



---

6-1-1973

## Difficulty in Maintaining Truth in Lending Suits as Class Actions.

Sue M. Hall

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Civil Procedure Commons](#)

---

### Recommended Citation

Sue M. Hall, *Difficulty in Maintaining Truth in Lending Suits as Class Actions.*, 5 ST. MARY'S L.J. (1973).  
Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol5/iss2/14>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact [egoode@stmarytx.edu](mailto:egoode@stmarytx.edu), [sfowler@stmarytx.edu](mailto:sfowler@stmarytx.edu).

thwarted. The limited numbers<sup>89</sup> of employees affected by suits brought under the Act reflects both the use of enforcement techniques geared to the broader scope of the Fair Labor Standards Act<sup>90</sup> and perhaps to the lack of publicity given remedies available to women employees under the Equal Pay Act itself.

Shifting social standards require equalization of women's pay on a nationwide basis. Denying this most basic of economic rights to a major segment of the nation's labor force only perpetuates the very conditions the Equal Pay Act was supposed to overcome.

*Michael H. Bailey*

### CONSUMER CLASS ACTION—FEDERAL TRUTH IN LENDING ACT—Difficulty In Maintaining Truth in Lending Suits As Class Actions

FED. R. CIV. P. 23(b)(3); 15 U.S.C. § 1640(a),(e) (1970).

Federal Rule of Civil Procedure 23, as revised in 1966, allows any civil suit to be maintained as a class action if the requirements of the Rule are satisfied. Since suits are brought under provisions of various federal and state statutes, the decision whether or not to allow a class action necessarily involves interpretation of the Rule, the statute, and the resulting intersection of the two.

Suits under certain statutes are particularly amenable to class action.<sup>1</sup> There are also statutes which so conflict with Rule 23 that suits pursuant to them cannot be maintained.<sup>2</sup> The federal Truth in Lending Act<sup>3</sup> (here-

---

field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards for female workers and the economic and social consequences which flow from it." *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970) (citation omitted). See also Act of June 10, 1963, Pub. L. No. 88-38, § 2, 77 Stat. 56, amending 29 U.S.C. § 206 (1961) (codified at 29 U.S.C. § 206(d)(1) (1970).

89. 112,979 employees have recovered back wages in equal pay suits. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, *WOMEN IN 1972*, at 11 (1973).

90. 29 U.S.C. §§ 201-219 (1970).

---

1. Securities fraud cases appear to be quite appropriately brought as class actions. *Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). The Securities and Exchange Commission concedes that class actions appear to provide the most meaningful method by which individual investors' claims may be pursued. *Dolgow v. Anderson*, 43 F.R.D. 472, 483-84 (E.D.N.Y. 1968).

2. An example of this was illustrated in *Sims v. Parke Davis & Co.*, 334 F.

inafter referred to as "the Act") is an example of a statute in which the applicability of Rule 23 is limited. Special provisions of the Act allow a consumer to bring suit against a creditor in federal district court<sup>4</sup> and to collect costs and a minimum penalty for violations of the Act.<sup>5</sup> These provisions place restrictions upon the discretion that a district judge may exercise in granting the maintenance of a class action suit brought under the Act. If the provisions of the Truth in Lending law under which the consumer is allowed to bring suit and collect a minimum penalty are combined with a class action, the result, in most cases, is unconscionable.<sup>6</sup>

Since the provisions of Rule 23 and the Truth in Lending Act are often incompatible, the question arises as to when it is appropriate to use them in conjunction with one another. Further, what adaptations of the Act may be possible to render the two more compatible? In order to deal with these questions it is first necessary to discuss Rule 23(b)(3), the portion of the Rule under which these actions are being brought, the Truth in Lending Act itself, and problems that have arisen with the attempted union of the two.

Rule 23 in its present form was proposed by an advisory committee<sup>7</sup> and approved by the Supreme Court in 1966.<sup>8</sup> It evolved from the original Rule 23,<sup>9</sup> adopted in 1938, which was an attempt to encourage more frequent use of class actions by making them available in suits for legal remedy as well as requests for equitable relief.<sup>10</sup> Although the intent of the original Rule was commendable, in practice it fell short of its purpose.<sup>11</sup> The categories of the class actions in the original rule were phrased abstractly, in terms of the rights of the individuals involved.<sup>12</sup> For instance, the so-

---

Supp. 774 (E.D. Mich.), *aff'd*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972):

Claims for minimum wages under the Fair Labor Standards Act, however, cannot be maintained as a class action under Rule 23. That is because 29 U.S.C. § 216(b) limits the binding effects of a judgment adjudicating rights under the FLSA to persons who have filed a written consent to become parties to the suit.

*Id.* at 780.

3. 15 U.S.C. §§ 1601-1681 (1970).

4. 15 U.S.C. § 1640(e) (1970).

5. 15 U.S.C. § 1640(a) (1970).

6. In *Alsop v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972), for instance, the recovery which could have resulted from allowing the Truth in Lending suit as a class action would have totalled 10 times the net worth of the company. *Id.* at 92.

7. See Advisory Committee's Note on proposed Rule 23 at 39 F.R.D. 98 (1966).

8. Amendments to Rules of Civil Procedure, 383 U.S. 1029, 1031 (1966).

9. Fed. R. Civ. P. 23, 308 U.S. 689 (1939).

10. C. WRIGHT, FEDERAL COURTS § 72, at 306 (2d ed. 1970); Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970).

11. C. WRIGHT, FEDERAL COURTS § 72, at 307 (2d ed. 1970); Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970). For a discussion on the problems of the original rule complete with an extensive list of cases and articles, see Advisory Committee's Note, 39 F.R.D. 98 (1966).

12. Fed. R. Civ. P. 23, 308 U.S. 689 (1939).

called "true" category involved "joint, common, or secondary rights" while the "hybrid" category dealt with "several" rights related to "specific property."<sup>13</sup> The final category, termed "spurious,"<sup>14</sup> was concerned with "several" rights affected by a common question and related to common relief.<sup>15</sup>

The 1966 revision of the Rule attempted to correct some of the defects of the 1938 rule by substituting functional tests for the conceptualizations found in its predecessor and by providing more explicit guidance for the courts in handling class actions.<sup>16</sup> Although the rewritten categories are much clearer and more manageable than the originals, the Rule in its current form is still considered to be "extremely complicated."<sup>17</sup>

In its present configuration, Rule 23 provides that a suit, to be maintained as a class action, must satisfy four preliminary requirements, found in 23(a),<sup>18</sup> and one of the three subdivisions of 23(b). Subdivision 23(b)(1) provides that an action may be maintained as a class action if separate suits might result in inconsistent findings which would establish incompatible standards of conduct for the opposition or which would affect parties outside the class in such a manner that their interests would be in jeopardy. If the opposing party has acted in such a way to the class as a whole, as to justify final injunctive or declaratory relief with respect to the class as a whole, a class action is allowable under 23(b)(2).<sup>19</sup> The situations described in

13. C. WRIGHT, FEDERAL COURTS § 72, at 310 (2d ed. 1970).

14. The "spurious" class action was not a true class action, as it bound only the parties who took affirmative steps to join the suit. *Id.* at 310. A characteristic of the class action is that all members of the class are bound by the decision unless they have previously withdrawn from the suit. *Id.* at 314.

15. Fed. R. Civ. P. 23, 308 U.S. 689 (1939).

16. C. WRIGHT, FEDERAL COURTS § 72, at 307 (2d ed. 1970); Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970). For a discussion on the problems of the original

17. Proceedings of the Twenty-Ninth Annual Judicial Conference, Third Judicial Circuit of the United States, 42 F.R.D. 437, 563 (1968).

18. These prerequisites are:

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

FED. R. CIV. P. 23(a).

19. The text of 23(b)(1), (2) reads:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

23(b)(3) were not felt to necessitate class action treatment as clearly as those in the previous subdivisions, and few class actions were expected under this section.<sup>20</sup> To the amazement of many, including the authors of the revised Rule, the majority of the reported class actions have been brought and maintained under Rule 23(b)(3).<sup>21</sup> It is also under this subsection that the majority of suits pursuant to the Truth in Lending Act have been sought to be maintained.<sup>22</sup>

To allow a 23(b)(3) suit, the court must first find that the questions of law or fact common to the members of the class predominate over any questions affecting individual members. Second, the class action must be "superior" to other available methods for the fair and efficient adjudication of the controversy. The Rule lists four factors which are pertinent to a finding of "superiority":

The matters pertinent to the findings include:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.<sup>23</sup>

While the court must consider these four factors in making its determination,<sup>24</sup> they are non-exhaustive and a suit may be decided not to be "superior" for reasons outside the scope of these matters, including the peculiarities of the statute under which a violation is alleged.<sup>25</sup>

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

FED. R. CIV. P. 23(b)(1), (2).

20. Proceedings of the Twenty-Ninth Annual Judicial Conference, Third Judicial Circuit of the United States, 42 F.R.D. 437, 567 (1968).

21. Wright, *Class Actions*, 47 F.R.D. 169, 179 (1970).

22. While some plaintiffs have attempted to bring suit under 23(b)(1) or alternatively under 23(b)(3), the courts have generally found that 23(b)(3) is the more hopeful possibility. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 415 (S.D.N.Y. 1972).

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

24. The court in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) stated: "[T]he dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself." *Id.* at 563; *accord*, *Esplin v. Hirschi*, 402 F.2d 94, 98 n.7 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

25. It is agreed that "subparts (A) through (D) of Rule 23(b)(3) are only suggestive, not exhaustive, of the factors it should consider in deciding whether to allow a Rule 23(b)(3) class action." *Buford v. American Fin. Co.*, 333 F. Supp. 1243, 1250 (N.D. Ga. 1971). *accord*, *Wilcox v. Commerce Bank*, 474 F.2d 336 (10th Cir. 1973); *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972); *Rogers v. Coburn Fin. Corp.*, 54 F.R.D. 417 (N.D. Ga. 1972); *Shields v. First Nat'l*

In determining whether a class action may be or should be maintained, it is insufficient to find either that the common questions predominate or that it is "superior," but not both.<sup>26</sup> In order to deny a class action under 23(b)(3), however, it is not necessary that both aspects of the subsection be considered. The Court of Appeals for the Tenth Circuit in *Wilcox v. Commerce Bank*,<sup>27</sup> held it sufficient for the judge to find that the class action was not "superior" without concerning himself with the issue of the predominance of common questions.<sup>28</sup>

Two years subsequent to the enactment of the revised Rule 23, Congress passed the federal Truth in Lending Act.<sup>29</sup> The Act soon became the most fruitful source of consumer class actions in the federal courts.<sup>30</sup> The statute basically was designed to protect consumers by providing them with accurate credit information.<sup>31</sup> The law requires each creditor to clearly and conspicuously disclose information, such as yearly interest rates, to each person to whom credit is extended with the disclosure being made prior to the actual extension of credit so as to provide the consumer with the facts necessary to make an intelligent choice between the various sources of credit.<sup>32</sup> Any creditor who fails to disclose to a consumer any information required by the Act is liable to the consumer for the costs of the litigation, attorneys fees and a fine.<sup>33</sup>

Two portions of the Act dealing with the creditor's liability to the consumer make the penalty provisions of the Truth in Lending law appear inconsistent with the procedural advantages of the class action.<sup>34</sup> First, any

---

Bank, 56 F.R.D. 442 (D. Ariz. 1972); *Garza v. Chicago Health Clubs, Inc.*, 56 F.R.D. 548 (N.D. Ill. 1972); *Goldman v. First Nat'l Bank*, 56 F.R.D. 587 (N.D. Ill. 1972); *Kenney v. Landis Fin. Group, Inc.*, 349 F. Supp. 939 (N.D. Iowa 1972); *Kroll v. Cities Serv. Oil Co.*, 352 F. Supp. 357 (N.D. Ill. 1972); *Kruger v. European Health Spa, Inc.*, 56 F.R.D. 104 (E.D. Wis. 1972); *Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972).

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

27. 474 F.2d 336 (10th Cir. 1973).

28. As the court stated:

In denying class action status it was sufficient for the trial court to determine on an adequate record and for good reasons stated that the procedure was not superior to other procedures irrespective of whether the common issues of fact or law were predominant.

*Wilcox v. Commerce Bank*, 474 F.2d 336, 345 (10th Cir. 1973).

29. 15 U.S.C. §§ 1601-1681 (1970).

30. Starrs, *Continuing Complexities in the Consumer Class Action*, 49 J. URBAN LAW 349, 354 (1971).

31. *Bostwick v. Cohen*, 319 F. Supp. 875, 877 (N.D. Ohio 1970).

32. *Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955, 959 (N.D. Ill. 1972). The phrase used in the legislative history was to "permit the consumer to 'comparison shop' for credit." S. REP. No. 392, 90th Cong., 1st Sess. 1 (1968).

33. 15 U.S.C. § 1640(a) (1970).

34. *Wilcox v. Commerce Bank*, 474 F.2d 336, 347 (10th Cir. 1973); *Shields v. First Nat'l Bank*, 56 F.R.D. 442, 447-48 (D. Ariz. 1972); *Rogers v. Coburn Fin. Corp.*, 54 F.R.D. 417, 419 (N.D. Ga. 1972); *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

consumer to whom there has not been proper disclosure of credit information may bring suit under the Act in any U.S. district court.<sup>35</sup> Second, if the consumer's suit is successful, he is entitled to receive from the creditor not less than \$100 nor more than \$1,000, plus costs.<sup>36</sup> It is not necessary that the consumer prove damages to be entitled to the minimum penalty amount.<sup>37</sup> The accessibility of federal district courts to the consumer and the recovery possible under the Act make one purpose of the class action procedure—to facilitate a remedy for persons with limited resources—unnecessary.

There is nothing in the Truth in Lending Act which specifically prohibits suits for violations of the Act from being prosecuted under Rule 23.<sup>38</sup> The legislative history of the statute<sup>39</sup> likewise threw scant light on the subject of class action,<sup>40</sup> leaving the courts to reach their own conclusions as to the intent of Congress. The court in *Wilcox* reflected the view shared by many other courts in its statement:

If we were to hazard a reconstruction of pertinent congressional intent from the enactment of the Truth in Lending Act, it would be that a mandate for general class action treatment of all of these cases, on the one hand, or for none of these cases as class action, on the other, was not intended in view of a congressional confidence in case by case determinations by qualified and informed trial judges with a wide general discretion and specific leeway under Rule 23 itself to avoid inferior, unfair or senseless applications of it.<sup>41</sup>

In exercising their discretion, the courts in varying degrees consider seven factors as they relate to the "superiority" of the particular Truth in Lending suit to maintenance under 23(b)(3).<sup>42</sup> The first factor, considered by all of the courts,<sup>43</sup> is the size of the class. In order to justify any class action,

35. 15 U.S.C. § 1640(e) (1970).

36. 15 U.S.C. § 1640(a) (1970).

37. In order to collect the penalty for a creditor's failure to disclose, as required by the statute, "[t]here is no requirement that the plaintiff prove he himself was deceived." *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 280 (S.D.N.Y. 1971).

38. In a recent case the court stated:

[T]here is nothing in the Act itself, the Rule, or the notes of the Advisory Committee on Rules of Civil Procedure with respect to it which expressly or impliedly precludes class actions in this type of case.  
*Wilcox v. Commerce Bank*, 474 F.2d 336, 343 (10th Cir. 1973).

39. Legislative History of the Consumer Credit Protection Act, S. REP. NO. 392, 90th Cong., 2d Sess. (1968).

40. *Wilcox v. Commerce Bank*, 474 F.2d 336, 343 (10th Cir. 1973).

41. *Id.* at 344. The court in *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972), likewise refused to concede that the courts either must always or may never permit 23(b)(3) class actions to proceed under the Truth in Lending law. The court has "considerable discretion of a pragmatic nature." *Id.* at 416.

42. Although no one court has stated that there are seven factors, the factors have been identified from those cases dealing with the "superiority" of class actions in Truth in Lending suits.

43. The cases under discussion are ones which have dealt with Truth in Lending

the class must be large enough to make joinder impracticable, though it is not necessary that it be impossible.<sup>44</sup> In *Green v. Wolf Corp.*,<sup>45</sup> it was maintained that the relevant criterion to consider in deciding whether a class action is superior to other methods of adjudication is the number of people who have been injured by the alleged violation.<sup>46</sup> If the class is too large, it is possible that it will produce complications sufficient to mitigate against using a class action approach.<sup>47</sup> The court in *Katz v. Carte Blanche Corp.*,<sup>48</sup> however, followed another federal district court in concluding that even "the possible necessity for separate trials on individual issues does not bar class action"<sup>49</sup> and suggested the critical determinant to be the judicial, administrative and practical manageability of a suit as a class action.<sup>50</sup>

The size of the class determines in part the factor which makes many 23(b)(3) suits under the Act so unpalatable to the courts—the amount of the possible recovery. Faced with the prospect of having to impose a penalty of up to \$13,000,000 if the suit in which there were no proven damages were allowed to continue as a class action, the court in *Ratner v. Chemical Bank New York Trust Co.*<sup>51</sup> exercised its discretion under 23(b)(3) in denying the suit, and stated that the resulting penalty would have been "a horrendous, possibly annihilating punishment."<sup>52</sup> While the court in *Ratner* held the penalty provision of the Truth in Lending Act to be "re-

---

cases as class actions: *Wilcox v. Commerce Bank*, 474 F.2d 336 (10th Cir. 1973); *Alsop v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972); *Garza v. Chicago Health Clubs*, 56 F.R.D. 548 (N.D. Ill. 1972); *Gerlach v. Allstate Ins. Co.*, 338 F. Supp. 642 (S.D. Fla. 1972); *Goldman v. First Nat'l Bank*, 56 F.R.D. 587 (N.D. Ill. 1972); *Kenney v. Landis Fin. Group Inc.*, 349 F. Supp. 939 (N.D. Iowa 1972); *Kruger v. European Health Spa, Inc.*, 56 F.R.D. 104 (E.D. Wis. 1972); *Kroll v. Cities Serv. Oil Co.*, 352 F. Supp. 357 (N.D. Ill. 1972); *Lamar v. H & B Novelty & Loan Co.*, 55 F.R.D. 22 (D. Ore. 1972); *Rodriguez v. Family Publications Serv., Inc.*, 57 F.R.D. 189 (C.D. Cal. 1972); *Rogers v. Coburn Fin. Corp.*, 54 F.R.D. 417 (N.D. Ga. 1972); *Shields v. First Nat'l Bank*, 56 F.R.D. 442 (D. Ariz. 1972); *Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545 (N.D. Ill. 1972); *Buford v. American Fin. Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971); *Douglas v. Beneficial Fin. Co.*, 334 F. Supp. 1166 (D. Ala. 1971); *Joseph v. Norman's Health Club, Inc.*, 336 F. Supp. 307 (E.D. Mo. 1971); *Katz v. Carte Blanche Corp.*, 53 F.R.D. 539 (W.D. Pa. 1971); *Syna v. Diners Club, Inc.*, 49 F.R.D. 119 (S.D. Fla. 1970).

44. *Wallace v. Brewer*, 315 F. Supp. 431, 438 (M.D. Ala. 1970).

45. 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

46. *Id.* at 301. *Accord*, *Cannon v. Texas Gulf Sulphur Co.*, 47 F.R.D. 60, 64 (S.D.N.Y. 1969).

47. One of the factors the court in *Gerlach v. Allstate*, 338 F. Supp. 642 (S.D. Fla. 1972) used to deny a class action was that the class was so large as to be unmanageable. *Id.* at 646.

48. 53 F.R.D. 539 (W.D. Pa. 1971).

49. *Id.* at 541, *citing* *Epstein v. Weiss*, 50 F.R.D. 387 (E.D. La. 1970).

50. *Id.* at 541.

51. 54 F.R.D. 412 (S.D.N.Y. 1972).

52. *Id.* at 416. Among the courts which have echoed this statement are *Shields v. First Nat'l Bank*, 56 F.R.D. 442, 446 (D. Ariz. 1972) and *Alsop v. Montgomery Ward & Co.*, 57 F.R.D. 89, 93 (N.D. Cal. 1972), in which the recovery could have been for more than \$8,000,000,000.



medial" rather than "penal,"<sup>53</sup> in *Eovaldi v. First National Bank*,<sup>54</sup> the court stated that "the penalty provisions of the Act are punitive and unrelated to actual damages, thus perhaps depriving the defendant of property without due process."<sup>55</sup> How this conflict is finally resolved will have a significant effect upon the suits under discussion. If the penalty provision is found to be punitive and is struck down, the major deterrent to the use of class actions in Truth in Lending suits will be eliminated.

A third factor which influences the finding of superiority is the number of individual actions which could be expected to be brought if the class action was not allowed. Although obviously of less importance than earlier stated factors, one of the elements that the court in *Ratner* found pertinent was that no other member of the proposed class had evinced an interest in the lawsuit or brought a similar suit elsewhere.<sup>56</sup> If one purpose of the class action procedure is to save court time, effort and expense,<sup>57</sup> it is germane to consider whether additional individual suits would be filed if the class action was disallowed. Because the court must exercise care to protect the other members of the class, energies are expended by the court in a class action which would not be necessary in an individual suit on the same question. Since another purpose of the class action is to provide a remedy for those who, through lack of knowledge or lack of resources, would not be able to bring an individual action,<sup>58</sup> the fact that only one person brings suit becomes less important if the violation of the Act involves provable damages.

It follows then that the extent of damage, if any, inflicted by the alleged violation of the Act, is a fourth factor that the courts consider. In *Ratner* the court concluded that plaintiffs had sustained no damages at all, and consequently it was inequitable that defendants should have to pay the large penalty that would have resulted from a class action suit.<sup>59</sup> The court suggested a conceivable alternative to a class of claimants seeking the \$100 minimum, would be a class of those who could prove actual damages suing for the amount so proved.<sup>60</sup> The plaintiffs in *Eovaldi* were allowed to maintain

53. 329 F. Supp. 270, 282 (S.D.N.Y. 1971), *citing* the holding in *Bostwick v. Cohen*, 319 F. Supp. 875, 878 (N.D. Ohio 1970).

54. 57 F.R.D. 545 (N.D. Ill. 1972).

55. *Id.* at 548.

56. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972).

57. Advisory Committee's Note on Rules of Civil Procedure, Rule 23, 39 F.R.D. 98, 102 (1966).

58. *Wilcox v. Commerce Bank*, 55 F.R.D. 134, 136 (D. Kan. 1972), *aff'd*, 474 F.2d 336 (10th Cir. 1973), *citing* *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968).

59. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 413 (S.D. N.Y. 1972).

60. *Id.* at 416.

their suit as a class action for violations of the Truth in Lending Act after amending their complaint to sue for damages and attorneys fees.<sup>61</sup>

The final three factors<sup>62</sup> are subsidiary elements which have contributed to, but have not been determinative of the decisions which have found that a class action was not the superior method of adjudication under the particular set of circumstances. The Act, with its liquidated damages clause and allowance for costs and attorneys fees, is a boon for attorneys.<sup>63</sup> In *Ratner* the plaintiff recovered \$100 while the plaintiff's attorneys received \$20,000.<sup>64</sup> While motive, the fifth factor, is ordinarily outside the scope of the court's consideration, if the reason for the suit is merely to provide an attorney with income, the court should dispense with the case as quickly as possible and move to more urgent matters.

According to *Ratner*, the scheme of the Truth in Lending Act, by virtue of the provision allowing for suit to be brought by a consumer in federal district court for a violation of the Act, is to create a species of "private attorney general" to participate prominently in enforcement.<sup>65</sup> Thus, the effect the suit will have, or should have, on the violators is the sixth factor which is recognized by the courts.<sup>66</sup> Where the infraction is technical and is corrected by the time the case is heard in court, as in *Ratner* and *Wilcox*, there is little cause for using a class action to prevent future violations. If, however, the violation is flagrant, or has caused or will cause damage, and is likely to be repeated, a class action resulting in a substantial penalty may be necessary to serve as a deterrent. The court in *Wilcox* came to a similar conclusion and stated that "Creditors disregarding their responsibilities under the Act and causing damages to members of a class, however limited or extensive, should have no assurance that their accumulated responsibility cannot be enforced through this means."<sup>67</sup>

The final factor is the effect the suit will have on class actions in general or on future class actions under the Truth in Lending Act if it is allowed to proceed. The suggestion is made that class actions are not achieving the purposes for which they were designed in that they are consuming large

61. *Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545, 548 (N.D. Ill. 1972).

62. The three factors are the motive for bringing the suit as a class action, the effect the suit should have on violators and the effect the suit might have on future class actions.

63. The dissenting judge in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 571 (2d Cir. 1968) remarked that "the only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them."

64. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

65. *Ratner v. Chemical Bank*, 329 F. Supp. 270, 280 (S.D.N.Y. 1971).

66. Pertinent to the court's finding in *Ratner* was the fact that defendant had been in compliance with the statute for well over a year. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972).

67. *Wilcox v. Commerce Bank*, 474 F.2d 336, 348 (10th Cir. 1973).

amounts of court time and not really providing relief for the "little guy."<sup>68</sup> If Rule 23(b)(3) is used in situations in which it is inappropriate or perhaps even ludicrous, the Rule itself is endangered for use in those actions in which it is not only appropriate but even necessary.<sup>69</sup>

Although the discussion thus far has been generally unfavorable toward using 23(b)(3) procedure to bring claims under Truth in Lending Act, this is true only because the facts of the cases considered have not rendered these suits amenable to class action. The instances in which the courts have determined that class action would be the superior method of adjudication in actions pursuant to the Truth in Lending Act do little, however, to clarify when the Act and the Rule could be appropriately used together.<sup>70</sup> In the majority of these decisions, the courts did not even allude to the fact that there might be inconsistencies between the two methods of recovery or that the penalty which would result might be unfair under the circumstances.<sup>71</sup> There was also no reference to the fact that other courts had so decided under the facts of their respective cases. The facts of the cases in which a class action was permitted are not so different that it can be concluded that the courts considered these problems and rejected them as inapplicable. That a trial judge has discretion in such matters is clear from the decision in *Wilcox*.<sup>72</sup> The discussion contained in *Wilcox*, however, suggests that the court agreed with the reasoning of the trial court's decision and would consider it abuse of discretion to agree to a class action under similar circumstances.<sup>73</sup>

An example of a suit under Truth in Lending that would be "superior" under 23(b)(3) is a situation in which all parties have proven damages which fall between the minimum and maximum penalty amounts provided for in the Act.<sup>74</sup> There would be no inconsistencies in such a situation as the defendant would be directly responsible for the final penalty imposed upon

68. *Wilcox v. Commerce Bank*, 55 F.R.D. 134, 137 (D. Kan. 1972), *aff'd*, 474 F.2d 336 (10th Cir. 1973), *citing* Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure, American College of Trial Lawyers (March 15, 1972), at 5-6.

69. C. WRIGHT, FEDERAL COURTS § 72, at 307 (2d ed. 1970).

70. *Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545 (N.D. Ill. 1972); *Lamar v. H & B Novelty & Loan Co.*, 55 F.R.D. 22 (D. Ore. 1972); *Douglas v. Beneficial Fin. Co.*, 334 F. Supp. 1166 (D. Alas. 1971); *Joseph v. Norman's Health Club, Inc.*, 336 F. Supp. 307 (E.D. Mo. 1971); *Katz v. Carte Blanche Corp.*, 53 F.R.D. 539 (S.D. Pa. 1971).

71. *Lamar v. H & B Novelty & Loan Co.*, 55 F.R.D. 22 (D. Ore. 1972); *Douglas v. Beneficial Fin. Co.*, 334 F. Supp. 1166 (D. Alas. 1971); *Joseph v. Norman's Health Club, Inc.*, 336 F. Supp. 307 (E.D. Mo. 1971); *Katz v. Carte Blanche Corp.*, 53 F.R.D. 539 (S.D. Pa. 1971).

72. *Wilcox v. Commerce Bank*, 474 F.2d 336 (10th Cir. 1973).

73. *Id.* at 349.

74. The court in *Ratner* spoke in such a manner as to suggest that it would find such a situation a proper class action. *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416 n.7 (S.D.N.Y. 1971).

him. Another possibility would arise when a creditor has acted in such flagrant violation of the law or so obviously unconcerned about the damage being done to the consumer that the court feels the creditor deserves the penalty which will result, however harsh. These are two feasible situations for using 23(b)(3) in conjunction with the Act as it is construed now. If the courts exercise some flexibility in amending or waiving the penalty provision of the Truth in Lending Act, additional possibilities result.

In *Eovaldi* the judge, who, as earlier stated, believed the penalty provision of the Act to be punitive, allowed the plaintiffs to amend their petition to waive the penalty clause of the Act and sue for damages alone. On this basis he allowed the suit to proceed as a class action under 23(b)(3), concluding that this procedure was superior and the case a classic example of the reason for creating Rule 23.<sup>75</sup> Previously, however, a federal district court judge ruled that the penalty clause of the Act could not be waived for absent members of the class,<sup>76</sup> directly contradictory to the holding of *Eovaldi*.

In order to make adequate use of class actions in Truth in Lending suits, the courts need to assume the discretion enabling them to waive the minimum penalty clause of the Act for members of a class. There is no reason for not exercising this discretion. If the purpose of these particular provisions is to encourage private policing efforts, this can be as adequately accomplished via class action as through individual suits. Although the members of the class will be precluded from collecting the minimum penalty after the suit is decided, class members retain the privilege under Rule 23 of withdrawing from the class in the early stages of the action and filing suit as individuals. Once the courts begin to exercise discretion in waiving, or modifying, the minimum penalty provision, Truth in Lending suits will be more amenable to class action treatment and their numbers should increase.

*Sue M. Hall*

---

75. *Eovaldi v. First Nat'l Bank*, 57 F.R.D. 545, 547 (N.D. Ill. 1972).

76. *Goldman v. First Nat'l Bank*, 56 F.R.D. 587, 592 (N.D. Ill. 1972).