
**CREDIT LIFE INSURANCE PREMIUM OVERCHARGING
LITIGATION:¹ *INMAN v. HEILIG-MEYERS*²**

PROLOGUE

When a consumer buys relatively costly items such as automobiles, furniture, or appliances, the purchase price is often wholly or partly financed by the dealership or retail store. When the contracts of sale and financing are signed, buyers are frequently asked if they would also like to obtain a special kind of insurance—for an additional fee—that would protect their purchase from repossession if they were unable to make the required monthly payments as a result of various calamities. One such coverage, dubbed “credit life insurance,” is designed so that in the event of the purchaser’s death, no further payments of any installments would be needed.³ The primary financial beneficiary of this type of insurance is not the purchaser’s family, but rather the seller-creditor who would be paid directly for all outstanding amounts owed on the purchase. But such coverage allows the surviving family members to rest assured that they would not have to return the goods or incur continued monthly payments if income ceased due to death. Offering this coverage is attractive to retailers not only because they are confident that they will be paid in full despite the death of the purchaser, but also because they often receive a commission for the sale of each policy.

Most credit life policies are “decreasing” or “declining term” in nature; that is, the insurer is obliged to pay an increasingly smaller benefit to the retailer as the purchaser’s balance decreases. Once all payments have been made, coverage is terminated. The credit life insurance premium is sometimes itself financed and included in a loan’s repayment schedule. Credit life shares a number of similarities with other optional finance insurance policies, such as those that cover the loss of the property (credit property) or the loss of the purchaser’s income from either involuntary unemployment (credit unemployment) or health reasons (credit disability).

For some families, credit life policies are a plausible alternative to ordinary life insurance for the protection of their property from repossession because these policies usually have limited or no medical requirements for obtaining the insurance, and because the minimum coverage (and associated premium) can be smaller and more affordable than that associated with traditional life insurance.⁴ In Alabama, for example, the cost of this insurance is 80 cents for each \$100 of the financed purchase price for each year financed.⁵ For these reasons, credit life policies (as well as the other types of optional finance insurance) are more popular in low-income communities where the ramifications of the loss of a family member's income may be especially severe. However, credit life insurance is generally not regarded by consumer advocates as a particularly good purchase because of its low rate of payout per premium dollar.⁶

The McCullar Case

In early 1993, the credit life industry in Alabama was about to undergo a radical upheaval due in no small part to the actions of attorney Garfield "Garve" W. Ivey, Jr. Ivey and his firm of King Ivey & Warren, in the north central Alabama town of Jasper, enjoyed a local reputation for litigating financial disputes, especially on behalf of consumers and against lenders.

The story began when an attorney friend of Ivey's, J. O. Isom of Hamilton, Alabama, reviewed client Cindy McCullar's installment contract for the purchase of a new automobile in order to uncover any potential defenses to an action brought against her for default on her auto loan. Initially, Isom thought there might possibly be some issues revolving around McCullar's contention that she had thought she was purchasing a six-cylinder automobile when in fact the dealer had only delivered a four-cylinder model. Isom filed a complaint based on a fraud theory, but during the course of his research he learned more about one particular aspect of McCullar's installment contract: the supplemental credit life policy she had agreed to buy as an add-on to financing when purchasing the car from the dealership. After studying the contract and discussing related issues with another Alabama attorney, Isom realized that its credit life premium was calculated using both the initial amount financed and *all* interest that could conceivably be paid over the life of the loan. In other words, the policy covered the total of all monthly payments anticipated in the installment plan, including any interest. Arguably, this calculation resulted in more coverage than was needed, because if the purchaser died while still making payments, the insurer would have to pay the seller only the unpaid principal (and possibly a single month's interest) in order for the surviving family to own the goods free and clear. The seller would certainly not be entitled to any interest not yet accrued.

If McCullar had died, the coverage would have been more than enough to pay off the outstanding debt and would have resulted in a surplus. Even though any excess credit life insurance benefits not needed to pay off the outstanding principal (and any interest accrued since the last payment made before death) would be rebated to McCullar's family or estate,⁷ she had arguably paid a higher premium than she might have if the amount financed had been the sole focus of the coverage.

On the contract in question, the amount financed was \$15,108.54 and was to be paid over 60 months; the total purchase price, plus precomputed interest, was \$20,742.⁸ According to McCullar's attorney, had the credit life policy covered only the unpaid principal, rather than also including the yet-to-be-incurred interest, the premium would have been \$755.45 rather than \$1037.10.⁹ The difference of \$281.65 was equivalent to a 27.16-percent reduction in the credit life insurance premium and a 1.36-percent decrease in the overall amount to be paid by the McCullars. What the McCullar family would have received as the rebated difference between the coverage amount and the outstanding principal (plus one month's interest) depended on the number of payments already made at the time of death. For example, assuming monthly loan payments of \$345.70 and a 13.25 percent interest rate, the purchaser's death around the due date of the first payment would have resulted in a rebate of \$5467 after the outstanding principal of \$15,108.54 and a single month's interest of \$166.82 were paid to the dealership. By the time the 30th payment was due, the rebate would have been about \$1600; by the 50th, only \$200.

The practice of calculating credit life premiums on the total of installment payments instead of only on the principal had arguably been sanctioned by both the Alabama Banking Department and the Alabama Department of Insurance since at least 1982.¹⁰ Moreover, 14 other states indisputably allowed the coverage to include the total of payments and arguably 26 other states did as well.¹¹ Nevertheless, Isom felt that his interpretation of various Alabama state statutes and regulations relevant to credit life premiums was persuasive enough to drop that original fraud suit (over the number of cylinders in McCullar's auto) in favor of a new complaint that concentrated only on credit insurance issues. Isom filed a suit (*Cindy McCullar v. Universal Underwriters Life Insurance Company et al.*, No. CV93-89, Marion County Circuit Court) against the credit life insurer and the dealership in May 1993. The complaint was based in part upon the state's truth-in-lending law, the Alabama Consumer Credit Act¹² (popularly known as the "Mini-Code"). A key issue revolved around the meaning of the following provision:

With respect to any credit transaction, the creditor shall not require any insurance other than insurance against loss of or damage to any property in which the creditor is given a security interest and insurance insuring the lien of the

creditor on the property which is collateral for said transaction. Credit life and disability and involuntary unemployment compensation insurance may be offered and, if accepted, may be provided by the creditor. The charge to the debtor for any such insurance shall not exceed the authorized premium permitted for such coverages. *Insurance with respect to any credit life transaction shall not exceed the approximate amount and term of the credit.* (Emphasis added.)¹³

The question was whether the practice of selling coverage for as yet unpaid principal *plus* interest, alternatively referred to as “gross coverage,” “total of payments coverage,” and “gross-based premiums” (or “gross loan balance”), exceeded the “amount and term of the credit” limits as defined in the Mini-Code. Also of concern was Alabama Insurance Regulation No. 28 § III, which provided that insurance “with respect to any credit transaction shall not exceed the approximate unpaid balance of the loan.” The issues were serious ones, even given the relatively small amounts alleged to be overcharged, because at the time the Mini-Code’s penalties for intentional excess finance charges included forfeiture of both the interest *and* the underlying principal.¹⁴

While his case was proceeding, Isom dropped off a copy of his complaint at the offices of his friend Garve Ivey for review. Unfortunately for Cindy McCullar, a Marion County circuit judge was not convinced by her attorney’s arguments that the practice violated state laws and regulations. After considering the affidavits of key banking and insurance department staff members who indicated that their agencies had expressly approved the use of total of payments policies, the trial court granted summary judgment for the defendants in October 1993. Isom thereafter appealed the ruling to the Alabama Supreme Court, but by this time he had Ivey’s assistance and expertise in consumer-related financial litigation to help in arguing his case.¹⁵ While the *McCullar* case only involved a single policy, the outcome would have a significant impact on the entire credit life industry.

THE LITIGATION BEGINS

Even before the supreme court’s deliberations in the *McCullar* matter, and despite the adverse summary judgment in that case at the trial-court level, Ivey saw the potential for large-scale class actions based upon the credit life premium fraud theory currently being advanced in the Marion County matter. As one of the targets for such a class suit, he selected Heilig-Meyers Furniture,¹⁶ a furniture retailer based in Richmond, Virginia, with over a billion dollars in annual sales and whose forté is “face-to-face” contracts with customers who may not have checking accounts, credit cards, or good credit.¹⁷ One of the largest

furniture retailers in the nation, Heilig-Meyers had 700 stores nationwide in August 1996 and 39 in Alabama,¹⁸ where it had been selling furniture through its retail store operations since 1986. Part of the operating strategy of the corporation includes locating its stores primarily in small towns and rural markets that are at least 25 miles from a metropolitan area, as well as offering in-house credit programs to provide flexible financing to its customers.¹⁹ Technically Heilig-Meyers is only a retailer of furniture, not a lender, but because the company “extends merchandise on credit” as per the Mini-Code definition, it falls under its requirements as a seller of credit.

Heilig-Meyers drew Ivey’s attention because furniture buyers who were being extended credit by the retailer had routinely been given the option of buying a supplemental credit life policy. Though Heilig-Meyers’ sales personnel were providing the opportunity to buy the credit life coverage, Voyager Life Insurance Company²⁰ technically issued the optional insurance. Voyager had been issuing Heilig-Meyers’ credit policies since September 1989. Voyager is not related to Heilig-Meyers; however, Voyager paid a 50-percent commission to Heilig-Meyers for each policy sold. The furniture company deducted its commissions from the policy premiums received from the installment purchasers before forwarding the remainder of the premiums to Voyager.²¹

During the appeal of the *McCullar* case, Ivey chose nearby Fayette County, a semirural area of northwestern Alabama with about 18,000 inhabitants,²² as the site for his May 12, 1994 filing against Heilig-Meyers and Voyager.²³ The suit was one of the first times Heilig-Meyers had been a defendant in a consumer class action. Instead of a single plaintiff and a single transaction as in the *McCullar* matter, the case was pled from the beginning as a statewide class action and alleged credit life premium overcharging on a company-wide scale. Marilyn and Gary Inman, Heilig-Meyers customers who on May 12, 1993, had made a purchase on one of the furniture retailer’s installment contracts and had also purchased an optional credit life policy underwritten by Voyager Life, were the designated plaintiffs.²⁴ Counsel associated with Ivey were Clatus Junkin (a recently retired Fayette County judge), Charles E. Harrison, and subsequently Barry A. Ragsdale. The trial judge was James W. Moore, Jr., reportedly Junkin’s choice to succeed himself on the bench. Heilig-Meyers’ defense was initially handled by Luther M. Dorr, Jr., of Birmingham’s Maynard Cooper & Gale, and E. Duncan Getchell, Jr., of McGuire Woods Battle & Boothe, in Richmond, Virginia; eventually David G. Greene of Atlanta’s Lord Bissell & Brook also participated on the defendant’s team. Voyager was represented by William B. Hairston, Jr., and Nathan B. Norris of the Birmingham firm of Engel Hairston & Johanson.

The Heilig-Meyers class action was one of over a hundred Ivey and his office would subsequently file that advanced similar credit life overcharging theories against other installment contract providers in Alabama, such as auto dealerships, retail stores, and small loans brokers.²⁵

PRIMARY ISSUES OF THE LITIGATION

The complaint alleged that Heilig-Meyers and Voyager entered into a contract for insurance on the lives of the plaintiffs for coverage sufficient to protect any “unpaid indebtedness”;²⁶ however, the contract was breached when the amounts of insurance actually sold were in excess of that needed to protect whatever indebtedness remained in the event of death. Moreover, the overcharging of credit life premiums was alleged to be “oppressive, unreasonable, unconscionable, against public policy and not in the public interest.”²⁷ Other allegations—though not as novel as the overcharging claim—were also included.²⁸ The complaint charged that fraud occurred when Voyager and Heilig-Meyers misrepresented to plaintiffs that the credit life policy premiums would be paid “to the insurance company for credit life insurance,” when in actuality some amount of the premium was eventually retained by Heilig-Meyers as its commission.²⁹ The failure to disclose that these were decreasing term policies was also felt to go to the issue of fraud.³⁰ These actions (or inactions) were held out to be part of the defendants’ “routine, daily, and standard” “pattern and practice” and were alleged to have been part of each credit life transaction, the only difference being the size of the premiums. The plaintiffs asked for compensatory and punitive damages and for an order declaring the contracts void and unenforceable. The complaint also asked the court to certify an Alabama Rules of Civil Procedure (ARCP) 23(b)(3) class,³¹ with the Inmans as representatives of over 10,000 retail installment contract purchasers who had bought credit life coverage from the defendants, to award monetary damages for the class, and to provide declaratory and injunctive relief.³²

Like the car dealership in the *McCullar* transaction, Heilig-Meyers gave its customers the option of purchasing a credit life policy in conjunction with the credit transaction. There was no question that the premiums were indeed written on the gross loan balance, nor that Heilig-Meyers earned a 50-percent commission on the credit insurance premiums sold to its customers.³³ In response to the plaintiffs’ allegations, however, Heilig-Meyers argued that the buyers were, or reasonably should have been, aware of exactly what was the subject of the credit life policy. The defendants claimed that the federal Truth in Lending Act³⁴ disclosures in the credit contracts—“the benchmark for consumer protections in these types of transactions”³⁵—adequately set forth the amount financed, the applicable percentage rate, the total finance charge, and

the total of payments. Moreover, the “Total of Payments” figure was defined in the contract as the “amount you will have paid after you have made all payments as scheduled.”³⁶ On the Customer Insurance Certificate issued by Voyager and attached to the credit contract, the “Initial Amount Insured” set forth was the same as the total of payments on the credit contract.³⁷ There was no subterfuge or attempt to mislead, Heilig-Meyers suggested; indeed, the buyers knew exactly what they were getting into. No breach could have taken place because Heilig-Meyers obtained precisely the amount of insurance the Credit Contract and Customer Insurance Certificate indicated. In addition, any insurance benefits not needed to pay the outstanding principal would have been rebated to the decedent’s estate, a fact the defendant claimed was clearly revealed on the Customer Insurance Certificate,³⁸ so no excess would have been pocketed by Heilig-Meyers. The defendants also claimed that the additional coverage was prudent in light of the fact that monthly payments often are missed during the period preceding death from illness, and if the policy paid off only the principal, the surviving family would still owe some amount—possibly a substantial one—of interest. In regard to the commissions Voyager paid to Heilig-Meyers, defendants argued that such commissions were regulated and approved by the Alabama Department of Insurance, were typical of commissions allowed in other states, need not be disclosed because the federal disclosure requirements were silent on this issue, and could legally be withheld by the furniture retailer out of the policy premiums it collected on Voyager’s behalf.³⁹ Additionally, Heilig-Meyers also counterclaimed against the Inmans for nearly \$1900 left on the installment contract.⁴⁰

Paralleling their defense in *McCullar*,⁴¹ defendants subsequently offered affidavits from Robert F. Floyd, supervisor of the Alabama Banking Department’s Bureau of Loans (the designated deputy administrator responsible for enforcing the Alabama Mini-Code), and from Harland Dyer, consulting actuary for the Alabama Department of Insurance (one of the persons responsible for interpreting and applying insurance statutes and regulations as they relate to actuarial computations).⁴² Defendants argued that the interpretations of these key agencies’ staff members who routinely oversaw the calculation and sales of credit life policies lent credence to the view that coverage for the total amount of unpaid installments was within the bounds of the law:

4. The State Banking Department, in its official capacity as the regulatory agency over licensees under the Mini-Code, has consistently interpreted the Mini-Code to permit and authorize credit life insurance premiums to be calculated and the amount of credit life insurance to be written based upon the “total of payments” in the context of an add-on, precomputed interest loan. The Department has so informed and enforced the interpretation of the Mini-Code and its implementing regulations as to licensees.⁴³

The Insurance Department agrees with this interpretation as consistent with Insurance Regulation 28, and has so confirmed both to insurers and financing companies who have so asked.⁴⁴

How the state supreme court eventually would rule on the similar assertions of *McCullar* would have great impact on the resolution of *Inman*.

THE LITIGATION CONTINUES

Litigation in the *Inman* case moved slowly because crucial issues were simultaneously being addressed in the supreme court's consideration of Isom's and Ivey's appeal of the October 1993 summary judgment ruling in *McCullar*. However, the first order of business was the motion for class certification that was filed simultaneously with the original complaint in *Inman*. Plaintiffs' counsel moved the court to certify a class of all living Alabama residents who had purchased credit life from Voyager as part of a Heilig-Meyers installment contract during the 20 years before the filing of the action in May 1994. In actuality, the period in question for covered purchases would have been less than four years because Voyager had been writing credit life insurance for Heilig-Meyers customers only since September 1989. Through September 1994, Heilig-Meyers had sold Voyager credit life policies generating an estimated \$3.15 million in premiums to perhaps as many as 150,000 consumers in 300,000 transactions.⁴⁵

After listening to the oral argument of counsel in a vigorously contested hearing that lasted about half a day, Judge Moore ordered on November 29, 1994, that the case could conditionally proceed as a class action "pursuant to Rule 23(b)(1), (2), and (3) of the Alabama Rules of Civil Procedure," and that there would now be two subclasses: one for any purchasers of Voyager credit life insurance, and a second for Heilig-Meyers customers who had purchased any credit life insurance from any insurer as a result of installment contracts with the furniture retailer.⁴⁶ As requested, the subclasses were limited to living class members, and the period of time for which purchases qualified a consumer for class status was set at 20 years. The division of the class into two subgroups essentially dissolved the linkage between the two defendants in terms of the allegations; a consumer could now be a class member if he or she had purchased any Voyager credit life policy (from any retail store, dealership, or other installment contract seller) *or* if he or she had bought any credit life policy offered through Heilig-Meyers (regardless of whether it was underwritten by Voyager or some other insurance company).⁴⁷

The Inmans were appointed as class representatives and Ivey, Junkin, and Harrison were named as class counsel. The defendants were required to pro-

vide the names, addresses, and telephone numbers of all class members to class counsel by December 19.⁴⁸ Notice to the class of the certification was to be accomplished in two ways: Class counsel was to publish a notice in newspapers of general circulation once a week for three weeks and to mail a copy of the notice to each class member. Assuming that the mailing of notice would be completed by February 1, 1995, the court set March 1, 1995, as the deadline for class members to opt out of the action.⁴⁹ A Request for Exclusion form was subsequently added to the anticipated notice to provide a convenient method by which class members could opt out.⁵⁰

The dates for providing the identity of class members and for giving notice set out in the certification order soon became irrelevant. In December 1994, the defendants filed motions for reconsideration of the certification order.⁵¹ Heilig-Meyers wanted the notice to advise class members that by electing to remain in the class, a “substantial number” of class members would be subjecting themselves to compulsory counterclaims (as had been filed against the Inmans). Voyager claimed that it did not maintain a list of the names and addresses of the purchasers of its credit life policies and so could not provide the information to the class counsel as ordered. In light of this claim of having no list of insureds, Voyager also wanted the notice to be amended to reflect that each class member would have the burden of proving each policy purchase. The 20-year purchase period was also attacked as being too broad. The defendants argued that statutes of limitations barred any tort claims involving contracts executed more than two years before the complaint was filed; moreover, the loan and insurance documents that class members had received provided sufficient information to put them on notice of any alleged fraud (thus, the statute began to run immediately at the time of purchase).⁵² The defendants also argued that, in any event, the longest statute of limitations for the key allegations of breach of contract, fraud, and unconscionability would be six years. At the very least, they maintained, the size and scope of any class should be limited to customers in this smaller group.

Soon after they made the motions for reconsideration, defendants moved for summary judgment, primarily on the basis that the Alabama Banking Department’s Bureau of Loans and the Alabama Department of Insurance had given their stamp of approval to total-of-payment credit life premiums.⁵³ Because the motions for summary judgment and reconsideration of the certification order could conceivably determine whether there was a need for plaintiffs’ attorneys to initiate the process of informing the class, class counsel deferred the initiation of notice until the court ruled. Additionally, the parties were beginning to explore the possibility of settlement; consequently, Judge Moore granted an oral motion for postponing notice.

Final rulings on the reconsideration of summary judgment and certification never came, in part because of the pending appeal of the similar suit in *McCullar*. Over the next few months, not much activity transpired in the Fayette County courtroom because there was little point in pushing the *Inman* matter along briskly until the core issues had been decided elsewhere.

Finally, the dam broke. The Alabama Supreme Court ruled on September 29, 1995,⁵⁴ that the credit life premium calculations in *McCullar* indeed constituted overcharging and were in violation of the Mini-Code. Moreover, the court declined to apply the case's holdings prospectively only.⁵⁵ In ruling that the concept of gross coverage "contravenes the plain language of the statute," the court also held that prior state banking and insurance department interpretations were "inconsistent with this plain meaning."⁵⁶ Critically, the court ruled that selling the insurance in a manner consistent with regulatory agencies' interpretations did not absolve the defendants of liability for fraud:

. . . we determine that the species of fraud under which a plaintiff can assert a claim is that of an "innocent/mistaken" misrepresentation.⁵⁷

Whether the creditor's actions constituted fraud was held to be a question of fact for the jury, and the underlying summary judgment was therefore overturned.⁵⁸

With the supreme court's decision in *McCullar*, the outcome of *Inman* was arguably a forgone conclusion. One commentator felt that insurers would have little choice but to settle such credit life overcharging cases:

Numerous class action suits relying on *McCullar* have been filed throughout the state of Alabama. One consumer class action suit names 224 insurance companies as defendants and any other "person or entities . . . who or which sold or made available for sale, credit life insurance in the State of Alabama at any time within the period of twenty (20) years preceding the filing of this action." *As plaintiffs' attorneys capitalize on the McCullar holding, insurance companies will probably settle to avoid further liability. Insurance companies are in a precarious position because McCullar leaves them with no bargaining power, and litigating cases involves the risk of punitive damages. Thus, insurance companies will have little choice but to settle these cases.* (Emphasis added.)⁵⁹

McCullar also directly affected Heilig-Meyers' operations. The defendant reported to us that within two weeks of the supreme court's decision, the furniture retailer stopped selling credit life insurance policies that were based upon the total of payments.

Activity in another branch of government also had an effect, albeit an indirect one, on the outcome of *Inman*. During the spring of 1996, the Alabama legisla-

ture debated the credit life coverage problem in response to the supreme court's rulings and the flurry of class action filings. When amendments to the Mini-Code were finally passed, they specifically forbade the use of unearned finance charges, except for a single payment's worth of interest, in the calculation of credit life policies for all consumer credit transactions entered into on or after June 19, 1996 but did not speak to policies issued before that date.⁶⁰ The legislation provided a safe harbor for creditors in the future: They could not be held liable for a violation if they were following state regulations. The amendments also limited the penalties for intentional finance overcharges to forfeiture of the interest on the contract rather than including forfeiture of the underlying principal. Importantly, the legislature applied these limits on forfeiture penalties retroactively, including to pending lawsuits such as *Inman*. Garve Ivey, a member of the negotiating team for the Mini-Code amendments on behalf of the Alabama Trial Lawyers Association, downplayed the impact of the legislation:

The Mini-Code bill that passed is substantially unchanged from the current law The penalties do change somewhat, to the detriment of the consumer. But taken as a whole, it was a reasonable compromise.⁶¹

David Greene, the attorney for Heilig-Meyers at this time, felt that the revisions were a “hodgepodge” that would not end the litigation problems because the legislation's safe harbor for following state regulations and certain other provisions did not apply retroactively.⁶² As the legislature debated the Mini-Code amendments, the *Inman* case moved forward, albeit with the possibility that the plaintiffs might be forestalled from recovering the underlying principal on the contracts.

Greene was experienced in representing large corporate defendants who were being sued in Alabama, and he realized that the combined impact of statewide issues being argued in a venue located in a semirural community, a verdict with at least the potential for punitive damages, and the currently controlling appellate case law was overwhelmingly in favor of the plaintiffs. On the other hand, the legislature was moving toward reducing the potential size of any compensatory verdict in the case by retroactively limiting the penalties for finance-charge excesses to the amount of interest overcharged. And on April 1, 1996, the Alabama Supreme Court heard arguments for reconsideration of its holdings in *McCullar*, most critically in regard to issues of retroactive application,⁶³ thus giving defendants the hope that the adverse decision might be blunted with respect to past transactions. Indeed, one possible interpretation of the supreme court's initial ruling was that credit life total-of-payment fraud claims could *only* be brought as “innocent/mistaken” misrepresentation; if this were true, punitive damages might not be available because the requisite require-

ments of unconscionable behavior would be lacking. During this relatively favorable period of uncertainty about the impact of *McCullar* on rehearing, Greene felt the time was right for resolving the case as inexpensively as possible. On April 12, 1996, the case partially settled, and the settlement class was broadened to all credit life and credit disability insurance transactions with Heilig-Meyers.

Greene, in a newspaper story about the case, was quoted as saying that Heilig-Meyers agreed to the settlement to avoid lengthy litigation. “These are extremely technical arguments about how premiums should be calculated and charged. . . . There was a valid question raised here. It wasn’t that big an amount of money.”⁶⁴

DETAILS OF THE AGREEMENT

The Settlement Class and Settlement Benefits

The settlement between defendant Heilig-Meyers and class counsel did not include Voyager. Ivey and Greene agreed to a settlement that was defined as “each and every living person who, while a resident of Alabama, at any time on or before October 13, 1995, purchased any policy, contract, or other form of coverage” from Heilig-Meyers for either credit life or credit disability insurance.⁶⁵

This class was proposed to be certified as a non-opt-out class under ARCP Rule 23(b)(2) for the purpose of obtaining injunctive relief. Interestingly, in the original complaint, the plaintiffs had asserted that the prerequisites for certification under either Rule 23(b)(1) or (b)(2) did not apply to the action.⁶⁶ Another change from the early days of the litigation was the addition of credit disability policy buyers to the class definition. Both the plaintiffs and defendants felt that because such coverage was only issued as a rider on Heilig-Meyers credit life policies and essentially arose out of the same transaction, inclusion of any claims related to credit disability into the settlement agreement was compulsory.⁶⁷ The key issue from the original complaint germane to credit disability policies would have been the alleged nondisclosure of the commissions earned by Heilig-Meyers (as well as the retention of commissions before it remitted the balance to Voyager); this type of insurance makes monthly payments for purchasers during any period where illness or injury prevents them from working, so there was no dispute over the need to include both principal and interest in each payment.

Under the claims-made settlement agreement, those class members who submitted a claim would be entitled to one-half the difference between any premi-

ums paid that were calculated on the gross basis and what they would have been if they had been calculated on the net amount of principal owed. The agreement claimed that such restitution “effectively divests Heilig-Meyers of its earnings on the credit life and/or disability charges challenged in the Action”;⁶⁸ because Heilig-Meyers received a 50-percent commission on the amount of the premiums collected from the purchaser, half of the alleged excess amounts collected would constitute their “earnings” on the overages. An additional fund for “extra contractual damages” of \$250,000 was also established, to be divided equally among all class members who had satisfied the proof-of-claim requirements.⁶⁹ As part of the settlement, and as the basis for (b)(2) class treatment, Heilig-Meyers was “enjoined from certain practices in connection with permitting the sale of credit life and/or disability insurance” written on their retail installment sales contracts. Aspects of this injunction on Heilig-Meyers regarding its practices on supplemental insurance would be modified automatically to comport with subsequent legislation, regulation, or Alabama Supreme Court rulings. In return, the class released any possible claims regarding the premiums, rates, methods of sales, disclosures made or not made, or amounts of credit life or disability insurance. It also released any claims over issues related to commissions retained by Heilig-Meyers out of the premiums. Claims against Voyager were not affected by this agreement.

Even though it was part of the parties’ settlement, the supplemental fund of \$250,000 to be shared among the claiming class members became a point of disagreement between the class and the defendant’s counsel as to its purpose. At the time, Ivey referred to the fund as “punitive damages,” while Greene suggested that even had the defendant’s conduct been wrong, it certainly would not qualify as outrageous or reprehensible.⁷⁰

Notice

Heilig-Meyers would provide notice of settlement (as well as the pendency of the class action and the forthcoming fairness hearing) to the class within 60 days of entry of the preliminary order with respect to the settlement. Defendant’s counsel would notify class members in two ways: by first-class mail to all class members who currently had balances on Heilig-Meyers retail installment sales contracts, and by publication to those without current balances or those who did not receive the notice by mail. Notice by publication would be effected by placing ads once a week for three consecutive weeks in newspapers of general circulation in the state’s largest cities: Mobile, Montgomery, Birmingham, and Huntsville. Heilig-Meyers would bear the costs of this initial notice. Class members who wished to object to any aspects of the settlement would be required to file an objection no later than 15 days before the fairness hearing. If the settlement was approved at the fairness hearing, provisions for notice of

such approval and of the claim process were to be similar to those used for the notice of the proposed settlement.

Claiming Process

To obtain the refund, the claiming class member would have to submit a properly completed claim form (containing name, address, date and location of purchase, and a description of the item bought), a copy of the customer's insurance certificate, and a copy of the underlying retail installment sales contract.⁷¹ Heilig-Meyers would make the refund by crediting the accounts of those class members with outstanding balances and by writing checks to all others. If a class member could submit only the claim form with his name and the date and store of purchase, but could not provide a copy of one or both of the other two documents, Heilig-Meyers agreed to conduct a "diligent search" to obtain the missing items. In the event the search was unsuccessful, class members who had submitted only a claim form would receive a certificate for 10 percent off the regular selling price of any item in an Alabama Heilig-Meyers store. The certificates would be freely transferable but would expire after June 30, 1998—about two years after the settlement date. Any potential benefits owed to class members who could not be located by May 30, 1997, would revert to Heilig-Meyers, as would the value of the coupons after their 1998 expiration date.

Interestingly, nowhere in the stipulation of settlement or the joint motion for approval do either the plaintiffs or the defendants state what they believed was the total size of the class, the total damages owed to the class, an estimate of the number of class members who were likely to make a claim, an estimate of the total amount of money that was likely to be paid to class members, or any formulae for calculating the difference between net and gross premiums. However, one of the plaintiffs' attorneys we spoke to indicated that such estimates were probably a part of the oral discussion at the final fairness hearing.

Fees and Expenses

Plaintiffs' counsel agreed not to petition the court for any fees and expenses exceeding \$580,000, and Heilig-Meyers agreed to not to object to any amounts requested as long as they did not exceed this cap. According to the settlement stipulation, these covenants were not to be "construed as an agreement between plaintiffs, their counsel, and Heilig-Meyers as to the amount of attorneys' fees to be paid to class counsel by Heilig-Meyers."⁷² No pleadings were filed with the court that demonstrate any justification for the size of the plaintiffs' fee request in regard to hours expended, comparison to class benefit, or effect on

the practices of the defendants. One of the plaintiff attorneys has asserted that justification for the fees would have been made orally at the final fairness hearing. Moreover, the attorney asserted that the fee request should be viewed in light of not only the amount of money ordered to be refunded to the class but also the suit's effect on the defendant's credit life practices. For the most part, the settlement was negotiated while the reconsideration of the original *McCullar* decision was pending; because the plaintiffs were uncertain how the Alabama Supreme Court would eventually rule, they felt the settlement required a specific injunction to prevent future total-of-payment policies. They also believed the cessation of such sales to be indirectly influenced by this and other credit life class actions because the latter forced the Alabama legislature to clarify the relevant issues through its 1996 revisions to the Mini-Code.

PRELIMINARY APPROVAL

On May 15, 1996, after an hour-long hearing, the court issued its preliminary settlement order and found that the terms of settlement appeared to be within the "range of reasonableness."⁷³ The class certified in November 1994 was now officially modified to consist of:

Each and every resident of the State of Alabama, or persons then present in Alabama, who at any time prior to the date of this Order made an installment purchase through or from the defendant Heilig-Meyers Furniture company, on which installment sale credit life and/or disability insurance was included.⁷⁴

Because Heilig-Meyers had operated in Alabama since 1986, this group would conceivably include anyone who bought coverage during the previous decade; in actual practice, however, Heilig-Meyers' credit life insurance sales were initiated around the beginning of 1990, so the settlement class only included sales made during the previous six years. At the plaintiffs' request, the preliminary certification provided for an ARCP Rule 23(b)(2) non-opt-out class.⁷⁵ The court designated the Inmans as class representatives and Ivey and Junkin as class counsel. A final certification and settlement approval hearing was set for 120 days following.

Some of the terms of the settlement agreement were amended slightly by this preliminary order. The court now required notice by first-class mail of all members for whom Heilig-Meyers had addresses and made no mention of limiting mail notice only to those with current balances. All others with unknown addresses were to be given notice by publication. Also, the court held that those class members who failed to object according to the terms of the settlement waived their right to object or relitigate their claims.

FINAL APPROVAL

Though they jointly agreed to end the case, lawyers for the plaintiffs and for Heilig-Meyers assessed the need for the litigation differently between the preliminary approval of the settlement and the final hearing. Ivey saw the case as an example of litigation protecting consumers⁷⁶ from contracts that put them at a distinct disadvantage, and was quoted as saying: “Their customers may have a high degree of sophistication in their trade or craft, but not in financial matters. Heilig-Meyers has some of the finest lawyers in America put together these contracts for the average guy to sign.”⁷⁷

Greene thought the suit was yet another example of the greed and power of Alabama trial lawyers and that the motivations behind bringing such suits were not purely altruistic: “These guys are not in it out of the goodness of their hearts.”⁷⁸

The final hearing on the settlement was conducted on September 17, 1996.⁷⁹ The questions presented were whether the litigation should be finally certified as an ARCP Rule 23(b)(2) class action, and the amount of the award to the plaintiffs’ attorneys; in addition, Judge Moore was to consider any objections to the proposed settlement. In support of approval, Heilig-Meyers informed the court that it had indeed provided notice as required by mailing “greater than 100,000 Settlement Notices” to class members for whom they had an address and by newspaper publication.⁸⁰ The defendant indicated that in response to the notice effort, it had received only a couple of hundred letters regarding the settlement. These letters from class members were primarily notifications of name or address changes or complaints regarding unrelated problems (e.g., scratched furniture) and none were formal objections to the proposed settlement. Five class members (represented by two separate lawyers) did indicate to Heilig-Meyers that they considered filing an objection, but the defendant separately settled each of their claims (Heilig-Meyers has declined to reveal the terms of these settlements). With the resolution of these matters, neither the parties to the agreement nor the court had received any formal objections by the time of the final hearing. By terms of the agreement and preliminary order, no class member requests for exclusion from the settlement were considered because this was a non-opt-out injunctive class.

As a result of a hearing that, like the preliminary approval hearing, lasted about an hour, the court found that the requirements of ARCP Rule 23(b)(2) were met⁸¹ and approved the class set forth in the preliminary order. Alabama class action rules require that, in addition to the standard tests of numerosity, commonality, typicality, and adequacy of representation, a (b)(2) class is appropriate when

[t]he 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. . .

The maintenance of the action as a (b)(2) class was found to be “superior to any other means of adjudicating the claims raised.”⁸² In this light, all class members—regardless of whether they completed the claiming process—were then “enjoined and prohibited from commencing or prosecuting any action . . . [or] asserting any claims that are released under the settlement. . .”⁸³ Any and all class members’ claims against Heilig-Meyers over their purchases of credit life or disability insurance—including claims of fraud, misrepresentation, Mini-Code violations, violations of federal Truth In Lending, RICO, or Antitrust and Restraint of Trade Acts, or breach of contract—were dismissed with prejudice. However, the court expressly retained its jurisdiction over the enforcement or implementation of the settlement agreement and all other issues involved in the action. The Final Judgment was careful to note that the release from liability was only effective for Heilig-Meyers and did not include Voyager Life Insurance Company.⁸⁴

In approving the settlement between the parties, the court found the notice given to class members of the proposed settlement and fairness hearing to be the best practicable under the circumstances and noted that there were no objections to its adequacy. Heilig-Meyers was ordered to send class members another notice of the final claim process within 60 days of the effective date.⁸⁵ Like the original notice of preliminary settlement, notice of final approval and claiming process was to be accomplished by first-class mail to all class members for whom Heilig-Meyers had addresses and by newspaper publication (once a week for three consecutive weeks in newspapers of general circulation in Mobile, Montgomery, Birmingham, and Huntsville) to all others (or to those who for some reason did not receive the notice by mail). All costs of this re-notice and of the administration of the settlement were to be borne by the defendants.

Fee Award and Settlement Fund

Finding that Ivey and Junkin had adequately represented the interests of the class, the court also awarded \$580,000 to class counsel to be paid by Heilig-Meyers.⁸⁶ No other fees or costs were awarded. The basis of this award (either as a percentage of the total settlement fund or as compensation for actual hours of work) is unclear from the final order itself (presumably, it might have been based on oral arguments made at the hearing).

How much money was actually being offered to settle the class action, and what would the average class member receive? Though the approved settlement provided that successful claimants would receive 50 percent of the portion of the premiums that pertained to covering the interest payments on the purchase (plus a pro rata share of the \$250,000 supplemental fund), pleadings filed in the case do not set forth the estimated size of the settling class, the total amount of overcharges, or what the defendant expected to distribute in benefits. Nevertheless, we can get a rough idea of the size of the defendant's maximum potential exposure by using what little information is publicly available.

Combining estimates offered by plaintiffs and defendants in various pleadings throughout the litigation, we find that Heilig-Meyers appears to have collected about \$3.15 million worth of Voyager credit life premiums from 150,000 consumers in 300,000 transactions over a five-year period ending in September 1994. Figures for the period from September 1994 up to the point at which the defendant ceased sales of total-of-payment policies are not available.⁸⁷ How much of this \$3.15 million would have been "excess" in terms of using the total-of-payments (principal plus interest), rather than the initial purchase price only, as the basis of the premium? Because the price of credit life insurance is a fixed percentage per \$100 financed per annum, the excess on any particular contract would be the cost of credit life coverage on the total interest charges; therefore, the proportion of a premium that was excessive is the same as the proportion that total contracted interest would be of the aggregate total monthly payments. This proportion is independent of the price of credit life insurance (\$.80 or \$1.00 for every \$100 financed for each year financed) or the amount of the underlying principal. It is, however, a function of the annual interest rate and the number of months financed. For example, 27.16 percent of the credit life insurance premium charged in the *McCullar* automobile finance contract—on a 60-month contract with a 13.25 percent annual interest rate—was alleged to be improperly based on the precomputed interest. This percentage would increase as the number of monthly payments increased (e.g., 35.05 percent for 84-month contracts) or as the annual interest rate increased (34.37 percent at 18 percent APR). Thus, it is possible to know how much of a premium was for excess coverage if one also knows the length of the loan and the annual percentage rate.

While Heilig-Meyers, for all its stores nationwide, extends credit for terms for up to 24 months, the average installment contract was about 17 months, according to documents the company filed with the Securities and Exchange Commission.⁸⁸ Telephone calls to the credit departments of a number of Heilig-Meyers Furniture stores in Alabama indicated that in April 1998, the company offered financing of retail purchases for periods of three to 20 months with a range of annual interest rates from 20 to 24 percent. Using these maximum rates and

lengths as upper bounds, a credit life policy premium based only on the underlying principal in a Heilig-Meyers 20-month, 24-percent interest loan would be, at most, 18.24 percent less than a premium calculated on total-of-payment coverage.⁸⁹ If these terms were consistently applied to the contracts entered into by all class members, as much as \$574,560 of the \$3.15 million in all premiums paid in the five-year period through September 1994 would have been based on the total interest paid. Therefore the average overcharge for each of the estimated 150,000 consumers was \$3.83. To the extent that finance agreements were for less than 20 months of payments or for less than 24 percent annual interest, the total estimated overcharge would be reduced from \$575,000, and the average overcharge per consumer would drop as well. On the other hand, because consumers might have entered into multiple contracts with the furniture retailer, or made particularly large purchases, some might have been overcharged more than our estimated \$3.83 average. For example, if a customer bought \$5000 worth of furniture (perhaps as a result of multiple transactions), financed this amount over 20 months and at 24 percent interest, and bought a supplemental total-of-payments credit life policy at \$1 per \$100 financed per year, the excess premium would be \$18.59.⁹⁰ Our classwide average of \$3.83 in overcharges is similar to a \$1030 purchase paid over 20 months, at 24 percent, and a credit life cost of \$1 per \$100 financed per year (or a \$1286 purchase at the post-August 1991 credit life rate of \$.80 per \$100 per year).

Although we were able to collect some information on Heilig-Meyers sales to calculate this average overcharge, we cannot make an accurate estimate of total overcharges to the class because the total class period covered by the Heilig-Meyers settlement includes purchases made up to the date of the preliminary order approving the settlement (May 15, 1996), or about 19 months longer than the 60 months for which we have some indication of the amount and number of policies sold. Even using the reported October 1995 date for the last Heilig-Meyers gross coverage credit life sales, we would still lack about a year's worth of additional data.

Nevertheless, we have some idea of the responsibility of the defendant under the settlement agreement. Heilig-Meyers claimed to have mailed individual notices to more than 100,000 class members and all others were given notice of the settlement by publication only. One should remember that Heilig-Meyers mailed notices only to individuals for whom it had addresses, so we can assume that the true class size is larger than the number of letters sent. This assumption is supported by indications that over a five-year period ending in September 1994, an estimated 150,000 customers made purchases involving credit life insurance. Assuming these customers satisfied the settlement class criteria, they would also have been part of the class—but so would have other customers who made purchases any time from October 1994 to May 1996 (or October

1995, if we use the defendant's reported date of last gross coverage policy sales). If 150,000 indeed represents the actual size of the class, and all members sent in a successful claim form and were paid 50 percent of the average premium excess ($\$3.83/2 = \1.92) plus their share of the \$250,000 supplemental fund, we estimate that Heilig-Meyers would have been responsible under the terms of the settlement for issuing checks and credits totaling about \$537,325 (for an average benefit of \$3.58). In the unlikely event that there were 200,000 in the class, the defendant might have had to pay out \$633,100 (average benefit of \$3.17). If the true class size were doubled or tripled compared to the 150,000 floor, Heilig-Meyers' responsibility to the class would have been at most \$824,649 or \$1,111,974 (and average benefits of \$2.75 and \$2.47 respectively).

We think it is fair to compare these estimates (ranging from \$540,000 to \$1.1 million) to the class counsel award of \$580,000. But the plaintiffs' attorneys have argued to us that the figures do not tell the whole story of the impact of *Inman* and similar litigation. In their view, the suit forced the entire credit life industry in the state of Alabama, and Heilig-Meyers in particular, to halt the sale of total-of-payment policies.⁹¹

DISTRIBUTION OF SETTLEMENT FUNDS

The process for making a claim was simple. Because the defendant had agreed to make a search of its records to locate retail installment contracts and the insurance certificates, conceivably all that class members had to do was send in their names and addresses and the location of the store of purchase to obtain the benefits. According to the Final Judgment, all such proof of claims would have to be filed within 180 days of the effective date of the settlement. Heilig-Meyers would have up to 90 days to provide benefits after the cutoff for filing a proof of claim. However, class members who did not receive notice, were not located, or for any reason failed to make a valid and timely claim forfeited their rights to the settlement. No requirement was placed upon Heilig-Meyers to pay any such forfeited benefits, or the value of any checks issued but not cashed within 180 days, to the court, to other class members, or to any third-party charity. The process of settlement administration was to be self-administered by Heilig-Meyers at its expense, and the records of distribution would be provided to class counsel. However, there was no provision for ongoing reporting of the claims process to the court nor any requirement that a final report of the distribution be made to the court.

Because public accounting was not required, it is not possible to assess independently the distribution of the settlement benefits to the class without the cooperation of either class counsel or the defendant. Heilig-Meyers did provide such information to us. It appears that 5940 claims were made to recover one-

half of the credit life premium overcharges plus a share of the \$250,000 supplemental fund. The total amount distributed to the class was approximately \$272,000 for an average payment of \$45.79 per claim. Almost all of the average payment was from the supplemental fund; only \$3.70 was for the overcharge. Heilig-Meyers also reported to us that the costs of providing the notice of the settlement, final judgment, and claiming process were about \$125,000, and the costs of administering the settlement benefit distribution were at least \$175,000.⁹²

One cannot independently assess the actual value of the settlement as disbursed without knowing what the parties estimated the size of the class to be at the time of the final judgment. It appears that claimants who actually received settlement benefits had entered into contracts that resulted in excess premium payments that were much higher than what we believe the overall class average to be. The distributed benefits, less the accompanying share of the supplemental fund, averaged \$3.70, but this amount constituted only one-half of the actual premium overcharge. Assuming class members with successful claims were indeed paid one-half their actual loss, the full amount of the average overcharge to claimants would have been \$7.40 (compared to our estimate of \$3.83 for all class members, claiming or not). This compensation formula corresponds to about a \$1993 purchase paid over 20 months, at 24 percent, and a credit life cost of \$1 per \$100 financed per year (or a \$2490 purchase at a credit life rate of \$.80 per \$100 per year).

EPILOGUE

Two months after the final settlement with Heilig-Meyers was approved, the Alabama Supreme Court reaffirmed its earlier holding in *McCullar* after considering arguments made at the April 1996 rehearing.⁹³ The court again found total-of-payment credit life policies to violate the Mini-Code, and it reaffirmed and strengthened the retrospective nature of the opinion. Despite the apparent boost the court had given the plaintiffs' case, the litigation with respect to Voyager Life Insurance continues.⁹⁴ The Heilig-Meyers settlement resulted only in making one-half of the excess premiums collected available to the class; to obtain the remainder, plaintiffs' attorneys have renewed their action against Voyager.⁹⁵ However, Voyager's counsel have not been as quick as Heilig-Meyers to negotiate a settlement.

For a number of reasons, Voyager's attorneys felt that the *McCullar* decision did not control their destiny. First, *McCullar* was believed to speak only to the Mini-Code's statutorily defined responsibilities for lenders and credit providers such as Heilig-Meyers, not to those of the underlying credit life insurance companies. Second, the insurers' attorneys felt that the Alabama Supreme Court

still required proof of the oral misrepresentations actually made to the purchasers and their individual reliance thereon, so a class action would be inappropriate. In their view, “. . . *McCullar* rings a death knell for class treatment of similar ‘net vs. gross’ causes of action due to its emphasis on the individualized factual demonstration absolutely required to prevail on this cause of action.”⁹⁶

Further, Voyager counsel hoped that any adverse impact of *McCullar*, even on insurance policy issuers, would disappear with the passage of time. They believed that the *McCullar* opinion was only the view of a plurality of the court’s justices and would be controlling for only the facts of the case immediately before the court;⁹⁷ any future change in the composition of the court might result in the decisions being overturned. Finally, defense counsel were encouraged, because despite the multitude of gross versus net credit life lawsuits filed before and after the *McCullar* decision, relatively few had reached settlement.⁹⁸ The original certification order from November 1994 involving Voyager insureds was vacated in February 1998 in light of recent Alabama Supreme Court rulings regarding the prerequisites of class certification. As we went to press, plaintiffs were in the process of obtaining a new class certification order and were also employing, on the credit life gross-versus-net issue only, theories that Voyager is additionally guilty of fraudulent suppression (of the fact that more than the lawful amount was being charged) and unjust enrichment.⁹⁹

Heilig-Meyers’ battles over its credit life policies, including those it might have with Garve Ivey, are not over. In April 1997, both Heilig-Meyers and Voyager were sued in U.S. District Court for the Northern District of Florida in a putative class action that also alleged gross-versus-net premium issues.¹⁰⁰ The complaint, while filed by a Panama City, Florida, attorney, listed the Jasper, Alabama, firm of King Ivey & Junkin as being “of Counsel.” A national class was anticipated, presumably one that would ultimately exclude the Alabama settlement class as it pertained to Heilig-Meyers, but the matter was stayed pending a Florida state appellate court’s review of a circuit judge’s dismissal of a credit life premium case previously filed. This time, the ultimate outcome was in favor of the defendants. Unlike the Alabama Supreme Court’s decision in *McCullar*, in November 1997 the Florida First District Court of Appeals held that both statutory laws and administrative regulations permitted total-of-payment credit life insurance in Florida and upheld the lower court’s ruling.¹⁰¹ When notified of the state appellate decision, the federal district judge dismissed with prejudice all claims of the named representative against Heilig-Meyers (because the representative’s purchase was made in Florida and thus would have been permissible under state law as interpreted by the Florida appellate justices).¹⁰² However, because no class had actually been certified, claims of potential class members were dismissed *without* prejudice. Conceivably, the

door is still open for national class treatment of credit life premium issues involving Heilig-Meyers' operations in those states where the gross-versus-net question has not been settled.

This family of credit life litigation in Alabama was not unexpected, even before the September 1995 supreme court ruling. Though the Alabama Retail Association and the Automotive Dealers Association of Alabama claimed that the court's decision in *McCullar* ignited many similar suits *after* publication,¹⁰³ Chief Justice Hooper's dissent in *McCullar* commented on the cases filed in anticipation that the summary judgment in *McCullar* would be overturned:

Before the release of the first opinion in this case on September 29, 1995, potentially huge lawsuits were already filed against companies that have conducted thousands of transactions that as of September 29, 1995, all members of the finance and insurance industries thought were perfectly legal. The opinion of this Court is made worse by the fact that the decision will not apply prospectively only, but retroactively. Therefore, the lawsuit floodgates have been opened wide. The potential damage to the Alabama economy is beyond estimate. A constitutional case might arise from this opinion over the implications attendant to exposing business to massive liability for actions taken in reliance on the regulations and statutory interpretations of state agencies.

This new construction of § 5-19-20(a)—a complete departure from the longstanding administrative construction of this provision of the Mini-Code—should be applied prospectively only. The result of retroactivity will be massive litigation and massive liability—liability so great that it could destroy much of the consumer credit and insurance industry in Alabama. If this opinion is allowed retroactive application as to already-filed cases, then any consumer who has obtained a precomputed interest credit life insurance loan—and there could be literally hundreds of thousands of potential litigants—could join a class action lawsuit and sue his or her consumer lender, retailer, and insurance company, despite those companies' strict compliance with every statute, rule, or policy governing these transactions for approximately 25 years. The potential exposure of these consumer lenders, retailers, and insurance companies—every bank, every thrift, every life insurer, every automobile or appliance dealer, every furniture store—is virtually limitless.¹⁰⁴

The Alabama litigation involving Heilig-Meyers appears to be just one of these anticipated suits.

Key Events	Date
Filing	May 12, 1994
Certification hearing	November 29, 1994
Certification order	November 29, 1994

Notice of certification	Ordered but not made
Certification opt-out cutoff	Not applicable as notice of certification is not made
Settlement reached	April 12, 1996
Preliminary approval hearing	May 15, 1996
Preliminary approval order	May 15, 1996
Notice of preliminary settlement and class certification	May, June, July, 1996
Settlement opt-out cutoff	Not applicable; was injunctive class without opt-out
Settlement objector cutoff	September 2, 1996
Fairness hearing	September 17, 1996
Final approval order	September 17, 1996
Notice of final approval	October, November, and December 1996
Notice of claiming procedures	October, November, and December 1996
Claiming period ends	April 22, 1997

NOTES

¹As part of our research on this litigation, we interviewed the plaintiffs' and defendant's attorneys, one of the defendants, the judge, and the organization responsible for claims administration. We also reviewed the pleadings and papers filed in the case as well as other documents including newspaper and magazine articles, law review articles, press releases, and internet web site postings.

²*Inman v. Heilig-Meyers Furniture*, No. CV 94-047 (Ala. Cir. Ct. Fayette County filed May 12, 1994).

³For an excellent discussion of credit life policies generally, see JoClaudia Mitchum, Comment, "The Death of Credit Life Insurance: *McCullar v. Universal Underwriters Life Insurance Company*," 27 *Cumberland Law Review* 719 (1997).

⁴Thomas Caywood, *New Orleans City Business - Suit Alleges Fraud in Car Dealers' Sale of Credit Life Insurance* (July 7, 1997), available on the internet at <http://www.neworleans.com/citybusiness/...-Suitalleges.html> (Feb. 6, 1998).

⁵For example, the credit life insurance premium for an item priced at \$2500 with a down payment of \$500 and a net balance of \$2000 to be financed over three years would be \$48 ($\$2000/\$100 \times \0.80×3). This rate is fixed by the Alabama State Banking Department; before September 1, 1991, the premium rate was \$1 per \$100 per annum. Affidavit of Robert K. Floyd (Aug. 1, 1994) at 2, Exhibit A to Defendant Heilig-Meyers Furniture's Motion for Summary Judgment (Jan. 1, 1995), *Inman v. Heilig-Meyers Furniture*. Unless noted otherwise, hereinafter all court documents cited pertain to *Inman v. Heilig-Meyers Furniture*.

⁶Average credit life insurance payout in 1995 was 42 cents for every dollar collected in premiums as compared to the National Association of Insurance Commissioners' recommendation that insurance generally should pay out at least 60 cents per premium dollar; see *Most Credit Life*

Insurance Still a Rip-Off, available on the internet at the Public Interest Research Groups' home page, <http://www.pirg.org/press/life96.html> (press release of Jan. 29, 1997).

⁷Mitchum, *supra* note 3 at 724.

⁸*McCullar v. Universal Underwriters Life Insurance Co.*, 687 So. 2d 156, 160–61 (Ala. 1996).

⁹*Id.*

¹⁰Amicus curiae briefs filed by both departments in *McCullar v. Universal Underwriters Life Insurance Co.* appeared to confirm this interpretation. 687 So. 2d at 162, 174; Mike Cason, "Heilig-Meyers Settles Suit, Raps Lawyers," *Montgomery Advertiser*, Aug. 7, 1996, at 3B (hereinafter Cason, "Heilig-Meyers Settles Suit"); Mike Cason, "Insurance Case Returns to High Court," *Montgomery Advertiser*, Apr. 2, 1996, at 3B (hereinafter "Insurance Case Returns").

¹¹Appendix to Special Opinion of Chief Justice Hooper, *McCullar v. Universal Underwriters Life Insurance Co.*, 687 So. 2d at 186. Whether or not the 40 states actually allowed premiums based on the total outstanding payments or only on the net principal owed was hotly disputed by both sides. Litigation over credit life premiums has arisen in at least five other states besides Alabama. Caywood, *supra* note 4.

¹²Ala. Code §§ 5-19-1 *et seq.*

¹³Alabama Code § 5-19-20(a) (Supp. 1995).

¹⁴Mike Cason, "Mini-Code Legislation Passes; Both Sides Win?" *Montgomery Advertiser*, May 21, 1996, at 3B.

¹⁵Under Alabama court procedures, civil appeals from the circuit courts of general jurisdiction involving over \$50,000 in controversy are heard by the state supreme court.

¹⁶Hereinafter referred to as Heilig-Meyers.

¹⁷The company reported sales of \$1.139 billion for the fiscal year ending February 29, 1996. Its SEC 10-K filing for that period discussed Heilig-Meyers' approach to offering financing to those without a strong credit history: "Because Company representatives work with customers on a local level, they can often extend credit, without significantly increasing the risk of nonpayment, to customers who may not qualify for credit under bank card programs or from competitors who typically use strict, impersonal credit extension models." Heilig-Meyers Furniture Co., Form 10-K Filing for the Fiscal Year Ended February 29, 1996 at 6 (hereinafter Heilig-Meyer's 1995 10-K).

¹⁸Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

¹⁹Heilig-Meyers 1995–96 10-K, *supra* note 17 at 6.

²⁰Hereinafter referred to as Voyager.

²¹Memorandum in Support of Motion for Summary Judgment (Jan. 31, 1995) at 9–10.

²²See table labeled "General Profile," in U.S. Census Bureau, "Geographic Area: Fayette, AL (01057)," *USA COUNTIES 1996*, available on the internet at the U.S. Census Bureau web page, <http://www.census.gov/statab/USA96/01/057.txt> (Feb. 20, 1998).

²³Interestingly, Ivey once sold credit life policies as part of his duties as a used car salesman.

²⁴Complaint (May 12, 1994) at 1–2. The Inmans also purchased an optional credit property policy. Memorandum in Support of Motion for Summary Judgment at 3.

²⁵Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

²⁶Complaint at 1–2.

²⁷*Id.* at 4.

²⁸Claims against lenders who failed to disclose the receipt of a commission for credit life policies they sold as an adjunct to the extension of credit had been previously litigated elsewhere. See, e.g., *Spear v. Colonial Bank of Alabama*, 514 So. 2d 814 (Ala. 1987), *Rivera v. Dick McFreely Pontiac, Inc.*, 431 F. Supp. 506 (N.D. Ill. 1977).

²⁹Complaint at 2.

³⁰Plaintiffs' Memorandum of Law in Support of Motion for Class Certification (Nov. 22, 1994) at 3 (hereinafter Memorandum in Support of Certification).

³¹Alabama follows the federal procedural rule structure and federal decisions regarding Rule 23 are “persuasive authority” for Alabama courts interpreting class action rules. *Adams v. Robertson*, 676 So. 2d 1265, 1268 (Ala. 1981).

³²Complaint at 5.

³³Defendant Heilig-Meyers Furniture’s Motion for Summary Judgment (Jan. 1, 1995) at 2 (hereinafter Motion for Summary Judgment). The defendant later stipulated that it had acted as a licensed agent for Voyager in connection with the sale of insurance products. Stipulation of Settlement (Apr. 12, 1996) at 15.

³⁴15 U.S.C. §§ 1601 *et seq.*

³⁵Memorandum in Support of Motion for Summary Judgment at 7–9.

³⁶Motion for Summary Judgment at 2.

³⁷*Id.*

³⁸*Id.* at 1–2. The Certificate of Insurance provided that Voyager would “. . . pay all benefits to the Lender. The Lender will apply the payments to reduce or pay off the debt. Any amount left over will be paid by the Lender as follows: for life insurance benefits, the excess will be paid to the estate of the Insured who died, or his named beneficiary.” Memorandum in Support of Motion for Summary Judgment at 4.

At an early point in the litigation, the plaintiffs made a claim that in actual practice, the excess was not being rebated as required. See, e.g., Memorandum in Support of Certification at 3. No evidence was offered to support a claim that either Heilig-Meyers or Voyager ever failed to rebate any excess. This issue does not seem to have been developed further, presumably because the failure to pay any excess would impact only the beneficiaries or estate of purchasers who had died, a group not contemplated as being part of the proposed class. Interestingly, it was suggested to us by various sources that some Alabama insurers did indeed retain the excess as a matter of practice.

³⁹Motion for Summary Judgment at 2; Memorandum in Support of Motion for Summary Judgment at 10; Deposition of Brent Lee Fletcher (Nov. 10, 1994) at 29, quoted in Memorandum in Support of Certification at 4 n.6.

⁴⁰Defendant Heilig-Meyers Furniture’s Counterclaim (June 16, 1994) at 1–2.

⁴¹Indeed, it was argued by the defense early in the *Inman* litigation that the trial court’s granting of summary judgment in the pre-appeal phase of *McCullar* was dispositive of any issue over credit life overcharging fraud. Memorandum in Support of Motion for Summary Judgment at 5–6.

⁴²Affidavit of Robert K. Floyd (Aug. 1, 1994), Exhibit A to Motion for Summary Judgment, and Affidavit of Harland Dyer (July 27, 1994), Exhibit B to Motion for Summary Judgment.

⁴³Affidavit of Robert K. Floyd at 2.

⁴⁴Affidavit of Harland Dyer at 2.

⁴⁵During depositions, defendants estimated that \$3,151,463 in premiums were collected over the period of fiscal year 1990 through September 1994 and that credit life policies were sold to at least 136,000 consumers in over 270,000 transactions since February 1990. Memorandum in Support of Certification at 8. Plaintiffs’ attorneys offered the figures of 150,000 consumers and 300,000 transactions in their pleadings in support of certification to account for the handful of months from September 1989 that were not included in the defendants’ estimates. *Id.* at 15.

⁴⁶Order (Nov. 29, 1994) at 1–2 (hereinafter Certification Order).

⁴⁷It appears that while Voyager provided credit life insurance services through a multitude of retailers, finance companies, and other entities, Heilig-Meyers had offered Voyager policies only through its Alabama operations during the period in question.

⁴⁸The judge gave the defendants 20 days from entry of the certification order on November 29 to forward the names to class counsel. Certification Order at 2–3.

⁴⁹The court anticipated that class counsel would learn the identities of the class members by December 23 and so gave them 40 days thereafter to mail notice to the class. *Id.* at 3.

⁵⁰Motion for Correction and Supplementation of Class Notice (Dec. 8, 1994) at 1–2.

⁵¹[Defendant Heilig-Meyer’s] Motion to Reconsider November 29, 1994 Order (Dec. 5, 1994); [Defendant Voyager’s] Motion to Reconsider Class Certification (Dec. 22, 1994); Amendment to

Defendant Heilig-Meyers Furniture, Inc.'s Motion to Reconsider Class Certification Order (Mar. 22, 1995).

⁵²[Defendant Voyager's] Amendment to Motion to Reconsider Certification (Jan. 17, 1995) at 1–2.

⁵³See, e.g., Affidavit of Robert K. Floyd at 2; Affidavit of Harland Dyer at 2.

⁵⁴*McCullar v. Universal Underwriters Life Insurance Co.*, No. 1930246, 1995 WL 577025 (Ala. Sept. 29, 1995). The original opinion in this case was subsequently withdrawn and substituted on rehearing. The official opinion was released on November 22, 1996, but differs from the original primarily in the extent of the discussion of the prospective nature of the ruling and in the concurring and dissenting opinions. *McCullar v. Universal Underwriters Life Insurance Co.*, 687 So. 2d 156 (Ala. 1996). Passages found herein that are attributed to the Alabama Supreme Court's ruling in *McCullar* are taken from the November 1996 version.

⁵⁵687 So. 2d at 166.

⁵⁶*Id.* at 163–64.

⁵⁷*Id.* at 164.

⁵⁸It should be noted that the Alabama Supreme Court did not hold that the practice of gross coverage was per se fraud or constituted misrepresentation; there would still be the issue of whether the creditor disclosed “information relevant to insurance and banking laws, the costs of premiums allowed, or the type of installment loan contract” to which the plaintiff agreed. *Id.*

⁵⁹Mitchum, *supra* note 3, at 749 (footnotes omitted); emphasis added.

⁶⁰Cason, *supra* note 13.

⁶¹*Id.*

⁶²Cason, “Heilig-Meyers Settles Suit,” *supra* note 10.

⁶³Cason, “Insurance Case Returns,” *supra* note 10.

⁶⁴Cason, “Heilig-Meyers Settles Suit,” *supra* note 10.

⁶⁵Stipulation of Settlement at 9.

⁶⁶Complaint at 5–6.

⁶⁷We received conflicting information as to whether the Inmans had purchased any credit disability insurance. Pleadings in the matter indicate that besides the credit life policy, a credit *property* policy was also obtained at the time of financing. Memorandum in Support of Motion for Summary Judgment at 6. One attorney involved in the case asserted that the Inmans also had a credit disability policy while another told us that they did not (but argued that the inclusion of such claims was compulsory nevertheless).

⁶⁸Stipulation of Settlement at 13.

⁶⁹*Id.* at 14–15.

⁷⁰Cason, “Heilig-Meyers Settles Suit,” *supra* note 10.

⁷¹Notice for Proof of Claim (May 15, 1996), Exhibit B to Motion for Approval of Heilig-Meyers Settlement.

⁷²Stipulation of Settlement at 24.

⁷³Preliminary Order with Respect to Proposed Settlement (May 15, 1996) at 2.

⁷⁴*Id.* at 1.

⁷⁵*Id.* at 1–2.

⁷⁶Cason, “Heilig-Meyers Settles Suit,” *supra* note 10.

⁷⁷Mike Hudson, “Theories Abound on Chain's Rapid Growth,” *Roanoke Times & World News*, July 21, 1997, at A-4.

⁷⁸Cason, “Heilig-Meyers Settles Suit,” *supra* note 10.

⁷⁹Final Judgment, Settlement Approval, and Dismissal with Prejudice (Sept. 17, 1996) at 1 (hereinafter Final Judgment).

⁸⁰Heilig-Meyers' Brief in Support of Stipulation of Settlement (Sept. 16, 1995) at 1–2.

⁸¹Final Judgment at 3.

⁸²*Id.*

⁸³*Id.* at 4.

⁸⁴Handwritten notations—initialed by both Ivey and Greene—clarifying that Heilig-Meyers was the only defendant being released appear throughout the Final Judgment.

⁸⁵*Id.* at 4.

⁸⁶Final Judgment at 2. In comparison, Heilig-Meyers reported to us that it spent approximately \$115,000 in outside legal fees and costs in defending and settling this litigation. We do not have an estimate of the in-house legal expenses incurred by the defendant.

⁸⁷Memorandum in Support of Certification at 8, 15.

⁸⁸For the fiscal years ending February 28, the reported average was approximately 16.7 months for fiscal year 1994 and 17 months in fiscal years 1995 and 1996. Heilig-Meyers Furniture Co., Form 10-K Filing for the Fiscal Year Ended February 28, 1994; Heilig-Meyers Furniture Co., Form 10-K Filing for the Fiscal Year Ended February 28, 1996; Heilig-Meyers' 1995 10-K, *supra* note 17 at 6.

⁸⁹Other combinations of length of payments and annual percentage rates would be 17 months and 20 percent: 13.54 percent reduction in premiums charged; 17 months and 24 percent: 15.93 percent reduction; 24 months and 24 percent: 21.19 percent reduction.

⁹⁰It is unlikely, however, that any one consumer would have had an overcharge that exceeded \$50. In order to incur \$50 in overcharges, one would have to finance at least \$13,500 over 20 months and at 24 percent interest at a credit life cost of \$1 per \$100 financed per year. Discussions with the defendant indicated that Heilig-Meyers would not extend credit at this level on any single transaction, that the amount financed in the overwhelming majority of instances would be less than \$2500, and that the average sale (though not necessarily the average sale that also involved credit life coverage) was around \$800.

⁹¹It should also be noted that at least some of the members of the class counsel team have indicated to us that *Inman* was a fairly early case in terms of their own class action experiences and that their current practices involving documentation of class loss and justification for fee awards, as well as designing settlement benefit distribution procedures, are more refined.

⁹²Rust Consulting's Claims Administration Services of Minnesota was responsible for providing telephone support to Heilig-Meyers during the claim process.

⁹³Mitchum, *supra* note 3, at 732.

⁹⁴While the Heilig-Meyers settlement was under review, and while the Alabama Supreme Court considered the arguments advanced in the rehearing of the *McCullar* matter, Voyager moved for a stay in the case or a continuance of the trial then scheduled for August 26, 1996. Motion for Stay or Continuance of Trial (July 31, 1996). Voyager argued that besides the interests of judicial economy in waiting to see how the high court would eventually rule, holding trial would have been premature because the court had not yet ruled on the motions for reconsideration of the class certification and for summary judgment filed back in the winter of 1994–1995. With the publication of the second supreme court decision in November 1996, the case is again proceeding in the Fayette County Circuit Court.

⁹⁵Two groups of consumers are apparently still able to pursue a claim against Voyager: settling Heilig-Meyers customers who could seek to recover the other half of the excess premium, and the original subclass of all living, Alabama resident, Voyager credit life purchasers. The extent to which these two groups overlap is not known.

⁹⁶Defendant Voyager Life Insurance Company's Supplemental Memorandum in Support of Its Motion to Reconsider Class Certification (Feb. 12, 1997) at 5–6.

⁹⁷*Id.* at 3. "The *McCullar* opinion was less than anticipated in that only three justices joined in the opinion for the court. Only two justices concurred in the result (reversal of summary judgment in favor of the credit insurer and car dealership), one justice concurred in the result but expressly disagreed with the opinion. Chief Justice Hooper agreed that further discovery was needed but otherwise dissented and one justice simply dissented." *Id.*

⁹⁸Information from counsel on both sides in the remaining action against Voyager indicates that fewer than ten credit life overcharge class actions were settled prior to early 1998, and more recently perhaps an additional five to ten settlements have been reached. Class counsel also informed us

that while a number of credit life class actions still remained open, most of the insurance companies that offered the coverage have settled at least one or more of the various actions against them.

⁹⁹First Amended Complaint (Apr. 22, 1997). The court dismissed an additional count of theft by deception on December 11, 1997.

¹⁰⁰*Cain v. Heilig-Meyers Furniture*, No. 5:97-CV-96RH (N.D. Fla. filed Apr. 7, 1997).

¹⁰¹*Robertson v. PHF Life Insurance Co.*, 702 So. 2d 555 (Fla. Dist. Ct. App. 1997).

¹⁰²Order Granting Motion to Dismiss (Jan. 15, 1998), *Cain v. Heilig-Meyers Furniture*.

¹⁰³Cason, "Heilig-Meyers Settles Suit," *supra* note 10.

¹⁰⁴*McCullar v. Universal Underwriters Life Insurance Co.*, 687 So. 2d at 183 (dissent of Chief Justice Hooper, decision substituted November 22, 1996).