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From Ratner to Qui Tam: Truth-in-Lending Class Action Developments

By L. Richard Fischer*

Attempts to utilize the consumer class action to recover the minimum statutory penalty provided in the Truth-in-Lending Act have threatened creditors subject to the act with potential liability of staggering proportions. The very magnitude of this potential liability, however, may have the anomalous result of neutralizing the class action device as a deterrent to violations of the act. This article will examine the purposes of the civil remedy provisions of the act and will review recent judicial responses to truth-in-lending class actions. Finally, the article will recommend legislative modification of the act to avoid the practical problems presented by the use of consumer class actions to enforce its provisions, and, at the same time, to provide a realistic method of encouraging private enforcement of truth-in-lending.

Civil Remedies

Perhaps in recognition of common law failures to provide realistic private remedies,1 it is increasingly common for modern remedial legislation to contain provisions encouraging private attorneys general by including an opportunity to obtain recoveries above and beyond compensatory damages.2 While the specific provisions of these statutes

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2. E.g., section 4 of the Clayton Act provides: “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.” 15 U.S.C. § 15 (1970); the Fair Labor Standards Act of 1938 includes the following provision: “Any employer who violates the provisions . . . of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid over-
may vary considerably, the principal inducements offered usually fall
within three categories: attorney's fees, minimum damages and multi-
ple damages. The twofold purpose for the inclusion of such induc-
ments is to compensate the injured party and to deter violations of the
statute in which the inducements are included.

Drafters of recent remedial legislation have recognized the neces-
sity of providing in such legislation sufficient private or public remedies
to encourage compliance. More specifically, it has become apparent
that legislatures must either rely on governmental agencies or authori-
ties to provide public enforcement or develop a sufficient "incentive-to-
sue element" to make the legislation "self-enforcing." In each case
time compensation, as the case may be, and in an additional equal amount as liquidated
damages. The court in such action shall, in addition to any judgment awarded to
the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant,
and costs of the action." 29 U.S.C. § 216(b) (1970); the Civil Rights Act of 1964
provides in part: "In any action commenced pursuant to this subchapter, the court,
in its discretion, may allow the prevailing party, other than the United States, a reasonable
attorney's fee as part of the costs, and the United States shall be liable for costs

Similarly, the civil remedies provision of the Uniform Consumer Credit Code is as
follows:

"(1) Except as otherwise provided in this section, a creditor who, in violation of
the provisions [of the Federal Truth-in-Lending Act], fails to disclose information to a
person entitled to the information under this Act is liable to that person in an amount
equal to the sum of

"(a) twice the amount of the finance charge in connection with the transaction, but
the liability pursuant to this paragraph shall be not less than $100 or more than $1,000;
and

"(b) in the case of a successful action to enforce the liability under paragraph (a),
the costs of the action together with reasonable attorney's fees as determined by the
court." UNIFORM CONSUMER CREDIT CODE § 5.203. See also NATIONAL CONSUMER
ACT §§ 5.304 (punitive damages), 5.307(1) (attorney's fees).

3. See generally Rice, Remedies, supra note 1, at 567-76.
4. See Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390
(1906); Loevinger, Private Action—the Strongest Pillar of Antitrust, 3 ANTITRUST
BULL. 167, 168 (1958) (repair the injury to competitors, provide more effective deter-
rent to antitrust violation); Still, Monetary Recovery Under the Fair Labor Standards
Act, 45 TEXAS L. REV. 921, 948 (1967) (inducements intended to implement private en-
forcement of public compliance with the act); Watkins, Monetary Recovery Under
Federal Antitrust Statutes, 45 TEXAS L. REV. 856 (1967) (remedy intended to compe-
sate the injured party and to deter antitrust violations).

6. See Hearings Before the Subcomm. on Financial Institutions of the Senate
Comm. on Banking and Currency, 90th Cong., 1st Sess., at 18 (1967); Rice, Exemplary
Damages in Private Consumer Actions, 55 IOWA L. REV. 307, 327-28 (1969) [herein-
after cited as Rice, Exemplary Damages]. In the area of civil rights, for example,
Congress expected enforcement to be effected primarily through private litigation in
the district courts by plaintiffs' attorneys acting as private attorneys general. Macey,
Award of Attorney Fees as a Stimulant to Private Litigation Under the Truth-in-Lending
where specific inducements have been provided by statute, the decision apparently has been made that private individuals ought to be a primary factor in encouraging compliance with the statute and that such inducements are necessary to promote such private litigant involvement.  

In enacting the Truth-in-Lending Act, Congress established two vehicles for public enforcement. In addition to providing criminal liability for certain violators, Congress distributed administrative enforcement authority among several federal agencies having general supervisory power over certain designated creditors. Nevertheless, private litigation was intended to be a "primary mechanism for inducing compliance with truth-in-lending." The specific civil remedy supplied by Congress for the private enforcement of the Act includes all three principal inducements: multiple damages of twice the amount of the finance charge in connection with the transaction, minimum damages of $100, and reasonable attorney's fees as determined by the court. In providing these inducements, the intention of the draftsmen was clearly to make the Act self-enforcing through private actions. To encourage private actions, a "bounty," in the form of the minimum $100 recovery, is provided to any "affected person" who discovers a violation.

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7. See Rice, Exemplary Damages, supra note 6, at 338.
8. 15 U.S.C. §§ 1601-81t (1970). The Truth-in-Lending Act is a legislative attempt by Congress to inform consumers of the costs of credit. The specific congressional findings and declaration of purpose are set forth in section 1601 which provides: "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." For a brief but good description of the purposes of the Truth-in-Lending Act see Kroll v. Cities Serv. Oil Co., 352 F. Supp. 357, 360 (N.D. Ill. 1972).
10. Id. § 1607.
14. Id.
15. Id. § 1640(a)(2).
16. Rice, Remedies, supra note 1, at 575.
17. Section 1640 provides in part that "any creditor who fails . . . to disclose to any person any information required . . . to be disclosed to that person is liable to that person ..."
violation of the act and successfully prosecutes an action against the responsible creditor.\textsuperscript{18} The minimum statutory amount may be recovered by such an affected person regardless of whether that individual has himself suffered any actual damages as a result of the violation.\textsuperscript{19} In discussing this civil penalty, Judge Frankel explained that the scheme of the statute was to create a species of private attorney general to participate prominently in the enforcement of the act.\textsuperscript{20} Thus, Congress invited individuals, whether they themselves were deceived, to bring suit on the public's behalf. Congress encouraged this private litigant involvement by providing for the recovery of costs and a reasonable attorney's fee, in addition to the incentive of public service and the $100 minimum statutory award.\textsuperscript{21}

The justification for such inducements in a truth-in-lending context is obvious. In a typical case involving a violation of the act, individual damages are likely to be quite small, if not nonexistent.\textsuperscript{22} The inducements are intended, therefore, to provide an incentive to consumers to initiate reparative proceedings.\textsuperscript{23} In establishing these inducements, Congress not only provided a means whereby an injured party might be compensated, but also created a sufficient threat of private suit to serve as a viable deterrent to violations of the act.\textsuperscript{24} Nevertheless, the inclusion of these inducements has given rise to several problems, the most pressing of which is the possible application of the civil penalty provision in a class action context.

\textbf{Class Action Developments}

The class action is by no means a new phenomenon. Class or representative actions developed in England in the courts of equity at...
least as early as 1676.\textsuperscript{25} However, with the large classes made possible by the "opt out" provision of revised rule 23 of the Federal Rules of Civil Procedure,\textsuperscript{26} the number of complaints seeking class action treatment under the revised version of the rule has increased substantially.\textsuperscript{27}

\begin{footnotesize}
\begin{itemize}
\item Brown v. Vermuden, 22 Eng. Rep. 796, 797 (Ch. 1676).
\item Fed. R. Civ. P. 23(c)(2). Subsection (c)(2) is described as an "opt out" provision because it requires a class member to specifically request to be excluded from the class. All class members who do not request exclusion are included in the judgment.
\item See generally Foreword to American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure at II-III (1972). Presently, revised rule 23 provides in part:
\begin{itemize}
\item \textbf{(a) Prerequisites to a Class Action.} 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.
\item \textbf{(b) Class Actions Maintainable.} An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
\begin{itemize}
\item (1) the prosecution of separate actions by or against individual members of the class would create a risk of
\begin{itemize}
\item (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
\item (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
\item (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
\item (3) the court finds that 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 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.
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\end{itemize}
\item \textbf{(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.}
\begin{itemize}
\item (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.
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\end{footnotesize}
In particular, considerable interest has developed in the utilization of the class action vehicle to recover the minimum statutory penalty provided in the Truth-in-Lending Act. Yet, unlike the National Consumer Act or the Fair Labor Standards Act of 1938, the Truth-in-Lending Act does not specifically authorize the use of class actions to enforce its civil remedy provisions. Similarly, its legislative history is silent on the question of class actions. Thus, while legislation has been proposed which will modify the act to provide specifically for class action recoveries, its present language does not resolve current questions regarding the appropriateness of maintaining class action suits to enforce its civil remedy provisions.

Despite this silence, class actions have been brought to remedy a wide variety of truth-in-lending violations. Perhaps due in part to the legislative silence regarding the use of the class action vehicle in a truth-in-lending setting, the defendants in several of these actions have argued that the maintenance of a truth-in-lending class action is per se improper. One defendant urged, for example, that since the legisla-
tive history of the act did not indicate that Congress had considered the impact of rule 23 in an action to enforce the act, truth-in-lending class actions were improper.\textsuperscript{36} Without elaboration, the court concluded that “a class action is an available remedy under the Act.”\textsuperscript{37} In another action, the defendant reasoned that having provided both the incentive of a civil penalty and the basis for the recovery of attorney’s fees and costs, Congress had obviated the need for the class action enforcement vehicle.\textsuperscript{38} Nevertheless, the court ordered the suit to proceed as a class action, specifically stating that the availability of the class action vehicle was important to the act’s enforcement scheme.\textsuperscript{39} In a third action, the defendant argued that the intent of the act was inconsistent with the maintenance of a class action for the recovery of statutory minimum penalties and that the allowance of attorney’s fees eliminates the necessity of a class action.\textsuperscript{40} While the court ultimately decided not to certify the class,\textsuperscript{41} it specifically declined to rule on the per se improper argument raised by the defendant.\textsuperscript{42}

On the other hand, dictum in a recent decision of the United States District Court for the Northern District of California provides perhaps the strongest federal judicial support for the per se improper argument. In its opinion, the court reasoned that the incentive of class action benefits was unnecessary because Congress has encouraged consumers to enforce the act through individual efforts.\textsuperscript{43} Nevertheless, while several courts have specifically declined to certify particular truth-in-lending suits as class actions because such suits failed to satisfy certain of the requirements of rule 23,\textsuperscript{44} apparently no decision has held class actions to be per se improper under the act. A case by case examination is, therefore, necessary to determine whether a particular suit may properly be maintained as a class action under rule 23.\textsuperscript{45}

\textsuperscript{37} Id.
\textsuperscript{39} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 413.
\textsuperscript{45} See Rogers v. Coburn Fin. Corp., 53 F.R.D. 182, 183 n.1, vacated Civil No.
Rule 23(a)

While earlier decisions in truth-in-lending suits provide little insight into the factors considered by the courts in ruling upon the appropriateness of maintaining the suits as class actions, the expanded discussion presented in more recent decisions makes possible a closer examination of the application of rule 23 to truth-in-lending actions.

As a threshold matter, it is clear that a truth-in-lending class action cannot be properly maintained under rule 23 unless the class is so numerous as to make joinder of all members impracticable, there exist questions of law or fact common to the class, the claims of the representative parties are typical of the claims of the class, and the representative parties will fairly and adequately protect the interests of the class.

In most truth-in-lending actions against creditors who provide standard form disclosure statements to consumers, the plaintiff should have little difficulty in establishing the impracticability of the joinder of all members of the purported class or the existence of common questions of law or fact. Difficulty may be encountered, however, in establishing the typicality of the claims of the representative party or the ability of the representative party to fairly and adequately represent the purported class. Thus, the question may arise whether an individual plaintiff may represent those who have received credit cards or extensions of credit from, or have dealt with, creditors.


with whom the representative party has had no relationship whatsoever. For example, certain of the defendants in one truth-in-lending action argued that the plaintiff had not satisfied the requirements of typicality and adequate representation with respect to them because the plaintiff had borrowed from a completely unrelated defendant creditor. The argument continued that since a representative plaintiff may represent only his class, the plaintiff in the action could not represent persons who borrowed from other creditors. Despite these arguments of the nonrelated defendants, the court determined the class action to be proper with respect to all of the defendants.

Similarly, a plaintiff may be disqualified as a representative of a purported class as the result of his actions. In one truth-in-lending action, the plaintiff first exercised her right to rescind the transaction

52. Id. at 24. The only alleged "relationship" between the named defendants was that each was a pawnbroker that failed to satisfy the disclosure requirements of the Truth-in-Lending Act. The plaintiff did not argue that the defendants had acted in concert or even that they belonged to a common trade association or similar organization; in fact, no such common bonds existed.
53. Id.
54. Id. at 24-25. In certifying the class with respect to all of the defendants, the court stated:

"Plaintiff purports to represent 33,000 borrowers each with an alleged right of action against one or more of the defendants. Each defendant allegedly injured all borrowers in the same way: i.e., by failing to follow the requirements of the Truth in Lending Act. Plaintiff thus seeks to represent persons who have suffered similar injuries, and who may therefore be said to have similar 'rights' against the defendants. "The fact that plaintiff was not, himself, injured by each and every defendant does not detract from the representative nature of his claim. All members of the purported class are similarly situated, within the meaning of Rule 23.

"One important function of a class action is to afford meaningful legal rights to persons who may be ignorant of such rights . . . or to those whose individual claims are too small to support custom-tailored litigation. [Citation omitted]. If the Rule is to be effective, the courts should not restrict class membership by narrow and grudging rules. Unduly restrictive limitations upon the class may have the effect of denying legal remedies to the ignorant and the poor while creating windfall immunities for law violators." Id. Supplemental briefs on the multiple defendant question were requested and have been filed in connection with the appeal of this decision; oral argument is expected to be set in the Ninth Circuit Court of Appeals in the near future. LaMar v. H & B Novelty & Loan Co., Civil No. 72-1485 (9th Cir., filed Mar. 16, 1972).
55. The Truth-in-Lending Act provides the consumer with the right to rescind certain credit transactions involving real property used or expected to be used as the principal residence of the consumer to whom the credit is extended. 15 U.S.C. § 1635 (1970). This section provides in part: "Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind
and then attempted to recover, for herself and each member of the purported class, the civil penalty provided in the act.\textsuperscript{56} The court held that the plaintiff had elected her remedy and thus was precluded from obtaining additional relief under the act.\textsuperscript{57} Furthermore, the court concluded that since the plaintiff did not have a civil remedy against the defendant, she was not a member of the class of persons she sought to represent and, thus, could not prosecute an action on behalf of the class.\textsuperscript{58}

Alternatively, action on the part of the defendant may preclude the plaintiff from representing the class. In one action, the plaintiff asserted a truth-in-lending claim on behalf of himself and all other Diners Club cardholders.\textsuperscript{59} Subsequent to the institution of the action, the plaintiff's card was revoked by the defendant company for non-payment.\textsuperscript{60} The court held that since the plaintiff was no longer a Diners Club cardholder, he was not a member of the class he sought to represent.\textsuperscript{61} The court was quick to point out, however, that the reason for the termination of the plaintiff's membership (his failure to pay past due charges) occurred prior to the institution of the action and that the "evidence before the court indicates that the plaintiff's membership was terminated for that reason and for no other reason."\textsuperscript{62}

Challenges to the ability of a plaintiff to fairly and adequately represent a class in a truth-in-lending action may center on the competence of the plaintiff's counsel or on an alleged conflict between the interests of the named plaintiff and the interests of the members of the purported class. Applying this principle, one court noted that the ac-

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  \item \textsuperscript{57} \textit{Id.} at 877.
  \item \textsuperscript{58} \textit{Id.} at 878.
  \item \textsuperscript{60} \textit{Id.}
  \item \textsuperscript{61} \textit{Id.} at 121.
  \item \textsuperscript{62} \textit{Id.} Nevertheless, it might be noted that on the day after plaintiff's membership was terminated the defendant company also credited plaintiff's account for the amount of the interest charge providing the basis of the plaintiff's complaint. Unilateral action of this type is a common defense tactic aimed at disqualifying a "representative" plaintiff under rule 23(a)(3).
\end{itemize}
tions of the attorney seeking to prosecute the case demonstrated his lack of experience and his lack of understanding of the Federal Rules of Civil Procedure as well as the rules of that district court. Such a challenge, however, could result in a court-directed substitution of a more qualified plaintiff's class action attorney a result that may be difficult for a defense counsel to explain to his client. With respect to the conflict of interest question, several courts have held that an attorney attempting to represent himself as well as the class is not competent or objective enough to fairly and adequately protect the interests of the class. Thus, one court explained that in seeking to represent himself individually, while at the same time attempting to recover attorney's fees for his representation of the class, the plaintiff demonstrated that he was not competent to represent the class. In another truth-in-lending action, the court discussed the plaintiff's association with the law firm representing him in the action and stated that as a result of this association the plaintiff could not fairly and adequately protect the interests of the class. Specifically, the court explained that because the law firm might be required to withdraw as counsel to the class if the plaintiff was required to give testimony during the course of the action, the plaintiff had initiated the action under a disability not shared by other members of the class—namely, "an inability to testify except at the cost of withdrawal of counsel familiar with the case from its incep-

65. Eovaldi v. First Nat'l Bank, 57 F.R.D. 545, 546 (N.D. Ill. 1972); Shields v. Valley Nat'l Bank, 56 F.R.D. 448, 449-50 (D. Ariz. 1972); Shields v. First Nat'l Bank, 56 F.R.D. 442, 444 (D. Ariz. 1972). In this regard, the following dictum in Berkman v. Sinclair Oil Corp. is noteworthy: "Plaintiffs Berkman and Adelman are attorneys. Some courts have denied class actions based on the impropriety of a plaintiff-attorney's representation of a class in Truth in Lending cases.... This Court in its opinion in Goldman did not decide the issue of the impropriety of a plaintiff-attorney purporting to represent the interests of a class, nor will this Court at the present time decide the issue of propriety. Yet, this Court is not blind to the possible dangers present in this situation." Civil Nos. 69 C 2055, 69 C 2320 (N.D. Ill., Mar. 8, 1973) opinion at 14-15. The court then noted: "For a delineation of these dangers see: Class Action Under the Truth in Lending Act, 87 Notre Dame Lawyer 1305, 1316-17; Handler, The Shift From Substantive to Procedural Innovation in Anti-Trust Suits—the Twenty-Third Annual Anti-Trust Review, 71 Colum. L. Rev. 1, 9 (1971)." Opinion at 15 n. 15.

66. Shields v. Valley Nat'l Bank, 56 F.R.D. 448, 449-50 (D. Ariz. 1972). The court went on to state: "The practice involved does not seem to the Court to comport with the high quality of objectivity, duty and integrity required of lawyers practicing in this Court or elsewhere. This case seems to involve a questionable method of soliciting legal business and such solicitation should not be encouraged." Id.

In response to the plaintiff's argument that his testimony might not be needed, the court concluded that the mere possibility of such a need made the plaintiff less capable of adequate representation than other members of the class.

Rule 23(b)

Despite the arguments available to defense counsel with respect to the issues of typicality and adequate representation, courts have determined the requirements of rule 23(a) to have been satisfied in several truth-in-lending class actions. Nevertheless, in order to be properly maintained as a class action, a suit must, in addition to satisfying the four requirements of rule 23(a), satisfy any one of the three subdivisions of rule 23(b).

Rule 23(b)(1)

Plaintiffs in several truth-in-lending actions have argued for certification of a class on the basis that the prosecution of separate actions would create a risk of inconsistent or varying adjudications as to individual members of the class, and that such adjudications would establish incompatible standards of conduct for the opponent of the class.

In what appears to be the only truth-in-lending class action in which the court certified a rule 23(b)(1)(A) class action (“clause A” class action), the district court’s docket card shows that the defendant submitted no papers in opposition to the plaintiff's motion.

68. Id. at 106.
69. Id.
On the other hand, several courts have specifically declined to certify clause A class actions in a truth-in-lending setting. In the most important of these decisions, the court held that the certification of a clause A class was not appropriate in an action to establish monetary liability. In two other truth-in-lending actions, the courts refused to

75. In Shields v. Valley National Bank, the court, in concluding that the proposed class action did not comply with clause A, observed that the Truth-in-Lending Act grants all potential class members the same rights they would have collectively as well as the power to hold defendant to the same standard of conduct. 56 F.R.D at 451. The court in Goldman v. First National Bank, having reviewed the notes of the advisory committee regarding subdivision (b)(1) of rule 23, explained that in order for there to be a risk of varying adjudications, there must be different parties attempting to impose different standards upon an individual. The court noted that since there was no suggestion that some plaintiff might sue to compel less disclosure than that provided by the defendant, there was no danger in that case that the defendant would be confronted with incompatible standards of conduct. Thus, the court held that the plaintiff could not maintain a rule 23(b)(1)(A) class in that action. 56 F.R.D. at 590. The court in Ratner, in denying the maintenance of a class action under clause A, stated that "there is no suggestion that some perverse plaintiff might sue (though none has) to compel less disclosure than defendant is now supplying. The prospect of 'varying adjudications' is in a word imaginary." 54 F.R.D. at 415 (footnote omitted). See also Rodriguez v. Family Publications Serv., Inc., 57 F.R.D. 189 (C.D. Cal. 1972). It might be noted, however, that Regulation Z prohibits the presentation with required disclosures of additional information or explanations "stated, utilized, or placed so as to mislead or confuse the customer or contradict, obscure, or detract attention from the information required . . . to be disclosed." 12 C.F.R. § 226.2(c) (Supp. 1972). It is quite possible, therefore, for some plaintiff to sue to compel less disclosure than that provided by the defendant.

76. Rodriguez v. Family Publications Serv., Inc., 57 F.R.D. 189 (C.D. Cal. 1972). Specifically, the Rodriguez court explained: "Clause (A), however, does not apply to an action for a monetary liability. See Note, Federal Rules of Civil Procedure: Rule 23, The Class Action Device and Its Utilization, 22 U. FLA. L. Rev. 631, 636 (1970) ("[A]ctions for money damages would not be affected by clause (A) even where the opposing party might have to pay some class members but not others."); Note, Rule 23: Categories of Subsection (b), 10 B.C. IND. & COM. L. Rev. 539, 540 (1969) ("Thus, actions for money damages would not be a clause (A) situation. Although the opposing party may have to pay some members of the class and not other members, this kind of incompatible conduct does not fall within the specific concern of (b)(1)(A).'). Furthermore, plaintiff's concern that courts might reach inconsistent or varying adjudications as to monetary liability under Section 130(a) is unfounded. If anything, one would assume that stare decisis would result in uniform decisions." 57 F.R.D. at 192.

The following dictum from Ratner is also helpful in this regard: "Since the observations in the text seem sufficient for clause (A), the court need not and does not reach the broader defense argument, supported by scholarly authority, that this provision was not meant as a vehicle for class claims asserting the kind of monetary liability here in question. See Travers & Landers, The Consumer Class Action, 18 KAN. L. REV. 811, 823-24 (1970); Comment, Rule 23: Categories of Subsection (b), 10 B.C. IND. & COM. L. Rev. 539, 540-42 (1968); Note, Federal Rules of Civil Procedure: Rule 23, The Class Action Device and its Utilization, 22 U. FLA. L. Rev. 631, 636 (1970); Note, Proposed Rule 23: Class Actions Reclassified, 51 VA. L. Rev. 629, 646-47 (1965)." 54 F.R.D. at 415 n.5.
certify clause A classes because the defendants in the actions apparently were willing to assume the risk of incompatible standards.\textsuperscript{77} In one of the decisions, the court explained that by seeking to have a clause A class certified, the plaintiff was, in effect, attempting to protect the defendant from the risk of incompatible standards of conduct caused by varying or inconsistent adjudications.\textsuperscript{78} Nevertheless, because the defendant apparently was willing to accept this risk, the court concluded that the certification of a clause A class was not appropriate.\textsuperscript{79}

In another truth-in-lending action, the plaintiff made a stare decisis argument for the certification of a rule 23(b)(1)(B) class ("clause B" class).\textsuperscript{80} Briefly stated, the argument from stare decisis to clause B is that the decision rendered in a suit by one member of a consumer class will be a precedent in subsequent suits brought by other class members and, as such, will determine or substantially affect the outcome of the subsequent suits. Thus, the argument continues, because it is unlikely that another court would reach a decision differing from the ultimate decision in the first suit, that suit should be maintainable as a clause B class action.\textsuperscript{81} The court in this truth-in-lending action, in rejecting the stare decisis argument and declining to certify a clause B class, stated that clause B was intended for situations where the action would be dispositive of the interests of nonparty class members "in a practical sense," such as a suit to determine the distribution of a common fund, and that the clause was not appropriate "simply because a legal precedent may be established."\textsuperscript{82} This reasoning has

\textsuperscript{79} Id.
\textsuperscript{81} See FED. R. CIV. P. 23 (b)(1)(B). See note 27 supra. Perhaps a more direct argument to rule 23(b)(1)(B) would be that since it is highly unlikely that another court would reach a decision that differed from that in the first action, the first action should be maintainable as a clause (B) class action in that the prosecution of separate actions would create a risk of actions involving individual class members which, as a practical matter, would determine the interests of nonparty members of the class or would substantially impair or impede the ability of such members to protect their interests.
\textsuperscript{82} Goldman v. First Nat'l Bank, 56 F.R.D 587, 591 (N.D. Ill. 1972). The court went on to express agreement with the following reasoning of Professors Travers and Landers for the unacceptability of the stare decisis argument: "For any case to qualify for class action treatment under 23(a)(2) there must be common questions of law or fact, and under 23(b)(3) these questions must 'predominate.' Hence, in any case meet-
been adopted by the courts in two subsequent truth-in-lending actions.83

**Rule 23(b)(2)**

In a number of truth-in-lending suits,84 the plaintiffs have sought to justify the maintenance of a class action on the grounds that injunctive or declaratory relief was appropriate with respect to the whole class, because the party opposing the class had acted or refused to act on grounds generally applicable to the class.85 The court in one such suit explained that where the predominant reason for bringing the action is the recovery of monetary damages, the plaintiff must look to subsection (b)(3) rather than subsection (b)(2) to justify class action treatment.86 The court went on to hold that a rule 23(b)(2) class...
is not appropriate where substantial money damages have been
demanded in addition to the requested injunctive relief.\textsuperscript{87}

Conversely, if the plaintiff seeks declaratory or injunctive relief with
respect to the continuing conduct of a defendant that allegedly violates
the act, a court could conceivably certify a subdivision (b)(2) class
even though the representative of the class also seeks to recover, on be-
half of himself alone, the minimum statutory penalty and reasonable
attorney's fees and costs as provided in the act.\textsuperscript{88} Nevertheless, dictum
in one recent action argues against the certification of any subdivision
(b)(2) truth-in-lending class action. The court in that action ex-
plained that by its very content the Truth-in-Lending Act forces a
creditor to a standard of conduct which is applicable to all customers
of that creditor, irrespective of whether they are members of the pro-
posed class.\textsuperscript{89}

Rule 23(b)(3)

Subdivision (b)(3) of revised rule 23 is intended to encompass
those situations that previously might have been classified as spurious
class actions.\textsuperscript{90} For a class action to be properly maintained under

\textsuperscript{87} Id. at 593.

\textsuperscript{88} See Dole, Private Enforcement of Consumer Credit Legislation, 26 Bus. Law.
915, 918 (1971); Hausmann, Class Actions Under the Truth-in-Lending Act, 1 Class

Nonetheless, in Goldman, the plaintiff first sought to recover the minimum statutory
$100 penalty for each member of the class as well as for himself. Then, “apparently
aware that no court is likely to levy such a crushing judgment on a defendant for a vio-
lation of a very new and technical statute,” the plaintiff amended the complaint to speci-
fically disclaim, on behalf of himself and of the class, any prayer for the $100 minimum
damages provided in the Act. 56 F.R.D. at 591-92. The court decided, however, that
the plaintiff was “without power to disclaim rights given to members of the pur-
ported class by statute.” \textit{Id.} at 592. \textit{See also} Ratner v. Chemical Bank New York Trust
Co., 54 F.R.D. 412, 416 n.7 (S.D.N.Y. 1972). In addition, the Goldman court noted
that while the plaintiff could disclaim the statutory minimum amount on behalf of
himself alone, should he do so he would not be a representative of the class since his
interests would then be different from that of the class members. Goldman v. First Nat'l
Bank, 56 F.R.D. 587, 592 n.4 (N.D. Ill. 1972). While there is apparently no decision
that specifically discusses the possibility of allowing a plaintiff to bring an action to
recover the statutory minimum amount on behalf of himself and to recover actual dam-
ages on behalf of purported class members, the dictum in footnote 4 of the Goldman
opinion infers that rule 23(a)(3) would preclude this possibility.


\textsuperscript{90} In discussing rule 23(b)(3), the advisory committee noted that: “In the
situations to which this subdivision relates, class-action treatment is not as clearly
called for as \textit{under subdivisions (b)(1) and (b)(2)}, but it may nevertheless be con-
venient and desirable depending upon the particular facts. Subdivision (b)(3) encom-
passes those cases in which a class action would achieve economies of time, effort,
this subdivision, the plaintiff must establish that the questions common
to the class predominate over questions affecting only individual mem-
bers. As the advisory committee on revised rule 23 explained: "It is
only where this predominance exists that economies can be achieved by
means of the class action device." The question of the predominance
of common questions in a truth-in-lending context has been considered
by several courts. In one action, the plaintiff alleged that the disclo-
sure statement provided to him and to purported class members by the
defendant violated the act. However, because of the lack of predomi-
nance of common questions, the court refused to permit the suit to pro-
cceed as a class action. Specifically, the court explained that no econ-
omy would be gained by allowing the suit to proceed as a class action,
since it would still be necessary for the court to examine several thousand
disclosure statements to determine if each complied with the disclosure
requirements imposed by the act. The court feared that the suit would
"rapidly degenerate into multiple lawsuits separately tried, which is
precisely what Rule 23(b)(3) prohibits."

Despite the standard forms utilized by major creditors, such as the
periodic monthly disclosure statements provided to open-end credit ac-
counts, defense attorneys should be able to raise substantial questions

and expense, and promote uniformity of decision as to persons similarly situated, with-


95. Id. at 183.

96. Id. When on rehearing, the plaintiff was able to establish that only two dis-
closure statements were used by the defendant during the period in question and that
both contained the provisions determined by the court to be violative of the Truth-in-
Lending Act, the court agreed that questions of law and fact common to the class did
predominate over any questions affecting only individual members, such as the compu-
tation of individual recoveries. 54 F.R.D. at 418. The court, however, went on to
deny class action treatment for lack of superiority. Id. at 419.

97. The periodic disclosure requirements for open-end credit accounts are set
forth at 15 U.S.C. § 1637(b) (1970). The term "open-end credit" is defined in Reg-
ulation Z. 12 C.F.R. § 226.2(r) (Supp. 1972). Nevertheless, the question whether
a particular extension of credit is open-end or "other than open-end" is at times very
difficult to answer. See 12 C.F.R. § 226.8 (Supp. 1972). However, most credit card
concerning the predominance of common questions presented in most truth-in-lending class actions. An argument can be made, for example, that the distinction between a business cardholder and a consumer cardholder and, more importantly, between business purchases and consumer purchases\textsuperscript{98} would require a detailed examination of every cardholder's account for every month to determine for each transaction whether the card was used for personal or business purposes.\textsuperscript{99} Similarly, counterclaims against the plaintiffs, both named and unnamed, may make an action unsuitable for class action treatment; such counterclaims may, for example, result in an adverse decision regarding the predominance of common questions\textsuperscript{100} or the manageability of the action.\textsuperscript{101}

accounts, such as those opened for cardholders in \textit{Katz} would constitute open-end credit accounts.

98. The distinction between business purchases and consumer purchases becomes important in light of the fact that the act's disclosure requirements do not apply to "credit transactions involving extensions of credit for business or commercial purposes . . ." 15 U.S.C. § 1603(1) (1970).

99. In the \textit{Katz} case, the defendant argued that section 104 of the act, 15 U.S.C. § 1603 (1970), would require a detailed examination of every cardholder's account for every month to determine whether the card was used for personal or business reasons, and thus, that individual questions predominated over questions applicable to the class as a whole. The court noted the complexities of questions concerning individual use raised by section 104 of the act, as well as complexities presented by the size of a class and questions concerning actual damages, but nevertheless held that the questions of law and fact did predominate and thus that the action could be maintained as a class action. 53 F.R.D. at 542-43. However, the court in \textit{Rodriguez} expressed the following contrary view: "The questions of law or fact here common to the members of the class do not predominate over any questions affecting only individual members. Section 104 of the Act, 15 U.S.C. § 1603 (1970), provides for an exemption for extensions of credit for business or commercial purposes. That exemption will require an individual analysis of the circumstances surrounding each customer's contract with defendant to determine if it applies. Counterclaims by defendant for nonpayment of amounts due under the contracts, which would be compulsory counterclaims under Rule 13(a), would raise further difficulties, including possible defenses such as the fraud defense raised in plaintiff's reply to defendant's counterclaim here. Questions affecting only individual members, therefore, predominate over questions common to the members of the class." 57 F.R.D. at 193.


101. Cotchett v. Avis Rent-A-Car System, Inc., 56 F.R.D. 549, 553 (S.D.N.Y. 1972); Berkman v. Sinclair Oil Corp., Civil Nos. 69 C 2055, 69 C 2320, opinion at 12 (N.D. Ill., Mar. 8, 1973). In \textit{Berkman}, the court explained: "Any class action would involve a number of delinquent credit card holders. Clearly [sic], defendants have a plethora of small claims against these delinquent credit card holders which might well have to be asserted as compulsory counterclaims under the Federal Rules. Such a result would turn this action into a wholly unmanageable proceeding. Such counter-
The predominance of common questions is not, however, the sole requirement for the certification of a rule 23(b)(3) class. To properly maintain a (b)(3) class action, the plaintiff must also establish that the class action vehicle is "superior to other available methods for the fair and efficient adjudication of the controversy." The advisory committee explained that to underscore the importance of an assessment by the court of the "relative advantages of alternative procedures for handling the total controversy," rule 23(b)(3) requires as an additional condition of the certification of a class action that the court determine the class action device to be "superior" to these alternative procedures in light of the particular circumstances of the case. This requirement of superiority has been the most fruitful area for dis-
discussion in recent truth-in-lending decisions.\textsuperscript{105} Courts have highlighted the size of the class and the fact that borrowers represented in the class would otherwise be barred by the statute of limitations as evidence of the superiority of class action treatment.\textsuperscript{106} At least one court has noted that the existence of an administrative enforcement power does not alone make a concurrent private civil action inferior for purposes of rule 23(b)(3).\textsuperscript{107} In addition, courts have discussed the difficulties likely to be encountered in the management of a class action in determining whether the particular suit satisfies the requirement of superiority.\textsuperscript{108}

Nevertheless, the majority of the decisions considering the superiority of the class action treatment of truth-in-lending suits have focused their discussion on the problems created by the $100 minimum penalty provision of the act.\textsuperscript{109} As noted above,\textsuperscript{110} the act creates a species of private attorney general by providing for a bounty, in the form of the minimum $100 recovery, to any “affected person” who discovers a violation of the act and successfully prosecutes an action against the creditor. It is also clear that this minimum statutory amount is available to such an affected person, whether or not that individual has suffered any actual damages as a result of the violation.\textsuperscript{111} The question of major concern to creditors, however, is whether a plaintiff can maintain a class action to recover this minimum penalty on behalf of each member of a purported class. In response to this question, one writer expressed a belief that the statutory minimum penalty provision was designed to “recompense consumers for the time and trouble of going to court,” and that Congress did not intend that this minimum penalty be awarded to class members who were merely represented in court by

\textsuperscript{105} See cases cited in note 121 infra.
\textsuperscript{108} Gerlach v. Allstate Ins. Co., 338 F. Supp. 642, 646 (S.D. Fla. 1972); Shields v. Valley Nat’l Bank, 56 F.R.D. 448, 450 (D. Ariz. 1972); Katz v. Carte Blanche Corp., 53 F.R.D. 539, 541-43 (W.D. Pa. 1971). In Gerlach, a class action against a major insurance company for alleged truth-in-lending violations, the court included among its reasons for denying maintenance of a class action the fact that a contrary decision would result in the creation of a class so large as to be unmanageable. 338 F. Supp. at 646. However, in the Katz case, the court held that a class of over 600,000 cardholders was not unmanageable since feasible methods, including subclasses, were available for the resolution of individual questions. 53 F.R.D. at 541-43.
\textsuperscript{109} See cases cited in footnote 121 infra.
\textsuperscript{110} See text accompanying notes 17-20 supra.
The writer thus concluded that in a consumer class action, the minimum statutory penalty should be recoverable only by those consumers who act as class representatives and those consumers who personally appear in the action.

**Ratner and Superiority**

The court in *Ratner v. Chemical Bank New York Trust Co.* was the first to analyze specifically the question of the appropriateness of a class action to recover on behalf of each member, the minimum statutory amount provided in the act. The defendant in the *Ratner* case argued that the incentive of class action benefits was unnecessary because the act provides for the recovery of a minimum $100 penalty and the payment of costs and reasonable attorney's fees, and that to allow the recovery of the $100 statutory penalty for each class member would result in a "horrendous, possibly annihilating punishment," unrelated to any actual damages suffered by members of the purported class or to any benefits realized by the defendant, for what was at most a "technical and debatable violation" of the act. The court found the defendant's arguments to be "cogent and persuasive" and concluded that the certification of the *Ratner* action as a class action would have been inconsistent with the specific remedy provided by Congress. Thus, exercising "some considerable discretion of a pragmatic nature," the court held that the suit could not be maintained as a class action.

At least as important as the *Ratner* decision itself is the trend that has subsequently developed. According to the Federal Reserve Board, the clear trend since *Ratner* is away from allowing class actions to enforce compliance with the act. At least twenty-three district court decisions have followed the *Ratner* logic in refusing to certify truth-in-

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113. *Id.*
117. *Id.* The court went on to state: "It is not fairly possible in the circumstances of this case to find the (b)(3) form of class action 'superior to' this specifically 'available [method] for the fair and efficient adjudication of the controversy.'"
118. *Id.*
119. *Id.*
lending class actions.\textsuperscript{121} The common thread found in this series of decisions rejecting the superiority of class action treatment is the attempt by a plaintiff to recover for each member of a purported class, without proof of actual damages and for a violation of a new and technical statute, the minimum statutory amount provided in the act.\textsuperscript{122} Having considered these factors, Judge Frankel decided that a class action was not superior to the species of private attorney general created by Congress.\textsuperscript{123} The reasoning of the \textit{Ratner} decision obviously has proven to be very persuasive to courts subsequently faced with the problem of massive statutory liability for violations of the act.\textsuperscript{124} This effect is summarized in a decision of the United States District Court for the Northern District of Illinois, in which the court explained that while there were some earlier decisions to the contrary, since the "thoughtful opinion" in \textit{Ratner}, courts unanimously had held the class action device to be inappropriate in truth-in-lending suits "where the size of the potential class, coupled with the statutory minimum re-


\textsuperscript{122} See, e.g., Kroll v. Cities Serv. Oil Co., 352 F. Supp. 357, 360 (N.D. Ill. 1972). In \textit{Berkman v. Sinclair Oil Corp.}, the court explained: "It is well settled that the class action device is inappropriate in Truth in Lending cases where, as in the instant action, the size of the potential class, coupled with the statutory minimum recovery of $100 would result in absurdly high or ruinous damages, wholly unrelated to the actual harm caused by the violations." Civil Nos. 69 C 2055, 69 C 2320 (N.D. Ill., Mar. 8, 1973) opinion at 11 (footnote omitted).


\textsuperscript{124} See cases cited in note 121 \textit{supra}. 
covery of $100 would have resulted in absurdly high and even ruinous damages, wholly unrelated to the actual harm caused by the violations.125

The only decision to date126 to specifically reject the Ratner superiority logic is Eovaldi v. First National Bank.127 In that case, Judge McMillen, who in two previous decisions had adopted the Ratner reasoning,128 stated that he “reluctantly disagreed” with the conclusion in Ratner that individual actions for the minimum statutory penalty and attorney’s fees were “fairer and more efficient [for] adjudicating these controversies” or that the possibility of a “horrendous, possibly annihilating punishment” was a valid consideration under rule 23(b)(3).129 Judge McMillen went on to explain that his only concern was “whether a class action is superior to multitudinous individual actions from a standpoint of efficiency.”130 Then, equating the question of efficiency with that of the manageability of the class, he held a subdivision (b)(3) class action to be appropriate.131 Nevertheless, Judge McMillen expressed his concern over the disproportionate size of the liquidated damages (as high as $17 million plus attorney’s fees) as compared to the actual damages (perhaps nonexistent). As a result, although he expressed some doubt concerning the plaintiff’s ability to do so, Judge McMillen conditioned his certification on the amendment of the plaintiff’s complaint to sue only for actual damages and attorney’s fees.132 In the event that the plaintiff was unable to waive the multiple minimum statutory amounts,133 the parties were to brief the question

130. Id.
131. Id. at 547-48.
132. Id. at 548.
133. See the Goldman discussion in note 88 supra. In Berkman v. Sinclair Oil Corp., the court noted: “Plaintiffs in their Memorandum recognize that the punishment they seek to impose upon defendants would be ‘undesirable’ and offer to reduce the amount of recovery far below the statutory minimum. They propose that the amount of recovery should be limited to double the monthly finance charges or $496,300 plus $100 for each of the three named plaintiffs. This Court in Goldman [Goldman v. First Nat’l Bank, 56 F.R.D. 587 (N.D. Ill. 1972)] has previously held that such a reduction of the statutorily imposed minimum civil penalty is an improper method for preserving class actions under the Act. See also Kroll et al. v. Cities Service Oil
of the constitutionality of the act's liquidated damage provision in a class action context. In this regard, the court expressed its belief that the penalty provisions were punitive and unrelated to actual damages, and thus that these provisions could deprive the defendant of property without due process.

In any event, it is clear that neither Ratner nor its progeny have held class actions to enforce the civil remedy provisions of the act to be per se improper. On the contrary, the Ratner decision specifically left unanswered the appropriateness of the class action device in situations where the class of plaintiffs is made up of individuals who are able to claim injury and prove actual damages. In fact, Judge McMillen conditionally certified a class action for the recovery of actual damages, attorney's fees and costs, despite the fact that the act does not specifically provide for the recovery of actual damages. Furthermore, because the Ratner decision resulted from the exercise of the judicial discretion called for by subdivision (b)(3) of rule 23, it is possible that on harsher facts than those found in Ratner, or in the cases following the Ratner precedent, a judge might find the imposition of greater liability to be appropriate.

*Company* [352 F. Supp. 357 (N.D. Ill. 1972)] where Judge Tone held that a similar offer to reduce was inappropriate. Cf. *Eovaldi, et al. v. The First National Bank of Chicago* [57 F.R.D. 545 (N.D. Ill. 1972)] where no decision as to reduction has yet been reached." Civil Nos. 69 C 2055, 69 C 2320 (N.D. Ill., Mar. 8, 1973) opinion at 11 n. 12.


135. *Id.* Cf. *United States v. Van de Carr*, 343 F. Supp. 993, 1014-15 (C.D. Cal. 1972) (criminal action dismissed because of inconsistent administrative interpretations and the complex nature of Regulations T and U). The court in *Berkman v. Sinclair Oil Corp.*, provided some insight with respect to this due process argument: "[T]he substantial difficulty which would be encountered by the parties in proving various members of the class use their cards primarily for business rather than for personal use has already been demonstrated with regard to the named plaintiff, Adelman. The Act is primarily directed at consumer protection rather than business credit. Defendants contend that they have the 'due process' right to require proof as to whether the primary use of the credit card during the months in question was personal or business from each of its credit card holders. The necessity for such proof makes this action entirely unmanageable. A shorter route of proof might well deprive defendants of 'due process' rights which under Rule 23(b)(3) is strictly prohibited." Civil Nos. 69 C 2055, 69 C 2320 (N.D. Ill., Mar. 8, 1973) opinion at 13.


Therefore, despite Ratner and its progeny, and perhaps in light of the Eovaldi decision, there is still a great deal of uncertainty concerning the potential liability of creditors for violations of the act. As discussed earlier, massive statutory liability becomes a possibility when the consumer class action is coupled with the statutory minimum penalty feature of the act. Thus, if the purported class includes 5 million consumers, as was the case in Mullen v. Montgomery Ward & Co., the minimum aggregate of statutory penalties recoverable in a class action could reach $500 million. One writer, who describes the minimum penalty feature as the greatest practical problem presented by the attempt to utilize the class action device to enforce the civil penalty provisions of the act, explained that as important as the Truth-in-Lending Act may be, "in a rational order of social priorities compliance with truth-in-lending simply is not that important." The writer concluded that it is improbable that Congress could have contemplated the imposition of such liability.

While some may argue that this massive potential liability is important as a deterrent to truth-in-lending violations, the possibility of such liability may in fact reduce the effectiveness of the class action as an enforcement device. In this regard, a member of the Federal Reserve Board explained that this potential massive statutory liability could impede the use of the consumer class action as an effective device for the private enforcement of truth-in-lending. It was the belief of this board member that courts, which are given a great deal of discretion in determining whether to certify class actions, may be inclined to deny certification merely because of the magnitude of potential class action recoveries. Moreover, soon after the effective

140. 57 F.R.D. 89 (N.D. Cal. 1972).
142. Id.
143. Id. See Berkman v. Sinclair Oil Corp., Civil Nos. 69 C 2055, 69 C 2320, opinion at 17 (N.D. Ill., Mar. 8, 1973).
146. 118 Cong. Rec. 6913 (daily ed. Apr. 27, 1972) (letter from J. L. Robertson, Vice Chairman of the Federal Reserve Board, to Senator William Proxmire) [hereinafter cited as Robertson letter].
147. Id. See Wilcox v. Commerce Bank, Civil No. 72-1494 (10th Cir., Feb. 20, 1973).
148. Robertson letter, supra note 146. The reason for Mr. Robertson's concern is demonstrated by the following dictum in Goldman: "no court is likely to levy such a crushing judgment on a defendant for a violation of a very new and technical statute."
date of the act, it became evident that the truth-in-lending class action device was being utilized in an attempt to obtain large recoveries from "deep-pocket" corporations, rather than to enforce compliance by less reputable creditors.\textsuperscript{149} It is difficult to justify large recoveries from such corporations when the agencies charged with administrative enforcement of the act have found the larger creditors to be in substantial compliance with its requirements.\textsuperscript{150} The massive potential liability makes even less sense in light of the Federal Reserve Board's statement in its most recent report to Congress that "in almost all cases where violations are noted, they are found to be a result of inadvertent error or misunderstanding."\textsuperscript{151}

A Legislative Limitation on Liability

Following the controversy generated by the Ratner decision on the substantive disclosure issue\textsuperscript{152} and the resulting potential $13 million liability of the defendant bank, the Federal Reserve Board stated that it might be desirable to establish a maximum liability, or otherwise restrict the scope of potential liability in a class action context, should truth-in-lending suits be allowed to proceed as class actions.\textsuperscript{153} In response, a provision limiting class action liability was added to a bill then being considered in the United States Senate.\textsuperscript{154} The provision ultimately passed by the Senate shortly before the end of the second session of the Ninety-Second Congress would have amended the act to provide for the recovery of actual damages and of exemplary damages subject to a minimum recovery of $100 in an individual action and a maximum recovery of $100,000 in a class action, together with court-determined costs and reasonable attorney's fees based on services performed.\textsuperscript{155} The act, if amended, would have required the court in as-

\textsuperscript{56}{F.R.D. at 591-92. Mr. Robertson concluded that it was, therefore, important to "suitably limit" the exposure of creditors in truth-in-lending class actions.}
\textsuperscript{149}{Hearings on H. 14931 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess., at 287 (1970).}
\textsuperscript{150}{See FRB 1972 REPORT, supra note 28, at 11; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1971 14 (1972) [hereinafter cited as FRB 1971 REPORT].}
\textsuperscript{151}{FRB 1972 REPORT, supra note 28, at 11.}
\textsuperscript{153}{FRB 1971 REPORT, supra note 150, at 18.}
\textsuperscript{154}{S. 653, 92d Cong., 2d Sess., § 208 (1972).}
\textsuperscript{155}{The provisions passed by the United States Senate would have amended section 1640(a) of the act to read: "Except as otherwise provided in this section, any creditor who fails to comply with}
Assessing exemplary damages to consider all relevant factors, including the amount of any actual damages awarded, the frequency and persistence of the creditor's failures to comply with the act, the resources of the creditor, the number of persons adversely affected by the violation, and whether the creditor's actions were intentional.\footnote{156}

any requirement imposed under this chapter or chapter 4 of this title (other than section 161) with respect to any person is liable to such person in an amount equal to the sum of—

"(1) any actual damages sustained by such person as a result of the failure;

"(2) such additional amount as the court may allow, except that the total awarded shall (A) be not less than $100 in the case of an individual action, or (B) in the case of a class action, not more than $100,000; and

"(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee which shall be the reasonable value of the services rendered by the attorney without regard to the amount of any recovery. In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional." S. 652, 92d Cong., 2d Sess. § 208 (1972).

The Senate Committee on Banking, Housing and Urban Affairs had the following comments concerning this provision:

"The Committee gave careful consideration to the problem of a creditor's class action liability under the Truth in Lending Act. Under section 130 of the Truth in Lending Act, a consumer can bring a civil action against creditors who fail to meet the law's disclosure requirements and recover twice the amount of the finance charge, subject to a minimum liability of $100 and a maximum liability of $1,000. As the Federal Reserve Board's 1971 Annual Report on the Truth in Lending Act pointed out, these provisions of section 130 raise serious problems because of their possible applicability in class actions. The $100 minimum liability provision could produce an enormous penalty upon a creditor if applied to all the members of a class action suit filed in a Federal court pursuant to Rule 23 of the Federal Rules of Civil Procedure. . . .

"The purpose of the civil penalties section of the Truth in Lending Act was to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy. However, the Committee feels that this objective can be achieved without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature.

"In reviewing the alternative solutions to the problem, the Committee considered a proposal to exempt creditors from any class action liability unless actual damages could be shown. The Committee rejected this alternative on the grounds that most Truth in Lending violations do not involve actual damages and that some meaningful penalty provisions are therefore needed to insure compliance. Accordingly, the Committee decided to place an aggregate limitation on a creditor's class action liability for violations not involving actual damages." S. Rep. No. 92-750, 92d Cong., 2d Sess. 7-8 (1972).

156. S. 652, 92d Cong., 2d Sess. § 208 (1972). With respect to the provision for exemplary damages, the Senate Committee on Banking, Housing and Urban Affairs explained:

"In assessing punitive damages, the courts are instructed to consider, among other factors, the amount of any actual damages awarded, the frequency and persistence of
This Senate approved amendment died in the House of Representatives with the close of the Ninety-Second Congress. Nevertheless, a bill proposing a similar amendment\textsuperscript{157} was introduced recently by Senator Proxmire of Wisconsin. The new Proxmire bill incorporates a Federal Reserve Board recommendation that the greater of $50,000 or one percent of the creditor's net worth be established as the upper limit on the aggregate amount of possible recovery in truth-in-lending class actions.\textsuperscript{158} It is likely, however, that such an arbitrary maximum on class action liability will, in fact, yield more problems than it avoids. For example, it is easy to conjure up fact situations in which an arbitrary maximum on class action liability makes absolutely no sense at all. Consider, for example, the application of a $100,000 maximum liability provision to the class of 600,000 cardholders certified in \textit{Katz v. Carte Blanche}.\textsuperscript{159} Even assuming court approval of the highest exemplary damages allowable under the Senate approved maximum liability provision, the cost of distributing the award would far exceed the less than seventeen cents to which each class member would be entitled. Furthermore, such an artificial maximum liability could encourage plaintiffs' counsel to seek certification of several smaller classes, rather than one large class, in an attempt to recover multiple $100,000 exemplary damage awards; in turn, such an attempt could have the anomalous result of requiring the defendant to argue for certification of the largest possible consumer class. In any event, the court would still be required in each such action to determine the appropriateness of class action treatment in accordance with rule 23(c)(1) and to satisfy the notice requirements set forth in rule 23(c)(2), an exercise which is certain to result in a costly expenditure of judicial time and effort.\textsuperscript{160} Thus, while the proposed maximum on class action liability

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\item \textsuperscript{157} While the Committee expects the courts will award higher punitive damages to the extent found appropriate after considering the pertinent factors, including those listed above, a court does not have to find a violation was intentional in order to assess a meaningful penalty upon a creditor to induce compliance with the legislation.” S. Rep. No. 92-750, 92d Cong., 2d Sess. 9 (1972).
\item \textsuperscript{158} S. 914, 93d Cong., 1st Sess. § 208 (1972). Section 208 of S. 914 is very similar to section 208 of S. 652 with the exception of the class action exemplary damage provision, which reads: “in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the greater of $50,000 or 1 per centum of the net worth of the creditor.”
\item \textsuperscript{159} FRB 1972 REPORT, supra note 28, at 14.
\item \textsuperscript{160} For a good discussion of the difficulties of determining the class and pro-
\end{itemize}
\end{footnotesize}
represents an attempt to rectify the uncertainties caused by the present statutory language, it would provide only a partial solution. In fact, there is little justification for the utilization of the class action device to respond to truth-in-lending violations that result in no actual damages, whether or not an arbitrary maximum is established for potential class action liability.

The objective of any such truth-in-lending exemplary damage provision has been identified by the Federal Reserve Board as the "encouragement [of] the voluntary compliance [with the act] which is so necessary to insure nationwide adherence to uniform disclosure."161 As previously discussed, voluntary compliance is encouraged by providing a sufficient incentive to sue element to make the statute self-enforcing.162 It is possible to provide this encouragement and the deterrent sought by the Federal Reserve Board without the harsh effects that would result from the recovery by each member of a class of the present minimum statutory penalty and without the problems that would be created by the artificial limitations on class action liability adopted by the Senate and recommended by the Federal Reserve Board.

In this regard, the civil remedy provisions of the act163 should be amended to provide specifically for the recovery of actual damages resulting from a violation, together with reasonable attorney's fees and costs as determined by the court. The legislative history of this amended provision could make it clear that both individual and representative actions were contemplated for the recovery of such damages. In addition, the act should provide that where a violation results in no actual damages, a qualified plaintiff may bring an action for injunctive or declaratory relief in any federal court on behalf of himself and the United States. If such a plaintiff is successful in establishing a violation of the act, technical or otherwise, he should be entitled to recover court-determined attorney's fees and costs. In addition, the court should be empowered to impose a civil penalty not to exceed an amount established by Congress, of which a designated portion could be awarded by the court to the successful plaintiff. More specifically,

162. See text accompanying notes 4-24, supra.
such an amendment\textsuperscript{164} might modify the remedy provisions of the act to read in part:

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part with respect to any person is liable to such person for any actual damages sustained by that person as a result of the failure. Any action under this subsection may be brought by such person in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

(b) Except as otherwise provided in this section, any obligor, whether or not actually damaged, may bring a civil action pursuant to Title 28, U.S.C. \textsection{}2201, in any United States district court for a declaration that the course of conduct of the creditor of such obligor has given rise to one or more violations of the requirements imposed under this part with respect to such obligor, at least one of which occurred within one year prior to the bringing of the action, and for injunctive relief. The person bringing the action shall describe in the complaint all such violations known to such person. The action shall be brought and carried on by the person prosecuting such action in the name of and for the United States, as well as for such person. The person shall bring the action, and shall give notice of the pendency thereof, in accordance with regulations of the Board. In the event that more than one civil action shall be instituted pursuant to this subsection involving the same course of conduct, the court shall, upon motion by a defendant, stay further proceedings with respect to the course of conduct in all but the first action filed, to await final adjudication in the first action filed. If the person bringing such action prevails in the action, the court in its discretion may impose an appropriate civil penalty on the creditor of not more than $50,000, of which amount up to $2,500 may be awarded to the person who first brought the action and the balance, if any, shall be awarded to the United States. No such civil penalty shall be awarded in any other action with respect to the same course of conduct or violations of the creditor occurring prior to the time at which the judgment imposing the penalty or enjoining such conduct or violations becomes final. In deter-

\textsuperscript{164} The proposed amendment takes into consideration only subsections (a) and (e) of the present section 1640. Amendments to present subsections (b) through (d) are beyond the purview of this article.
mining the amount of any penalty hereunder, the court shall consider, among other relevant factors, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

(c) In the case of any successful action to enforce the liability under subsection (a) or to obtain declaratory or injunctive relief under subsection (b), the court may award to the person bringing the action the costs of the action, together with a reasonable attorney's fee, which shall be the reasonable value of the services rendered by the attorney without regard to the amount of any recovery or penalty.

Such an amendment would clarify, in subsection (a), the right to recover under the act's civil remedy provisions actual damages resulting from a truth-in-lending violation, together with attorney's fees and costs. As provided in subsection (c), the attorney's fees would be based on the reasonable value of services rendered by the attorney and would not be governed by the amount of actual damages awarded. In addition, in adopting the broader language recently proposed by the Federal Reserve Board, the right to recover damages under subsection (a) would not be limited to damages resulting from disclosure violations, but would expressly extend to the recovery of actual damages resulting from the failure to comply with any requirement imposed under part B of the act. As is the case with the existing act, subsection (a) would permit an action for actual damages to be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

Proposed subsection (b) would permit any "affected person," whether or not actually damaged, to bring an action in any United

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166. Section 1640(a) presently provides that any creditor who "fails . . . to disclose . . . any information required under this part to be disclosed . . . is liable." Because this language may be interpreted as limiting the liability of creditors to disclose violations, the Federal Reserve Board has recommended that section 1640(a) be amended to specifically apply to the failure "to comply with any requirement imposed." FRB 1972 REPORT, supra note 28, app. D, at 1.
168. See note 17 supra.
States district court for a declaration that the course of conduct of a creditor gave rise to one or more violations of the act and to enjoin such conduct. The action would be brought qui tam in the name of and for the United States as well as the person bringing the action; this requirement accords with the nature of a qui tam action, limits the number of actions that may be brought for a violation, and avoids problems of establishing the individual entitled to a possible share of the penalty. In order to ensure a measure of governmental control over such litigation and to discourage the splitting of actions by a plaintiff, the plaintiff would be required to describe all violations of the creditor known to the plaintiff and to bring the action, and provide notice of its pendency, in accordance with regulations of the Federal Reserve Board. The resort to board regulations, rather than statutory guidelines, is intended to provide a degree of flexibility in meeting problems, unforeseen at present, that may arise in connection with the use of the qui tam action. While no sanctions are expressly provided in the event a plaintiff does attempt to split actions, this fact would presumably be considered by the court, together with the nonexclusive criteria expressly provided in the subsection, in determining the amount of any penalty to be imposed and any reward to be awarded.

If the plaintiff can successfully establish a violation of the act, technical or otherwise, the court would be authorized to award reasonable attorney’s fees, as well as the costs of the action. Again, as

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170. Section 2201 creates a remedy in “any court of the United States.” Subsection (b) further restricts the remedy to district courts.

171. 28 U.S.C. § 2201 (1970). Section 2201 provides: “In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

172. See 28 U.S.C. § 2202 (1970). Section 2202 provides: “Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment.”

provided in subsection (c), the attorney's fees awarded would be based on the reasonable value of services rendered and would not be governed by the amount of any penalty imposed on the creditor. In addition, the court would be empowered to impose a civil penalty not to exceed $50,000 (or such other amount as may be established by Congress) of which up to $2,500 could be awarded by the court to the successful plaintiff. The remainder of the civil penalty, if any, would be paid in accordance with the directives of Congress, perhaps to the Federal Reserve Board and other designated agencies to further administrative enforcement of the act. In determining the amount of the civil penalty, the court would be directed by Congress to consider the same criteria specified by the Senate in its "amended" version of the act and recommended by the Federal Reserve Board in its recent report to Congress. The $2,500 limit on the reward recognizes the fact that the plaintiff need not have suffered any actual damages and that $100, together with attorney's fees and costs, was heretofore considered sufficient to induce a person to act as a private attorney general.

This provision, or one similar to it, would retain the purpose of encouraging private enforcement of truth-in-lending, while providing a penalty for violations of the act that more fairly reflects the nature of possible offenses. At the same time, it would limit the need to provide class actions as procedural vehicles to be misused by private attorneys general.

Conclusion

The present civil remedy provisions serve neither the consumers intended to be aided by the Truth-in-Lending Act nor the creditors intended to be subject to its controls. While the modifications adopted by the Senate and recommended by the Federal Reserve Board would provide a partial solution to the shortcomings of the present statutory provisions, they fail to recognize the distinction between inducements

177. A person who has suffered damages may sue for damages under subsection (a) as well as for a reward under subsection (b).
178. The lure of large attorney's fees was undoubtedly a factor in the filing of certain truth-in-lending class actions. In any event, the ability to recover attorney's fees and costs is a valid inducement to private enforcement. This inducement is retained in proposed subsection (c).
intended to compensate, and inducements intended to deter violations of law. More specifically, the distinction must be made between truth-in-lending violations that result in actual damages and violations that do not result in such damages. Where actual damages arise, the civil remedy provisions of the act should serve a reparative function. However, where actual damages are not present, the remedial function of the civil remedy provisions should predominate. While the class action is a legitimate procedural device for the recovery of damages suffered by a properly certified class, the class action vehicle is inappropriate when used by a private attorney general in a nonactual damage situation; the absence of actual damages eliminates the need for a representative party to effect a "recovery" on behalf of a class of persons who, by definition, can establish no loss. It is recommended, therefore, that the class action device be statutorily limited to the recovery of actual damages and that a new technique—the qui tam action—be utilized to encourage the private attorney general to prominently participate in the enforcement of truth-in-lending.