

March 2021

## Correction and Update to Second Annual Tenth Circuit Survey

Denver Law Journal

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### Recommended Citation

Denver Law Journal, Correction and Update to Second Annual Tenth Circuit Survey, 53 Denv. L.J. 452 (1976).

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CORRECTION AND UPDATE TO SECOND ANNUAL *Tenth Circuit Survey*

In the last issue of the *Denver Law Journal*, the second annual *Tenth Circuit Survey*, there appeared an article entitled *Rule 23 and the Truth in Lending Act*.<sup>1</sup> The case discussed in that comment, *Redhouse v. Quality Ford Sales, Inc.*,<sup>2</sup> had been reheard en banc by the Tenth Circuit; the earlier opinion had been withdrawn and a new opinion issued.<sup>3</sup> The Board of Editors failed to take note of the rehearing and apologizes to the author, the court, and our readers. Following is an analysis of the court's action on rehearing in relation to the court's original opinion and the criticisms in the *Survey* article.

In *Redhouse v. Quality Ford Sales, Inc.*<sup>4</sup> two truck buyers brought a class action against their seller for violations of the Truth in Lending Act<sup>5</sup> and the Utah Uniform Consumer Credit Code.<sup>6</sup> In its original opinion the Tenth Circuit stated that certification of the plaintiffs' cause as a class action under Rule 23<sup>7</sup> was improper because there was no evidence that a class action would be "superior" to other available methods<sup>8</sup> and stated that "class actions are not proper . . . where the action is predominately for monetary damages."<sup>9</sup> These grounds were criticized in the *Survey* article.<sup>10</sup> In addition the author of the article suggested that, under *Eisen v. Carlisle & Jacquelin*,<sup>11</sup> final adjudication of the class action status should precede any findings on the merits. A judgment entered prior to a determination of class action status could bind only named plaintiffs, and further litigation might be necessary.<sup>12</sup> On rehearing the court did remand for findings and

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<sup>1</sup> 53 DENVER L.J. 62 (1976).

<sup>2</sup> 511 F.2d 230 (10th Cir. 1975).

<sup>3</sup> *Redhouse v. Quality Ford Sales, Inc.*, 523 F.2d 1 (10th Cir. 1975).

<sup>4</sup> 511 F.2d 230 (10th Cir. 1975), *modified on rehearing en banc*, 523 F.2d 1 (10th Cir. 1975).

<sup>5</sup> 15 U.S.C.A. §§ 1601-66 (1970), *as amended* (Supp. 1976) [hereinafter cited as the federal Act].

<sup>6</sup> Utah Code Ann. §§ 70B-1-101 to -11-105 (Supp. 1975) [hereinafter cited as the UUCCC].

<sup>7</sup> FED. R. CIV. P. 23.

<sup>8</sup> 511 F.2d at 235-36.

<sup>9</sup> *Id.* at 236.

<sup>10</sup> 53 DENVER L.J. at 67-68.

<sup>11</sup> 417 U.S. 156 (1974).

<sup>12</sup> 53 DENVER L.J. at 67.

determinations as to the elements of a class action.<sup>13</sup> This action seems consistent with the author's suggested approach.

In the earlier opinion the court further held that actual damages must be shown before the liquidated damage provisions of the federal Act or the UUCCC become applicable.<sup>14</sup> The *Survey* article criticized this holding as contrary to the plain meaning of the statutes<sup>15</sup> and as contrary to recent amendments to the federal Act.<sup>16</sup> On rehearing, citing those amendments, the court held that a showing of actual damages is not a prerequisite to an award of liquidated damages.<sup>17</sup>

In both opinions the Tenth Circuit reversed the entry of summary judgment<sup>18</sup> and remanded for findings of fact which control the applicability of the federal Act and the UUCCC. Finally, the court remanded for findings on the applicability of recent changes in Utah law to the question of recovery under both the federal and State statutes and for findings of fact relative to attorneys' fees.<sup>19</sup> The court expressly withheld any opinion as to whether defendant's acts conformed to the federal Act.<sup>20</sup> Conversely, in its first opinion the court had held that deferred downpayments are exempt from compliance with the reporting requirements of the federal Act and the UUCCC when evidenced by short-term, non-interest notes.<sup>21</sup>

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<sup>13</sup> 523 F.2d at 2.

<sup>14</sup> 511 F.2d at 236-37.

<sup>15</sup> 53 DENVER L.J. at 69-70.

<sup>16</sup> 15 U.S.C.A. § 1640(a) (Supp. 1976). These amendments became effective October 28, 1974, subsequent to the trial of *Redhouse* but prior to the first hearing by the Tenth Circuit.

<sup>17</sup> 523 F.2d at 2.

<sup>18</sup> 511 F.2d at 234-35; 523 F.2d at 2.

<sup>19</sup> 523 F.2d at 2.

<sup>20</sup> *Id.*

<sup>21</sup> 511 F.2d at 238. See 53 DENVER L.J. at 71-73.

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