Class Actions Under the Truth in Lending Act

The Truth in Lending Act is a response by Congress to the many and varied methods used by creditors to state the interest rates on consumer loans. The purpose of the Act is to prescribe a uniform method of stating the interest rate on consumer loans and thereby enable consumers to compare more easily the various credit terms and to avoid the uninformed use of credit.

While the purpose of the Act was clear, the means of enforcing it were not so obvious. The Senate version of the Truth in Lending Act relied on private enforcement to effectuate the terms of the Act. It provided for jurisdiction in the federal district courts without regard to a minimum jurisdictional amount and also provided an individual with incentive to litigate: A successful plaintiff would recover statutory damages of twice the amount of the finance charge imposed in the transaction, with a minimum of $100, plus reasonable attorney's fees and court costs.

The House amended the Senate bill by providing for enforcement by the Federal Trade Commission (FTC) and other agencies largely because it feared that the small purchaser and the poor would not be able to adequately protect their rights and enforce the Act.

It also retained the $100 minimum statutory damages provision, as an incentive for enforcement by private litigation. The Truth in Lending Act thus contained both administrative and private enforce-
ment provisions, but Congress did not indicate when one or the other would be the preferred enforcement mechanism.9

The Truth in Lending Act thus emerged with a confusing scheme of enforcement, particularly regarding actions involving large numbers of people. Congress never foresaw the problem class actions would present:10 Multiplication of the individual minimum recovery of $100 by the number of members of a large class makes potential liability astronomical. Soon after the remedial provisions of the Act became effective,11 a number of plaintiffs filed class action suits seeking damages as high as a billion dollars.12

The substantive law and procedure interact in many subtle ways in other areas of the law,13 but in the case of class actions brought under the Truth in Lending Act the union of substance and procedure has given birth to the prospect of damages which might financially destroy or cripple major credit institutions. This teratological offspring of Rule 23 and the Truth in Lending Act has played a major role in the procedural decision to allow a suit to proceed as a class action, a decision usually made before a decision on the merits,14


10. There is no mention of class action recovery in any of the legislative proceedings on Truth in Lending. See Note, Class Actions Under the Truth in Lending Act, 47 Notre Dame Law. 1305, 1307 (1972).


14. Fed. R. Civ. P. 23(c)(1) requires that the determination whether the class action may be maintained be made as soon as practicable after commencement of the action.

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and it also has had a major impact on shaping the substantive Truth in Lending doctrine.

This Note examines the question of when, if ever, a class action should be allowed under the Truth in Lending Act. It analyzes the three approaches the courts have taken and the subsequent congressional response, and it explores possible solutions to the problem.

I

By the time the Truth in Lending Act's enforcement provisions were fourteen months old, at least eighteen class action suits had been filed under the Act. The courts were on the whole favorable, certifying eight class actions and denying three prior to February 1972. After Judge Frankel denied class action status in Ratner v. Chemical Bank New York Trust Company, there was a marked change in judicial attitude toward class actions under the Act. Between February 14, 1972, the date of the Ratner decision, and November 29, 1972, the date of Eovaldi v. First National Bank of Chicago, the courts denied twenty-one class actions alleging Truth in Lending violations while allowing only two.

19. S. REP. No. 278, 93d Cong., 1st Sess. 14 (1973) (erroneously stating that only one case allowed a class action).

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The plaintiff in *Ratner* alleged that Chemical Bank had violated the disclosure requirements of the Truth in Lending Act by failing to show the annual percentage rate on a Master Charge card monthly statement, even though no finance charge had yet been imposed and no interest rate had yet been applied.\(^2\) The alleged class\(^3\) was composed of 130,000 Master Charge credit card holders which multiplied Chemical Bank’s potential liability under the minimum statutory damages of $100 per person to $13 million.\(^4\)

Judge Frankel denied class action certification on three grounds\(^5\)


\(^7\) The two cases allowing the class action were Eovaldi v. First Nat’l Bank of Chicago, 57 F.R.D. 545 (N.D. Ill. 1972); Flickinger v. Horseshoe Dev. Corp., Civil No. 11-334-C-1 (S.D. Iowa, Mar. 10, 1972).

\(^8\) 329 F. Supp. at 272.

\(^9\) 329 F. Supp. at 282.

\(^10\) Judge Frankel had also submitted a motion for summary judgment, and Chemical Bank had moved to dismiss. The parties agreed to hear these motions before hearing the class action motion. Judge Frankel granted Ratner’s motion for summary judgment, 329 F. Supp. at 282, and in the subsequent hearing was faced with the problem of determining class action status.

\(^11\) 54 F.R.D. at 413.

\(^12\) Judge Frankel first denied class action certification under Rule 23(b)(1)(A) and Rule 23(b)(1)(B). A class action is maintainable under Rule 23(b)(1)(A) if the prosecution of separate actions by or against individual members of the class would create a risk of “inconsistent or varying adjudications . . . which would establish incompatible standards of conduct for the party opposing the class . . . .” At the time that Judge Frankel ruled on class action status, the Chemical Bank was in conformity with the Truth in Lending Act disclosure requirements. The bank was therefore not open to a legitimate suit for more disclosure. Since it was also unlikely that someone would or could successfully sue for less disclosure, there was no danger that the bank would be exposed to varying adjudication. There was thus no need for a class action under Rule 23(b)(1)(A). 54 F.R.D. at 415. *Contros*, Smith v. International Magazine Serv. of Mid Atlantic, Inc., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,249 (N.D. W. Va. 1971), aff’d, 483 F.2d 1401 (4th Cir. 1973); Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971).

\(^13\) Rule 23(b)(1)(B) provides that a class action is maintainable if prosecution of separate actions by individual members of the class would create a risk of 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 . . . .

In *Ratner* Judge Frankel had granted plaintiff’s motion for summary judgment on the merits prior to the determination of class action status, 54 F.R.D. at 412. Thus the only effect of denial of class action status on absent class members would be the stare decisis effect of this earlier decision, an effect not generally regarded as sufficient to warrant a Rule 23(b)(1)(B) suit. *See generally 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1772-74, 1781 (1972); 3B MOORE’S FEDERAL PRACTICE ¶ 23.31 (1974).*

However, the decision to disallow the class action would possibly affect the right of other class members to bring an action. Since the one year statute of limitations had run, 15 U.S.C.A. § 1640(e) (Supp. 1974), other class members could not bring an individual action unless they could show reliance on the pending class action as a reason for not previously filing an action. *Hunter v. Gross Bros. Furniture, Inc., Civil No. C-71-2443 (N.D. Cal., Dec. 20, 1972).*

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of which the most important was lack of "superiority" of the class action to other procedural methods for the fair and efficient adjudication of the controversy under Rule 23(b)(3).24

The court ruled first that the Act contemplated enforcement by a species of private attorney general.25 Since the validity of an action by an individual was guaranteed by the provisions for a minimum recovery of $100 plus reasonable attorney's fees, the incentive of a class action was unnecessary to enforce the Act.26

Second, the (b)(3) class action was not superior because the proposed recovery of $100 for 190,000 people would be a "horrendous, possibly annihilating punishment" for what was at most a "technical" violation.27 Speaking more broadly of Rule 23(b), Judge Frankel said that granting certification of a class action required the exercise of a "pragmatic discretion" and that the consequences of a class action in the case would be absurd.28

If the Ratner decision is confined by the fact that plaintiff did not allege actual damages for himself or for the class, the holding of the case is correct. The decision proceeds from the lack of an allegation

24. Rule 23(b)(3) imposes two requirements on the certification of a (b)(3) class. First, the court must find that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members ...." The Advisory Committee's Notes to amended Rule 23 explain that "it is only where this predominance exists that economies can be achieved by means of the class-action device." The Advisory Committee's Notes, 39 F.R.D. 69, 103 (1966). For further explanation of this requirement see 3B MOORE'S FEDERAL PRACTICE § 23.45[2] (1974); Note, Developments in the Law of Federal Class Action Litigation—Catch 22 in Rule 23, 10 HOUSTON L. REV. 337, 358 (1973).

The second requirement, "the superiority requirement," provides that the class action must be superior to other available methods for the fair and efficient adjudication of the controversy. To aid in the evaluation of these requirements the Rule also lists four factors as follows: 1) the interest of members of the class in individually controlling the action; 2) the extent and nature of any litigation concerning the controversy already commenced; 3) the desirability or undesirability of concentrating the litigation in the particular forum; 4) the difficulties of managing the class action.

The "superiority" requirement in Rule 23(b)(3) was influenced by a Weinstein article suggesting that before certifying the class the procedure should be evaluated in light of other procedural devices of joinder, jurisdiction and service, intervention, consolidation, joint trials, stays, stare decisis, summary judgment, the test case, res judicata, and collateral estoppel. Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 BUFFALO L. REV. 439, 438-48 (1960). See also Frankel, Amended Rule 23 from A Judge's Point of View, 32 A.B.A. ANTI TRUST L.J. 295, 298 (1966).

Commentators have noted that the criteria for determining the predominance of common questions and superiority are so generalized that they serve less as a judicial screen than as a yardstick of managerial power. 3B MOORE'S FEDERAL PRACTICE § 23.45[2] (1974); Note, Developments in the Law of Federal Class Action Litigation—Catch 22 in Rule 23, 10 HOUSTON L. REV. 337, 366 (1973). See also Order of Feb. 28, 1966 (with amended rules), 383 U.S. 1031-32 (1966) (Black, J., dissenting).

25. 54 F.R.D. at 413; see p. 1416 infra.
26. 54 F.R.D. at 416.
27. Id.
28. Id. at 414.
of actual damages to the conclusion that an individual action is the superior form of adjudication. The $100 minimum recovery was considered to be a sufficient incentive to encourage an individual plaintiff to litigate.29 If a person could litigate and correct the disclosure error, the class action would be unnecessary and even absurd. Ratner is also correct in not imposing the “annihilating” punishment of $13 million on Chemical Bank. In the absence of any actual damages it is difficult to envisage a set of social priorities that would justify such a draconian outcome.30

Courts subsequently applying the Ratner decision31 have failed to recognize that the lack of actual damages was necessary to Judge Frankel’s conclusion that the class action was inappropriate.32 They have transmuted the Ratner result, that a (b)(3) class action is not a “superior” procedure, into a theory about congressional intent: The Truth in Lending Act’s provision for incentives for individual litigation has been read to preclude class actions.33

Divination of congressional intent from the structure of a statutory scheme is a legitimate method of judicial reasoning.34 In the case of

32. Judge Frankel confined his decision to the “molecular purpose” of deciding the appropriateness of the class action given the facts of the case at hand. 54 F.R.D. at 413. He made clear that he was making “no sweeping pronouncements” on the propriety of all class actions under Truth in Lending. Id. Although Judge Frankel considered the lack of actual damages to be of great importance, he only mentioned the absence of damages in a footnote at the end of the opinion. 54 F.R.D. at 416 n.7.
enforcement of the Truth in Lending Act, however, the evidence is not at all clear that Congress intended to bar the use of the class action. Congressional silence does not imply congressional rejection of the class action procedure. Class actions have been extensively used without specific authorization by Congress in antitrust and securities litigation. Since class actions were a part of the existing body of law when the Truth in Lending Act was passed, one might just as easily conclude that congressional silence was an endorsement of existing procedure.

A second flaw in the reasoning that a (b)(3) class action is not a superior procedure under Truth in Lending is that class actions are necessary to the Act's enforcement scheme. The argument that the incentive for individual litigation precludes class action litigation assumes that incentive relates solely to the consumer incentive to bring an action, and disregards the creditor incentive to comply with the Act. The statutory minimum damage provision was enacted as much to induce creditor compliance as it was to provide incentives for private litigants. Private enforcement and particularly class action enforcement remain important aspects of the statutory scheme, a fact recognized by Congress in recent committee reports on pending legislation.

In addition to undercutting enforcement, use of the Rule 23(b)(3) superiority requirement to eliminate class actions under Truth in

35. See notes 161, 162 infra.
36. In other circumstances Congress has limited class actions to a situation where class members give written consent to the class representative to proceed on their behalf. Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Age Discrimination in Employment Act, 29 U.S.C.A. § 626(b) (Supp. 1974).
37. The Act as originally passed in the Senate relied completely on private enforcement to secure creditor compliance. See sources cited in note 4 supra. Even though the House version of the bill added administrative enforcement, the large number of creditors involved precluded enforcement solely by administrative agencies.

The FTC has enforcement responsibility over 95 percent of all consumer creditors. Feldman, F.T.C. Enforcement of the Truth in Lending Act—One Year Later, 26 Bus. Law. 835 (1971). In the first year Truth in Lending was in effect, the FTC instituted 19,496 investigations resulting in three final cease and desist orders. Id. at 841 n.6. Mr. Feldman, a member of the FTC's Bureau of Consumer Protection, noted with concern that private civil actions were not playing an effective role in enforcing creditor compliance. Id. at 843.

The FTC's enforcement role is also restricted by a limited budget and staff. In 1970, the estimated FTC budget allocated to enforcement of Truth in Lending was $1.700,000. Braucher, Administrative Enforcement Including Licensing, 26 Bus. Law. 907, 913 (1971).
Lending denies the Rule 23 purpose of affording relief to widespread harm. If an individual action precludes a class action under Truth in Lending, the relief afforded is first, damages awarded to the individual, and second, correction of the disclosure error. The class is restricted in the collection of damages\textsuperscript{40} and the Rule 23 purpose of affording relief to widespread harm is effectively limited to correction of the disclosure error.\textsuperscript{41} If the members of the class have suffered damages, it follows that class action recovery of those damages is warranted, or at least superior to an individual action whose only practical effect is to correct a disclosure violation.

\textit{Roth v. Community National Bank}\textsuperscript{42} is an example of a case which misinterpreted \textit{Ratner} to deny class actions status to all suits brought under the Truth in Lending Act. The \textit{Roth} court concluded that the individual incentive argument was sufficient to deny class action status where actual damages in excess of the $100 minimum were alleged for a class of 1,500 people.\textsuperscript{43} Since Truth in Lending contemplated individual litigation there was even less justification for

\textsuperscript{40} The class is restricted in the collection of damages by at least three factors: the short one year statute of limitations, 15 U.S.C. § 1640(e) (1970); the inability of the poor and uninformed to enforce their rights, see p. 1410 supra; and the improbability that large numbers of the class members will come forward on their own to litigate.

\textsuperscript{41} There is no indication that Congress intended to limit relief under Truth in Lending to correction of the disclosure error. On the contrary, there is some evidence that Congress foresaw actual damages to individuals on a class scale as a result of inadequate credit disclosure. Congress declared that the Act's purpose is to enable the consumer to more readily compare the various credit terms and "avoid the uninformed use of credit," 15 U.S.C. § 1601 (1970). There was certainly a fear that the poor were often being gouged by creditors. See note 63 supra. Congress did not limit the award to a successful plaintiff to a fixed statutory penalty. Rather, the provision for an award of twice the finance charge imposed in the transaction explicitly recognized that actual damages may exceed the minimum penalty of $100. Proof of actual damages from a disclosure failure is difficult at best. 119 CONG. REC. S14423 (daily ed. July 23, 1973) (remarks of Sen. Proxmire); see \textit{Ratner v. Chemical Bank New York Trust Co.}, 53 F.R.D. 412, 413 n.2 (S.D.N.Y. 1972). The remedy was not framed in terms of damages but in terms of the "finance charge" imposed. 15 U.S.C. § 1640(a) (1970), Congress seemed to feel that a consumer could not be damaged more than the total finance charge imposed.

A second kind of damage to the consumer was also foreseen—the cost of an inefficient credit market. The various and confusing means of stating the finance charge on credit extended were seen as precluding the consumer from selection of the cheapest credit source available to him. 113 CONG. REC. 18400 (1967) (remarks of Sen. Proxmire).

This imperfect competition for credit allowed creditors to impose higher finance charges. In this context the disclosure provisions were a way to overcome credit ignorance by educating the consumer, and thereby to induce price competition in credit. 113 CONG. REC. 18401 (1967) (remarks of Sen. Proxmire). A creditor violating the disclosure provisions would be disrupting the competition of the consumer credit marketplace and imposing a harm very similar to the harm proscribed by the antitrust laws—interference with the competitive market.

\textsuperscript{42} Civil No. C-72-1031 (N.D. Ohio, Mar. 13, 1973).

\textsuperscript{43} \textit{Id.}; accord, \textit{Pennino v. Morris Kirschman & Co.}, Civil No. 72-1339 (E.D. La., Apr. 27, 1973).
a class action where more than the minimum in damages was involved.44

Denying a class action where class members have suffered actual damages not only effectively bars relief to those individuals45 but also rewards a guilty defendant with the fruits of his wrongdoing. The total reliance on individual action to enforce rights is a step backwards to a 19th century view of a society without computers, standard forms, or mass marketing; Rule 23 is an attempt to adjust judicial machinery to a world of mass production.46 The retrogression suggested by the Ratner line of cases should not be lightly taken.

A final reason why the Rule 23(b)(3) superiority requirement should not preclude class actions alleging Truth in Lending violations is that the denial of the class action looks to only one side of the question of procedural fairness. Predominantly, the courts have echoed Ratner's fear of imposing crushing damages on defendants, and have found that the potential for large damages fails the (b)(3) superiority requirement.47 By their overriding concern for defendants, the courts have allowed fairness to defendants to override fairness to plaintiffs.48 The Advisory Committee Notes to amended Rule 23 emphasize that (b)(3) superiority is to be viewed with respect to adjudicating "the total controversy."49

In effect, denial of class action status because of the fear of large damage awards allows the potential Truth in Lending violator to limit recovery to a few individuals if the harm caused is widespread enough. Neither the need to enforce Truth in Lending nor the theory of Rule 23 would support this conclusion.

Some cases50 which deny class action status rely on a failure to meet

45. See note 40 supra.
48. Cf. 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1779, at 59 (1972); Weinstein, supra note 46, at 305.
50. Class actions under Rule 23(b)(2) have also been alleged and denied in all of the following cases: Alpert v. U.S. Indus., Inc., Civil No. 72-354-AAH (C.D. Cal., May 7, 1973); Coleman v. City Fin. Co., Inc., Civil No. 72-688-K (D. Md., Mar. 27, 1973); Eovaldi v. First Nat'l Bank of Chicago, 57 F.R.D. 545 (N.D. Ill. 1972); Alsup v. Mont-
one or all of the requirements of Rule 23(a).\textsuperscript{51} Most frequently the courts have found that the person seeking to represent the class has not met the Rule 23(a)(4) requirement that he "will fairly and adequately" protect the class interests.\textsuperscript{62} Often this inadequate representation is a result of the class representative also being the class attorney.\textsuperscript{63} The courts have been justifiably concerned with the conflict of the dual role of the class attorney and the class representative.\textsuperscript{64} Since a judgment in any class action will have res judicata effects on all members of the class,\textsuperscript{65} the adequacy of representation is particularly important.\textsuperscript{66} The obvious ethical questions, including solicitation of clients,\textsuperscript{67} warrant finding that the class representative should not be both the class attorney and the plaintiff.

Not all Rule 23(a) cases rest on such strong ground. For example, \textit{Hunter v. Gross Brothers Furniture, Inc.}\textsuperscript{58} held that none of Rule

\begin{itemize}
\item 51. Rule 23(a) provides that a suit is maintainable as a class action only if: (1) the class is so numerous that joinder of all of the members is impractical, \textit{Fed. R. Civ. P. 23(a)(1)}; \textit{3B Moore's Federal Practice} \textsuperscript{\textsection 23.05} (1974); (2) there are questions of law or fact common to the class, \textit{Fed. R. Civ. P. 23(a)(2)}; \textit{3B Moore's Federal Practice} \textsuperscript{\textsection 23.05-1} (1974); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, \textit{Fed. R. Civ. P. 23(a)(3)}; \textit{3B Moore's Federal Practice} \textsuperscript{\textsection 23.05-2} (1974); (4) the representative of the parties is able to represent fairly and adequately those in the class. \textit{Fed. R. Civ. P. 23(a)(4)}; \textit{3B Moore's Federal Practice} \textsuperscript{\textsection 23.07} (1974). \textit{See also The Advisory Committee's Notes, 39 F.R.D. 69 (1966); Note, Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23, 53 B.U. L. Rev. 406 (1973); Note, Manageability of Notice and Damage Calculation in Consumer Class Actions, 70 Mich. L. Rev. 338, 340 (1971) [hereinafter cited as Note, Manageability].


\item 53. See cases cited in note 52 supra.

\item 54. The courts have pointed to two major conflicts. The first is that if the plaintiff were required to testify, the ethical question of withdrawing as counsel would be raised. Kriger v. European Health Spa, Inc., of Milwaukee, 56 F.R.D. 104, 105 (E.D. Wis. 1972); \textit{ABA Code of Professional Responsibility}, Canon 5, EC 5-9 (1971). The second conflict is a fear that the attorney's interest in his fee will conflict with his interest as the class representative in securing relief for the class. Graybeal v. American Sav. & Loan Ass'n, 1973 Trade Cas. \textsuperscript{\textsection} 74,469, at 94086 (D.D.C., Apr. 24, 1973); \textit{ABA Code of Professional Responsibility}, Canon 5 (1971).


\item 57. \textit{ABA Code of Professional Responsibility}, Canon 2, EC 2-9 (1971); id. Canon 5.

\item 58. Civil No. C-71-2443 RHS (N.D. Cal., Dec. 20, 1972).
23(a)'s requirements had been met. Central to the reasoning was the fact that the alleged class members had not shown a great interest in the action; they seemed content "to let sleeping dogs lie." This reasoning comports with a traditional view that individuals should enforce their own rights, but it denies one of Rule 23's purposes—to protect the small and unwary claimant. The present Rule 23, by adopting an "opt out" requirement rather than an "opt in" requirement, favors including within a class those persons who show no interest in a pending suit. The legislative history of the Truth in Lending Act also expresses a concern that those people who do not enforce their rights either because of poverty or ignorance should be protected by the Act. Clearly, the "let sleeping dogs lie" rationale does not justify denial of class action status.

The courts have successfully used Rule 23's requirements to avoid the problem of astronomical class recoveries under Truth in Lending, but in doing so they have twisted the substance of Truth in Lending as well as the procedure of Rule 23. Yet the difficulty of handling class actions for alleged Truth in Lending violations is also highlighted by a second major line of cases which allow class action status.

II

A major case certifying class action status is Katz v. Carte Blanche Corp. Plaintiff alleged that Carte Blanche had not properly disclosed as part of the finance charge the annual membership dues, the late charge assessed on unpaid bills, and the charges on the

extended payment plan for airline ticket purchases. The general class of all 600,000 of defendant's credit cardholders was potentially affected. Liability under Truth in Lending's $100 per person minimum recovery totaled $60 million. In the hearing to determine if the alleged class met Rule 23(b)(3) requirements, Judge Teitelbaum reviewed alternative procedures for handling the case and found that a class action was superior to determine the issue of Carte Blanche's liability. The case was then appealed to the Third Circuit.

Over three strong dissents the Third Circuit en banc reversed the trial court on the ground that the (b)(3) superiority finding was in error, and the case was remanded. However, the court was not willing to deny relief to all of the members of the Katz class. The question of class action treatment of additional issues was left open, except that determination of the propriety of the class action would be postponed until after the decision on the merits.

65. 52 F.R.D. at 512.
66. 53 F.R.D. at 540. There is some question whether the class consisted of 600,000 or 800,000 people. Carte Blanche urged that the class was 800,000 strong making total damages $80 million. Brief for Appellant at 8, Katz v. Carte Blanche Corp., Civil No. 72-1054 (3d Cir., Mar. 15, 1974). On the other hand, Katz urged that the class would probably be much smaller, 40,000 to 60,000 people, making damages only $4 million. Brief for Appellee at 43 n.31.

This curious situation of a plaintiff alleging damages smaller than the defendant is a trial strategy. Defendant alleged a large class in the hope of making the total amount of liability sought absurd, and thereby falling within the Ratner "annihilating punishment" language. See Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972). Plaintiff alleged a small class and less damages in the hope of escaping the Ratner language.

67. In a previous hearing on the class action issue, Judge Teitelbaum decided that Katz met all of the Rule 23(a) requirements. 52 F.R.D. at 514-15.
68. Id. at 517; 53 F.R.D. at 540-41.
69. 53 F.R.D. at 543-44.
70. The trial court certified the granting of Katz' motion for determination of a class action for appeal pursuant to 28 U.S.C.A. § 1292. Id. at 547. The Third Circuit then granted Carte Blanche's petition for leave to appeal. Brief for Appellant at 11. At the first hearing the appellate court also found that the trial court could proceed with a class action to find Carte Blanche's liability, and at a later time could reexamine the class action question as to any facet of the case. 41 U.S.L.W. 2661 (3d Cir., June 12, 1973). The court then granted Carte Blanche's petition for rehearing and vacated its previous judgment. Appellant's Brief on Rehearing at 1.
72. Id. at 27.
73. Id. at 21. The specific issue left open for possible class action treatment was the business or consumer use of the credit card. Business use of credit is exempted from the Truth in Lending Act. 15 U.S.C. § 1603(1) (1970).
74. Civil No. 72-1054 at 21. The court outlined a bifurcated procedure with the non-class action issue being decided first. But see Farnum G. First, P. 23(c)(1). The court was not clear on the issue, but indicated that allegation of a class action for determination of the business or consumer use of the credit card would continue to toll the statute of limitation for the class members until the determination was made for or against the class action. This was true even though the present class action had been dismissed. Civil No. 72-1054 at 21-22.
In effect, the Third Circuit imposed the *Ratner* procedure of deciding the merits of the case before the motion for class action certification without the parties having agreed to the *Ratner* procedure.\(^7\)

The court outlined in dicta a vague procedure which allows a trial court to decide the merits before deciding the class action motion. After plaintiff has moved for class action certification and if defendant can show that its business would be harmed or disrupted by Rule 23 notice, the Third Circuit indicated that the District Court should pursue a procedural alternative to the class action absent "compelling circumstances."\(^7\)

The Third Circuit suggested a test case would be appropriate to decide *Katz*.\(^7\)

Under the test case procedure, the judge stays all but one of the suits upon the consent of all parties to be bound by the outcome of that one case.\(^7\)

The *Katz* trial court rejected a test case because the potential class members were so numerous that their express consent to be bound by the judgment in such a test case could not be obtained.\(^7\)

The appellate court answered this objection by saying that the trial court's argument was based on the doctrine of mutuality of estoppel,\(^8\) and that the Supreme Court had discredited that doctrine\(^8\) in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation.*\(^8\) However, the Supreme Court limited its objection to mutuality of estoppel in that case by two considerations. The Court did not consider the question of "offensive" use of estoppel—allowing a second plaintiff to establish liability by using "a judgment obtained by a different plaintiff in a prior suit against the same defendant."\(^8\)

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75. See note 25 supra.
76. Civil No. 72-1054 at 24.
77. *Id.* at 20-21.

Professor Moore has noted that a test case is a "quasi-class action" with the direction of the litigation being overseen by the litigants rather than the judge. The effectiveness of the test case depends upon the sufficient private power of both sides to enforce an agreement to abide by the outcome, and sufficient trial resources to insure a full hearing. The test case "cannot insure that all the group's claims will receive adequate, uniform disposition." \(^3\)B Moore's *Federal Practice* \(^2\)23.45[3], at 23-813 (1974).

79. 53 F.R.D. at 540-41. Note also that *Katz* did not involve multiple suits; other plaintiffs had not asserted individual actions.
80. The Supreme Court has defined mutuality of estoppel as a judge-made doctrine "ordaining that unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action." *Blonder-Tongue Labs., Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329-31 (1971).
81. Civil No. 72-1054 at 18-20.
82. 402 U.S. 313 (1971).
83. *Id.* at 329-30.
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The procedure outlined by the Third Circuit clearly is "offensive" use of estoppel. All members of the plaintiff class would be able to use a judgment favorable to Katz to establish liability in subsequent suits. The estoppel asserted in Blonder-Tongue was a defense to a patent holder suit for infringement after the patent had been held invalid, and the Supreme Court limited its decision to the patent question before it. The Third Circuit is clearly outside the holding of Blonder-Tongue. If the majority's mutuality of estoppel argument is in error, then the only person bound by the Katz test case is Reuben Katz.

An additional objection follows from the Third Circuit's mutuality of estoppel argument. Class members would be able to enter the litigation after a decision on the merits in their favor, but would not be bound by an unfavorable decision. This attempt to reinstate one-way intervention in (b)(3) suits is in direct contravention to Rule 23(c)(3).

As a practical matter the Third Circuit's approach may have little value. The price exacted from the defendant for obtaining a procedural alternative to the class action is high. A decision unfavorable to the defendant will be given effect in favor of the class; the statute of limitations will have been tolled in favor of the class; the defendant will not have collateral estoppel protection for a judgment in his favor; and defendant will have waived Seventh Amendment rights to a unitary trial. It would seem to be only an occasional

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84. Civil No. 72-1054 at 21-22.
85. 402 U.S. at 350.
87. Civil No. 72-1054 at 21-22.
88. One-way intervention has been defined as allowing parties to intervene after a decision on the merits favorable to them, although they would be unaffected by an unfavorable decision. The Advisory Committee's Notes, 39 F.R.D. 69, 105-06 (1966).
89. Rule 23(c)(3) provides in part: "The judgment in an action maintained as a class action under subdivision (b), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class." See 3B Moore's Federal Practice § 23.60, at 23-1201 (1974); The Advisory Committee's Notes, 39 F.R.D. 69, 105 (1966).
90. See note 74 supra; note 121 infra.
91. In effect, if Carte Blanche wins on the issue of liability, the decision in Katz will not protect it in subsequent actions by other plaintiffs. Civil No. 72-1054 at 21.
92. Id. at 21-22. There is some question as to the extent of the claimed Seventh Amendment right. The court framed the unitary trial issue as a Seventh Amendment right to have all issues of liability and damages tried before a single jury. Id. at 22. However, the Third Circuit was overruled long ago on this view of the Seventh Amendment. McKean v. Central Stamping Co., 264 F. 385 (3d Cir. 1920), overruled sub nom. Gasoline Prods. Co. v. Champlin Co., 233 U.S. 494, 499 (1911).
defendant in rare circumstances who would be willing to pay that price.

By reversing the District Court the Third Circuit joined the cases denying class action status in alleged Truth in Lending violations. However, the decision of the District Court in Katz, even though reversed, remains important not only because it is an alternative to the Ratner line of cases denying class action status, but also because it has been followed by other cases.93 The District Court in Katz essentially ignored the effect of the class action on potential Truth in Lending damages by treating the issues of class action status and liability as distinct. While the Katz approach does have the initial appeal of maintaining a distinct line between substance and procedure, Ratner correctly noted that the line is indistinct in Truth in Lending cases.94 The line of cases following the District Court in Katz may only postpone the large damages problem to another day.

Perhaps the most dangerous potential result of the Katz District Court approach is the ultimate effect the class action decision may have on the merits. The court may be less willing to impose liability because of the effect the decision would have.95 Loose and inconsistent interpretation of the substantive provisions of the Truth in Lending Act poses the danger of restoring the pre-Truth in Lending situation of varying definitions and usages of terms.96 The loss of strict uniformity of disclosure would hinder the comparison shopping by consumers that was envisaged by the Act.97

Another example of manipulation of substantive doctrine would be a narrow definition of the term “violation.” For example, if a disclosure error were made on computer-printed statements, the error in programming the computer may be defined as one error subject to one recovery under the Act, regardless of how many times the programming error is repeated in the printing and mailing of credit


94. 54 F.R.D. at 416; 3B MOORE'S FEDERAL PRACTICE ¶ 23.45[3], at 23-801 to 23-802 (1974).


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statements.98 This approach weakens the definition of "violation" and negates the deterrent effect on creditors.99

No court as yet has allowed a class so large as to destroy financially the defendant if liability were found. Indeed, the majority of cases allowing class actions have involved a rather small class.100 Of course, this does not resolve the problem of class actions under Truth in Lending; the number of members in a given plaintiff class can hardly serve as an adequate basis to decide class action status. If anything, Rule 23 is more responsive to protecting the larger class.101

The one court that has allowed a class action in the face of heavy penalties did so on the grounds that "discounting" the penalty by relying on individuals to bring actions would only deny relief to those potential plaintiffs most lacking in wealth and education.102 This is the opposite side of the Ratner coin with the court protecting plaintiff's interests to the exclusion of defendant's interests. It would seem that some sort of compromise is called for. However, as the one case attempting to achieve a balance demonstrates, a compromise does not necessarily mean a doctrinally satisfactory solution.

III

In Eovaldi v. First National Bank of Chicago,103 the court was faced with an alleged Truth in Lending disclosure violation perpetrated through a large-scale credit card system. Eovaldi alleged that the bank had failed to mail a statement to the first BankAmericard holders for April, 1971, with the result that 170,000 credit cardholders incurred an additional month's interest.104

The court found that the alleged class met Rule 23(b)(3)'s requirements, and specifically disagreed with Ratner by finding that the

98. Dole, supra note 30, at 919.
99. See p. 1416 supra.
101. See notes 24, 46 supra.
104. 57 F.R.D. at 546.
class action was "superior." Judge McMillan characterized the $100 minimum damages as punitive and noted that they possibly worked to deprive defendants of their property without due process. To overcome this difficulty he agreed to let the class action proceed if plaintiff would amend the complaint and sue only for actual damages. But, he questioned whether Eovaldi could also waive the minimum damages for the class.

In a subsequent proceeding the Bank attempted to strike Eovaldi's disclaimer of liquidated damages. The court noted that there was no controlling precedent for allowing the disclaimer but denied defendant's motion to strike. Judge McMillan ruled that if the liquidated damages were indeed unconstitutional, then plaintiff really had not waived anything. The court sidestepped the argument that waiver of minimum damages by the class representative was ineffective by defining the class Eovaldi was seeking to represent as the class consisting of only those people who also would waive the minimum damages. The judge then noted that if Rule 23(e) would allow a judge in his discretion to dismiss completely a class action, it should allow him to permit the pleading of a rational compromise short of dismissal. Finally, the court said that any error could be remedied easily by either multiplication or nullification.

Eovaldi represents an innovative attempt to retain class actions under the Truth in Lending Act, but the attempt is not without difficulty. To achieve its result Eovaldi twists the substance of Truth in Lending as well as the procedure of Rule 23. The Truth in Lending Act specifically provides that the relief "shall not be less than $100

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105. Id. at 547. In disagreeing with Ratner, Judge McMillan initially observed that the question of fairness of the punishment imposed by the Act had been decided by Congress, and that the "horrendous punishment" question was not a valid consideration under Rule 23(b)(3). He then noted that the class had 170,000 members and that larger classes had been handled by the courts. He finally observed that the most important issues in the suit were damages and attorney's fees, and that those questions were best resolved by a class action.

106. Id. at 548.

107. Id.

108. Civil No. 71-C-1654.

109. Id.

110. Id.


112. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Fed. R. Civ. P. 23(e).

113. Civil No. 71-C-1654.

114. Id. Judge McMillan may be overly optimistic in his view that any error may be easily corrected. The practical effect of the "easily correctible error" view may be the same as that created by the District Court in Katz, i.e., the difficult decision is just postponed to another day. See p. 1421 supra.
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..." There is simply no way to construe these words to permit individual recoveries of less than $100, and Rule 23's grant of discretionary authority to a court does not extend to substantive rights. Moreover, limiting the class to those who also will waive their statutory damages raises several novel problems.

One of the first matters a court will have to determine is the method of securing the waiver of damages by the class. Judge McMillan's opinion implies that the notice sent to the class will contain the waiver provision, and that a person will have to opt out of the class to avoid the waiver. In other words, an absent member of the class will waive his statutory right by doing nothing. This result is inconsistent with Rule 23(c)(2)(B) which provides that a person must affirmatively opt out of a class in order not to be included in the judgment.

The harm of this inconsistency is mitigated by the waiver of only one form of relief, the statutory minimum penalty of $100. The amended Eovaldi complaint still asks for double the amount of actual damages incurred. But, by asking the parties to prove actual damages, in effect, the Eovaldi court may deny all meaningful relief. The Truth in Lending Act does not frame relief in terms of actual damages, but in terms of the finance charge imposed in the particular transaction. The statute does not refer to actual damages because it was recognized that damages for a disclosure violation are difficult to prove. The difficulty of proving actual damages may not only discourage many persons from coming forward to allege damages, but it may also deny relief to those who attempt but do not succeed in their proof of damages.

The fear of abuse of the waiver thus becomes very real when the effect of the difficulty of proving actual damages is combined with the opt out method of obtaining waiver of statutory damages. And by doing nothing, the class members may not only lose the relief afforded by the statute, they will also be bound by the res judicata effect of the decision.

116. Civil No. 71-C-1654.
117. "[T]he judgment, whether favorable or not, will include all members who do not request exclusion . . . ." Fed. R. Civ. P. 23(c)(2)(B). See Frankel, supra note 24, at 299. See note 61 supra.
A further problem with the Eovaldi requirement of proof of actual damages is that it imposes a heavy and unnecessary burden on the court. Proof of individual damages, especially in a case of 170,000 individuals, is no easy task. If the Eovaldi complaint had asked for recovery of twice the finance charge imposed in the transaction, as contemplated by the Act, proof would be easily accessible to both the parties and the courts by means of the bank’s records.

A final concern for denial of relief by means of the Eovaldi waiver relates to the statute of limitations. A class action tolls the statute of limitations for those members of the class, named as well as unnamed.121 A person not wishing to waive his statutory damages who thus disqualifies himself from the class might also lose the protection of the tolled statute of limitations. This is particularly important in Truth in Lending suits because the statute of limitations is one year122 from the date of the extension of the credit.123

The Eovaldi approach to allowing a class action demonstrates the problem Truth in Lending has posed for the courts. The compromise retains most of the essential provisions of both Truth in Lending and Rule 23, but distorts both to achieve the result. The inability of the courts to resolve the problem has returned the issue to Congress.

IV

The 1971 Report to Congress on Truth in Lending by the Board of Governors of the Federal Reserve System124 called to Congress’ attention, apparently for the first time, the catastrophic results of the interaction of class action law with the Truth in Lending Act.125 Just a few months after receiving the report from the Board of Governors, the Senate passed a bill amending the Truth in Lending Act to place a ceiling on the damages recoverable in a class action.126 The bill provided for recovery of actual damages for the class and an additional award not to exceed $100,000.127 The Senate bill died in a House committee.128

A similar bill, S. 2101, was introduced in the 93d Congress.129 The

124. FRB, supra note 38.
127. Id.
new bill again passed the Senate, and is currently before the House Banking and Commerce Committee. S. 2101 amends § 1640 of the Truth in Lending Act to allow for actual damages. In an individual action the amendment provides an additional award of twice the amount of the finance charge imposed in the transactions with a minimum award of $100 and maximum award of $1000. In a class action actual damages may also be recovered, but there is no minimum individual recovery. While not required to do so, the court may also grant an additional award with the total recovery not to exceed the lesser of $100,000 or one percent of the net worth of the creditor. The amended section would still allow court costs and attorney’s fees for successful plaintiffs. To help determine the amount of the additional award in a class action, the court is to consider five factors: the amount of 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.

Two major concerns were expressed by the Senate in its report and floor debates on this amendment. First, the Senate took note of the trend away from class actions after Ratner and the need for potential class action liability to encourage voluntary creditor compliance. The Senate considered individual actions an insufficient deterrent to large creditors, and so imposed a $100,000 or one percent of net worth ceiling to provide sufficient deterrence without financially destroying the creditor.

A second concern of the Senate was that after Ratner consumers were not receiving much relief because of the courts’ reluctance to allow class actions with their unreasonably high damages. The ceil-

133. Id. § 208(a)(4).
134. Id. § 208(a).
136. 118 Cong. Rec. S6911 (daily ed. Apr. 27, 1972) (remarks of Sen. Moss); 119 Cong. Rec. S14420 (daily ed. July 23, 1973). The Senate rejected an amendment which would have allowed a heavier penalty for violating Truth in Lending. In the case of a class action it would have placed a ceiling of $50,000 or 1 percent of the creditor’s net worth, whichever was greater. In effect, the amendment would have placed a ceiling of 1 percent of the creditor’s net worth, while the bill placed a ceiling of $100,000. 119 Cong. Rec. S14424 (daily ed. July 23, 1973).
ing on damages recoverable was thus also seen as a means of extending consumer relief by making the class action feasible. The Senate explicitly rejected the alternative of abolishing class actions alleging violations of Truth in Lending.\textsuperscript{138}

The Senate bill not only expresses a strong policy in favor of the class actions but also removes the immediate problem the courts have faced of huge damage awards. However, the bill may ultimately discourage class actions.

Under S. 2101 the court may award class action litigants actual damages, court costs and attorney's fees, plus an award not to exceed $100,000 or one percent of the creditor's net worth. The first problem with the legislation is the difficulty of proving actual damages. Actual damages may be impossible to prove in the situation of a disclosure violation under Truth in Lending.\textsuperscript{139} In addition S. 2101 may impose upon the court the task of hearing proof of damages for each member of the class.\textsuperscript{140} For a large class this raises serious manageability problems.\textsuperscript{141} It is suggested that the class will not receive meaningful relief on a wide scale under this section.

Further, by separating the actual damages from the "award" in the structure of the amendment, the Senate clearly suggests that additional factors should be considered by the court before allowing any additional award whatsoever.\textsuperscript{142} In the original damages section the

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\textsuperscript{138} S. REP. No. 278, 93d Cong., 1st Sess. 15 (1973).
\textsuperscript{140} See note 41 supra.
\textsuperscript{141} The Second Circuit's most recent Eisen opinion casts some doubt on the viability of the fluid class recovery method for calculating and distributing damages, and implicitly questions other damage calculation methods which eliminate the need for individual proof of claims. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1011, 1013, 1017-18 (2d Cir.). Fluid class recoveries may never be needed after the Supreme Court's decision that plaintiff must bear the cost of individual notice to all identifiable members of the class. Eisen v. Carlisle & Jacquelin (U.S. May 28, 1974), in N.Y. Times, May 29, 1974, at 1, col. 5. The cost of individual notice will probably reduce the size of the class sufficiently to make the fluid class recovery unnecessary.
\textsuperscript{142} One of the factors to be considered in determining whether to allow or disallow a Rule 23(b)(3) class action is "the difficulties likely to be encountered in the management of the class action." Fed. R. Civ. P. 23(b)(3)(D). Even if the members of the class can be identified and reached by notice, the distribution of individual damages may be so burdensome as to make the class action unmanageable. City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 71 (D.N.J. 1971). But see West Virginia v. Chas. Pfizer & Co., 514 F. Supp. 710, 721, 723-26 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971). The problem of distributing damages may be postponed until after liability is decided, or solved by subclasses and the like. See Fed. R. Civ. P. 29(c)(4); Katz v. Carte Blanche Corp., 41 U.S.L.W. 2661 (3d Cir., June 12, 1973), rev'd on rehearing en banc, Civil No. 72-1054 (3d Cir., Mar. 15, 1974); Note, Manageability, supra note 51; Note, Eisen v. Carlisle & Jacquelin: "Frankenstein Monster" Posing as a Class Action, 33 U. Pitt. L. REV. 868 (1972).
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amount recoverable was fixed. The amendment, however, draws a
distinction between actual damages and an additional penalty. Cer-
tainly the courts will require additional proof of willfulness or malice
before imposing a penalty in addition to actual damages. This will
make the successful prosecution of a civil action more difficult.\textsuperscript{143}

Finally, the courts will have difficulty determining the magnitude
of the "award." In an individual action the award is mandatory and
is the easily ascertainable figure of twice the finance charge,\textsuperscript{144}
within the stated limits. However, in a class action the award is discretionary
and the amount of the award is based upon five rather ambiguous
and inconsistent categories.\textsuperscript{145} For example, the first category of actual
damages awarded may be inconsistent with the policy of limiting total
class action liability. If the actual damages awarded are high, the
policy to limit class action liability may require the award to be rela-
tively low. In effect this may make the penalty for a serious violation
lighter than the penalty for a minor violation.

All five factors suggest a balancing of considerations but there is
no indication of the weight to be accorded to each. For example,
frequency of failure to comply and the extent to which the violation
was intentional may be balanced against the resources of the creditor,
but there is no indication of how the scales are to be tipped. The
court has before it Senate policy considerations that could go either
way. If deterrence is the primary objective, then perhaps the resources
of the creditor should be given more weight—a relatively small award
may sufficiently deter a financially strapped creditor even though the
violation was intentional. On the other hand, if consumer relief is
the primary objective the other side of the equation may be favored.

This is not to suggest that the courts will be unable to handle these
considerations. The balancing of various factors does, however, bring

\textsuperscript{143} Robertson noted that the punitive damages concept would
require the courts to find deliberate deception, gross negligence or the like, and
that this would make a civil suit more difficult to bring. 118 Cong. Rec. S6913
(daily ed. Apr. 27, 1972) (letter from J.L. Robertson to Sen. Proxmire). In response
to this criticism, the damages section, § 208, was amended to replace the words
"punitive damages" with the word "award." 118 Cong. Rec. S6914 (daily ed. Apr.
27, 1972).

While the word "award" may have removed the harsher implications of "punitive
damages," the practical effect on civil litigation remains the same. Both the structure
of § 208, which allows an award in addition to actual damages, and the concept of
an award carry the implication that additional proof beyond that required for actual
damages will be required for an award. It is not unlikely that the award will be
viewed as punitive by the courts, with the resultant effect feared by Robertson.
145. See p. 1429 \textit{supra}. 
out the contrast between the ease of fixing an individual award and
the difficulty of fixing a class award. Certainly, the burden of proof
placed on named class action litigants to sustain an award is greater
than that placed on individual litigants. The combined effect of the
difficulty of proving actual damages and the additional burden of
justifying any additional award may be enough to deny effectiveness
to the class action remedy.

Even if the class is able to surmount these difficulties, several prob-
lems remain unanswered concerning the distribution of the award.
For example, only those who have successfully proved actual damages
may receive part of the award, or it may be divided among all mem-
ers of the class irrespective of their ability to prove actual damages.
The award could be divided either equally or pro rata according
to a factor assessing the harm done. If the class is large, as in Katz,
the cost of distribution to each person might cost more than each
person would be entitled to receive.\textsuperscript{146} The class may be so large that
even the maximum award of $100,000 would not be sufficient to
confer any benefit on the class members, or even satisfy their claims
for actual damages.\textsuperscript{147} If the award fund is not practically distribut-
able, a court will then be faced with the question of its use or ulti-
mate disposition.

V

The best way to solve the current problem of class actions under
Truth in Lending would be to amend Section 1640(a).\textsuperscript{148} Two

\textsuperscript{146} If, for example, a court had before it a class of 800,000, the $100,000 divided
equally would entitle each person to a 12.5\textcent; award. The cost of first class mail alone
would amount to 10\textcent; per person.

\textsuperscript{147} The class members could be denied any real benefits in at least two ways.
First, the class could be so numerous that the $100,000 award would allow only a
negligible amount per person. See note 146 \textit{supra}. Second, the larger the class the
smaller the amounts of actual damages recoverable. A class of 10,000 people can re-
cover a maximum of $10 per person. There are two additional limitations to the
above discussion. First, the limit of 1 percent of the creditor's net worth may force
a recovery much smaller than $100,000. Second, the cost of notice to the plaintiff
class will also be deducted from the recovery making the amount distributable even

\textsuperscript{148} A suggested amendment to § 1640(a) is (amendment in italics):
(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 $1000;

\textit{(A) in the case of an individual action the liability under this paragraph shall
not be less than $100 nor greater than $1000, or

\textit{(B) in the case of a class action there shall be no minimum recovery as to each
member of the class and the total recovery shall not be more than the lesser
of $100,000 or one per centum of the net worth of the creditor, Provided that if
amendments to S. 2101 would solve the problems of the bill. The amendment to § 1640(a) should retain the liquidated damages structure of § 1640(a) rather than adopt the penalty structure of S. 2101. This would avoid the problem S. 2101 creates by requiring proof of actual damages. The amendment should also retain the finance charge imposed in the transaction as the basic measure of damages. This would ease the burden on the parties of proving actual damages and ensure an effective remedy. It would greatly ease the administrative burden on the court by allowing damage calculations to be made from the defendants' business records. It would also serve a secondary purpose of facilitating settlement in that the parties would know the specific amount of potential liability should the case go to trial. Finally, the finance charge measure of damages would provide a useful yardstick for the courts to measure the superiority of Rule 23(b)(3) class action over other procedures. If the proposed recovery is too small to benefit the class members, either because the finance charge is de minimis or the class is so numerous that the $100,000 or one percent ceiling would make the individual amounts negligible,

149. It is not clear why the Senate changed the measure of damages from the finance charge to actual damages. The change could have been a response to pressure by the credit industry to leave the law as it was. The credit industry's theory is that class actions for other than actual damages were inappropriate and would become illegal. The change therefore could be a move to preserve the class action.

150. In Shields v. Valley Nat'l Bank of Ariz., 56 F.R.D. 448 (D. Ariz. 1972), the finance charge imposed in the transaction in issue was 15%. Twice the finance charge, or 26%, would not justify the time or effort spent to determine the issue. See note 152 infra.

151. See notes 146, 147 supra.
then an administrative action, an individual action, or another procedure would probably be superior. 152

As the history of the current Senate bill demonstrates, it may be some time before Congress acts on the class action problem. In fact, the Ratner line of cases denying class action status may have decreased Congress' sense of urgency to correct the problem of class actions under Truth in Lending. 153 The courts are left with the dilemma of reconciling an expressed public policy favoring class actions under Truth in Lending 154 with the minimum damages provision and resultant heavy damages.

The courts are not faced, as the Eovaldi court has demonstrated, with an impossible situation. A canon of statutory construction creates a presumption against rendering a statute ineffective, or inefficient, or reading the statute so as to cause grave public injury or inconvenience. 155 Construing § 1640(a) to allow "horrendous" damages greatly increases the inefficiency of the Act; annihilation of major credit institutions causes a grave public injury. By interpreting § 1640(a) to allow a waiver similar to that used in Eovaldi, Truth in Lending is made more efficient and the public injury is avoided.

A waiver, similar to that used in Eovaldi, is supportable on several grounds despite its troublesome doctrinal problems. First, if the mini-

152. Other procedures that should be considered when evaluating the desirability of a class action are listed in Weinstein, supra note 24, at 438-48. In the Truth in Lending situation where damages may be widespread but negligible in amount, alternative procedures to correct the disclosure violation include a private civil suit, a criminal suit, 15 U.S.C. § 1611 (1970), and enforcement by an administrative agency. 15 U.S.C. § 1607 (1970).

The problem of the cost of notice depleting the amount recoverable by the class might also enter at this stage. If, as in Ratner, the merits have been decided before the determination of class action status, then the amount of recovery minus the cost of notice may be the yardstick to measure the appropriateness of the class action. Resolution of who should bear the cost of notice is a far more difficult issue when the question arises before a decision on the merits. In Eisen v. Carlisle & Jacquelin, the Supreme Court held the plaintiff must bear the cost of individual notice to all identifiable members of the class. N.Y. Times, May 29, 1974, at 1, col. 5 (U.S. May 28, 1974).


mum damages provision as amplified by the class action deprives defendants of property without due process of law, the class members have waived nothing.

The waiver also protects the interest of the members of the class. If minimum damages are waived in favor of twice the finance charge imposed in the transaction, rather than twice the actual damages as the Eovaldi court required, the class members are assured that their interest will be protected. If the minimum damages are not waived, the class faces total denial of relief by either a Ratner rejection of the class action or a potential denial of substantive relief. If any class member chooses not to waive the minimum damages he is theoretically able to sue on his own, and if he is successful, court costs and the fees of his attorney will be paid by the defendant.

Public policy also strongly favors a solution allowing the class action to go forward. Class actions have been used to deter public wrongs and compensate widespread injuries in the antitrust laws, the securities laws, and the civil rights laws. Truth in Lending, when violated with resultant public wrong and widespread injuries, also should be enforced by class actions. Denial of class action status rewards a guilty defendant with the fruits of his wrongdoing and leaves plaintiffs uncompensated for their injuries. The effect is denial of relief to a legitimate legal claim.

The major difficulty with the statutory construction solution to the Truth in Lending class action problem is that it is blatant judicial legislation. Section 1640(a) provides that the minimum recovery “shall

157. See p. 1427, notes 135-37 supra.
158. See p. 1424 supra.
not be less than $100." The foregoing arguments have all been based on construction of the terms of a statute, and § 1640(a) does not leave room for "construction." Another canon of statutory construction provides that when the words of a statute fairly permit only one interpretation, lurking problems do not permit judicial disregard of what Congress commands. If the courts were to pay strict heed to the expressed policy favoring class actions and also to the explicit words of § 1640(a) the resulting "horrendous" damages would return the problem to Congress.

At least one additional approach remains open to the courts—the exercise of Rule 23's discretionary powers. In a class action alleging antitrust violations Judge Fullam limited potential damages by including in the class notice a requirement that class members file within a reasonable time a statement of intent to prove damages. The size of the class would be determined by the number of class members filing the statement of intent. Even though this approach abridges the Rule 23(c)(2) requirement that a class member is included in the class unless he requests exclusion, it is certainly a better alternative than total denial of relief to all class members.

Another alternative might be to return unclaimed proceeds of a settlement or judgment to the defendant. The liability of a defendant and the damages owed are determined on a class scale, achieving the Rule 23 purpose of judicial economy. The individual must then step forward to prove his claim. This lessens the defendant's liability burden to the extent claims are not pressed. Presumably an individual notified of the action and still not interested enough to press his own claim has waived his right to relief.

The difficulty with the solution lies in allowing the defendant to retain the fruits of his wrongdoing. However, Judge Lord included in the Rule 23(c)(2) notice a provision that unless damage claims were

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filed within a reasonable time, the state Attorney General, as the representative of individuals in the class not filing a claim would be authorized to expend the unclaimed damages as the court may direct.\(^\text{171}\)

However, authorizing the class representative to claim the damages and expend them for the benefit of the class would not solve the problem of class actions under Truth in Lending. The object is to reduce the damage award so as not financially to destroy a defendant. A defendant would be just as easily destroyed if the money went to the class representative as if it went to the individual class members. Returning the unclaimed proceeds of a judgment or settlement to the defendant would alleviate the burden.

There are no easy solutions available to a court by exercising its discretionary powers under Rule 23. Limiting class size by an opt in requirement, or returning unclaimed damages to the defendant, may deny relief to those least able to protect themselves legally—the poor and the uninformed. The exercise of discretionary powers may also create precedents adversely affecting Rule 23. The Third Circuit in \textit{Katz} would void Rule 23(c)(3) with its judicial reinstatement of one-way intervention in (b)(3) suits.\(^\text{172}\) The Rule 23(c)(1) requirement also was strained\(^\text{173}\) by postponing the class action determination until after a decision of the merits.\(^\text{174}\)

Conclusion

Judicial efforts to reconcile Rule 23 with Truth in Lending cases for the most part have been unsatisfactory; the modifications of both the substance of Truth in Lending and the procedure of Rule 23 have been too great. The task of modifying the substance of the Truth


\(^{172}\) \textit{Katz v. Carte Blanche Corp.}, Civil No. 72-1054 (3d Cir., Mar. 15, 1974) (slip opinion at 18-19, 21); \textit{see note 89 supra}.

\(^{173}\) \textit{Fed. R. Civ. P.} 23(c)(1) requires that the class action determination be made as soon as possible after commencement of the action. The time for determining the class action will vary from case to case. 3B Moore's \textit{Federal Practice} \textsection{23.50}, at 23-1102 (1974). However, the (c)(1) discretionary power to alter or amend an order, or to make it conditional is exercisable only before the decision on the merits. The inference is that, normally, the class action determination will be made before the decision on the merits.

in Lending Act belongs to Congress. Judicial formulation of a "new" Rule 23 specifically for Truth in Lending cases is at best a dubious undertaking. Absent a clear word from Congress, the accommodation of Rule 23 to Truth in Lending that is eventually achieved will be a second best solution, one doing the least doctrinal damage to the provisions involved. To the extent Rule 23 is accommodated to Truth in Lending, courts should be chary of applying those accommodations to other substantive areas, such as antitrust, where the problem of minimum statutory damages does not exist.