No. 00-6484

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADDIE T. COLEMAN,
on behalf of herself and others similarly situated,

Plaintiff-Appellee

v.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE* AND THE SOURCE OF THE AUTHORITY TO FILE

The United States files this brief pursuant to Fed. R. App. P. 29(a). This case involves claims under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691-1691f, which prohibits race (and other forms of) discrimination in credit transactions. 15 U.S.C. 1691(a). The United States Department of Justice has authority to bring suit in federal court to enforce ECOA, either upon referral of a complaint by another federal agency or when the Attorney General has reason to believe that a creditor is engaged in a pattern or practice of discrimination. 15 U.S.C. 1691e(g) & (h). Because of the inherent limitations on administrative

enforcement mechanisms and on the litigation resources of the Department of Justice, the United States has a strong interest in ensuring that individuals will act as "private attorneys general" to enforce ECOA in federal court. See *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

Effective enforcement of ECOA through private litigation depends on the ability of plaintiffs to proceed through class actions. Many ECOA lawsuits are complex and expensive to litigate, and individual monetary claims are often relatively small. Therefore, many discrimination victims will have no incentive to seek redress for ECOA violations in individual lawsuits.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in certifying a plaintiff class in this lawsuit challenging alleged racial discrimination under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691-1691f.[1]

STATEMENT OF THE CASE

Addie T. Coleman filed suit under ECOA against the General Motors Acceptance Corporation (GMAC), alleging racial discrimination. Specifically, she alleged that GMAC created, implemented, and profited from a nationwide lending policy that has a significant disparate impact on African Americans and cannot be

[1] This issue is similar to the one pending before the Court in *Cason v. Nissan Motor Acceptance Corp.*, No. 00-6483 (6th Cir.).

justified by business necessity (R. 266, Complaint ¶¶ 131-135).[2] The district court denied GMAC's motion for summary judgment in most respects, concluding that there are genuine factual disputes as to whether Coleman has established a *prima facie* case of discrimination under a disparate-impact theory (R. 276, Memorandum at 15-22; R. 277, Order).

At the request of Coleman, the district court certified a plaintiff class that included certain African-American car buyers in Tennessee who allegedly were adversely affected by GMAC's financing policy (*ibid.*; R. 276, Memorandum at 1-13). The court found certification appropriate under Fed. R. Civ. P. 23(b)(2), but declined to certify a class under Rule 23(b)(3) (R. 276, Memorandum at 9-13).

STATEMENT OF FACTS

The parties present dramatically different versions of GMAC's lending practices. The United States takes no position in this brief as to the accuracy of either party's factual allegations. The following statement is based on Coleman's allegations, which the Court must accept as true in deciding the class certification issue (see p. 7, *infra*):

GMAC lends money to individuals to purchase automobiles from local dealers throughout Tennessee and the United States (R. 266, Complaint ¶¶ 3-4). Those dealers effectively serve as loan arrangers by referring customers to GMAC

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[2] "R. __" indicates the record entry number on the district court docket sheet. "Br. __" refers to the page number of GMAC's opening proof brief.

and by submitting credit applications to GMAC on the borrowers' behalf (R. 266, Complaint ¶¶ 45, 48, 83-84).

As part of its lending program, GMAC has adopted a "Finance Charge Markup Policy," which it applies uniformly throughout Tennessee and the United States (R. 266, Complaint ¶¶ 8, 34; R. 183, Amended Memorandum at 8, 10-11; R. 243, Reply Memorandum at 2, 7 n.9, 9 n.12). That policy affects the interest rate that borrowers pay on their GMAC loans. In setting the interest rate, GMAC first assigns applicants to credit risk tiers using a scoring system that takes into account several factors related to creditworthiness (R. 266, Complaint ¶¶ 55-62). For each risk tier, GMAC establishes a "buy rate," the lowest interest rate at which it will approve the loan (*id.* ¶ 29c). Pursuant to its Finance Charge Markup Policy, GMAC authorizes the local dealer to set a borrower's interest rate at a level higher than the risk-based buy rate; this increase is known as the "markup" (*id.* ¶¶ 21-22, 24, 29f). The markup does not reflect the customer's credit risk because creditworthiness is already accounted for in the calculation of the buy rate (*id.* ¶ 80b-c). GMAC imposes limits on the range of the permissible markup and approves only those loans that comply with its Finance Charge Markup Policy (*id.* ¶¶ 29g, 50).

Because a borrower's loan is with GMAC, all payments – including the amount attributable to the markup in the interest rate – are made directly to GMAC (*id.* ¶¶ 29f, 53, 80e). GMAC then pays to the local dealer a portion of the finance charge attributable to the markup (*id.* ¶¶ 29h-j, 80c). Under GMAC's policy, the

dealer gets 100% of the markup up to a certain amount (usually 2.5 percentage points) and the remainder of the markup is split evenly between GMAC and the dealer (*id.* ¶¶ 29h-j). GMAC thus provides an economic incentive for dealers to impose markups and often directly profits if they decide to do so (*id.* ¶¶ 77, 80c).

Addie T. Coleman, the named plaintiff, is an African-American consumer who obtained a loan from GMAC to purchase a car from a dealer in Tennessee (*id.* ¶¶ 1, 81-96). The loan included a substantial markup in the interest rate. Coleman qualified for GMAC financing at a buy rate of 18.25%, but the dealer exercised its authority under GMAC's Finance Charge Markup Policy to increase the interest rate to 20.75% (*id.* ¶¶ 85-92). The 2.5-point markup required Coleman to pay an additional $809 in finance charges to GMAC over the life of the loan (*id.* ¶ 92d).

Coleman alleges that GMAC's Finance Charge Markup Policy has a significant disparate impact on African Americans (*id.* ¶¶ 131-135). She asserts, based on a sample of GMAC accounts in Tennessee, that African Americans, on average, are consistently charged higher markups than similarly-situated white customers (*id.* ¶¶ 97-113, 125-126).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in certifying a plaintiff class. This lawsuit satisfies all the threshold requirements for class certification imposed by Fed. R. Civ. P. 23(a). In particular, Coleman's claims are typical of those of the class as a whole and, from all indications, she will adequately represent the class. Her case also meets the criteria for class certification under Rule 23(b)(2),

which applies if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The challenged policy allegedly injured all class members and thus is "generally applicable to the class." *Ibid.* Moreover, if Coleman prevails against GMAC, the class members will be entitled to final injunctive or declaratory relief (or both) to redress the ECOA violation. Certification under Rule 23(b)(2) is proper even though the remedies Coleman seeks include monetary relief. She is requesting equitable restitution – not compensatory or punitive damages – and it is well-settled that restitutionary relief is appropriate in 23(b)(2) class actions.

Civil rights actions seeking declaratory or equitable relief for alleged discrimination are prime examples of proper 23(b)(2) class actions. That is especially true where, as here, the plaintiff bases her claims on the disparate-impact theory of discrimination. Disparate-impact claims are particularly appropriate for class certification because, by definition, they focus on the *class-wide* effect of a policy or practice on a protected group. GMAC's sweeping arguments against class certification in this case could threaten the viability of class actions in disparate-impact lawsuits and thereby impede effective enforcement of numerous civil rights statutes.

Although we believe class certification is appropriate, the United States takes no position in this brief on the merits of Coleman's disparate-impact claim

because the merits are not properly before the Court. For purposes of the class certification question, this Court must accept Coleman's allegations as true.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING A PLAINTIFF CLASS

To obtain class certification, a plaintiff must satisfy the requirements of Rule 23(a) and then must show that a class action is appropriate under one of the subsections of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-614 (1997). A trial court has broad discretion to certify a class under Rule 23, and its decision will not be overturned absent an abuse of discretion. *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997). The district court in this case did not abuse its discretion in certifying a plaintiff class under Rule 23(b)(2).

A. The Merits Of Plaintiff's Claim Are Not At Issue In This Appeal

At the outset, it is important to clarify the scope of this interlocutory appeal. "[T]he relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action." *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984), cert. denied, 471 U.S. 1125 (1985); accord *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Consequently, in deciding this appeal, the Court "must take the allegations of plaintiff[] as true." *Eddleman v. Jefferson County*, 96 F.3d 1448 (Table), No. 95-5394, 1996 WL 495013, at *3 (6th Cir. Aug. 29, 1996) (unpublished opinion); accord *J.B. v. Valdez*, 186 F.3d

1280, 1284, 1290 n.7 (10th Cir. 1999). Because the merits are not at issue here, the United States takes no position in this brief on the validity of Coleman's claim.

B. This Case Satisfies The Requirements Of Rule 23(a)

A class action is permissible "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Courts often refer to these requirements as "numerosity," "commonality," "typicality," and "adequacy of representation." *Amchem*, 521 U.S. at 613. This case meets each of these requirements, but we will discuss only the two that GMAC challenges: typicality and adequacy of representation.

A plaintiff's claim "is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996). This case satisfies the typicality requirement. Coleman alleges that she, like all class members, suffered injury as a result of defendant's Finance Charge Markup Policy. And she proposes to prove her own claim, and the claims of all the other class members, using the same disparate-impact theory.

Coleman also satisfies the adequacy-of-representation requirement, which focuses on the competency of class counsel, the likelihood that the named plaintiff

will vigorously pursue the litigation, and the absence of conflicts with the other class members' interests. See *American Med. Sys.*, 75 F.3d at 1083. We know of no conflict of interest between Coleman and the other class members. Moreover, from all indications, Coleman's attorneys are well-qualified and have vigorously pursued this litigation, as evidenced by their success thus far in compiling a massive database and retaining experts to perform complicated statistical analyses.

GMAC asserts, however, that Coleman is an inadequate class representative because her claims are allegedly time-barred and thus atypical of those of the class as a whole (Br. 15, 18-26, 35). GMAC contends (Br. 20) that ECOA's 2-year limitations period began to run when Coleman entered the contract with GMAC, not when she later discovered the markup in her interest rate. That argument is flawed. Coleman has alleged facts that, if proven, would establish that her claims are timely, as the district court properly recognized in refusing to dismiss the complaint (R. 42, Memorandum at 9-11). Specifically, Coleman has alleged that GMAC deliberately concealed the existence of the markup from her and other class members, and thus they did not know of, and could not reasonably have discovered, the existence of the challenged policy at the time they obtained their GMAC loans (*ibid.*; R. 266, Complaint ¶¶ 21-22, 26-28, 66-69, 92; R. 183, Amended Memorandum at 32-33; R. 246, Plaintiff's Statement of Disputed Facts ¶¶ 72-74; R. 243, Reply Memorandum at 10 n.14).

Coleman's allegations, if proven, would make her claims timely under the "discovery" rule, which this Court typically applies in interpreting limitations

periods in federal statutes. See, *e.g.*, *Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 582 n.3 (6th Cir. 2000); *Michigan United Food & Commercial Workers Unions v. Muir Co.*, 992 F.2d 594, 597-598 (6th Cir. 1993). Under the discovery rule, "the statute of limitations begins to run when the reasonable person knows, or in the exercise of due diligence should have known, both his *injury* and the *cause* of that injury." *Campbell v. Grand Trunk Western R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001) (emphasis in original).[3] Contrary to GMAC's suggestion (Br. 20 n.7), the reference to the "occurrence of the violation" in 15 U.S.C. 1691e(f) does not preclude application of the discovery rule in ECOA cases. This Court has applied the rule to another federal law whose statute-of-limitations provision refers to the occurrence of the unlawful conduct. See, *e.g.*, *Nida v. Plant Protection Ass'n Nat'l*, 7 F.3d 522, 525 (6th Cir. 1993) (interpreting 29 U.S.C. 160(b)).[4] The discovery rule logically should apply to ECOA, as well.

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[3] Nothing in the Senate Report cited by GMAC (Br. 22-23) is inconsistent with the discovery rule. At most, the Report suggests that Congress expanded ECOA's statute of limitations from 1 to 2 years to give individuals additional time to determine whether lenders' acts were "[d]iscriminatory" and thus "potential violations" of ECOA. S. Rep. No. 589, 94th Cong., 2d Sess. 14 (1976). The Report does not address a situation where, as here, the credit applicant allegedly is unaware that the conduct itself has occurred (as opposed to whether that conduct is discriminatory). Coleman alleges that she was unaware when she received the loan that a markup had been included in her interest rate.

[4] Compare 29 U.S.C. 160(b) ("no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board"), with ECOA, 15 U.S.C. 1691e(f) ("No such action shall be brought later than two years from the date of the occurrence of the violation [with certain exceptions]").

Coleman also could invoke the equitable doctrine of "fraudulent concealment" if she proves all of her allegations. Under that doctrine, the running of the statute of limitations is tolled if "(1) the defendant took affirmative steps to conceal the plaintiff's cause of action; and (2) the plaintiff could not have discovered the cause of action despite exercising due diligence." *Jarrett v. Kassel*, 972 F.2d 1415, 1423 (6th Cir. 1992), cert. denied, 507 U.S. 916 (1993). If the doctrine is applicable, the limitations period "will begin to run when the borrower discovers or had reasonable opportunity to discover the fraud." *Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037, 1041 (6th Cir. 1984). This equitable doctrine is to be "read into every federal statute of limitation." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946).

GMAC suggests, however, that the district court should not have certified the class without making factual findings that GMAC engaged in fraudulent concealment or that Coleman was prevented from obtaining information necessary to uncover the alleged practice (Br. 17, 24-25). The district court cannot be faulted for the lack of factual findings on these issues because, as far as we can determine from the record, GMAC did not raise the issue in opposing class certification (see Coleman Proof Br. 22-23; R. 209, Opposition to Plaintiff's Motion for Class Certification; R. 274, 8/7/00 Transcript).[5] At any rate, resolution

[5] The district court addressed the statute of limitations issue in 1998 in denying a motion to dismiss filed by GMAC's co-defendant, Beaman Automotive Group (R. 42, Memorandum at 9-11).

of these questions is premature because they are intertwined with the merits of Coleman's claim; they depend, in part, on disputed factual issues about GMAC's implementation of the Finance Charge Markup Policy. Therefore, even if GMAC had raised the issue in opposing class certification, the district court would not have abused its discretion in declining to resolve the merits of GMAC's statute-of-limitations defense at this stage of the litigation. See *Eisen*, 417 U.S. at 177-178 (court must not decide merits in ruling on class certification).

Alternatively, GMAC suggests (Br. 46, 49) that class certification is inappropriate because, even if Coleman's claim is found to be timely, the district court must conduct individualized hearings into whether the other class members' claims are time-barred. This argument was not raised below and thus is waived. See *United States v. Universal Mgmt. Servs.*, 191 F.3d 750, 758 (6th Cir. 1999), cert. denied, 120 S. Ct. 2740 (2000). At any rate, this issue would not preclude class certification. This Court has held that the possibility that different class members' claims will be subject to different defenses will not foreclose certification under Rule 23. *Bittinger*, 123 F.3d at 884. Consistent with this holding, numerous courts have concluded that class certification can be appropriate even where individual class members are affected differently by a statute of limitations. See *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 & n.4 (1st Cir. 2000); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 924 (3d Cir. 1992); *Kennedy v. Tallant*, 710 F.2d 711, 718 (11th Cir. 1983);

Cameron v. E.M. Adams & Co., 547 F.2d 473, 478 (9th Cir. 1976); accord 1 Newberg & Conte, *Newberg on Class Actions* § 4.26 at 4-104 (3d ed. 1992).[6]

At any rate, it is merely hypothetical at this point whether individualized hearings on statute-of-limitations questions would be needed for most class members. As previously noted, Coleman has alleged that GMAC has a policy of concealing from borrowers that their interest rates include markups, and that such concealment prevented class members from discovering the markups at the time they obtained their GMAC loans (see p. 9, *supra*). Those allegations must be accepted as true for purposes of the class certification decision. If the district court ultimately finds that GMAC enforced such a non-disclosure policy, the court may be able to conclude without individualized hearings that virtually no class members could have reasonably discovered their injury until they learned about the Finance Charge Markup Policy in connection with this lawsuit. Therefore, contrary to GMAC's argument (Br. 55-56), the district court did not abuse its discretion in failing to exclude from the class anyone whose loan was approved more than 2 years prior to the filing of Coleman's lawsuit.

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[6] In support of its argument, GMAC relies (Br. 49) on *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), cert. denied, 526 U.S. 1114 (1999). Although *Barnes* cited the statute-of-limitations issue in rejecting class certification, that case is distinguishable from Coleman's suit. The court in *Barnes* concluded that individualized hearings would be necessary on several issues relating to liability, not just the statute-of-limitations defenses. See *Barnes*, 161 F.3d at 143. As explained below, the district court should be able to resolve liability questions in the present case without individualized hearings. See pp. 19-20, *infra*.

Next, GMAC contends that Coleman has no standing to seek the injunctive relief she requests for the class and thus fails to satisfy the typicality and adequacy-of-representation requirements (Br. 26). GMAC's argument is meritless. Coleman alleges that she was overcharged as a result of racial discrimination and thus suffered a concrete injury. If Coleman's allegations are true, she undoubtedly has standing to seek a declaration that GMAC's Finance Charge Markup Policy is unlawful and an order requiring equitable restitution of the amount she was allegedly overcharged. Such a declaration would benefit the entire class because it would entitle class members to restitution or other forms of equitable relief. All class members' claims, including Coleman's, depend on the same legal determination: whether the alleged Finance Charge Markup Policy violates ECOA. Coleman thus has a strong incentive to vigorously litigate this common legal issue on behalf of the entire class. The possibility that not all class members will be entitled to the same type of relief does not preclude certification because, as this Court has correctly recognized, "[f]actual identity between the plaintiff's claims and those of the class he seeks to represent is not necessary." *Senter v. General Motors Corp.*, 532 F.2d 511, 524 (6th Cir.), cert. denied, 429 U.S. 870 (1976); see also *Bertulli v. Independent Ass'n of Continental Pilots*, __ F.3d __, 2001 WL 121814, at *3-*4 (5th Cir. Feb. 13, 2001) (finding typicality and adequacy of representation despite possible differences in appropriate relief between class representatives and some unnamed class members).

Finally, GMAC asserts that Coleman would not be part of the plaintiff class if it were properly confined to similarly-situated individuals, and thus she cannot satisfy the typicality and adequacy-of-representation requirements (Br. 15, 17, 19, 26-27). Specifically, GMAC asserts that its lending practices did not disadvantage Coleman in comparison to similarly-situated borrowers (Br. 27). That argument is not a proper basis for denying class certification because there is a factual dispute as to whether plaintiff's markup was greater than that of similarly-situated white customers (R. 276, Memorandum at 8-9). GMAC's argument is essentially an attack on the merits of Coleman's claim because it goes to the heart of whether her statistical analysis is sound and whether it shows a racial disparity among similarly situated borrowers after controlling for legitimate variables that would have affected the level of the markup. The district court properly refused to resolve these merits issues at the class certification stage, see *Eisen*, 417 U.S. at 178, and thus did not abuse its discretion in concluding that Coleman satisfied the requirements of Rule 23(a).

C. Class Certification Is Appropriate Under Rule 23(b)(2)

Rule 23(b)(2) permits class certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The claims asserted here fit squarely within Rule 23(b)(2). GMAC's Finance Charge Markup Policy is "generally applicable" because it allegedly injured each of the class members, and

Coleman is seeking equitable and declaratory relief for the entire class (R. 266, Complaint ¶¶ 139, 142).

Civil rights cases alleging racial discrimination are "prime examples" of appropriate Rule 23(b)(2) class actions, *Amchem*, 521 U.S. at 614, because "[r]ace discrimination is peculiarly class discrimination." *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372 (6th Cir. 1977) (citation omitted), cert. denied, 436 U.S. 946 (1978). Indeed, the Advisory Committee Notes to Rule 23(b)(2) cite discrimination cases as "[i]llustrative" examples of 23(b)(2) class actions. Rule 23(b)(2) certification is proper in civil rights cases "even though 'the discrimination may have been manifested in a variety of practices affecting different members of the class in different ways and at different times.'" *Alexander*, 565 F.2d at 1372.

Rule 23(b)(2) certification is particularly appropriate where the discrimination claims are based on a disparate-impact theory. Disparate-impact cases focus on the *class-wide* effect of a policy or practice on a protected group, and thus "by their very nature implicate class-based claims." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998).

Practical considerations also weigh heavily in favor of class certification in complex disparate-impact suits under ECOA. Proving a disparate-impact claim of this sort often requires an expensive and time-consuming compilation of a massive database, as well as the performance of sophisticated statistical analyses. Repeating this process hundreds or thousands of times in separate lawsuits would

be a tremendous waste of judicial resources. Moreover, borrowers often have no economic incentive to bring individual actions under ECOA. Individual monetary losses in ECOA cases are often relatively modest (in this case, only a few hundred or a few thousand dollars) and thus are unlikely to justify the potentially enormous litigation expenses inherent in complicated disparate-impact cases of this sort. This disincentive to pursue small claims is the core reason for permitting class actions. *Amchem*, 521 U.S. at 617.

GMAC argues, however, that Coleman's claim for monetary relief precludes Rule 23(b)(2) certification (Br. 16-17, 28-55). Specifically, GMAC asserts that the monetary claim is not merely incidental to the requested injunctive and declaratory relief, but rather is the predominant remedy that Coleman seeks (Br. 16, 35-39). In support of its argument, GMAC cites (Br. 32) the Advisory Committee Notes to Rule 23, which state that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."

The premise of GMAC's argument is flawed. The restriction cited in the Advisory Committee Notes is inapplicable here because the only monetary relief Coleman seeks is equitable restitution, not compensatory or punitive damages.[7]

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[7] GMAC incorrectly suggests (Br. 33-34) that (b)(2) certification might interfere with absent class members' Seventh Amendment rights to a jury trial. This case does not implicate the Seventh Amendment because there is no constitutional right to a jury trial where, as here, the plaintiff seeks only equitable remedies. See *Tull v. United States*, 481 U.S. 412, 417-424 (1987); *Bittinger*, 123 F.3d at 882-883.

Although her complaint requested "money damages" and "damages allowed by law" (R. 266, Complaint at 3, 41), Coleman has clarified that her monetary claims are limited to restitution[8] – *i.e.*, a refund of the amounts that GMAC overcharged as a result of the alleged discrimination (Coleman Proof Br. 36, 39, 41, 50-51; R. 316, Plaintiff's Reply at 2-4; R. 274, 8/7/00 Tr. at 122). Restitution is an equitable remedy and is not equivalent to money damages. See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (equitable relief includes "restitution, but not compensatory damages"). "When monetary relief is properly sought as equitable restitution, such cases qualify as Rule 23(b)(2) classes," even where that monetary relief is "as predominant as the injunctive and other equitable relief sought."[9] 1 *Newberg on Class Actions*, *supra*, § 4.14 at 4-48; see also *Allison*, 151 F.3d at 415-416 & n.10, 422, 425.[10]

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[8] Coleman's appellate brief describes the requested monetary relief as "disgorgement and/or restitution" (Coleman Proof Br. 36, 41). We use the term "restitution" to include the equitable remedy of disgorgement, which courts often characterize as "restitutionary." *Chauffeurs, Teamsters & Helpers v. Terry*, 494 U.S. 558, 570 (1990).

[9] This rule is consistent with the unpublished decision in *Butler v. Sterling, Inc.*, No. 98-3223, 2000 WL 353502 (6th Cir. Mar. 31, 2000), on which GMAC relies (Br. 39-40). The plaintiffs in *Butler* sought compensatory damages for emotional distress, not simply restitution. 2000 WL 353502, at *8-*9.

[10] GMAC urges this Court to adopt the Fifth Circuit's "incidental damages" standard for determining the propriety of (b)(2) certification in cases seeking monetary relief (Br. 33, 40-42, citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998)). *Allison* does not support GMAC's position because, as the Fifth Circuit explained, the "incidental damages" standard does not apply in a case involving "only claims for equitable monetary relief." *Allison*, 151 F.3d at 415-416 & n.10; accord *id.* at 422, 425.

It is well-settled, for example, that 23(b)(2) certification is appropriate in civil rights actions seeking monetary relief in the form of back pay, which (like the restitution sought here) is an equitable remedy. See *Alexander*, 565 F.2d at 1372; *Senter*, 532 F.2d at 525; *Allison*, 151 F.3d at 415, 422. GMAC attempts to distinguish these back pay cases by asserting that back pay calculations "do not involve a need for the type of individualized inquiries and determinations required by the Plaintiff's claim for monetary relief" (Br. 39-40 n.14). GMAC is mistaken. Back pay calculations often require an individualized inquiry into whether a discrimination victim made reasonable attempts to mitigate his or her monetary losses. In determining appropriate back pay, courts offset the monetary award by the amount of replacement earnings that the victim actually received (or could have earned with reasonable efforts) from an employer other than the defendant. See *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 623-626 (6th Cir. 1983), cert. denied, 466 U.S. 950 (1984). In light of this duty of mitigation, determinations of appropriate back pay in employment discrimination suits are far more likely to require individualized hearings (see *ibid.*) than would the calculation of the alleged overcharges that Coleman seeks as restitution.

In the present case, the district court should be able to determine liability and calculate appropriate relief without conducting individualized hearings into the circumstances surrounding each individual's loan. Coleman proposes to prove the disparate impact of the Finance Charge Markup Policy using multiple regression analyses, which are designed to isolate the effect, if any, that race had

on a borrower's markup by controlling for various legitimate variables that might have affected the size of the markup (see, *e.g.*, R. 248, Cohen Report at 7-14). The variables that Coleman proposes to include in these statistical analyses are in GMAC's business records or otherwise available through public sources (see *ibid.*; R. 266, Complaint ¶¶ 97-106). If Coleman establishes a *prima facie* case of discrimination, GMAC could nonetheless avoid liability by showing that its policy is justified by business necessity. See *Policy Statement on Discrimination in Lending*, 59 Fed. Reg. 18,269 (1994). But that determination would focus on GMAC's needs, rather than on the particular circumstances of each class member. If GMAC is found liable, the district court should be able to calculate appropriate relief for each class member by using a standard formula derived from the same statistical analyses that Coleman used to prove her *prima facie* case. Cases that rely so heavily on statistical evidence are especially well-suited for class certification.

GMAC also contends that Rule 23(b)(2) is inapplicable because Coleman lacks standing to seek injunctive relief (Br. 35-39). That argument is flawed. As previously noted in response to GMAC's argument about typicality and adequacy of representation (p. 14, *supra*), Coleman has standing to seek a declaration that the Finance Charge Markup Policy is unlawful and an order requiring GMAC to reimburse her for the alleged overcharges. Such an order requiring equitable restitution is a type of injunctive relief even though it results in the payment of money. See *Universal Mgmt. Servs.*, 191 F.3d at 760-761 (restitution order was

encompassed within court's power to provide "injunctive relief"); *Keck v. Michigan Dep't of Corrections*, 9 F.3d 108 (Table), No. 92-2378, 1993 WL 406378, at **1 (6th Cir. Oct. 12, 1993) (plaintiff sought "injunctive relief in the form of an order for back-pay"); *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1335 (10th Cir. 1998) ("restitutionary injunction" for back wages). Because either declaratory or injunctive relief (or both) would be appropriate if Coleman prevails on the merits, this case meets the requirements of Rule 23(b)(2).

Next, GMAC argues that class certification is inappropriate because local dealers had input in setting the finance charge markups on the class members' loans (Br. 45-48). But Coleman alleges that the cause of the disparate impact was GMAC's *own* "nationally uniform" policy (R. 183, Amended Memorandum at 8). At this stage of the litigation, the Court must accept this allegation as true. Specifically, Coleman alleges that GMAC has adopted a Finance Charge Markup Policy that it administers uniformly throughout Tennessee and the United States, that the policy authorizes local dealers to impose markups in borrowers' interest rates and gives the dealers an economic incentive to do so, that GMAC profits directly from the dealers' decisions to mark-up the interest rates, that GMAC approves loans that contain these markups, and that GMAC imposes limits on the size of the markups. See pp. 3-5, *supra*. Although it is uncertain whether Coleman can prove the existence of a specific nationwide or statewide policy that actually caused the alleged disparate impact, her allegations are sufficient at this preliminary stage of the litigation to justify class certification. If it later appears

that Coleman will be unable to prove that a specific GMAC policy or practice caused the alleged disparate impact, the district court can revisit the class certification issue at that point. See *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 (6th Cir. 1997).

GMAC also contends (Br. 13-17, 45-54) that class certification is impermissible because a multitude of non-discriminatory factors may affect the amount of each car buyer's loan markup. At bottom, this argument is nothing more than an attack on the merits of Coleman's claim – essentially an assertion that plaintiff cannot prove disparate impact or causation because her statistical analyses allegedly do not account for legitimate, non-racial factors that might vary among the thousands of borrowers who have loans with GMAC. Contrary to GMAC's suggestion, denying class certification will not resolve this merits issue. Coleman has made clear that if her case proceeds as an individual lawsuit, she will base her disparate-impact claim on the same statistical proof that she proposes to use in the class action (see R. 299, Plaintiff's Response at 2; R. 183, Amended Memorandum at 32). Either way, Coleman will try to prove disparate impact using statistical analyses that include thousands of GMAC customers.

At any rate, GMAC cannot avoid class certification merely by speculating that disparities in the markup are attributable to borrower-specific variables that are not included in the plaintiff's statistical models. Rather, GMAC has the burden of producing specific evidence that those variables do, in fact, undermine plaintiff's statistical analyses. See *Bazemore v. Friday*, 478 U.S. 385, 399-400,

403-404 n.14 (1986); *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 908-909 (6th Cir. 1991). If GMAC were able to produce such evidence in the future, the district court could determine at that point whether obtaining information about those variables for each class member would require cumbersome, individualized hearings. If so, the court could then consider decertifying the class due to changed circumstances. See *Barney*, 110 F.3d at 1214. But the court might find, instead, that all relevant variables can be obtained either from GMAC's own business records or from public sources without individualized hearings.

For the reasons we have explained, the district court did not abuse its discretion in certifying a plaintiff class under Rule 23(b)(2). This Court should therefore affirm the class certification order. In doing so, the Court may wish to encourage the district judge to provide notice to absent class members at the remedial stage of this litigation if it progresses that far. Although notice and opt-out rights are not mandatory under Rule 23(b)(2) – as they are in (b)(3) class actions, see Fed. R. Civ. P. 23(c)(3) – the district court nonetheless has discretion to order such protections for members of a (b)(2) class. See *Penland v. Warren County Jail*, 759 F.2d 524, 531 (6th Cir. 1985) (*en banc*); Fed. R. Civ. P. 23(d)(2). By providing class members with these procedural safeguards, a court "can permit civil rights class actions to proceed under 23(b)(2) without requiring that such actions meet the stiffer substantive requirements of 23(b)(3), yet still ensure that the class representatives adequately represent the interests of unnamed class

members." *Allison*, 151 F.3d at 418 n.13; accord *Lemon v. International Union of Operating Eng'rs*, 216 F.3d 577, 582 (7th Cir. 2000).

Notice in a case such as this is advisable because of the possibility that the interests of individual class members may diverge at the remedial stage, even though the monetary relief is purely equitable in nature and can be calculated using a standard formula. There may be more than one acceptable formula for calculating restitution, and individual class members may have an interest in objecting to the formula chosen by the named plaintiffs. But this divergence of interests is unlikely to arise until the remedial phase of the litigation. Therefore, the district court may properly delay notice in a (b)(2) class action "until a more advanced stage of the litigation; for example, until after class-wide liability is proven." *King v. South Cent. Bell Tel. & Tel.*, 790 F.2d 524, 529 (6th Cir.1986) (quoting *Johnson v. General Motors Corp.*, 598 F.2d 432, 438 (5th Cir. 1979)).

CONCLUSION

The district court's class certification order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a), I certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 6,286 words of proportionally-spaced text. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2001, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE were served by Federal Express, next business day delivery, on each of the following attorneys for the Appellant:

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