In 1968, Congress enacted the Truth in Lending Act\(^1\) "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."\(^2\) Congress provided guidelines for disclosure of the terms of consumer credit transactions\(^3\) and encouraged compliance with them by establishing civil penalties for a creditor's failure to disclose consumer credit terms in the prescribed manner.\(^4\) A plaintiff who successfully proves a violation of the Act will recover, in addition to damages, court costs plus reasonable attorneys' fees.\(^5\) The Act makes any cause of action arising under it subject to a one year statute of limitations.\(^6\)

In *Goldman v. First National Bank*,\(^7\) the Seventh Circuit confronted two troublesome issues presented by the Truth in Lending Act—determination of when the Act's statute of limitations begins to run and adaptation of class actions to litigation under the Act. The limitations problem as applied to the "open end

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\(^6\) 15 U.S.C. § 1640(e) (1970) ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of occurrence of the violation.").

\(^7\) 532 F.2d 10 (7th Cir.), cert. denied, 97 S. Ct. 183 (1976).
credit plan'\textsuperscript{8} in \textit{Goldman} was an issue of first impression. In cases involving closed end plans,\textsuperscript{9} other courts had construed strictly the limitations provision, holding that it commences the moment the credit transaction is consummated.\textsuperscript{10} Faced with the different situation created by a lender making false and misleading disclosures in the context of an open end credit plan, the court held that the limitations period began to run on the date that a finance charge was first imposed. The class action question entailed determining whether the trial court abused its discretion by refusing to allow the suit to proceed as a class action under the Truth in Lending Act. The Seventh Circuit perceived that the district court's denial of class certification was based on barriers to class actions made irrelevant by pasage of the 1974 amendments to the Act,\textsuperscript{11} but the court then overlooked new problems posed by the amendments.

This Comment will examine the court's analysis of the statute of limitations issue, demonstrating that the court's reasoning could be employed in future cases to undermine the congressional objective of promoting compliance with the Truth in Lending Act through private enforcement by denying some injured consumers a valid cause of action under the Act. The Comment also will explore aspects of the Seventh Circuit's resolution of the class action question, concluding that the court's failure to determine class size and composition precluded a reasoned determination that the suit was manageable as a class action and that the plaintiff was qualified to represent the class. Finally, the Comment will analyze the effect of the statute of limitations decision on the class action question, suggesting that the interaction of these issues may make it advantageous for a consumer with a cause of action to delay bringing a class action or individual suit, at the same time making it more difficult for a creditor to control or even estimate his potential liability for any given year.

\textsuperscript{8} For a discussion of the significant attributes of open end credit plans, see note 34 infra & accompanying text.

\textsuperscript{9} For a definition of closed end credit plans, see text accompanying notes 32-33 infra.

\textsuperscript{10} E.g., Wachtel v. West, 476 F.2d 1062 (6th Cir.), cert. denied, 414 U.S. 874 (1973); Alpert v. United States Indus., Inc., 59 F.R.D. 491, 498 (C.D. Cal. 1973). In Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99, 107 (E.D.N.Y. 1973), the court stated "that without some Congressional intent to the contrary, it should not by construction increase the defendant's liability beyond the one year from the date of the execution of the contracts."

In a larger context, *Goldman* is directly relevant to the growing concern that class actions may serve as an invitation to solicitation and propagation of unnecessary litigation. This Comment will suggest that the entangling of statute of limitations and class action problems may make individual suits more attractive than class actions to some plaintiffs, while potentially depriving other plaintiffs of their causes of action.

I. BACKGROUND

A. *The Truth in Lending Act*

Before enactment of the Truth in Lending Act in 1968, divergent—and at times fraudulent—practices used by creditors to inform consumers of credit terms often prevented consumers from shopping for the best terms available and sometimes caused them to assume liabilities they could not meet. After years of congressional study and debate, the Act was passed in a form designed to remedy such consumer credit problems. The House Committee on Banking and Currency concluded that by requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the cost

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12 See *Free World Foreign Cars, Inc. v. Alfa Romeo*, 55 F.R.D. 26, 30 (S.D.N.Y. 1972) (“[C]lass actions . . . threaten to engulf the courts; . . . substantial questions have been raised whether the Rule . . . has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees.”); *Buford v. American Fin. Co.*, 333 F. Supp. 1243, 1251 (N.D. Ga. 1971) (“[T]he plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation.”); *Comment, Involuntary Dismissals of Class Actions*, 40 U. CHI. L. REV. 783 (1973) (“The possibility of recovery of large attorney’s fees has led to an inundation of the federal courts with class actions, many of which have little merit or are of negligible importance to class members.” (footnote omitted)).


of credit and to make the best informed decision on the use of credit.\(^{15}\)

Although primary enforcement of the Act is the responsibility of the Federal Reserve Board,\(^{16}\) further provision is made in section 130 "for the institution of civil action by an aggrieved debtor."\(^{17}\) The original section 130 fixed damages for noncompliance with the uniform disclosure provisions of the Act\(^{18}\) at "twice the amount of the finance charge in connection with the transaction,"\(^{19}\) subject to a minimum award of $100 and a maximum award of $1000.\(^{20}\) The plaintiff's cause of action in \textit{Goldman} arose under this original version of the Truth in Lending Act.

\textbf{B. The Factual Setting of Goldman}

On April 3, 1970, plaintiff Steven Goldman applied to the First National Bank of Chicago for a BankAmericard credit card on a printed form prepared by the bank. This form included the bank's contract with its cardholders (BankAmericard Agreement) and a section labeled "Disclosure Statement As Required by the Federal Truth-in-Lending Act."\(^{21}\) The BankAmericard Agreement provided that "[i]n respect to credit purchases, . . . [f]inance charges shall commence 25 days from billing date."\(^{22}\) This statement, ultimately proven false,\(^{23}\) was the center of the controversy.

\(^{20}\) Id.
\(^{21}\) 532 F.2d at 12.
\(^{22}\) Id. at 13.
\(^{23}\) The bank argued that, assuming the sentence were false, its inconsistency with the required disclosures in the Disclosure Statement and each periodic billing statement should have alerted the defendant to the discrepancy immediately. Brief for Appellant at 35. A careful reading of the Disclosure Statement and the periodic billing statements, however, reveals nothing that contradicts the disputed sentence in the BankAmericard Agreement. See 532 F.2d at 12-13; Brief for Appellant, app. at 33-34. Although the Disclosure Statement states conspicuously that the "FINANCE CHARGE for Cash Advances begins on the date the cash advance is made (emphasis supplied)," it never states when the finance charge for merchandise purchases begins. 532 F.2d at 12-13; Brief for Appellant, app. at 33-34. Furthermore, because the bank was not required by the Truth in Lending Act to disclose the date on which finance charges would begin, see 15 U.S.C. § 1637 (1970 & Supp. V 1975), the absence of this information on the Disclosure Statement and periodic billing statements would not have indicated to the plaintiff that something was wrong.
The defendant bank approved Goldman's application in April 1970 and sent him his credit card shortly thereafter. Goldman first used his card on July 1, 1970, and made additional purchases with it during the remainder of the year. From September 1970 through January 1971, he paid the entire balance shown on each billing statement within the twenty-five day "free ride" period; consequently, he did not incur any finance charges for those months. The bank, however, did not receive Goldman's check for his February 8, 1971 billing statement until March 9, 1971. Because payment had not been made within twenty-five days from billing, the bank included a finance charge of $1.19 in its March 8 billing statement. The plaintiff alleged that this amount represented a finance charge for the period from February 9 to March 8, at the rate of 1.5 percent per month. Referring to the BankAmericard Agreement, Goldman argued that the appropriate finance charge was thirteen cents, representing the charge for the three days between the end of the twenty-five day "free ride" period and the March 8 billing date. He filed a complaint under the Truth in Lending Act on July 8, 1971 on behalf of himself and a class of BankAmericard holders similarly situated, alleging that the defendant had made a false and misleading disclosure in violation of the Act.

II. Statute of Limitations Question

Goldman filed his complaint more than one year after he had applied for credit from the bank. The district court held that the sentence meant only that the bank's right to collect finance charges vested 25 days after the billing date. Brief for Appellant at 36. The bank's interpretation, however, defies the plain language of the sentence; even if such an interpretation could be justified, the sentence would violate the requirement that the disclosure be made "clearly." 15 U.S.C. § 1631(a) (1970) (amended 1974). Additionally, if the sentence in fact referred only to the date the bank's right to collect finance charges vested, then nothing in the Disclosure Statement or the BankAmericard Agreement told the consumer about the very important date from which finance charges would be computed.

Each billing statement included the following information:

4. . . “FINANCE CHARGE” at the rate of 1½% per month for "MERCHANDISE PURCHASES" is charged to your account on your next billing date . . . unless the “NEW BALANCE” on this statement is paid in full within 25 days after your billing date.

592 F.2d at 13.

See text accompanying note 22 supra.

Although the Act condemns specifically only not disclosing the required information, see 15 U.S.C. §§ 1637-1640 (1970 & Supp. V 1975), Goldman contended, and the court agreed, that a false or misleading disclosure is also a violation of the Act. See 592 F.2d at 18; text accompanying notes 47-50 infra.

There were two lower court opinions in this case. The statute of limitations question was decided in Goldman v. First Nat'l Bank, 392 F. Supp. 214 (N.D. Ill. 1975).
Goldman's claim to be barred by the Act's statute of limitations.\textsuperscript{28} The trial judge concluded that

the purpose of the statute is to provide full disclosure to the consumer of the cost of using credit to the end that he may more intelligently use it. Disclosure is what Congress intended. Violation of the disclosure provision must occur, if at all, sometime before the first transaction occurs. In this case, disclosure occurred when defendant [sic] received and accepted the card from the defendant in April or May, 1970, or, at the very latest, on July 1, 1970 when plaintiff first used the card. Thus, the statute of limitations bars this action since the complaint was filed July 8, 1971, more than one year after the disclosure was made.\textsuperscript{29}

The district court noted the uniqueness of this case;\textsuperscript{30} with one exception,\textsuperscript{31} previous cases dealing with the Truth in Lending Act's statute of limitations involved "closed end credit transactions" under sections 128 and 129 of the Act.\textsuperscript{32} In a closed end plan, "the finance charge is divided into the term of the loan and incorporated into the time payments and thus the rate is computable by the consumer from the time he receives his first billing."\textsuperscript{33} A consumer who makes a closed end credit transaction can, therefore, determine after his first billing statement whether the creditor has omitted a required disclosure, or has made a false or misleading statement.

\textsuperscript{28} 15 U.S.C. § 1640(e) (1970); see note 6 \textit{supra}.

\textsuperscript{29} 392 F. Supp. at 218. The reported opinion contains an error. The court obviously meant to say "disclosure occurred when \textit{plaintiff} received and accepted the card from the defendant . . . ."

\textsuperscript{30} \textit{Id.} at 216.

\textsuperscript{31} \textit{White v. Central Charge Serv., Inc., [1969-1973 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 99,170} (D.C. Super. 1972), is the one reported case involving an open end credit plan. In \textit{White}, the plaintiff alleged a violation of § 1637(b)(2) of the Act, requiring inclusion of a description of the goods purchased on the periodic billing statement sent to the customer. The absence of this disclosure on the billing statement gave immediate notice to the plaintiff that a violation had occurred; consequently, the \textit{White} court held that the statute of limitations ran from the date that the statement was received. \textit{White} is therefore analogous to an omission in the disclosure statement that would immediately alert the consumer that a violation had been committed. \textit{See} text accompanying notes 38-62 \textit{infra}. \textit{White} provides no guidance, however, in a situation where, as in \textit{Goldman}, the violation alleged is a false or misleading disclosure. \textit{See} 532 F.2d at 17 n.10; text accompanying notes 45-71 \textit{infra}.


\textsuperscript{33} 532 F.2d at 19.
The credit arrangement involved in Goldman on the other hand, was an open end credit plan.

An open end credit plan is one in which credit terms are initially established with the opening of the account, but no fixed amount of debt is incurred at that time. Purchases made from time to time are added to the outstanding balance in the account, and each new purchase represents an additional extension of credit under the terms as originally defined in the credit agreement.34

Goldman argued that discovery of a violation of the Act's disclosure requirements is more difficult under an open end plan, and that the difference between the two types of plans should affect the determination of when the statute of limitations begins to run.35 In support of his contention, he presented the following four theories in the circuit court: (1) that the bank's repeated failure to disclose the true finance charge constituted a series of "continuing violations," (2) that the bank's fraudulent concealment of the amount of the finance charge tolled the statute of limitations, (3) that no cause of action accrues in an open end plan until a finance charge is imposed, and (4) that notice of the Act's violation, required for running the statute of limitations by both congressional intent and equitable considerations, is not given in an open end credit plan until a finance charge is imposed.36

Like the district court, the Seventh Circuit disagreed with Goldman's contention that the bank's disclosure violation was "continuing."37 It referred to earlier cases involving closed end plans, most notably Wachtel v. West,38 that rejected the "continuing violation" theory and held that there is a specific time at which a disclosure violation takes place—usually the time that the credit contract between the borrower and lender is made or, at the latest, the time credit is first extended.39 Although ultimate
mately not choosing the same point from which to measure the limitations period,
the Goldman circuit court, relying on the earlier cases and the language of the Act itself,
nonetheless found that when "there is a violation of the Act in an open end credit plan, it occurs at the time the account is opened, or at the very latest, some time before the first transaction takes place." In both closed and open end credit plans, if there is no disclosure as required by the Truth in Lending Act, the consumer can discover the violation immediately by comparing the disclosure statements with the relevant section of the Act. Thus, the court of allowing the consumer to make a "meaningful" credit decision, it is necessary that he have the required information in his possession before he becomes committed to any particular lender. This conclusion is supported by 15 U.S.C. § 1639(b) (1970), which directs that the disclosures required in 15 U.S.C. § 1639(a) (1970) (loan transactions) be made "before credit is extended." Because the Act fails to specify when credit is deemed extended, the court looked to the Federal Reserve Board's Regulation Z, which, defining the time at which a transaction is "consummated," states: "A transaction shall be considered consummated at the time a contractual relationship is created between a creditor and a customer irrespective of the time of performance of either party." FRB Regulation Z, 12 C.F.R. § 226.2(kk) (1976). The Wachtel court concluded that a credit transaction requiring disclosure under the Act is completed when the lender and borrower contract for the extension of credit. In the absence of proper disclosure, therefore, violation of the Act takes place at the time of contracting, or, at the very latest, at the time of performance; it does not occur continuously. 476 F.2d at 1065.

Subsequent cases generally have agreed that there is a specific time at which a violation of the disclosure requirements takes place and that the limitations period runs from that time. For example, in Stevens v. Rock Springs Nat'l Bank, 497 F.2d 307, 309 (10th Cir. 1974), the court remarked:

While in this opinion we do not necessarily adopt the Sixth Circuit's reference to the date of "performance" as the date on which the violation occurs, we nevertheless agree generally with the proposition that violation of the disclosure requirements ... occurs at a specific time from which the statute will then run. Thus it does not necessarily become a continuing failure or breach.


See text accompanying notes 45-71 infra.

532 F.2d at 17.
rejected the argument that in an open end credit plan "the duty
to disclose mandates that until disclosure is made as required by
the Act, a violation continues and thus the statute is tolled."44

The Seventh Circuit, however, did not terminate its analysis
at this point. Unlike the district court, it proceeded to consider
another distinction between preceding cases and the case before
it. In the earlier cases the lenders had made no disclosure of
credit terms as required by the Act;45 in Goldman there was dis-
closure, but it was, allegedly, misleading. Goldman contended
that false or misleading disclosures are equivalent to nondisclo-
sure under the Act, but that discovery of the violation by the
injured consumer is nearly impossible in such situations until a
finance charge has been imposed. Therefore, he argued, "the
relevant date for the limitations period should be the date on
which the [finance] charge was first assessed."46

The court agreed with Goldman that, although the Act on
its face condemns only "not disclosing" credit terms,47 a false or
misleading disclosure was a violation of the Truth in Lending
Act no less than nondisclosure. Taking its cue from the stated
purpose of the Act "to assure a meaningful disclosure of credit
terms,"48 the Seventh Circuit found that the congressional intent
to protect consumers from "the uninformed use of credit"49
would be frustrated unless the Act were so construed.50

In assessing whether an action based on a misleading dis-
closure is subject to a different limitations period than one
arising out of nondisclosure, the court declined to consider
Goldman's fraudulent concealment theory.51 Without discussing

44 Id. at 20. Similarly, the district court analyzing the earlier cases and holding that
they were not controlling because they did not deal with a transaction under an open
end credit plan, nevertheless determined that under an open end plan disclosure viola-
tions are not continuing and that "the violation occurs when the credit contract is exe-
cuted." 392 F. Supp. at 217; see text accompanying note 29 supra.
45 532 F.2d at 20.
46 Id. at 17.
makes this argument even stronger. The amended declaration of purpose adds that the
Act is "to protect the consumer against inaccurate and unfair billing and credit card
practices." Id.
49 Id.
50 532 F.2d at 18.
51 Id. at 20-21.

The federal doctrine of fraudulent concealment was announced by the Supreme
[Where the party injured by the fraud remains in ignorance of it without any
fault or want of diligence or care on his part, the bar of the statute does not
begin to run until the fraud is discovered, though there be no special circum-
separately the plaintiff's remaining two theories, it found "the stated legislative intent," "the unique but somewhat problematic nature of open end credit arrangements," and "other considerations" sufficient to decide that where "there has been an incomplete, inaccurate or misleading disclosure, the limitations period should not be measured from the date the disclosure was required by law to be made, but instead by the date on which a finance charge was first imposed."

Goldman averred that the district court's interpretation of the limitations provision frustrated the intent of Congress to protect consumers from "the uninformed use of credit." Consumers would not be protected effectively if their suit were

stances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

Although this doctrine was first introduced in equity, it is equally applicable in cases involving legal actions. Bailey v. Glover, 88 U.S. (21 Wall.) at 349 (dictum); Morgan v. Koch, 419 F.2d 993, 997 (7th Cir. 1969); Janigan v. Taylor, 344 F.2d 781, 784 (1st Cir.), cert. denied, 382 U.S. 879 (1965); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.), cert. denied, 368 U.S. 821 (1961). "This equitable doctrine is read into every federal statute of limitation." Holmberg v. Armbricht, 327 U.S. 392, 397 (1946).

Goldman's fraudulent concealment argument was twofold: (1) the bank "actively" and intentionally concealed its method of determining the finance charge, or (2) even if the bank had not attempted actively to conceal the misrepresentation, the statute of limitations should not begin to run until the consumer has had an opportunity to perceive that a violation has occurred. The first argument is without merit because Goldman never introduced any evidence that the scienter necessary to prove fraud was present in this case. See Chevalier v. Baird Sav. Ass'n, 371 F. Supp. 1282, 1284-85 (E.D. Pa. 1974) ("While the doctrine of fraudulent concealment may well have application to violations under Truth-in-Lending, this could only be where a fraudulent intention prevented the requisite disclosure. This would require at the least that defendants have known they were violating the provisions of the Act."). See generally Dawson, Fraudulent Concealment and Statutes of Limitation, 31 Mich. L. Rev. 875 (1933). Goldman's second argument technically is not based on fraudulent concealment because it incorporates equitable considerations that may pertain in the absence of fraud. See Quinton v. United States, 304 F.2d 254, 240 (5th Cir. 1962) (In a claim for medical malpractice under the Federal Tort Claims Act, the statute of limitations begins to run when the claimant "discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice." (footnote omitted)); Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962). Although declaring it unnecessary to consider this contention, the Goldman court nonetheless evinced concern for these equity arguments. See text accompanying notes 57-63, 68-71 infra.

See text accompanying note 36 supra.

32 F.2d at 21; see text accompanying notes 57-63 infra.

54 See 32 F.2d at 21; see note 34 supra & accompanying text.

55 See 32 F.2d at 21; see text accompanying notes 64-71 infra.

56 Id. The court subsequently obfuscates the matter by limiting the holding "to the unique and narrow set of circumstances presented in open end credit plans." Id. at 22. It is true that the holding of this case is inapposite in a case involving a closed end credit plan. See text accompanying note 33 supra. Nevertheless, this statement is incomplete because the presence of the false or misleading disclosure is a necessary prerequisite for this decision.

barred by the statute of limitations before they had an opportunity to know of the violation. Finding this argument persuasive, the Seventh Circuit was apparently "guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." The court's broad interpretation is consistent with cases holding that the Truth in Lending Act is remedial in nature and should be construed liberally in favor of the consumer: "Since the civil penalty prescribed [in 15 U.S.C. § 1640 (1970)] is modest and the prohibited conduct clearly set out in the regulation, we need not construe this section as narrowly as a criminal statute providing graver penalties . . ." A limitations statute is most properly interpreted "in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." The remedial purpose of the Truth in Lending Act strongly suggests that Congress did not intend the one year limitations period to begin to run against the consumer until the consumer's right "has accrued in a shape to be effectively enforced."
The circuit court also emphasized the importance of the imposition of a finance charge in the legislative scheme. It noted that the finance charge is the central consideration in the measure of damages imposed by the statute. Despite the fact that liability may be found even where no finance charge is assessed, the court concluded that the imposition of a finance charge was clearly contemplated as the event that would usually give rise to suit under the Act. The court added that in a case of inaccurate disclosure under an open end credit plan, the imposition of a finance charge "is a necessary condition for the assessment of liability since it is this charge against which the accuracy of the disclosure must be measured. . . . Until a finance charge is levied the debtor has no cause for complaint since there has been no action inconsistent with the inaccurate disclosure."

The Goldman court bolstered its decision with reference to "those cases which designate as the time from which a statute of limitations begin [sic] to run the date at which the last significant event necessary to make the claim suable occurs." A claim is not "suable" until after notice of an invasion of one's legal rights, before that time the injury is unknown, and legal action cannot be taken. By finding the proposition "irrefutable" that, in the context of an open end credit plan, "when the disclosure statement is false, incomplete or inaccurate it is not until the imposition of the first finance charge that the debtor can perceive that a violation [of the Truth in Lending Act] has occurred," the Seventh Circuit in effect found that the debtor's claim was not "suable" until a finance charge was assessed. Thus, Goldman's claim was held not to be barred by the statute of limitations.

Although the Seventh Circuit enforced the Truth in Lend-
ing Act's statute of limitations consistently with congressional intent in this circumstance,\textsuperscript{72} in so doing the court employed broad language that could be construed in other contexts to contravene the purposes of the Act. The court stated that "[t]he imposition of a finance charge under an open end credit plan in which an inaccurate disclosure has been made is a necessary condition for the assessment of liability since it is this charge against which the accuracy of the disclosure must be measured."\textsuperscript{73} The implication is that under these circumstances the creditor is not liable for violating the Act unless and until he imposes a finance charge upon the consumer in a manner inconsistent with the false disclosure;\textsuperscript{74} consequently, a consumer who is misled by a false disclosure would have no cause of action until a finance charge is imposed.\textsuperscript{75}

The court's broad language may have been partially a result of a failure to analyze separately two distinct theories of the plaintiff—accrual of a cause of action and notice of a cause of action.\textsuperscript{76} Determining when the injury occurred or a cause of action arose was unnecessary for deciding when the statute of limitations began to run. It became apparent that the plaintiff had been injured by the false disclosure only upon imposition of the finance charge. Accordingly, the \textit{Goldman} court could have held the statute of limitations tolled on equitable grounds until then—the first time the plaintiff knew, or should have known, of his injury.\textsuperscript{77} Such a result would be reasonable whether the actual injury had occurred at the time the finance charge was imposed or at some prior time.

More importantly, the court's unnecessary conclusion may have the undesirable effect of denying a valid cause of action under the Truth in Lending Act to a consumer (either as an individual or a member of a group bringing a class action) who has been injured by a false disclosure and becomes aware of it


\textsuperscript{73} 532 F.2d at 21 (emphasis supplied).

\textsuperscript{74} Technically, another interpretation of the court's reasoning is possible. The Seventh Circuit noted that imposition of a finance charge "is not the only event which may precipitate an action . . . ." 532 F.2d at 21. The circuit court deemed this caveat "immaterial" to the facts of \textit{Goldman}. \textit{Id.} But the statement may herald a flexible approach to the statute of limitations problem that remains mindful of congressional intent to protect the consumer. This reading comports with the \textit{Goldman} court's discussion of \textit{Mourning v. Family Publications Serv., Inc.}, 411 U.S. 356 (1973), where the Supreme Court asserted that Congress did not attempt to list all the situations where the Act might apply. See 532 F.2d at 21 n.18.

\textsuperscript{75} See text accompanying note 67 supra.

\textsuperscript{76} See text accompanying notes 36 & 52 supra.

\textsuperscript{77} See text accompanying note 69 supra.
without incurring a finance charge. Although in most cases imposition of a finance charge is necessary before a consumer can perceive that he has been victimized by a false or misleading disclosure,\textsuperscript{78} the consumer may suffer actual injury before that time. For example, he may select credit card \textit{A} instead of credit card \textit{B} because a "false" disclosure made \textit{A}'s credit terms appear more advantageous to him.\textsuperscript{79} Based on his own evaluation of his needs and desires, the consumer, therefore, will have chosen a card that is less beneficial to him and will have forfeited irretrievably the extra benefits offered by card \textit{B} during the time that he was unaware of card \textit{A}'s "false" disclosure.\textsuperscript{80} Additionally, he may at that point be unable to acquire readily credit card \textit{B}.\textsuperscript{81} Although a consumer in this situation may have difficulty establishing monetary damages, he will have suffered an injury nevertheless, and be entitled to a cause of action.

The contention that the consumer has no cause for complaint until a finance charge is imposed is inconsistent with the Truth in Lending Act's aim of assuring "a meaningful disclosure

\textsuperscript{78} A consumer may learn that a false disclosure was made to him without having a finance charge imposed on his statement. For example, he may be informed by a friend who has had a finance charge imposed on his own statement.

\textsuperscript{79} Such a proposition may, at first glance, appear tenuous in the context of bank credit cards such as BankAmericard and Master Charge. In the absence of any issuing charge, the consumer can simply apply for both cards. He may be wise not to do so, however. For example, a consumer may wish to use only one of the cards in order to simplify his bill paying and financial accounting. The consumer also may desire to minimize his number of credit cards, perhaps because of fear of loss or theft, and keep only one for special or emergency use. The proposition is even stronger, however, when considered in the context of such prestigious credit cards as American Express and Diners' Club. These creditors charge their cardholders an annual fee for the privilege of using their card; consequently, a consumer could reasonably conclude that he can only afford to hold one of these two cards, especially since they are similar in many respects. Even a consumer who obtains both cards may be disadvantaged. Suppose he either utilizes both cards or exclusively employs the card that later turns out to be less beneficial. Despite owning both cards, the consumer is injured to the extent that he used the less advantageous credit card. Of course, the amount of the injury may well depend upon the nature of the false or misleading disclosure.

\textsuperscript{80} For example, American Express provides each of its cardholders with a $25,000 travel accident life insurance policy. Similarly, Diners' Club gives each of its members a subscription to a magazine that it sponsors. A consumer who originally chose American Express has been deprived of receiving those issues of the Diners' Club magazine sent out during that time period. Conversely, a consumer who originally chose Diners' Club has been forced to either purchase insurance for a few dollars each time he travels or deny himself the piece of mind engendered by having the insurance. More dramatically, he might have chosen to travel without the insurance and died in an accident uninsured.

\textsuperscript{81} For example, having paid the annual fee for credit card \textit{A} he may be unable to afford to pay another fee for credit card \textit{B}. Additionally, his financial situation may have changed (perhaps he was laid off from his job) since he chose credit card \textit{A} and he may no longer satisfy the requirements for obtaining credit card \textit{B}. 
of credit terms so that the consumer will be able to compare more readily the various credit terms available to him..."  

Although the consumer may have no reason to believe that a disclosure is false until a finance charge is imposed in a manner inconsistent with the disclosure, the bank actually renders the disclosure "false" as soon as it imposes an inconsistent finance charge on any of its customers. Consequently, although the consumer cannot perceive from his own records that the bank has made a false disclosure to him, the bank has nevertheless violated the Act. The imposition of a finance charge is usually the event impelling suit under the Act; liability may be found, however, in the absence of the imposition of a finance charge.

The remedy provided by the Truth in Lending Act indicates that a cause of action arises even in cases in which no finance charge has been imposed on the plaintiff. Actual damages are not a prerequisite to recovery of the statutory damages provided in section 130. The congressional intent in this circumstance has been stated by a federal district court in a manner inconsistent with the expansive language in Goldman:

Beyond using the finance charge as such an available and handy reference point, presumably to be replaced in the normal case by the $100 minimum or $1,000 maximum, Congress made clear its broader scheme, and broader system of reimbursement, for private enforcement. It invited people like the present plaintiff, whether they were themselves deceived or not, to sue in the public interest. Following familiar precedents, it encouraged such actions by providing, in addition to the incentive of public service, costs and a reasonable attorney's fee above the minimum recovery of $100.

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82 15 U.S.C. § 1601 (Supp. V 1975). Since one purpose of the statute is to allow consumers to make informed choices, public policy should favor notification of any misleading or false disclosures at the earliest possible time. Allowing a cause of action to accrue as soon as a falsity is discovered would encourage consumers who gain knowledge of such false or misleading disclosures to institute suit immediately rather than wait for imposition of a finance charge. This would benefit both consumers and creditors because early discovery would tend to limit the number of consumers deceived and consequently limit the total amount of potential damages.


Thus, the Seventh Circuit's restrictive interpretation of when the cause of action accrued arguably tends to undermine the mechanism of private enforcement instituted by Congress to promote compliance with the Act.

III. CLASS ACTION QUESTION

Coupling the penalty originally prescribed by the Truth in Lending Act with the class action provisions of rule 23 of the Federal Rules of Civil Procedure created a situation with apparently unforeseen and unintended destructive potential. Consumer advocates instituting class actions to recover the Act's minimum damages of $100 for themselves and all others similarly situated often sought enormous damages awards. Because such sizable claims threatened to destroy even the largest of the thousands of lenders who regularly extend credit to consumers, the courts were reluctant to sanction class action suits in the absence of an explicit congressional directive.

The quintessential class action case under the original section 130 was *Ratner v. Chemical Bank New York Trust Co.* Less than three months after the Truth in Lending Act became effective, a Chemical Bank credit card customer filed suit against the bank, alleging that the bank's monthly Master Charge statement violated the Act by failing to disclose the annual percentage rate of the finance charge. Plaintiff sought to recover the Act's minimum damages of $100 for himself and each of the approximately 130,000 similarly situated Chemical Bank credit card customers. The court ruled that Chemical Bank's failure to disclose the nominal annual percentage rate constituted a violation of the Act even though no finance charge was imposed during

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86 No significant discussion of class actions appears anywhere in the legislative history of the Truth in Lending Act as it was originally enacted. See Wilcox v. Commerce Bank, 474 F.2d 336, 343-44 (10th Cir. 1973); Berkman v. Sinclair Oil Corp., 59 F.R.D. 602, 611 (N.D. Ill. 1973); Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410, 1411 n.10 (1974).


88 For an extensive list of the numerous federal district courts that have considered the appropriateness of class actions under the original Truth in Lending Act, see Berkman v. Sinclair Oil Corp., 59 F.R.D. 602, 607 n.9 (N.D. Ill. 1973).

89 54 F.R.D. 412 (S.D.N.Y. 1972). This opinion decided whether the action pursued under the Act could be maintained as a class action. The same case at an earlier stage was reported at 329 F. Supp. 270, deciding the question whether there was a disclosure violation under the Act. See note 90 infra & accompanying text.

the month for which the periodic disclosure statement was issued. Consequently, the question of class certification presented Judge Frankel, who had previously decided the question of liability, with two alternatives: certify the class and assess the bank with damages totalling roughly $13 million, or deny the plaintiff's motion for class certification and award him the statutory minimum of $100 plus costs and attorneys' fees.

Judge Frankel, in opting for the second alternative, apparently assumed that the plaintiff satisfied the prerequisites to maintaining a class action set out in rule 23(a). Analyzing the case from the perspective of the additional requirements for maintaining a class action set forth in rule 23(b), Judge Frankel summarily rejected the plaintiff's efforts to rely on 23(b)(1). After conceding that the plaintiff had made a prima facie showing that the conditions of 23(b)(3) were fulfilled, Judge Frankel

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91 Id. at 280.
92 See note 89 supra.
93 54 F.R.D. at 414.
94 Judge Frankel did not discuss the prerequisites to maintenance of a class action listed in rule 23(a). The full text of Fed. R. Civ. P. 23(a) specifies:

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

95 The full text of Fed. R. Civ. P. 23(b) specifies:

Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (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. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

96 54 F.R.D. at 415.
articulated two reasons persuading him that a class action in this instance was not "superior to other available methods for the fair and efficient adjudication of the controversy":

(1) The incentive of class-action benefits is unnecessary in view of the Act's provisions for a $100 minimum recovery and payment of costs and a reasonable fee for counsel; and

(2) the proposed recovery of $100 each from some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act.97

Although Judge Frankel carefully limited his decision to the facts of the case at bar,98 his reasoning was adopted enthusiastically by several courts subsequently faced with Truth in Lending class certification motions.99

Goldman's class certification motion, ruled on only seven months after Ratner was decided,100 was denied by the district

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97 Id. at 416. Neither of these justifications falls within the four pertinent considerations set out in rule 23(b)(3). See note 95 supra.
98 See 54 F.R.D. at 413.
99 In the two year period following Ratner, federal district courts in at least 36 different Truth in Lending suits denied motions for class certifications. E.g., cases cited in Katz v. Carte Blanche Corp., 496 F.2d 747, 763 n.9 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974); Alpert v. United States Indus., Inc., 59 F.R.D. 491, 500 (C.D. Cal. 1973). In nearly all of these cases, the courts relied on Ratner to support the conclusion that a class action, with its potentially destructive effect, was not superior to an individual suit for statutory damages. During this same period, only two district courts considered and explicitly rejected the Ratner rationale. See Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99 (E.D.N.Y. 1973); Eovaldi v. First Nat'l Bank, 57 F.R.D. 545 (N.D. Ill. 1972).

Other courts have objected to an attorney's representing the class as plaintiff in these suits because the prospect of an award of attorney's fees in a successful action made it questionable whether the best interests of the class were his primary concerns. See Eovaldi v. First Nat'l Bank, 57 F.R.D. 545 (N.D. Ill. 1972); Shields v. Valley Nat'l Bank, 56 F.R.D. 448 (D. Ariz. 1971); cf. Kriger v. European Health Spa, Inc., 56 F.R.D. 104 (E.D. Wis. 1972) (plaintiff-attorney could not "fairly and adequately protect the interests of the class" because his testimony would necessitate the withdrawal of his own firm as counsel). Still other courts have held that a class action is not superior to an individual action under section 130(a) because of its "potential for abuse." Alpert v. United States Indus., Inc., 59 F.R.D. 491, 500 (C.D. Cal. 1973); Wilcox v. Commerce Bank, 55 F.R.D. 134, 137 (D. Kan. 1972), aff'd, 474 F.2d 336 (10th Cir. 1973); Buford v. American Fin. Co., 333 F. Supp. 1243, 1251 (N.D. Ga. 1971). In Berkman v. Sinclair Oil Corp., 59 F.R.D. 602, 609 (N.D. Ill. 1973), the court noted that the defendant had a "plethora" of small claims against delinquent credit card holders that might have to be asserted as compulsory counterclaims, which would result in the suit being wholly unmanageable as a class action.
court on the ground that the action did not fall within any of the
categories of rule 23(b).\textsuperscript{101} District Judge Bauer prefaced his
consideration of the applicability of subsections two and three of
rule 23(b) with a discussion of the original section 130(a)
pre-
scription of a minimum recovery of $100 without differentiation
between individual and class actions.\textsuperscript{102} Influenced by the pros-
pect of a crushing damages award, he relied on Judge Frankel's
language in \textit{Ratner} to conclude that a class action in this case
would not be "'superior' to other available methods for the fair
and efficient adjudication of the controversy."\textsuperscript{103} The district
court opinion also quoted Judge Frankel's conclusion that allow-
ing a class action in such a case is "essentially inconsistent with
the specific remedy supplied by Congress . . . ."\textsuperscript{104}

Congress eventually became aware of the problems created
by class actions under the original Truth in Lending Act.\textsuperscript{105} Al-
though the congressional response to these problems was some-
what tardy, once Congress appreciated the destructive potential
inherent in a class action filed under the original section 130 it
resolved that the potential should be limited. Accordingly, sec-

\begin{footnotesize}
\textsuperscript{101} \textit{Id.} The district court found that subsections one, two, and three of rule 23(a)
were satisfied, but failed to reach a conclusion regarding subsection four, due to the
nature of its disposition of the motion based on rule 23(b). \textit{See Goldman v. First Nat'l
Bank, 532 F.2d 10, 13 n.4 (7th Cir. 1976).}

\textsuperscript{102} Goldman attempted in his amended complaint to disclaim the minimum statu-
tory amount on behalf of himself and all other members of the class. The district court
concluded that a representative plaintiff had no authority to make this disclaimer on
behalf of the other class members but could waive the statutory minimum only for
himself; he then could not act as the representative of the class, however, because he
would not have interests in common with other class members. 56 F.R.D. at 592 n.4.

\textsuperscript{103} 56 F.R.D. at 593.

\textsuperscript{104} \textit{Id.} (quoting \textit{Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 416
(S.D.N.Y. 1972)).

\textsuperscript{105} In its annual report for 1971, the Federal Reserve Board noted the existence of
at least 49 Truth in Lending class actions and advised Congress that
[creditors have been expressing increased concern over their possible expo-
sure to class action suits and the potential ruinous liability which may be at-
tached to such suits. While the question of class action liability in the \textit{Ratner}
case . . . has not yet been decided, the reported $13 million potential liability
has led many creditors to believe that similar suits filed against them could
seriously threaten the solvency or future existence of their organizations.
that Congress consider amending the Act "to set a maximum liability, or otherwise
restrict the scope of potential class action liability, should it finally be determined that
class actions are allowable in Truth in Lending suits." \textit{Id.}

For a discussion of the congressional response to this recommendation, see \textit{Fischer,
From \textit{Ratner} to \textit{Qui Tam}: Truth-in-Lending Class Action Developments, 24 Hastings L.J. 813,
838-45 (1973); Note, \textit{Class Actions Under the Truth in Lending Act, 83 Yale L.J. 1410,
in Lending Act, 47 Notre Dame Law. 1305 (1972).}
tion 130 was amended, effective October 28, 1974, to limit the maximum damages permissible in a Truth in Lending class action to the lesser of $100,000 or one percent of the creditor's net worth. Congress adopted this approach as a reasonable compromise between class actions with unlimited damages, proposed by consumer groups, and the consumer finance industry's contention that class actions should be eliminated in Truth in Lending cases. The amended section 130 was designed to make class actions viable under the Truth in Lending Act because Congress felt that "potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosure." It was also intended to shield the business community from the massive claims made possible by the language of the original section 130.

In Haynes v. Logan Furniture Mart, Inc., the Seventh Circuit determined that class actions were not barred under the original Truth in Lending Act. Goldman relied on both Haynes and the 1974 amendments to persuade the Seventh Circuit that his action fell within rule 23(b)(3) and that the district court abused its discretion by not allowing the suit to proceed as a class action. The district court relied in part on its belief that class actions are incompatible with Truth in Lending cases and in

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107 See S. Rep. No. 278, 93d Cong., 1st Sess. 42-43 (1973). This is a 1973 report on S.2101, which is not the bill that ultimately became law. The civil liability provisions in S.2101, however, are identical to the provisions in H.R. 11221, the bill that did become law, and the substance of the arguments concerning the limitation did not change in the following year. See, e.g., 120 Cong. Rec. H10, 270-73 (daily ed. Oct. 9, 1974) (remarks of Reps. Sullivan, Wylie & Rinaldo).


110 503 F.2d 1161 (7th Cir. 1974). In Haynes, the Court of Appeals noted that trial courts are usually afforded great latitude in determining the fairest and most efficient methods of adjudication under rule 23(b)(3). The court subsequently concluded that the trial court abused its discretion in denying class action certification on the legal theory that the procedural device of such actions was incompatible with the substantive ends to which the Act is addressed. Id. at 1163.

111 See text accompanying note 104 supra. This notion was expressly rejected in Haynes. 503 F.2d at 1163.
part on its concern over the possibility of enormous damages.\textsuperscript{112} In light of \textit{Haynes} and the amendment of section 130, the Seventh Circuit's reversal of the lower court's decision to deny class certification is not surprising; but instead of remanding the question to the district court for reconsideration in light of the statutory and judicial developments of the previous four years,\textsuperscript{113} the court resolved the class certification question based on its own analysis of the effects of these developments.

The \textit{Haynes} opinion delineated four considerations that the Seventh Circuit in \textit{Goldman} deemed important in evaluating the appropriateness and desirability of granting plaintiffs class action status under the original section 130 of the Act. They were: (1) the allegation of actual damages; (2) whether or not the individual recovery of twice the finance charge in the transactions for most of the class members would exceed the statutory minimum; (3) the number of prospective class members; (4) the difficulty in fulfilling the notice requirements of rule 23(b)(3).\textsuperscript{114} The second and third considerations relate directly to projecting the amount of recovery that could be granted in a class action involving no waiver of the minimum statutory damages awards for the class members. The \textit{Goldman} panel found that in assessing the unfairness of allowing a class action to proceed under the original section 130, the \textit{Haynes} court evaluated the hardship that the class action damages award would impose upon the defendant and the extent to which the individual recoveries of most of the class members would have exceeded the minimum amount of recovery.\textsuperscript{115}

The amended section 130 established a maximum recovery and eliminated the statutory minimum recovery in class actions; consequently, the court accorded the second and third \textit{Haynes} considerations little weight in determining whether Goldman's suit should proceed as a class action.\textsuperscript{116} The court noted that Goldman alleged two alternative measures of actual damages and that he satisfied the prerequisites of rule 23(a). Finding that the notice requirements of rule 23(b)(3) represented no barrier, because the class members were easily identifiable from the

\textsuperscript{112}See text accompanying note 103 supra. This concern was obviated by the 1974 amendments. See note 106 supra & accompanying text.

\textsuperscript{113}The Fifth Circuit followed this course of action in Boggs v. Alto Trailer Sales, Inc., 511 F.2d 114 (5th Cir. 1975), after recognizing that the 1974 amendments posed some new problems of their own. Accord, Pennino v. Morris Kirschman & Co., 526 F.2d 367 (5th Cir. 1976); see text accompanying note 127 infra.

\textsuperscript{114}532 F.2d at 15-16.

\textsuperscript{115}Id.

\textsuperscript{116}Id. at 16.
bank’s records, and that common questions of law and fact predominated, the court determined that in this case a class action was superior to other methods of adjudication. Accordingly, the circuit court found that the district judge abused his discretion by failing to allow the suit to proceed as a class action.\textsuperscript{117} It then remanded the case to the district court for a determination of class members.\textsuperscript{118}

The Seventh Circuit’s decision to reverse the lower court’s denial of class certification was sound because the district court based its decision on considerations that were both improper and irrelevant in light of the 1974 amendments. The circuit court should have remanded the entire question to the district court, however, rather than deciding itself whether class certification was appropriate. The complexity of the statute of limitations issue and the resulting uncertainty concerning the rationale the circuit court would adopt to justify its conclusion made it exceedingly difficult for counsel to consider and brief the class action question adequately.\textsuperscript{119} The court, therefore, did not hear all of the pertinent arguments and was not in a position to properly evaluate all of the relevant considerations before rendering its decision. This may account for a number of deficiencies in the Seventh Circuit’s reasoning.

The major flaw in the \textit{Goldman} court’s analysis is its failure to take into account all of the effects of the 1974 amendments. The court did note that the amended version of section 130(a) eliminates some of the problems caused by the original version,\textsuperscript{120} but it failed to recognize that the amended version creates new problems that must be taken account of before a decision on a class certification motion can be rendered.\textsuperscript{121}

Amended section 130(a) raises significant difficulties for the class representative attempting to satisfy the requirement of rule 23(a)(4) that the representative will “fairly and adequately represent the interests of the class”: his vigorous representation of the class’ interests may be contrary to his own self-interest. In

\textsuperscript{117} Id.
\textsuperscript{118} Id. at 22.
\textsuperscript{119} For example, if the court had held that no cause of action accrued until a finance charge was imposed inconsistently with a disclosure, the composition and size of the class would differ from that of the injured class resulting from a decision that the violation occurred at the time of disclosure but the statute of limitations was tolled until the consumer had perceived his injury.
\textsuperscript{120} 532 F.2d at 16. See text accompanying note 116 supra.
\textsuperscript{121} For a general discussion of the effects of the 1974 amendments on class actions under rule 23, see LeValley & Walker, \textit{Truth-in-Lending Class Actions Under Amended Section 130}, 24 U. KAN. L. Rev. 471 (1976).
Weathersby v. Fireside Thrift Co.,\textsuperscript{122} the court posed the problem as follows:

The fundamental problem is the limitation on total recovery, which serves to penalize plaintiffs for representing a large class. Since the outside limits of the size of the pie are rigid, plaintiffs will be prompted to scale down the size of their class to permit larger individual recoveries. But a class of modest size would still disadvantage the named plaintiffs. For example, any class of more than 1000 members would permit individual recoveries of less than $100.\textsuperscript{123}

The court concluded that the new legislation works at cross purposes with rule 23 by making it disadvantageous for a class representative to satisfy the mandate of 23(a)(4) to "fairly and adequately protect the interests of the class."\textsuperscript{124} The amount of maximum recovery is constrained further by the requirement that damages not exceed one percent of the creditor's net worth.\textsuperscript{125} The implications of this requirement and the debilitating effect that it may have on maintaining class actions was noted and explained in Boggs v. Alto Trailer Sales, Inc.\textsuperscript{126}

Another important criteria, now to be considered in view of the amendment to § 1640(a) [Truth in Lending Act section 130(a)], is the [rule] 23(a) requirement that the class representative be able fairly and adequately to protect class interests. Under § 1640(a) as amended, the recovery by a class member may be in a lesser amount than would be the case in an individual action. By way

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\textsuperscript{122} 5 CONS. CRED. GUIDE (CCH) ¶ 98,640, at 88,179-82 (N.D. Cal. 1975).
\textsuperscript{123} Id. at 88,180. The Act has been amended against since Weathersby to increase the upper limit from $100,000 to $500,000, effective March 23, 1977. Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 4(3), 90 Stat. 260 (codified at 15 U.S.C.A. § 1640(a)(2)(B) (West Supp. 2, 1976)) (amending 15 U.S.C. § 1640(a)(2)(B) (Supp. V 1975)). This increase, however, merely requires that the class size be kept under 5,000 members in order to prevent a situation where the class representative receives less in damages from a class action than he would from an individual action. Such an increase is inconsequential with respect to the court's analysis in light of class sizes such as the 130,000 member class in Ratner v. Chemical Bank N.Y. Trust, 54 F.R.D. 412 (S.D.N.Y. 1972).
\textsuperscript{124} See text accompanying note 97 supra.
of a hypothetical, let us assume that Alto, a trailer sales company, has a net worth of $500,000... Appellants contend that at least 121 trailer purchasers did not receive pre-transaction disclosure statements from Alto. In a successful class action without proof of actual damages, each class member would receive less than $42, dividing one percent of the assumed net worth among class members. Suing individually, on the other hand, each class member could recover double the amount of the finance charge up to $1,000, and, in any event, a minimum of $100.127

Instead of ascertaining that Goldman satisfied the requirements of rule 23(a)(4), the Seventh Circuit noted simply that "Goldman's withdrawal as counsel in the case removed the judge's major objection to his acting as the representative party for the class."128 This terse observation is inadequate, however, because the district judge made his determination in light of the original section 130(a) with no consideration of the problems posed by the amended version.129 Failing to perceive the ramifications of amended section 130(a), the circuit court never determined what the approximate class size would be. Goldman might be inclined to minimize the class size in order to maximize his damages award; in doing so, however, he would fail to satisfy the requirements of rule 23(a)(4). Consequently, before deciding whether Goldman should be allowed to act as the class representative, the circuit court should have scrutinized carefully the composition of the class that he proposed to represent.

Another vital consideration ignored by the Seventh Circuit is that a class action under rule 23(b)(3) requires a determination of "the interest of members of the class in individually controlling the prosecution... of separate actions."130 Because the Goldman court made no determination of approximate class size, it could not evaluate the effect of class size on the amount of

127 511 F.2d at 118.
128 532 F.2d at 15 n.6.
129 The district judge's objection reflected a concern that rule 23 should not be used as a device for the solicitation of litigation by attorneys. For a discussion of this problem, see Buford v. American Fin. Co., 333 F. Supp. 1243, 1251 (N.D. Ga. 1971); note 12 supra. Moreover, when attorneys bring actions on behalf of themselves and proposed classes, courts are suspicious that they might be seeking to use the rule 23 mechanism merely to garner a large fee award as part of a settlement. See Kline v. Coldwell, Banker & Co., 508 F.2d 226, 238-39 (9th Cir. 1974) (Duniway, J., concurring), cert. denied, 421 U.S. 963 (1975); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), cert. denied, 407 U.S. 925 (1972). See generally note 99 supra.
each class member's recovery. Such an assessment is essential because under amended section 130 class members will almost always recover less than they would if they proceeded individually. As the amount that each class member will recover in damages decreases, each member has an increasing interest "in individually controlling the prosecution or defense" of a separate action.

Also relevant to determining whether rule 23(b)(3) requirements have been satisfied is the manageability of the suit as a class action. The Seventh Circuit in Goldman noted that the bank's installment contract records would facilitate identification of the class members. The court failed to consider, however, that the apportionment of damages among class members could present serious difficulties in manageability, especially if many of the class members seek to recover actual damages. Moreover, if the size of the class is such that the aggregate of the actual damages exceeds the maximum amount allowed by the statute, the court would be faced with the difficult task of apportioning equitably the damages award. Additionally, if the bank has small claims against a large number of delinquent cardholders who are also class members, these may have to be asserted as compulsory counterclaims, thereby causing the suit to be unwieldy as a class action.

A final consideration is that class size directly affects the cost of notifying class members that a class action has been instituted under rule 23(c)(2). Without a determination of approximate class size there could be no estimate of the cost of notification; therefore, the court was unable to determine whether Goldman was able to bear the initial cost of providing notice to all class members in a rule 23(b)(3) action. If the class prevails in the suit, the cost of this notification process may be recovered from the

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131 See text accompanying notes 111-16 supra.
132 FED. R. CIV. P. 23(b)(3)(D).
133 532 F.2d at 16.
135 See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-79 (1974); FED. R. CIV. P. 23(c)(2). Rule 23(c)(2) reads as follows:
In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.
defendant, over and above the damages award. Consequently, although a maximum damages limit exists, the cost of notification could constitute a substantial additional burden to the creditor if the class size is very large. In light of Congress' attempt to limit a creditor's potential liability in such class action suits, high notification costs resulting from a large class size may justify a court's conclusion that a class action is not "superior to other available methods for the fair and efficient adjudication of the controversy."137

IV. INTERPLAY OF STATUTE OF LIMITATIONS DECISION AND CLASS ACTION QUESTION

The most surprising aspect of Goldman is that the ramifications of the court's interpretation when the statute of limitations begins to run are never considered in determining whether class certification should be granted. This omission is disturbing because the circuit court's resolution of the statute of limitations issue directly affects the size and composition of the class. Under the approach taken in Wachtel v. West138 for closed end transactions,139 the class in Goldman would consist of all those credit card holders who received or first used their BankAmericard during the year before the date the action was commenced (July 8, 1971)—the date on which the contract for the extension of credit was "consummated." Under the Seventh Circuit's decision, the class would consist of all those BankAmericard holders who first incurred a finance charge during the year prior to July 8, 1971.140 Because it is likely that most credit card holders tend to use their card soon after receipt, the class size under the Wachtel approach should approximate the number of cards issued during that year. On the other hand, because of the numerous influences that affect when a credit card holder will first incur a finance charge,141 an a priori prediction of class size under the Goldman approach is much more difficult; the many

137 FED. R. CIV. P. 23(b)(3).
139 See notes 38-39 supra & accompanying text.
140 See text accompanying note 26 supra.
141 For example, when a credit card holder will incur a finance charge may depend on whether he plans to use the card to buy things he cannot afford or solely to avoid having to carry too much cash. Beyond his planned use, his actual use of the card may be altered by a change in his overall financial situation or a temporary liquidity crisis. Alternatively, he may simply forget to pay his bill within the applicable "free-ride" period.
influences on the composition of the class under Goldman increase the variability of class size.

This variance in class size from year to year has significant implications for both the consumer and the creditor. As explained earlier, because the maximum recovery for a class action is fixed, an increase in class size tends to diminish the recovery of each class member. Due to this volatility of class size, the damages award to a class member may vary greatly depending upon when an action is brought. This will influence both a consumer's decision to act as a class representative and a class member's decision to request exclusion from the class.

Under Goldman, a consumer contemplating bringing a class action has one year after a finance charge is imposed to bring suit against the creditor. If the class size shortly after imposition of the finance charge is prohibitively high, he could reasonably delay bringing an individual action for up to one year in the hope that the class size will decrease to a number that will make a class action advantageous. Each member of this smaller class would receive a higher damages award; however, the injured consumers who will no longer be in the relevant class and who were ignorant of their right to bring an individual suit will forfeit their cause of action.

These same considerations are relevant to a consumer, notified that he is part of a class action, who must decide whether or not to request exclusion. The consumer's attorney must be aware of the effect of class size on his client's potential damages award so that he can evaluate whether an individual suit would be preferable. The lawyer must also consider the variability of class size because the class member will have a certain amount of time (depending on when his finance charge was first imposed) before the one year statute of limitations bars his cause of action. Consequently, after evaluating the potential benefits of the class action, the consumer may find it advantageous to wait and see if another class action with a smaller class will be brought some time before his cause of action is barred.

142 See text accompanying notes 122-27, 130-31 supra.

143 A class action attorney should be aware of these considerations so that he can advise his client of the available options and their ramifications. Moreover, the situation may present serious ethical questions. Although the attorney must zealously represent his client's interests, ABA CANONS OF PROFESSIONAL ETHICS No. 7, query whether he possesses a responsibility to other potential class members. Note that if an attorney actually functions as class counsel, added responsibility inheres because an element of public service is involved. Kiser v. Miller, 364 F. Supp. 1311, 1315 (D.D.C. 1973), modified sub nom. Pete v. UMW Welfare and Retirement Fund, 517 F.2d 1275 (D.C. Cir. 1975) (en banc). Kiser is discussed in 8 SUFFOLK U.L. REV. 1354 (1974).
The variability of class size poses a problem for the creditor by making it difficult for him to control or estimate his potential liability for any given year. In general, the upper limit governing class action damages awards will make the creditor’s best strategy the inclusion of all persons with potential claims arising out of the violation alleged in the original action within the class. This proposition, however, is subject to two caveats. As class size increases and the potential damages award to each class member decreases, the number of persons who will opt out of the class action and bring an individual action to obtain a higher damages award may increase. At the same time, the likelihood that the court will deny class certification also increases (either for reasons of manageability or because the damages award to each class member is too low or too difficult to apportion). The result is a large number of individual suits with the $100 statutory minimum damages award. The creditor could mathematically estimate his potential liability as a function of class size subject to these constraints. Under the Wachtel approach, he would have a reasonable estimate of class size that could be used to estimate his potential liability for the coming year. Moreover, he could control the extent of his potential liability by varying the number of cards that are issued. Under the Goldman approach, on the other hand, not only does the creditor lose this ability to control his potential liability, but he faces a formidable task in even estimating his potential liability for the coming year. Consequently, the court’s interpretation of the statute of limitations issue indirectly imposes a greater burden on both the consumer and the consumer credit industry.

V. Conclusion

The complexity of open end credit plans poses problems for uninformed consumers and conscientious legislators endeavoring to protect them. A prominent feature of most open end plans is a uniform agreement with a large number of customers. Consequently, a false disclosure or breach of contract by the creditor ordinarily would create an appropriate situation for a class action; however, adaptation of the class action mechanism to false or misleading disclosures under open end credit arrangements governed by the Truth in Lending Act has not proceeded smoothly. One problem has been determining whether the applicable statute of limitations begins to run before the imposition of a finance charge. In Goldman v. First National Bank, the Seventh Circuit faced the unenviable task of deciding and
reconciling intricate Truth in Lending Act class action and statute of limitations issues.

The first question was when the Act's one year statute of limitations should begin to run where a false, ambiguous, or inaccurate disclosure has been made concerning an open end credit plan. In the context of closed end plans, previous cases had held that the limitations period commences as soon as the credit transaction is consummated. The nature of the open end arrangement, however, created a situation in which the consumer had no reason to be aware that a disclosure was inadequate until a finance charge was imposed. Accordingly, the Seventh Circuit rejected the contention that the statute of limitations should run from the time of the deficient disclosure and ruled that the statute proceeded only upon imposition of the finance charge.

The class action question was decided in light of the 1974 amendments to the Truth in Lending Act. The court downplayed the importance of class size and composition in its analysis because the amendments eliminated the ominous threat of a crushing damages award in a class action under the Act. This lack of attention to class size was unfortunate, however, because the amendments make it difficult for a class representative to satisfy the requirements of rule 23(a)(4) and for the suit to constitute a legitimate class action under rule 23(b)(3). Its failure to determine class size and composition thus prevented the Seventh Circuit from determining satisfactorily whether Goldman should proceed as a class action.

Surprisingly, the court did not consider how its interpretation of the statute of limitations issue affected the class certification motion; the interaction of these issues may influence class size and composition. Additionally, the interdependence of the statute of limitations and class action problems adds complexities to the consumer's decision to be involved in a class action and the creditor's estimation of potential liability.

The statute of limitations question was an issue of first impression. Although the decision in Goldman was appropriate to the facts of the case, the Seventh Circuit employed broad language that may be construed in the future to undermine the Truth in Lending Act's scheme of private enforcement by denying a cause of action to an injured consumer with a valid complaint. The considerations relevant to a class action certification motion under the Act were altered by the 1974 amendments. In this context, Goldman provides an important post-amendment
contribution to the question of the feasibility of class actions in the consumer transaction area. Recognition of Goldman's strengths and weaknesses will help prevent both retrogression in consumer credit law and confusion about maintaining class actions under the Truth in Lending Act.