STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Joyce M. Anderson and Loren M. Anderson, Edward A. Spiel and Rochelle P. Spiel, Shirley Lundgren, Charles Kelly and Melvina Kelly, and the class of all persons similarly situated,

Plaintiffs,

vs.

Central States Waterproofing, a Minnesota corporation; Finance-America Plan, Inc., a Minnesota corporation; First Federal Savings & Loan Association of Minneapolis, a federally chartered savings and loan association; Thomas Horner; William Lone; Lorene Lone; and National Management Consultants, Inc., an Iowa corporation,

Defendants.

ORDER

File No. 790478

The above-entitled matter came on for hearing before the Honorable Donald T. Barbeau, one of the judges of the above-named Court, on May 26, 1982, pursuant to Rule 65.08 of the Minnesota Rules of Civil Procedure, for an order providing for a temporary injunction.

Winthrop Rockwell, Esq. and John H. Daniels, Jr., Esq., appeared on behalf of plaintiffs. Edward M. Laine, Esq., appeared on behalf of defendant FinanceAmerica. Richard G. Mark, Esq., appeared on behalf of defendant First Federal. There were no appearances on behalf of the other defendants.

The Court having heard arguments of counsel, having considered the memoranda, records, files and proceedings in this action, and being otherwise fully advised,

IT IS ORDERED:

That defendants FinanceAmerica Plan, Inc. and First Federal Savings & Loan Association of Minneapolis are restrained and enjoined as follows:

the named plaintiffs or class members for 90 days from the date hereof;

b) During said 90-day grace period, any class member currently in default shall have the right to cure the default by paying all arrearages into the trust escrow account, established pursuant to paragraph 3 of this Order. In order to cure a default, no class member shall be required to pay penalties provided in his or her installment sales contract;

c) At the close of the 90-day grace period, defendants shall be restrained and enjoined from accelerating the obligations of class members under the installment sales contract for breaches of said contracts occuring during or before the 90-day grace period, which have been cured by the close of said grace period;

d) Following the 90-day grace period, defendants shall be free to enforce all terms and conditions of the installment sales contracts. Any recovery or collection obtained pursuant to suit or otherwise shall be paid into the trust escrow account and credited to the balance of that particular debtor in the trust escrow account.

2. From releasing any adverse credit information to anyone with respect to any of the named plaintiffs or any of the members of the class during the pendency of the above-referenced litigation. Said temporary injunction to remain in effect until final settlement or final judgment in the above-captioned litigation or until further Order of this Court.

3. To establish and adminster, as trustees, escrow accounts into which the named plaintiffs and all members of the class of plaintiffs who were financed through FinanceAmerica Plan, Inc. or First Federal Savings & Loan Association of Minneapolis would pay their monthly payments on their installment contracts, under the following conditions:

a) Said trust escrow accounts shall be established as of the date of the Court's order directing such accounts to be

discharged from such trusteeship by order of this Court at the time of final settlement or final judgment in the above-captioned action;

c) All payments which are received on or after the date of the order requiring the establishment of the trust escrow accounts and which are made pursuant to installment contracts held by FinanceAmerica or First Federal for work performed by Central States shall be deposited in said trust escrow accounts;

d) The principal balance of said trust escrow accounts may be invested by FinanceAmerica and First Federal in the following:

(i) investments in direct obligations of the United States of America or any agency or instrumentality thereof whose obligation constitutes full faith and credit obligations of the United States of America having a maturity of one year or less;

(ii) commerical paper issued by U.S. corporations rated "A-1" or "A-2" by Standard & Poors Corporation or "P-1" or "P-2" by Moody's Investors Service;

(iii) certificates of deposit or banker's acceptance having a maturity of one year or less issued by members of the Federal Reserve System having deposits in excess of $100,000,000.

Interest from said investments shall accrue to the trust escrow accounts.

e) All members of the class shall continue to make their monthly installment contract payments and said payments shall be deposited immediately upon receipt by either FinanceAmerica or First Federal in their respective trust escrow accounts;

f) FinanceAmerica and First Federal shall make a quarterly accounting to the Court and to plaintiffs' counsel of the funds held in said trust escrow accounts showing separately the principal amount of all payments made as of the time of the accounting and the total interest accrued as of the time of each accounting;

g) Funds from these trust escrow accounts shall be disbursed only upon order of and in the manner directly by the above-

MEMORANDUM

This instant action was commenced on or about April 26, 1982. Plaintiffs are attempting to bring a consumer class action against Central States Waterproofing, its principal shareholders and officers, National Management Consultants, Inc. a company claimed to have supervised and controlled Central States, and FinanceAmerica Plan, Inc., and First Federal Savings and Loan Association of Minneapolis, two entities which plaintiffs allege financed or purchased installment contracts from Central States.

Plaintiffs bring the present motion to enjoin defendants FinanceAmerica Plan, Inc., and First Federal Savings and Loan Association of Minneapolis in three separate ways. First they attempt to enjoin the defendants from instituting or pursuing collection actions to enforce the terms of installment sales contracts executed between plaintiffs and Central States Waterproofing against any of the named plaintiffs or class members for a period of ninety days. Secondly, plaintiffs are attempting to enjoin the defendants from releasing any adverse credit information to anyone with respect to any of the named plaintiffs or any members of the class during the pendency of the above-referenced litigation. Thirdly, plaintiffs seek to have defendants establish and administer an escrow account into which the named plaintiffs and all members of the class of plaintiffs who were financed through FinanceAmerica Plan, Inc., or First Federal Savings and Loan Association of Minneapolis would pay their monthly payments on their installment contracts.

The granting of a temporary injunction is governed by Rule 65.02 of the Minnesota Rules of Civil Procedure. However, Rule 65.02 furnishes no specific grounds for the granting of a temporary injunction. The Minnesota Supreme Court has established certain fundamental requirements as to when the granting of a temporary injunction may be appropriate.

a clear abuse of discretion by the trial court disregarding either the facts or the applicable principles of equity. Thompson v. Barnes, 294 Minn. 528, 200 N.W.2d 921 (1972); Cramond v. American Federation of Labor and Congress of Industrial Organizations, 267 Minn. 229, 126 N.W.2d 252 (1964); Village of Blaine v. Independent School District No. 12, Anoka County, 265 Minn. 9, 121 N.W.2d 183 (1963); Northwest Hotel Corporation v. Henderson, 257 Minn. 87, 100 N.W.2d 493 (1960); Independent School District No. 35 v. Engelstad, 274 Minn. 366, 144 N.W.2d 245 (1966); AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 260 Minn. 499, 110 N.W.2d 348 (1961). However, a temporary injunction is an extraordinary equitable remedy to be granted only in clear cases. Thompson v. Barnes, supra; Independent School District No. 35 v. Engelstad, supra.

One of the main objects of a temporary injunction is to maintain the status quo until the action can be heard and determined on the merits. Pickerign v. Pasco Marketing, Inc., 303 Minn. 442, 228 N.W.2d 562 (1975); Village of Blaine v. Independent School District No. 12, Anoka County, supra.

Dahlberg Bros., Inc. v. Ford Motor Company, 272 Minn. 264, 137 N.W.2d 314 (1965), is the leading Minnesota case on the issuance of temporary injunctions. The Dahlberg court enunciated the following five relevant considerations in determining whether the trial court's granting of an injunction should be affirmed:

(1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.

(2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.

(3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.

(4) The aspects of the fact situation, if any, which permit or require consideration of

272 Minn. at 274-275, 137 N.W.2d at 321-322 (Footnotes omitted); See also, Miller v. Foley, 317 N.W.2d 710 (Minn. 1982).

Two of these considerations are relevant in the instant case. They are irreparable harm and likelihood of success on the merits. Irreparable harm was defined in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) as follows:

> The key word in this consideration is 'irreparable'. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Closely tied to the irreparable harm issue are two others, balance of hardships and adequacy of remedy at law. Not only must the party moving for a temporary injunction show the requisite harm, he also must not have an adequate remedy at law. AMF Pinspotters, Inc., v. Harkins Bowling, Inc., supra.

Plaintiffs point out a number of reasons why their harm would be irreparable were the injunction not to issue. They claim as the fundamental harm the loss of use of their money. Taken individually the sum is not substantial, but taken as a whole the sum could be staggering. Plaintiffs will lose the use of this money during the pendency of the litigation, thereby causing serious harm. However, standing alone, this loss of the use of the money isn't irreparable harm. What makes the injury irreparable is the fact that if the injunction is denied, plaintiffs will have no way of recovering the lost interest. Under the FTC clause the interest would not be recoverable, therefore, absent the injunction, plaintiffs are left without a remedy at law.

Plaintiffs also bring out a salient point in connection with the financial health of the defendants. The claim is that the

be appreciated that financial institutions, as well as the general business community, have been going through difficult times. Although speculative, insolvency is within the realm of possibility. We have seen a number of financial institutions succumb to debt in recent months. Were this possibility to eventualize, plaintiffs would suffer irreparable injury.

The Court is most moved by the possible loss of credit to plaintiffs were the injunction to be denied. If the defendants were to bring individual collection actions against the plaintiffs, it would result, at this point, in damage to plaintiffs' credit ratings. This is something which cannot be adequately compensated for and is, therefore, irreparable harm. In todays society loss of credit rating is a disasterous event. Expenses in defending against any collection actions would also be prohibitive in the aggregate.

Closely connected is the idea that the prevention of a multiplicity of actions is a ground for injunctive relief. It is a proper consideration for the Court. Fairley v. City of Duluth, 150 Minn. 374, 185 N.W. 390 (1921); City of Red Wing v. Wisconsin-Minnesota Light & Power Co., 139 Minn. 240, 166 N.W. 175 (1918).

Also to be considered by the Court is the balancing of the harm. The granting or denial of a temporary injunction involves the balancing of the harm which will result to the parties involved if the injunction is granted or denied. Northwest Hotel Corporation v. Henderson, supra; Thompson v. Barnes, supra.

When the harmful results shown by the plaintiffs are balancedagainst the harm to be suffered by the defendants, the scales tip mightily to the plaintiffs' side. In fact, the only harms enunciated by the defendants are the expense and administrative burden of establishing an escrow account. Clearly this pales

The next consideration for the Court is whether or not the plaintiff is likely to succeed on the merits. See, Williams v. Rolfe, 257 Minn. 237, 101 N.W.2d 923(1960).

The complaint contains many allegations against the non-finance defendants which have been answered, but only sparingly, and without much substance. Plaintiffs allege in their complaint marketing of waterproofing goods and services by misrepresentation and falsehoods. These allegations are supported by affidavits. It appears to the Court that plaintiffs are likely to succeed against the non-finance defendants.

Once that is proved we turn to the probability of success on the merits against the two finance defendants. The "Home Improvement Installment Contracts" of FinanceAmerica Plan, Inc., contain the following notice requirement of the Federal Trade Commission, 16 C.F.R. Part 433:

> NOTICE - ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

The language of this notice is clear. It makes any holder of the "Home Improvement Installment Contract" subject to all claims and defenses which the purchaser of waterproofing services could have asserted against Central States Waterproofing.

The Notice requirement above was designed to solve a specific problem. The history of the holder in due course doctrine had been to leave consumers stranded without a remedy where sellers of goods or services sold the financing paper obtained from the consumer/debtor and then either disappeared from the jurisdiction or were found to be judgmentproof when the consumer attempted to rescind the contracts or otherwise vindicate his rights.

The following is the stated purpose of the Federal Trade Commission Regulation:

> or even fraud on the part of the seller, and despite the fact that the consumer's debt was generated by the sale. 40 Fed. Reg. 53506, 53508 (November 18, 1975).
>
> The purpose of this rule. The Commission believes that it is an unfair practice for a seller to employ procedures in the course of arranging the financing of a consumer sale which separates buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised. 40 Fed. Reg. 53506, 53522 (November 18, 1975).

First Federal failed to include the notice provision in its installment sales contract.

Pursuant to federal regulation, the notice of consumer claims and defenses clause was required to be inserted into the installment sales contracts that consumers entered into with First Federal. See 16 C.F.R. Part 433. Under that federal regulation it is an unfair trade practice, under § 5 of the Federal Trade Commission Act, for a seller to accept the proceeds of a purchase money loan in connection with the sale of goods or services, unless the consumer credit contract contains the notice of consumer claims and defenses clause. A purchase money loan is defined as a cash advance received by a consumer in return for a finance change within the meaning of the Truth-in-Lending Act and Regulation Z, and which is applied to purchase goods or services from a seller who: (a) refers consumers to the creditor; or (b) is affiliated with a creditor by common control, contract or business arrangement.

It is apparent from affidavits supplied by plaintiffs that Central States referred consumers to First Federal within the meaning of the regulation.

Because the omitted clause was required to be inserted in the installment sales contract, it should be an implied term of the contract as a matter of law. The requirements of the regulation that existed at the time the contract was formed must become [illegible] expressly set forth

Defendants rely heavily on the Minnesota case of Meyers v. Postal Finance Company, 287 N.W.2d 614 (Minn. 1979), for the proposition that the assignment of a contract "does not impose upon the assignee the duties or liabilities imposed by the contract on the assignor in the absence of the assignee's specific assumption of such liabilities". Meyers v. Postal Finance Company, Id. at 617. A closer reading of the case reveals a fact situation easily distinguishable from the present case. The defendants in the Meyers case had stopped collecting on the installment sales contracts, a situation not present in the instant case. The Court went on to say that "United Buyers Union of California, Incorporated's alleged fraud and deceptive practices would probably be a valid defense to any further collections under the contract by Postal". Meyers v. Postal Finance Co., Id. at 617. Therefore, it is apparent that plaintiffs in the instant case would at the very least prevail on any future payments. Since the relief requested by plaintiffs in this motion does not go beyond enjoining future collection activities, the relief should be granted.

Having satisfied the irreparable injury and likelihood of success requirements, only one issue is left for the Court's determination. It is whether or not the trial court can grant classwide relief prior to class certification. This Court is of the opinion that it has the power to grant a temporary injunction and that the power is not affected by whether or not a Rule 23 class has been certified. Defendants rely upon Beckman v. St. Louis County Board of Commissioners, 308 Minn. 129, 241 N.W.2d 302 (1976) to support their contention that relief is not available to to a class prior to its certification. In Beckman the trial court entered a permanent injunction against the future collection of union fees from non-union employees. The Supreme Court stated that,

"Plaintiffs acknowledge and the record makes

The Court's holding was that final disposition of potential class members' claims, prior to class certification under Rule 23 was error.

At least two points distinguish the present case from the Beckman case. First, the relief requested is different. Here, only a temporary injunction is requested as opposed to a permanent injunction. A temporary injunction neither establishes the law of a case nor constitutes an adjudication of the issues on the merits. E.g., Village of Blaine v. Independent School District No. 12, supra. Here we do not have a final disposition of the claims of the class as a whole prior to certification as was found to be error in Beckman.

Secondly, we don't have a total bypassing of the class certification procedure here, as there was in Beckman. Rule 23.03 (1) of the Minnesota Rules of Civil Procedure requires that the court as soon as practicable after the commencement of an alleged class action must determine by order whether plaintiffs have a right to so maintain it. This Court is following the proscribed procedure. Class certification arguments will be heard as soon as the parties are able to complete discovery relating to the certification.

LET THIS MEMORANDUM BECOME A PART OF THE WITHIN AND FOREGOING ORDER.

D.T.B.