CASE NOTES

Consumer Credit Protection Act—Annual Rate Disclosure on Open End Credit Statements—Civil Liability—Bona Fide Errors—Class Action—*Ratner v. Chemical Bank New York Trust Co.*[1]—The plaintiff entered into a Master Charge Card Agreement, a revolving credit plan,[2] with Chemical Bank. Pursuant to this agreement, the plaintiff made several purchases on credit, and received, at the end of the bank's monthly billing cycle, a periodic billing statement which disclosed a current indebtedness of $191.58 for such purchases. The statement also disclosed that plaintiff could make an immediate ten dollar payment to avoid delinquency charges and thereby defer payment of the obligation. As to this deferment, the statement enumerated three periodic, i.e., monthly, finance charge rates[3] applicable to any outstanding balance in plaintiff's account after expiration of the free ride period.[4] However, the monthly statement did not disclose any type of *annual* finance charge percentage rate.[5] The plaintiff sent Chemical Bank the ten dollar payment required for the deferred payment plan. The plaintiff then brought a civil action, on behalf of himself and that class of obligors similarly situated, against Chemical Bank for the latter's alleged violation of Section 130 of the Consumer Credit Protection Act (Act).[6] Plaintiff contended that Chemical Bank's monthly statement

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1 329 F. Supp. 270 (S.D.N.Y. 1971).

2 This type of credit plan is characterized as "open end credit" in the Consumer Credit Protection Act, and defined as:

> a plan prescribing the terms of credit transactions which may be made thereunder from time to time and under the terms of which a finance charge may be computed on the outstanding unpaid balance from time to time thereunder.

15 U.S.C. § 1602(i) (1970).

3 The three rates are: 1.50% for purchases up to $500, 1.00% for purchases over $500, and 1.00% for cash advances. 329 F. Supp. at 274.

4 The free ride period is the number of days from the date of the monthly billing statement in which the cardholder can pay the indebtedness and not incur a finance charge. Under the Master Charge Card Agreement, the free ride period is 25 days. Id. at 273.

5 The methods for determining the annual percentage rate on billing statements for open end credit transactions are enumerated in § 107 of the Consumer Credit Protection Act, 15 U.S.C. § 1606 (1970).

6 § 130(a) provides that:

> [A]ny creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of
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> (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and
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> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

15 U.S.C. § 1640(a) (1970).

regarding the consumer credit transaction between plaintiff and Chemical Bank failed to disclose a nominal annual percentage rate of interest allegedly required by Section 127(b)(5) of the Act[7] and Regulation Z of the Federal Reserve Board.[8] Chemical Bank countered that such a rate was not required on a monthly billing statement unless a finance charge was actually "applicable" to an outstanding balance on the statement.[9] The Bank also argued that, even assuming such a requirement, civil relief should not issue since plaintiff had not paid a finance charge.[10] Further, Chemical Bank reasoned that, at most, it had mistakenly interpreted Section 127(b) of the Act, which action was a "bona fide" error and an absolute defense as provided by Section 130(c) of the Act.[11] Finally, at a subsequent hearing, Chemical Bank urged that a class action was an improper vehicle for adjudication of the controversy.[12]

At trial, the defendant argued that the Federal Reserve Board had primary jurisdiction over the controversy and moved for a stay of proceedings until the Board could rule on the controversy.[13] The United States District Court for the Southern District of New York found the doctrine of primary jurisdiction inapplicable and denied defendant's motion.[14] On rehearing, this order denying Chemical Bank's motion for a stay was affirmed.[15] The district court then granted plaintiff's motion for summary judgment[16] and HELD: the Consumer Credit Protection Act and Regulation Z require the disclosure of nominal annual percentage rates on a cardholder's monthly statement even though a finance charge has not been imposed. The court determined that this conclusion is necessitated by the clearly "prospective" intent of the Act.[17] The court also stated that civil liability under the Act is not predicated on the payment of a finance charge by a plaintiff-obligor, because the purpose of the civil recovery provision of the Act is to encourage private enforcement of the statute. Further, the court determined that Chemical Bank's omission of an annual percentage rate was not a "bona fide" error within the meaning of the Act, since Congress intended that only clerical errors should constitute an absolute defense. Finally, the court concluded that, notwithstanding the reasonableness of Chemical Bank's

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7 15 U.S.C. § 1637(b)(5). This section also states that the nominal annual percentage rate is to be computed by "multiplying the periodic rate by the number of periods in a year." Id.

8 12 C.F.R. §§ 226.1 et seq. (1971).

9 329 F. Supp. at 275.

10 Id. at 280.

11 Id. at 281.

12 54 F.R.D. 412 (S.D.N.Y. 1972).

13 309 F. Supp. 983 (S.D.N.Y. 1969).

14 Id. at 987. The doctrine of primary jurisdiction prescribes that where the district courts and an administrative agency have concommitant jurisdiction over a matter, deference should be given to the agency's determination in order to preserve uniformity of treatment and regulation. Id. at 986.

15 Id. at 989.

16 329 F. Supp. at 282.

17 Id. at 276.

interpretation of section 127, a "reasonableness" defense had not been provided by the Act and was, therefore, unavailable to Chemical Bank in the present action.[18]

In a subsequent decision on the issue of whether the plaintiff could bring a class action under the statute, the district court HELD: the suit could not be maintained as a class action because there was not an affirmative need for this type of adjudication.[19] The court reasoned that such an action would be inconsistent with the specific remedy provided for individual obligors in Section 130(a) of the Consumer Credit Protection Act.[20]

This note will examine and analyze the *Ratner* court's conclusions regarding the Consumer Credit Protection Act. First, this will include an analysis of the court's determination that Section 127(b) of the Act and Section 226.7 of Regulation Z requires some form of annual percentage rate disclosure on a creditor's monthly billing statement to an obligor absent the imposition of a finance charge. Further, the court's conclusion that Section 130 of the Act did not require a dismissal of the plaintiff's suit will be scrutinized. Finally, the note will analyze the court's holding that a class action would be an inappropriate remedy in the *Ratner* situation.

The main controversy in *Ratner* concerned the meaning of Section 127(b) of the Consumer Credit Protection Act which provides in part:

> The creditor of any account under an open end consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items *to the extent applicable*:
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> . . . .
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> (5) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is *applicable*, and, unless the annual percentage rate . . . is required to be disclosed pursuant to paragraph(6), the *corresponding nominal annual percentage rate* determined by multiplying the periodic rate by the number of periods in a year.
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> (6) Where the total finance charge exceeds 50 cents for a monthly or longer billing cycle . . . the total finance charge expressed as an annual percentage rate. . . .[21]

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[18] Id. at 282.

[19] 54 F.R.D. at 414.

[20] Id. at 416.

[21] 15 U.S.C. § 1637(b) (1970) (emphasis added). Section 107(a) of the Act provides that the annual percentage rate shall be calculated as follows:

> (2) in the case of any extension of credit under an open end credit plan, as the quotient (expressed as a percentage) of the total finance charge for the

Chemical Bank urged that the import of section 127(b)(5) was that since a finance charge had not been "applied" to plaintiff's monthly statement during the billing cycle, a nominal annual percentage rate was not "applicable." In short, the defendant argued that to apply an annual rate pursuant to the Act there must be a finance charge. Chemical Bank asserted that section 127(b)(5) was fashioned to require an "historical account of things"[22] that had actually happened, in contrast to section 127(a) which requires certain disclosures "[b]efore opening any account under an open end consumer credit plan. . . ."[23]

In support of this argument, Chemical Bank asserted that Regulation Z, Section 226.7, promulgated by the Federal Reserve Board pursuant to the Act,[24] did not require the alleged omitted disclosure. Section 226.7(b)(5) requires that the periodic, i.e., monthly, percentage rate be disclosed on the creditor's monthly statement to the cardholder regardless of "whether or not applied during the billing cycle."[25] However, section 226.7(b)(6), which requires disclosure of an annual rate,[26] does not include the phrase "whether or not applied during the billing cycle," and thus, Chemical Bank argued, does not require disclosure of any annual percentage rate unless a finance charge has actually been imposed on the obligor.[27] In fact, in a letter to Chemical Bank, the Federal Reserve Board's Deputy Secretary concluded that Regulation Z, Section 226.7(b)(6), did not require the disclosure of an annual percentage rate on a monthly statement if a finance charge had not been imposed.[28]

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period to which the finance charge for that period is based, multiplied by the number of such periods in a year.

15 U.S.C. § 1606(a)(2) (1970).

[22] 329 F. Supp. at 275.

[23] Section 127(a), in pertinent part, requires that:

[b]efore opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items, to the extent applicable:

. . . .

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

15 U.S.C. § 1637(a)(4) (1970).

[24] Section 105 of the Act provides that:

The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

15 U.S.C. § 1604 (1970).

[25] 12 C.F.R. § 226.7(b)(5) (1971).

[26] 12 C.F.R. § 226.7(b)(6) (1971).

[27] 329 F. Supp. at 278.

[28] See 4 CCH Consumer Credit Guide ¶ 30,220 at 66,099-100 (Nov. 28, 1969) for pertinent excerpts of the letter.

The *Ratner* court was unable to accept Chemical Bank's interpretation of the Act and Regulation Z. The court reasoned that "the thrust of the Act and its fundamental weapon of compelled disclosure is 'prospective.'"[29] By "prospective," the court meant that disclosure was intended to help the consumer make decisions as to the use of credit *before* entering into a transaction. The court stated that this was the only way a consumer could adequately comprehend the myriad possibilities offered by creditors, and have the necessary tools to "intelligently compare his options"[30] and shop for credit. The court noted that to be able to compare effectively the cost of credit offered by Chemical Bank's open end Master Charge Card Agreement with credit rates of other lenders utilizing other than open end plans—i.e., savings banks, retail merchants, and banks offering consumer loans—periodic and annual percentage rates must be adequately disclosed, since lenders utilizing other than open end credit plans must disclose their annual percentage rates under the Act.[31]

In making this determination regarding annual rate disclosures, the court looked to the legislative history of the Consumer Credit Protection Act. The court noted that the Senate version of the Act, S. 5, did not require disclosure for most open end, revolving credit plans. The House Banking and Currency Committee version of the Act, H.R. 11601, contained similar exceptions.[32] However, before House passage, the bill was reworded to require annual percentage rate disclosure in open end credit transactions, and the final conference committee version of the bill required that either an annual or nominal annual percentage rate be disclosed.[33] The court further noted that the House Banking and Currency Committee's report on H.R. 11601 reiterated that the goal of the bill was to permit the consumer to comparison shop for credit by requiring disclosure in a uniform manner.[34] The court concluded that "the history, in sum, is, like the statutory language on its face, compellingly favorable to plaintiff's position."[35]

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29 329 F. Supp. at 276.

30 Id.

31 Id. A typical "other than open end" transaction is the traditional retail installment sale where the goods are sold on credit, and the credit price is determined by adding the finance charge to the cash price of the article. The obligor then repays the total credit price in predetermined fixed installments. See Jordan & Warren, Disclosure of Finance Charges: A Rationale, 64 Mich. L. Rev. 1285, 1289 (1966). See § 128 of the Consumer Credit Protection Act, 15 U.S.C. § 1638 (1970), for disclosure requirements for consumer credit sales not under an open end plan; and § 129, 15 U.S.C. § 1639 (1970), for disclosure requirements for consumer loans not under an open end plan.

32 H.R. 11601, 90th Cong., 1st Sess. § 203(d)(2)(c) (1967). For a discussion of the reasons for including the exceptions in H.R. 11601, see H.R. Rep. No. 1040, 90th Cong., 2d Sess. 13-17 (1967).

33 H.R. Rep. No. 1397, 90th Cong., 2d Sess. 27 (1968).

34 329 F. Supp. at 276.

35 Id. at 277. Chemical Bank further contended that the phrase, "to the extent applicable" in the context of § 127(b) of the Act meant "applied" to an outstanding balance on a monthly statement. This interpretation was also rejected by the *Ratner* court on the basis of a comparison of § 127(b) with § 127(a). The court noted that

As to Chemical Bank's contention that Regulation Z did not require disclosure of a nominal annual percentage rate, the court replied that the clear intent of Section 226.7 of Regulation Z was the same as Section 127 of the Consumer Credit Protection Act. The court stated that the draftsmen of Regulation Z, Section 226.7, had "done no more than attempt a useful simplification . . . when they undertook to shorten and streamline the thoughts" of Section 127 of the Act.[36] The court further stated that there was no reasonable argument for requiring a periodic, i.e., monthly, percentage rate disclosure and not requiring some form of annual percentage rate disclosure. The court concluded that since disclosure of an annual percentage rate would be more useful to the consumer as a comparison-shopping tool, it was more logical to include the annual percentage rate than the periodic percentage rate.[37]

Finally, the court was not persuaded by the letter from the Federal Reserve Board to the defendant, which interpreted Section 226.7(b)(6) of Regulation Z as not requiring annual percentage rate disclosure on a monthly statement absent a finance charge.[38] Noting that the letter did not refer to the Consumer Credit Protection Act, and that it probably failed to integrate Sections 226.7(b)(6) and 226.7(b)(5) of Regulation Z, the court rejected the correspondence as an "insufficient analysis of the pertinent materials."[39]

It is submitted that the *Ratner* court correctly interpreted the Act as requiring nominal annual percentage rate disclosure, even absent a finance charge. The disclosure aspects of the Act were specifically designed, in the words of Senator Paul Douglas, to "restore consumer sovereignty in the consumer credit market place. Every individual has the right to know what he is paying for credit."[40] In addition, sponsors of the Act argued that the disclosure sections of the Act would "strip away the disguises which frequently hide or distort the true price of credit."[41] As was stated in a report issued by the House Banking and Currency Committee, full disclosure of credit charges would

> aid the consumer in deciding for himself the reasonableness of credit charges imposed and further permit the consumer to "comparison" shop for credit . . . . [F]ull disclosure of the terms and conditions of credit charges [would] encourage a wiser and more judicious use of consumer credit.[42]

§ 127(a), which requires disclosure of the periodic and nominal annual percentage rates to potential cardholders before execution of open end credit agreements, also contains the phrase "to the extent applicable." Thus, the court concluded that since nothing could have been "applied" under § 127(a), "applicable" can only mean "relevant" in the context of the Act. Id. at 275.

36 Id. at 278.

37 Id.

38 Id. at 279.

39 Id.

40 Hearings on S. 750 Before a Subcomm. of the Senate Comm. on Banking and Currency, 88th Cong., 1st Sess., pt. 1 at 2 (1963).

41 Id. at 3.

42 H.R. Rep. No. 1040, supra note 32, at 7.

The concept of disclosure can be effective and useful for the consumer only if the finance charge disclosure invites and permits comparison. If the disclosure is such that it does in fact encourage comparison of annual rates, the consumer can make meaningful decisions as to which type of credit best suits his needs and, more importantly, which creditor can give him the best credit arrangement. This means that disclosure as to amounts and percentage rates would have to be made in a uniform manner by all creditors, for all types of credit they offer, so as to enable the consumer to compare costs effectively.[43]

As previously noted, the Senate version of the Act, S. 5, exempted revolving credit plans from annual percentage rate disclosure. The conference committee, however, inserted section 127(b)(6), which requires nominal annual percentage rate disclosure, in the final version of the legislation, and in so doing implicitly acknowledged that disclosure of an annual percentage rate would not be an accurate reflection of credit charges in all situations.[44] The committee noted that the effect of Section 127(b)(6) of the Act wouid be such that:

In any statement of an account under an open end plan under

[43] A supplemental view of a number of senators expressed the opinion that:

> [The] purpose [of the Consumer Credit Protection Act] is to insure to the consumer sufficient, clearly understandable and readily comparable information to enable him to measure various types of consumer credit proposals with one another, and then decide with reasonable accuracy, which offer is more suitable to his economic situation, or a better buy, or whether he should dip into his savings or make other arrangements to avoid using credit in a particular situation.

Id. at 106. For a judicial discussion of the purposes of the Consumer Credit Protection Act, see Mourning v. Family Publications Service, 449 F.2d 235 (5th Cir. 1971), cert. granted, — U.S. —, 40 U.S.L.W. 3455 (U.S. Mar. 21, 1972) (No. 829); and Strompolos v. Premium Readers Service, 326 F. Supp. 1100, 1102 (E.D. Ill. 1971).

[44] H.R. Rep. No. 1397, supra note 33, at 27. See also H.R. Rep. No. 1040, supra note 32, at 14. This conclusion is also supported by a 1965 study of revolving credit accounts:

> [A] leading retailer selected at random 205 of its revolving credit accounts and calculated, on the basis of the annual interest on the declining balance, the actual rate of the finance charge for the period September 10, 1964, through September 9, 1965. The results were as follows:

Annual Rate	*Number of Accounts*	*Per-Cent-Total*
0%	53	25.8%
1%-9.9%	23	11.2%
10%-14.9%	27	13.2%
15%-16.9%	22	10.7%
17%-17.9%	40	19.5%
18%-18.9%	28	13.7%
19%-20.9%	12	5.9%
	205	100.0%

> . . . If this sampling is representative of revolving credit accounts, it indicates clearly that it is not accurate to equate the 1½% monthly charge with an 18% annual rate as is sometimes suggested.

Jordan & Warren, supra note 31, at 1307.

> which a rate may be used to compute the finance charge (even though, for the particular month the rate may yield a charge below the minimum and thus be inapplicable) the creditor must state the periodic rate and the "nominal" annual percentage rate . . . .[45]

Recommending the conference committee's amendment of this provision, Senator Proxmire stated:

> The conference committee has recommended that both the periodic or monthly rate and the annual rate be disclosed. Under this approach, creditors with revolving credit plans would disclose to their customers that in the typical case they are charging for credit at the rate of 1½ percent a month or 18 percent per year.
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> . . . .
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> I believe the report of the conference committee represents an effective and realistic solution to the knotty problem or revolving credit. It recognizes the importance of annual rate disclosure on all forms of revolving credit plans.[46]

It is submitted, then, that this legislative history indicates that the *Ratner* court correctly interpreted the Consumer Credit Protection Act as requiring at least a nominal annual percentage rate disclosure on a creditor's monthly billing statement regardless of whether a finance charge has been imposed. The consumer can only weigh and compare his credit alternatives if rates among the different creditors are disclosed in a uniform manner, and such uniform disclosure would appear to require revealing the nominal anual percentage rate. Nominal annual percentage rate disclosure on monthly statements can be helpful to a consumer in two ways. First, with knowledge of such a rate, the consumer can decide *before* his payments are due whether he will use credit which can be extended over a number of months. Furthermore, the consumer can compare, *before* entering into an open end credit transaction, the rate offered by one creditor with annual rates offered by

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45 H.R. Rep. No. 1397, supra note 33, at 27. Concern was also expressed that disclosure of periodic percentage rates alone could be misleading, and would give an unfair competitive advantage to open end creditors. See H.R. Rep. No. 1040, supra note 32, at 108-09. See also Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 90th Cong., 1st Sess., pt. 1 at 126 (1967) [hereinafter cited as House Hearings]; and Comment, An Analysis of the Uniform Consumer Credit Code and the National Consumer Act, 12 B.C. Ind. & Com. L. Rev. 889, 899 (1971).

46 114 Cong. Rec. 14487-88 (1968) (remarks of Senator Proxmire). A number of members of the House Banking and Currency Committee pointed out that the original House version of the bill, H.R. 11601, contained a "loophole" that "would defeat the basic thrust of [the bill]." This "loophole" was the open end exemption which would allow open end creditors "to express their credit charges to the customer on a periodic percentage rate basis . . . rather than the annual rate method prescribed in the bill for all other forms of consumer credit . . . . " H.R. Rep. No. 1040, supra note 32, at 107.

other creditors. Disclosure after a finance charge has been imposed on the cardholder can only serve to limit the consumer's ability to shop for credit, and destroy the Act's explicitly "prospective" orientation.

The *Ratner* court's holding on the second issue—that Regulation Z requires the disclosure of an annual percentage rate on a monthly statement—is less satisfactory. The court appears to have misinterpreted the language of Section 226.7(b) of Regulation Z. This section provides, in pertinent part, that:

> [T]he creditor of any open end account shall mail or deliver to the customer, for each billing cycle at the end of which there is an outstanding debit balance in excess of $1 in that account or with respect to which a finance charge is imposed, a statement or statements . . . setting forth . . . each of the following items to the extent applicable:
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> . . . .
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> > (5) Each periodic rate . . . that may be used to compute the finance charge (whether or not applied during the billing cycle). . . .
> >
> > (6) The annual percentage rate or rates determined under § 226.5(a). . . .[47]

Notwithstanding the reasonableness of the *Ratner* court's determination that in the Regulation, as in the Act, "applicable" does not mean "applied," the court's characterization of Section 226.7 of Regulation Z, as a "useful simplification of the Act,"[48] is not an accurate reflection of the Regulation's language. The Act provides that when at the end of a billing cycle there is an outstanding balance or imposition of a finance charge, the creditor is required to disclose one of two annual rates. If the total finance charge exceeds 50 cents for the billing cycle, subsection 127(b)(6)[49] requires that the creditor calculate and disclose an "annual percentage rate" in accordance with Section 107(a)(2) of the Act. The latter section provides, in part, that this rate shall be computed by utilizing:

> the quotient (expressed as a percentage) of the total finance charge for the period to which it relates divided by the amount upon which the finance charge for that period is based, multiplied by the number of such periods in a year.[50]

The significance of this section is that in order to compute the "annual percentage rate" a finance charge must be imposed on the cardholder and used in rate computation. In contrast, subsection 127(b)(5) provides that if the finance charge is 50 cents or less, the creditor shall disclose the rate as a "nominal annual percentage rate,"

[47] 12 C.F.R. §§ 226.7(b)(5) and (6) (1971).

[48] 329 F. Supp. at 278.

[49] 15 U.S.C. § 1637(b)(6) (1970).

[50] 15 U.S.C. § 1606(a)(2) (1970).

and calculate that rate by multiplying the periodic, i.e., monthly rate by the number of periods in a year.[51] Subsection 127(b)(5) is therefore distinguishable from subsection 127(b)(6) since the former does not require the imposition of an actual finance charge for calculation of the rate, while the latter does.

In contrast to Section 127(b) of the Consumer Credit Protection Act, Regulation Z, Section 226.7, requires only the disclosure of an "annual percentage rate"[52] and does not include provision for a "nominal annual percentage rate." In conjunction with Section 226.5(a)[53] of the Regulation, Section 226.7 requires the imposition of a finance charge to calculate an "annual percentage rate" and, absent a finance charge, the rate cannot be calculated. The important distinction, then, between the Act and the Regulation is the omission of a "nominal annual percentage rate" provision from Section 226.7 of Regulation Z.

Under Regulation Z, therefore, a creditor need not include an annual rate of any kind if he has not imposed a finance charge on the cardholder. This result would appear to be contrary to the language and intention of Subsections 127(b)(5) and (6) of the Act as described above. In the face of this conflict, it is submitted that the Federal Reserve Board has done more than merely shorten and streamline the "thoughts" of Section 127 of the Act;[54] the Board has radically altered explicit statutory language.

Unfortunately, this apparent inconsistency between Section 127 of the Act and Section 226.7 of Regulation Z was neither recognized nor discussed by the *Ratner* court. However, decisions subsequent to *Ratner* have resolved other conflicts between the Act and Regulation Z in favor of the Act. In *N.C. Freed Co. v. Federal Reserve Board*,[55] the plaintiff sought, *inter alia*, a declaratory judgment regarding an apparent conflict between Section 125(a) of the Consumer Credit Protection Act[56] and Section 226.9(a) of Regulation Z.[57] Plaintiff was in the business of repairing and remodeling homes and, to this end, entered into contracts with homeowners. Under these contracts, if a homeowner desired to defer payment, provision was made for the execution of a promissory note in favor of the plaintiff as consideration for the latter's extension of credit.

Plaintiff sought to have Section 226.9(a) of Regulation Z declared null and void, on the ground that the section enlarged the scope of an

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[51] 15 U.S.C. § 1637(b)(5) (1970).

[52] 12 C.F.R. § 226.7 (1971).

[53] 12 C.F.R. § 226.5(a) (1971).

[54] 329 F. Supp. at 278.

[55] — F. Supp. —, 4 CCH Consumer Credit Guide ¶ 99,356 at 89,317 (W.D.N.Y. Sept. 29, 1971). See also Mourning v. Family Publications Service, note 43, and Garland v. Mobil Oil Corp., — F. Supp. —, 4 CCH Consumer Credit Guide ¶ 99,558 at 89,514 (N.D. Ill. Feb. 11, 1971).

[56] 15 U.S.C. § 1635(a) (1970).

[57] 12 C.F.R. § 226.9(a) (1971).

obligor's right of rescission beyond the scope granted in Section 125(a) of the Act. This enlargement was due, plaintiff argued, to the fact that the Act permitted rescission only when a security interest was taken in the obligor's residence by the creditor, while Regulation Z allowed rescission when a security interest might attach to an obligor's residence by operation of law.

The *Freed* court found that Section 226.9(a) of Regulation Z had "enlarged the scope of contract rescission" found in Section 125(a) of the Act.[58] The court, agreeing with the plaintiff, noted that section 125 (a) allows an obligor to rescind a transaction, if, pursuant to the transaction, a security interest "is retained or acquired" in the obligor's residence as a condition for the extension of credit. The court also recognized that section 226.9(a) permits the obligor to rescind a credit transaction in which a security interest "is or will be retained or acquired" in the obligor's residence—i.e., mechanics' liens or other security interests which might arise by operation of law. On the basis of this analysis and a determination that Congress did not intend to include future security interests within the clear, specific coverage of Section 125(a) of the Act, the court concluded that Section 226.9(a) of Regulation Z was an *ultra vires* promulgation and, therefore, "null and void."[59]

As the *Freed* court recognized, the Federal Reserve Board's authority to promulgate Regulation Z was derived from authority granted to the Board by the Act. This authority permits the Board to issue regulations which will "carry out the purposes" of the Act, and does not include authority to extend the substantive provisions of the Act by means of regulatory promulgation. Further, since Section 125(a) of the Act explicitly indicates when the right of rescission is granted to an obligor, it would appear that the Act sufficiently and unambiguously delineates the rights and obligations of both the creditor and obligor, thus requiring that companion Section 226.9(a) of Regulation Z be a complementary reiteration of Section 125(a).

The *Freed* decision indicates that if a section of Regulation Z enlarges upon the scope of its unambiguous companion section in the Act, the courts should strike down the deviating section of the Regulation. It is submitted that this reasoning should have been applied to the Act-Regulation conflict in *Ratner* and should be applied in future disputes involving the same regulatory and statutory provisions as those in *Ratner*. Although factually distinguishable, the conflict in *Freed* is very similar to the conflict in *Ratner*. In *Ratner*, as in *Freed*, the pertinent sections of Regulation Z were not absolutely necessary for an understanding or effectuation of the corresponding complemented sections in the Act. Section 127(b) of the Act, which was involved in the *Ratner* dispute, is very explicit as to the disclosure of finance charges by the creditor. Further, section 107(a) carefully provides for deter-

58 — F. Supp. at —, 4 CCH Consumer Credit Guide ¶ 99,356 at 89,318.

59 Id. at —, 4 CCH Consumer Credit Guide ¶ 99,356 at 89,319.

mination of an "annual percentage rate," while section 127(b)(5) specifically explains how to calculate a "nominal annual percentage rate," and when it is to be used. The effect of these sections is to provide the creditor with sufficient disclosure information so that he can comply with the Act. Therefore, since the complementary sections of Regulation Z involved in the *Ratner* and *Freed* disputes do not adequately reflect the policy of the Act, the offending sections of Regulation Z should be discarded.

The Board, in an attempt to resolve the inherent conflict between Section 127 of the Act and Section 226.7 of Regulation Z, has proposed an amendment to Subsection 226.7(b)(5) of the Regulation which provides, in part:

> Whether or not a finance charge is imposed during the billing cycle, each periodic rate (whether or not applied during the billing cycle) . . . and the "corresponding nominal annual percentage rate" . . . determined by multiplying the periodic rate by the number of periods in a year [must be disclosed by the creditor on a monthly billing statement].[60]

In effect, the amendment provides that creditors are required to disclose a "nominal annual percentage" rate on monthly statements to obligors regardless of whether a finance charge has been imposed. The amendment, therefore, reflects, and was probably prompted by, the decision of the *Ratner* court that the Consumer Credit Protection Act requires, even absent a finance charge, some type of annual percentage rate disclosure. It is submitted that the amendment should be adopted to obviate any future conflicts between Subsections 127(b)(5) and (6) of the Act and Subsection 226.7(b)(6) of Regulation Z.

In light of the *Ratner* court's conclusion that Regulation Z requires disclosure of a "nominal annual percentage rate,"—a conclusion contrary to the position taken by the Board in its letter to Chemical Bank—a further question arises as to the weight to be given to informal Board correspondence. In *Stefanski v. Mainway Budget Plan, Inc.*,[61] the plaintiff alleged that her purchase of insurance on credit from the defendant violated Section 128 of the Consumer Credit Protection Act,[62] and Section 226.8 of Regulation Z,[63] in that the agreement failed to disclose, *inter alia*, the cash price, the cash down payment and the unpaid cash balance of the transaction. Plaintiff alleged that the transaction was a "credit sale" and that defendant was liable under Section 130 of the Act because the omitted disclosures allegedly violated Section 128 of the Act and Section 226.8 of Regulation Z. The defendant, on the other hand, contended that the transaction was a loan and that this fact precluded its liability.

60 1 CCH Consumer Credit Guide ¶ 3556 at 3333 (Aug. 5, 1971).
61 326 F. Supp. 138 (S.D. Fla. 1971).
62 15 U.S.C. § 1638 (1970).
63 12 C.F.R. § 226.8 (1971).

Defendant's liability depended on whether the credit transaction was a loan or a credit sale. In deciding this question, the court considered a letter from the Board which characterized a similar agreement as a credit sale. However, the court rejected this credit sale characterization, and noted that "[w]hile such correspondence releases by the Federal Reserve Board are persuasive to this Court, they are not binding authority as to questions of interpretation of federal law."[64] As part of its rationale for rejecting the Board's credit sale characterization, the *Stefanski* court noted that comparison of the Board's hypothetical transaction and the *Stefanski* transaction was difficult because the court was unable to determine if the transactions were the same or even similar. Further, the court concluded that the Board letter was an incomplete analysis of all pertinent factors which might assist in determining the character of the transaction.[65]

Stefanski is significant in several respects. The court made it clear that judicial deference to a Board letter interpreting Regulation Z depends, in part, on the degree of similarity between the transaction discussed in the letter and the transaction being adjudicated by the court. If the two transactions are dissimilar, or if there is not sufficient information to make an adequate comparison, a court should not consider the Board's interpretation. Further, as the court in *Stefanski* pointed out, the Board letter must include a complete analysis of all factors which could possibly assist in the characterization of a transaction. Since a court must make a complete analysis of these factors pursuant to a proper adjudication of the dispute, a Board interpretation which is not founded on similar analysis should not be substituted for the court's judgment.

In certain respects, *Ratner* is analogous to *Stefanski*. Even though the letter discussed by the *Ratner* court was interpreting a section of Regulation Z, while the *Stefanski* letter characterized a transaction between creditor and debtor, the courts similarly concluded that the Board's letters were lacking as to a complete analysis of the pertinent information which might affect the letters' characterization or interpretation. In *Ratner*, the Board's letter did not discuss the Consumer Credit Protection Act; nor did it interrelate pertinent sections of Regulation Z. In addition, it must be noted that these letters are merely "staff opinions" and not formal administrative interpretations of Regulation Z.[66] It would seem, then, that an insufficient analysis of all pertinent and

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64 326 F. Supp. at 142.

65 Id. The court did not elaborate on this point other than to indicate that these "other factors" included a consideration of pertinent state laws.

66 The Deputy Secretary of the Federal Reserve Board has described a "staff opinion" as "the informed view of the particular official responding to the inquiry. . . ." The Deputy Secretary has further pointed out that "it is possible that in some instances [staff opinions] might not represent the position which the Board members themselves would take if they formally considered the issue. . . ." 4 CCH Consumer Credit Guide ¶ 30,640 at 66,283 (March 1, 1971). For a discussion of the authoritative weight of formal administrative interpretations, see Garza v. Chicago Health Clubs, Inc., 329 F.

relevant factors by the Board should not be accorded substantial deference by the courts, nor routinely substituted for the courts' independent judgment.

Chemical Bank's final argument, notwithshanding the court's determination that an annual percentage rate disclosure, absent a finance charge, was required by Section 127 of the Act, was that plaintiff's suit should have been dismissed on three separate grounds based on Section 130 of the Act. This section provides in part that:

> (a) any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of
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> (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and
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> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.
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> . . . .
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> (c) a creditor may not be held liable in any action brought under this section for a violation of this part if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.[67]

Chemical Bank's first defense under Section 130 was that the plaintiff had not incurred or paid a finance charge, and therefore Chemical Bank could not be held liable under Section 130(a) of the Act. Further, Chemical Bank argued that section 130(c) provided a "good faith" defense since the alleged violation was not intentional. Finally, Chemical Bank asserted that the alleged violation resulted from a "reasonable interpretation" of Section 127 of the Act and, therefore, Chemical Bank should not be subjected to the "penalty" provided for in Section 130(a).[68]

Notwithstanding Chemical Bank's argument that the plaintiff must have incurred or paid a finance charge in order to compute liability under section 130(a), the *Ratner* court concluded that liability under that section was not based on the imposition or payment of a finance charge. On the contrary, the court stated that liability under section 130(a) is determined by the failure of a creditor to disclose to the obligor certain information as required by the Act. The imposition of a

Supp. 936, 939 (N.D. Ill. 1971). See also Udall v. Tallman, 380 U.S. 1, 4 (1965); and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

67 15 U.S.C. § 1640 (1970).

68 329 F. Supp. at 282.

finance charge, the court noted, was significant, but not controlling, only for determination of damages[69] since it was "sufficient for present purposes that . . . there was a *readily knowable* 'finance charge in connection with the transaction. . . .' "[70]

To buttress the determination that a finance charge was not necessary for civil recovery, the court concluded that Congress intended the $100 minimum civil recovery as more than just "a handy reference point," and had set up this minimum recovery, notwithstanding the imposition of a finance charge, as part of a broader scheme of recovery. The court stated that Congress, in enacting Section 130 of the Act, intended to create "private attorneys general" who would be one of the Act's most vital and effective enforcement weapons.[71] The implementation of civil recovery "invited people like the present plaintiff, whether they were themselves deceived or not, to sue in the public interest."[72] The *Ratner* court concluded that to deny plaintiff civil recovery would impede the congressional policy of encouraging suits by "private attorneys general" and destroy the Act's most potent enforcement weapon.

The use of private attorneys general as a statutory enforcement tool is not a novel concept. In *Newman v. Piggie Park Enterprises, Inc.*,[73] the petitioners instituted a class action seeking an injunction under Title III of the Civil Rights Act of 1964.[74] The petitioners had allegedly been barred from eating at the defendant's drive-in restaurants solely on account of petitioners' race and color. The United States Court of Appeals for the Fourth Circuit held that petitioners could be awarded counsel fees, as provided by the Civil Rights Act of 1964, only to the extent that the defendant's defenses had been raised "for purposes of delay and not in good faith."[75] On certiorari, the Supreme Court modified the circuit court's decision so as to award the petitioners reasonable attorney's fees, notwithstanding the defendant's motives for raising particular defenses.[76] In so holding, the Court concluded that when an individual seeks an injunction under the Civil Rights Act of 1964, he does so not only for himself, but also as a " 'private attorney general' vindicating a policy that Congress considered of the highest priority."[77] The Court reasoned that there would be few parties who could afford to defend the public interest by coming into a federal court if they were saddled with attorney's fees and court costs.[78]

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69 Id. at 280.

70 Id. (emphasis added). Although the court was vague as to what constituted this "knowable" finance charge, it is reasonable to assume that the court was referring to the finance charge that would be imposed on plaintiff for not paying the outstanding indebtedness during the free ride period.

71 329 F. Supp. at 280.

72 Id.

73 390 U.S. 400 (1968).

74 42 U.S.C. §§ 2000a et seq. (1970).

75 377 F.2d 433, 437 (4th Cir. 1967).

76 390 at 402-03.

77 Id. at 402.

78 Id.

Newman, like *Ratner*, can be said to stand for the proposition that in order to encourage a potential plaintiff to vindicate a violation of a statutory public policy, an economic incentive must be provided to the potential plaintiff. This incentive—i.e., attorney's fees and court costs in *Newman*, and civil recovery in *Ratner*—encourages individuals to become private attorneys general. Inherent in the concept of private attorneys general is a realization that private citizens are needed as a complement to bureaucratic organizations and enforcement agencies which are often ineffective because of the limited scope of their enforcement powers and an "inability to make expeditious determinations."[79] It is submitted, then, that in light of the congressional policy of utilizing private attorneys general, the *Ratner* court has correctly determined that the imposition or payment of a finance charge is not a prerequisite for civil recovery.

In the face of this unfavorable determination by the court in *Ratner*, Chemical Bank alternatively argued that the alleged violation was unintentional and a "bona fide" error which would constitute an absolute defense as provided by Section 130(c) of the Act.[80] However, the court rejected this argument and pointed out that Chemical Bank's failure to disclose any type of annual percentage rate, even though based on a mistaken interpretation of Section 127 of the Act, was an intentional violation of the Act and proscribed by Section 130(c).[81] The court further reasoned that, in light of the available legislative history, the defense of "bona fide" errors was allowable under the Act only for clerical errors and "[a] defendant invoking this excuse is required not merely to show [that] the clerical error was unintentional, but also that due care has been taken to set up *procedures* to avoid it."[82] Thus, in *Ratner*, the court's characterization of Chemical Bank's mistaken interpretation of the Act as an "intentional" violation under Section 130(c), indicates that any adverse consequences of a mistake of law regarding a truth-in-lending violation should be imposed on the party making the mistake.

It is submitted that this characterization is correct since anything short of such a determination could, in effect, destroy the clear statement in section 130(a) that a creditor who simply "*fails* . . . to disclose"[83] is liable under the section. A further indication that Section

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79 Note, Translating Sympathy for Deceived Consumers into Effective Programs for Protection, 114 U. Pa. L. Rev. 395, 444 (1966). See also Boyd, The Federal Consumer Credit Protection Act—A Consumer Perspective, 45 Notre Dame Lawyer 171 (1970). The author notes that often "[h]eavy reliance is placed on public enforcement through criminal prosecutions and administrative proceedings, while to date established public agencies, in general, have had a less than enviable record in furthering the consumer's interest." Id. at 182.

80 329 F. Supp. at 281.

81 Id.

82 Id. See Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 374, 698 (1967). [Hereinafter cited as Hearings on S. 5.]

83 15 U.S.C. § 1640(a) (1970) (emphasis added).

130(c) does not require a violation to be willful or knowing arises from a comparison of that section with Section 112 of the Act,[84] which provides criminal liability for the creditor who "willfully and knowingly" fails to comply with the Consumer Credit Protection Act's requirements. Moreover, the legislative history concerning section 130(c)—though unfortunately sparse—seems to support the court's determination in *Ratner*. The original version of the Senate truth-in-lending bill, S. 5, did not even contain the express exemption for "bona fide" errors presently found in Section 130(c) of the Act. In response to this omission, numerous creditors, testifying before the Subcommittee on Financial Institutions of the Senate Banking and Currency Committee, contended that because open end credit percentage rate computations could be highly complex, errors of a mathematical and clerical nature could arise quite frequently.[85] It is reasonable to assume, then, that Section 130(c) of the Act was enacted to remedy this situation. Thus, application of the defense provided in that section should be restricted to clerical errors.

However, the legislative history is not the only indication of the meaning of "bona fide" errors. Section 130(b) of the Act provides:

> A creditor has no liability under this section if within fifteen days after discovering an error . . . the creditor notifies the person concerned of the error and *makes whatever adjustments in the appropriate account* are necessary to insure that person will not be required to pay a finance charge in excess of the amount or percentage rate *actually disclosed*.[86]

The clear language of section 130(b) reinforces the conclusion that the "bona fide" errors defense provided in section 130(c) was extended only to clerical errors. Indeed, the statute is directed only to errors which might cause an obligor "to pay a finance charge in excess of the amount

[84] 15 U.S.C. § 1611 (1970). The original House version of H.R. 11601 required proof of a "knowing" violation for civil liability. H.R. 11601, 90th Cong., 1st Sess. § 206(a)(1) (1967). The Justice Department, in a letter to Representative Wright Patman, was of the view that:

> The requirement of proof of specific knowledge, which the Department does not believe is required in a criminal proceeding, is certainly not required by fairness in a civil proceeding. The burden of proving specific knowledge by an offending creditor might frustrate prospective plaintiffs, and thereby weaken the enforcement provisions of the act.

House Hearings, supra note 45, at 903.

[85] See Hearings on S. 5, supra note 82, at 374, 698.

[86] 15 U.S.C. § 1640(b) (1970) (emphasis added).

The Senate Committee on Banking, Housing, and Urban Affairs has suggested, in S. 652, an amendment to § 130(b) of the Act. The bill adds the words "for any failure to comply with any requirement imposed under this subchapter" after the first "this section" in § 130(b). Since the phrase "to insure that person will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed" has not been deleted, the proposed addendum confuses the actual meaning of the section. This addendum does not appear to change the discussion of the section in the text. S. 652, 92d Cong., 2d Sess., § 208(b) (1972).

or percentage rate actually disclosed." This language is directed to the correction of an erroneous disclosure on the billing statement, and in no way appears to include an erroneous *failure* to disclose as involved in *Ratner.*

To date, the *Ratner* court's restricted interpretation of the Act's "bona fide" error provision has, with one exception, been followed by other courts.[87] In the exceptional decision, *Richardson v. Time Premium Co.*,[88] the plaintiff purchased an automobile liability insurance policy from the defendant. Pursuant to the transaction, the defendant required the plaintiff to sign a finance agreement which provided for payments to another defendant. This finance agreement, the plaintiff alleged, was in violation of Regulation Z because the agreement substituted the phrase "total balance due" in place of the words "total of payments" which were required by Section 226.8(b)(3) of the Regulation.[89] Further, the agreement utilized the words "amount to be financed" instead of the phrase "amount financed" as required by section 226.8(d)(1).[90] Therefore, plaintiff argued, the defendant was liable under Section 130(a) of the Act for this failure to utilize terminology required by the Act. The court concluded that defendants' terminology had in fact violated the provisions of Regulation Z, but did not find the defendants liable for the violations. The court reasoned that:

> [The] defendants' failure to comply with the regulations is a *de minimus* violation which is clearly contemplated by [Section 130 of the Act]. The agreement on its face reflects the use of a procedure to insure proper disclosure. *It strains credulity that defendants gained any advantage by the variance. . . .*[91]

However, in light of the submitted accuracy of the conclusion in *Ratner* that Congress intended Section 130 of the Act to exempt only clerical errors, the contrary conclusion in *Richardson* should be viewed with skepticism. Although the defendants' violation may have been "de minimus," section 130(c) does not expressly exempt incidental violations, nor does any language in the statute even remotely suggest such an exemption. In addition, contrary to the determination in *Richardson*, the Act does not predicate liability on a creditor gaining any "advantage" by his violation. Indeed, the *Richardson* court made no mention of the source or basis in reason for the "de minimus" and "advantage gained" tests which were used in applying section 130(c). Further, the *Richardson* court failed to consider the statute's legisla-

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87 See Buford v. American Finance Co., 333 F. Supp. 1243 (N.D. Ga. 1971); and Douglas v. Beneficial Finance Co., 334 F. Supp. 1166 (D. Alas. 1971).

88 — F. Supp. —, 4 CCH Consumer Credit Guide ¶ 99,272 at 89,237 (S.D. Fla. Sept. 14, 1971).

89 12 C.F.R. § 226.8(b)(3) (1971).

90 12 C.F.R. § 226.8(d)(1) (1971).

91 — F. Supp. at —, 4 CCH Consumer Credit Guide ¶ 99,272 at 89,239 (emphasis added).

tive history, or even to mention the prior careful analysis of the section in *Ratner*.

Chemical Bank's final argument based on Section 130 of the Act was that the defendant's mistaken interpretation of Section 127 was at least "reasonable," and, accordingly, should not be subject to the "penalty" imposed by Section 130(a). However, the court rejected this argument, reasoning that section 130(a) provided remedial civil recovery, rather than a penalty. The court noted that Section 130(a) would have been superfluous legislation were it to be interpreted as imposing a penalty, since criminal sanctions were already provided in Section 112 of the Act.[92] Further, the court concluded that "the aim to protect consumers is the paramount aspect of the statute; the countenancing of 'reasonable' violations would be grossly subversive of that."[93]

Thus, the *Ratner* court appears to have concluded that the Consumer Credit Protection Act imposes strict liability for erroneous interpretations of that statute. The court has, in effect, balanced the interests of the obligor against those of the creditor, and, finding that the "paramount aspect" of the Act is to *protect consumers*, concluded that the Act necessitates a finding that the weight of the balance must fall in favor of the obligor. This is not to say that Chemical Bank did not make a "good faith," reasonable interpretation of Section 226.7 of Regulation Z. Nor does it seem entirely fair that Chemical Bank must incur civil liability because the Federal Reserve Board, in promulgating section 226.7, misinterpreted Section 127(b) of the Act. However, in light of the small civil recovery contemplated by the Act, it is submitted that creditors, as opposed to obligors, are better able to bear the burdens of a mistaken interpretation of law. A less stringent determination might encourage creditors to be less cautious when attempting to comply with the requirements of the Act.[94]

Subsequent to the *Ratner* decision that Chemical Bank had violated the Act and was therefore liable under Section 130, the court considered

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[92] 329 F. Supp. at 282. For a general statement that the recovery provided in § 130(a) is remedial rather than penal, see Bostwick v. Cohen, 319 F. Supp. 875, 878 (N.D. Ohio 1970).

[93] 329 F. Supp. at 282.

[94] S. 652 would also amend § 130 of the Consumer Credit Protection Act by adding a new section:

> No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulations, or interpretation thereof by the Board, or in conformity with any interpretation issued by any other agency designated in section 108 unless such interpretation has, prior to the time such act was done or omitted, been determined by the Board to be inconsistent with the Board's rules, regulations or interpretations, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

S. 652, 92d Cong., 2d Sess., § 206 (1972). However, it is submitted that this proposed "good faith" defense is similar to Chemical Bank's "reasonableness" defense, and, therefore, is susceptible to the same objections.

the plaintiff's argument that the suit could be maintained as a class action under the Federal Rules of Civil Procedure.[95] However, the court rejected this argument, reasoning that a class action in the situation involved in *Ratner* would be "essentially inconsistent with the specific remedy supplied by Congress."[96] The court determined that Section 130(a) provided incentive for potential individual plaintiffs to sue under the Act because of the provision for a minimum recovery of one hundred dollars even absent proof of damage.[97] In addition, the court indicated that a judgment of one hundred dollars for each of the 130,000 obligors of Chemical Bank would be a grossly unreasonable punishment.[98] Further, the court determined that a class action, under the circumstances involved in *Ratner*, would not be "superior to" other means of adjudicating the controversy.[99] The court felt these considerations were important in light of the fact that "the broad and open-ended terms [of Rule 23] call for some considerable discretion of a pragmatic nature."[100]

Generally, the federal judiciary has been divided as to whether

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95 Rule 23(b) provides in part, that:

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

Fed. R. Civ. P. 23(b). Plaintiff further relied on subdivision (b)(3) of the Rule which provides that a class action can be permitted if the "prerequisites of subdivision (a) are satisfied" and

> The court finds that the question 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.

Fed. R. Civ. P. 23(b)(3).

96 54 F.R.D. at 416.

97 Id.

98 Id.

99 Id. Although the court did not expand upon this statement, presumably it considered that an individual suit, as utilized by the plaintiff in *Ratner*, constituted one of these "other means."

100 Id. The court did not specifically indicate which "terms" were to be regarded as "open ended" but a reading of Rule 23 will disclose that the court was referring to terms such as "superior," "fair," "efficient" and "desirability." See note 95 supra.

class actions are permitted under the Act.[101] However, one of the recognized fundamental purposes of a class action is to provide incentive for injured parties to sue as a group where individual actions might be economically unattractive because of possible minimum recoveries.[102] In light of this fundamental purpose, it is submitted that the court in *Ratner* correctly concluded that the one hundred dollar minimum civil recovery and reasonable attorney fees provide adequate incentive for individual consumers to bring civil actions under the Consumer Credit Protection Act.[103]

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101 For cases allowing class actions under the Act see La Mar v. H&B Novelty & Loan Co., — F. Supp. —, 4 CCH Consumer Credit Guide ¶ 99,239 at 89,213 (D. Ore. Jan. 27, 1972); Martin v. Family Publications Service, — F. Supp. —, 4 CCH Consumer Credit Guide ¶ 99,267 at 89,235 (D. Vt. June 30, 1971); Berkman v. Westinghouse Elec. Corp., — F. Supp. —, 4 CCH Consumer Credit Guide ¶ 99,270 at 89,236 (N.D. Ill. June 25, 1971). For cases not allowing class actions under the Act see: Rogers v. Coburn Finance Corp., 54 F.R.D. 417 (N.D. Ga. 1972); Allerton v. Century Credit Corp., — F. Supp. —, 4 CCH Consumer Credit Guide ¶ 99,271 at 89,237 (S.D. Fla. Apr. 12, 1971).

102 See Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). There, the California Supreme Court, in allowing class recovery, concluded that

> [A]bsent a class suit, recovery by any of the individual [members of the alleged class] is unlikely. The complaint alleges that there is a relatively small loss to each individual class member. In such a case separate actions would be economically unfeasible. It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs.

Id. at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738. Further, as pointed out by one commentator:

> Class actions could permit consumers who are the victims of similar violations to join in a single suit under the direction of one or more victims. Such joinder increases the likelihood and effectiveness of private action in a number of ways. For example, it would compensate for the fact that few victims are sufficiently motivated on their own to bring an action. Moreover, although individual recovery is basically unchanged the members of the class may share attorney's fees and costs . . . . Because the aggregate recovery possible is potentially very great, attorneys who would be reluctant to undertake a suit on behalf of an individual victim might be attracted to an action on behalf of a class. . . .

Boyd, supra note 79, at 184 n.105. See also Starrs, The Consumer Class Action—Part II: Considerations of Procedure, 49 B.U. L. Rev. 407, 408-15 (1969); Dole, Consumer Class Actions Under Recent Consumer Credit Legislation, 44 N.Y.U. L. Rev. 80, 81 (1969); and Note, Class Actions Under the Truth-In-Lending Act, 47 Notre Dame Lawyer 1305 (1972).

103 The Senate Banking, Housing and Urban Affairs Committee has, in S. 652, suggested an amendment to § 130(a) which would provide for class actions under the Act. The bill provides:

> (a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter or chapter 4 of this title (other than section 161) with respect to any person is liable to such person in an amount equal to the sum of—
>
> (1) any actual damages sustained by such person as a result of the failure;
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> (2) such punitive damages as the court may allow, except that such damages shall (A) be not less than $100 in the case of an individual action, or (B) in the case of a class action, not more than the lesser of $50,000, or 2 per centum of the net worth of the creditor as of the end of the

Ratner, then, has interpreted Section 127(b)(6) of the Consumer Credit Protection Act as being "prospective" in scope and requiring as least a nominal annual percentage rate disclosure on the monthly billing statement to an obligor in an open end credit transaction, even if the obligor has not incurred a finance charge. This required disclosure will effectively assist the consumer to compare credit costs, and enable him to determine which creditor offers the best deal. In addition, the court determined that since the paramount purpose of the Consumer Credit Protection Act is to provide consumer protection, only clerical errors are sufficient to exempt creditors from the Act's civil proscriptions and that, accordingly, even "reasonable" mistakes are violations of the Act. The import of this conclusion is that the creditor will not be able to experiment with obligors' rights under the Act, and see how far the language can be stretched. Finally, by denying plaintiff class recovery the court concluded that class actions might not always be proper under the Act.

CHARLES J. HANSEN

Labor Law—Unions—Political Campaign Contributions—*United States v. Pipefitters Local 562*.[1]—In 1949, Local No. 562 of the Pipefitters Union established the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund (Fund). Until the end of 1962, the Fund was maintained solely by the assessments of members of Local 562 and members of other unions working within Local 562's jurisdiction. The assessments were in addition to the union dues. During this time each union member was assessed a specified amount for each eight hour work day. These assessments were collected directly

> creditor's fiscal year immediately preceding the fiscal year in which the failure occurred; and
>
> (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 which shall be the reasonable value of the services rendered by the attorney without regard to the amount of any recovery.
>
> In determining the amount of punitive damages 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.

S. 652, § 208, 92d Cong., 2d Sess. (1972). Senator Proxmire has called S. 652 the "'Bank Protection Act of 1972.'" S. Rep. No. 92-750, 92d Cong., 2d Sess. 22 (1972). As to the class action provision, Senator Proxmire states that the amendment would weaken the Consumer Credit Protection Act's civil liability provisions and concludes that the "maximum liability figure should be substantially raised in order to provide a meaningful compliance by large creditors." Id. at 33.

1 434 F.2d 1116 (8th Cir. 1970), aff'd on rehearing, 434 F.2d 1127 (8th Cir. 1970), cert. granted, 402 U.S. 994 (1971). The case was argued before the Supreme Court in January, 1972.