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RECENT DEVELOPMENTS IN THE EFFORT TO SIMPLIFY TRUTH IN LENDING

Elwin Griffith*

Since the Truth in Lending Act was passed in 1968 numerous ambiguities have arisen. Congress and the courts have made several attempts to resolve these difficulties. Dean Griffith discusses the effects of the remedial legislation and recent court decisions on controversies arising both before and after the effective date of the most recent legislation. The discussion includes the types of transactions covered by the Act, rescission rights and procedures, civil liability for violations of the Act, attorney's fees in Truth in Lending actions, the definition of a creditor, late payments, and disclosure of security interests. Dean Griffith also suggests solutions for several remaining problem areas.

I. INTRODUCTION

In 1968, Congress passed the Truth in Lending Act¹ (Act) to clarify credit terms for the average consumer. There was a perception that the cost of credit was shrouded in vague, mystical terms and that creditors failed to inform or to educate the public about credit transactions.² Whether or not this was true, the Act revolutionized the area of con-

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1. Act of May 29, 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601-1667e (1982)).

2. For example, Paul H. Douglas, Chairman of the National Commission on Urban Affairs, made the following observations about interest rate disclosure during the Senate Hearings on the Truth in Lending bill:

It is only in the field of consumer credit that confusion and obfuscation prevail. Here borrowers are being forced to pay interest on amounts which they have already repaid. They are not told this, however. In fact, this is carefully concealed from them. When the consumer is faced with this jumble of rate methods and complicated financial terms, it is no wonder that he throws up his hands and asks merely to see the size of the monthly payments. For unless he is a skilled mathematician, he will be utterly confused and thoroughly misled if he attempts to compare rates quoted by various lenders.

sumer credit. In the name of providing adequate disclosure, it introduced terminology³ which until then was unknown to many consumers and authorized the Board of Governors of the Federal Reserve Board (Board) to issue regulations to implement its purposes.⁴ Soon thereafter, the Board issued Regulation Z,⁵ a product of careful drafting.

With the passage of time, the Act and Regulation Z provided fertile ground for litigation. Some creditors disclosed too much or misread the regulations altogether. At times, the statute and the regulation seemed clear until the Board's interpretation was published.⁶ Confusion resulted when the courts and the Board could not agree on a uniform interpretation of a statutory or regulatory provision.⁷ Occasionally, the federal circuits disagreed among themselves.⁸

By 1980 it was clear that the Act needed to be simplified. Accordingly, Congress enacted the Truth in Lending Simplification and Reform Act⁹ (Simplification Act), pursuant to which the Board amended Regulation Z.¹⁰ In the process, several interesting issues arose. The

Truth in Lending—1967: Hearings on S.5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 41 (1969).

3. See, e.g., 15 U.S.C. § 1638(a)(2)(A) (1982) (providing for disclosure of the "amount financed"); *id.* § 1638(a)(4) (providing for an "annual percentage rate").

4. Pub. L. No. 90-321, § 105, 82 Stat. 146, 148 (codified as amended at 15 U.S.C. § 1604 (1982)).

5. 12 C.F.R. §§ 226.1-1002 (1970) (current version at 12 C.F.R. §§ 226.1-29 (1983)).

6. Between 1969 and 1980 the Board issued numerous official interpretations to guide creditors in making disclosures. A creditor's bona fide conformity with such interpretations shield him from liability. 15 U.S.C. § 1640(f) (1982). In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), the Supreme Court, granting a high degree of deference to the Board's interpretations of the Act, held that a staff opinion should be dispositive unless it is demonstrably irrational. *Id.* at 565.

7. For example, in *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753, 757-58 (9th Cir. 1978), *rev'd*, 444 U.S. 555 (1980), and *St. Germain v. Bank of Hawaii*, 573 F.2d 572, 577 (9th Cir. 1977), the Ninth Circuit rejected the Board's view that the creditor need not disclose the right of acceleration. For the Board's opinion, see Official Staff Interpretation No. FC-0054, 12 C.F.R. app. at 726 (1982) (creditor need not disclose right of acceleration).

8. For example, the Fifth, Seventh and Eighth Circuits grant double recovery to joint obligors for statutory violations relating to a single transaction. In contrast, the Fourth, Ninth and Tenth Circuits allow only one recovery in such circumstances. Compare *White v. World Fin.*, 653 F.2d 147, 152 (5th Cir. 1981) (each joint and severally liable signer entitled to statutory recovery) and *Andersen v. Farmers Bank*, 640 F.2d 1347, 1349 (8th Cir. 1981) (each joint obligor may collect full damages) and *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 881-83 (7th Cir. 1976), *cert. denied*, 439 U.S. 1039 (1978), with *Riggs v. Government Employees Fin. Corp.*, 623 F.2d 68, 75 (9th Cir. 1980) (joint debtors allowed only one recovery) and *Mason v. General Fin. Corp.*, 542 F.2d 1226, 1235 (4th Cir. 1976) (husband and wife allowed only one recovery) and *Hinkle v. Rock Springs Nat'l Bank*, 538 F.2d 295, 297 (10th Cir. 1976) (single recovery allowed for joint obligors).

9. Pub. L. No. 96-221, 94 Stat. 168 (1980) (codified as amended at 15 U.S.C. §§ 1601-1693(r) (1982)).

10. 12 C.F.R. §§ 226.1-29 (1983).

seemingly simple procedure provided for the consumer to rescind a credit transaction¹¹ has caused great difficulty for both consumer and creditor. Before the passage of the Simplification Act, the courts had no statutory authority to vary the procedure.¹² This inflexibility in the statutory structure left creditors uncertain about their rights when a consumer rescinded. This Article discusses this area of uncertainty and examines the changes brought about by the revised statute.

This Article also discusses other problems which have arisen under the Act. First, it focuses upon the consumer's right to attorney's fees¹³ and considers whether creditors have a statutory right to a setoff against a consumer's claims. Next, this Article addresses the question of whether public policy should allow a consumer to release his Truth in Lending claims. Finally, some consideration is given to the effect of the Simplification Act upon the disclosure of security interests¹⁴ and late payments.¹⁵

II. TRANSACTIONS COVERED

Regulation Z applies to any transaction in which a creditor regularly extends credit for personal, family, or household purposes that is subject to a finance charge or that requires payment pursuant to a written agreement in more than four installments.¹⁶ One difficulty arises when a creditor provides credit in a particular transaction which is payable in four installments or less, or which does not impose a finance charge. In that individual transaction a seller, retailer or a lender is not

11. 15 U.S.C. § 1635 (1982); 12 C.F.R. § 226.15(a) (1983) (open-end credit); *id.* § 226.23(a) (closed-end credit). The Simplification Act changed the period in which the creditor must act on the consumer's rescission from 10 to 20 days. 15 U.S.C. § 1635(b) (1982); 12 C.F.R. §§ 226.15(d)(2), 226.23(d)(2) (1983). Once the rescission has been acted upon, the consumer must tender the creditor's property to the creditor. 15 U.S.C. § 1635(b) (1982); 12 C.F.R. §§ 226.15(d)(3), 226.23(d)(3) (1983). If the creditor does not take possession of his property within 20 days the consumer may keep it without further obligation. 15 U.S.C. § 1635(b) (1982); 12 C.F.R. §§ 226.15(d)(3), 226.23(d)(3) (1983).

12. The Simplification Act added new language that the procedures prescribed could be modified by a court. Pub. L. No. 96-221, § 612, 94 Stat. 175 (1980) (codified at 15 U.S.C. § 1635(b) (1982)); *see also* 12 C.F.R. §§ 226.15(d)(4), 226.23(d)(4) (1983) (implementing regulations).

13. 15 U.S.C. § 1640(a)(3) (1982).

14. 12 C.F.R. § 226.18(m) (1983).

15. 12 C.F.R. § 226.18(l) (1983).

16. Regulation Z applies to a transaction when the following conditions are met:

(i) The credit is offered or extended to consumers; (ii) the offering or extension of credit is done regularly; (iii) the credit is subject to a finance charge or is payable by a written agreement in more than 4 installments; and (iv) the credit is primarily for personal, family, or household purposes.

12 C.F.R. § 226.1(c)(1) (1983) (footnote omitted).

technically a creditor as defined in the regulation.¹⁷ While one court has ruled that it would not be in keeping with the purpose of Truth in Lending to apply the four-installment requirement on a case-by-case basis,¹⁸ the Official Staff Commentary of the Federal Reserve Board suggests that a creditor must pass the test in each individual transaction in order that the transaction be subject to regulation.¹⁹ It is also to be noted that an agreement to pay the debt in more than four installments must be in writing to be covered, whereas an obligation to pay the finance charge is covered even if it is oral.²⁰

Another requirement of Truth in Lending is that the transaction must involve credit which is primarily for personal, family or household purposes.²¹ It is sometimes difficult to separate business transactions from personal transactions. For example, in *Anderson v. Rocky Mountain Federal Savings & Loan*²² the consumers purchased a damaged mobile home to repair and resell at a profit.²³ Because the consumers had never lived in the property and never had any intention of doing so, the court found that they had purchased the mobile home for a business purpose and that the transaction was not subject to Regula-

17. The Act defines "creditor" as follows:

(i) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required; and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 702(a), 96 Stat. 1469, 1538 (amending 15 U.S.C. § 1602(f) (Supp. V 1981)). "A person regularly extends consumer credit only if it extended credit more than 25 times (or more than 5 times for transactions secured by a dwelling) in the preceding calendar year." 12 C.F.R. § 226.2(a)(17) n.3 (1983).

18. See *Boyajian v. Kingstown Furniture Co. (In re Maxwell)*, 22 Bankr. 958 (D.R.I. 1982) (construing old Regulation Z, 12 C.F.R. § 226.2(s)).

19. The Board takes this position on the definition of "creditor":

1. Prerequisites. This test is composed of 2 requirements, both of which must be met in order for a particular credit extension to be subject to the regulation and for the credit extension to count towards satisfaction of the numerical tests mentioned in footnote 3 to § 226.2(a)(17). *First*, there must be either or both of the following:

A written (rather than oral) agreement to pay in more than 4 installments. A letter that merely confirms an oral agreement does not constitute a written agreement for purposes of the definition.

A finance charge imposed for the credit. The obligation to pay the finance charge need not be in writing.

Second, the obligation must be payable to the person in order for that person to be considered a creditor. If an obligation is made payable to "bearer," the creditor is the one who initially accepts the obligation.

FRB Official Staff Interpretations para. 2(a)(17)(i), 12 C.F.R. Supp. 1 at 670 (1983).

20. *Id.*

21. 12 C.F.R. § 226.1(c)(1) (1983), *quoted supra* note 16.

22. 651 P.2d 269 (Wyo. 1982).

23. *Id.* at 270.

tion Z.²⁴ In determining whether credit has been extended for business purposes, the Official Staff Interpretations of the Board suggests consideration of the following factors: (1) the relationship between the borrower's principal occupation and the acquisition; (2) the extent to which the borrower is personally involved in managing the acquisition; (3) the ratio of income from the acquisition to the overall income of the borrower; (4) the size of the transaction; and (5) the borrower's statement of the purpose for the loan.²⁵

Another interesting situation arises when a consumer seeks legal services. If a consumer purchases personal property for his home and seeks a remedy against the seller, the deferment of legal fees incurred in that action might subject the transaction to the disclosure requirements.²⁶

Credit is not primarily for personal, family, or household use simply because the security offered for the loan is the obligor's personal holdings.²⁷ A loan obtained to purchase a business would be exempt even if it was secured by the residence of the guarantor.²⁸ The importance of the purpose of the credit was indicated in *American Express Co. v. Koerner*,²⁹ where the Supreme Court held that issuing credit cards to a corporation for the use of the corporation's officers was not an extension of consumer credit. Even though the officers were jointly and severally liable for charges to the cards, the credit was extended because of the company's credit rating and was to be used primarily for business; therefore, the transactions did not involve consumer credit.³⁰

24. *Id.* at 273.

25. FRB Official Staff Interpretations para. 3(a)(2), 12 C.F.R. Supp. 1 at 675 (1983).

26. *Dougherty v. Hoolihan, Neils, & Boland, Ltd.*, 531 F. Supp. 717 (D. Minn. 1982). In *Dougherty*, the plaintiffs hired defendant attorney to determine, inter alia, whether a Bank had misapplied funds in connection with the foreclosure sale of personal property from plaintiff's farm. *Id.* at 720. The defendant acquired a promissory note secured by a mortgage on the plaintiffs' farm as consideration for additional services by defendant. The court held that the transaction was a "consumer credit transaction" within the meaning of § 103(h), 15 U.S.C. § 1602(h) (Supp. V 1981), because the legal services rendered had to do with the plaintiffs' personal property. *Id.* at 721.

27. *Smith v. Chapman*, 436 F. Supp. 58, 61 (W.D. Tex. 1977); FRB Official Staff Interpretations para. 3(a)(2), 12 C.F.R. Supp. 1 at 675 (1983).

28. *Poe v. First Nat'l Bank*, 597 F.2d 895 (5th Cir. 1979) (per curiam); see also *Weingarten v. First Mortgage Co.*, 466 F. Supp. 349 (E.D. Pa. 1979) (mem.).

29. 452 U.S. 233 (1981).

30. The precise question involved in *American Express Co.* was whether the creditor had to comply with § 161(a) of the Act, 15 U.S.C. § 1606(a) (1982) (correction of billing errors). The Court recognized three possibilities for the use of the credit card. If the account was primarily for consumer purposes, then Truth in Lending would apply even in the case of an occasional business use. If a transaction-by-transaction approach was used, then Truth in Lending would apply if the specific transaction in dispute was for a consumer purpose. The third alternative was a combina-

III. RIGHT OF RESCISSION

A. *Procedural Problems*

Except for specific exemptions,³¹ a consumer has the right to rescind a credit transaction in which his principal dwelling is subject to a security interest.³² The right to rescind is available not only to a person who is obligated to pay the debt under the transaction, but also to any person whose ownership interest in the dwelling will be subject to a security lien, even though the latter has not signed the credit contract.³³ However, the mere existence of a security interest in the consumer's principal dwelling does not make a transaction rescindable. The transaction must be one for consumer purposes, and the lien must affect property which is used as the consumer's principal dwelling at the time the security interest is created.³⁴ Furthermore, the security interest must arise as a result of the credit agreement. A mechanic's lien obtained by a contractor because of work done on a homeowner's property does not create a rescindable transaction if the contractor is not involved in the credit transaction between the lender and the homeowner.³⁵ But if the contractor is a creditor in the transaction, then his security interest retained in connection with the credit transaction will

tion of the two approaches by applying § 161(a) to disputes that flow from an account that is characterized as a consumer credit account and also to disputes about a specific transaction that is an extension of consumer credit, even if the general purpose of the account is primarily for business. The Court decided the case without using any of the alternatives. 452 U.S. at 242. The Simplification Act and revised Regulation Z do not change the billing error provisions applicable to this situation. 15 U.S.C. § 1666 (1982); 12 C.F.R. § 226.13 (1983).

31. Section 125(e)(1) provides that the obligor's right to rescind does not apply to the following:

- (A) a residential mortgage transaction as defined in section 1602(w) of this title;
- (B) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;
- (C) a transaction in which an agency of a State is the creditor; or
- (D) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(2) The provisions of paragraph (1)(D) shall cease to be effective 3 years after the effective date of the Truth in Lending Simplification and Reform Act.

15 U.S.C. § 1635(e)(1) (1982). Section 103(w) defines "residential mortgage transaction" as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w) (1982); 12 C.F.R. § 226.2(a)(24) (1983); *see also* 12 C.F.R. §§ 226.15(f), 226.23(f) (1983).

32. 15 U.S.C. § 1635(a) (1982); 12 C.F.R. §§ 226.15(a), 226.23(a) (1983).

33. FRB Official Staff Interpretations para. 23(a)(1), 12 C.F.R. Supp. 1 at 729 (1983).

34. 12 C.F.R. § 226.2(a)(11), (12) (1982).

35. FRB Official Staff Interpretations para. 23(a)(1), 12 C.F.R. Supp. 1 at 729 (1983).

give rise to the right of rescission.³⁶

One of the difficulties in rescission has been the procedure required by the statute.³⁷ When a consumer exercises his right of rescission, the lien on his property is automatically void.³⁸ As a rule, creditors have not been pleased about the prospect of having an unsecured loan if the consumer balks at returning the proceeds. Therefore, some creditors have taken it upon themselves to condition the right of rescission upon the consumer's willingness to repay the debt.³⁹ The difficulty with that approach is that the statute and the regulation require the creditor to terminate the security interest and return all money and property within twenty days of the notice of rescission,⁴⁰ and the debtor is not obligated to do anything, including returning the loan proceeds, until the creditor has acted. Even before the revised statute authorized a variation of the stipulated procedure in appropriate cases, some courts ignored the apparently strict language of the statute if the debtor kept the creditor's funds.⁴¹ Other courts were not afraid to act if a debtor was simply unable to restore the creditor to his original condition.⁴² It was difficult, however, for a creditor to adopt protective measures on his own if he was unsure of a debtor's position on restitution.⁴³

36. *Id.*

37. 15 U.S.C. § 1635(b) (1982); 12 C.F.R. § 226.23(d) (1983).

38. 15 U.S.C. § 1635(b) (1982); 12 C.F.R. § 226.23(d)(1) (1983).

39. *Powers v. Sims & Levin*, 542 F.2d 1216, 1218 (4th Cir. 1976) (creditor's refusal to rescind until improvements or reasonable value returned); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974) (refusal to rescind until proceeds tendered).

40. 15 U.S.C. § 1635(b) (1982); 12 C.F.R. § 226.23(d)(2) (1983).

41. *See Rudisell v. Fifth Third Bank*, 622 F.2d 243, 254 (6th Cir. 1980) (court may condition return of debtor's monies upon debtor's tender); *Powers v. Sims & Levin*, 542 F.2d 1216, 1222 (4th Cir. 1976) (debtor may not rescind without making restitution).

42. *See Nietert v. Citizens Bank & Trust Co.*, 263 Ark. 251, 565 S.W.2d 4, *cert. denied*, 439 U.S. 965 (1978). In *Niertert*, defendant debtors obtained a loan from the plaintiff bank, which they secured by a mortgage on their farm. Defendants exercised their right to rescind the transaction, but because they were unable to secure a second loan, they failed to tender the principal amount due the plaintiff. The bank then instituted foreclosure proceedings. Defendants claimed, however, that they were not required to tender the principal sum of the loan as the bank had refused to release the mortgage on defendants' property in violation of 15 U.S.C. § 1635(b) (1976). The Arkansas Supreme Court rejected defendants' contentions, upholding the bank's right to retain its security interest in the farm until it received repayment of the loan. 263 Ark. at 261, 565 S.W.2d at 9. 15 U.S.C. § 1635(b) (1976) required the creditor to take action to terminate any security interest created under a transaction within ten days after notice of rescission.

43. Furthermore, failure to act within the statutory period may subject a creditor to civil liability under 15 U.S.C. § 1640(a) (1982) in addition to the rescission remedy. *Harris v. Tower Loan*, 609 F.2d 120, 123 (5th Cir.), *cert. denied*, 449 U.S. 826 (1980); *see also Etta v. Seaboard Enters., Inc.*, 674 F.2d 913, 919 (D.C. Cir. 1982) (statutory damages and rescission allowed); *Ljepava v. M.L.S.C. Properties, Inc.*, 511 F.2d 935, 945 (9th Cir. 1975) (Act authorizes both statutory damages and rescission) (citing *Eby v. Reb Realty Inc.*, 495 F.2d 646, 651 (9th Cir. 1974));

The procedural problems of rescission have been evident since *Sosa v. Fite*.⁴⁴ In *Sosa*, the consumer rescinded a home improvement contract and at the same time offered to return the property to the creditor. However, the creditor did not respond to the consumer and took no action to terminate the security interest in the consumer's property. The Fifth Circuit found that the creditor had forfeited the loan proceeds because he did not act within ten days of the consumer's rescission and tender.⁴⁵ The court recognized the existence of an orderly, statutory procedure for putting the parties in their original positions. However, it regarded the creditor's silence as an attempt to abort the procedure and felt that the dispute could be solved only by treating the consumer's tender as the benchmark for the eventual forfeiture of the creditor's proceeds.⁴⁶ The court in *Sosa* accelerated the period in which the consumer could recover his property. The second ten-day period ordinarily would not have begun until the creditor had acquiesced in the debtor's rescission by taking the necessary steps to terminate the security interest. It was only because the creditor failed to do anything in his ten-day response time that the tender had the effect of discharging the consumer from any further responsibility.⁴⁷

*Powers v. Sims & Levin*⁴⁸ reinforced rescission as an equitable doctrine. The consumer thought that he could enforce his right of rescission even though he had offered to return only part of the consideration. The Fourth Circuit disagreed. The court stressed that it could not enforce the right of rescission in the face of the consumer's failure to honor the statutory requirements.⁴⁹ It was one thing to remain silent on the question of returning the consideration, but it was quite another to affirm one's intention not to make restitution. Because there was nothing in the statute to prevent the court from exercising its equitable powers,⁵⁰ the consumer received very little sympathy when

Poirrier v. Charlie's Chevrolet, Inc., 442 F. Supp. 894, 896 (E.D. Mo. 1978) (double recovery allowed). *But see* Bostwick v. Cohen, 319 F. Supp. 875, 877 (N.D. Ohio 1970) (act of rescission precludes recovery of damages).

44. 498 F.2d 114 (5th Cir. 1974).

45. *Id.* at 118-19.

46. *Id.* at 119 n.6. In 1974, when the Fifth Circuit decided *Sosa*, § 125(b) of the Act required the creditor to act within 10 days of rescission. The creditor then had an additional 10 days to retrieve his property from the debtor. 15 U.S.C. § 1635(b) (1976).

47. 498 F.2d at 119. *But see* Gerasta v. Hibernia Nat'l Bank, 575 F.2d 580 (5th Cir. 1978) (*per curiam*) (no discharge of debt where consumers refused to tender the proceeds of the loan).

48. 542 F.2d 1216 (4th Cir. 1976).

49. *Id.* at 1221.

50. *Id.* at 1222; *see also* Etta v. Seaboard Enters., 674 F.2d 913 (D.C. Cir. 1982) (rescission viewed as an equitable remedy; court conditioned return of monies to debtor on return of property

he attempted to rescind the transaction without promising to restore the creditor to his former position. Therefore, the court conditioned the rescission on the debtor's return of the creditor's proceeds.⁵¹

The tender doctrine articulated by the Fifth Circuit in *Sosa* has remained viable and was further confirmed in *Rudisell v. Fifth Third Bank*.⁵² Unfortunately, the consumers had made no tender and the court would not let them keep the property which was the subject of the transaction. Had the proper tender been made, the court seemed willing to allow the consumers to keep the property installed on their premises.⁵³ It is clear, therefore, that the consumer cannot impose additional conditions on the creditor when he makes his tender. The statute sets out the responsibilities of the parties, and the tender loses its force if it is circumscribed by the debtor's unwarranted demands.⁵⁴

There is no doubt that the tender recognized in *Sosa* went a long way toward prodding the creditor into action, even though the old act did not afford the creditor much time in which to decide on a course of action. Now that the Simplification Act has extended the response period to twenty days,⁵⁵ the creditor has a reasonable time to decide whether to act on the consumer's rescission. Furthermore, it is not necessary for the creditor to complete all the actions required of him under the statute within the twenty-day period. He is on safe ground if he merely begins the process within that period, as long as he follows through to completion.⁵⁶ It is also significant that if the consumer is tendering property back to the creditor, the consumer has an option of making that tender either at his residence or at the property's location.⁵⁷ However, if the consumer is tendering money, that tender must be made at the creditor's place of business.⁵⁸ That requirement for tendering money may have an effect in some cases on the consumer's ability to follow through on his tender and, in that sense, may prevent

to creditor); *Rudisell v. Fifth Third Bank*, 622 F.2d 243 (6th Cir. 1980) (court found nothing inconsistent about allowing both statutory damages and rescission but conditioned the granting of rescission on plaintiff's repayment of loan to creditor).

51. 542 F.2d at 1221-22.

52. 622 F.2d 243 (6th Cir. 1980).

53. *Id.* at 254.

54. *See Kovalik v. Delta Inv. Corp.*, 125 Ariz. 602, 607, 611 P.2d 955, 960 (Ct. App. 1980) (consumer's tender not valid when conditioned upon return of payments and payment of \$1,000 penalty by creditor).

55. 15 U.S.C. § 1635(b) (1982).

56. FRB Official Staff Interpretations para. 23(d)(2), 12 C.F.R. Supp. 1 at 731 (1983).

57. 12 C.F.R. § 226.23(d)(3) (1983).

58. *Id.*

him from accelerating the period within which the creditor is forced to act.

B. *Return of Proceeds or Property*

The statute requires the debtor to return the creditor's property once rescission has occurred. Sometimes the consumer cannot return the property because he has used it to his own advantage.⁵⁹ In that case the consumer may tender the property's reasonable value if return of the property in kind would be impracticable or inequitable.⁶⁰ Of course, if the lender advances funds for the debtor to purchase materials for remodeling, the debtor should not be given the option of tendering the reasonable value of those materials. He should be asked to return the money itself, since the property subject to the transaction is the loan proceeds and not the remodeling materials. In *Brown v. National Permanent Federal Savings & Loan Association*,⁶¹ the Circuit Court for the District of Columbia remanded the parties to the trial court for a determination of whether the debtor had obtained any benefit from the work performed on her house and if so, whether rescission should be conditioned upon the debtor's paying the reasonable value of the work. In *Brown* the bank made advances to the contractor from the consumer's loan as the work progressed. The lender's only interest was to ensure that the contractor was performing in accordance with the financing transaction. However, the property which the creditor delivered to the obligor was the money, the actual proceeds of the loan. It certainly was not the remodeling materials which improved the debtor's home. The statute required the consumer to return the creditor's property, but the property was the loan amount, not the materials, and the language dealing with the impracticability of returning the property in kind therefore was not applicable, since the money could have been returned.⁶²

The point was brought home in *Myrick v. Finance America Credit Corp.*,⁶³ where the defendant was the assignee of a home improvement contractor. The Alabama Court of Civil Appeals pointed out that if the defendant had lent money to the plaintiff, the defendant would be

59. *Baker Bank & Trust Co. v. Matthews*, 401 So. 2d 1246, 1251 (La. Ct. App. 1981) (proceeds of loan used for bills and living expenses; consumer unable to repay principal).

60. 15 U.S.C. § 1635(b) (1982); 12 C.F.R. § 226.23(d)(3) (1983).

61. 683 F.2d 444 (D.C. Cir. 1981) (per curiam).

62. 15 U.S.C. § 1635(b) (1982).

63. 404 So. 2d 700 (Ala. Civ. App. 1981).

entitled to the "net proceeds of the loan."⁶⁴ But the defendant assignee had purchased the home improvement contract from the contractor, and the property subject to restitution was siding installed by the contractor. Therefore, if it was impracticable or inequitable for the homeowner to return that property, then it was proper to invoke the "reasonable value" substitute in the statute.⁶⁵

If the debtor has received proceeds and has applied them to the improvement of his property, then he ought not to have the option of paying back less than the amount that he has received from the creditor simply because he may be dissatisfied with the product of his investment.⁶⁶ It is too easy a resolution to give the debtor the opportunity to repay the reasonable value of property, and thus allow him to reduce the amount repayable on the basis of his dissatisfaction.⁶⁷

Of course, if the debtor has to return the reasonable value of the improvements to his property, the obligation does not include the reasonable value of the services performed by the creditor.⁶⁸ The purpose of the rescission statute is to put the parties in their original positions to the extent possible; it is unfair to require the debtor to pay the creditor for services which have been performed in spite of the rescission.

In *Hull v. Bowest Corp.*⁶⁹ the creditor sought the best of both worlds. The consumers wanted the creditor to cancel the lien on their property since they had rescinded the transaction. The Colorado Court of Appeals agreed with the creditor's argument that the creditor should remove the lien from the consumer's property only if the consumer repaid the outstanding mortgage loan.⁷⁰ The creditor also recovered a

64. *Id.* at 704.

65. *Id.*; see also *Rudisell v. Fifth Third Bank*, 622 F.2d 243, 254 (6th Cir. 1980) (return of property impossible; debtors must tender reasonable value); *Dougherty v. Hoolihan, Neils, & Bolland, Ltd.*, 531 F. Supp. 717 (D. Minn. 1982) (return of reasonable value); cf. *Bookhart v. Mid-Penn Consumer Discount Co.*, 559 F. Supp. 208 (E.D. Pa. 1983) (consumer should return entire proceeds to lender even though dissatisfied with work of third-party contractor).

66. No doubt the consumer in *Brown*, 683 F.2d 444, was dissatisfied with the quality of the home improvement work done by the contractor, but it was not relevant whether the consumer received any benefit from the work as the bank loaned money, not building materials. Accordingly, the court erred in remanding the case to the lower court for a determination of the fair value of the work performed.

67. Revised Regulation Z, providing guidance for the courts on the issue of repayment, states that "[w]hen the creditor has complied . . . the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value." 12 C.F.R. § 226.23(d)(3) (1983).

68. See *Tri-West Constr. Co. v. Hernandez*, 43 Or. App. 961, —, 607 P.2d 1375, 1381 (1979) (defendants required to tender all personalty advanced or reasonable value thereof, not including the services furnished).

69. 649 P.2d 334 (Colo. Ct. App. 1982).

70. *Id.* at 337.

judgment on the promissory note for the outstanding principal plus interest because the court regarded the rescission as inoperative after the consumer failed to pay back the outstanding balance of the mortgage. Thus, failure to pay back the outstanding balance deprived the consumer of his rescission rights, and the mortgage lien continued in effect on the property.⁷¹ Unfortunately, the court lost sight of the fact that the statute relieved the consumer of the obligation to pay interest after rescission.⁷² The court must have perceived the note as valid despite the consumer's rescission, but once the consumer rescinds, section 125(b) of the Act triggers the obligations of the parties, and in these circumstances a court's priority should be to obtain the creditor's funds or other property in exchange for the removal of the lien on the consumer's property. In attempting to assist the parties, the court in *Hull* may have gone too far.⁷³

Although the consumer can bring an action for damages within one year of the violation,⁷⁴ he must rescind a rescindable transaction within three business days after consummation. However, if a creditor does not provide the required disclosures or notice of the right to rescind, then the right to rescind expires three years after consummation, on transfer of the consumer's interest in the property, or on sale of the property, whichever occurs first.⁷⁵ If the consumer rescinds and the creditor fails to initiate action to remove the lien within twenty days, the consumer may sue for damages for the creditor's failure to follow the rescission procedure.⁷⁶

Prior to the passage of the Simplification Act, some courts believed that they had no alternative but to give the consumer damages if the creditor failed to take action on the consumer's rescission notice.⁷⁷ Sometimes the creditor placed itself in a precarious situation by refusing to cancel the lien and accept the consumer's tender of the principal balance. Even though the refusal was made in good faith, the old lan-

71. *Id.*

72. The consumer is not liable for "any finance or other charge." 15 U.S.C. § 1635(b) (1982).

73. See 13 CONSUMER CRED. & TRUTH IN LENDING COMPLIANCE REP. 5-6, Oct. 1982 (Warren, Gorham & Lamont, Inc.).

74. 15 U.S.C. § 1640(e) (1982). The consumer may still assert a violation in any action by the creditor as a matter of defense by recoupment or set-off, even though one year has expired. *Id.*

75. 15 U.S.C. § 1635(f) (1982); 12 C.F.R. § 226.23(a)(3) (1983). The period may be longer if there is intervening agency or court action. *Id.*; see also FRB Official Staff Commentary Update para. 23(a)(3), 48 Fed. Reg. 14,882, 14,889 (1983) (sale of consumer's property terminates rescission right even though consumer takes back mortgage).

76. 15 U.S.C. § 1640(a) (1982).

77. *Reid v. Liberty Consumer Discount Co.*, 484 F. Supp. 435 (E.D. Pa. 1980) (mem.).

guage did not seem to leave any leeway for the court to avoid the creditor's forfeiture of the proceeds in the borrower's hands.⁷⁸ The creditor's misconception of a material disclosure did not absolve him of liability.⁷⁹ Thus, the consumer's tender of the proceeds triggered the period in which the creditor was supposed to act,⁸⁰ but even in that situation, the consumer had to tender the entire amount of the loan. A decision to tender monthly installment payments as they fell due was not sufficient under the statute.⁸¹

C. Other Rescission Issues

Scrupulous adherence to the statute ordinarily requires the creditor to return all monies that the consumer has paid in the transaction. This seems pointless if the consumer is expected to refund the entire proceeds of the loan to the creditor. Some courts find it permissible, therefore, for the creditor to offset its own debt by the amount the consumer owes.⁸² The judicial power granted under the revised statute to modify the rescission procedure would seem to allow this kind of setoff.⁸³

In a credit sales transaction, the creditor would be taking a calculated risk in trying to estimate the value of improvements to the consumer's property without excluding the installation cost.⁸⁴ An inaccurate estimate of the value of the property or material which has already been installed in the consumer's property could result in a violation of the statute, thus giving the consumer additional ammunition. It appears that the setoff procedure is useful only in the direct loan transaction in which it is easy to compute the amount to be deducted from the proceeds and returned by the creditor to the consumer.

Under the Simplification Act, a creditor seems to have a stronger foundation for protecting himself in the rescission situation. If the creditor is willing to honor the consumer's rescission by removing the lien but the consumer does not want to return the loan proceeds to the

78. See *Harris v. Tower Loan*, 609 F.2d 120, 123 (5th Cir.), *cert. denied*, 449 U.S. 826 (1980) (creditor loses rights in property not accepted 10 days after tender).

79. See *Hamilton v. Southern Discount Co.*, 656 F.2d 150 (5th Cir. 1981) (reliance on judicial opinions no defense).

80. *Harris v. Tower Loan*, 609 F.2d 120, 123 (5th Cir.) *cert. denied*, 449 U.S. 826 (1980); *Sosa v. Fite*, 498 F.2d 114, 119 (5th Cir. 1974).

81. *Bustamante v. First Fed. Sav. & Loan Ass'n*, 619 F.2d 360, 365 (5th Cir. 1980).

82. *Harris v. Tower Loan*, 609 F.2d 120, 123 (5th Cir.), *cert. denied*, 449 U.S. 826 (1980); *Baker Bank & Trust Co. v. Matthews*, 401 So. 2d 1246, 1252 (La. Ct. App. 1981).

83. 15 U.S.C. § 1635(b) (1982); 12 C.F.R. § 226.23(d)(4) (1983).

84. *Tri-West Constr. Co. v. Hernandez*, 43 Or. App. 961, 607 P.2d 1375 (1979).

creditor, then the creditor should be willing to litigate the matter.⁸⁵ The ultimate objective of the litigation should be to get the court to exercise its powers under section 125(b) to vary the rescission procedure and condition the creditor's performance on the consumer's return of the proceeds. That action would preserve the creditor's security interest, which would remain effective until the consumer's performance of his part of the bargain. If the consumer is unable to make immediate restitution, the court could require him to continue his payments under the original loan transaction or could set its own repayment schedule. In any event, all payments would go to the reduction of principal because the Simplification Act precludes the consumer's liability for the payment of any interest or other charges. If the consumer defaulted under this arrangement, the creditor would then be able to foreclose on his security interest.⁸⁶

When a creditor lends money secured by a mortgage on the consumer's property, the rescission normally is intended to put the parties back in their original positions. Thus, the creditor should cancel his lien and the consumer should return the money. However, when a consumer gives a mortgage for a preexisting debt, rescission affects only the security interest. The preexisting debt survives the rescission because the creditor originally granted the loan without requiring any security. Thus, the cancellation of the transaction will restore the lender to the position of an unsecured creditor.⁸⁷

If a consumer rescinds a transaction and the creditor refuses to accept the rescission, the consumer may argue that the creditor forfeits his right to the return of the loan proceeds. However, if the creditor is able to show that the consumer's purported tender could not be fulfilled because of the consumer's financial condition, then the creditor should use the consumer's inability to make good his tender to preserve his rights under the transaction.⁸⁸ In the same vein, a bankrupt should not

85. 13 CONSUMER CRED. AND TRUTH IN LENDING COMPLIANCE REP. 5-6, Oct. 1982 (Warren, Gorham & Lamont, Inc.).

86. *Id.*; see also Note, *Who Can Win in Truth in Lending Rescission Transactions*, 43 OHIO ST. L.J. 693, 712 (1982).

87. See *Dougherty v. Hoolihan, Neils, & Boland, Ltd.*, 531 F. Supp. 717 (D. Minn. 1982).

88. See, e.g., *Baker Bank & Trust Co. v. Matthews*, 401 So. 2d 1246 (La. Ct. App. 1981). In *Baker*, the court recognized the defendant debtors' right to rescind a loan agreement secured by collateral mortgages on a car and certain real estate. The court, however, rejected the debtors' claim that they were entitled to keep the loan proceeds because the bank had failed to take action to terminate the security interest. The court concluded that the "tender of loan proceeds" was but an empty offer" due to the debtors' inability to repay the loan at the time the offer was made. *Id.* at 1251.

be able to rescind a transaction in which he is unable to comply with the statutory requirement of returning the lender's money.⁸⁹

IV. CIVIL LIABILITY

A. *Rescission and Double Recovery*

Rescission of a transaction does not prevent a consumer from obtaining damages for the creditor's failure to comply with the statute.⁹⁰ The double remedy is available when goods have been delivered or money has been advanced under a credit arrangement.⁹¹ The result should not be any different simply because there has been no action by either of the parties subsequent to consummation of the credit transaction. The critical period for making disclosures is *before* consummation of the transaction; the creditor's failure to meet that timetable establishes his liability. It should not be relevant whether the creditor has advanced any funds or delivered any goods under the agreement.⁹² However, there is a question whether the same result should follow when the parties to the transaction agree on a mutual rescission. If Truth in Lending is regarded as a true disclosure law, then the decision of the parties to rescind the transaction should have no effect on the creditor's liability for a disclosure violation. The rescission of the transaction ends the parties' obligations to act on the transaction but technically has no effect on the requirement that disclosure should precede consummation of that transaction. Rescission follows consummation;⁹³ therefore the obligation to disclose is not necessarily obviated by the agreement to rescind.

There may be different considerations when the credit transaction has been consummated but the consumer fails to keep his part of the bargain. In *Streit v. Fireside Chrysler-Plymouth, Inc.*,⁹⁴ there was no doubt that the creditor and the consumer had consummated a credit

89. *Pitre v. First Fed. Sav. & Loan Ass'n (In re Pitre)*, 11 Bankr. 777 (N.D. Ill. 1981).

90. *Dryden v. Lou Budke's Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980).

91. *See, e.g., Sellers v. Wollman*, 510 F.2d 119, 123 (5th Cir. 1975) (partial performance under home improvement contract); *Madewell v. Marietta Dodge, Inc.*, 506 F. Supp. 286 (N.D. Ga. 1980) (exchange of money for possession of car under retail installment contract); *Mitchell v. Sec. Inv. Corp.*, 464 F. Supp. 650 (S.D. Fla. 1979) (payment of insurance and recording costs for home improvement loan).

92. *Burgess v. Charlottesville Sav. & Loan Ass'n*, 477 F.2d 40 (4th Cir. 1973) (disclosures must precede loan closing).

93. Regulation Z defines "consummation" as "the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13) (1983). The right to rescind, therefore, presumes the existence of a transaction.

94. 697 F.2d 193 (7th Cir. 1983).

transaction. Subsequently, the consumer did not follow through on the underlying agreement and sued because the creditor did not provide the necessary disclosures. The Seventh Circuit held the creditor not liable for disclosure violations because the consumer had failed to make the down-payment and had understated the amount of money due on his automobile trade-in. The court emphasized the consumer's violation of the underlying agreement,⁹⁵ but the creditor was nevertheless delinquent in providing the necessary disclosures. The Truth in Lending Act was designed to give a consumer access to credit information before consummation of a transaction.⁹⁶ The creditor's obligation to disclose does not depend on whether the consumer fulfills his part of the bargain; the disclosure must precede any contractual undertaking. It should not be relevant that Mr. Streit did not shop around or that he was fully informed about the credit transaction.⁹⁷ If the bank was aggrieved by the consumer's failure to act pursuant to the agreement, then it should have pursued its remedies under the terms of that agreement. Liability under Truth in Lending is a different question. The consumer has a right to sue for violations of the Act, and the creditor should not be given the upper hand under circumstances which do not relate to his prior disclosure obligations.

The court seemed heartened by the failure of the Sixth Circuit in *Davis v. Werne*⁹⁸ to impose liability on a creditor when the parties did not take any further action after consummation of the transaction. However, in *Davis* the parties had agreed to rescind the transaction. If a consumer prevails on a creditor to terminate the transaction because the consumer is overextended, the creditor's failure to provide the necessary disclosure may have been a significant factor in the creation of the consumer's financial dilemma. The creditor's liability for not disclosing should not depend on his liability on the underlying contract. Therefore, there is little basis for suggesting that some action must be taken subsequent to the consummation of the transaction for the disclosure obligation to apply.

95. *Id.* at 197.

96. *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219-20 (1981).

97. The court said that the Act was intended to encourage consumers to look around for the best credit terms. 697 F.2d at 197 (citing *Anderson Bros. Ford*, 452 U.S. at 219-20). The court excused the creditor from liability in *Streit*, finding that the purposes of the Act were served when the consumer understood the terms of the agreement. 697 F.2d at 197; *cf. Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877 (11th Cir. 1982) (disclosure requirements under Truth in Lending not determined by consumers' ability to understand English).

98. Mutual rescission occurred when the creditor informed the consumer that the assignee-finance company never purchased the contract. 697 F.2d at 196.

The court in *Streit* seemed convinced that there was no congressional intent to impose liability in a situation in which consumer default precluded implementation of the transaction.⁹⁹ It appears that the court may have confused actions effectuating consummation of the transaction with actions taken subsequent to consummation. There is no provision in Truth in Lending that requires the consumer to do anything to perpetuate the agreement. The creditor's contractual remedy should not affect his Truth in Lending liability.

B. Releases

Adventurous creditors may seek to protect themselves from Truth in Lending actions by obtaining a release from consumers for any violations. Allowing creditors to obtain general releases from consumers presents a question of public policy about the goals of Truth in Lending. Such releases might deprive consumers of their bargaining power and nullify congressional attempts to provide meaningful information in this area. On the other hand, other considerations are involved if the release of the Truth in Lending claim is part of a general settlement. It depends, of course, upon whether the settlement concerns only the credit transaction or whether it also involves the creditor's disclosure obligation. In *Parker v. DeKalb Chrysler-Plymouth*,¹⁰⁰ the consumer signed a document releasing a dealer from any claim arising out of an automobile purchase.¹⁰¹ However, the dealer never gave the consumer a disclosure statement and the consumer did not even know that she had a Truth in Lending claim when she signed the release. This circumstance raised a question in the court's mind as to whether the consumer intended to release her claim when in fact she had complained about a mechanical defect in the automobile.¹⁰² It was the Eleventh

99. 697 F.2d at 197. The court stated as follows:

[O]ur holding is based on our opinion that it is not good policy and is not required by a reasonable construction of the Act to hold a creditor liable for a technical violation of the sort here involved: where the consumer was not misled nor financially harmed and where the consumer unilaterally breached the contract almost immediately after it was entered.

Id.

100. 673 F.2d 1178 (11th Cir. 1982).

101. The release read as follows:

For and in consideration of \$500.00, I, Marlene V. Parker, hereby release and forever discharge DeKalb Chrysler-Plymouth, Inc., its agents and employees, from any and all claims from the beginning of the world to the date of these presents including but not limited to any claim I may have of any kind arising out of my purchase of a 1977 Chrysler Cordoba

673 F.2d at 1179.

102. *Id.* at 1182.

Circuit's view that a release affecting the consumer's Truth in Lending remedies must be specific enough to become part of the settlement agreement and that general language cannot rob the consumer of her statutory claim.¹⁰³

Although the court was unwilling to reject all releases of Truth in Lending claims,¹⁰⁴ it was unmoved by the sweeping language of the document in *Parker*. The dealer saw the issue as one involving the intent of the parties at the time the release was signed. The court did not see intent as a relevant consideration unless it could ascertain that the release might conceivably include Truth in Lending claims. However, the court subsequently held that the consumer "was unaware that the release encompassed her TILA rights."¹⁰⁵ Surely this was an assessment of her intent; therefore, it seems questionable for the court to disavow the relevance of the consumer's intent on one hand, while advertising to the consumer's unawareness on the other.

Although the court alleged substantial reliance on the public policy aspects of *Brooklyn Savings Bank v. O'Neil*,¹⁰⁶ in which the Supreme Court frowned upon the release of an employee's rights to overtime compensation under the Fair Labor Standards Act, the court was more concerned with the consumer's waiver of her rights through use of the language "any and all claims."¹⁰⁷ Had the dealer made the appropriate disclosure, he might have had a more convincing argument that the waiver encompassed all claims, including those based on disclosure violations. The consumer's ignorance of her rights would have been less pertinent under those circumstances. However, because the consumer was unaware of her rights under the Act and may have been unaware of the Act itself, the release of "any and all claims" could have

103. *Id.*; see also *Standish v. Hub Motor Co.*, 149 Ga. App. 365, 254 S.E.2d 416 (1979). In *Standish*, the consumer filed suit in federal district court, alleging Truth in Lending violations. She subsequently agreed to settle, signing a release which covered all claims "arising out of any alleged violation of the 'Truth in Lending Act.'" 149 Ga. App. at 365, 254 S.E.2d at 417. Thereafter, the plaintiff sued in state court for violations of state law. The state court rejected the creditor's defense of res judicata, holding that the release was limited to the Truth in Lending claims, and that the dismissal of federal claims did not operate as an adjudication of the claims presented under state law. *Id.*

104. 673 F.2d at 1182.

105. *Id.*

106. 324 U.S. 697 (1945). In *Brooklyn Savings* the Supreme Court, holding that the release of an employee's rights to overtime compensation under the Fair Labor Standards Act was void as against public policy, stated that: "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate." *Id.* at 704 (footnote omitted).

107. 673 F.2d at 1182.

applied only to claims affecting the automobile.¹⁰⁸ Even in *Brooklyn Savings* the Court reserved decision concerning releases given in situations involving a genuine dispute between the parties and culminating in a compromise.¹⁰⁹ There was no blanket rejection of releases under the Fair Labor Standards Act; the Court in *Brooklyn Savings* simply thought that public policy prohibited a waiver of an employee's right to liquidated damages under that act.¹¹⁰

Since the court in *Parker* did not hold all releases void under the Act, thereby disagreeing with *Buford v. American Finance Co.*,¹¹¹ one is left to speculate as to the court's reaction if the consumer had signed her release after receiving a defective disclosure statement. It can be argued that public policy considerations require an absolute ban on releases under the Act. The Act is intended to ensure that creditors give consumers meaningful disclosures of credit costs. The civil remedy providing a minimum recovery to consumers is obviously meant to be a strong deterrent to uncooperative creditors,¹¹² but there may be a significant difference between the sufficiency of disclosures and the non-existence of disclosures. If a creditor and a consumer are quarrelling over the language of a particular item on a disclosure form, it can be argued that settling the issue will not necessarily compromise public policy. But if a creditor makes no disclosures, the deterrent effect of the statute might be compromised through an attempted waiver. There may be other situations in which there is substantial compliance even though the creditor does not follow the exact language of the Act.¹¹³ An aggressive consumer may view the creditor's obligation as one of very strict compliance without any room for minor deviations.¹¹⁴ This

108. The court also recognized that enforcement efforts rely essentially on individual consumers who act as private attorneys general. Therefore, allowing a waiver in a case such as *Parker* would hamper enforcement efforts as well as thwart public interest in determining inconsistent lending practices. *Id.* at 1181.

109. 324 U.S. at 714.

110. *Id.* at 707.

111. 333 F. Supp. 1243 (N.D. Ga. 1971). The *Buford* court held that releases obtained after commencement of Truth in Lending actions in federal court were null and void.

112. See *Smith v. Chapman*, 614 F.2d 968, 971 (5th Cir. 1980) (remedy under the Act designed to deter illegalities as well as compensate consumers for actual injuries); see also *Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538 (3rd Cir. 1979) (per curiam) (in light of Act's purpose to inform consumers, plaintiff need not allege financial injury to recover for alleged disclosure violations).

113. The court in *Smith v. Chapman* said: "Strict compliance does not necessarily mean punctilious compliance if, with minor deviations from the language described in the Act, there is still a substantial, clear disclosure of the fact or information demanded by the applicable statute or regulation." 614 F.2d at 972.

114. The Simplification Act amended § 130(a) of the Truth in Lending Act by allowing civil

could give rise to a bona fide dispute between the parties. Working out an effective compromise under these circumstances would clearly not violate the public policy embodied in the Act.

V. ATTORNEY'S FEES

A. Settlements

When a consumer is successful in a Truth in Lending action, he is entitled to recover a reasonable attorney's fee.¹¹⁵ If the consumer and the creditor settle the suit before trial, thus avoiding any judicial finding of a violation, a question arises whether this is a "successful action" giving rise to the consumer's right to an attorney's fee. The Fifth Circuit feels that if the creditor settles the action only to avoid the inconvenience of an unfounded suit, then the suit is not really a successful one in the statutory sense.¹¹⁶ On the other hand, if the suit is meritorious, then there is no question of liability—only one of damages. An attorney's fee should not be awarded if the consumer waives his right to the fee as a part of the settlement,¹¹⁷ but if the court does not set the attorney's fee, there may be some question whether the attorney can bring his own action to recover payment. Arguably, the Act grants the consumer, not the attorney, the right to insist on an attorney's fee. The Eleventh Circuit, however, in *James v. Home Construction Co.*,¹¹⁸ found no difficulty in providing a remedy to an attorney whose fee was omitted from the settlement. The court held that the lawyer's right to bring a direct action for his fee was implied in the statutory framework which allowed the consumer to sue the creditor,¹¹⁹ and that it would be contrary to the intent of Congress to deprive attorneys of their statutory rights in the event of a successful suit simply because the court had neglected to fix the fee when the lawsuit was settled.¹²⁰

penalties only if a creditor fails to follow the rescission requirements or to give certain designated disclosures which may be regarded as material. See Pub. L. No. 96-221, § 615(b)(2), 94 Stat. 168, 181 (1980) (codified at 15 U.S.C. § 1640(a) (1982)). The amendment to § 130(a) was intended to deal with the problem of minor errors which do not affect the consumer's ability to determine the most favorable terms.

115. 15 U.S.C. § 1640(a)(3) (1982).

116. *Gram v. Bank of La.*, 691 F.2d 728, 730 (5th Cir. 1982) (dicta).

117. *Id.*

118. 689 F.2d 1357 (11th Cir. 1982).

119. *Id.* at 1359.

120. *Id.*

B. Counterclaims

There is also a question whether an attorney's fee should be awarded to a consumer for defending a creditor's counterclaim. The statutory criterion is whether the attorney's fee for defending the counterclaim can be interpreted as part of a successful action to enforce the creditor's liability under the Act.¹²¹ In *Lacy v. General Finance Corp.*¹²² the Fifth Circuit did not award an attorney's fee to the plaintiffs for defending against the creditor's counterclaim because it felt that such a defense was not the same as enforcing liability under the Act. The court's decision in *Lacy* was followed in *McDonald v. Credit Thrift of America, Inc.*¹²³ But in *McDonald*¹²⁴ Judge Clark distinguished *Lacy* in his dissent because the plaintiff in *Lacy* lost on the creditor's counterclaim whereas in *McDonald* the plaintiff won. His point was that the successful defense of a counterclaim should be regarded as part of the "successful action to enforce" liability under the Act,¹²⁵ and that failure to compensate the plaintiff in the Truth in Lending action for defending against the creditor's counterclaim might discourage plaintiffs from bringing meritorious claims if there is a possibility that there will be no attorney's fee for defending the counterclaim. Judge Clark supported a rule which would allow the plaintiff to recover an attorney's fee in successfully defending a creditor's counterclaim, discouraging lenders from raising frivolous issues to thwart the enforcement of Truth in Lending.

The general rule, of course, is that a prevailing party may not recover attorney's fees.¹²⁶ Congress has created specific statutory exceptions to this rule to allow recovery of fees where necessary to protect

121. The current provision for an attorney's fee, § 130(a) of the Act, provides:

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title . . . is liable to such person in an amount equal to the sum of—

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court.

15 U.S.C. § 1640(a) (1982).

122. 651 F.2d 1026 (5th Cir. 1981).

123. 661 F.2d 69 (5th Cir. 1981) (per curiam).

124. *Id.* at 70.

125. *Id.* (citing 15 U.S.C. § 1640(a)(3) (1982)).

126. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 (1975) (denying fee award in action under the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1982), and National Environmental Policy Act, 42 U.S.C. § 4321-95 (1982)).

important federal interests,¹²⁷ such as encouraging consumers to vindicate their rights under the Act.¹²⁸ The Act awards an attorney's fee incurred in prosecuting a successful claim;¹²⁹ it does not provide such a fee for parties to any other claim or controversy.¹³⁰ Accordingly, when a creditor brings a compulsory counterclaim against the consumer for default in the credit transaction, the consumer is not entitled to an attorney's fee for defending the counterclaim.¹³¹

This distinction conforms with the underlying purpose of the statute, which is to provide liability for a creditor's failure to disclose certain terms in a consumer credit transaction. Liability under the statute bears no relation to the consumer's liability on the outstanding debt, and the consumer's claim under the Act may be won or lost regardless of the merits of a creditor's claim for the outstanding debt.¹³²

In a Truth in Lending action, an attorney's fee is not subject to setoff against the consumer's outstanding debt to the creditor,¹³³ and thus, the consumer cannot deny the attorney his fees on the theory that the statute provides that the money be paid to the consumer. The Fifth Circuit has held that the "mechanics of payment" lie within a trial court's jurisdiction and that a trial court can authorize payment directly to the attorney or to the attorney and the consumer jointly.¹³⁴ But the attorney cannot carry forward the litigation on appeal if the client has settled the matter, inasmuch as a contingent fee arrangement does not invest an attorney with an independent, recognizable interest under the statute.¹³⁵

C. *Who Can Recover Attorney's Fees*

If a consumer comes into court on his own behalf, he cannot recover the statutory allowance for an attorney's fee, since the purpose of the Act is to encourage private enforcement of its provisions by permit-

127. 421 U.S. at 260 & n.33.

128. See *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973) (goal of statute is to create system of "private attorney generals" to enforce Act).

129. 15 U.S.C. § 1640(a)(3) (1982).

130. *Lacy v. General Fin. Corp.*, 651 F.2d at 1029.

131. *McDonald v. Credithrift of Am.*, 661 F.2d 69, 70 (5th Cir. 1981) (per curiam); *Lacy v. General Fin. Corp.*, 651 F.2d 1026, 1029 (5th Cir. 1981).

132. *Lacy v. General Fin. Corp.*, 651 F.2d at 1029. But see *McDonald v. Credithrift of Am.*, 661 F.2d at 70 (Clark, J., dissenting) (consumer who defeats counterclaim entitled to fee award).

133. *Plant v. Blazer Fin. Serv. Inc.*, 598 F.2d 1357 (5th Cir. 1979); *Graham v. Bank of Damascus*, 528 F. Supp. 596, 597-98 (W.D. Va. 1981); *Allied Fin. Co. v. Garza*, 626 S.W.2d 120, 124 (Tex. Civ. App. 1981).

134. *Plant v. Blazer Fin. Serv. Inc.*, 598 F.2d at 1366.

135. See *Smith v. South Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978).

ting the litigant to obtain legal services.¹³⁶ The Fourth Circuit, in *White v. Arlen Realty and Development Corp.*,¹³⁷ did not award an attorney a statutory fee for representing himself. The court thought that the purposes of the Act would be best served by awarding fees to attorneys who represent plaintiffs other than themselves and that effective legal representation depends not only on legal expertise "but also on detached and objective perspective."¹³⁸

That does not mean that a consumer must have a legal obligation to pay his attorney in order for a court to award an attorney's fee. An attorney's fee is available to Legal Aid attorneys who defend consumers without charge.¹³⁹ In such a case, the fee which is awarded is normally paid directly to the Legal Aid organization in furtherance of the purposes of private enforcement under the Act.

D. *Setoffs*

There is an additional consideration if a state statute allows a creditor to recover an attorney's fee when he prevails in a suit against the consumer on the underlying transaction. In *Hines v. Good Housekeeping Shop*¹⁴⁰ a creditor was allowed to offset the debtor's recovery of an attorney's fee under Truth in Lending against his own award of an attorney's fee from the contractual claim. The Georgia Court of Appeals distinguished *Plant v. Blazer Financial Services* on the grounds that the setoff prohibited in *Plant* pitted attorney's fees awarded in Truth in Lending against the consumer's outstanding debt to the creditor.¹⁴¹ That may be a viable distinction, especially since the attorney's fees awarded to the creditor in *Hines* were based on a state statute authorizing such fees for a party's "bad faith, stubborn litigiousness, or unnecessary trouble and expense."¹⁴² It seems, therefore, that this setoff was rooted in the public policy of the two statutes involved and that the state interest in deterring groundless litigation was just as strong as the federal interest in ensuring meaningful credit disclosure.

136. *Hannon v. Security Nat'l Bank*, 537 F.2d 327, 328 (9th Cir. 1976).

137. *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 388 (4th Cir.) *cert. denied*, 447 U.S. 923 (1980).

138. *Id.* at 388.

139. *Kessler v. Associates Fin. Serv. Co.*, 639 F.2d 498 (9th Cir. 1981); *Manning v. Princeton Consumer Discount Co.*, 533 F.2d 102, 106 (3rd Cir.), *cert. denied*, 429 U.S. 865 (1976); *Sellers v. Wollman*, 510 F.2d 119, 123 (5th Cir. 1975) (fee allowed to Legal Aid lawyer).

140. 161 Ga. App. 318, 291 S.E.2d 238 (1982).

141. *Id.* at 322, 291 S.E.2d at 243 (citing GA. CODE ANN. § 20-1404 (Supp. 1982)).

142. *Id.*

Having granted the setoff of one party's fees against the other, the *Hines* court still had to face the issue raised in *Plant*, since the attorney's fee for the consumer was slightly larger than that for the creditor. The issue then became whether this excess could be set off against the amount owed by the consumer on the underlying debt. The court held that it could, but viewed the award of an attorney's fee as "the right of the party suing not the attorney representing him."¹⁴³ The court's reliance on that characterization, originally made in *Smith v. South Side Loan Co.*,¹⁴⁴ may have been misplaced. The question in *Smith* was whether an attorney should be allowed to proceed with Truth in Lending litigation on appeal after his client had settled the matter.¹⁴⁵ It would have been pointless to allow the attorney to proceed when he had no client after settlement. It would be more appropriate to say that the right to bring the action resides in the consumer, but that once the action is successful, then the award of fees is the attorney's and not the consumer's.¹⁴⁶ If the attorney's award is subject to setoff, the congressional purposes in enacting Truth in Lending would be thwarted.¹⁴⁷ In many cases the setoff might reduce the award so much that it would not be worthwhile for the attorney to pursue his client's legal remedy. The better approach, therefore, is to insulate the attorney's award from the underlying controversy so as to ensure that a consumer would have no hesitation in seeking representation in his legal skirmish with the creditor.

E. *Attorney's Fees in Rescission Actions*

Another question is whether a consumer can recover an attorney's fee in an action for rescission. The original section 130(a) apparently did not allow for that possibility. The "reasonable attorney's fee" was available only in a successful action to enforce the creditor's liability for failing to disclose the appropriate information.¹⁴⁸

143. *Id.* at 324, 291 S.E.2d at 244 (quoting *Smith v. South Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978) (per curiam)).

144. *Smith v. South Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978) (per curiam).

145. *Id.*

146. See *Allied Finance Co. v. Garza*, 626 S.W.2d 120, 124 (Tex. Civ. App. 1981) (award of fees is property of attorney).

147. *James v. Home Constr. Co.*, 689 F.2d 1357, 1359 (11th Cir. 1982); *Plant v. Blazer Fin. Serv., Inc.*, 598 F.2d 1357, 1366 (5th Cir. 1979).

148. Section 130(a) originally provided as follows:

Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal

It was this version of the statute that confronted the Fifth Circuit in *Sosa v. Fite*.¹⁴⁹ The court applied principles of statutory construction that ordinarily would foreclose the application of the provision for civil liability under these circumstances.¹⁵⁰ While section 130(a) did recognize the appropriateness of a fee in any action by the consumer to recover a civil penalty for the creditor's failure to disclose, there was no comparable language concerning the consumer's rights in a rescission action. While this statutory silence could mean that Congress did not intend to award an attorney's fee for rescission, the court was not deterred by this missing language. It saw a rescission action as a vehicle for vindicating congressional policy in the Truth in Lending area and used its discretion to award an attorney's fee.¹⁵¹

The Fifth Circuit was not at all surprised that the rescission provision did not deal with the question of an attorney's fee. It read the section as self-implementing; that is, the section provided "legal remedies which have binding legal effect absent any court action."¹⁵² But since Congress must have realized that there would be times when a creditor would not take the necessary steps to reflect the termination of a security interest in a consumer's property,¹⁵³ there was no justification for assuming that the enforcement of civil penalties would bring more litigation than that of rescission. The rescission section does make the security interest void once a consumer rescinds,¹⁵⁴ but it also requires the creditor and the consumer to take certain actions to complete the process. Those actions must be enforced in court when the parties do not follow the statutory requirements.

In 1974, section 130(a) was amended. The new language imposed

to the sum of (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than \$100 nor greater than \$1,000; and (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

Truth in Lending Act, Pub. L. No. 90-321, § 130(a), 82 Stat. 146, 157 (1968) (current version at 15 U.S.C. § 1640(a) (1982)).

149. 498 F.2d 114 (5th Cir. 1974).

150. *Id.* at 121. The principle is *expressio unius est exclusio alterius*. If something is specifically covered in a statute, then anything missing was not intended to be covered. See 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.23 (4th ed. 1973 & Supp. 1983).

151. 498 F.2d at 121.

152. *Id.* at 121-22.

153. Section 125 of the Act provides the procedure to be followed in effectuating rescission. 15 U.S.C. § 1635(b) (1982). Accordingly, to the extent that the creditor complies with the procedure, the statute is self-implementing. On the other hand, the creditor's noncompliance forces the consumer to seek judicial intervention to enforce his rights under the statute.

154. 15 U.S.C. § 1635(b) (1982).

liability not when the creditor failed to "disclose . . . any information required" but when the creditor failed "to comply with any requirement" imposed by certain sections of the Act, including section 125.¹⁵⁵ That broader liability was imposed in *Gerasta v. Hibernia National Bank*.¹⁵⁶ In that case the creditor did not respond to the debtor's attempts to rescind the transaction and thus did not comply with the requirements of section 125,¹⁵⁷ leaving the consumer to seek his remedy in court. There was no doubt about the validity of the consumer's rescission, yet the bank did not act because of some uncertainty about the consumer's rights. The statute, however, required the bank to take the appropriate steps for terminating its security interest, and the bank therefore failed to comply with a requirement of the Act.¹⁵⁸

When section 130 of the Act was amended again in 1980, it left no doubt that an attorney's fee would be granted in an action for rescission.¹⁵⁹ The statute¹⁶⁰ now gives explicit support to the interpretation of the *Gerasta* court¹⁶¹ and lays to rest any doubts about the propriety of awarding an attorney's fee in a rescission action.

155. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat. 1511, 1518 (codified as amended at 15 U.S.C. § 1640(a) (1982)).

156. 575 F.2d 580, 583 (5th Cir. 1978). See also *James v. Home Constr. Co.*, 689 F.2d 1357, 1358 (11th Cir. 1982) (attorney may recover fee in rescission action).

157. Under § 130 the creditor's failure to comply with any requirement imposed by chapter 2, 4 or 5 of Title 1 of the Act exposed him to liability for the attorney's fees in a successful consumer action. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat. 1511, 1518 (amended 1980). In *Rachbach v. Cogswell*, 547 F.2d 502, 506 (10th Cir. 1977), the court denied attorney's fees in a rescission action on the authority of *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). In *Strader v. Beneficial Fin. Co.*, 191 Colo. 206, 551 P.2d 720 (1976), the court allowed attorney's fees because the Uniform Consumer Credit Code authorized such fees "as determined by the court." 191 Colo. at 211-212, 551 P.2d at 723-24 (citing COLO. REV. STAT. § 5-5-203(1)(b) (1973)).

158. 15 U.S.C. § 1640(a) (1976).

159. Effective October 1, 1982, § 130(a) reads in pertinent part:

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter including any requirement under section 125, or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of —

. . . .

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have right of rescission under section 125, the costs of the action, together with a reasonable attorney's fee as determined by the court.

Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, tit. VI, § 615(a), 94 Stat. 168, 180 (codified as amended at 15 U.S.C. § 1640(a) (1982)).

160. The Senate Report stated the following about the amendment: "The bill also makes explicit that a consumer may institute suit under section 130 to enforce the right of rescission and recover costs and attorney's fees in a successful action." S. Rep. No. 368, 96th Cong., 2d Sess. 32, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 236, 268.

161. 575 F.2d at 584.

VI. CREDITORS AND ASSIGNEES

A. *Judicial Interpretations*

Until recently, it was fairly well settled that a retailer who promptly assigned a credit contract to a finance company was not the one extending credit. The courts looked at the reality of the situation and held that the finance company was the creditor and the retailer merely an arranger of credit.¹⁶² Courts viewed the retailer as an arranger because he assigned the credit contract to the assignee as soon as the transaction was completed and it was generally acknowledged that the retailer fully expected the assignee-lender to pay him out promptly.¹⁶³ But even though an arranger was still classified as a creditor and the disclosure statement had to identify both the retailer and the assignee¹⁶⁴ as creditors, this did not mean that the word "creditor" had to be used for the assignee. It was sufficient if the statement explained the role of the assignee-lender in the transaction and informed the consumer about the assignment.¹⁶⁵

B. *Statutory Changes*

The Simplification Act addressed the plight of assignees and took them out of the definition of "creditor."¹⁶⁶ The retailer was regarded as the creditor and was therefore expected to make the necessary disclosures. An assignee-lender who actually lent the money was not a creditor because the installment contract did not identify him as the one to whom the debt was initially payable. The retailer was identified as the creditor because he arranged for the credit to be given by the assignee-finance company. In 1982, the definition of "creditor" was further amended by excluding arrangers.¹⁶⁷ A creditor is now one who regu-

162. See *Meyers v. Clearview Dodge Sales Inc.*, 539 F.2d 511, 515 (5th Cir. 1976) (automobile retailer is arranger of credit), *cert. denied*, 431 U.S. 929 (1977); *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86 (8th Cir. 1976) (health club is arranger of credit). The Act originally defined creditors as those who "regularly extend or arrange for the extension of credit. . . . 15 U.S.C. § 1602(f) (1976). See also Reg. Z, 12 C.F.R. § 226.2(s) (1976) (creditor is anyone who in the ordinary course of business regularly extends credit).

163. *Ford Motor Credit Co. v. Cenace*, 452 U.S. 155, 158 (1981) (per curiam); *Meyers v. Clearview Dodge*, 539 F.2d 511, 515-16 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977).

164. An assignee can avoid liability if the disclosure is not apparent on the face of the instrument. 15 U.S.C. § 1641(a) (1982).

165. *Boncyk v. Cavanaugh Motors*, 673 F.2d 256, 260 (9th Cir. 1981).

166. Pub. L. No. 96-221, § 602(a), 94 Stat. 134, 168 (current version at 15 U.S.C. § 1602(f) (1982)).

167. Garn-St. Germain Depository Institution Act of 1982, Pub. L. No. 97-320, § 702, 96 Stat. 1469, 1538, (amending § 103(f) of the Truth in Lending Act, 15 U.S.C. § 1602(f) (1982)).

larly extends credit, but the debt must be initially payable to him.¹⁶⁸

The dilemma posed by characterizing a retailer as an arranger is apparent. If one follows the judicial approach to the retailer-assignee relationship, then under the amended definition there is no creditor in this kind of transaction. If the retailer is only an arranger, he is not extending credit. Even if the assignee is extending credit, he is still not a creditor because the debt is not initially payable to him. This means that neither party is responsible for making disclosures.

The opinion of the Federal Reserve Board Staff¹⁶⁹ differs from that of the courts. The Staff view is that the retailer is in fact a creditor because he extends credit and the debt is initially payable to him. Thus the retailer must make the disclosures required by the Act. Under this view an assignee is not a creditor because the debt is not initially payable to him, but an assignee is still liable for any disclosure violations apparent on the face of the instrument.¹⁷⁰

Although the Board's position seems to impose a new obligation on the retailer to make disclosures, that apparent responsibility actually flows from the new definition of "creditor." Inasmuch as the Simplification Act does not include arrangers in the definition of creditor a retailer must be classified as a creditor and the disclosure obligation applies to him. Otherwise, in the retailer-assignee situation, no one would have that obligation. The courts will have to accustom themselves to the idea that a retailer is in fact extending credit at the time of the credit transaction even though the assignment to the finance company is made immediately.

Arrangers of credit were removed from coverage under the Act because Congress wanted to insulate real estate brokers from liability.¹⁷¹ However, in making such a sweeping change, Congress has in fact created confusion about the responsibility for making disclosures.

168. *Id.*

169. FRB Official Staff Interpretations para. 2(a)(17)(ii), 12 C.F.R. Supp. I at 670 (1983).

170. 15 U.S.C. § 1641(a) (1982).

171. The Senate Report explained the amendment this way:

When the Truth in Lending Act was amended in 1980, the definition of "creditor" was altered in order to eliminate confusion in "multiple creditor" situations. However, as a result of that change, the Act for the first time appeared to impose disclosure responsibilities on those who arrange for credit extensions, whether or not there is a person who regularly extends credit participating in the transaction. Since the coverage of real estate brokers was clearly not the focus of the Committee when it began the task of simplifying the law in 1977, nor when it redefined "creditor", it is time the Congress indicates its intent with respect to the coverage of such individuals.

S. REP. No. 536, 97th Cong., 2d. Sess. 43, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3054, 3097.

The original 1980 amendment to the Truth in Lending Act was intended to clarify the responsibility for disclosure where there was more than one creditor.¹⁷² The unhappy result was that arrangers of credit were saddled with the duty of disclosure, even though the person extending credit may not have been in the lending business. The elimination of arrangers of credit from the definition was intended to ensure that coverage would be restricted to those who were in the business of extending credit.¹⁷³ It remains to be seen whether there will be further action to resolve the doubts that have arisen as a result of the latest congressional action.¹⁷⁴

VII. DOUBLE RECOVERY

Prior to the passage of the Simplification Act, the circuits disagreed whether each obligor in a transaction could recover the statutory penalty for a creditor's violation of the Act. The Fifth Circuit¹⁷⁵ and the Seventh Circuit¹⁷⁶ came out in favor of a separate recovery for each obligor. Section 130(a) of the Act caused the confusion, providing that any creditor who violated the Act with respect to any person would be liable to that person.¹⁷⁷ The question was whether the language in the House Report prescribing a maximum penalty of \$1,000 in any "individual credit transaction" limited the recovery so that regardless of the number of obligors, the maximum amount would always be the same.

Those courts which have supported recovery for each obligor have

172. Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, § 602(a), 94 Stat. 168 (amending 15 U.S.C. § 1602(f) (1982)).

173. The summary of the bill shed this light on the amended definition of creditor:

Section 702: Definition of creditor

This section amends the definition of "creditor" in the Truth in Lending Act to exclude "arrangers of credit", so that in other than open end credit transactions, the Act will apply only to professional extenders of consumer credit, namely, those who regularly extend consumer credit.

S. REP. No. 536, 97th Cong., 2d Sess. 71 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3054, 3125.

174. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 702(a), 96 Stat. 1469, 1538 (amending 15 U.S.C. § 1602(f) (1982)).

175. *Davis v. United Cos. Mortgage & Inv.*, 551 F.2d 971, 973 (5th Cir. 1977).

176. *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 883 (7th Cir. 1976), *cert. denied*, 439 U.S. 1039 (1978).

177. 15 U.S.C. § 1640(a) (1976). The legislative history added to the confusion because of the language of the House Report which read as follows: "Any creditor failing to disclose required information would be subject to a civil suit with a penalty equal to twice the finance charge, with a minimum penalty of \$100 and a maximum penalty not to exceed \$1,000 on any individual credit transaction." H.R. REP. No. 1040, 90th Cong., 1st Sess. (1967) *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 1962, 1976.

concentrated on the statutory language imposing liability with respect to "any person." The creditor's failure to comply with the statutory requirements makes him liable to that person in the statutory amount. Some courts have argued that disclosure must be made to all obligors and that failure to do so creates liability with respect to any one of them.¹⁷⁸ It has also been suggested that when a creditor bargains for more than one signatory on a loan, he assumes disclosure liability with respect to each person who has promised to repay the debt. The creditor gets the additional security provided by another obligor, but he also is responsible for making the appropriate disclosures to that other person.¹⁷⁹ Others have argued that disclosure liability was not weakened by a provision which allowed the creditor to provide a "statement of information" to one obligor only.¹⁸⁰ It was assumed that each obligor would still have an opportunity to look at the disclosure statement before deciding on the best available credit terms and that the discretion allowed in the statute to provide a single statement did not detract from the remedy available to other obligors who were misled by faulty disclosure.¹⁸¹

The Fourth,¹⁸² Ninth,¹⁸³ and Tenth¹⁸⁴ Circuits did not allow multiple recoveries for joint obligors. For example, the Fourth Circuit in

178. *Davis v. United Cos. Mortgage & Inv.*, 551 F.2d 971, 972 (5th Cir. 1977); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 883 (7th Cir. 1976) *cert. denied*, 439 U.S. 1039 (1978); *Allen v. Beneficial Fin. Co.*, 531 F.2d 797, 806 (7th Cir. 1976).

179. *Andersen v. Farmers Bank*, 640 F.2d 1347, 1349 (8th Cir. 1981) (per curiam); *Cadmus v. Commercial Credit Plan, Inc.*, 437 F. Supp. 1018, 1022 (D. Del. 1977); *Rivers v. Southern Discount Co.* (N.D. Ga. 1973), [1974-80 Transfer Binder] CONSUMER CRED. GUIDE (CCH) ¶ 98, 796. See also *White v. World Fin.*, 653 F.2d 147, 152 (5th Cir. 1981) (double recovery for joint obligors). *But see In re Wilson*, 411 F. Supp. 751, 753 (S.D. Ohio 1975) (husband and wife entitled to one recovery where they enter into credit transaction as a "family unit"); *St. Marie v. Southland Mobile Homes, Inc.*, 376 F. Supp. 996, 996-97 (E.D. La. 1974) (same).

180. *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d at 882-83.

181. *Allen v. Beneficial Fin. Co.*, 531 F.2d 797, 805 (7th Cir. 1976); *Sutliff v. County Sav. & Loan Co.*, 533 F. Supp. 1307, 1313 (N.D. Ohio 1982). *But see Vines v. Hodges*, 422 F. Supp. 1292, 1301 (D.D.C. 1976) (Single recovery allowed because Regulation Z requires that disclosures be made to only one of several purchasers). The provision allowing disclosures through a single statement seemed to be motivated by congressional interests in avoiding unnecessary documentation. The House Report made this point: "In order to reduce needless paper work, disclosure need only be made to one obligor. For example, if two people (e.g. a husband and wife) are the obligors, only one copy of the contract with the required disclosure information would need to be furnished." H.R. REP. No. 1040, 90th Cong., 1st Sess. (1967) *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 1962, 1984.

182. *Mason v. General Fin. Corp.*, 542 F.2d 1226 (4th Cir. 1976).

183. *Riggs v. Government Employees Fin. Corp.*, 623 F.2d 68, 75 (9th Cir. 1980); *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753, 758 (9th Cir. 1978), *rev'd on other grounds*, 444 U.S. 555 (1980).

184. *Hinkle v. Rock Springs Nat'l Bank*, 538 F.2d 295 (10th Cir. 1976).

*Power v. Sims and Levin*¹⁸⁵ agreed that the creditor was obligated to make disclosures to both consumers because the transaction was rescindable, but interpreted the legislative history to mean that there could only be a single recovery. The court held that the contract was one credit transaction and that the statutory maximum applied to each credit transaction. Since there was only a single credit transaction involving the joint obligors, there could be only a single recovery.¹⁸⁶

The Simplification Act limits recovery for joint obligors to the \$1,000 maximum set out in the statute,¹⁸⁷ resolving the question for transactions arising subsequent to the effective date of that Act.¹⁸⁸ However, courts are still presented with cases under the old statute, which had no specific language dealing with the problem. Recently, in *Brown v. Marquette Savings and Loan Association*,¹⁸⁹ the Seventh Circuit reexamined its previous position in light of the new language in the Simplification Act. While the transaction under review predated the new statute, the court looked to the amendment to determine whether Congress intended to change, or to clarify, the existing law. This was an opportunity for the court to decide on the effect of this subsequent legislation which, although clarifying the situation for subsequent cases, led to further inquiry about the meaning of the previous version. There seemed to be no legislative history explaining the rationale for the change and therefore the court had to resort to general principles of statutory construction to determine the effect of the new language.

One principle suggests that where there is a dispute among the courts, a statutory amendment is intended "to clarify, rather than change, the existing law."¹⁹⁰ Since the court could find no evidence in the legislative history that Congress intended to change the law in the area of dispute, it decided that the amendment was simply a point of clarification, indicating once and for all the original congressional in-

185. 542 F.2d 1216, 1219-20 (4th Cir. 1976).

186. *Id.*; *Milhollin v. Ford Motor Credit Co.*, 588 F.2d at 758.

187. Pub. L. No. 96-221, § 615(a)(3), 94 Stat. 168, 180 (1980) (current version at 15 U.S.C. § 1640(a) (1982)).

188. The Act took effect on October 1, 1982, Pub. L. No. 96-221, § 625(a) 94 Stat. 168, 185, but there may still be some decisions in the judicial pipeline which will be affected by the old version. Compare *White v. World Fin.*, 653 F.2d 147, 152 (5th Cir. 1981) (allowing double recovery without considering the impact of the 1980 amendment to the Act) and *Andersen v. Farmers Bank*, 640 F.2d 1347, 1349 (8th Cir. 1981) (same), with *Brown v. Marquette Sav. & Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982) (allowing one recovery to joint obligors in light of the 1980 amendment's clarification on the issue).

189. *Brown v. Marquette Sav. & Loan Ass'n*, 686 F.2d 608 (7th Cir. 1982).

190. *Id.* at 615 (citing 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 49.11 (4th ed. 1973 & Supp. 1983)).

tent in enacting the penalty provision. The court seemed convinced that it had found the "more convincing evidence"¹⁹¹ which it wanted. It is clear that the Seventh Circuit has reversed itself and has joined the Fourth, Ninth and Tenth Circuits in limiting joint debtors to a single recovery. However, although the Eighth Circuit¹⁹² and the Fifth Circuit¹⁹³ have both had opportunities since the passage of the Simplification Act to reflect on the effect of the amendment restricting obligors to a single recovery, they still allow each obligor to recover the statutory penalty in pre-Simplification Act cases. It is also significant that the Seventh Circuit has repudiated *Mirabal v. General Finance Acceptance Corp.* In *Andersen v. Farmers Bank* the Eighth Circuit found the *Mirabal* reasoning to be persuasive and the statute to be unambiguous.¹⁹⁴ The court did not discuss the amendment in reaching its conclusion and relied strictly on the *Mirabal* approach. But the Seventh Circuit in *Brown* did not agree with the Eighth Circuit in *Andersen* that the language was unambiguous or that the *Mirabal* decision supported that proposition. Instead the Seventh Circuit read the *Mirabal* decision as a close case and indicated that there was some ambiguity in the language of the statute.¹⁹⁵

VIII. LATE PAYMENTS

Under old Regulation Z a creditor was supposed to disclose "[t]he amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."¹⁹⁶ There was for some time a serious question whether an acceleration clause could be characterized as a default, delinquency or similar charge. The matter was eventually settled by the United States Supreme Court in *Ford Motor Credit Co. v. Milhollin*.¹⁹⁷ The Court held that a "charge" means a sum of money assessed by the creditor against the debtor and that acceleration did not come within that definition.¹⁹⁸ The Court noted that charges are payable in the event of late payment. In no way, therefore, could acceleration be regarded as a sum payable to the creditor in the event of late payment, and the term

191. 686 F.2d at 615 (quoting *Mirabal v. General Fin. Acceptance Corp.*, 537 F.2d at 883).

192. *Andersen v. Farmers Bank*, 640 F.2d 1347 (8th Cir. 1981).

193. *White v. World Fin.*, 653 F.2d 147 (5th Cir. 1981).

194. 640 F.2d at 1349.

195. 686 F.2d at 615 n.3.

196. 12 C.F.R. § 226.8(b)(4) (1981).

197. 444 U.S. 555 (1980).

198. *Id.* at 561.

could not logically fit within section 226.8(b)(4).¹⁹⁹

The statute continued to cause problems. In *Pittman v. Money Mart, Inc.*²⁰⁰ the creditor disclosed only that it *could* collect a default charge of five percent of an unpaid installment, not to exceed five dollars. The debtor complained that the use of the term "may" did not give him adequate notice of the exact conditions under which the charge would actually be imposed. The debtor wanted the creditor to disclose either that it would always collect the default charge or to disclose the situations in which it would or would not do so. The court nevertheless held that the creditor had complied with the disclosure provisions.²⁰¹ It agreed that the Federal Reserve Board's judgment about the sufficiency of disclosures should not be disturbed unless clearly irrational.²⁰²

The revised regulation changes the disclosure requirements for late payments.²⁰³ The creditor must disclose late payment charges as a dollar percentage charge that may be added to individual delinquent installments, as long as the creditor regards the transaction as continuing. The new definition makes it clear that the right of acceleration is definitely excluded because of the requirement that the disclosure reflect a dollar or percentage charge.²⁰⁴ But the definition also takes care of the point raised in *Pittman* by specifically requiring disclosure of any charge that may be imposed. The new language allows the creditor discretion to impose the late charge and enough flexibility to ignore the late charge in appropriate circumstances.²⁰⁵

IX. DISCLOSURE OF SECURITY INTERESTS

Before Regulation Z was revised, a creditor was required to disclose a security interest which he obtained in connection with his extension of credit to a consumer.²⁰⁶ The regulation defined a security interest as "any interest in property which secures payment or perform-

199. *Id.* at 561-62 (construing 12 C.F.R. § 226.8(b)(4) (1979)).

200. 636 F.2d 993 (5th Cir. 1981).

201. *Id.* at 997.

202. *Id.* at 996 (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. at 568).

203. 12 C.F.R. § 226.18(1) (1983).

204. FRB Official Staff Interpretations para. 18(l)(1), 12 C.F.R. Supp. I at 722 (1983).

205. *See, e.g.*, *Dryden v. Lou Budke's Arrow Fin. Co.*, 630 F.2d 641 (8th Cir. 1980) (late charge not assessed against new owner assuming the debt).

206. Regulation Z required the following disclosure in credit other than open end credit: "A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates . . ." 12 C.F.R. § 226.8(b)(5) (1981).

ance of an obligation."²⁰⁷ If that definition seemed simple, it was not clear enough to avoid disagreements over whether unearned insurance premiums should be disclosed as a security interest.²⁰⁸ The definition set out some examples of a security interest, but did not purport to be a limiting provision.²⁰⁹

It was possible, therefore, for other interests to come within the definition of a security interest. Although the language seemed general enough to encompass a creditor's interest in unearned insurance premiums, there was doubt whether such incidental interests were the type contemplated for disclosure under Truth in Lending. Knowing whether a creditor had such an interest would not be very helpful to a consumer who wanted to compare the terms of credit available from various sources. A critical element of the financing might be the risk of losing the property subject to the lender's security interest. Therefore, the problem was to decide whether disclosure of a creditor's rights to something like unearned insurance premiums should be included within the definition of "security interest" when it was not the intention of Truth in Lending to provide information which would not be useful in a consumer's comparison of credit terms.

It remained for the Supreme Court in *Anderson Brothers Ford v. Valencia*²¹⁰ to decide the question. The consumer purchased an automobile on credit and assigned to the creditor-seller all money due under the automobile insurance policy, including "returned or unearned premiums."²¹¹ The Court held that the assignment of such premiums was not a security interest that had to be disclosed.²¹²

207. 12 C.F.R. § 226.2(gg) (1981). The revised regulation defines it as "an interest in property that secures performance of a consumer credit obligation . . ." 12 C.F.R. § 226.2(a)(25) (1983).

208. The circuits were split on the issue of whether or not the Act requires such disclosure. Compare *Murphy v. Ford Motor Credit Co.*, 629 F.2d 556, 560 (8th Cir. 1980), *vacated and remanded*, 452 U.S. 957 (1981); *Edmondson v. Allen-Russell Ford, Inc.*, 577 F.2d 291, 292 (5th Cir. 1978); *Gennuso v. Commercial Bank & Trust Co.*, 566 F.2d 437, 442 (3d Cir. 1977) (per curiam) (all requiring disclosure of a security interest in unearned insurance premiums) with *James v. Ford Motor Credit Co.*, 638 F.2d 147, 150 (10th Cir. 1980) (no disclosure of unearned insurance premium required) *cert. denied*, 453 U.S. 901 (1981).

209. Section 226.2(gg) provided in pertinent part as follows:

The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

12 C.F.R. § 226.2(gg) (1981).

210. 452 U.S. 205 (1981).

211. *Id.* at 207.

212. *Id.* at 222.

The Court relied on a proposed Official Staff Interpretation which held that the right to receive insurance premiums was not subject to disclosure.²¹³ But the Court also looked to the definition of "security interest" in revised Regulation Z which specifically excludes "premium rebates."²¹⁴ It had to decide whether the definition in the revised regulation was intended to change the meaning of the term in the old regulation. Significantly, the original security interest provision in the Truth in Lending Act was enacted to warn the consumer that his home would be subject to a security interest.²¹⁵ Taking all this into account, the Court upheld the Board's view that the assignment of unearned insurance proceeds should not be a required disclosure.²¹⁶

It is noteworthy that the majority of the Court relied on an unofficial staff interpretation that was not yet effective at the time of the suit, rather than on a clear statement on the question in the old regulation. In addition, while the definition in the revised regulation provided the Court with a clear understanding of the place of "incidental interests,"—that they should be excluded from a disclosure statement²¹⁷—the dissenters were quite concerned that the Court seemed to apply the revised regulation retroactively.²¹⁸ The new regulation was issued to implement a new statute that was not retroactive, raising some question about the regulation's relevance. The dissent believed that Congress was changing the law in 1980 with the Simplification Act and that there was no evidence that Congress intended to construe the old law applicable to the case.²¹⁹ By so arguing, the dissent raised an issue that will be with us for a little longer: the proper interpretation of language under the old provisions in light of the new Act and regulation. In some cases the old law will still apply because of violations which arose before the effective date of the Simplification Act.

Under the new regulation, disclosure is required if a particular interest in property is a security interest under applicable state law.²²⁰ The definition excludes interests in after-acquired property, interests

213. FRB Proposed Official Staff Interpretation FG-0173, 45 Fed. Reg. 63,295 (1980).

214. 12 C.F.R. § 226.2(a)(25) (1983).

215. The original draft of the bill did not require disclosure of a security interest. Representative Cahill offered an amendment requiring such disclosure out of a concern for consumers whose homes might be secured by a mortgage. 114 CONG. REC. 1610-11 (1968).

216. 452 U.S. at 222.

217. 12 C.F.R. § 226.2(a)(25) (1983).

218. 452 U.S. at 231 (Stewart, J., dissenting).

219. *Id.*

220. 12 C.F.R. § 226.2(a)(25) (1983).

that arise solely by operation of law, and incidental interests.²²¹ Incidental interests are excluded; they exist only because of the primary security interest. The characterization of an interest as an incidental interest does not depend upon the importance that the creditor attaches to the property, however, and placing more reliance on some property does not necessarily convert all other property to the category of incidental interests.²²² The incidental interest category includes accessories to the primary security. Accessories added to an automobile, for example, would be incidental because the automobile would be the primary security.²²³ Creditors should be relieved by the simple requirement of the revised regulation that they need disclose only the fact that they will have a security interest in the property purchased in the transaction, or in other property identified by item or type.²²⁴

Some creditors are trapped by their use of overbroad language. If the disclosure statement is too broad, it may not properly describe the security interest.²²⁵ The revised regulation has simplified matters, but creditors must still be wary of sweeping language that does not properly identify the "other property" by item or type in the case of a lien that is not a purchase-money security interest.

Creditors should also note that although liens which arise by operation of law need not be disclosed under the general requirements for open-end and closed-end transactions, such liens must be disclosed in rescindable transactions.²²⁶

221. *Id.* However, for purposes of the right of rescission, under §§ 226.15 and 226.23, the term includes interests that arise solely by operation of law. *Id.*

222. *Gray v. I.T.T. Thorp Corp.*, 101 Ill. App. 3d 167, 169-71, 427 N.E.2d 1284, 1286-87 (Ill. App. Ct. 1981) (construing similar provisions of the Ill. Consumer Installment Loan Act, ILL. REV. STAT. ch. 74, § 66(k) (1977)).

223. FRB Official Staff Interpretation para. 2(a)(25)-3, 12 C.F.R. Supp. I at 674 (1983).

224. 12 C.F.R. § 226.18(m) (1982). Prior to the 1980 revision, Regulation Z contained more stringent disclosure requirements. Former § 226.8(b)(5) provided as follows: "If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by an such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired." 12 C.F.R. § 226.8(b)(5) (1981).

225. *Bizier v. Globe Fin. Serv. Inc.*, 654 F.2d 1 (1st Cir. 1981). The disclosure statement listed a security interest in the consumer's home and also in after-acquired property. The mortgage gave a security interest in the house only. The disclosure statement therefore identified a broader security interest than the mortgage itself and did not properly describe the security interest. *Id.* at 3. *See also Franklin v. Community Fed. Sav. & Loan Ass'n*, 629 F.2d 514, 516 (8th Cir. 1980), (disclosure statement misleading where it provides for a security interest in after-acquired property which is greater than that allowed under state law); *In re Sherman*, 13 Bankr. 259, 261-62 (D.R.I. 1981) (disclosure too broad because it mentioned collateral not included in the security agreement).

226. 12 C.F.R. § 226.2(a)(25) (1983).

The difficulty caused by imprecision is reflected in *Pridgeon v. Gates Credit Union*.²²⁷ In that case the disclosure statement provided that the security agreement *could* cover after-acquired property while the security agreement itself read that the note *would* be secured by after-acquired collateral.²²⁸ The consumer argued that the difference in terms violated the clear mandate of section 226.8(b)(5), which required that the creditor clearly set forth the fact that after-acquired property would be subject to the security interest.²²⁹ The Seventh Circuit disagreed and relied on the views expressed in a Federal Reserve Board Staff Opinion.²³⁰ The Board suggested that a simple disclosure of the fact that after-acquired property could be subject to the security interest would be sufficient to comply with the clear language of section 226.8(b)(5). The court also approved the creditor's disclosure statement because it referred to the security agreement which in turn "expressly provided that the Promissory Note was in fact secured by after-acquired property."²³¹ This incorporation by reference should be tolerated only if the disclosure statement and the security agreement are consistent. Considerable deference is generally due to the Board's opinion because the Board is the agency charged with enforcement of Truth in Lending,²³² but if the creditor's disclosure statement does not agree with the security agreement, the purpose of disclosure is in doubt.

This problem of interpretation will not disappear under the revised regulation. Section 226.18(m)²³³ requires the creditor to disclose, if applicable, the fact that he has or will acquire a security interest. A court should dissuade a creditor from using slightly different language which does not give the consumer the information mandated by the regulation. Although section 226.18(p)²³⁴ allows the creditor to use the disclosure statement to refer the consumer to the contract for further details about various items, that freedom should not be taken as a license to provide conflicting information. It is particularly crucial in the case of a security interest because a consumer wants to know which property, if any, will be subject to the security interest.²³⁵

227. 683 F.2d 182 (7th Cir. 1982).

228. *Id.* at 194.

229. *Id.*

230. FRB Staff Opinion No. 153, CONSUMER CRED. GUIDE (CCH) ¶ 31, 393 (May 28, 1976).

231. 683 F.2d at 195.

232. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980).

233. 12 C.F.R. § 226.18(m) (1983).

234. *Id.* § 226.18(p).

235. The same observation may be made about a prepayment penalty. The revised regulation requires "a statement indicating whether or not a penalty may be imposed if the obligation is

X. CONCLUSION

There is no doubt that there has been substantial progress in clarifying the elements of consumer credit. The Simplification Act has introduced some changes that will simplify matters for consumers and creditors. The specific language allowing a court to vary the rescission procedure in appropriate circumstances relieves creditors of the rigid statutory requirement of responding to a consumer's rescission notice. Now those creditors can move forward with some confidence, especially if they seek judicial approval.

There has also been some clarification of the term "creditor." Although the Simplification Act provided a new definition of the term,²³⁶ it took a second amendment to exclude arrangers.²³⁷ But now the full thrust of the term has been placed where it belongs, on the person who lends the money or extends the credit. This definition is much more realistic and promotes a clearer understanding of the responsibilities of the parties in a credit transaction, particularly in the creditor-assignee relationship.

The Simplification Act has also settled the long dispute about double recovery in joint obligor transactions. It was always obvious that the creditor's violation with respect to "any person"²³⁸ was not a reliable indicator of his total liability when more than one obligor was involved. The other matters discussed have given some flavor of the current litigation. As time goes on and disagreements arise about interpretation, more simplification will be necessary.

prepaid in full." 12 C.F.R. § 226.18(k) (1983). That information puts the consumer on notice about the creditor's policy on prepayment. If the penalty may be imposed, the creditor has the option of enforcing it. The consumer should then go to the contract for the specific terms of the prepayment penalty. In that situation, the consumer would be primarily interested in ascertaining the amount of the penalty. There is no inconsistency between this additional information and the statement in the disclosure form that a prepayment penalty may be imposed.

236. Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, § 602(a), 94 Stat. 132, 168 (1980).

237. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 702(a), 96 Stat. 1469, 1538, (amending 15 U.S.C. § 1602(f) (1982)).

238. 15 U.S.C. § 1640(a) (1982).