a stampede. Think of the parking
4 outside the courthouse! Such a prospect is the antithesis of “manageability”.

5 **D. A class action is economical without sacrificing procedural fairness and Rule**
6 **23 should be construed liberally**

7 The ESI court, above, determined that the four factors identified in Rule 23(b)(3) are not
8 exclusive. “The rule is intended to allow a class action when it would ‘achieve economies of
9 time, effort, and expense, and promote uniformity of decision as to persons similarly situated
10 without sacrificing procedural fairness or brining about other undesirable results’”(citations
11 omitted). “Generally, the rule should be construed liberally, and doubts concerning whether to
12 certify a class action should be resolved in favor of certification” 203 Ariz. at 98, 50 P. 3d at 848.
13 A class action would be much more manageable than joining all the owners and as such would
14 be the superior method for resolving the common questions which predominate over any
15 individual questions.

16
17 In Defendants’ Answer to Plaintiffs’ Second Amended Complaint they refer to two
18 lawsuits aside from this one involving the interpretation of the Restrictions. They have cited
19 these as support for their claim that Plaintiffs are not the proper representatives of all property
20 owners. The cases also involve conduct which is prohibited by the Restrictions. The core issue
21 is the same as here, however. If the Restrictions are deemed abandoned, the conduct is no longer
22 prohibited. If the Restrictions are deemed to not have been abandoned, the conduct remains
23 prohibited. Plaintiffs are the proper representatives of the class of owners subject to the
24 Restrictions. Attorneys for the defendants in those cases are attempting to consolidate those
25 actions with this action. It would seem appropriate to assimilate those actions into this case once

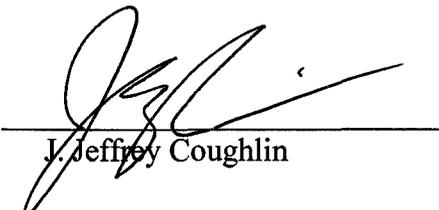
1 it becomes certified as a class action. It also seems appropriate to certify this case as a class
2 action, commence the notification process and determine if there are any owners who choose to
3 be excluded from the class. Once the excluded owners, if any, are identified, they could be
4 joined in the class action as actual parties, not representative of the class.

5 **III. CONCLUSION**

6 Plaintiffs have satisfied the requirements of Rule 23 for the purposes of certifying a class
7 consisting of all those owners of property in Coyote Springs Ranch who are subject to the
8 Restrictions. Plaintiffs request that this Court deny Defendants' motion to deny class
9 certification, grant Plaintiffs' motion, determine that the class exists, certify the class and allow
10 Plaintiffs to commence the notification process under the auspices of the Court.
11

12
13 RESPECTFULLY SUBMITTED this 1st day of October, 2009

14 **J. JEFFREY COUGHLIN PLLC**

15
16 By: 
17 J. Jeffrey Coughlin

18 COPY of the foregoing
19 hand - delivered this 1st day of
20 October, 2009 to:

21 Jeffrey R. Adams
22 ADAMS & MULL, PLLC
23 211 East Sheldon Street
24 Prescott, AZ 86301
25 Attorneys for Defendants

By: 

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518 P.2d 1230
21 Ariz.App. 306

Kenneth R. LENNON and Darlene Lennon, husband and wife; John Eagle and Nikki Eagle, husband and wife; Bary C. Marriott; Andrea Doggett, formerly known as Andrea Marriott, Appellants,

v.

FIRST NATIONAL BANK OF ARIZONA, a National Banking Association, Appellee.

No. 1 CA-CIV 2159.

Court of Appeals of Arizona, Division 1.

Feb. 5, 1974.

[21 Ariz.App. 307]

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Blake, Colter, Flickinger & Daudet, P.C., by James H. Colter, Phoenix, for appellants.

Streich, Lang, Weeks, Cardon & French by Earl E. Weeks, Phoenix, for appellee.

OPINION

HATHAWAY, Chief Judge.

Defendants have appealed from the trial court's dismissal of Count Two of defendant Darlene Lennon's counterclaim through which she seeks to maintain a class action. 1

In early 1970 Mrs. Lennon set up a personal checking account with plaintiff First National Bank of Arizona (the bank). The bank issued Mrs. Lennon a 'Guardian Check Cashing Service Courtsey Card' which she signed and used. The agreement as to the use of this card was as follows:

'If Bank in its discretion pays from its own funds any amounts respecting checks drawn by me on which appears the above number, I promise to pay all such amounts with interest at 10% Per annum to bank on demand and all attorney fees in collecting same. Bank shall not be required to honor any stop payment order respecting any such check. Bank owns this card and I agree to return it to bank immediately upon its request.'

Between October 1, 1970 and January 25, 1971, 598 checks were written on the account with insufficient funds in the account to honor them. These checks were honored by the bank under the terms of the aforementioned card.

The bank subtracted from Mrs. Lennon's account a service charge of \$3.00 each for 515 of the checks. It waived the service charge as to the remainder. The total service charge was \$1,545.00. On or about January 27, 1972, the bank closed Mrs. Lennon's account and destroyed the 'Guardian Check Cashing Service Courtsey Card' which she had returned on request. At that time--between overdrafts and service charges--Mrs. Lennon owed the bank approximately \$4,900.00.

At the bank's request, Mrs. Lennon and the remaining defendants then executed a promissory note in favor of the bank in satisfaction of the indebtedness. They also executed a security agreement in favor of the bank which gave the bank a security interest in certain personal property contingent upon payment of the note. Mrs. Lennon soon defaulted on the monthly payments prescribed by the note and the bank brought a replevin action seeking possession of the property covered by the security agreement. The defendants answered, and in addition, Mrs. Lennon counterclaimed setting forth two claims. Count One sought rescission of the note, alleging that the service charges on her account had been unlawful, that the bank had erred [21 Ariz.App. 308]

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in computing the balance in her account, and that she had signed the note and security agreement as a result of fraud and duress.

In Count Two of the counterclaim, Mrs. Lennon asserted that she was a member of a class of people who had been assessed illegal service charges. She prayed that her rights and those of other class members be determined, that judgment be entered against the bank in a sum equal to the total amount of overcharges to class members, that the class be awarded punitive damages, and that she be allowed her costs and attorney's fees from the total award. Her theory that the service charges were unlawful is based upon former A.R.S. §§ 6--371 et seq. (repealed Laws 1973, Chap. 116 § 1, effective August 8, 1973). Those sections defined 'check loans' and limited service charges thereon to 25 cents per check. The governing provision is now A.R.S. § 44--1205 which limits the interest and other charges assessable by a bank on check loans. 2 Whatever merit there may be to the contention that the bank's transactions with Mrs. Lennon were check loans and subject to the above limitations, we are concerned only with the trial court's dismissal of the class action aspect of this case (Count Two). No challenge has been made to Mrs. Lennon's right to pursue this claim individually as asserted in Court One of her counterclaim.

A plaintiff seeking to bring a class action has the burden of showing the appropriateness of a class action and the trial court has discretion in determining whether this burden is met. *Carpinteiro v. Tucson Sch. Dist. No. 1 of Pima County*, 18 Ariz.App. 283, 501 P.2d 459 (1972). First, the plaintiff must show the following prerequisites enumerated in A.R.C.P. Rule 23(a), 16 A.R.S. 3 'One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or

defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.'

In addition Rule 23(a) requires by implication that a definable class exist, *De Bremaecker v. Short*, 433 F.2d 733 (5th Cir. 1970), and that the representative be a member of the class. *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969). There is no question that a definable class exists here. However, throughout the record we find varying definitions of the class sought to be represented. The trial court, if possible, should employ its discretion to define the class in a manner that will allow utilization of the class action procedure. *Dolgow v. Anderson*, 43 F.R.D. 472, 492 (E.D.N.Y.1968), rev'd on other grounds, 438 F.2d 825 (2nd Cir. 1970). Since Mrs. Lennon cannot represent those not similarly situated, the class should be limited to persons who hold or have held Guardian Check Cashing Cards and who have been assessed the allegedly illegal service charges.

The bank argues that Mrs. Lennon cannot be a member of the class since she did not maintain a checking loan account with the bank at the time she filed her counterclaim. The fact that Mrs. Lennon's account was terminated prior to the filing of her counterclaim should not deprive her of class membership. In *Seligson v. Plum Tree, Inc.*, 55 F.R.D. 259, 261 (E.D.Pa. 1972), the court held that '(t)o be a member of a class, a party must have rights in the cause of action asserted on behalf of [21 Ariz.App. 309]

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the class, i.e., he must have suffered or be threatened with the same injury alleged on behalf of the class.' Clearly, Mrs. Lennon was assessed the allegedly illegal service charges along with the rest of the class. Her alleged harm is identical to absent class members.

The bank cites *Carroll v. Associated Musicians of Greater New York*, 316 F.2d 574

(2nd Cir. 1963); *Syna v. D...s Club, Inc.*, 49 F.R.D. 119 (S.D.Fla.1970); and *Sawyers v. Grand Lodge Int'l Ass'n of Machinists*, 279 F.Supp. 747 (E.D.Mo.1967), as authority for its assertion of lack of class membership. A careful reading of these cases reveals that in each, the purported class representative lacked standing to sue individually.

We have also considered the possibility that in signing the note representing the amount owed to the bank, Mrs. Lennon has waived any claim of illegality which she may have had as to the original debt. If the service charges underlying the note are found to be illegal, case law indicates that the claim of illegality could not have been waived by signing the note. *Williamsen v. Jernberg*, 99 Ill.App.2d 371, 240 N.E.2d 758 (1968); *Shreveport Auto Finance Corp. v. Harrington*, 113 S.2d 476 (La.App.1959); *Duncan v. Black*, 324 S.W.2d 483 (Mo.App.1959); 10 C.J.S. Bills and Notes § 154. Therefore, it would appear that Mrs. Lennon has standing to assert the claim and is a member of the class.

Rule 23(a)(1) is satisfied since it is clear that the class is so numerous that joinder of all members is impracticable.

Rule 23(a)(2) requires simply that there exist questions of law or fact common to the class. Whether or not the loans made pursuant to the Guardian Check Cashing Card would be check loans under our statutes is certainly a common question. If the service charges are found to be illegal, the determination of what portion of each assessed service charge should be refunded would be a common question. Our consideration of whether common questions predominate over individual questions, as required by Rule 23(b)(3), will be discussed below.

Under Rule 23(a)(3) the claims of the representative party must be 'typical' of the claims of the class. Some courts have held that the typicality requirement is satisfied when common questions of law or fact exist. *Green v. Wolf Corp.*, 406 F.2d 291, 299 (2nd Cir. 1968).

Others have held representative's claim typical if the interests of the representative are not antagonistic to those of absent class members. *Thomas v. Clarke*, 54 F.R.D. 245 (D.C.Minn.1971); *Katz v. Carte Blanche Corp.*, 52 F.R.D. 510 (W.D.Pa.1971). Still others require the representative to demonstrate that absent class members have suffered the same grievances of which he complains. *White v. Gates Rubber Company*, 53 F.R.D. 412, 415 (D.C.Colo.1971). Under each of the above tests, we find Mrs. Lennon's claim to be typical of the remainder of the asserted class. There are common questions, her position is clearly not antagonistic to those of the class, and her alleged grievance is identical to that of the class.

Rule 23(a)(4) requires that the plaintiff show that he 'will fairly and adequately protect the interests of the class.' In *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562--563 (2nd Cir. 1968), this requirement was summarized as follows:

'(A)n essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class.'

We have found nothing indicating that lack of adequate representation could have been the basis of the trial court's dismissal of the class action. Mrs. Lennon should be an excellent representative since she presumably has more at stake (i.e., a larger claim) than most class members. No [21 Ariz.App. 310]

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doubts have been raised as to the qualifications of her attorneys.

Having found the requirements of Rule 23(a) met, we turn to 23(b) which lists, in

addition to 23(a), three requirements, any one of which must be satisfied before bringing a class action. Mrs. Lennon seeks to proceed under Rule 23(b)(3) which provides as follows:

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

* * *

* * *

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

In requiring that common questions predominate over individual questions and that a class action be superior to other forms of relief, Rule 23(b)(3) seems to focus on the central question of manageability. In fact, subsection (D) requires that the court consider manageability in making findings as to these two questions. When, as here, the criteria listed in subsections (A), (B), and (C) are not relevant, 4 the key question involved in the two Rule 23(b)(3) findings should be manageability.

Our Supreme Court has very recently considered the manageability of a class action in *Reader v. Magna-Superior Copper Company*, 110 Ariz. 115, 515 P.2d 860 (1973). In that case, plaintiffs sought to bring a class action against six owners or operators of copper smelters on behalf of a class of approximately 700,000 residents of Maricopa County 'who have

occasion to and in fact do breathe and visualize air polluted by defendants.' (110 Ariz. at 115, 515 P.2d at 860).

In *Reader*, a divided court held that the case was unmanageable. Although the majority opinion found unmanageability in the context of Rule 23(a)(2), we feel that the case bears on our present Rule 23(b)(3) consideration of whether common questions of law or fact predominate over individual issues. The Supreme Court was clearly concerned with the numerous individual issues revolving around the claims for damages noting the 'impossibility of the vast majority of the members of the class being able to put a value on their individual damages.' (110 Ariz. at ---, 515 P.2d at 861). In contrast, the damages sought here would be liquidated as to each individual class member and ascertainable from records kept by either the bank or the individual.

The bank asserts that certain defenses it would have against class members would raise individual questions which would outnumber the common questions. It argues that the defenses of waiver, estoppel, affirmance and laches vary as to 'the thousands of members of the supposed class.' Without deciding the question we note the following general statement of the law quoted from 17 Am.Jur.2d § 232:

'As a general rule, an illegal contract cannot be validated by a waiver of illegality . . . It is likewise the general rule that as between the parties to a contract, validity cannot be given [21 Ariz.App. 311]

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to it by estoppel if it is prohibited by law or is against public policy.' (Footnotes omitted)

Thus there appears a strong likelihood that if the trial court finds the service charges to be illegal, there will be little if any individual litigation as to these defenses.

The bank next asserts that numerous individual questions in the form of compulsory

counterclaims 5 will render the action unmanageable. It argues that it will be required to assert two categories of counterclaims.

The first would be for a 'reasonable' service charge in the event the \$3.00 charge is found to be illegal. The trial court could easily compute the maximum legal charge and deduct it from each \$3.00 recovered by a class member. In doing so, it would be deciding a common question of law since the maximum legal charge would apply to every \$3.00 charge.

The second set of compulsory counterclaims described by the bank would be those against class members who are currently overdrawn in their accounts. In *Weit v. Continental Illinois Nat. Bank & T. Co. of Chicago*, 60 F.R.D. 5 (N.D.Ill.1973), plaintiffs sought to represent a class of credit card holders whom they alleged had been charged excessive interest rates which had been fixed in restraint of trade. The defendants asserted that the class was unmanageable (as the bank does here) because of compulsory counterclaims against class members with unpaid balances. The court held (60 F.R.D. at 8) as follows:

'We find nevertheless that the plaintiff classes are not rendered unmanageable by such counterclaims. In the case at bar, they would consist solely of liquidated amounts owed by class members on their delinquent accounts. These could best be ascertained from the defendants' own records. Few class members would be expected to contest either the fact of liability or the amount owed. This court would not be transposed into a vast 'collection agency' as defendants suggest, because if a counterclaim exceeded a class member's damages, the pertinent defendant would merely be in possession of a judgment for the difference, which it would then be able to enforce by normal procedures.'

Thus we conclude that common questions of law or fact do predominate over individual questions. The trial of this case as a class action will not splinter into numerous trials of individual issues and the trial court could not

have based its dismissal on a failure to satisfy this requirement.

The second requirement of Rule 23(b)(3) and relating to manageability is that the class action procedure be superior to other available methods of relief. The only possible alternative which we envision would be individual suits. It is highly unlikely that any significant number of absent class members would individually file lawsuits against the bank in light of the relatively small individual recoveries. Many class members undoubtedly have only been assessed occasional service charges on their Guardian Card checks. Mrs. Lennon, who was assessed 515 charges of \$3.00 each would seem to be the exception and not the rule. Therefore, the only possible device which would afford relief to numerous plaintiffs with small claims would be a Rule 23 class action. In *7A Wright and Miller, Federal Practice and Procedure* § 1779, the authors state:

'Individual actions also may be an inferior alternative to the class action when the economics of the situation or other practical considerations make it impossible for the aggrieved members to vindicate their rights by separate actions. Thus 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 [21 Ariz.App. 312]

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to other available methods for the fair and efficient adjudication of the controversy'. Of course, it must be recognized that the effect of making Rule 23(b)(3) available is to enable recourse to the courts in situations in which it otherwise would be unavailable. This is not troublesome when the action is predicated on a statutory mandate that is designed to promote the private rectification of conduct thought undesirable or to effectuate some other expression of public policy.'

We find that the trial court erred in holding that the requirements of Rule 23 have not been met. This case is ideal for class action treatment. To hold otherwise would totally emasculate Rule 23 and render it impossible to bring a class action in this jurisdiction. In Reader, supra, our Supreme Court noted 'a need for viable class action relief within our judicial system' (110 Ariz. at 117, 515 P.2d at 862).

We therefore reverse the dismissal of Count Two of appellant's counterclaim and order that it proceed as a class action pursuant to Rule 23.

KRUCKER and HOWARD, JJ., concur.

NOTE: This cause was decided by the Judges of Division Two as authorized by A.R.S. § 12--120(E).

1 Since the remaining defendants did not join in Mrs. Lennon's counterclaim, their appeals are dismissed.

2 Defendant as a national bank is also subject to federal statutes and regulations. See 12 U.S.C.A. §§ 21 et seq. and 12 C.F.R. §§ 3.1 et seq. Under 12 U.S.C.A. § 85 a national bank is generally subject to state-imposed limitations upon interest and charges on loans. Under 12 C.F.R. § 7.7105 a national bank has the power to issue 'check guarantee cards' similar to that issued Mrs. Lennon.

3 A.R.C.P. Rule 23, governing class actions, is identical to Rule 23 of the Federal Rules of Civil Procedure. Therefore, federal cases construing F.R.Civ.P. Rule 23, while not controlling, are authoritative.

4 There are no serious assertions here that members of the class would be interested in individually bringing separate actions, that there is any other litigation currently pending as to these service charges, or that it would be 'undesirable' to concentrate the claims in the Superior Court of Maricopa County.

5 See A.R.C.P. Rule 13(a).

Westlaw

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v

Court of Appeals of Arizona,
 Division I, Department D.
ESI ERGONOMIC SOLUTIONS, LLC, an Arizona
 limited liability company, individually and on be-
 half of all others similarly situated, Plaintiff-Appell-
 ant,
 v.
UNITED ARTISTS THEATRE CIRCUIT, INC., a
 Maryland corporation; American Blast Fax, Inc., a
 Texas corporation, Defendants-Appellees.
No. 1 CA-CV 01-0396.

July 16, 2002.
 Review Denied Jan. 7, 2003.^{FN*}

FN* Justice Ryan did not participate in the
 determination of this matter.

Recipient of faxed advertisement sued advertiser
 and company hired to transmit advertisement, al-
 leging violation of the Telephone Consumer Protec-
 tion Act (TCPA). The Superior Court, Maricopa
 County, Cause No. CV 99-020649, Norman J. Dav-
 is and Cari Harrison, JJ., denied recipient's motion
 to certify class and motion for reconsideration. Re-
 cipient appealed. The Court of Appeals, Patterson,
 J., held that: (1) lack of other lawsuits weighed in
 favor of certifying class; (2) given that Congress
 determined per-violation penalty and allowed for
 class actions under TCPA, it was not for court to
 determine that penalty, when applied in a class ac-
 tion context, was unfair; (3) per-violation penalties
 were not so disproportionate to actual damages as
 to violate due process; and (4) advertiser's bank-
 ruptcy proceeding did not provide superior method
 of adjudicating claims.

Reversed and remanded.

West Headnotes

[1] Courts 106 ↪97(1)

106 Courts

106II Establishment, Organization, and Proced-
 ure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling
 or as Precedents

106k97 Decisions of United States
 Courts as Authority in State Courts

106k97(1) k. In General. Most
 Cited Cases

Because state class action rule is identical to federal
 Rule, the Court of Appeals views federal cases con-
 struing the federal rule as authoritative. Fed.Rules
 Civ.Proc.Rule 23, 28 U.S.C.A.; 16 A.R.S. Rules
 Civ.Proc., Rule 23.

[2] Parties 287 ↪35.5

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.5 k. Factors, Grounds, Objections,
 and Considerations in General. Most Cited Cases
 Four factors listed in rule for a court to consider in
 making its findings on a motion for class certifica-
 tion are not exclusive, and the court, in its discre-
 tion, may consider other relevant factors. 16 A.R.S.
 Rules Civ.Proc., Rule 23(b)(3).

[3] Parties 287 ↪35.1

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.1 k. In General. Most Cited Cases
 The rule governing certification of class actions
 provides a mechanism by which those with claims
 involving small potential recoveries, which reduce
 incentive to bring an individual action, could ag-
 gregate those claims into an action worth someone's
 labor. 16 A.R.S. Rules Civ.Proc., Rule 23.

[4] Parties 287 ↪35.1

287 Parties

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287III Representative and Class Actions
287III(A) In General
287k35.1 k. In General. Most Cited Cases

Parties 287 ↪ 35.31

287 Parties

287III Representative and Class Actions
287III(B) Proceedings

287k35.31 k. In General; Certification in
General. Most Cited Cases

Generally, the rule governing class actions should
be construed liberally, and doubts concerning
whether to certify a class action should be resolved
in favor of certification. 16 A.R.S. Rules Civ.Proc.,
Rule 23.

[5] Appeal and Error 30 ↪ 949

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k949 k. Allowance of Remedy and
Matters of Procedure in General. Most Cited Cases
The Court of Appeals reviews for an abuse of dis-
cretion a trial court's decision whether to certify a
class action. 16 A.R.S. Rules Civ.Proc., Rule 23.

[6] Parties 287 ↪ 35.67

287 Parties

287III Representative and Class Actions

287III(C) Particular Classes Represented

287k35.67 k. Antitrust or Trade Regula-
tion Cases. Most Cited Cases

Lack of other lawsuits weighed in favor of certify-
ing class in action against advertiser that sent unau-
thorized fax advertisements for violation of Tele-
phone Consumer Protection Act (TCPA), even
though bankruptcy court had notified members in
purported class of potential claim against adver-
tiser, where notice sent was densely worded, two-
page document in small type that notified recipients
of potential claim "pursuant to 47 U.S.C. § 227 per-
taining to transmissions that might have been re-
ceived," without specifying substantive nature of

claim involved, such that members of class may
have been ignorant of claims or may have viewed
expense and effort of litigating individually to be
intimidating or prohibitive. Communications Act of
1934, § 227, as amended, 47 U.S.C.A. § 227; 16
A.R.S. Rules Civ.Proc., Rule 23(b)(3).

[7] Parties 287 ↪ 35.7

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.7 k. Superiority, Manageability,
and Need. Most Cited Cases

The focus in considering the existence of other lit-
igation is whether there is so much pre-existing lit-
igation that a class action would be unproductive.
16 A.R.S. Rules Civ.Proc., Rule 23(b)(3).

[8] Parties 287 ↪ 35.7

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.7 k. Superiority, Manageability,
and Need. Most Cited Cases

The absence of individual lawsuits is typically
viewed as supporting the superiority of a class ac-
tion. 16 A.R.S. Rules Civ.Proc., Rule 23(b)(3).

[9] Parties 287 ↪ 35.1

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.1 k. In General. Most Cited Cases

A class action serves to educate individuals about
their rights as well as protect those rights.

[10] Parties 287 ↪ 35.7

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.7 k. Superiority, Manageability,
and Need. Most Cited Cases

The presence of other suits weighs against class

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certification because it indicates a willingness to institute individual claims and demonstrates that the potential claim is not necessarily too small to be economically unfeasible outside of a class. 16 A.R.S. Rules Civ.Proc., Rule 23(b)(3).

[11] Telecommunications 372 ↪1003

372 Telecommunications
372III Telephones
372III(H) Penalties
372k1003 k. Telemarketing Violations.
Most Cited Cases
(Formerly 92Hk50 Consumer Protection)

Given that Congress in enacting Telephone Consumer Protection Act (TCPA), determined the per-violation penalty and allowed for the pursuit of class actions under the statute, it was not for court to determine that penalty, when applied in a class action context, was unfair to advertiser who sent unauthorized faxed advertisement. Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3); 16 A.R.S. Rules Civ.Proc., Rule 23(b)(3).

[12] Telecommunications 372 ↪1003

372 Telecommunications
372III Telephones
372III(H) Penalties
372k1003 k. Telemarketing Violations.
Most Cited Cases

(Formerly 92Hk50 Consumer Protection)

In enacting the Telephone Consumer Protection Act (TCPA), Congress established a penalty designed not only to compensate for the actual damages and unquantifiable harm, but also to deter the offensive conduct. Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

[13] Constitutional Law 92 ↪4426

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications

92XXVII(G)19 Tort or Financial Liabilities

92k4426 k. Penalties, Fines, and Sanctions in General. Most Cited Cases
(Formerly 92k303)

Telecommunications 372 ↪1003

372 Telecommunications
372III Telephones
372III(H) Penalties
372k1003 k. Telemarketing Violations.
Most Cited Cases

(Formerly 92Hk2.1 Consumer Protection)

The penalty of \$500 per violation or, in the court's discretion, \$1,500 per willful violation of the Telephone Consumer Protection Act (TCPA) is not so disproportionate to actual damages as to violate due process. U.S.C.A. Const.Amend. 14; Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

[14] Parties 287 ↪35.1

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.1 k. In General. Most Cited Cases
Class action rule allows for such actions to enhance the efficacy of any private right of action provided by law. 16 A.R.S. Rules Civ.Proc., Rule 23.

[15] Parties 287 ↪35.1

287 Parties
287III Representative and Class Actions
287III(A) In General
287k35.1 k. In General. Most Cited Cases
Class action relief is unavailable to enhance the efficacy of any private right of action provided by federal law only if Congress expressly excludes it.

[16] Penalties 295 ↪2

295 Penalties
295I Nature and Grounds, and Extent of Liability

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295k2 k. Constitutional and Statutory Provisions. Most Cited Cases

(Formerly 92k50)

The fairness of statutory punishment, within due process concerns, is properly determined by the legislature. U.S.C.A. Const.Amend. 14.

[17] Parties 287 ↪35.7

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.7 k. Superiority, Manageability, and Need. Most Cited Cases

That "ruinous or annihilating" damages should not be considered in the superiority analysis is particularly compelling in circumstances where the size of the class, and therefore, the potential class liability, is entirely within the control of the defendants; to deny the superiority of a class action because the size of the class made the damages annihilating, would serve to encourage violation of the statute on a grand rather than a small scale. 16 A.R.S. Rules Civ.Proc., Rule 23(b)(3).

[18] Parties 287 ↪35.7

287 Parties

287III Representative and Class Actions

287III(A) In General

287k35.7 k. Superiority, Manageability, and Need. Most Cited Cases

The availability of attorney fees makes the pursuit of individual claims more economically feasible, thereby diminishing any need for class action; when the amount at issue is small and costs and fees are not recoverable, claimants may well conclude that it would cost more to pursue an individual claim than they could obtain in relief, one of the very circumstances class actions are intended to address. 16 A.R.S. Rules Civ.Proc., Rule 23.

[19] Bankruptcy 51 ↪2062

51 Bankruptcy

51I In General

51I(C) Jurisdiction

51k2060 Exclusive, Conflicting, or Concurrent Jurisdiction

51k2062 k. Bankruptcy Courts and State Courts. Most Cited Cases

Bankruptcy 51 ↪2131

51 Bankruptcy

51II Courts; Proceedings in General

51II(A) In General

51k2127 Procedure

51k2131 k. Notice. Most Cited Cases

Parties 287 ↪35.47

287 Parties

287III Representative and Class Actions

287III(B) Proceedings

287k35.43 Notice and Communications

287k35.47 k. Sufficiency. Most Cited Cases

Parties 287 ↪35.67

287 Parties

287III Representative and Class Actions

287III(C) Particular Classes Represented

287k35.67 k. Antitrust or Trade Regulation Cases. Most Cited Cases

Although notice for filing proof of claim in advertiser's bankruptcy, which was sent to putative class members, who were recipients of fax advertisement, may have been adequate for purposes of bankruptcy court, it was not "the best notice practicable under the circumstances," as was required by court rule governing class actions, as it provided virtually no specific information about claim to permit recipients to identify the matter at issue, and, thus, bankruptcy proceeding did not provide superior method of adjudicating claims against advertiser under Telephone Consumer Protection Act (TCPA). Communications Act of 1934, § 227(b)(1)(C), (b)(3), as amended, 47 U.S.C.A. § 227(b)(1)(C), (b)(3); 16 A.R.S. Rules Civ.Proc., Rule 23(b)(3), (c)(2).

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****846 *96** LaVoy & Chernoff, P.C. by Christopher A. LaVoy, Phoenix, and Chandler, Tullar, Udall & Redhair, LLP by Edward Moomjian, II, Tucson, Attorneys for ESI Ergonomic Solutions LLC.

Lewis & Roca LLP by Keith Beauchamp Robert G. Schaffer, Phoenix, Attorneys for **United Artists Theatre Circuit, Inc.**

OPINION

PATTERSON, Judge.

¶ 1 ESI Ergonomic Solutions, LLC (“ESI”) filed suit as the representative of a class action against defendants **United Artists Theatre Circuit, Inc.** (“**United Artists**”) and American Blast Fax, Inc. (“ABF”). ESI alleged that the defendants violated 47 U.S.C. § 227 (1994), which prohibits transmitting unsolicited advertisements to telephone facsimile machines and provides for a private right of action against violators. 47 U.S.C. § 227(b)(1)(C), (b)(3)(1994). ESI appeals the trial court’s denial of its motion to certify the class. For the following reasons, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶ 2 In August 1999, **United Artists** contracted with ABF, a company in the business of distributing advertisements by facsimile, to send a one-page advertisement for discount movie ticket packages. The following month, ABF transmitted the advertisement to about 90,000 facsimile machines in the Phoenix area. Approximately 179 recipients requested information about the discount packages, and 29 purchased gift certificates, for which **United Artists** received \$12,080. None of the recipients, except ESI, complained to **United Artists** about receiving the advertisement. **United Artists** paid ABF \$3,375 for its services.

¶ 3 After ESI received the faxed advertisement, it

filed a complaint, alleging violation of the Telephone Consumer Protection Act (“TCPA”), codified at 47 U.S.C. § 227, which makes it unlawful for persons within the United States to, among other things, “use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.” 47 U.S.C. § 227(b)(1)(C)(1994). ESI requested statutory damages of \$500 per violation with possible trebling of those damages. 47 U.S.C. § 227(b)(3)(1994). ESI also sought injunctive relief against the defendants on behalf of the asserted class. ESI sought to represent a class consisting of “all persons and entities who received on a telephone facsimile machine” the particular advertisement sent by ABF for **United Artists**.

¶ 4 The trial court denied several motions for summary judgment filed by **United Artists** and ABF, including an argument that the TCPA’s damages provision violated due process because it provided damages grossly disproportionate to any harm caused.

¶ 5 In September 2000, **United Artists** filed for Chapter 11 bankruptcy, and all judicial proceedings against it were automatically stayed. While in bankruptcy, **United Artists**, via ABF, sent to the recipients of the fax advertisement a notice approved by the court advising the fax recipients that the notice was being sent to those with potential claims pursuant to 47 U.S.C. § 227, that any person having a potential claim should file a proof of claim in the bankruptcy, and that any claim for which a proof of claim was not filed would be barred. ESI filed a proof of claim purportedly on behalf of the putative class; no other proofs of claim were filed. The bankruptcy court lifted the automatic stay to permit the parties to pursue the litigation in Arizona. The order specifically provided that any judgment or settlement could be executed only against **United Artists’** insurance ****847 *97** policies and not against the company itself.

¶ 6 In February 2001, ESI moved for class certification. The following month, ABF notified the court

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that it was dissolving, and its counsel moved to withdraw. ABF made no further appearances in the litigation.

¶ 7 **United Artists** objected to the class certification arguing, among other things, that a class action was not the superior method of adjudicating the controversy under Arizona Rule of Civil Procedure 23(b)(3). **United Artists** argued that a class action suit could lead to liability against **United Artists** disproportionate to the harm caused, that the bankruptcy court had already offered a means of adjudicating the claims, and that the lack of any other claims indicated a lack of interest in pursuing any claim. ESI offered to waive the statutory minimum recovery of \$500 per violation and to reduce damages to \$90 or alternatively to modify and reduce the number of the class.

¶ 8 The trial court denied ESI's motion for certification of the class, concluding that a class action was not superior to other available methods of adjudication. The court expressed concern that a single plaintiff on behalf of approximately 90,000 other fax recipients was seeking mandatory statutory damages of \$45,000,000, and potentially \$135,000,000, for the transmission of a one-page advertisement, and that the court would be unable to fashion a reasonable sanction, but would be required to impose what it considered to be a "horrendous, possibly annihilating punishment." The court noted that the actual damage inflicted was minuscule. The court also noted the absence of any other claims, despite notification through **United Artists'** bankruptcy case, concluding that the case involved only a single plaintiff trying to inflict horrendous damage on the defendants. The court acknowledged that its decision ignored ESI's argument that **United Artists** would not be "annihilated" because ESI could collect only against **United Artists'** insurance. The court, however, found that ESI had failed to explain how "a grossly unfair adjudication which would crush these two Defendants for sending one fax advertisement is rendered fair and equitable because a por-

tion of the damage is absorbed by insurance companies." The court had additional concerns about whether the action complied with other requirements for class certification under Rule 23, but did not reach those issues, concluding that its decision that a class action was not superior was dispositive of ESI's motion to certify the class. The court did not address ESI's offer to waive statutory damages.

¶ 9 ESI moved for reconsideration, offering to accept \$40 per violation and to waive any entitlement to trebling of damages resulting in total potential damages of \$3.6 million. The court denied the motion for reconsideration without comment on ESI's newest offer to waive statutory damages.

¶ 10 ESI appealed the trial court's ruling. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(D)(1994).

DISCUSSION

[1][2][3][4][5] ¶ 11 Certification of a class action is governed by Arizona Rule of Civil Procedure 23, and ESI requested certification pursuant to Rule 23(b)(3). Under Rule 23(b)(3), the court must find that the action meets the requirements of Rule 23(a).^{FN1} If those requirements are met, the court may certify the class if it finds that:

FN1. These requirements are that (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law or fact common to members of the class exist, (3) the claims or defenses of the representatives or the parties are typical of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Ariz. R. Civ. P. 23(a).

the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the con-

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troversy.

Ariz. R. Civ. P. 23(b)(3). The rule provides the following four factors for a court to consider in making its findings.

(A) the interest of members of the class in individually controlling the prosecution or ***848 *98 defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id. The four factors are not exclusive, and the court, in its discretion, may consider other relevant factors. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Lozada v. Dale Baker Oldsmobile, Inc.*, 197 F.R.D. 321, 332 (W.D.Mich.2000).^{FN2} The rule is intended to allow a class action when it would "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed.R.Civ.P. 23, Advisory Committee Notes, 1966 Amendment; *Amchem*, 521 U.S. at 615, 117 S.Ct. 2231. The rule provides a mechanism by which those with claims involving small potential recoveries, which reduce incentive to bring an individual action, could aggregate those claims into an action worth someone's labor. *Amchem*, 521 U.S. at 617, 117 S.Ct. 2231. Generally, the rule should be construed liberally, and doubts concerning whether to certify a class action should be resolved in favor of certification. *Godbey v. Roosevelt Sch. Dist. No. 66*, 131 Ariz. 13, 18, 638 P.2d 235, 240 (App.1981). We review for an abuse of discretion a trial court's decision whether to certify a class action. *Id.* at 16, 638 P.2d at 238.

FN2. Because Rule 23 is identical to Rule 23 of the Federal Rules of Civil Procedure,

we view federal cases construing the federal rule as authoritative. *Lennon v. First Nat'l Bank of Arizona*, 21 Ariz.App. 306, 308 n. 3, 518 P.2d 1230, 1232 n. 3 (1974).

Lack of Other Law Suits

[6] ¶ 12 The trial court, in considering the extent and nature of existing litigation under Rule 23(b)(3), viewed the lack of other lawsuits—particularly in light of the bankruptcy notification—as indicating a lack of interest by other members of the purported class. ESI, citing numerous cases, argues that this interpretation of the factor is improper and that the absence of other lawsuits supports the superiority of a class action. **United Artists** concedes that the lack of other lawsuits ordinarily weighs in favor of certifying a class but contends that the rule is not without exception and that, in this case, the lack of claims filed despite notification of the members in the purported class through the bankruptcy supports the court's decision.

[7][8][9] ¶ 13 The focus in considering the existence of other litigation is "whether there is so much pre-existing litigation that a class [action] would be unproductive." *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628, 640 (D.S.C.1992), *affirmed* 6 F.3d 177 (4th Cir.1993). The absence of individual lawsuits is typically viewed as supporting the superiority of a class action. *See In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 385-86 (S.D.N.Y.1996); *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 60-61 (N.D.Ill.1996); *Dirks v. Clayton Brokerage Co. of St. Louis, Inc.*, 105 F.R.D. 125, 137 (D.Minn.1985). This is true for several reasons. The lack of other suits may indicate that individuals are unaware that they possess any claim. *See Little-dove v. J.B.C. & Assoc., Inc.*, 2001 WL 42199 *6 (E.D.Cal.2001); *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F.Supp. 1399, 1419, (N.D.Ill.1996); *Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302, 310 (N.D.Ill.1995). A class action serves to educate individuals about their rights as well as protect those rights. *Duran v.*

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Credit Bureau of Yuma, Inc., 93 F.R.D. 607, 610 (D.Ariz.1982); *Demitropoulos*, 915 F.Supp. at 1419.

¶ 14 The lack of other suits would also be consistent with circumstances when a claim is not economically feasible. Such would be the case when the claim involves a small potential recovery, whereby the cost and inconvenience of pursuing individual litigation would exceed the benefit even if victorious. Under such circumstances the ability to combine claims in a class action permits the vindication of rights that would otherwise go unprosecuted. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 566-67 (2d Cir.1968); **849*99*Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 49-50 (E.D.Va.1981).

¶ 15 Additionally, the lack of other suits supports superiority of the class action under another Rule 23(b)(3) factor: the interest of class members to control their own litigation. The lack of other suits suggests that proposed class members would have no such interest. *Walco Inv., Inc. v. Thenen*, 168 F.R.D. 315, 337 (S.D.Fla.1996); *In re Revco Sec. Litig.*, 142 F.R.D. 659, 669 (N.D. Ohio 1992).

[10] ¶ 16 The converse also applies. The presence of other suits weighs against class certification because it indicates a willingness to institute individual claims and demonstrates that the potential claim is not necessarily too small to be economically unfeasible outside of a class. *Steinmetz v. Bache & Co., Inc.*, 71 F.R.D. 202, 205 (S.D.N.Y.1976).

¶ 17 **United Artists**, while agreeing that the absence of other suits typically supports the superiority of a class action, argues that the court could properly consider the lack of other suits as weighing against certification under the circumstances of the case. **United Artists** cites as support *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir.1996).

¶ 18 In *Castano*, the appellate court reversed the trial court's certification of a class action for a class complaint against tobacco companies for injury re-

lated to nicotine addiction. *Id.* at 737. The trial court certified a class consisting of all nicotine-dependent persons in the United States that purchased and smoked cigarettes manufactured by the defendants as well as their estates, spouses, children, relatives, and significant others since 1943. *Id.* In reversing the trial court's decision, the appellate court noted a number of errors, including the failure to meet the superiority requirement. *Id.* at 746. The appellate court commented that class action status for mass tort litigation was generally disfavored, in part because it could strengthen non-meritorious claims. *Id.* The court also noted that the district court certified the class despite recognizing the extensive manageability problems because it believed doing so would preserve judicial resources in the millions of inevitable individual trials. *Id.* at 747. It was in this context that the appellate court found that the lack of other lawsuits did not support the trial court's action in certifying the class. *Id.* The court found that, in the absence of other litigation and given that the claims were based on a new theory of liability, a potential judicial crisis was just speculation. *Id.* at 748. The court also found that the most "compelling rationale" for finding superiority in a class action was missing in that case—the existence of a negative value suit. *Id.* Individual suits were feasible given that potential damage claims were high, punitive damages were available in most states, and the prevailing party could recover attorneys' fees. *Id.*

¶ 19 *Castano* does not support the trial court's action here. The appellate court in *Castano* found that the lack of other suits undermined the trial court's assumption that a judicial crisis was looming, which was the trial court's rationale for certifying the class despite recognized manageability problems. 84 F.3d at 747-48. The appellate court did not view the lack of suits as indicating a lack of interest in filing a claim, and thus, *Castano* fails to support **United Artists'** claim. See *id.*

¶ 20 **United Artists** also cites in support *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412,

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414 (S.D.N.Y.1972). In *Ratner*, the federal district court denied a motion for class certification pursuant to the Truth in Lending Act of 1968 ("TILA"). *Id.* The court was persuaded that class action certification was inappropriate because the statute's provision for a \$100 minimum recovery per violation plus costs and attorneys' fees provided adequate incentive for individual action and because the statutory damages would inflict horrendous punishment on the defendant. *Id.* at 416. In reaching this conclusion, the court listed as a factor that no other members of the proposed class had shown interest in the class action or filed a separate suit and the statute of limitations had run. *Id.* at 414.

¶ 21 Accordingly, *Ratner* does not help **United Artists**. In *Ratner*, not only had other proposed class members expressed no interest, but they were by that point statutorily barred from ever entering the case at all. *Id.* The lack of suits was not part of the court's classification analysis. *See id.*

****850 *100** ¶ 22 The court here did consider that other potential class members filed no claim despite receiving notice of a potential claim through **United Artists'** bankruptcy proceedings. Even this, we believe, fails to overcome the general rule that the absence of other suits supports class certification. The notice sent was a densely worded, two-page document in small type that notified recipients of a potential claim "pursuant to 47 U.S.C. § 227 pertaining to transmissions that might have been received." Given the lack of specification as to the substantive nature of the claim involved, the failure to respond to this notice cannot be deemed an expression of a lack of interest in the claim filed under the class action. It does not defeat the rationale for class actions and why the absence of other suits favors them: that members of the class might be ignorant of their claims and that, even if aware, may view the expense and effort of litigating individually to be intimidating or prohibitive.

¶ 23 We conclude, therefore, that the trial court, in finding the absence of individual claims to weigh against the superiority of the class, misapplied the

factor under Rule 23(b)(3) providing that the court consider "the extent or nature of any litigation concerning the controversy already commenced by or against members of the class." The court thereby abused its discretion. *See Gorman v. City of Phoenix*, 152 Ariz. 179, 182, 731 P.2d 74, 77 (1987) (court abuses its discretion by "misapply[ing] law or legal principle [s]").

Consideration of "Annihilating" Damages

[11] ¶ 24 The trial court, in denying ESI's motion to certify the class, was primarily concerned with the mandatory penalty it would be required to impose against the defendants. The court noted that a mandatory penalty of \$500 per violation with possible trebling to \$1,500 per violation applied to a class of 90,000 resulted in potential liability to defendants of \$45,000,000 or \$135,000,000. The court speculated that if other requirements for the class were met, the defendants' defenses were limited, and the court would be "unable to fashion a reasonable sanction" for their prohibited conduct and would be required to impose the mandatory penalty. Quoting *Ratner*, the court labeled the potential liability to defendants as "a horrendous, possibly annihilating punishment," unrelated and disproportionate to actual damages suffered by ESI or benefits reaped by the defendants. 54 F.R.D. at 416.

¶ 25 ESI contends, for several reasons, that the potential damage to defendants was an improper factor on which to find lack of superiority and that the court therefore abused its discretion. We agree.

¶ 26 The court's ruling evinces a greater concern with the fairness of the consequences to the defendants should a plaintiff class prevail than with the procedural fairness of adjudicating the matter through a class action versus some other method. We agree with ESI that the fairness of the statutory penalty for the specific form of violation alleged here has been decided by Congress in enacting the law and that the court's determination that it would be unfair is an improper consideration in deciding

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whether a class action is the superior method of adjudication.

[12][13] ¶ 27 Congress made a legislative determination that the appropriate penalty for violating 47 U.S.C. § 227 was \$500 per violation or, in the court's discretion, \$1,500 per willful violation. 47 U.S.C. § 227(b)(3). In doing so Congress established a penalty designed not only to compensate for the actual damages and unquantifiable harm, but also to deter the offensive conduct. *Texas v. American Blastfax, Inc.*, 121 F.Supp.2d 1085, 1090-91 (W.D.Tex.2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1166 (S.D.Ind.1997). The penalty is not so disproportionate to actual damages as to violate due process. *American Blastfax*, 121 F.Supp.2d at 1090; *Kenro*, 962 F.Supp. at 1166.

[14][15] ¶ 28 Having provided for a private right of action and having decided the appropriate penalty, Congress did not preclude the use of class actions to obtain redress for violations. See 47 U.S.C. § 227. Rule 23 allows for class actions to "enhance the efficacy" of any private right of action provided by law. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). Class action relief is unavailable only if Congress expressly excludes it, ****851*101** *Califano v. Yamasaki*, 442 U.S. 682, 699-700, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979), and Congress has done so in some statutes. See, e.g., 15 U.S.C. § 6614 (2000) (limiting Y2K class actions); 29 U.S.C. § 732(d) (Supp.1999) (barring designated agency class actions); 15 U.S.C. § 2310(e)(2000) (restricting consumer warranty class actions). Congress provided no express exclusion of class action relief in 47 U.S.C. § 227.

[16] ¶ 29 Given that Congress determined the per-violation penalty and allowed for the pursuit of class actions under the statute, it is not for the court to determine that the penalty when applied in a class action context is unfair. The fairness of statutory punishment, within due process concerns, is properly determined by the legislature. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45, 99 S.Ct.

2326, 60 L.Ed.2d 931 (1979).

[17] ¶ 30 That "ruinous or annihilating" damages should not be considered in the superiority analysis is particularly compelling in circumstances such as this, where the size of the class, and therefore, the potential class liability, is entirely within the control of the defendants. To deny the superiority of a class action because the size of the class made the damages annihilating, would serve to encourage violation of the statute on a grand rather than a small scale. See Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 4.43, at 4-177 (3d ed.1992). **United Artists** argues that this concern is inapplicable here because it was unaware of the statute when it contracted to send the transmissions. What **United Artists** did or did not know, however, is a fact question for another time. The court, therefore, improperly considered the perceived unfairness of the punishment as a factor in determining the superior method of adjudication.

¶ 31 Furthermore, even if economic impact were a permissible consideration in keeping with *Ratner*, *Ratner* is inapplicable to this case. In *Ratner*, the plaintiff, seeking class action status, sued the defendant for its failure to show on his credit card statement the "nominal annual percentage rate" in violation of TILA. 54 F.R.D. at 413. In denying the motion for certification, the court noted that TILA provided for a \$100 minimum recovery and payment of costs and attorneys' fees; that allowing a class action would be inconsistent with the remedy specified by Congress; that the proposed recovery of \$100 per violation for a class of 130,000 would be a "horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant"; and that the misconduct was at most a technical and debatable violation of TILA. *Id.* at 416.

[18] ¶ 32 Keeping in mind that the objective is to determine whether a class action is the superior method for adjudicating the controversy, a critical element in *Ratner* was the availability of a viable alternative remedy in the form of a statutory min-

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imum penalty plus costs and attorneys' fees. *Id.* The availability of attorneys' fees makes the pursuit of individual claims more economically feasible, thereby diminishing any need for class action. *Parker v. Time Warner Entertainment Co.*, 198 F.R.D. 374, 385 (E.D.N.Y.2001). When the amount at issue is small and costs and fees are not recoverable, claimants may well conclude that it would cost more to pursue an individual claim than they could obtain in relief—one of the very circumstances class actions are intended to address. *Amchem*, 521 U.S. at 617, 117 S.Ct. 2231.

¶ 33 Consequently, in *Ratner*, the court considered the impact of the damages on defendant under circumstances in which claimants had viable means of pursuing individual claims. 54 F.R.D. at 416. Here, the TCPA provides for mandatory damages of \$500 per violation, but makes no allowance for attorneys' fees or costs. Consequently, unlike in *Ratner*, denying class certification because the statutorily mandated punishment would be too harsh on the defendants leaves potential claimants with no economically feasible means of pursuing their claims.

¶ 34 Additionally, the *Ratner* court found that Congress had specified the remedy to be employed in the event of violations of TILA and that a class action would be inconsistent with that congressional determination. *Id.* Here, the trial court similarly found that the legislative history of the TCPA endorsed the view that victims should bring claims in small claims or justice court without an attorney. Regardless of what the legislative history might suggest, however, Congress provided a private right of action and allowed for class **852 *102 actions in enforcing that right. Therefore, a class action under the statute cannot be deemed inconsistent with the remedy provided by Congress.

¶ 35 Finally, the court found the violation in *Ratner*, which consisted of the failure to include certain routine information on a credit card statement, to be a “technical violation.” In contrast, we agree with ESI that the conduct involved here is not comparable and does not constitute a technical viola-

tion. *Id.* Rather, the conduct alleged involved conscious decisions to take an affirmative act expressly prohibited by statute. It also involved taking or using the property of the recipients, even if on a minuscule scale as the court found.

¶ 36 Given that the factors of importance in *Ratner* are absent here, we conclude that the trial court abused its discretion in applying the annihilating punishment factor in its superiority analysis.

Failure to Consider Proposed Reduced Damages

¶ 37 ESI also argues that the trial court abused its discretion by concluding that potential damages were “annihilating” without considering ESI's offer to accept less than the statutory damages. Because we conclude that the trial court improperly considered the economic impact on defendants, we do not address this issue.

Bankruptcy Proceeding as a Superior Method

[19] ¶ 38 **United Artists** argues that the bankruptcy proceeding constituted a superior method of adjudicating the matter and that the trial court therefore did not abuse its discretion in finding the class action lacked superiority. We disagree that the bankruptcy proceeding constituted a superior method. As discussed earlier, the notice to the putative class members provided virtually no specific information about the claim to permit recipients to identify the matter at issue. Although the notice may have been adequate for the purposes of the bankruptcy court, it was not “the best notice practicable under the circumstances,” as required by Arizona Rule of Civil Procedure 23(c)(2). The goal is to determine the superior available method for the “fair and efficient adjudication of the controversy.” *See* Ariz. R. Civ. P. 23(b)(3). Given this standard and the lack of a comprehensive notice to potential claimants, we cannot find that the bankruptcy proceeding provided a superior method of adjudication.

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CONCLUSION

¶ 39 The trial court abused its discretion by construing the lack of other suits as weighing against the superiority of the class action and by considering the potential resulting damages to the defendants in denying the motion for class certification. We, therefore, reverse the court's decision denying the class certification. Because the trial court expressed, but did not articulate, additional concerns about compliance with Rule 23, we remand the matter back to the trial court for further proceedings.

CONCURRING: WILLIAM F. GARBARINO,
Presiding Judge, and JOHN C. GEMMILL, Judge.
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