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CLASS ACTIONS UNDER THE TRUTH-IN-LENDING ACT

I. Introduction

While the consumer class action may be a desirable device for judicial redress of consumer injuries, its results become questionable when coupled with the statutory penalty features of the Truth-in-Lending Act¹ (hereinafter sometimes referred to as the Act). The basis of this problem stems from the \$100 minimum recovery, without regard to actual damages, allowed under the Act.² When this minimum civil recovery is applied to each plaintiff in a large class, the effect upon a creditor may be not only unfair, but also ruinous.³ In this article, discussion will focus on the pertinent parts of the Truth-in-Lending Act, the applicability of federal and state procedural rules for class actions under the Act, and, finally, on an evaluation of the class action as a fair, efficient, and effective means of enforcement of the Truth-in-Lending Act.

II. The Truth-in-Lending Act

A. Regulatory Provisions

The purpose of the Truth-in-Lending Act is to "assure a meaningful disclosure of credit terms" so that "economic stabilization would be enhanced and the competition among the various financial institutions . . . would be strengthened by the informed use of credit."⁴ As a means to this end, Congress enacted legislation which provides for the standardized calculations of the "finance charge"⁵ and the "annual percentage rate"⁶ and full disclosure of this information to customers.⁷

The "finance charge" is the total of all charges imposed either directly or indirectly by a creditor to or as a condition of an extension of credit, and is payable either directly or indirectly by the customer.⁸ More specifically, but not exclusively, the finance charge must include, when applicable, the following

1 Truth-in-Lending Act, 15 U.S.C. §§ 1601-1613, 1631-1644, 1661-1665 (1970).

2 *Id.* § 1640(a):

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than \$100 nor greater than \$1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

3 Consider the plight of a small loan company which has made only 1,000 loans on forms which failed to meet the strict standards set by the Act and Regulation Z. The minimum cost to the creditor would be \$100,000 plus attorney's fees plus court costs. It is easily seen why creditors have expressed increasing concern over their possible exposure to class actions.

4 15 U.S.C. § 1601 (1970).

5 *Id.* § 1605.

6 *Id.* § 1606.

7 *Id.* §§ 1631-1639.

8 *Id.* § 1605.

types of charges: (1) interest, time price differential, discounts or other system of charges; (2) service, transaction, or carrying charges; (3) loan fees, points, finder's fee or similar charges; (4) fees for an appraisal, credit report or investigation; (5) premiums on insurance written in connection with the loan which protects the debtor's ability to repay or the creditor's interest in the collateral, unless the creditor has complied with regulations which allow for the non-inclusion of such premiums; (6) premium or charge for any guarantee or insurance protecting the creditor against the customer's default; and, (7) any charge imposed by a creditor upon another creditor for purchasing the customer's obligation if the customer must pay any part of the charge in cash or if it is deducted from the proceeds of the loan.⁹

The second important concept of the Act is the "annual percentage rate." This is the result of calculating the total "finance charge" and then expressing it as an "annual percentage rate." While on the surface this appears quite simple, when applied to the various forms of credit contracts it becomes complicated. The method of computation varies when applying the annual rate to the extension of open-end credit,¹⁰ or other forms of credit.¹¹

The main thrust of the Act is the disclosure requirements. The Act states separate disclosure requirements for each of three basic types of transactions: credit sales not under open-end plans,¹² open-end credit plans,¹³ and consumer loans not under open-end plans.¹⁴ Generally, before the seller-creditor can extend credit, he must inform the customer of the following types of information: the amount financed, finance charges, annual percentage rate, repayment procedures, rebates, delinquency charges and security interests.¹⁵ The disclosure must be made prior to the extension of credit¹⁶ by clear and conspicuous writing¹⁷ in a meaningful sequence and in the prescribed terminology.¹⁸

B. Enforcement

Compliance with the Act is exacted by administrative, criminal and civil sanctions. Administrative enforcement is spread among nine federal agencies.¹⁹ Agencies with general supervisory power over a special group of creditors, such as the Federal Reserve Board over members of the Federal Reserve System,²⁰ are given enforcement responsibility for that group. Enforcement of all other creditors is left to the Federal Trade Commission.²¹ Each agency is to treat a

9 12 C.F.R. § 226.4(a) (1971).

10 15 U.S.C. § 1606(a)(2) (1970); 12 C.F.R. § 226.5(a) (1971).

11 15 U.S.C. § 1606(a)(1) (1970); 12 C.F.R. § 226.5(b) (1971).

12 15 U.S.C. §§ 1638(a) (1970); 12 C.F.R. §§ 226.6, 226.8 (1971).

13 15 U.S.C. § 1637(a) (1970); 12 C.F.R. §§ 226.6, 226.7 (1971).

14 15 U.S.C. § 1639(a) (1970); 12 C.F.R. §§ 226.6, 226.8 (1971).

15 15 U.S.C. §§ 1637(a), 1638(a), 1639(a) (1970); 12 C.F.R. §§ 226.6, 226.7, 226.8 (1971).

16 *Id.*

17 15 U.S.C. § 1631 (1970); 12 C.F.R. § 226.6(a) (1971).

18 12 C.F.R. § 226.6(a) (1971).

19 15 U.S.C. § 1607 (1970).

20 *Id.* § 1607(a)(1)(B).

21 *Id.* § 1607(c).

violation of the Act as if it were a violation of the law administered by that agency and may use its normal powers to secure compliance.²²

Criminal liability of up to \$5,000 and/or one year in prison can result from willfully and knowingly: (1) giving false or inaccurate information or failing to give required disclosures; (2) using authorized tables to consistently understate the annual percentage rate; or, (3) failing to comply with any other requirement of the Act.²³

In an effort to make it worthwhile for individuals to bring a civil action against the nonconforming creditor, Congress allowed a civil recovery of twice the finance charge or \$100, whichever is greater, but limited to a maximum of \$1,000, plus reasonable attorney's fees.²⁴ It appears from the legislative history, however, that no consideration was given to the possible abuses of the minimum recovery when coupled with a large class action.²⁵ The civil action may be maintained for failure to disclose required information in connection with any credit transaction.²⁶ The creditor is allowed to correct any error, and thereby avoid liability, by notifying the customer and making appropriate adjustments if done within 15 days of the discovery of the error and prior to institution of an action against him.²⁷

A creditor may not be held liable for a violation if the act "was not intentional *and* [emphasis added] resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."²⁸ This defense has been interpreted by the courts through statutory language and legislative history as requiring that the *act* which resulted in the error be unintentional rather than merely the error being unintentional.²⁹ Therefore, the "unintentional error" defense has been defined as "clerical errors which result despite reasonable safety precautions and not 'good faith' error of law If consumers would be required to prove that creditors were determined to violate the Act in order to prevail, the civil remedy would be a hollow one."³⁰ A divergent view is found in a recent case where the court interpreted the test to be whether the error was a "de minimus," good faith violation and, if so, was within the "unintentional error" defense.³¹ This decision, however, runs contrary to the statutory language, legislative history, and well-reasoned precedent. Furthermore,

22 *Id.* § 1607(b).

23 *Id.* § 1611.

24 *Id.* § 1640(a). Text of statute at note 2 *supra*.

25 Nowhere in the legislative history of the Truth-in-Lending Act was the writer able to discover any mention of class actions.

26 15 U.S.C. § 1604(a) (1970).

27 *Id.* § 1604(b).

28 *Id.* § 1604(c).

29 *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 281 (S.D.N.Y. 1971); *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1247 (N.D. Ga. 1971); *Douglas v. Beneficial Finance*, 334 F. Supp. 1166, 1178 (D. Alaska 1971).

30 *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1248 (N.D. Ga. 1971).

31 *Richardson v. Time Premium Co.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,272 (No. 70-1814, S.D. Fla., Sept. 14, 1971). It may be speculated that the reason for such a holding may have been the court's reluctance to award the \$100 minimum recovery to each member of a large class in a case where "ilt strains credulity that defendant gained advantages by the variance"

just recently the Federal Reserve Board suggested that Congress amend the Act in order to create the "good faith" defense.³²

The Act allows suits to be initiated in the United States District Courts (regardless of amount in controversy) or any other court of competent jurisdiction (state courts) within one year of the violation.³³ This is pertinent to our discussion of class actions under the Act since the Federal Rules³⁴ are generally recognized as being more liberal in allowing class actions than are most state class action procedures.³⁵

III. Consumer Class Actions Under the Truth-in-Lending Act

A. *Treatment in Federal Courts*

Class actions brought in the federal courts are controlled by Rule 23 of the Federal Rules of Civil Procedure.³⁶ There are four prerequisites which must be met before a class action can be maintained: (1) The class is so numerous that the joinder of all members is impracticable; (2) There are common questions of law or fact; (3) The claims of the representative members are typical of the claims of the class; and, (4) The representative parties are capable of fairly and adequately protecting the interests of the absent class members.³⁷ After the parties have met the first four prerequisites, the court must find that they fall into one of the three types of permissible class actions under Rule 23(b). Rule 23(b)(1) allows a class action in cases where individual litigation would create a risk of inconsistent adjudications or adjudications with respect to individual members which would be dispositive of the interests of persons not parties to the action. A second type of permitted class action, Rule 23(b)(2), used primarily in civil rights cases, arises where the defendant has acted or refused to act on grounds generally applicable to the class so that injunctive or declaratory relief is appropriate with respect to the class as a whole. The final type of federal class action is the one primarily used for consumer class actions. Rule 23(b)(3) is applicable where the court finds that questions of law or fact common to the class predominate over individual questions and that the class action is superior to other methods of adjudication. In making their findings as to the dominance of common questions of fact or law and the superior method of adjudication, the court is to consider: (1) the interest of individual members in maintaining their own suits; (2) the extent and nature of presently pending litigation concerning the controversy; (3) the desirability or undesirability of concentrating the litigation in the particular forum; and, (4) the difficulties likely to be encountered in management of a class action.³⁸ The judge is to determine whether a class

32 BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, TRUTH-IN-LENDING ANNUAL REPORT TO CONGRESS FOR THE YEAR 1971, reprinted in CCH CONSUMER CREDIT GUIDE (Supp. to Issue No. 161), Jan. 19, 1971, at 18 [hereinafter cited as ANNUAL REPORT].

33 15 U.S.C. § 1640(e) (1970). But note, the Act does not authorize nationwide service of process. *Bernard v. Richter's Jewelry Co.*, 53 F.R.D. 606, 607 (S.D.N.Y. 1971).

34 FED. R. CIV. P. 23.

35 Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80, 114 (1968).

36 FED. R. CIV. P. 23.

37 *Id.* at 23(a).

38 *Id.* at 23(b)(3) (A)-(D).

action is maintainable as soon as practicable³⁹ and, in the case of (b) (3) actions, direct that the best notice practicable under the circumstances be made to the class, including individual notice to all members identified by reasonable effort.⁴⁰ The court is given broad powers in the conduct of class actions to determine procedures for the adjudication of the controversy and the protection of absent class members.⁴¹

In its 1971 *Annual Report to Congress* concerning the Truth-in-Lending Act, the Federal Reserve Board noted that of the 71 civil actions filed under section 130 of the Act,⁴² 49 of these cases were class actions for damages.⁴³ Several courts have viewed class actions as applicable in these suits,⁴⁴ but as of this writing the author has failed to discover a class action suit in which the statutory minimum of \$100 has been awarded. These class actions have resulted in decisions for the defendant,⁴⁵ been settled between the parties,⁴⁶ or not yet reached a decision as to liability under the Truth-in-Lending Act.⁴⁷ These cases, and other judicial indications,⁴⁸ exhibit a willingness on the part of some judges to allow class actions under the Act. This willingness may in the near future produce an example of the extensive liability which may be imposed under the Act due to the minimum recovery of \$100. An example of possibly excessive liability is seen in *Katz v. Carte Blanche*, where the class consists of over 600,000 holders of credit cards issued by the defendant, who allegedly failed to make required Truth-in-Lending disclosures to the card holders. For this non-compliance, *Carte Blanche* may find itself liable for \$60,000,000.⁴⁹ This is

39 *Id.* at 23(c)(1).

40 *Id.* at 23(c)(2).

41 *Id.* at 23(d).

42 15 U.S.C. § 1640 (1970).

43 ANNUAL REPORT, *supra* note 32, at 9.

44 *Joseph v. Norman's Health Club, Inc.*, 336 F. Supp. 307 (E.D. Mo. 1971); *Katz v. Carte Blanche*, 53 F.R.D. 539 (W.D. Pa. 1971); *Berkman v. Westinghouse Electric Corp.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,270 (No. 69 C 2056, N.D. Ill., Oct. 22, 1971); *Richardson v. Time Premium Co.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,272 (No. 70-1814, S.D. Fla., Sept. 14, 1971); *Smith v. International Magazine Serv. of Mid Atlanta, Inc.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,249 (No. 71-16-F, N.D. W. Va., Oct. 29, 1971); *Martin and Alexander v. Family Publications Serv., Inc.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,267 (No. 5829, D. Vt., June 30, 1970).

45 *Richardson v. Time Premium Co.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,272 (No. 70-1814, S.D. Fla., Sept. 14, 1971).

46 *Berkman v. Westinghouse Electric Corp.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,270 (No. 69c 2056, N.D. Ill., Oct. 22, 1971).

47 *Smith v. International Magazine Serv. of Mid Atlanta, Inc.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,249 (No. 71-16-F, N.D. W. Va., Oct. 29, 1971); *Martin and Alexander v. Family Publications Serv., Inc.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,267 (No. 5829, D. Vt., June 30, 1970); *Katz v. Carte Blanche*, 53 F.R.D. 539 (W.D. Pa. 1971); *Joseph v. Norman's Health Club, Inc.*, 336 F. Supp. 307 (E.D. Mo. 1971).

48 The statement is from a letter from Judge Soloman, District Court of Oregon, to Senator Magnuson and entered in the Congressional Record. 117 CONG. REC. S1944 (daily ed. Feb. 25, 1971):

Rule 23 of the Federal Rules of Civil Procedure gives ample authority to the trial judge to direct a flow of class actions efficiently and expeditiously and to police actual and incipient abuses of the class action mechanism. I have experienced no substantial difficulty in managing such cases. Moreover, the class action may be the only viable judicial device for the redress of substantial citizen injuries

Another letter from Judge Bazelon to Senator Magnuson reveals a similar attitude toward the class action. *See* note 71 *infra*.

49 *Katz v. Carte Blanche*, 53 F.R.D. 539 (W.D. Pa. 1971).

even more frightening to creditors due to the fact that the only errors allowed are "clerical" errors.⁵⁰

While some courts have allowed class actions under the Act, other courts have refused to allow suits to proceed as class actions.⁵¹ These rejections of the class action have been based on the discretion of the court, a strong interest in members individually controlling the litigation, the inability of plaintiffs to provide proper notice to the class, the unmanageability of the class action, and the availability to another, superior method of adjudication.

When considering the merits of a class action under 23(b)(3), one of the matters pertinent to the court's finding is the "interest of members of the class in individually controlling the prosecution of separate actions."⁵² In *Buford v. American Finance Co.*, the court believed that persons in the same situation as the plaintiff may be denied recovery because in most class actions the court must set a date by which all members who have not opted out must file an individual claim if they are to recover damages.⁵³ Here, the court felt that due to the large size of the class there was a possibility that some members would not receive actual notice of the suit and therefore would neither opt out nor file a claim, and as a result would be denied a civil remedy.⁵⁴ This reasoning, however, is questionable. The person who fails to either opt out or file a claim, due to failure of notice, is not likely to be frustrated in an attempt to bring a subsequent action. The court also failed to mention the many more persons who would be denied a recovery due to the failure of the court to permit the class action and the subsequent reluctance of these persons to bring an individual suit for a minimal recovery. This argument on the part of the court is, in the writer's opinion, an example of the extent to which courts will go to avoid the possibly excessive liability inherent in a class action.⁵⁵

Probably the most legitimate obstacle to the allowance of large class actions is the question of which party is to provide financing for the giving of adequate notice to absent members. As previously stated, most class actions are brought under Rule 23(b)(3). With this form of class action, Rule 23(c)(2) requires the court to direct the best notice practicable under the circumstances to the members of the class, "including individual notice to all members who can be identified through reasonable effort."⁵⁶ The federal district courts have

50 *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 281 (S.D.N.Y. 1971); *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1247 (N.D. Ga. 1971); *Douglas v. Beneficial Finance*, 334 F. Supp. 1166, 1178 (D. Alaska 1971).

51 *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1249 (N.D. Ga. 1971); *Allerton v. Century Credit Corp.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,271 (No. 70-1614-Civ-PF, S.D. Fla., April 12, 1971); *Mourning v. Family Publications Services, Inc.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,632 (No. 70-559-Civ-WM, S.D. Fla., Nov. 27, 1970).

52 FED. R. CIV. P. 23(b)(3).

53 *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1249 (N.D. Ga. 1971).

54 *Id.* at 1250.

55 *Supra* note 3.

56 FED. R. CIV. P. 23(c)(2):

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any

been inconsistent in their interpretation of when personal notice must be made,⁵⁷ but the mailing of personal notice to those members of the class whose names and addresses are easily obtainable may be inescapable under due process requirements.⁵⁸ In Truth-in-Lending violations, identification of class members is generally readily achieved by an examination of the creditor's records, and, consequently, personal notice would seem indispensable. The expense of personal notice is easily seen when a class numbers 100,000 and the cost for postage alone is \$8,000. Logically, the financial and physical burden of providing notice should fall on the plaintiff as a requirement of maintaining a class action.⁵⁹ Some courts have held that the task of furnishing notice must rest solely upon the representative party when he is the plaintiff, and if financial considerations prevent him from furnishing notice which complies with both Rule 23 and due process, the dismissal of the suit must follow.⁶⁰ Courts in general have been unwilling to assume the financial responsibility for providing notice.⁶¹

Other courts have suggested that in class actions where the representative plaintiffs are unable to finance proper notice, the defendant may be called upon to share the burden of providing it.⁶² This seems reasonable in the case where the defendant need only include such notice in his next regular mailing to customers, many of whom may already be receiving monthly statements. The decision to initially allocate a share of the notice expense to the defendant is usually arrived at after a preliminary hearing on the merits to assess the likelihood of success by the plaintiffs.⁶³ The courts allowing such procedure have attempted to balance the purpose of Rule 23, which is to allow class actions where individual parties might be unable to afford private litigation, and the possible harassment of corporate defendants by the instigation of frivolous class actions. The preliminary hearing procedure has been rejected for a variety of reasons: (1) as illusory in its attempt to avoid strike suits;⁶⁴ (2) because such a preliminary "hearing would be a fact-finding procedure that would deprive the plaintiff and the class of the right to a jury trial";⁶⁵ and, (3) because "the new rule [Federal Rule of Civil Procedure 23] does not indicate that the merits are

member who does not request exclusion may, if he desires, enter an appearance through his counsel.

57 Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 267 (S.D.N.Y. 1971); compare Weiss v. Tenney Corporation, 47 F.R.D. 283, 294 (S.D.N.Y. 1971); Buford v. American Finance Co., 333 F. Supp. 1243, 1249 (N.D. Ga. 1971). See Note, *Class Actions Under Federal Rule 23(b)(3) — The Notice Requirement*, 29 Md. L. Rev. 139 (1969).

58 Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 318 (1950); Schroeder v. City of New York, 371 U.S. 208, 213 (1962); Richland v. Cheatham, 272 F. Supp. 148, 156 (S.D.N.Y. 1967).

59 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55, at 1154 (2d ed. 1969); Kaplan, *Continuing Work Of The Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 398 n.157 (1967).

60 Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 570 (2d Cir. 1968); Buford v. American Finance Co., 333 F. Supp. 1243, 1250 (N.D. Ga. 1971).

61 Buford v. American Finance Co., 333 F. Supp. 1243, 1250 (N.D. Ga. 1971).

62 Herbst v. Able, 47 F.R.D. 11, 22 (S.D.N.Y. 1969); Dolgow v. Anderson 43 F.R.D. 472, 499 (E.D.N.Y. 1968); Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 272 (S.D.N.Y. 1971); Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y. 1969); Bragalini v. Biblowitz, 13 F. R. Serv. 2d 23b.3, Case 8, p. 635 (S.D.N.Y. 1969).

63 Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 272 (S.D.N.Y. 1971); Dolgow v. Anderson, 43 F.R.D. 472, 500-01 (E.D.N.Y. 1968).

64 Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y. 1969).

65 Mersay v. First Republic Corporation of America, 43 F.R.D. 465, 469 (S.D.N.Y. 1968).

relevant [in allowing a representative suit], and it specifically requires the court to make an order concerning the nature of the action '[a]s soon as practicable after the commencement of an action brought as a class action.'⁶⁶

In summarizing the problems surrounding the notice requirements of Rule 23(c)(2) for class actions under 23(b)(3), very few general conclusions can be drawn. The decisions as to whether personal notice must be mailed to absent members and which party is to bear the expense of whatever type of notice is required are in the discretion of the court, and to date there has been little consistency among the courts on these matters. These discrepancies undoubtedly lead to forum shopping in an attempt to plead the case before a receptive court.

Unmanageability is another barrier to the successful maintenance of a class action. Consideration of "the difficulties likely to be encountered in the management of a class action" under Rule 23(b)(3) is mandated by the Rule itself.⁶⁷ This is not a universally incurred problem and many suits present few problems as to management; but significant sources of difficulty in administering an action arise from the size of the class, the potential participation of large numbers of class members, and the court's inability to compute damages and apportion relief in a systematic way.⁶⁸ The trend, however, appears to be away from the prohibition of class actions because of problems of management. Mere administrative problems of a class action, short of impossibilities, cannot justify rejection of a class suit,⁶⁹ as the courts will rely upon "the ingenuity and aid of counsel to solve complex problems . . ."⁷⁰ of management in order to keep the courts open to citizens with just and proper claims.⁷¹

In addition to a finding that common questions of law and fact predominate over individual questions, the court must also find the class action "superior to other available methods for the *fair* [emphasis added] and efficient adjudication of the controversy."⁷² In deciding if the class action is the "superior" method, Professor James Moore has outlined the primary considerations: (1) whether it will be worthwhile for the court and counsel to spend the necessary time to provide effective methods for the disposition of all the claims in a class action; and, (2) "whether it would be just to do so even if it would be convenient."⁷³ The second consideration appears especially appropriate in Truth-in-Lending class actions where the recovery may be completely disproportionate to actual damages, rendering the class action unjust even though convenient. The deter-

66 *Fogel v. Wolfgang*, 47 F.R.D. 213, 215 n.4 (S.D.N.Y. 1969).

67 FED. R. CIV. P. 23(b)(3)(D).

68 J. MOORE, *supra* note 59, ¶ 23.45, at 891.

69 *Id.* at 893.

70 *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398, 404 (C.D. Cal. 1970).

71 *Id.*; *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 264 (S.D.N.Y. 1971); *see* note 48 *supra*, concerning statement of Judge Soloman. In a letter to Senator Magnuson, Judge Bazelon expressed the following opinion as to the manageability of consumer class actions:

As you noted in your letter, there is some thought that consumer class actions are unmanageable and would create a flood of litigation in the federal courts. I am not aware that there is any basis for this view. Experience demonstrates that class actions can be handled expeditiously, without unduly burdening the judicial system. 117 CONG. REC. S1944 (daily ed. Feb. 25, 1971).

72 FED. R. CIV. P. 23(b)(3); J. MOORE, *supra* note 59, ¶ 23.45, at 801.

73 J. MOORE, *supra* note 59, ¶ 23.45(3), at 801-02.

mination of the superior method of adjudication is one "in which the court is invited to exercise its discretion."⁷⁴ An example is *Hunt v. Edmunds*, a welfare case, where the court in exercising its discretion denied class action status without mention of the four pertinent findings suggested by the Rule⁷⁵ in considering 23(b)(3) class actions.⁷⁶ Instead the opinion merely states that "[t]he court has misgivings as to the propriety of such a course, and exercises its prerogative under Rule 23(c) to deny the request."⁷⁷ In a direct application of the class action to a Truth-in-Lending violation, Judge Edenfield in the *Buford* opinion expressed his concern for possible inequities present in class actions which seek monetary relief.⁷⁸ He went on to say:

The class action is supposed to "achieve economics of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other *undesirable results*." [emphasis added] Advisory Committee's Notes, [39 F.R.D. 69] 102-103 (1966). Today, however, many claims which simply did not exist have been brought to life by our courts through the judicial act of allowing a class action to be maintained. Although some courts say these claims are not brought because plaintiffs believe the potential recovery would be too small to justify the time and expense of litigation, the plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an "*undesirable result*" [emphasis added] which cannot be tolerated. Until otherwise directed this court, for one, intends to carefully scrutinize every action in which plaintiffs seek monetary relief and wish to represent a class of similarly situated persons to determine if all the requirements of Rule 23 are fully satisfied, and it will not hesitate to exercise whatever discretion is granted by the Rule in such matters.⁷⁹

It is submitted that Judge Edenfield is entirely correct in his interpretation of the purposes of Rule 23 and the likelihood of the "*undesirable result*" of solicitation of claims. It is further submitted that the possible gross disparity between damages and statutory relief in a class action is neither a *desirable* nor a *fair* adjudication of the controversy. Such a disparity would be contrary to the required finding of Rule 23(b)(3) that a "class action is superior to other available methods for the *fair* [emphasis added] and efficient adjudication of the controversy" and to the Advisory Committee's prohibition against incurring *undesirable* results.⁸⁰

As has been exhibited, the success of class actions in the federal courts is subject to the willingness of individual courts to solve the mechanical and equitable problems which will arise. This willingness varies considerably from one court to another.

74 *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1250 (N.D. Ga. 1971); *accord*, *Alameda Oil Company v. Ideal Basic Industries, Inc.*, 326 F. Supp. 98, 105 (D. Colo. 1971); *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969).

75 Fed. R. Civ. P. 23(b)(3)(A)-(D).

76 328 F. Supp. 468, 474 (D. Minn. 1971).

77 *Id.*

78 *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1251 (N.D. Ga. 1971).

79 *Id.*

80 Amendments to Rules of Civil Procedure, Advisory Committee's Notes, 39 F.R.D. 69, 102-03 (1966) [hereinafter cited as Advisory Committee's Notes].

The problem areas presented in the foregoing material are not intended as exhaustive of possible barriers to Rule 23(b)(3) class actions, but are merely those most common to representative suits under the Truth-in-Lending Act.

B. Class Actions in State Courts

Class actions for Truth-in-Lending violations will, as a rule, be received more hospitably in the federal courts under Rule 23 than in most state courts,⁸¹ with the result that most plaintiffs will take advantage of the federal district court jurisdiction granted in the Act.⁸² While representative suits for equitable relief are maintainable almost everywhere,⁸³ consumer class actions for monetary relief meet with obstacles in most states.⁸⁴ Truth-in-Lending class actions appear to be impossible in New York courts.⁸⁵ This is especially true after the recent decision dismissing a class action for recovery of the statutory penalty for a violation of the New York Retail Installment Sales Act⁸⁶ which prohibits the use of less than 8-point type on certain printed parts of installment contracts.⁸⁷ The court held that there was no unity of interest among the members, following precedent which barred class actions where the claims arose out of separate transactions even though adjudication of the separate wrongs required the same factual determination.⁸⁸

Although the rest of the states do not take as restrictive a view as New York, California is the only state in which the consumer class action has met with any significant success.⁸⁹ In *Daar v. Yellow Cab Company*,⁹⁰ the California Supreme Court, in allowing a taxicab customer to recover excessive charges on behalf of other customers, held that to sustain a class action there must be: (1) an ascertainable class, and (2) "a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented."⁹¹ In a literal interpretation of what is needed to fulfill the requirements, the court emphasized the factors of necessity and concern, noting that if the class action were denied the consumers would be without a remedy and the defendant would be allowed to retain the benefits from its alleged wrongs.⁹² More recently, California again displayed its willingness to entertain class actions by upholding a class action in consumer fraud where the subjective elements of fraud were the subject of representative proof.⁹³ In these decisions, California has demonstrated

81 Dole, *supra* note 35, at 114.

82 15 U.S.C. § 1640(e) (1970).

83 Dole, *supra* note 35, at 81.

84 *Id.* at 114; Tydings, *The Private Bar — Untapped Reservoir of Consumer Power*, 45 NOTRE DAME LAWYER 478, 483 (1970).

85 Dole, *supra* note 35, at 114; *see* Society Million Athena v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939).

86 N.Y. PERS. PROP. LAW § 402 (McKinney 1962).

87 Hall v. Coburn Corporation of America, 26 N.Y.2d 396, 259 N.E.2d 720 (1970).

88 *Id.* at 400, 259 N.E.2d at 721.

89 Tydings, *supra* note 84, at 483.

90 67 Cal. 2d 695, 433 P.2d 732 (1967).

91 *Id.* at 704, 433 P.2d at 739.

92 *Id.* at 715, 433 P.2d at 746.

93 Vasquez v. Superior Court of San Joaquin County, 4 Cal. 2d 800, 484 P.2d 964 (1971). *See* Comment, *Vasquez v. Superior Court of San Joaquin County: A Class Action in Consumer Fraud*, 8 CAL. WEST. L. REV. 165 (1971).

a favorable disposition to adjudication of the class controversy and appears to be equally available with the federal courts for instigation of class actions.

IV. Evaluation of the Class Action as a Fair, Efficient and Effective Means of Enforcement of the Truth-in-Lending Act

Rule 23 requires that the court find, in addition to the predominance of common questions of law or fact, that a class action is "superior to other methods for the *fair and efficient* [emphasis added] adjudication of the controversy."⁹⁴ In the Advisory Committee Notes to Rule 23(b)(3), the subdivision was said to encompass "those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, *without sacrificing procedural fairness or bringing about other undesirable results* [emphasis added]."⁹⁵ It is within these established guidelines that serious questions arise as to the validity of the class action as a fair, efficient and effective means of enforcing the Truth-In-Lending Act.

A. Fairness of the Truth-in-Lending Class Action

As previously stated, the civil penalty for violating any disclosure provisions of the Act in connection with a credit transaction is twice the finance charge but not less than \$100 nor more than \$1000.⁹⁶ The recovery is applicable even where the creditor has adopted a practice which it in good faith believes to be in compliance with the Act.⁹⁷ The only excusable noncompliance is a clerical error which occurs despite the presence of procedures to avoid such error.⁹⁸ Thus, if a nationwide creditor had made loans or issued periodic statements on forms containing a technical violation (as contrasted to one resulting in damage to the debtor) of the disclosure requirements to a million customers, it would be subject to civil penalties totaling, at the minimum, 100 million dollars. This manifest injustice is a result of providing an individual debtor with a recovery of at least \$100 plus reasonable attorney's fees.⁹⁹ This was an attempt to make it worthwhile for the individual debtor to bring an action. But as seen, the statutory recovery as a measure of damages in a class action is clearly inappropriate and unfair, and in the long run the real loser may well be the consumer due to higher costs of credit.

Another inequity could develop if the trial court were to impose the burden of notice upon the defendant prior to adjudication of the merits. As previously noted, this has been suggested by some courts as appropriate in certain in-

94 FED. R. CIV. P. 23(b)(3).

95 Advisory Committee's Notes, *supra* note 80, at 102-03.

96 15 U.S.C. § 1640(a) (1970). Text of statute at note 2 *supra*.

97 *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 281 (S.D.N.Y. 1971); *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1247 (N.D. Ga. 1971); *Douglas v. Beneficial Finance*, 334 F. Supp. 1166, 1178 (D. Alaska 1971); *contra*, *Richardson v. Time Premium Co.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,272 (No. 70-1814, S.D. Fla., Sept. 14, 1971).

98 *Id.*

99 15 U.S.C. § 1640(a)(1)(2) (1970). See text, *supra* note 2.

stances.¹⁰⁰ If this were done, the defendants in effect would be penalized prior to a decision of guilt. If, on the other hand, notice was delayed until after a decision on the merits, it would be in direct conflict to the purpose and express direction of Rule 23(c), which eliminates one-way intervention¹⁰¹ and requires a decision on whether to allow continuation as a class action as soon as practicable after commencement of the action.¹⁰²

B. *Efficiency of the Truth-in-Lending Class Action*

As was previously noted, the providing of sufficient notice can prove to be extremely expensive, possibly far in excess of any damages actually incurred. As the size of the class increases, possibly involving over a million absent parties, the problems and costs of notice, general administration, and attorney's fees become even more disproportionate to the actual damages (if any) incurred by the class.

A second factor in considering the efficiency of the class action as a means of enforcing the Act is the long delay in relief resulting from the overcrowded dockets of the federal courts.¹⁰³ This delay, combined with probably lengthy processing of the trial, reminds us of the trite but appropriate phrase: "justice delayed is justice denied."

C. *Effectiveness of the Truth-in-Lending Class Action*

In discussing the effectiveness of the class action in providing relief for consumers and in enforcing the Truth-in-Lending Act, two questions must be considered. The first is which creditors are being sued, and secondly, who are the members of the typical class action?

To the extent that the Truth-in-Lending Act has been employed to date, the defendants have most often been large corporations with the so-called "deep pocket."¹⁰⁴ It is contended that many of these class actions are not under the control of the representative, but, primarily from necessity, are rather under the control of the attorney representing the class.¹⁰⁵ It has also been submitted that many of these attorneys would not waste considerable time and effort on suits to recover from "loan sharks," pawnshops or other credit facilities known well by the inner-city resident.¹⁰⁶ The result is that defendant creditors are not selected on the basis of guilt or bad faith but rather on their ability to pay extensive damages, and marginal operators, who are quite likely to be judgment-proof in any event, are not sued. As such, the legitimate and wealthy corporation,

100 *Herbst v. Able*, 47 F.R.D. 11, 22 (S.D.N.Y. 1969); *Dolgow v. Anderson*, 43 F.R.D. 472, 499 (E.D.N.Y. 1968); *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 272 (S.D.N.Y. 1971); *Berland v. Mack*, 48 F.R.D. 121, 132 (S.D.N.Y. 1969).

101 FED. R. CIV. P. 23(c)(3).

102 *Id.* at 23(c)(1).

103 117 CONG. REC. S1947 n.6 (daily ed. Feb. 25, 1971).

104 *Hearings on H. 14931 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., ser. 91-43, at 287 (1970) [hereinafter cited as *House Hearings*].

105 *Id.*

106 *Id.*

although making a good faith attempt to comply with the difficult disclosure requirements, will be the target of most suits. If the class action is allowed, the corporation is forced to consider settlement rather than face the possibly extensive statutory penalty.¹⁰⁷

While the requirement of uniform credit disclosures may have produced the desired result of competitive pricing of credit for the middle-class consumer, in poverty areas it has had little effect.¹⁰⁸ There are three basic reasons why disclosure is inapplicable to purchases by the poor.¹⁰⁹ In the first place, the average low income consumer will likely fail to read the financing agreement.¹¹⁰ Secondly, while a consumer in a poverty area may understand that he is being bilked by excessive prices and finance charges, he is equally aware that other merchants are not going to extend him the credit he needs to make the purchase.¹¹¹ Finally, a credit seller can merely increase the price of his merchandise and create his extra margin in that manner rather than by the finance charge.¹¹² The forces of competitive pricing of financing costs and of pricing of goods are of little effect in the ghetto, as its shopper is not a comparison shopper and does not have access to lower prices.¹¹³ Combined with this failure of the Truth-in-Lending Act to correct unconscionable credit practices in poverty areas is the reluctance of the private bar to investigate actions against defendants who are likely to be judgment-proof. The result is that those businesses whose credit sales techniques are the most questionable (both legally and morally), and therefore should logically be the subject of strict enforcement of the Act, are not restrained at all by the class action except in those few cases instigated by legal aid services. Instead, the excessive penalty will most often fall upon a large corporation which is doing its best to comply with the Act.¹¹⁴

Still another problem limiting the effectiveness of the class action is that the persons most often damaged by unfair credit practices are the least often included in a class suit. Those persons most damaged by unfair credit practices were described in the preceding paragraph as ghetto residents. These persons would have had little access to the credit extended by a significant majority of the defendants in cases pending as of October, 1971. These defendants were predominantly companies such as Westinghouse, Carte Blanche and Chemical Bank.¹¹⁵ The lack of low income consumers in the courts is furthered by their "daily life [which] reveals the law as an instrument of harassment and oppres-

107 In a recent case, Westinghouse Electric Corp. settled with a class of 3,440 members for \$20 per person plus \$25,000 attorney's fees. It is not difficult to see who the real winner was in this case. *Berkman v. Westinghouse Electric Corp.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,270 (No. 69 C 2056, N.D. Ill. Oct. 22, 1971).

108 Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. Rev. 1, 5 (1969).

109 *Id.*

110 *Id.* at 5.

111 *Id.* at 6.

112 *Id.* at 7.

113 *Id.*

114 *House Hearings, supra* note 104, at 287.

115 *Berkman v. Westinghouse Electric Corp.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,270 (No. 69 C 2056, N.D. Ill., Oct. 22, 1971); *Katz v. Carte Blanche*, 53 F.R.D. 539 (W.D. Pa. 1971); *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971).

sion."¹¹⁶ Other reasons are ignorance of their legal rights, failure to file required claims, and practical difficulties in utilizing a redress mechanism which is probably a considerable distance from their home and consists of a bureaucracy normally staffed by persons of an alien culture.¹¹⁷

D. *Undesired Solicitation of Litigation*

The class action is the superior method of adjudication only so long as it does not bring about "undesirable results."¹¹⁸ A significant undesirable result of the class action is its use as a tool for "stirring up plaintiffs who may not have been aware of the violation of their rights or who thought the violations not worth bothering about . . . ,"¹¹⁹ with the driving force behind the attorneys who "stir up" these future clients being substantially economic.¹²⁰ A possible indication of solicitation of class actions can be observed upon an examination of those Truth-in-Lending class actions pending as of October, 1971, where approximately 20% of the attorneys representing a class were handling nearly 50% of the total number of cases, with a vast majority of the remaining cases being handled by free legal services. As previously noted, Judge Edenfield squarely faced this practice and described it as "clearly an 'undesirable result' which cannot be tolerated."¹²¹ The even more disturbing factor is that class actions can result in substantial legal fees for the attorney regardless of whether the action was filed in good faith. This is due to the defendants' willingness to submit to a settlement, rather than waste considerable time, effort and expense in defending the action and still having to face the possibility that it will be liable for the statutory recovery.¹²² Although the Disciplinary Rules of the Code of Professional Responsibility specifically prohibit an attorney from taking any action which "would serve merely to harass or maliciously injure another,"¹²³ without enforcement it does little to curb the strike suit.¹²⁴ But extensive harassment should be limited somewhat by the exhibited reluctance of some courts to allow class actions where the only parties likely to be benefited are the attorneys who bring them.¹²⁵

Another undesirable result may occur when the class action is used as an instrument to further an attorney's cause or make new law, rather than preserve the interests of the client.¹²⁶ Some clients may prefer to settle their claims individually without the delay of representing a class, but are forced into a class

116 Eovaldi and Gestrin, *Justice For Consumers: The Mechanisms of Redress*, 66 NW. U.L. REV. 281, 282 (1971).

117 *Id.* at 284.

118 Advisory Committee's Notes, *supra* note 80, at 102-03.

119 Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 436 (1960).

120 *Id.*; Starrs, *Continuing Complexities in the Consumer Class Action*, 49 J. URB. L. 349, 356 (1971).

121 Buford v. American Finance Co., 333 F. Supp. 1243, 1251 (N.D. Ga. 1971).

122 Starrs, *supra* note 120, at 356.

123 AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102 (1970).

124 Starrs, *supra* note 120, at 357.

125 Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 567 (2d Cir. 1968).

126 Starrs, *supra* note 120, at 357.

action by a "cause oriented" attorney (as compared to a "client oriented" attorney).¹²⁷ Once in a class action, settlement becomes unavailable without agreement by the parties and approval of the court,¹²⁸ which the "cause oriented" attorney may be reluctant to obtain.¹²⁹

V. Conclusion

The numerous problems and inequities which surround the Truth-in-Lending class action make it susceptible to dismissal by the valid exercise of judicial discretion. The statutory recovery is most inappropriate in a class action, and results in a reluctance to allow the suit to proceed as a class action due to the extensive damages which may be imposed for a "good faith" error. It is submitted that this potentially ruinous liability is the real reason behind many dismissals of class suits based allegedly on procedural difficulties. This manifest injustice, created by multiplying the minimum recovery of \$100¹³⁰ by a large class, could most easily be avoided by an amendment to the Truth-in-Lending Act. The Federal Reserve Board has recommended that the Act be amended to preclude liability where the creditor has made a "good faith" attempt to conform with the Act.¹³¹ It is contended that such an amendment would do little to solve the problems of strike suits and solicitation of litigation. The possibility of an extensive recovery and attorney's fees, upon decision or settlement, would still be present. A better amendment would be to limit the recovery in class suits to those damages actually incurred, such as was done in the Uniform Consumer Sales Practices Act, while allowing a minimal recovery, similar to that presently allowed under the Truth-in-Lending Act, for individual suits.¹³²

127 *Id.* at 357-58.

128 FED. R. CIV. P. 23(e).

129 Starrs, *supra* note 120, at 358.

130 15 U.S.C. § 1640(a) (1970). Text of statute at note 2, *supra*.

131 ANNUAL REPORT, *supra* note 32 at 18. The "good faith" provision proposed was such as is contained in the Securities and Exchange Act of 1934:

No provision of this subchapter imposing liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason. 15 U.S.C. § 77(s)(a) (1970).

132 Uniform Consumer Sales Practices Act, § 11 (Final Draft, 1970).

Section 11 [Private Remedies]:

(a) A consumer who suffers loss as a result of a violation of this Act:

(1) may recover in other than a class action actual damages or \$100, whichever is greater;

(2) may recover on behalf of himself and numerous consumers similarly situated the actual damages caused by an act or practice enumerated in Section 3(b)

(b) Whether or not a consumer is entitled to recover damages or has an adequate remedy at law, he may obtain on behalf of himself and numerous other customers similarly situated a declaratory judgment, an injunction, or other appropriate ancillary equitable relief against an act or practice which violates this Act.

(c) In an action brought under this section the court may award a reasonable attorney's fee to the prevailing party if it finds:

(1) that the consumer complaining of an act or practice which violates this Act has brought or maintained an action which he knew to be groundless; or

(2) that the supplier committed an act or practice which violates this Act.

In consumer class actions pursuant to Section 11(a)(2) any award of a reasonable attorney's fee to the consumer class shall be determined by the value of the

This would eliminate the potential disparity between liability and actual damages found within the present Act. The Uniform Act goes on to specifically allow a class action for equitable relief.¹³³ This would be effective, where damages cannot be proved or the class action for monetary relief is unmanageable, in allowing a plaintiff to individually recover the statutory minimum and also secure future compliance for the class. As in the Uniform Act, reasonable attorney's fees should be awarded to the plaintiff if the defendant violated the Act and to the defendant if the plaintiff instituted a groundless action.¹³⁴ The possible payment of defendant's legal expenses should cause the plaintiff and his attorney to think twice before initiating a groundless strike suit designed to merely harass a legitimate business. Finally, the Uniform Act specifies that in awarding reasonable legal fees the sum "shall be determined by the value of the amount of time reasonably expended by the consumer class's attorney and not by the amount of the recovery on behalf of the consumer class."¹³⁵

If the Truth-in-Lending Act were to be amended as suggested, the patent injustice resulting from the imposition of the statutory penalty in class actions and much of the temptation for unethical behavior by attorneys would be eliminated. Moreover, absent these undesirable results, it is likely that courts may be more willing to solve the procedural problems inherent in class actions and thereby allow access to the courts for those plaintiffs with just and proper claims.

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amount of time reasonably expended by the consumer class's attorney and not by the amount of the recovery on behalf of the consumer class.

133 *Id.* § 11(b).

134 *Id.* 11(c).

135 *Id.*