

20-8035

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

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PATRICIA MCINTYRE, *et al.*,

Plaintiffs-Respondents,

against

REALPAGE, INC. d/b/a ON-SITE,

Defendant-Petitioner.

—————
*On Petition for Permission to Appeal from the United States District Court
for the Eastern District of Pennsylvania Civil Action No. 2:18-cv-03934
The Honorable Chad F. Kenney, United States District Judge*

**MOTION OF THE PROFESSIONAL BACKGROUND
SCREENING ASSOCIATION, THE CONSUMER DATA
INDUSTRY ASSOCIATION, AND THE NATIONAL
CONSUMER REPORTING ASSOCIATION
FOR LEAVE TO FILE *AMICI CURIAE* BRIEF
IN SUPPORT OF PETITIONER**

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submitted)*

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The Professional Background Screening Association (“PBSA”), The Consumer Data Industry Association (“CDIA”) and The National Consumer Reporting Association (“NCRA”) (collectively “Amici”), through the undersigned counsel, respectfully move for leave to file the accompanying amici curiae brief in support of RealPage Inc.’s Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f).

The three Amici are leading national industry associations representing the background screening industry. Collectively, the Amici represent over 900 direct members and indirectly represent the interests of virtually every company who conducts background checks in the United States, in every industry sector, and from every region across the country.

An important function of the Amici is to represent the interests of their members and the public at large in matters before Congress, the Executive Branch, and the courts. To that end, the Amici file amicus curiae briefs in cases that raise issues of concern to the Nation’s business community. The Amici submitting this proposed brief consist of the following organizations:

PBSA: The Professional Background Screening Association (“PBSA”) is an international trade association of over 800 member companies that provide employment and tenant background screening and related services to virtually every industry around the globe. The reports prepared by PBSA's background screening members are used by employers, property managers, and volunteer organizations every day to ensure that communities are safe for all who work, reside, or visit there. PBSA members range from large background screening companies to individually-owned

businesses, each of which must comply with applicable laws, including how they obtain, handle, or use public record data.

CDIA: The Consumer Data Industry Association is a voice of the consumer reporting industry, representing consumer reporting agencies, including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition, and expanding consumers' access to financial and other products suited to their unique needs.

NCRA: The National Consumer Reporting Association is a national trade organization of consumer reporting agencies, regulated by the Fair Credit Reporting Act, and associated professionals that provide consumer information products and services to mortgage lenders, credit grantors, landlords, employers and other businesses. Founded in 1992, NCRA's membership includes more than 80 percent of the nation's mortgage credit reporting agencies, and many of the largest tenant-screening providers. NCRA creates and disseminates educational, operational, and advocacy services for its members for the benefit of both their members and the end-users of consumer data. In doing so, NCRA advocates for fair governmental treatment of consumers, consumer reporting agencies, lenders and property owners in multi-family housing businesses nationwide.

Many of the Amici's members and affiliates are or may become defendants in individual actions and putative class actions brought under the Fair Credit Reporting Act ("FCRA"). The Amici therefore have a keen interest in ensuring that the courts consistently interpret the FCRA, appropriately distinguish between individual actions and class actions, and rigorously and uniformly analyze whether plaintiffs have satisfied all the requirements of Rule 23 before any class is certified. That did not happen here. The district court certified a class despite the highly individualized claims of each potential class member.

The Amici respectfully submit that their proposed brief will aid the Court by providing their perspective on important questions raised by the district court's class certification decision. The Amici's proposed brief is not intended to address each of the many issues with the district court's decision. The matters addressed in the proposed brief, however, are relevant to the disposition of the petition in this case because the brief provides additional context, particularly with respect to the issue of the individualized "inaccuracy" inquiries that make the claim at issue in this matter unsuitable for class treatment. The issues raised by the petition are significant not just to the parties in this case, but to all businesses that may be affected by class action litigation.

For the foregoing reasons, the Amici respectfully request that this Court grant leave to file the brief submitted with this motion.

Respectfully submitted,

/s/ Robert T. Szyba

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Dated: September 11, 2020

CERTIFICATE OF COMPLIANCE

I, Robert T. Szyba, certify that pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), the forgoing Motion for Leave to File Brief as *Amicus Curiae* is 714 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f), if applicable.

I further certify that the motion's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) in that it is proportionately spaced and has a typeface of 14 points.

I further certify, pursuant to Local Appellate Rule 31.1(c), that the text of the electronic form of this motion is identical to the text in the paper copies, and that the electronic form of this motion has been scanned for viruses using Trend Micro OfficeScan Agent, and that no virus was detected.

Dated: September 11, 2020

/s/ Robert T. Szyba
Robert T. Szyba

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**CERTIFICATE OF INTERESTED PARTIES AND CORPORATE
DISCLOSURE STATEMENT**

Case No. 20-8035, *Patricia McIntyre, et al. v. RealPage, Inc. d/b/a On-Site.*

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the Petitioner's Certificate, the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amici Curiae

The Professional Background Screening Association; The Consumer Data Industry Association; The National Consumer Reporting Association.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A) and Local Appellate Rule 26.1, the foregoing associations have no parent corporations. No publicly held company has any ownership interest in any of the Amici.

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PARTIES.....	i
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT.....	3
CONCLUSION.....	11
CERTIFICATES OF COMPLIANCE.....	13
CERTIFICATE OF SERVICE.....	14

TABLE OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>Amchen Prod., Inc. v. Windsor</i> , 521 U.S. 591 (1997)	4
<i>Berkery v. Equifax Info. Servs., LLC</i> , No. 18-cv-3417, 2019 WL 1958567 (E.D. Pa. May 2, 2019)	5
<i>Cablin v. Gen. Motors Acceptance Corp.</i> , 936 F.2d 1151 (11th Cir. 1991)	5
<i>Farmer v. Phillips Agency, Inc.</i> , 285 F.R.D. 688 (N.D. Ga. 2012)	7
<i>Gomez v. Kroll Factual Data, Inc.</i> , No. 13-445, 2014 WL 1456530 (D. Colo. April 14, 2014)	7
<i>Harper v. Trans Union, LLC</i> , No. 04-3510, 2006 WL 3762035 (E.D. Pa. Dec. 20, 2006)	7
<i>Jones v. Sterling Info. Sys., Inc.</i> , 317 F.R.D. 404	8
<i>Klotz v. Trans Union, LLC</i> , 246 F.R.D. 208 (E.D. Pa. 2007)	7
<i>Owner-Operator Independent Drivers Ass’n v. USIS Commercial Servs., Inc.</i> , 537 F.3d 1184 (10th Cir. 2008)	6
<i>Pendleton v. Trans Union Sys. Corp.</i> , 76 F.R.D. 192 (E.D. Pa. 1977)	7
<i>Sarver v. Experian Info. Sols.</i> , 390 F.3d 969 (7th Cir. 2004)	5
 Statutes	
15 USC § 1681e(b)	<i>passim</i>
15 USC § 1681k(a)	7

Other Authorities

Rule 23*passim*
Rule 23(f) 1

INTEREST OF AMICI CURIAE

The importance of the issues on this Rule 23(f) appeal is reflected by the Amici submitting this proposed brief in support of Petitioner. The three Amici are the Nation's leading associations for the background screening industry. Collectively, the Amici represent over 900 direct members and indirectly represent the interests of virtually every company in the United States who conducts background checks, in every industry sector, and from every region across the country.

Through their organizations, the Amici seek to promote, among other goals, the accurate and timely reporting of a variety of consumer-related information for the purpose of empowering employment, housing, insurance, credit and other financial opportunities to individuals across the country. Consistent with those purposes, the Amici's members obtain consumer information from thousands of different courts and other sources across the country and, in compliance with the FCRA and other laws, distribute a high volume of consumer information on a daily basis.

Many of the Amici's members and affiliates are or may become defendants in single-plaintiff actions and putative class actions that, like here, are brought under the Fair Credit Reporting Act. The Amici therefore have a significant interest in ensuring that the courts rigorously and consistently analyze whether plaintiffs have satisfied all the requirements of Rule 23 before a class is certified.

The Amici respectfully submit that this did not happen here. The district court certified a class under Section 1681e(b) of the FCRA, 15 U.S.C. § 1681e(b). By its very

nature, Section 1681e(b) requires highly individualized factual determinations and, therefore, such claims generally are unsuitable for class treatment. In particular, Section 1681e(b) claims require each and every putative class member to demonstrate, among other things, that he or she was subject to a consumer report containing an inaccurate record – a showing which must be made on an individual-by-individual and report-by-report basis.

The Amici have a vital interest in promoting a predictable, rational and fair legal environment for its members. The Amici therefore submit this brief in support of Real Page, Inc.'s ("RealPage's) petition and to highlight the above issues in furtherance of those interests.

No counsel for a party authored this brief in whole or in part, and no person other than amici curiae made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The district court should not have certified a class, and this Court should grant the petition to review that erroneous certification for the reasons set forth by the Petitioner and below.

The FCRA claim asserted in this lawsuit depends on inherently individualized issues not suitable for class treatment. Section 1681e(b) of the FCRA requires consumer reporting agencies to follow reasonable procedures to assure maximum possible accuracy when reporting consumer information. An essential element to any

Section 1681e(b) claim requires that the plaintiff (and, in a class case, every putative class member) show an *actual* inaccuracy on his or her consumer report. Thus, the very nature of Section 1681e(b) requires fact-intensive, individualized inquiries as to whether any particular report contained an inaccuracy and, if it did, whether such inaccuracy was the result of a failure by the defendant to follow reasonable procedures. The district court's decision glossed over these individualized issues, instead focusing almost exclusively on Petitioner's procedures with respect to one record vendor.

The potential impact of the district court's decision is a flood of new FCRA claims pled as purported class actions. That outcome has significant ramifications for the background screening industry and for consumers, employers, landlords, and other users of consumer information and consumer reports. By allowing Respondent to dispense with the requisite individualized proof under Section 1681e(b) and proceed on a class basis, the district court provided an unwarranted incentive for future litigants to attempt to turn any garden variety single plaintiff individual action into a class action. That outcome is unsupported by Rule 23, the FCRA, or the weight of case law.

ARGUMENT

I. This Court should grant the petition and reinforce that Section 1681e(b) claims, by their highly individualized nature, are not suitable for class treatment.

As RealPage's petition ably explains, the plaintiff class should not have been certified. At a minimum, the claim here fails to meet Rule 23's ascertainability, commonality and predominance requirements. (Pet. Br. 2, 17-28.)

The district court's opinion addressed each of these requirements, but unduly emphasized that a single common issue can warrant certification. The Amici disagree that the class here is ascertainable or involves common issues under Rule 23. But even if there was a single common issue, "the predominance criterion is far more demanding," and cannot be met when the number and significance of individual issues outweigh the common ones. *Amchen Prod., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). Thus, predominance is not satisfied where liability determinations are individual and fact-intensive.

Section 1681e(b) liability is predicated on individual determinations. Although the Respondent's class also fails for the many additional reasons detailed in Petitioner's brief, the critical importance of Section 1681e(b)'s inaccuracy requirement alone ensures that individualized issues necessarily will almost always predominate over any common issue and preclude a Section 1681e(b) class. Without a showing that a report has inaccurate information, no plaintiff or class member may recover under Section 1681e(b). As a general matter, the defendants in Section 1681e(b) actions produce a high volume of consumer reports – typically assembled under standardized procedures at the high macro level, but which require extremely individualized collection, interpretation and review of each record in question at the court or source level. If a class could be certified simply by identifying one high-level common procedure, and ignoring or deferring accuracy and other individualized determinations, then FCRA

class certifications have the potential to increase exponentially. That result is inconsistent with Rule 23 and Section 1681e(b).

The “inaccuracy” requirement is an insurmountable hurdle for plaintiffs attempting to transform Section 1681e(b) individual claims into large scale class actions. As the district court itself recognized, an “inaccuracy” on a consumer report is a *prima facie* element of any Section 1681e(b) claim. (Op. 15.) *See also Berkery v. Equifax Info. Servs., LLC*, No. 18-cv-3417, 2019 WL 1958567, at *3 (E.D. Pa. May 2, 2019) (requiring plaintiffs to show “inaccurate information was included on the report” to proceed under Section 1681e(b)); *accord Sarver v. Experian Info. Sols.*, 390 F.3d 969, 971-72 (7th Cir. 2004); *Cablin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991). Despite that recognition, the district court’s Rule 23 analysis largely glossed over the actual inaccuracy requirement and instead focused primarily on Petitioner’s alleged procedures with respect to one of multiple vendors from whom Petitioner obtained eviction records. (Op. 23, 25-26, 30-33.) That focus on one high-level alleged policy cannot be reconciled with Rule 23’s predominance requirement and the overwhelming report-by-report accuracy determinations necessary for liability determinations.

Indeed, by focusing on Petitioner’s procedures with respect to one vendor, the district court essentially excised or misunderstood Section 1681e(b)’s inaccuracy requirement. According to the district court, predominance was satisfied because a “jury should be able to determine [liability] . . . by considering common evidence related to Defendant’s [collection] policy, practice and procedure without focusing on

information individual to a class member.” (Op. 31.) The district court also concluded that the case was capable of classwide resolution because “Defendant’s [alleged] behavior produced a common, generally applicable impact.” (Op. 33.)

These conclusions cannot be reconciled with the fact that *every single class member* must still show an actual inaccuracy on their report to be entitled to any relief. As in any Section 1681e(b) case, such individual accuracy determinations will swallow whole any purported common question related to a defendant’s record collection and reporting procedures. As Petitioner’s brief explains, courts can determine whether an actual inaccuracy exists *only* by reviewing each and every putative class member’s report and comparing any records on the report to the records as they existed in county court records or other sources at the time the report was prepared. (Pet. Br. 25-26.) And that assumes also that such information is even available or able to be ascertained. Many court records are not kept indefinitely or able to be accessed after a certain period of time. Indeed, although it does not grapple with its import, the class certified by the district court ultimately will require such an individualized review for every putative class member. (Op. 11.)

Not surprisingly, due to the individualized nature of Section 1681e(b), virtually all courts to address the issue of class certification have held that class treatment is inappropriate for Section 1681e(b) claims. In *Owner-Operator Independent Drivers Ass’n v. USIS Commercial Servs., Inc.*, 537 F.3d 1184, 1194 (10th Cir. 2008), for example, the Tenth Circuit affirmed a district court’s denial of class certification on a Section 1681e(b)

claim, holding that “plaintiffs’ accuracy claims were not amenable to a class action” because “the accuracy of each individual’s [report], an essential element of a § 1681e(b) claim, required particularized inquiry.” Similarly, in *Harper v. Trans Union, LLC*, No. 04-3510, 2006 WL 3762035, at *8 (E.D. Pa. Dec. 20, 2006), the court denied class certification, recognizing that proving the plaintiff’s Section 1681e(b) claim would “require highly individualized proofs.” See also *Pendleton v. Trans Union Sys. Corp.*, 76 F.R.D. 192, 194-95 (E.D. Pa. 1977) (denying class certification because “several individual issues must be resolved in order to prove the defendant’s liability” and recognizing that “[t]here can be no liability for denials of credit caused by accurate reports”); *Gomez v. Kroll Factual Data, Inc.*, No. 13-445, 2014 WL 1456530, at **3-4 (D. Colo. April 14, 2014) (“The individualized nature of an FCRA claim . . . has led most courts to deny class certification in these types of cases.”); *Klotz v. Trans Union, LLC*, 246 F.R.D. 208, 216 (E.D. Pa. 2007) (refusing to certify FCRA accuracy class action because determination of “whether disputed information was inaccurate” required individualized inquiry).

In a similar context, numerous courts also have denied class certification under Section 1681k(a) of the FCRA, which instead of promoting “accuracy,” seeks to ensure that reports are “complete and up to date.” In *Farmer v. Phillips Agency, Inc.*, for example, the court explained why claims requiring a review of the content of a background report are unsuitable for class treatment:

[I]t will be necessary to conduct a highly individualized inquiry into the content of each consumer’s report in order to determine if the adverse information in the report is complete and up to date. To sustain a claim, each consumer will need to prove that the adverse information in the report defendant furnished about that consumer was either incomplete or not up to date. This will entail an individual inquiry into the contents of each consumer report issued by defendant.

285 F.R.D. 688, 703 (N.D. Ga. 2012). Thus, the court concluded that individual “inquiries will predominate over the common issues” and that “[e]ach of these factual inquiries will require the presentation of significant amounts of new evidence for each putative class member.” *Id.* Under those circumstances (present for any Section 1681e(b) claim as well), “it is clear the predominance requirement is not met” *Id.* See also *Jones v. Sterling Info. Sys., Inc.*, 317 F.R.D. 404, 412-13 (denying class certification on FCRA claim requiring “intensively individualized inquiry to determine whether the information reported on any given class member was complete and up to date,” which would “necessarily be specific to each individual report”).

In sum, Section 1681e(b) claims are inappropriate for class treatment. By focusing almost exclusively on a defendant’s alleged procedures (as the district court here did), Section 1681e(b)’s inaccuracy requirement would unjustifiably be either assumed or altogether excised from the statute. But this *prima facie* element is a definitive roadblock to class certification in Section 1681e(b) cases.

II. The district court’s decision potentially has sweeping adverse consequences for both the background screening industry and consumers.

The district court’s erroneous decision creates the incentive for plaintiffs to plead garden variety single-plaintiff cases as class actions. As certified, the class consists of anyone subject to a tenant screening report with an eviction record where the record had been updated to a different disposition by the time of Petitioner’s report. (Op. 11.)

The district court’s decision has the potential for a flood of FCRA class action litigation that would adversely affect the industry with no benefit to consumers (who remain free to bring individual actions based on an allegedly inaccurate report). Relying on this decision, all a plaintiff conceivably would need to plead to proceed on a class basis (and have a class certified) would be that just one of a defendant’s procedures or a vendor’s procedures allegedly resulted in the reporting of inaccurate information on some relatively small subset of a defendant’s overall reports. In fact, the district court here went so far as to uncritically adopt “Plaintiff’s theory of the case” – “that [Petitioner’s] reports are consistently inaccurate because [of Petitioner’s alleged vendor procedures].” (Op. 30.) Even if there was evidence of “consistent[] inaccurac[ies]” (which there is not here), the district court again incorrectly assumed that its finding of one common procedure supersedes the predominant inaccuracy determinations required for each person on whom a report was prepared to maintain class membership.

When applied to a typical reporting context, the logical fallacies in and consequences of the district court’s decision are apparent. The Amici’s members range

from smaller, individually-operated consumer reporting agencies and other background screeners to much larger such companies that prepare tens to hundreds of thousands of reports in a year for the nation's largest companies for the purpose of facilitating everything from a consumer's prospective employment and/or housing to a consumer's ability to obtain credit. To promote accuracy in reporting and compliance with the FCRA, the Amici's members have adopted robust and comprehensive procedures for the collection and reporting of consumer information. The district court's decision here potentially allows an individual plaintiff to obtain class certification merely by alleging an issue with one of the defendant's procedures as it relates to one individual person.

As illustrated by the cases above, class certification demands much more under Rule 23. In the context of Section 1681e(b), the inaccuracy element always will predominate over any procedure. There simply is no administratively feasible process to confirm whether a report contains an inaccuracy merely by reference to the procedure used by the defendant. Any such determination requires a court to conduct report-by-report determinations of whether a report included an inaccurate record, which requires a source-by-source review of how frequently records are updated, what records were available, when each source updated records specific to each putative class member, and the status of the record as it existed at the time of the report. Stated more succinctly, for any Section 1681e(b) class, the court would need to review every single record on every single putative class member report and compare it against each specific

court record as the record existed at the time of the report (again, assuming those records even exist). This creates a quagmire of unworkable class litigation, diverting resources to defending unsupported class actions and affecting the judicial system, the Amici's members, the Amici's customers and consumers nationwide.

For these and other reasons discussed in Petitioner's brief, Section 1681e(b) claims are not susceptible to class treatment. To hold otherwise has the potential to turn every single-plaintiff accuracy claim into a nationwide class action for no other reason than the defendant allegedly employs a common procedure when collecting and reporting consumer information.

CONCLUSION

For the reasons set forth herein, this Court should grant the petition and reverse the decision of the district court.

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CERTIFICATE OF BAR MEMBERSHIP

I Certify that I am a member in good standing of the bar of the U.S. Court of Appeals for the Third Circuit. *See* 3d Cir. R. 46.1(E).

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**CERTIFICATE OF COMPLIANCE WITH
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1. This brief complies with the type-volume limitation of FED. R. APP. P. 29(b)(4) because:

This brief contains 2,599 words.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in plain, 14-point Garamond typeface; footnotes appear in a plain, 14-point Garamond typeface.

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Attorney of Record for Amici Curiae

Dated: September 11, 2020

ANTI-VIRUS CERTIFICATION

I, Robert T. Szyba, hereby certify that the text of the electronic form of the brief is identical to the text in the paper copies, and that this document has been scanned for viruses and no viruses were detected prior to it being submitted in .PDF format. The name of the anti-virus program used is Trend Micro OfficeScan Agent.

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Attorney of Record for Amici Curiae

Dated: September 11, 2020

CERTIFICATE OF SERVICE

I certify that, on September 11, 2020, I served true and correct copies of the foregoing Motion for Leave to File Amici Curiae Brief in Support of Petitioner and accompanying Brief in Support, upon each of the following, by regular U.S. Mail (CM/ECF users will also receive electronic service through the CM/ECF system):

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