STATE OF MICHIGAN

COURT OF APPEALS

KRISTINE COWLES,

Plaintiff-Appellant,

and

KAREN B. PAXSON,

Intervening Plaintiff-Appellant,

v

BANK WEST, f/k/a BANK WEST FSB,

Defendant-Appellee.

FOR PUBLICATION
August 5, 2004
9:05 a.m.

No. 229516
Kent Circuit Court
LC No. 98-006859-CP

Official Reported Version

Before: Gage, P.J., and O'Connell and Zahra, JJ.

GAGE, P.J.

Plaintiffs appeal by leave granted from the trial court's March 24, 2000, order summarily dismissing intervening plaintiff Karen B. Paxson's claim under the Truth in Lending Act (TILA), 15 USC 1601 *et seq.*, as barred by the applicable statute of limitations. Summary disposition was previously granted to defendant on plaintiffs' other pleaded claims. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Plaintiff Kristine Cowles received a residential real estate mortgage loan from defendant, which loan closed on February 7, 1997. Cowles was charged a $250 document preparation fee, and the fee was disclosed on Line 1105 of her United States Department of Housing and Urban Development settlement statement (HUD-1), a standardized form used in residential real estate loan closings.

On July 1, 1998, Cowles filed a complaint alleging several claims related to the document preparation fee. The complaint was filed on her own behalf and that of a class of consumers similarly wronged by the payment of the document preparation fee. The class was defined to include all consumers who obtained real estate loans in Michigan from defendant and who were charged with, and paid or financed, the document preparation fee in the six-year period before the date of the filing of the complaint. Cowles specifically alleged that defendant's conduct in

preparing documents and charging a fee for the service constituted the unauthorized practice of law. She also alleged violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, and claims for replevin, unjust enrichment, innocent misrepresentation, and negligent misrepresentation.

On August 20, 1998, Cowles amended her complaint to add an allegation that the charged document preparation fee violated TILA, 15 USC 1638, because the document preparation fee was improperly identified on the TILA disclosure form as a fee "paid to others on your behalf." The fee was actually retained by the bank and not paid to others. Cowles also alleged that the document preparation fee exceeded the cost of actual preparation of the "final legal papers." Defendant's motion for summary disposition on the TILA claim was granted. Plaintiffs have not appealed that ruling.

On February 16, 1999, Cowles filed a second amended complaint, alleging another TILA violation, specifically that defendant's failure to disclose the document preparation fee violated 15 USC 1605(a), and Regulation Z, 12 CFR 226.4(c)(7).

The trial court subsequently certified the class as described in Cowles's, second amended complaint with Cowles acting as the class representative for all the claims. Defendant moved for reconsideration, arguing that Cowles's individual TILA claim was time-barred by the statute of limitations and thus she could not represent the class with respect to that claim. Defendant also moved for summary disposition on the merits of the TILA claim.

Paxson thereafter moved to intervene in the action and serve as the class representative for the TILA claim. Paxson obtained a residential refinancing loan from defendant on February 9, 1998, and was charged the $250 document preparation fee. Paxson's motion to intervene was granted, and she filed a complaint in intervention. The trial court later granted summary disposition to defendant on Cowles's TILA claim, finding that the statute of limitations barred her claim. The statute of limitations for a TILA claim is one year from the date of the alleged violation. 15 USC 1640(e). Cowles filed her initial complaint on July 1, 1998, more than one year after the closing on her loan. Her TILA claim was time-barred before she filed her initial complaint.

On January 10, 2000, the trial court granted summary disposition to defendant on all of plaintiffs' remaining claims with the exception of Paxson's TILA claim. Thereafter, both defendant and Paxson separately moved for summary disposition on the TILA claim. The trial court eventually ruled that Paxson's TILA claim was meritorious but was barred by the applicable statute of limitations. It determined that the claim accrued more than one year before the TILA claim was pleaded in Cowles's second amended complaint. Thus, the claim was untimely. The trial court did not relate the second amendment of the complaint back to the filing of the initial complaint.

This Court granted plaintiffs' application for leave to appeal and then held the appeal in abeyance pending the Supreme Court's resolution of *Dressel v Ameribank*, 468 Mich 557; 664 NW2d 151 (2003). In *Dressel*, the Court held that a bank does not engage in the unauthorized practice of law when it completes standard mortgage forms and charges a fee for that service. *Id.*

at 569. This ruling resolved plaintiffs' unauthorized practice of law issue, which was then dismissed by order of this Court. We now address plaintiffs' remaining allegations of error.

I

Plaintiffs first argue that the trial court erred in granting summary disposition on the MCPA claims. We disagree. In *Newton v Bank West*, 262 Mich App 434; ___ NW2d ___ (2004), we recently held that the defendant's residential mortgage loan transactions were exempt from the MCPA by virtue of MCL 445.904(1)(a). Because the transactions are exempt from the provisions of the MCPA, summary disposition on those claims was appropriate.

II

Plaintiff Paxson next challenges the trial court's grant of summary disposition to defendant on her TILA claim. Neither the Michigan Court of Appeals nor the Michigan Supreme Court has decided whether the amendment of a class action complaint to add new theories of liability relates back to the filing of the initial complaint for purposes of computing the expiration of the period of limitations. Thus, whether Paxson's TILA cause of action was barred by the period of limitations involves an issue of first impression and an issue of law, which is reviewed de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

The TILA claim was formally pleaded in Cowles's second amended complaint, which was filed on February 16, 1999. Defendant argues that the statute of limitations for Paxson and all other class members was not tolled with respect to that claim on that date. When the second amended complaint was filed, more than one year had passed since Paxson's TILA claim accrued on February 9, 1998. Therefore, defendant argues that Paxson's claim is barred by the statute of limitations. We disagree.

MCR 3.501(F)(1) provides that the statute of limitations is tolled with respect to all persons within the class described in the complaint on the commencement of an action asserting a class action. MCR 3.501(F)(2) delineates several circumstances in which the statute of limitations resumes running against class members, specifically, on the filing of a notice of the plaintiff's failure to move for class certification; twenty-eight days after notice of the entry, amendment, or revocation of an order of certification eliminating the person as a member of the class; entry of an order denying certification of the action as a class action; submission of an election to be excluded from the class; or final disposition of the action.

Paxson was a member of the original class described in the complaint on the commencement of Cowles's original class action. The class was ultimately certified and none of the circumstances of MCR 3.501(F)(2) occurred that could have caused the period of limitations to resume running against Paxson or any other class members. Thus, we find that the statute of limitations was tolled with respect to Paxson. The question then arises whether amendments to the complaint, adding claims arising out of the conduct, transaction, or occurrence alleged in the original complaint, relate back to the date of the initial filing when the statute of limitations was tolled.

We initially observe that the court rules governing representative actions, as set forth in subchapter 3.500 of the Michigan Court Rules, are not comprehensive. Thus, the general, civil procedure court rules must necessarily be applied to supplement the specific rules pertaining to representative actions.

There is no particular court rule or authority governing the relation back of amendments in class action lawsuits. MCR 2.118(D), however, provides the general rule that an amendment adding a claim relates back to the date of the original pleading if the claim asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth in the original pleading. An amended pleading may introduce new facts, new theories, or even a different cause of action as long as the amendment arises from the same transaction set forth in the original pleading. *Doyle v Hutzel Hosp*, 241 Mich App 206, 212-213; 615 NW2d 759 (2000), citing *LaBar v Cooper*, 376 Mich 401, 406; 137 NW2d 136 (1965). More than thirty years ago, the Supreme Court departed from the strictures of its old rulings and determined that amendments arising "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" were permitted. *LaBar, supra* at 407-408. "The test [] is no longer whether an amendment states a new cause of action, but is whether it arises out of the conduct, transaction, or occurrence alleged in the original pleading sought to be amended." *Id.* Michigan courts have consistently adhered to the aforementioned rule of law. Amendments setting forth new legal theories are not barred by the applicable statutes of limitation if derived from the same transactional setting. *Doyle, supra* at 219-220.

The federal rules of civil procedure and prior United States Supreme Court decisions also provide that amendments relate back to the initial filing for purposes of the statute of limitations. *Tiller v Atlantic C L R Co*, 323 US 574, 581; 65 S Ct 421; 89 L Ed 465 (1945). In *Tiller*, the plaintiff originally sued under one federal act and later amended to add a new theory of liability under another federal act. *Id.* at 575. The amendment was made after the period of limitations had expired on the newly asserted claim. *Id.* at 580. The Supreme Court held that both theories of liability related to the same general conduct, transaction, or occurrence. *Id.* at 581. "The cause of action now, as it was in the beginning, is the same—it is a suit to recover damages for the alleged wrongful death of the deceased." *Id.*

> There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's [railroad] yard. [*Id.*]

In this case, the cause of action was always to recover damages related to the document preparation fee charged in connection with the residential mortgage loans. The additional theory under the TILA, which was added through the second amended complaint, related to the same conduct or transaction as pleaded in the original complaint.

We disagree that the ruling in *American Pipe & Constr Co v Utah*, 414 US 538; 94 S Ct 756; 38 L Ed 2d 713 (1974), compels us to disregard the general rule of the relation-back doctrine when the action is a representative one and not an individual one. The Court in *American Pipe* did not address an amendment in a class action lawsuit and did not address the relation back of amendments. In that case, several individuals and companies were sued by the

United States government to restrain them from violating the Sherman Act and for violations of the Clayton Act, and False Claims Act. *Id.* at 540. The Clayton Act, 15 USC 16(b), provided that, when a proceeding is instituted by the United States to enforce antitrust laws, the running of the statute of limitations "in respect of every private right of action arising under said laws," and based on any matter complained of in the proceeding, is suspended during the pendency of the proceeding and for one year after. *Id.* at 541-542. Within one year after judgment was entered in the litigation between the United States and the several entities, the state of Utah commenced a class action for damages against American Pipe and other companies based on a Sherman Act violation. *Id.* at 541. The defendants moved for an order declaring that the suit could not be maintained as a class action. *Id.* at 542-543. The motion was granted, and class certification was denied. Eight days later, more than sixty parties, who were described as members of the original class, moved to intervene as plaintiffs in Utah's action. *Id.* at 543-544. Their motions were denied by the district court because the period of limitations on the individual claims, as tolled by 15 USC 16(b), had run. *Id.* at 544. The filing of Utah's class action did not toll the statute of limitations. *Id.* The Ninth Circuit Court of Appeals reversed, and the Supreme Court later granted certiorari to consider the tolling issue. *Id.* at 541-545.

The Supreme Court, noting that a federal class action is truly a representative suit designed to avoid repetitious filings, determined that the commencement of the action by the state of Utah satisfied the purpose of the limitation provision with respect to all those who might subsequently participate in the suit, as well as the named plaintiffs. *American Pipe, supra* at 550-551. Until the issue of class certification was decided, the statute of limitations was tolled:

> Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action. During the pendency of the District Court's determination in this regard, which is to be made "as soon as practicable after the commencement of an action," potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case. It follows that even as to asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and its ultimate judgment. [*Id.* at 552.]

The Supreme Court unequivocally held that "the commencement of a class action suspends the applicable statute of limitations with respect to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. The Court additionally discussed that its ruling was not inconsistent with the functional operation of a statute of limitations. *Id.*

> [S]tatutory limitation periods are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have

> disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." The *policies of ensuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights," are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation,* whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional interveners. [*Id.* at 554-555 (citations omitted; emphasis added).]

Both defendant and the trial court interpret the ruling in *American Pipe* to require notification of specific causes of action before the period of limitations on those claims expires. Given that the *American Pipe* Court was not addressing the relation back of amendments, we decline to interpret the language in that manner. Unlike the class in *American Pipe*, the class in the instant case was certified, and the statute of limitations continued to be tolled "as to all persons within the class described in the complaint." MCR 3.501(F). By way of the initial pleading, defendant was put on notice of the subject matter of the suit, specifically the document preparation fee and the manner in which it was disclosed and handled. Defendant was also put on notice of the size of the prospective class as outlined in the initial complaint.

In *Crown, Cork & Seal Co v Parker*, 462 US 345; 103 S Ct 2392; 76 L Ed 2d 628 (1983), the Court revisited its ruling in *American Pipe*. Again, however, the Court was not called on to address the relation back of amendments in class action litigation. In *Crown*, class certification was denied in an employment discrimination action. *Id.* at 347-348. Within ninety days of the denial of class certification, the respondent filed a separate action alleging his claim for employment discrimination. *Id.* at 348. The trial court dismissed the action on the ground that it was not timely filed. *Id.* The Fourth Circuit Court of Appeals reversed, and the Supreme Court granted certiorari. *Id.* at 348-349. The Supreme Court ruled that the filing of a class action tolls the statute of limitations for all asserted class members and not just those who subsequently intervene in the named plaintiffs' action. *Id.* at 350. If the filing of the class action did not toll the statute of limitations, class members would not be able to rely on the existence of the suit to protect their rights. *Id.* "Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure their rights would not be lost in the event that class certification was denied." *Id.* The Court noted that there would be a needless multiplicity of actions if every class member, who was fearful that class certification might be denied, took steps to file their own action. *Id.* at 350-351.

In this case, Paxson and other members of the potential class were entitled to rely on the existence of the class action and attendant tolling provisions to protect their rights with respect to claims arising from the charging of the document preparation fee. Cowles moved to file her second amended complaint, adding the TILA claim, before the period of limitations expired on Paxson's individual claim. If Paxson were not permitted to rely on the tolling provisions to

protect her TILA claim, every member of the class would be compelled to intervene and assert their separate claims without waiting to determine how the class action litigation would develop. More importantly, class members for whom the period of limitations may expire while a motion to amend to add the new claim is pending, could only protect their rights by intervening or filing separate actions to maintain those claims in the event that amendment is denied or is ordered after the period of limitations expires on their individual claims. The resulting multiplicity of actions would negate the efficiency for which class action litigation is designed.

Our ruling does not unfairly disadvantage class action defendants. Applicable court rules govern the amendment of pleadings. Thus, plaintiffs would not be able to add new theories or causes of action without stricture.[1] The dissent states that this "approach allows a massive suit, brimming with countless phantom plaintiffs, to rise repeatedly from its own ashes like a litigious Phoenix until a vexed and exhausted defendant finally pays it enough money to haunt someone else." *Post* at ___. This case is not, however, about resurrecting or manufacturing a new claim with a new class of plaintiffs, but is about protecting the claims of class members who relied on the class action.

Moreover, defendant herein is not disadvantaged any more than if each plaintiff in the class had filed separate suits at the outset or filed separate TILA claims before the period of limitations expired on their individual claims. If Paxson had filed an individual lawsuit on July 1, 1998, alleging the unauthorized practice of law, and later moved to amend to add the TILA claim, there is no question that the claim would relate back to the date of her original pleading regardless of whether the period of limitations on the TILA claim had expired. MCR 2.118(D). If the class action is truly a representative suit, then Paxson should not be treated differently because she was merely a member of a class in a representative action and not a named plaintiff in an independent action. We find no reason, nor do we find any controlling authority, that requires departure from the general rule of the relation-back doctrine when the action is a representative one and not an individual one.

In the conclusion of his dissent, Judge O'Connell indicates that he "would also hold that certification of a class only tolls the statute of limitations for claims that originally and properly received certification." *Post* at ___. This proposition is not supported by citation to authority or by analogy to any authority, and it ignores the purpose of class litigation. If class members cannot rely on the named plaintiff to toll the period of limitations on their claims, each class member will be required to separately bring all claims in his own name on the chance that the representative plaintiff will later be found to have an invalid claim and that the benefit of tolling will not apply. As is noted before, if Paxson had filed an individual lawsuit and later moved to

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[1] The dissent raises an unfounded concern that, without ruling in the manner suggested, the plaintiffs will continue to conjure legal issues and amend their complaint. This assertion completely disregards that trial courts have discretion with respect to the amending of complaints. MCR 2.118(A)(2). Plaintiffs in class action lawsuits will not have unfettered discretion to keep amending the complaint until they find a cause of action on which they can prevail.

amend to add the TILA claim, there is no question that the claim would relate back to the date of her original pleading under MCR 2.118(D). The dissent does not address why this result should change where the situation involves a class action suit and Paxson was initially an unnamed plaintiff. It bears repeating that *no new class members will be added or will benefit from the relation-back doctrine.*

Further, our ruling does not unfairly disadvantage defendant with respect to the number of class members. The relation-back doctrine does not apply to the addition of new parties. *Hurt v Michael's Food Ctr, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996); *Yudashkin v Holden (On Remand)*, 247 Mich App 642, 649; 637 NW2d 257 (2001). In *Arneil v Ramsey*, 550 F2d 774, 782-783 (CA 2, 1977), the court ruled that, because the plaintiffs were not members of the originally asserted class, they could not rely on tolling to save their claims. The filing of the initial complaint in *Arneil* did not put the defendant on notice of the existence and number of plaintiffs outside of the definition of the class found within the initial pleading. *Id.* Defendant herein argues that the second amended complaint expanded the class in this case. Any class members added by way of the second amended complaint, however, are new parties, not a "fresh class" of plaintiffs as the dissent claims. They may not avail themselves of the relation-back doctrine to save claims that may be time-barred. The initial complaint advised defendant of the size of the class with which it was dealing.

This is not a situation where Paxson tried to "piggyback" class actions. The rule against "piggybacking" operates to preclude plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive class actions. *Andrews v Orr*, 851 F2d 146, 149 (CA 6, 1988), citing *Korwek v Hunt*, 827 F2d 874, 879 (CA 2, 1987). The "pendency of a previously filed class action does not toll the statute of limitations period for additional class actions by putative members of the original asserted class." *Id.* In this case, there was only one class action. There were no new, repetitive actions filed by any of the plaintiffs in the class.

Within the statutory period, defendant was put on notice that Cowles and members of the class were seeking monetary damages related to the payment of the document preparation fee. Because the legal theories asserted in the initial complaint and the second amended complaint were derived from the same transactional setting of which defendant had notice, the amendments relate back to the initial filing, and Paxson's TILA claim is not barred by the statute of limitations. *Doyle, supra* at 219-220.

In reaching our conclusion, we reject the argument that the statute of limitations never tolled on the TILA claims because the period of limitations expired before Cowles's complaint was filed; and, thus, she was never a valid class representative for that claim. It is well-settled that a plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class. *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 598; 654 NW2d 572 (2002). However, when the class was certified in this case, there were plaintiffs like Paxson in the class who had valid TILA claims and could have served as the class representative

for those claims.[2] The court could have allowed any appropriate class member to substitute as the class representative. In *Haas v Pittsburgh Nat'l Bank*, 526 F2d 1083, 1095 (CA 3, 1975), the class should never have been certified with Haas as the representative for claims against a particular defendant. Haas's standing to remain as the class representative for the particular claims was challenged after the class was certified. *Id.* The court ordered that a nominal plaintiff be added to represent the class for the particular claims. *Id.* at 1095-1096. The only change in the class action effectuated by the order was the addition of a nominal plaintiff with standing. *Id.* at 1097. The newly named plaintiff was in existence and described in the class at the time the complaint was initially filed by Haas. *Id.* Class members have a right to rely on their representatives until the court rules otherwise. *Brink v DaLesio*, 667 F2d 420, 428 (CA 4, 1981). Paxson and other class members had a right to rely on Cowles as the class representative. Allowing Paxson to intervene as a named plaintiff affected the class action only by adding a named plaintiff to prosecute the properly added TILA claim.[3]

In sum, we conclude that the relation-back doctrine applies to Paxson's TILA claim and the claim was improperly dismissed on motion for summary disposition.

III

Given our decision that Paxson's TILA claim was improperly dismissed on statute of limitations grounds, we need to address defendant's alternative argument that summary disposition was nevertheless warranted as a matter of law. MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Murad v Professional & Admin Union Local 1979*, 239 Mich App 538, 541; 609 NW2d 588 (2000). The pleadings, affidavits, depositions, admissions, and other documentary evidence is considered in the light most favorable to the nonmoving party to determine whether there exists a genuine issue of material fact for trial. *Id.*

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[2] We find it interesting that the dissent incorrectly refers to Paxson as a "new party" to the action. Paxson was a member of the original class of plaintiffs. She was an unnamed plaintiff until she moved to intervene, and the class of plaintiffs was defined at the outset. Our courts have recognized that nonrepresentative members of a class are parties to the litigation. *Warren Consolidated Schools v W R Grace & Co*, 205 Mich App 580, 585; 518 NW2d 508 (1994); *Pressley v Wayne Co Sheriff*, 30 Mich App 300, 318; 186 NW2d 412 (1971). More importantly, the United States Supreme Court recently ruled that unnamed or nonrepresentative members of a class action are parties to the action for various procedural purposes; for example, the tolling of the statute of limitations and appealing settlements or judgments. *Devlin v Scardelletti*, 536 US 1, 9-11; 122 S Ct 2005; 153 L Ed 2d 27 (2002).

[3] The trial court ruled that the relation-back doctrine did not apply, and that decision had nothing to do with the class certification order. The dissent inexplicably focuses on the decision allowing Paxson to intervene and file her complaint in intervention, and no appeal was taken from this decision.

Paxson pleaded a violation of the TILA based on defendant's failure to include the document preparation fee as part of the annual percentage on the Truth in Lending disclosure statement. 15 USC 1605(a) provides:

> Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges.

Subsections 1 through 6 of 15 USC 1605(a) set forth a list of examples of charges that are included in the finance charge. Additionally, 15 USC 1605(e) provides a list of items that shall not be included in the computation of the finance charge. One of those items is "fees for preparation of loan-related documents." 15 USC 1605(e)(2). Paxson additionally pleaded that defendant's failure to disclose the document preparation fee as part of the finance charge on the itemization of the amount financed violated Regulation Z, 12 CFR 226.4(c)(7), which instructs that fees for preparing loan-related documents, such as deeds, mortgages, and reconveyance or settlement documents, are excluded from the finance charge if they are bona fide and reasonable in amount.

A resolution of the issue involves interpretation of federal law. When construing federal statutes and regulations, we are governed by authoritative decisions of the federal courts. *Bement v Grand Rapids & I R Co*, 194 Mich 64, 65-66; 160 NW 424 (1916). Where no decision on a particular issue has been rendered by the United States Supreme Court, we are free to adopt decisions of the lower federal courts if we find their analysis and conclusions persuasive and appropriate for our jurisprudence. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

In *Brannam v Huntington Mortgage Co*, 287 F3d 601 (CA 6, 2002), the plaintiffs argued that the $250 document preparation fee was not bona fide and reasonable such that it could be excluded from the finance charge. The court acknowledged that the TILA exempts fees for preparation of loan-related documents from the computation of the finance charge. *Id.* at 603. The Sixth Circuit Court of Appeals considered whether the $250 fee was bona fide and reasonable. *Id.* at 603-604. The evidence did not support that the fee covered anything more than document preparation costs. Thus, there was no evidence to support that the fee was not "bona fide" under Regulation Z. *Id.* at 606. With respect to the reasonableness of the $250 charge, the court determined that a fee is reasonable if it is for a service actually performed and reasonable in comparison to prevailing practices of the industry in the relevant market. *Id.* The evidence supported that $250 was a reasonable document preparation fee for western Michigan. *Id.*

In this case, unlike in *Brannam*, there is a question of material fact with respect to whether the fee was "bona fide." The term "bona fide," as used in Regulation Z, is not defined. 12 CFR 226.2(b)(3) provides that, unless a term is specifically defined in Regulation Z, "the words used have the meanings given to them by state law or contract." We construe undefined words used in statutes according to their plain and ordinary meanings. *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 18; 651 NW2d 356 (2002). Resort to dictionary definitions is acceptable and useful in determining ordinary meaning. *Id.* The term "bona fide" means made or done in good faith, without deception or fraud, authentic, genuine, real. *Random House Webster's College Dictionary* (1997). The purpose of TILA is to assure a meaningful disclosure of credit terms so consumers may compare various credit terms to allow them to avoid uninformed uses of credit. 15 USC 1601(a); *Inge v Rock Financial Corp*, 281 F3d 613, 619 (CA 6, 2002). With that purpose in mind, and using the ordinary definition of "bona fide," a document preparation fee is not bona fide, authentic, or genuine, if it includes charges for items other than document preparation.

There was evidence in this case to support that the document preparation charge was not "bona fide." Paul Sydloski, defendant's president, testified that he believed that the document preparation fee was charged to cover or defray defendant's expenses, specifically the costs associated "with taking a loan through the entire sequence from the application through the closing" and subsequently selling it to the secondary market or keeping it. Sydloski believed that defendant's senior management employees held the same view. He was unsure whether there was any difference between a document preparation fee and a loan processing fee. James Koessel, the bank's chief lending officer, testified that the document preparation fee was initially instituted at $100 to "defray some of the costs" incurred in preparing documents. Koessel admitted, however, that the document preparation fee was eventually replaced by a "loan-processing fee," which is properly disclosed as part of the finance charge. We believe the evidence presents a question of material fact with respect to whether the fee was for a variety of services necessary to take the loan from application through closing and beyond. Because a genuine issue of material fact exists with respect to whether the fee was bona fide, summary disposition on the merits of the TILA claim is inappropriate.

We note, however, that there is no question of material fact with respect to reasonableness. We agree with the *Brannam* Court that reasonableness is measured by looking at the marketplace, and we note that the market comparison approach is compatible with ordinary dictionary definitions of the term "reasonable," which include logical, not exceeding the limit prescribed by reason, not excessive, moderate. *Random House Webster's College Dictionary* (1997). The *Brannam* Court determined that $250 was a reasonable document preparation fee in west Michigan. *Id.* Paxson has failed to offer evidence to dispute that $250 is reasonable in west Michigan for document preparation.

IV

Paxson also argues on appeal that, if this Court finds that her TILA claim was barred by the statute of limitations, it should hold that the trial court abused its discretion in refusing to allow Sandra and Robert Glasser to intervene and act as class representatives for that claim. We need not address this issue in light of our ruling on Paxson's claim. Nevertheless, we find that the trial court did not abuse its discretion in denying the Glassers' motion to intervene. Class

members have a right to intervene, "subject to the authority of the court to regulate the orderly course of action." MCR 3.501(A)(4). In general, permissive motions to intervene are considered in light of whether intervention will result in undue delay or prejudice to the rights of the original parties. MCR 2.209(B). The trial court's determination that intervention would interfere with the orderly course of action, and would delay the action, is supported by the record before us.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Zahra, J., concurred.

/s/ Hilda R. Gage
/s/ Brian K. Zahra