Truth in Lending and the Federal Class Action

Joseph A. Dworetzky

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TRUTH IN LENDING AND THE FEDERAL CLASS ACTION

A wasp settled on a snake's head and tormented it by continually stinging. The snake, maddened with the pain and not knowing how else to be revenged on its tormentor, put its head under the wheel of a wagon...

AESOP

I. INTRODUCTION

In 1974 Congress amended the Truth in Lending Act (Act), in part, to give succor to the long-suffering Truth in Lending (TIL) class action. Prior to the amendments, individual plaintiffs had coupled the statutory recovery provided by the Act with the federal class action

Author's note: Under Federal Rule of Civil Procedure 23, the term “class action” includes both plaintiff class actions and defendant class actions. Fed. R. Civ. P. 23(a). The discussion of the Truth in Lending class action in this Comment, however, focuses only upon the situation where a class of consumer plaintiffs brings suit against a single — or several — defendants. Therefore, general statements concerning class actions in this Comment are intended to refer only to plaintiff class actions and are not relevant to defendant class actions.

The Superintendent of Documents classification number (Sup. Doc. No.) has been parenthetically included in this Comment wherever the standard bluebook citation form for congressional hearings is used. See A UNIFORM SYSTEM OF CITATION Rule 13:2 (12th ed. 1976). The Sup. Doc. No., which is the cataloguing number used in many Depository Libraries, provides a convenient method for locating congressional hearings. See Benton, Developments in the Law — Legal Citation, 86 YALE L.J. 197, 200 & n.16 (1976) (suggesting that congressional hearings are ordinarily cited “inconsistently and abominably.”)


3. Section 130(a) of the Act provides that in an individual action based upon a TIL violation, the successful plaintiff may recover twice the amount of the finance charge imposed in the credit transaction, between minimum and maximum limits of $100 and $1000. 15 U.S.C. § 1640(a)(2) (A) (Supp. V 1975). In addition, the prevailing plaintiff may recover attorney's fees. Id. § 1640(a)(3). Further, by virtue of a 1974 amendment that corrected an earlier legislative oversight, the prevailing plaintiff may also recover his or her actual damages, if any. Id. § 1640(a)(1) (Supp. V 1975) (amending 15 U.S.C. § 1640(a) (1970)); see Comment, The 1974 Amendments to the Truth in Lending Act, 53 N.C.L. Rev. 1259, 1284 (1974). The provision allowing recovery of actual damages has been of limited utility to date. The problem is that in the ordinary TIL case, where a consumer is given an incorrect disclosure statement at the time the credit contract is made, it is difficult to show any actual injury. Actual damages would, of course, exist whenever the consumer bypassed an
device\(^6\) in an effort to parlay individual claims of $100 to $1000\(^6\) into towering class actions demanding as much as one billion dollars in statutory damages.\(^7\) The courts, however, resisted this effort and refused to certify TIL class actions.\(^8\) In response, the 1974 amendments limited the potential recovery in a TIL class action to the lesser of $100,000 or one percent of the net worth of the creditor.\(^9\) The passage of these amendments convinced some that the strongest argument against the TIL class action — the possibility of crippling damage awards — had been eliminated.\(^9\) However, commentators\(^10\) and courts\(^11\) were quick to point out new problems created by the interplay of the amendments and the class action provisions of rule 23 of the Federal Rules of Civil Procedure (rule 23).\(^12\) Indeed, such were the apparent difficulties with the TIL class action that in 1976 Congress opportunity to secure a better credit bargain in reliance upon the defendant's defective disclosure statement. Frequently, however, the misdisclosure does not significantly affect the consumer's ability to shop for credit. Federal Reserve Board, Truth in Lending Annual Report to Congress for the Year 1976, reprinted in INSTAL. CRED. GUIDE (CCH) No. 434, pt. II, at 10 (Jan. 28, 1977). Even where the misdisclosure might have affected the consumer's decision, it may be difficult for the consumer to show not only that other, cheaper, credit was generally available, but also that it was available to that particular consumer. For these reasons, actual damages have not been particularly important in TIL litigation to date. However, an interesting theory for assessing actual damages on a class-wide rather than individual basis was proposed in a 1974 law review article. See Note, Recent Developments in Truth in Lending Class Actions and Proposed Alternatives, 27 STAN. L. REV. 101, 110-17 (1974). See also Eovaldi v. First Nat'l Bank, 5 CONS. CRED. GUIDE (CCH) ¶ 98,419, at 87,844 (N.D. Ill. Jan. 26, 1976) (assessing $27,899 in actual damages).


5. See note 3 supra.


7. See note 39 and accompanying text infra.


further amended the damage provisions of the Act, this time increasing the maximum potential class recovery to $500,000 or one percent of the creditor's net worth.\textsuperscript{18} Despite the 1976 amendments, a staff attorney for the Senate Subcommittee on Consumer Affairs ruefully commented during the 1976 senate hearings on TIL enforcement that hopes for the TIL class action had "probably been dashed."\textsuperscript{14}

Congress has again turned to the drafting table and may ultimately make significant changes in the method of private TIL enforcement.\textsuperscript{15}

\begin{itemize}
\begin{enumerate}
\item as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter . . . with respect to any person is liable to such person in an amount equal to the sum of—
\item (A) in the case of an individual action twice the amount of any finance charge in connection with the transaction except that the liability under this subparagraph shall not be less than $100 nor greater than $1000; or
\item (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and
\item (3) in the case of any successful action to enforce the foregoing liability the costs of the action together with a reasonable attorney's fee as determined by the court.
\end{enumerate}
\item \textsuperscript{14}Letter from Ralph Rohner, Staff Attorney, Senate Subcommittee on Consumer Affairs to Senator Joseph R. Biden (Feb. 20, 1976), reprinted in \textit{Qui Tam and Federal Reserve Board Procedures: Hearing on S. 3008 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 7} (1976) (Sup. Doc. No. Y4. B22/3: F31/53) [hereinafter cited as \textit{1976 Senate Qui Tam Hearings}]. During the same hearings Senator Biden, chairperson of the Senate Subcommittee on Consumer Affairs, characterized the "track record" of the TIL class action after the 1974 amendments as "gloomy" and described the present situation as "chaos." \textit{Id.} at 2.
\item \textsuperscript{15}The following statement appears in the Senate Report accompanying the Consumer Leasing Act of 1976:
\begin{quote}
The Committee is aware of the many difficulties surrounding the use of class actions for civil penalties or punitive damages. . . . For this reason the Committee, through its Subcommittee on Consumer Affairs, intends to look at alternative private enforcement procedures such as the so-called qui tam or private attorney general action. We are hopeful that there may be workable and effective substitutes for the class action as a consumer enforcement device not only for this Act but also for other similar legislation.
\end{quote}
\end{itemize}
However, it is submitted that recent developments in the case law, when taken in combination with the 1976 amendments, suggest that the problems which have arisen under the Act are not judicially insurmountable. This Comment will explore the ill-fated history of the TIL class action both before and after the 1974 amendments, focusing in particular upon four problem areas which have hindered the certification of TIL classes: 1) whether the ceiling on class recovery prevents a TIL class action from being superior to individual suits for purposes of rule 23; 2) whether the class representative will receive a sufficient incentive to ensure that the TIL class will be fairly and adequately represented; 3) whether a single TIL class can be artifically split into a number of smaller classes, each recovering the maximum statutory damages; and 4) whether a creditor-defendant may raise counterclaims against members of the TIL class. After examining these problems, this Comment will suggest various resolutions and conclude that in spite of the above-enumerated difficulties, the TIL class action can be effectively handled by the federal courts. Further, because the decision to certify or not to certify a class action lies largely within the discretion of the trial court and may be influenced by a variety of factors external to the basic procedural requirements of rule 23, this Comment also briefly examines whether there is a need for class enforcement of the Truth in Lending Act.

II. Background

The Truth in Lending Act was designed to expand the credit consciousness of American consumers. The theory behind the Act was that if the terminology used in credit transactions was standardized, individual

be required to give notice to the United States, which would have the opportunity to participate. If the government elected not to proceed, the individual would continue the suit as in an individual action; if successful, he or she could recover up to $50,000. The recovery would then be divided between the United States and the individual litigant, with the litigant receiving a sufficient "bounty" to make the suit attractive. Fischer, supra note 10 at 842-45. A successful prosecution of the qui tam action would bar all later claims for the same violation, except those for actual damages. Id. The beauty of the qui tam suit is that the individual litigant need not send notice to members of a "class," and need not generally comply with the procedural rules surrounding the class action device.

16. The various dilemmas discussed in this Comment originally arose under the "$100,000 or one per centum of the net worth of the creditor" liability ceiling; accordingly, they are presented in the context of that ceiling. Because the dilemmas arise from the fact of a liability ceiling, rather than from the particular amount of the ceiling, it has been suggested that the amendments will have little effect in alleviating the various problems that have arisen under the 1974 amendments. Le-Valley & Walker, supra note 10, 487 n.87. Indeed, the 1976 amendments will only increase the potential liability of creditors who have a net worth in excess of $10 million, since the "one percent of net worth" formula has been retained. However, it seems likely that the 1976 amendments will enlarge the number of cases in which the plaintiff class is small enough, and the creditor large enough, so that each class member could potentially recover the same amount through class action as in an individual suit. See note 64 infra.

consumers could readily compare credit costs and would dicker for the best credit bargain.\textsuperscript{18} Credit-shopping consumers would, in turn, drive lenders into competition among themselves, lowering the cost of credit for everyone.\textsuperscript{19} The Act, and the regulations supporting it,\textsuperscript{20} therefore required creditors to disclose the cost of credit in certain uniform terminology in all credit transactions.\textsuperscript{21}

When it came to enforcing the disclosure requirements, Congress spared no remedy. Aggrieved consumers were authorized to rescind certain loan contracts if the disclosures were inadequate;\textsuperscript{22} administrative\textsuperscript{23} and criminal enforcement\textsuperscript{24} procedures were designed; and, most importantly, Congress gave aggrieved consumers a private cause of action against noncomplying creditors.\textsuperscript{25} In order to encourage private suits, which were viewed as primary mechanisms for enforcing the Act,\textsuperscript{26} successful plaintiffs were authorized to recover twice the finance charge imposed by the creditor, within limits of $100 and $1000,\textsuperscript{27} as well as

\begin{itemize}
\item \textsuperscript{18} See B. Clark & J. Fonseca, Handling Consumer Credit Cases 137-38 (1972).
\item \textsuperscript{19} Id. at 138; see Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 363 (1973).
\item \textsuperscript{20} Regulation Z, 12 C.F.R. §§ 226.1-226.1002 (1976). Regulation Z is not a single regulation, but a collection of all the regulations concerning TIL promulgated by the Federal Reserve Board (Board) pursuant to the authority conferred upon it by section 105 of the Act, 15 U.S.C. § 1604 (1970). It has been suggested that the Board's regulations have frequently exceeded the scope of the power delegated to it. See Comment, supra note 3, at 1259. But see Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1972); Ives v. W. T. Grant Co., 522 F.2d 749, 756 (2d Cir. 1975).
\item \textsuperscript{22} Section 125 of the Act, 15 U.S.C. § 1635 (1970); Regulation Z, 12 C.F.R. § 226.9 (1976). For a discussion of the question of whether rescission is inconsistent with a later damage action, see Note, Truth in Lending Act Litigation: Concurrent Recourse to Rescission and the Civil Penalty, 43 Geo. Wash. L. Rev. 840 (1975).
\item \textsuperscript{24} Section 112 of the Act, 15 U.S.C. § 1611 (1970). Criminal penalties may be imposed only for willful and knowing violations. Id.
\item \textsuperscript{26} Dole, Private Enforcement of Consumer Credit Legislation, 26 Bus. Law. 915, 920 (1971). See also Comment, supra note 17, at 926. It has recently been noted that private actions are the "chief enforcement tool" of the Act. 1976 Senate Qui Tam Hearings, supra note 14, at 8.
\end{itemize}
reasonable attorney’s fees. Although considerable controversy was engendered by the confusing medley of enforcement devices, the greatest dispute centered around a device not mentioned in the Act — the class action.

A. The Pre-1974 Class Action

The legislative history of the TIL Act makes no mention of the class action; apparently, the drafters simply failed to consider it. Nevertheless, within a short period following the passage of the Act, numerous TIL class actions were filed around the country. These actions were for the most part unsuccessful. The problem was simple enough: if, for example, each class member in a class of 30,000 individuals recovered the minimum $100 damages, the class recovery would be three million dollars, even before calculation of the attorney’s fees and actual damages. If a medium- to large-sized class recovered the maximum damages, very few creditors could absorb the loss.

It was not surprising, then, that in Ratner v. Chemical Bank New York Trust Co. (Ratner II), the United States District Court for the Southern District of New York refused to certify a class of 130,000 consumer plaintiffs. Explaining his conclusion that the proposed class action was not “superior” to other forms of recovery and thus did not satisfy the requirements of rule 23(b)(3) of the Federal Rules of Civil Procedure, Judge Frankel stated: “[T]he proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating


30. For law review commentary on the controversy surrounding the TIL class action before the 1974 amendments, see Brown, supra note 9, at 16-18; Fischer, supra note 10, at 833-38; Note, Class Actions Under the Truth-in-Lending Act, 47 Notre Dame Law. 1305, 1308-14 (1972); Note, supra note 6, at 1412-20.


33. One estimate indicates that 18 TIL class actions were filed in the first 14 months of the Act’s existence. Note, supra note 6, at 1412.

34. For cases seeking far greater recoveries, see Note, supra note 6, at 1411 n.12.


36. Id. at 416.

37. In order to satisfy the requirements of a 23(b)(3) class action, it must appear to the court that the class action “is superior to other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). For a discussion of the other requirements of a 23(b)(3) class action, see notes 48-59 and accompanying text infra.
punishment, unrelated to any damage to the purported class or to any benefit to the defendant. . . .”

During the three years following Ratner II, court after court agreed with Judge Frankel’s assessment of the situation and refused to certify TIL class actions. Indeed, as one commentator accurately observed, “Ratner II was, in a very real sense, the beginning and end of the Truth-in-Lending class action under the original version of [the Act].”

B. The 1974 Amendments

In its annual report to Congress on the Truth in Lending effort, the Federal Reserve Board (Board) recommended in 1972 that Congress amend the Act to place a ceiling on class action liability so that the rationale of Ratner II would no longer prevent the certification of TIL class actions. In 1973, during the Senate hearings on the matter, the Board explained its request, stating:

The Board believes that potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosure. . . . [The threat of class action exposure] elevates a possible Truth in Lending lawsuit from the ineffective “nuisance” category to the type of suit which has enough sting in it to insure that management will strive with diligence to achieve compliance.

Most of the discussion in the 1973 Senate hearings was devoted not to the desirability of TIL class actions, but to the appropriate limitation on liability. Ultimately, Congress decided upon a maximum liability of

38. 54 F.R.D. at 416.
39. The cases are collected in Note, supra note 6, at 1415 n.31.
40. LeValley & Walker, supra note 10, at 475. The single case to reject Ratner II’s analysis was Eovaldi v. First Nat’l Bank, 57 F.R.D. 545 (N.D. Ill. 1972). Noting that the minimum class recovery totaled $17 million, the court suggested that if the plaintiff did not waive the $100 minimum per person recovery, application of the class action rule would raise constitutional problems. Id. at 548. The court agreed, however, to certify the class on the condition that the plaintiff explore the possibility of waiving the minimum recovery. Id.
42. FEDERAL RESERVE BOARD, TRUTH IN LENDING ANNUAL REPORT TO CONGRESS FOR THE YEAR 1972, at 31 (1973).
44. LeValley & Walker, supra note 10, at 476. The choice was between: 1) the greater of $50,000 or one percent of the creditor’s net worth; and 2) the lesser of $100,000 or one percent of the creditor’s net worth. See SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, TRUTH IN LENDING ACT AMENDMENTS, S. REP. No. 278, 93d Cong., 1st Sess. 35–37 (1973) (additional views of Sens. Proxmire and Hathaway) [hereinafter cited as 1973 Senate Report].
the lesser of $100,000 or one percent of the creditor’s net worth.\textsuperscript{46} It was assumed that this ceiling would protect creditors from the crushing liabilities noted in \textit{Ratner II} and thereby free the courts to certify class actions where they were otherwise appropriate.\textsuperscript{46} As was recently noted, “Congress, in so amending [the civil liability provision], recognized that courts were not certifying class actions and that there was a need to encourage voluntary creditor compliance via potential class action liability.”\textsuperscript{47}

III. Truth in Lending and Federal Rule 23: Four Dilemmas

Shortly after the 1974 amendments were enacted, it became apparent that Congress had not resolved all of the difficulties inherent in the TIL class action.\textsuperscript{48} In order for a federal court to certify a class action, the strictures of rule 23 of the Federal Rules of Civil Procedure must be satisfied.\textsuperscript{49} Under rule 23(a) it must appear that: 1) the class is so


It should be emphasized that $100,000 or one percent of net worth was the maximum recovery. In determining the amount of the class award, section 130(a) of the Act provides that the court shall consider, \textit{inter alia}, the following factors: 1) the amount of actual damages awarded; 2) the frequency and persistence of the creditor’s failure to comply; 3) the creditor’s resources; 4) the number of persons adversely affected; and 5) the extent to which the violation was intentional. 15 U.S.C. § 1640(a) (Supp. V 1975). Some guidance as to the application of the above factors is found in the Senate report on an earlier bill to amend the Act which contained class action provisions identical to the ones in the bill that ultimately was passed:

> While the Committee expects the court will award higher sums to the extent found appropriate after considering the pertinent factors, including those listed above, a court does not have to find a violation was intentional in order to assess a meaningful penalty upon a creditor to induce compliance with the legislation.


\textsuperscript{48} See note 10 \textit{supra}.

\textsuperscript{49} Rule 23 provides in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions or 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.

(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
numerous that joinder of all members would not be practicable;\textsuperscript{50} 2) common questions of law or fact pervade the individual claims of class members;\textsuperscript{51} 3) the representative of the class presents claims typical of those of the class;\textsuperscript{52} and 4) the class representative will fairly and adequately protect the interests of the class.\textsuperscript{53} If all four preconditions appear to be satisfied, the class action will be allowed if it fits under any one of the three provisions of rule 23(b).\textsuperscript{54} While there has been some attempt to bring TIL class actions under rule 23(b)(1) or 23(b)(2),\textsuperscript{55} the main focus has been upon rule 23(b)(3).\textsuperscript{56} Under rule 23(b)(3), a class action will be allowed if: 1) the questions of law or fact that are common to the class predominate over collateral questions;\textsuperscript{57} and 2) it appears that the class action device is superior to other methods for the "fair and efficient adjudication of the controversy."\textsuperscript{58}

TIL class actions have had little difficulty satisfying the requirements of numerosity and commonality under rule 23(a), as well as the requirement that common questions predominate under 23(b).\textsuperscript{59} However, the

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not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

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

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

\textbf{Fed. R. Civ. P. 23.}

50. \textit{Id.} 23(a)(1) (numerosity).
51. \textit{Id.} 23(a)(2) (commonality).
52. \textit{Id.} 23(a)(3) (typicality).
53. \textit{Id.} 23(a)(4) (fair and adequate representation).
54. \textit{Id.} 23(b); see note 49 \textit{supra}.
58. \textit{Id.} In determining whether common questions predominate and whether the class action is superior, the rule specifies certain pertinent factors:

(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.

\textit{Id.} 23(b)(3)(A)–(D).
59. Since the gravamen of a TIL cause of action is a creditor's failure to provide an accurate and understandable disclosure statement, it follows that where the disclosures are made in a widely distributed form contract, class claims will be
1974 amendments created a number of difficulties with respect to the fairness and adequacy of the class representation on the one hand, and the superiority of the class action device on the other.

A. Reduced Recovery

Although a consumer may always recover at least $100 for a TIL violation by suing individually, class recovery is limited to the lesser of $100,000 or one percent of the creditor's net worth, even when the class of plaintiffs is of substantial size. The result is that a class member may recover a lesser amount than a plaintiff who institutes an individual action. For example, assume that a creditor with a net worth of ten million dollars is sued by a class of 10,000 members for violating the Act. Since one percent of the creditor's net worth is $100,000, the class members' shares would appear to be limited to a maximum of $10 per person. Even where the plaintiff class is as small as 250 individuals and the creditor is very large, the maximum recovery of a class member would be $400, compared to a potential recovery of twice the finance charge up to $1000 in an individual suit. Furthermore, a $400 recovery assumes that the class receives the maximum award permitted by statute. However, the 1974 amendments give the courts considerable discretion in determining the amount of the recovery. It has been pointed out that courts may be reluctant to award the maximum amount unless the TIL violation is egregious. In light of the likelihood that the class member's recovery

numerous and, in most cases, identical. See, e.g., Eovaldi v. First Nat'l Bank, 57 F.R.D. 545 (N.D. Ill. 1972).
The requirement that the class representative's claim be typical of the claims of the class members has traditionally been subsumed within the requirements that there be a class-wide common questions of law or fact, and that the representative fairly and adequately represent the class. 3B Moore's Federal Practice § 23.06-2, at 23-325 (2d ed. 1976). Recently, however, class certification was denied in a TIL class action because of a lack of typicality, where the representative, who had dealt with only one of the pawn shop defendants, attempted to represent a class suing six pawnshops. La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973). See also Weiner v. Bank of King of Prussia, 358 F. Supp. 684 (E.D. Pa. 1973).

60. If the creditor's net worth is only $1 million, the class member's recovery would be a single dollar.

61. If a creditor has a net worth greater than $10 million, the maximum penalty would be $100,000. Divided by 250 members, this would yield $400 per class member.

62. See note 45 supra.

63. 1975 Senate Consumer Leasing Act Hearings, supra note 32, at 214 (remarks of Sheldon Feldman, Ass't Dir. for Special Statutes, Fed. Trade Comm.) In fact, it is in these discretionary factors that the creditor's greatest protection is found. A court hearing an individual suit has no discretion in awarding damages and cannot distinguish between technical and substantial violations. See section 130(a)(2)(A) of the Act, 15 U.S.C. § 1640(a)(2)(A) (Supp. V 1975). In the class action situation, however, the court may tailor the award according to the severity of the violation. 1975 Senate Consumer Leasing Act Hearings, supra note 32, at 214 (remarks of Sheldon Feldman); Federal Reserve Board, Truth-in-Lending Annual Report to Congress for the Year 1973, reprinted in Instal. Cred. Guide (CCH) No. 271 pt. II, at 10 (Jan. 16, 1974).
will be reduced in a class action, it has been argued that the class action is not superior to individual action for purposes of rule 23 and that certification of nearly all TIL class actions should be denied.

**B. Incentive to Represent a Class**

If a TIL class action will yield a lesser recovery than an individual suit, a question arises as to who will have the incentive to lead a class action. If the plaintiff can bring an individual suit which is quicker, easier, and potentially more profitable, it would seem that few plaintiffs would bother with the class action, especially in light of the United States Supreme Court's 1974 decision in *Eisen v. Jacquelin & Carlisle*, which held that the class representative must assume the initial burden of notifying all the members of the proposed class.

Besides discouraging the individual from bringing a class action, the 1974 amendments place plaintiff's counsel in an awkward position. On the one hand, the attorney is compelled to advance the best interest of his or her client. On the other hand, the attorney's fees resulting from a class action may well be substantially greater than those from an individual action. It has thus been contended that the attorney will be tempted to recommend the class action route to the plaintiff despite its potentially smaller recovery. The possibility of such professional misconduct has

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64. There is, of course, a narrow group of cases in which the individual class member's recovery might be the same whether the vehicle of redress is an individual or a class suit. The 1976 amendments to section 130(a)(2)(B) somewhat expands this group. See Pub. L. No. 94-240, § 4(3), 90 Stat. 260 (1976); note 13 supra. It is important to note, however, that because of the discretion involved in the class award, a class member can never be assured of a recovery equal to the amount which would be recovered in an individual suit. See note 63 supra.

65. Two commentators have recently observed that "[t]he reduction in potential recovery for the representative plaintiff and all putative class members in most actions under amended section 130 must be considered an 'undesirable result' that renders the utilization of the Rule 23 mechanism inappropriate." LeValley & Walker, supra note 10, at 487; see Weathersby v. Frieside Thrift Co., 5 CONS. CRED. GUIDE (CCH) ¶ 98,640, 22 Fed. R. Serv. 2d 44 (N.D. Cal., Feb. 25, 1975).

66. See Comment, supra note 17, at 922 & n.11.

67. See text accompanying notes 60-65 supra.

68. 417 U.S. 156 (1974). In *Eisen*, the United States Supreme Court held that in a rule 23(b)(3) class action, individual notice must be sent to each class member who could be identified through reasonable effort. Id. at 177. The Court further held that the plaintiff must ordinarily bear the expense of mailing the class notices. Id. at 178.

69. Id. at 175. The impact of *Eisen* may be considerably reduced in TIL class actions by utilizing the creditor's billing system to send the class notice. LeValley & Walker, supra note 10, at 488-89.

70. ABA CANONS OF PROFESSIONAL ETHICS No. 7.


72. One attorney testified before the Senate Subcommittee on Consumer Affairs as follows:

I think that lawyers, and this is where the judges should be more concerned about the ethics of the lawyer, . . . are bringing class actions right out in the truth-in-lending area and not telling their clients that you . . . are entitled to
been cited as another reason why the class action is not "superior" to other methods of adjudication of the controversy. Of course, this problem would not arise in cases where the plaintiff was also the class attorney, but in TIL cases the courts have refused to allow attorney-plaintiffs to represent the class.

C. Multiple Classes

While the 1974 amendments limited recovery in a class action to $100,000 or one percent of net worth, they failed to specify what constitutes a proper TIL "class." Where an institutional lender violates the Act, there may be 50,000 persons, scattered throughout a number of states, who received the same defective disclosure statement. If an individual brought a class action on behalf of all Pennsylvania residents who received the defective form, might a separate class action be brought on behalf of similarly situated New York residents? It has been suggested, on the one hand, that if numerous small TIL "classes" were able to proceed to judgment, the $100,000 or one percent of net worth limitation on class action exposure would become meaningless, and the creditor would be subject to the same horrendous potential liability as existed before the 1974 amendments. On the other hand, if the class representative were forced to sue on behalf of all 50,000 individuals who received the same loan disclosure statement in the preceding one-year period, the burden of mailing the Eisen notice might be too great for even the most well-intentioned plaintiff to bear.

73. LeValley & Walker, supra note 10, at 481–82.
74. See, e.g., Eovaldi v. First Nat'l Bank, 57 F.R.D. 545 (N.D. Ill. 1972); Shields v. First Nat'l Bank, 56 F.R.D. 442 (D. Ariz. 1972); Shield v. Valley Nat'l Bank, 56 F.R.D. 448 (D. Ariz. 1971). The courts appear to have been motivated by the fear that attorneys would actively search for TIL violations upon which to sue. Id.
75. LeValley & Walker, supra note 10, at 490–92.
76. The private cause of action created by the Act is subject to a one-year statute of limitations. Section 130(e) of the Act, 15 U.S.C. § 1640(e) (1970). See generally Comment, supra note 17.
77. See text accompanying notes 68 & 69 supra.
78. As the size of the class grows, problems of manageability may also increase; in an ordinary TIL action, however, this would not generally create a substantial problem. The ordinary TIL suit is founded upon an omitted or mistaken disclosure in a standard, widely distributed, form contract. The violation will usually be identical in each class member's case. As one commentator has noted: "[P]roof of a TIL violation requires very little evidence and few witnesses. Compliance can generally be determined from a single sheet of paper . . . ." Comment, supra note 17, at 922 (footnotes omitted). The author further states that in TIL cases there is often "no issue of material fact and the question of compliance is resolved on motion for summary judgment." Id. at 922 n.111.
D. Compulsory Counterclaims

Under the Federal Rules of Civil Procedure, a counterclaim is compulsory if it arises from the same "transaction or occurrence" which constitutes the subject matter of the plaintiff's claim. When a plaintiff brings a TIL action in federal court, the question arises whether the creditor must file a counterclaim for the amount of any outstanding indebtedness in order to preserve that claim from being barred by the doctrine of res judicata. The question is important because the test for deciding whether a counterclaim is compulsory is identical to the test used to determine whether the federal court has ancillary jurisdiction over the state claim: that is, does the defendant's state claim arise from the same "transaction or occurrence" as the plaintiff's federal claim. If (1976).

79. Fed. R. Civ. P. 13(a). All other counterclaims under the federal rules are deemed permissive and may be raised or reserved without fear of later being barred. Id. 13(b).


81. The precise relationship between the compulsory counterclaim rule and the doctrine of res judicata is not clear. While it is generally accepted that a litigant's failure to raise a compulsory counterclaim will prevent him or her from raising the claim in the future, there is no agreement on the underlying rationale. The majority of courts have reasoned that it is the doctrine of res judicata that bars later assertion of the claim. See, e.g., Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631 (3d Cir. 1961). Other courts, however, have relied upon the more flexible waiver or estoppel theory. See, e.g., Dow Chem. Co. v. Melton Corp., 281 F.2d 292 (4th Cir. 1960). For discussion of the theories involved, see 6 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 1417 (1971). In the present situation it makes no difference which theory is followed.

82. A federal court has ancillary jurisdiction to hear a state law claim only if it arises out of the same transaction or occurrence as a claim properly before the federal court. Moore v. New York Cotton Exch., 270 U.S. 593, 608-09 (1926). Therefore, if the creditor's counterclaim on the delinquent account does not spring from the same transaction or occurrence as the debtor-plaintiff's TIL action, the creditor's counterclaim cannot be entertained by a federal court. In effect, this would require the creditor to institute a separate suit in state court in order to recover the amount owed by the debtor.

Creditors would generally prefer to assert their counterclaims in federal court for two reasons: 1) it is more convenient to decide the contract claim at the same time as the TIL claim; and 2) the presence of a counterclaim tends to chill the plaintiff's enthusiasm in prosecuting his or her claim, thus giving the creditor settlement leverage. For similar reasons, TIL plaintiffs would prefer that their creditors be unable to assert their counterclaims in federal court. The harder it is for the creditor to collect on the contract claim, the greater the settlement leverage in the hands of the TIL plaintiff. Of course, if the consumer has already sued in federal court, it is to his or her advantage to argue that the creditor, by failing to assert a "compulsory" counterclaim, can no longer sue for the outstanding indebtedness.

It should be noted that a perfect congruence does not exist between the test for determining the ancillary jurisdiction of the federal court and the test for deciding whether a counterclaim is compulsory. Rule 13(a)(1) and (2) lists two situations where counterclaims which arise from the same transaction or occurrence as the plaintiff's claim are not compulsory. See Fed. R. Civ. P. 13(a)(1), (2). In these situations the counterclaims fall within the ancillary jurisdiction of a federal court, despite the fact that they are not compulsory.
the creditor's counterclaim is not compulsory under the same transaction or occurrence test, it will also not be within the ancillary jurisdiction of the court and cannot be raised in federal court unless supported by an independent basis of jurisdiction.\textsuperscript{83}

While initial authority appeared to support the proposition that the creditor's counterclaim is not compulsory,\textsuperscript{84} recent decisions have reached a contrary conclusion. In \textit{Mims v. Dixie Finance Corp.},\textsuperscript{85} the United States District Court for the Northern District of Georgia, sitting en banc, overruled a line of its earlier decisions\textsuperscript{86} and held the creditor's counterclaim to be compulsory within the meaning of rule 13(a).\textsuperscript{87} The court stated:

Manifestly, defendant's counterclaims arise out of the same transaction as plaintiff's Truth-in-Lending claims. Both claims derive their basis from the same credit transaction. When the parties executed that credit transaction, certain legal obligations were imposed upon them. The creditor was obligated to extend credit and make certain disclosures in conformity with the Consumer Credit Protection Act. On the other hand, the debtor executed a promissory note and promised to make scheduled monthly payments thereon. The claims of both parties are logically related in that they are offshoots of the same basic transaction; namely, an extension of credit. To arrive at a contrary conclusion would ignore judicial economy which underlies the purpose of a compulsory counterclaim.\textsuperscript{88}

Apart from the impact of the \textit{Mims} decision upon individual TIL suits,\textsuperscript{89} it is possible that \textit{Mims} signifies difficulties for the TIL class action in federal court. Federal courts have been understandably reluctant to become involved with numerous state law debt collection suits.\textsuperscript{90} In a situation

\begin{itemize}
\item \textsuperscript{83} Thus, if the creditor counterclaimed for a sum greater than $10,000, and the creditor and debtor were of diverse citizenship, the creditor could raise the counterclaim even though it was not compulsory. See 28 U.S.C. § 1331 (1970); Fed. R. Civ. P. 13(b).
\item \textsuperscript{85} 21 Feb. R. Serv. 2d 1042 (N.D. Ga. May 6, 1976) (en banc).
\item \textsuperscript{87} 21 Feb. R. Serv. 2d at 1046.
\item \textsuperscript{88} \textit{Id.} at 1047-48. The court suggested a further rationale for its decision: the same physical evidence would be required for the adjudication of the two claims. That is, in order to decide either the TIL or the contract claim, it would be necessary to examine the instrument containing the contract and the TIL disclosure statement. \textit{Id.} at 1046; see Comment, supra note 17, at 922.
\item \textsuperscript{89} See note 82 supra.
\end{itemize}
where a defendant asserts numerous compulsory counterclaims against members of the plaintiff class, the court may refuse to certify the class action on the grounds either that common questions do not predominate or that the class action is not superior to other methods of adjudication.91

IV. TRUTH IN LENDING AND RULE 23: SOLUTIONS

The commentary concerning the viability of federal TIL class actions following the 1974 amendments has been uniformly negative.92 Indeed, the authors of a well-researched article on the subject have stated flatly that Congress' objective of revitalizing the TIL class action has failed.93

91. See notes 58 & 59 and accompanying text supra.

92. See, e.g., Knepper, supra note 10, at 291. The United States District Court for the Northern District of California commented ruefully that "Congress may well have hoped that class actions would in some cases be maintained, but it did not provide a mechanism that would permit the courts to handle such actions." Weathersby v. Fireside Thrift Co., 5 CONS. CRED. GUIDE (CCH) ¶ 98,640, at 88,181, 22 Fed. R. Serv. 2d 44, 48 (N.D. Cal. Feb. 25, 1975).

93. LeValley & Walker, supra note 10, at 494. It is suggested that despite their thorough treatment of the subject matter, the authors reach several conclusions that are misleading. First, LeValley and Walker argue that section 130(a)(2) of the Act (see note 13 supra) limits recovery in a class action to $100,000 or one percent of the net worth regardless of the actual damages to the plaintiff class. LeValley & Walker, supra note 10, at 478 & n.38. Their reading is based upon the technical difference in the language of sections 130(a)(2)(A) and 130(a)(2)(B). Under section 130(a)(1) an individual litigant can recover his or her actual damages, plus any amount provided in section 130(a)(2). 15 U.S.C. § 1640(a)(1), (2) (Supp. V 1975). In an individual action, section 130(a)(2)(A) provides for a penalty recovery of twice the finance charge. Id. § 1640(a)(2)(A) (Supp. V 1975). Further, the minimum and maximum recoveries under this subparagraph are $100 and $1000 respectively. Id. In a class action, section 130(a)(2)(B) provides recovery of the amount that the court allows, except that the maximum recovery is $100,000 or one percent of the creditor's net worth. Id. § 1640(a)(2)(B) (Supp. V 1975). Unlike section 130(a)(2)(A), section 130(a)(2)(B) does not use the words "under this subparagraph" to qualify the maximum class recovery. LeValley and Walker therefore conclude that the statute sets an absolute ceiling of $100,000 or one percent of the net worth of the creditor. LeValley & Walker supra note 10, at 478 n.39.

The legislative history on this point is unequivocal. The Senate report on S. 2101, which contained the same civil liability provisions as the amendments that were enacted in 1974, stated: "[T]he Committee . . . decided to place an aggregate limitation on a creditor's class action liability for violations not involving actual damages" 1973 Senate Report, supra note 44, at 15 (emphasis added). The same report provides the following summary of the proposed amendments:

Under Section 130, as amended by this section, consumers can bring civil actions against creditors who violate the disclosure . . . provisions of the Act. Consumers are entitled to recover actual damages, court costs, reasonable attorney fees and such additional amounts as provided in the Act or allowed by the court . . . In the case of a class action, the members of the class can recover such additional amounts as the court may allow, but not more than the lesser of $100,000 or 1% of the creditor's net worth. (These limitations do not apply to the amount of any actual damages which can be awarded in a class action suit under the Act.)

Id. at 25 (emphasis added).

Aside from the legislative history, the authors' reading of section 130(a)(2)(B) as limiting recovery to $100,000 or one percent of net worth regardless of the
After pointing out several of the problems discussed above, they conclude that the class action "remains as unlikely a method of enforcing the Truth-in-Lending Act as it was immediately following *Rainer II*."  

Apparently, Congress believed the commentary, because in the spring of 1976 it began hearings on the possibility of replacing the class action device with the qui tam suit as an alternative for TIL enforcement.  

Leading off those hearings, Senator Joseph R. Biden, Chairperson of the Senate Subcommittee on Consumer Affairs, commented that the combination of the $100,000 or one percent of net worth ceiling and the Supreme Court's *Eisen* decision "may have mortally wounded the class action as a Truth in Lending enforcement device..."  

It is submitted that the problems frustrating the implementation of TIL class actions are by no means judicially insurmountable. Indeed, a recent line of cases has allowed TIL class actions to proceed despite the problems pointed out above.

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actual damages ignores the factors that the statute directs a court to consider in making a class award. Section 130(a) provides:  

In determining the amount of award in any class action, the court shall consider among other relevant 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.

5 U.S.C. § 1640(a) (Supp V 1975) (emphasis added). This implies that the amount of actual damages and the class award are separate items.

LeValley and Walker's reading of the statute to limit class recovery absolutely to $100,000 or one percent of net worth would logically deny attorney fees and costs over $100,000 as well, yet the Act clearly intended to provide full reimbursement of attorney fees. Section 130(a) (3) of the Act, 15 U.S.C. § 1640(a) (3) (Supp. V 1975). In Eovaldi v. First Nat'l Bank, 5 Cons. Cred. Guide (CCH) ¶ 98,419 (N.D. Ill. Jan. 26, 1976), the court awarded the successful TIL class $27,899 actual damages, $100,000 under section 130(a) (2) (B), plus costs and reasonable attorney's fees. 5 Cons. Cred. Guide (CCH) ¶ 98,419 at 87,843.

Other conclusions of LeValley and Walker are also questionable. For a discussion of their contention that rule 23(b)(1)(A) gives the defendant facing a TIL class action the right to force the plaintiff to expand the class to include all individuals with similar complaints, see notes 152-58 and accompanying text infra.  

For a response to the authors' statement that "the values [Truth in Lending] embodies are simply not important enough to make the availability of the class action vehicle an overwhelmingly crucial matter," LeValley & Walker, *supra* note 10, at 494, see notes 202-14 and accompanying text infra.


95. 1976 Senate *Qui Tam* Hearings, *supra* note 14. For a brief explanation of the qui tam suit, see note 15 *supra*. For a more detailed discussion, see Fischer, *supra* note 10.

96. For a brief discussion of Eisen, see notes 68 & 69 and accompanying text infra.


A. Reduced Recovery

In Chevalier v. Baird Savings Association,99 the plaintiff sought to bring a TIL action on behalf of a class of similarly aggrieved consumers.100 The plaintiffs desired no more than their pro rata share of the class recovery.101 In opposing certification of the class, the defendants argued that the individual class members were likely to receive less than the $100 minimum they could recover in individual suits, and therefore, the class action device was not "superior" to other methods of recovery.102 Chief Judge Lord of the United States District Court for the Eastern District of Pennsylvania rejected the creditors' argument.103 Noting that the 1974 amendments, which set a ceiling on the creditor's class exposure, were intended to "remove an impediment to the use of class actions,"104 he stated that "[t]o hold now that the amendments prevent a class action from being maintained would result in a judicially-decreed Catch 22."105 Chief Judge Lord reasoned that since each class member would receive notice of the action and would have an opportunity to opt out, the class would receive sufficient protection if the class notice clearly explicated that a greater recovery might be obtained by individual action.106

It is submitted that common sense supports this viewpoint. To the extent that a person brings an individual action to redress a TIL violation, he or she makes an unavoidable investment of time and energy in the cause107 and bears the risk of financial loss if not victorious.108 A class member, by contrast, is generally a silent partner in the litigation being carried on by the representative.109 As Chief Judge Lord recognized,

100. Id. at 143-44.
101. Id. at 152.
102. Id. Apparently, at least one of the several classes that was represented numbered more than 1,000 persons. Id.
103. Id. at 153.
104. Id. For a discussion of the legislative history of the 1974 amendments, see notes 41-47 and accompanying text supra.
106. Id. Chief Judge Lord stated: "We would expect such notice to state clearly whether a reduced award is certain (i.e., where the class exceeds 1,000) or merely possible (class under 1,000). The choice of opting out and the rights and liabilities arising therefrom should also be explained in clear, concise, nontechnical language." Id. at 153 n.35.
107. In fact, it is the substantiality of this investment that has led commentators to argue that the incentive to sue in individual suits is not sufficiently attractive to assure broad-based enforcement litigation. One commentator has flatly stated: "An award of $100 will not provide sufficient compensation for the costs in time, effort, and possibly credit standing that a [TIL] litigant will incur." Note, supra note 3, at 104 (footnote omitted).
108. Of course, if the plaintiff is not successful in the action, neither attorney's fees nor the cost of class notice will be reimbursed. See section 130(a)(3) of the Act, 15 U.S.C. § 1640(a) (3) (Supp. V 1975).
109. Note, however, that any class member who does not opt out may, if he or she desires, enter an appearance through counsel. Fed. R. Civ. P. 23(c)(2)(C). For
it is not unfair to offer an aggrieved consumer the option of being a class member with a potentially lesser recovery, so long as the consumer may decline the invitation and pursue the individual remedy.\textsuperscript{110}

\section*{B. Incentive}

While \textit{Chevalier} suggests a solution to the problem of reduced recovery, it posits no answer to the problem of incentive.\textsuperscript{111} In \textit{Chevalier}, the class representatives were willing to accept a lesser recovery than they would have received had they sued individually.\textsuperscript{112} It is unlikely, however, that many will share the altruism of the \textit{Chevalier} plaintiffs.\textsuperscript{113} Further, even when such a situation does arise, the spectre of misconduct by the plaintiff's attorney is unavoidably present.\textsuperscript{114}

One method of avoiding the disincentive that arises when the class representative is likely to recover less through class action than through an individual suit\textsuperscript{115} would be for the court to award the class representative the same amount in a successful class action that he or she would have received in a successful individual suit.\textsuperscript{116} However, one court has questioned the fairness and adequacy of the class representation\textsuperscript{117} where the class representative receives more than his or her equal share. In

\begin{footnotesize}
\begin{enumerate}
\item[110] See text accompanying notes 66-69 supra.
\item[112] See notes 70-74 and accompanying text supra.
\item[113] See text accompanying notes 66-69 supra.
\item[114] This proposal would somewhat ease the burden of an attorney in counseling his or her client about the desirability of instituting a TIL class action. \textit{See} text accompanying notes 70-74 supra.
\item[115] See text accompanying notes 66-69 supra.
\item[116] See text accompanying note 53 supra.
\end{enumerate}
\end{footnotesize}
Weathersby v. Fireside Thrift Co.,\(^{118}\) the consumer-plaintiff petitioned the court to certify his TIL action as a class action\(^ {119}\) and to authorize him to recover the same amount in the class action as he would have recovered had he brought an individual suit.\(^ {120}\) The United States District Court for the Northern District of California denied the request.\(^ {121}\) The court reasoned that if the plaintiff recovered more than his share, he would in essence be receiving money that belonged to the rest of the class.\(^ {122}\) Hence, there was a fundamental antagonism between the interests of the plaintiff and those of the class members, and the court held that he could not "fairly and adequately" represent them.\(^ {123}\)

However, in Vickers v. Home Federal Savings & Loan Association,\(^ {124}\) a New York state court certified a TIL class action\(^ {125}\) even though the plaintiff had requested the same advantage as had the plaintiff in Weathersby.\(^ {126}\) The decision in Vickers was limited to the narrow holding that on a motion for class certification, a division of damages would be premature.\(^ {127}\) However, in important dicta, the Vickers court suggested that awarding the representative a greater recovery than the other members of the class would not be inconsistent with the class action device.\(^ {128}\)

\(^{118}\) 5 CONS. CRED. GUIDE (CCH) \(\S\) 98,640, 22 FED. R. SERV. 2d 44 (N.D. Cal. Feb. 25, 1975).

\(^{119}\) Id. at 81,179, 22 FED. R. SERV. 2d at 45.

\(^{120}\) Id. at 81,181, 22 FED. R. SERV. 2d at 47.

\(^{121}\) Id., 22 FED. R. SERV. 2d at 48.

\(^{122}\) Id.

\(^{123}\) Id. The court dismissed an argument that class members could be protected by the provision of rule 23 that allows class members to opt out of the class without prejudice to their rights. Id. The Weathersby court, noting that the one-year statute of limitations, 15 U.S.C. \(\S\) 1640(e) (1970), had run, reasoned that there was no real choice of opting out. 5 CONS. CRED. GUIDE (CCH) \(\S\) 98,640, at 88,181, 22 FED. R. SERV. 2d 44, at 47. For criticism of this position, see note 136 infra.

\(^{124}\) Id. Misc. 2d ----, 836 N.Y.S.2d 291 (Sup. Ct. 1976).

\(^{125}\) Id. at ----, 386 N.Y.S.2d at 300. The class was certified under the recently enacted New York class action statute, N.Y. CIV. PRAC. LAW \(\S\) 901-909 (McKinney 1976). 386 N.Y.S.2d at 300. Although the Vickers court certified the class under the state class action statute, its analysis is no less pertinent to the instant discussion. The New York statute was derived in large part from federal rule 23. Farrell, Civil Practice, 1973 Survey of New York Law, 27 SYRACUSE L. REV. 425 (1976). Under the New York statute a class may be certified only if requirements of numerosity, commonality, and typicality are satisfied. N.Y. CIV. PRAC. LAW \(\S\) 901 (a) (1)-(3) (McKinney 1976). In addition, the class representative must be able to "fairly and adequately protect the interests of the class," and it must further appear that a class action is superior to other methods of adjudicating the controversy. Id. \(\S\) 901 (a) (4)-(5). For a discussion of the nearly identical requirements of federal rule 23, see text accompanying notes 49-58 supra. It is to be noted that the Vickers court relied almost exclusively upon federal cases to support its decision to certify the plaintiff class under the New York statute. --- Misc. 2d ----, 386 N.Y.S.2d at 296-300.

\(^{126}\) Id. at ----, 386 N.Y.S.2d at 298.

\(^{127}\) Id. at ----, 386 N.Y.S.2d at 299.

\(^{128}\) Id. at ----, 386 N.Y.S.2d at 299. The court stated: "[T]he fact that the plaintiffs herein may be awarded damages under a different section of T-I-L than the class members or that they may receive a somewhat larger monetary award is not sufficient to render their representation inadequate." Id. at ----, 386 N.Y.S.2d at 299.
The court noted that the requirement that the representative adequately protect the class has not meant that the representative's claim be the same kind or the same size as the claims of the class members. It was sufficient for the Vickers court that the class representative had, as a practical matter, every interest in the success of the class claim.

Aside from the persuasiveness of the Vickers decision, it is submitted that the Weathersby analysis is fundamentally unsound. The Weathersby court began its reasoning with the premise that each class member was entitled to an equal share of the class recovery. Given this premise, it was undeniably correct to conclude that if the representative recovered an amount greater than his or her share, the other class members would receive less than their shares. The defect in the Weathersby analysis lies not in the reasoning, but in the premise. Simply stated, the Act does not provide that each class member is entitled to an equal share of the class fund. Rather, the Act provides that in the case of a class action, the class member may recover "such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable." The Act thus places the distribution of the class fund in the discretion of the court. The fact that the court may grant the representative a recovery equivalent to the recovery an individual suit would

129. Id. at ----, 386 N.Y.S.2d at 299.
130. Id. at ----, 386 N.Y.S.2d at 299.
131. Id. at ----, 386 N.Y.S.2d at 299. The court noted:

[T] he nature of the defenses available to the defendant make it inevitable that the plaintiffs will be obliged to prove, even if they sue individually, that the defendant's procedures were inadequate because there were violations not only as to the plaintiffs but as to many others, i.e., the class members, as well. Accordingly, it may be reasonably concluded at this stage of the proceedings that the interest of the plaintiffs is co-extensive with that of the proposed class members.

Id. at ----, 386 N.Y.S.2d at 299.


134. Id. In exercising its discretion, the court should generally distribute damages to the class members on a pro rata basis. See Eovaldi v. First Nat'l Bank, 5 CONS. CRED. GUIDE (CCH) ¶ 98,419 (N.D. Ill. Jan. 26, 1976). At least two methods of distributing damages are possible. They may be illustrated by an example in which the TIL consists of 998 persons plus two class representatives, and the total class recovery is $50,000. Assuming that the representatives would have recovered $100 apiece in an individual action and that the court awards them that same amount, $49,800 would remain for class distribution. The court could, under one method, split the fund equally between the claimants, giving each class member a recovery of $49.79. Under the second method, the court could give each class member a percentage of the amount that he or she would have recovered in an individual proceeding, just as unsecured creditors generally receive only a percentage of their claims against the estate of a bankrupt. If the distribution of the class recovery followed this method, the class members that would have recovered $250 in individual actions would receive $ percent of $250. Class members who would have recovered only $100 in individual actions would receive $ percent of $100. It is likely that the courts will generally opt for the first procedure because of its convenience. For a broad discussion of the mechanics of distributing a class recovery, see generally Developments in the Law—Class Actions, 89 HARV. L. REV. 1319, 1523–36 (1976) [hereinafter cited as Developments].

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yield does not create an antagonism between the class and the representative. In principle it is fair that the representative get a somewhat greater share of the recovery than the silent partner. Protection of the class can be adequately insured by clearly explaining the different potential recoveries in the class notice. This will allow objecting class members the opportunity to opt out and pursue individual recovery.

If, as suggested above, it is proper for a court to award the class representative the amount that he or she would have received in an individual suit, the question is posed whether intervenors should

135. Antagonism between the class representative and the class members will prevent certification of a class action only where the antagonism concerns the subject matter of the suit. Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 317 (1st Cir. 1969); Redmond v. Commerce Trust Co., 144 F.2d 140, 151 (8th Cir.), cert. denied, 323 U.S. 776 (1944); Gates v. Dalton, 67 F.R.D. 621 (C.D. Cal. 1975). See 3B Moore's Federal Practice ¶ 23.07[3], at 23-403-04 (2d ed. 1976). The classic illustration of a situation where the adverse interests of the class members and the class representative do not interfere with class certification is the example of a class action brought to preserve a trust fund. Even though the various class member beneficiaries may have different theories concerning the distribution of the trust, especially if the fund is insufficient to pay all the claims in full, a class action is nevertheless proper, as long as all the class members are primarily concerned for preserving the trust fund. Redmond v. Commerce Trust Co., 144 F.2d 140, 151-52 (8th Cir.), cert. denied, 323 U.S. 776 (1944); 3B Moore's Federal Practice ¶ 23.07[3], at 23-403-04 (2d ed. 1976). See also Fed. R. Civ. P. 23, Advisory Committee's Note (1966). In the TIL context, the primary concern of the class representative, and that of each class member, is showing that the defendant's conduct constituted a violation of the Act. With respect to this goal, there is classwide solidarity. The fact that the class representative's interest is greater than the interests of the class members does not prevent class certification. See First Am. Corp. v. Foster, 51 F.R.D. 248, 250 (N.D. Ga. 1970).

136. One of the fundamental factors in the Weatherby court's refusal to certify the TIL class was that the court did not believe that the opt-out provision of rule 23(c)(2)(A) would adequately protect the class. 5 Cons. Cred. Guide (CH) at 88,181, 22 Fed. R. Serv. 2d at 47. However, the rationale for the court's belief was that the statute of limitations had run on the claims of the class. Id. Therefore, the ability to opt out of the class action afforded the class members no protection. Id. However, recent interpretations of the 1974 Supreme Court decision in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), suggest that the TIL statute of limitations, section 130(c) of the Act, 15 U.S.C. § 1640(e) (1970), is tolled by the filing of a class action. Eisen v. Carlisle & Jacquelin, 414 U.S. 156, 176 n.13 (1974); Agostine v. Sicon Corp., 69 F.R.D. 437, 448 n.13 (E.D. Pa. 1975). See also Comment, note 17 supra, at 921 n.103. If the Weatherby decision is read in light of the court's belief that the class members had no viable choice of opting out of the litigation because the statute of limitation had run, the decision is defensible. However, its logic is not persuasive where the opportunity to opt out and pursue individual recovery is a meaningful alternative.

137. See text accompanying notes 111-36 supra.

138. There are two methods by which individuals may secure an active participatory role in a rule 23(b)(3) class action. (In this context, "participation" is used to mean an involvement in the class action greater than that of the ordinary silent partner class member.) After receipt of the class notice, each class member who does not opt out of the class may enter an appearance in the action through counsel. Fed. R. Civ. P. 23(c)(2). If earlier participation is desired, or if a nonmember wishes to participate, rule 24(b) permits the court to allow an individual to intervene in a pending action if the intervenors claim and the pending claim share a question of law or fact. Id. 24(b). The difference between entering an appearance through counsel under rule 23 and intervening under rule 24 is more theoretical than practical,
receive similar treatment. In *Weathersby*, the court suggested that if the intervenors substantially aid in the successful conclusion of the action, it would be unfair to give them less than the original class representative.\(^{139}\) However, if they receive more than the ordinary class member, the court predicted a rush to the courthouse to intervene.\(^{140}\)

While the amount to be awarded to the individual class members is vested in the discretion of the court,\(^{141}\) it is anticipated that ordinarily only the class representatives\(^{142}\) would be awarded the same recovery that an individual suit would yield. It is further anticipated that the court would limit the number of representatives to the minimum number required to protect the class fairly and adequately.\(^{143}\) In some cases, intervenors would become class representatives if their full participation were needed to secure the adequate representation of the class. However, it is expected that in the majority of cases, the intervenors would not participate as class representatives, but would be afforded only a limited participation in the litigation. They would have the opportunity, for example, to receive copies of the pleadings and papers in the case and to contribute to the discovery carried out by the class representatives.\(^{144}\)

There are two reasons for treating the intervenors differently than the class representatives with respect to ultimate recovery. First, as discussed above, the class representative will have a greater participatory role than the intervenor. Second, the principal reason for awarding a greater recovery to the class representative is to cure the disincentive to *bring* a TIL class action.\(^{145}\) Once the class action has been initiated, there is a lesser need for encouraging participation.

because rule 23(d)(3) gives the court broad powers to impose conditions upon rule 24 intervenors. 3B Moore's *Federal Practice* § 23.90[2], at 23–1621–23 (2d ed. 1976). These conditions may be used to limit the intervenor's rights to those of a class member who enters an appearance by counsel. *Id.* The rights of a person entering an appearance by counsel have been interpreted to include the opportunity to view the papers of the class representative and to be fully informed of new developments in the proceedings. *Id.*

For convenience, class members seeking participatory roles in a TIL class action will herein be termed "intervenors," regardless of whether they intervene under rule 24, or enter an appearance under rule 23. In the case where the court grants an intervenor a full participatory role, the intervenor will herein be termed a class representative. *See* text accompanying notes 142–44 *infra.*

139. 5 *Cons. Cred. Guide* (CCH) at 88,181, 22 Fed. R. Serv. 2d at 47.

140. *Id.*


142. *See* note 138 *infra*; text accompanying note 143 *infra.*

143. Indeed, in a TIL action, where the substantive issue of liability is likely to be the same for every class member, a single class representative may often be sufficient to represent the class fairly and adequately.

144. For a discussion of the power of the court to limit the participation of intervenors, *see* note 138 *infra.* Such power is constitutionally exercised so long as the intervenor's interests are fairly and adequately represented. *See* Hansberry v. Lee, 311 U.S. 32 (1940). The alternative to allowing limited participation for intervenors under rule 24(b) would be for the court to deny the motion to intervene. *Fed. R. Civ. P.* 23(b).

145. *See* notes 111–14 and accompanying text *supra.*
It is submitted that inequity will rarely occur through this arrangement. It is probable that the likelihood of a lower recovery in the class action will encourage most individuals who are sufficiently motivated to intervene to opt out in favor of an individual suit. The intervenor in a successful suit will not lose anything by entering an appearance through counsel since his or her attorney fees will be reimbursed. However, in the rare case where an intervening party makes a substantial contribution to the success of the action and expends a like amount of time and energy as the class representative, the court could use its discretion to award him or her a greater share in the class recovery.

C. *Multiple Classes*

The problem created by the possibility of multiple TIL class actions for the same violation has not yet reached the courts. However, if several small class actions — rather than one large action — were instituted, and each successfully recovered the maximum penalty, the creditor would face the same potentially disastrous liability as before the 1974 amendments. The legislative history of the amendments indicates that this result would frustrate the intent of Congress. While Congress' primary goal was to destroy the impediments to use of the class action device, there was also genuine concern that creditors might be bankrupted by the enormous penalties originally possible under the Act.

In light of this situation, it has been argued that the creditor has the right to insist that the plaintiff expand any artificially reduced class to

147. See notes 133 & 134 and accompanying text supra.
148. See notes 75–78 and accompanying text supra.
149. See notes 31–40 and accompanying text supra.
150. See notes 41–47 and accompanying text supra.
151. The Senate Report on S. 2101, which contained the same civil liability provisions that were ultimately passed in the 1974 amendments stated: The purpose of the civil penalties section under Truth in Lending was to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy. However, the Committee feels this objective can be achieved without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature. Putting a reasonable limit on a creditor's maximum class action liability would seem to be in the best interests of both creditors and consumers.
1973 Senate Report, supra note 44, at 14–15. In discussing why the amendments were made applicable to pending class actions which had already been certified, the Senate report explained: The Committee ... decided to apply these new provisions to pending lawsuits which have not been finally decided. While the Committee would ordinarily be hesitant to amend provisions involved in pending court cases, it feels that some clarification is needed to avoid excessive judgments not intended by the original Truth in Lending Act.
1973 Senate Report, supra note 44, at 14–15. In discussing why the amendments were made applicable to pending class actions which had already been certified, the Senate report explained:

*Id.* at 15–16.

The House conference report accompanying H.R. 1121, the bill ultimately enacted, stated tersely: "The limitation on class action suits was further limited to the lesser of $100,000 or 1 percent of the net worth of the creditor to protect small business firms from catastrophic judgments." H.R. REP. No. 1429, 93d Cong., 2d Sess. 37, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6148, 6153.
include all persons who received the same disclosure form.\textsuperscript{152} However, if the plaintiff were always required to sue on behalf of every potential member of the class,\textsuperscript{153} it would be very difficult to locate a plaintiff with incentive and resources sufficient to provide Eisen notice to all the members of large plaintiff classes.\textsuperscript{154} This would create the anomaly of discouraging class suits in precisely those cases where the violation was most widespread, and the deterrent effect of class liability most needed.

\textsuperscript{152} LeValley & Walker, supra note 10, at 483–84, 490–92. The rationale of the authors, however, is not clear. Basically, their argument rests upon rule 23(b)(1)(A), which provides that an action (which has met the prerequisites of 23(a)) may be maintained as a class action if:

(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. . . .

\textsuperscript{153}\textsuperscript{153} The authors contend that 23(b)(1)(A) gives the defendant a substantive right to oppose the certification of any artificially reduced class or to force the plaintiff to expand the class to include all persons receiving the incorrect disclosure. LeValley & Walker, supra note 10, at 490–92. The problem with this contention is that rules 23(b)(1)(A) and 23(b)(3) are parallel provisions which specify separate and independent grounds upon which a class action may be maintained. Thus, to the extent that there is a danger of inconsistent individual suits, a class action may be maintained, not precluded, under 23(b)(1)(A). 3B MOORE'S FEDERAL PRACTICE \textsect{23.35}[1], at 23-551–53 (2d ed. 1976). In such case, the action is maintained as a 23(b)(1) class action, not a 23(b)(3) class action. The distinction is important because if the action is maintained as a 23(b)(1) class action, class members are not permitted to opt out of the action. Airline Stewards & Stewardesses Ass'n v. American Airlines, 490 F.2d 636, 642 (7th Cir. 1973). Nor need they receive individual notice. Larionoff v. United States, 553 F.2d 1167, 1186 (D.C. Cir. 1976). LeValley and Walker apparently do not contend that TTL class actions can be maintained under 23(b)(1)(A). LeValley & Walker, supra note 10, at 483–84. Rather, they suggest that 23(b)(1)(A) should somehow guide the decision of whether or not to certify the class under 23(b)(3). \textit{Id.} It is submitted, however, that rule 23(b)(1)(A) is simply inapplicable when certification is sought under 23(b)(3).

\textsuperscript{154} While the matter has seldom been considered, there may be limitations inherent in rule 23 on the freedom of the class representative to limit the class artificially. First, it is clear that the plaintiff class must be so large as to make joinder of the members impracticable. FED. R. CIV. P. 23(a)(1). Second, the rule requires that there must in fact be a class and that the representative be a member of it. 3B MOORE'S FEDERAL PRACTICE \textsect{23.04} at 23-251, 23-254 (2d ed. 1976). While it is the plaintiff's burden to allege the existence of the class, \textit{id.} \textsect{23.02}[2], at 23–153, the determination of whether the class described by the plaintiff is actually a class is a question of law for the court. \textit{See id.} When a group of individuals similarly affected by the conduct of the defendant is reduced for purposes of the class action by defining the class in terms which include an arbitrary qualification bearing no relationship to the conduct of the defendant, a court might simply conclude that no "class" exists. In Barrett v. Kunzig, 331 F. Supp. 266 (M.D. Tenn. 1971), a class action was brought on behalf of a class of courthouse spectators to enjoin security personnel from searching the briefcases of those entering a federal courthouse. \textit{Id.} at 268. Certification of the spectator class was denied on the grounds that, with respect to the defendant's conduct, there was no reason to distinguish spectators from other people entering the building. \textit{Id.} It might be extrapolated from Barrett that rule 23 contemplates a class described by factors which exclude only individuals not similarly situated with respect to the defendant's conduct. Beyond this, rule 23 itself offers little guidance on the problem of class splitting.

\textsuperscript{154} For a brief discussion of the requirements of Eisen, \textit{see} note 68 supra.
It is submitted that there is a better approach to the problem. In the ordinary case, where the TIL class resides in a single geographical area and is of a reasonable size, the court, in its discretion, may refuse certification if the plaintiff does not seek to represent the entire potential class. Yet such need not occur in every case. Section 130(b) of the Act does not require that the maximum penalty be awarded in every class action; rather, the section provides that in the case of a class action, the court shall determine the appropriate award by considering all the relevant factors, including "the number of persons adversely affected." Where the plaintiff represents a class which does not include all those "adversely affected" by the creditor's violation, the court should simply scale down the award in proportion to the size of the entire potential class. The broad power of the court to impose conditions on the class representative and to strip the complaint of class allegations when necessary will insure that classes are not fragmented in a manner that would unfairly burden the defendant.

D. Compulsory Counterclaims

Several approaches have emerged in dealing with the problems raised by the interplay between the compulsory counterclaim rule and the

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155. Section 130(a) of the Act provides in pertinent part:
In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

Precedent for limiting the size of a plaintiff class in situations where a class action would otherwise be unmanageable has been established in the antitrust area. In Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968), the United States District Court for the Eastern District of Pennsylvania was presented with a class action that potentially included in the plaintiff class "all state and local governments in the United States." Id. at 461. Realizing the tremendous difficulties involved in sending class notice and in managing such a prodigious class action, the court limited the size of the plaintiff class by defining it in terms of geography and population. Id. at 462. The court defined the plaintiff class to include: 1) all governmental entities in the Eastern District of Pennsylvania; 2) all state governments; and 3) all cities in the United States with a population greater than 50,000. Id. See also P.D.Q., Inc. v. Nissan Motor Corp., 61 F.R.D. 372, 381 (S.D. Fla. 1973) (plaintiffs unable to bear expense of notifying nationwide class; class limited on a geographical basis).

156. Fed. R. Civ. P. 23(d)(3); see note 138 supra.
157. Rule 23(d)(4) allows the court to order that the "pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(4). The purpose of such power is to provide for "fair and efficient conduct of the action." Id. The court has wide discretion in exercising this power. See 3B Moore's Federal Practice ¶ 23.70, at 23-1402 (2d ed. 1976).
158. Further, separate class actions can be consolidated for trial where there are common issues of law or fact. Fed. R. Civ. P. 42.
159. Rule 13(a) provides in relevant part:
A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the
class action device.\textsuperscript{160} As noted above, it has recently been held that a
creditor must counterclaim for delinquencies in the consumer plaintiff's
account or forever be barred from asserting that claim.\textsuperscript{161} In a large
consumer class action, a federal court may view with dismay the necessity
of adjudicating numerous state law debt claims and refuse to certify the
class action.\textsuperscript{162}

One approach has been to ignore the literal wording of rule 13 and
hold that the creditor's counterclaim is not compulsory. In \textit{Agostine v. Sidcon Corp.},\textsuperscript{163} the United States District Court for the Eastern District
of Pennsylvania reasoned that the state contract claims involved were
logically and legally distinct from the federal TIL claims and thus did not
arise from the same "transaction or occurrence" within the meaning of
the rule.\textsuperscript{164} The court was clearly influenced by policy considerations:

\textit{The purpose of the Act is to assure a meaningful disclosure of credit
terms so that consumers will be able to readily compare various
credit terms available to them and avoid the uninformed use of credit.
To allow [creditor's] counterclaims would effectively frustrate such a
purpose, by involving this court in a myriad of factual and legal questions
that are logically unrelated to the alleged Truth in Lending violations.}\textsuperscript{165}

Not arising from the same "transaction or occurrence," the creditor's
counterclaims did not fall within the subject matter jurisdiction of the
court\textsuperscript{166} and were dismissed.\textsuperscript{167}

A second approach to the problem is suggested by \textit{Donson Stores,
Inc. v. American Bakeries Co.}\textsuperscript{168} an antitrust action in which the plaintiffs
brought a class action for treble damages under section 4 of the Clayton

\textsuperscript{160} See notes 82 & 83 and accompanying text supra.
(en banc); accord, Rollins v. Sears, Roebuck & Co., 21 Fed. R. Serv. 2d 1088 (E.D.
La. June 21, 1976). See also Comment, supra note 17, at 916–18 & n.72. For later
cases not following Mims and Rollins, see notes 163 & 164 and accompanying text
infra.

\textsuperscript{162} See, e.g., Crotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549, 552–53
Malby v. General Elec. Credit Corp., 61 F.R.D. 59 (N.D. Ohio 1973), where the
court was undaunted by the possibility of some 3,000 counterclaims. Id. at 61.


\textsuperscript{164} Id. at 442. See also Jones v. Sonny Gerber Auto Sales, Inc., 22 Fed. R.
Discount Co., 21 Fed. R. Serv. 2d 1256 (W.D. Pa. Jan. 19, 1976); Shriver v. Sears,

\textsuperscript{165} 69 F.R.D. at 442 (citation omitted).

\textsuperscript{166} See note 82 supra.

\textsuperscript{167} 69 F.R.D. at 443.

Act.169 The defendant asserted counterclaims against various class members other than the class representatives.170 Arguing that rule 13 allows counterclaims only against opposing parties171 and that class members were not "parties" within the meaning of the rule, the plaintiffs moved to dismiss the counterclaims.172 The United States District Court for the Southern District of New York accepted the plaintiffs' contention, stating:

Rule 23 contemplates an adversary contest involving only the representative members of the class, with all other members of the class being permitted passively to await the outcome of the principal suit. Therefore, in the absence of any reported decision holding that absent class members are parties for the purpose of Rule 13, I hold that they are not. In reaching this decision I note that in these cases the right to counterclaim is readily subject to abuse as a tactical device to encourage plaintiffs to opt out.173

Since the Donson decision rests upon an interpretation of rule 13, its applicability is not limited to the antitrust area, but could be asserted in the TIL area as well.174

170. 58 F.R.D. at 487.
171. Id.
172. Rule 13(a) requires compulsory counterclaims to be made against "any opposing party." Fed. R. Civ. P. 13(a). Rule 13(b) allows other claims to be asserted against "any opposing party," Id. 13(b). The plaintiffs' contention in Donson would apply to any counterclaim, whether compulsory or permissive.
173. 58 F.R.D. at 489 (footnote omitted).

Interestingly, the question of whether class members are parties has come up in other contexts. For example, in the discovery area, interrogatories may only be served upon a "party." Fed. R. Civ. P. 33(a). In Wainwright v. Kraftco Corp., 54 F.R.D. 532 (N.D. Ga. 1972), it was held that interrogatories cannot be directed to class members because they are not parties within the meaning of the rule. Id. at 534; accord, Fisher v. Wolfinbarger, 55 F.R.D. 129 (W.D. Ky. 1971). Similarly, a request for production of documents can only be served upon a "party," Fed. R. Civ. P. 34(a). In Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972), the court held that discovery of class members was allowed in certain situations; however, the court did not decide whether the class members were parties. See also Robertson v. National Basketball Ass'n, 67 F.R.D. 691 (S.D.N.Y. 1975). For a discussion of whether class members are "parties" for other purposes, see In re Four Seasons Sec. Laws Litigation, 525 F.2d 590 (10th Cir. 1975) (class member not a party under rule 60(b) to challenge the adequacy of settlement); Lamb v. United Sec. Life Co., 59 F.R.D. 44 (S.D. Iowa 1973) (class members not parties to the action and hence not potentially liable for security for costs).

Still, the Supreme Court's decision in Zahn v. International Paper Co., 414 U.S. 291 (1973), which required each member of the plaintiff class to meet the $10,000 amount in controversy requirement of 28 U.S.C. § 1332 (1970), has been interpreted to mean that each class member is a "plaintiff" in the action and thus
A third approach to the problem was taken in *Rollins v. Sears, Roebuck & Co.* The defendant in *Rollins*, faced with a TIL class action, asserted numerous counterclaims against members of the plaintiff class for delinquencies in their accounts. The *Rollins* court held that the state law counterclaims were compulsory within the meaning of the federal rule and thus were within the jurisdiction of the court. However, the court saved the action from problems of unmanageability and lack of commonality by holding that class members who had counterclaims asserted against them were to be dropped from the class. Accordingly tailored, the class presented no problem for certification.

None of the three approaches described above is free from difficulty. The *Agostine* court seems to have ignored both the literal wording of rule 13(a) and the broad interpretation traditionally given to the compulsory counterclaim. The *Donson* decision is difficult to evaluate be-

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176. 21 Fed. R. Serv. 2d at 1093; see text accompanying notes 60-65 infra. Although the class representative in *Rollins* would have recovered $427 by an individual suit, but only $331 in the class action. 21 Fed. R. Serv. 2d at 1093; 2d at 1092. See text accompanying notes 60-65 supra. Despite the fact that the plaintiff was apparently a willing suitor, the court refused to certify the class action. 21 Fed. R. Serv. 2d at 1093. The court stated that the certainty of a lesser recovery for the plaintiff class representative "creates serious doubts about whether plaintiff..." 

177. Id. at 1089, 1092. 

178. 21 Fed. R. Serv. 2d at 1092. Of the 338 people in the class that the plaintiff sought to represent, 36, or roughly 10%, were excluded. Id.

179. Id. It should be noted, however, that the class action in *Rollins* was disallowed on other grounds. Apparently, the class representative in *Rollins* would have recovered $427 by an individual suit, but only $331 in the class action. 21 Fed. R. Serv. 2d at 1093; see text accompanying notes 60-65 supra. Despite the fact that the plaintiff was apparently a willing suitor, the court refused to certify the class action. 21 Fed. R. Serv. 2d at 1093. The court stated that the certainty of a lesser recovery for the plaintiff class representative "creates serious doubts about whether plaintiff..." 


181. Under that most widely cited test, a counterclaim is compulsory if it is logically related to the plaintiff's claim. Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631 (3d Cir. 1961). In the usual case, both claims arise from the debtor-creditor relationship. The proof of each claim will begin with the same...
cause it has potentially broad implications outside the area of TIL litigation.\textsuperscript{182} Moreover, two recent TIL decisions have narrowly read \textit{Donson} to apply only where the class members against whom the counterclaims are asserted are unidentified.\textsuperscript{183} Under this reading, \textit{Donson} would be meaningless in a TIL class action because the individual class members with delinquent accounts are ordinarily easily identified by the creditor.\textsuperscript{184} Nor is the \textit{Rollins} decision free from problems. Inflexibly applied, \textit{Rollins} would result in the unfortunate pruning of the plaintiff class even in cases in which the counterclaims did not materially complicate the proceedings.\textsuperscript{185}

However, if the \textit{Rollins} approach is not applied inexorably, but is reserved for those situations in which it is appropriate, it may present an adequate solution to this dilemma. For example, in \textit{Weit v. Continental Illinois Bank & Trust Co.},\textsuperscript{186} a credit issuer, faced with an antitrust class action, asserted numerous counterclaims against the class members.\textsuperscript{187} While the court held the counterclaims to be compulsory, it nevertheless

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\textsuperscript{182} As noted previously, \textit{Donson} would apply regardless of whether the counterclaim was permissive or compulsory. See note 172 \textit{supra}. Since it is based upon an interpretation of rule 13, it would apply regardless of the nature of the action at issue — whether civil rights, Truth in Lending, or patent law, for example. See text accompanying note 174 \textit{supra}. Also, the decision of whether a class member is a party will unavoidably have an impact upon a variety of procedural questions besides the narrow one at issue in \textit{Donson}. See note 174 \textit{supra}. The combination of these factors suggests that the question will probably not be quickly resolved. Generally, however, it can be questioned whether the policy decision implicit in \textit{Donson} is wise. To the extent that the court prefers the policy of convenience which underlies the class action over the policy of convenience which underlies the counterclaim rules, the court is saying, in essence, that the litigational convenience of the plaintiff is of greater importance than that of the defendant. While this may be true in some cases, there would seem to exist a number of cases wherein it would be unjust to shield a plaintiff class member from the possibility of counterclaim.

\textsuperscript{183} Rollins v. Sears, Roebuck & Co., 21 Fed. R. Serv. 2d 1088, 1091 (E.D. La. June 21, 1976); Turoff v. Union Oil Co., 61 F.R.D. 51, 59 (N.D. Ohio 1973). It is suggested that \textit{Rollins} and \textit{Turoff} are based upon a misinterpretation of \textit{Donson}. While the defendant in \textit{Donson} did not specify which of the plaintiff class members the counterclaim was directed against, the court's decision that class members are not parties was based upon its belief that class members are essentially silent partners in the litigation controlled by the class representative. 58 F.R.D. at 489; see the quotation from \textit{Donson} in text accompanying note 173 \textit{supra}.

\textsuperscript{184} See, e.g., Eovaldi v. First Nat'l Bank, 57 F.R.D. 545 (N.D. Ill. 1972) (members of a class of 170,000 identifiable from defendant's records).

\textsuperscript{185} Under the \textit{Rollins} approach, the class members with counterclaims asserted against them would be dropped as a condition to the certification of the class. Thus, the individuals who were dropped would not receive class notice. In many cases, they would never learn of the TIL violation or would learn of it only after the one-year statute of limitations, 15 U.S.C. § 1640(e) (1970), had run against the TIL claim.

\textsuperscript{186} 60 F.R.D. 5 (N.D. Ill. 1973).

\textsuperscript{187} \textit{Id.} at 7.
allowed the class action to proceed without dropping the class members against whom counterclaims were asserted:

We find . . . that the plaintiff classes are not rendered unmanageable by such counterclaims. In the case at bar, they would consist solely of liquidated amounts owed by class members on their delinquent accounts. These could best be ascertained from the defendant's own records. Few class members would be expected to contest either the fact of liability or the amount owed. This court would not be transposed into a vast "collection agency" as defendants suggest, because if a counterclaim exceeded a class member's damages, the pertinent defendant would merely be in possession of a judgment for the difference, which it would then be able to enforce by normal procedures. 188

The reasoning of the Weit court would be applicable to many TIL cases, especially those in which the defendant is a credit card issuer, a finance company, or a bank loan department. On the other hand, where the defendant is a vendor, or where, for any other reason, a number of delinquent accounts may be expected to be contested, the Rollins approach of paring down the class may be necessary. 189

V. "THE CONCLUSION, IN WHICH NOTHING IS CONCLUDED" 190

It is submitted that the TIL class action presents no insoluble problem to the federal judiciary. While the class action device poses certain inherent difficulties, 191 it nonetheless can be effectively coupled with the civil penalty provisions of the TIL Act in order to enforce the substantive policies which underlie the Act.

First, although the 1974 amendments to the Act carry the potential to reduce the recovery of class members in a substantial number of situations, certification of TIL classes need not be refused. As long as class members are advised of the possible reduction in potential recovery and given a meaningful opportunity to opt out and pursue individual redress, the class is sufficiently protected. 192 This conclusion is based upon the recognition that it is not unfair to provide a limited recovery for the

188. Id. at 8.

189. An even better result could be achieved through legislation similar to that found in the proposed Uniform Class Action Act. The proposed Act suspends the compulsory counterclaim rule in the class action context and requires the defendant to secure leave of the court to plead counterclaims against members of the plaintiff class. UNIFORM CLASS ACTIONS ACT § 11(a), (d), (f) (1976 Draft).


191. The presence of procedural difficulties with the post-1974 TIL class action is not surprising. The class action provisions of the 1974 amendments were unique when they were enacted. See Developments, supra note 134, at 1530–31.

192. See text accompanying notes 99–109 supra.
silent partners in a class action so long as they have the opportunity to actively seek the greater individual recovery.193

Second, the TIL Act vests a certain discretion in the courts to distribute the class recovery.194 While this discretion must be exercised in a manner not inconsistent with rule 23, it is broad enough to permit a court to award the class representative damages in the amount he or she would have recovered by individual suit.195 Such an award would have the positive effect of helping to diminish the disincentive to sue on behalf of a TIL class that was inadvertently created by the 1974 amendments.196 Further, the award would help to remove the spectre of professional misconduct present whenever an individual sues on behalf of a TIL class and risks a recovery less than the amount assured by a successful individual suit.197

Third, the potential problem of multiple TIL class actions for the same violation can be avoided by generally requiring the class representative to include in a single class all persons similarly situated with respect to the defendant's conduct.198 However, when the expense of notification of a nationwide class would otherwise prohibit a full class action, the court may allow the plaintiff to limit the class to a more reasonable size. In such a case, the court would scale down any class recovery in accordance with the size of the class.199

Fourth, if it is ultimately accepted that a creditor's counterclaim to a TIL action is compulsory, and hence within the ancillary jurisdiction of the federal courts, the class action can remain an effective TIL enforcement device. In many cases the counterclaims will not be of a nature that will extensively involve the federal court in disputed local collection suits.200 However, where such possibility exists, the court can protect the viability of the class by trimming from it those members against whom counterclaims are asserted.201

In summary, then, the TIL class action can be maintained in federal court. Yet, in a sense, this conclusion is no conclusion at all. The decision whether to certify a class action is committed to the discretion of the trial court.202 The soft terminology of rule 23 makes it difficult to reverse

193. See notes 110 & 130 supra.
194. See notes 133 & 134 and accompanying text supra.
195. See notes 133–35 and accompanying text supra.
196. See notes 66–69 and accompanying text supra.
197. See notes 70–74 and accompanying text supra.
198. See notes 138–43 and accompanying text supra.
199. See notes 144–58 and accompanying text supra.
200. See notes 186–88 and accompanying text supra.
201. See notes 174–79 & 189 and accompanying text supra.
202. In Postow v. Oriental Bldg. Ass'n, 390 F. Supp. 1130 (D.D.C. 1975), the United States District Court for the District of Columbia stated that the 1974 amendment to the Act "by no means requires or even recommends class action, but properly leaves such determination to the sound discretion of the courts." Id. at 1140. See generally 7A C. Wright & A. Miller, Federal Practice and Procedure § 1785 (1972).
the initial determination of the trial judge. While this Comment concludes that the judge may certify a TIL class, it does not address the overriding question of whether he or she should do so.

On the one hand, there are some strong indications that the class suit is a needed tool of TIL enforcement. Administrative enforcement has been disappointing in the first nine years of Truth in Lending. While the individual suit has flourished in certain areas, there is still a widespread lack of grassroots litigation encouraging creditor compliance. A number of factors operate to discourage individual suit. Most obvious among them are the highly technical nature of the Act and the short statute of limitations. Somewhat less apparent, but often determinative, is the fact that the ongoing nature of the credit relationship make is difficult for the individual to institute suit. The risk of a bad credit rating or of the creditor's refusal to service the product bought yesterday is greater than the lure of the minimum damages. For a number of people, the


204. Testifying before the Senate Subcommittee on Consumer Affairs in support of the 1976 amendments raising the ceiling on class action recovery (see note 13 supra), a spokesperson for the FTC stated:

The [FTC's] resources are very, very inadequate to enforce legislation such as truth in lending . . . where you have about a million creditors.

If [the] laws provide for substantive civil liability, this greatly relieves the government from having to do what it really hasn't got the capacity to do in the first place, that is, insure full compliance with these statutes.

This is primarily why we advocate raising the ceiling on the amount of possible civil liability. . . .

1975 Senate Consumer Leasing Act Hearings, supra note 32, at 225 (testimony of Sheldon Feldman).

205. It is interesting to note that most TIL litigation has been concentrated in only a few judicial districts in the United States. The district with the most extensive history of TIL litigation is the Northern District of Georgia. Between July 1973 and February 1976, TIL suits constituted an incredible 25.6% of all civil cases filed in that district. 1976 Senate Qui Tam Hearings, supra note 14, at 416-17. During the spring of 1974, TIL cases amounted to almost 35% of the civil business of that jurisdiction. Id. For a fascinating explanation of this phenomenon, see id. at 409-54 (statement and testimony of Rhet Tanner).

206. TIL violations occur quite frequently at the bottom of the economic ladder. During the 1976 hearings before the Senate Subcommittee on Consumer Affairs, representatives from the National Consumer Law Center estimated that some 65% of the contracts that come to the attention of Legal Services attorneys contain TIL violations. 1976 Senate Qui Tam Hearings, supra note 14, at 369 (statement of Wendy W. Schiller, National Consumer Law Center, Boston, Mass.). To the extent that the poor consumer deals with small, thinly capitalized creditors, the class action provides little relief. The limitation on class recovery to one percent of net worth effectively forecloses class remedies on this level.

207. See Comment, supra note 17, at 913.

208. In Haynes v. Logan Furn. Mart, Inc., 503 F.2d 1161 (7th Cir. 1974), the Seventh Circuit certified a TIL class action, noting that, in this respect, a class action would in many cases prove to be superior to individual suits. The court stated:

[N]o particular perceptiveness of modern society is needed for an awareness of a fact of life lying in the virtually perpetual monthly payment program of many
institution of an unprovoked suit would simply be bad manners. The
defects in administrative and individual enforcement underscore the need
for a broadly based enforcement device that would concentrate the little
stings of individual suits into one large deterrent bite without demanding
the full commitment of the consumer that is required by an individual
suit.\textsuperscript{209}

On the other hand, creditors have made convincing arguments that
Truth in Lending has become so overburdened with technicalities that
only the largest creditors can afford to comply with its provisions.\textsuperscript{210}
Indeed, the regulations, already quite extensive, are constantly being sup-

\begin{footnotesize}
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States District Court for the Eastern District of Pennsylvania rejected a creditor's
argument that the TIL class action was unnecessary because the Act creates sufficient
incentive for individual suit to ensure the Act's enforcement. The court stated:
\begin{quote}
The argument that the incentive for individual litigation necessitates a finding
of non-superiority assumed that the minimum damage provision relates solely to
consumer motivation to sue rather than a deterrent to creditors. While such may
have been the case prior to the amendments to § 1640(a), Congress, in so amend-
ing, recognized that courts were not certifying class actions and that there was a
need to encourage voluntary creditor compliance \textit{via} potential class action lia-
\begin{itemize}
\item To deny class action status in all Truth in Lending cases
\item would have the effect of nullifying what Congress attempted to do by amending
\item § 1640(a).
\item While costs and reasonable attorney's fees might provide an
\item incentive to litigate where an alleged violation can be defined as an isolated in-
cident, such is not the case where, as here, there are hundreds of alleged viola-
tions almost all of which will go unremedied but for a class action.
\end{itemize}
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\item 210. During the 1976 oversight hearings on the consumer protection activities of
several federal agencies, numerous creditor representatives testified that compliance
with the Act has become too difficult and expensive. For example, the representative of
the American Retail Federation testified:
\begin{quote}
By way of summary, let me reiterate that retailers — indeed, I am sure all
creditors — \textit{want} to comply with the law. However, any such law should be
capable of compliance, not just by the large creditors with access to lawyers
trained in this special field, but by all creditors subject to its provisions.

While I cannot speak personally for any company, I feel that it is a safe
assumption to say that none of the large, multistate retailers is going to be forced
out of business by complex regulations. They have . . . the resources to com-
ply. . . . It is the small merchant who is paying proportionately the highest price
for compliance with complex regulations, and it is the small merchant who is
most likely to be damaged.
\end{quote}
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\item 1976 \textit{Senate Administrative Enforcement Hearings}, supra note 23, at 153-54 (testi-
mony of Milton W. Schober).
\item Two commentators have recently written in their treatise: "In a nutshell, 
Truth-In-Lending has become a trap for the unwary; and most little merchants will
probably not come into compliance until they have been caught a couple of times."
\end{itemize}
\end{footnotesize}
The creditors argue that it is unfair to subject them to the potentiality of class liability in such a complicated and fluid area.212

The history of our jurisprudence shows that when the basic regulatory scheme becomes unfair, courts will utilize procedural difficulties as a shield for those treated unfairly by the statute. To some extent this has been true of Truth in Lending.213 It is believed that if Congress simplifies the technical substance of the Act, the procedural problems that have arisen around the enforcement devices will dissipate. However, the converse is also true: if Congress allows the complexities of the Act to multiply, no new enforcement device will be free from difficulty.

Joseph A. Dworetzky

211. The possibility of overregulation is compounded by the fact that the Truth in Lending Act is only one part of a matrix of recent federal statutes regulating the credit industry. See The Equal Credit Opportunity Act, 15 U.S.C. §§ 1691a–1691e (Supp. V 1975); The Fair Credit Reporting Act, 15 U.S.C. §§ 1681a–1681t (1970); The Fair Credit Billing Act, 15 U.S.C. §§ 1666a–1666j (Supp. V 1975); and the Consumer Leasing Act of 1976, Pub. L. No. 94-240, §§ 2-6, 90 Stat. 257 (1976). One of the difficulties created by frequent changes in the statutory scheme and the regulations supporting the statutes is that creditors do not have time to have new forms designed and printed, and train personnel adequately in their use. See 1976 Senate Administrative Enforcement Hearings, supra note 23, at 152 (statement of Milton W. Schober).

212. During the 1976 hearings on the qui tam alternative to the class action device, a representative of the Consumer Bankers Association summed up the matter as follows: "It is, in our view, totally unfair, even unconscionable, to award $500,000 for an act, not really bad, that was committed despite the retention of suitable legal and programming specialists." 1976 Senate Qui Tam Hearings, supra note 14, at 294 (testimony of Glen Hodges).

213. During the 1976 Qui Tam Hearings, Judge Sidney O. Smith, Jr., the Chief Judge of the United States District Court for the Northern District of Georgia from 1968 to 1974, made a statement to the Senate Subcommittee on Consumer Affairs. During the period of Judge Smith's tenure, the Northern District of Georgia received a greater number of TIL cases than any other district in the country. See note 205 supra. Judge Smith stated:

It was my experience that many, if not the great majority of [TIL] cases, were brought on the basis of allegations of hypertechnical violations of an extremely complicated law where logical arguments could be made by lawyers on either side of the case. This area of the law is so technical that the most conscientious judges frequently reach directly opposite opinions with respect to the same alleged violation. . . .

It is indeed difficult for a creditor in the utmost good faith and in the exercise of due diligence to prepare credit contracts which may not later be held in violation of the Truth-in-Lending Act by some court in the federal judiciary. It would seem that we need to work toward some solution which would allow a reasonable and fair way for creditors to work toward meaningful disclosure of the credit terms.

1976 Senate Qui Tam Hearings, supra note 14, at 342–43 (statement of Judge Sidney O. Smith, Jr.).