San Diego Law Review

Volume 44 | Issue 3 Article 14

8-1-2007

Lenders and Consumers Continue the Search for the Truth in Lending Under the Truth in Lending Act and Regulation Z

Elwin Griffith

Lenders and Consumers Continue the Search for the Truth in Lending Under the Truth in Lending Act and Regulation Z

ELWIN GRIFFITH*

TABLE OF CONTENTS

---

* Tallahassee Alumni Professor of Law, Florida State University.

I. INTRODUCTION

Since Congress began to regulate consumer credit in earnest by passing the Truth in Lending Act (TILA)[1] in 1968, creditors have had to disclose the essential elements of their credit transactions.[2] TILA was a welcome development given the nature of the competition in the marketplace, for consumers were able thereafter to compare the credit opportunities available to them.[3] Lenders could no longer devise their own disclosure strategies for making their loan programs more attractive, because they had to follow a prescribed statutory formula that put everybody on an even playing field. It became easier for consumers to understand how much they were paying for credit, because a loan's finance charge no longer meant different things to different people.[4] The new disclosure rules introduced a standard method for recognizing the true cost of credit, and they comprised the same elements regardless of the lender's standing in the business community.[5]

---

1. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f (2000)).

2. For example, creditors have to disclose the amount financed and the finance charge expressed as an annual percentage rate. 15 U.S.C. § 1638(a)(2)(A), (a)(3), (a)(4) (2000).

3. A House report reflected some of the legislative concerns as follows:

> Today the consumer is faced with a number of credit disclosure practices, most of which are not directly comparable to one another. With respect to rate, some creditors employ an "add on" rate, which is based on the original balance of the obligation as opposed to the declining balance. This has the effect of understating the simple annual rate by approximately 50 percent.
>
> . . . .
>
> The committee believes that by requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory changes imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit.

H.R. REP. NO. 90-1040, at 13 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1970–71.

4. One authority identified the problem this way:

> Creditors did not use a uniform way of calculating interest, or a single system for defining what additional charges would be included in the interest rate. Thus, a consumer had no way of knowing, for example, that a $6000 car financed through the dealer at 6% might well have been *more* expensive than financing it at 10% through a credit union.

NAT'L CONSUMER LAW CTR., TRUTH IN LENDING § 1.1.1 (5th ed. 2003 & Supp. 2006).

5. TILA provides an all-inclusive definition of "finance charge." It defines the "finance charge" as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. 15 U.S.C. § 1605(a) (2000). TILA contains several

Regulation Z, promulgated by the Federal Reserve Board pursuant to TILA,[6] identifies the finance charge as the cost of consumer credit and further explains that it includes any charge that the lender imposes as "an incident to or a condition of the extension of credit."[7] It is not surprising that there are sometimes disagreements over the "incident" or "condition" language, for the mere fact that a consumer must pay a charge in a transaction does not always mean that such a charge is in fact incident to or a condition of the extension of credit.[8] This Article will first tackle the problems of identifying the essential elements of a finance charge by discussing some recent cases. It will be seen that a charge that a consumer pays in connection with a transaction does not necessarily make it a finance charge, and that courts must look further before categorizing a consumer's payment.[9]

Another feature of Truth in Lending that has been the subject of debate is the consumer's right of rescission. Under normal circumstances, a consumer may rescind a transaction until midnight of the third business day following consummation, delivery of the notice of the right of rescission, or delivery of all material disclosures, whichever comes last.[10] When the consumer rescinds within three business days, there is usually no problem because the consumer has an unconditional right to

---

exceptions to the definition. *See id.*; *see also* RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶ 3.02[1] (2000).

6. Congress authorized the Federal Reserve Board (Board) to prescribe regulations to carry out the purposes of TILA. 15 U.S.C. § 1604(a). As a result, the Board issued Regulation Z. *See* 12 C.F.R. § 226.1 (2007).

7. 12 C.F.R. § 226.4(a) (2007).

8. TILA uses the language "incident to," 15 U.S.C. § 1605(a) (2000), but Regulation Z goes further and uses the phrase "incident to or a condition of the extension of credit," 12 C.F.R. § 226.4(a) (2007). In 1996, the Board revised Regulation Z to recognize a fee charged in connection with debt collection agreements as a finance charge because it is part of the cost of credit. The Board regarded the fee as being charged in connection with the loan, and therefore incident to the extension of credit. *See* Regulation Z, 61 Fed. Reg. 49,237, 49,239 (Sept. 19, 1996).

9. In *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 240 (2004), the Supreme Court recognized that there was some connection between an over-limit fee and an extension of credit. Nevertheless, the Court recognized also that TILA's categorization of the over-limit fee as one assessed "in connection with an extension of credit" did not mean that it was imposed "incident to the extension of credit." *Id.* at 241 (internal quotation marks omitted). Therefore, the Court upheld the Board's exclusion of the over-limit fee from the finance charge. *Id.* at 245.

10. 15 U.S.C. §1635(f) (2000); 12 C.F.R. § 226.23(a)(3) (2007).

do so.[11] If the lender has failed to discharge its disclosure obligations, the consumer's right of rescission can last as long as three years. Nevertheless, once the three-day period expires, the lender is normally not receptive to the consumer's rescission and the consumer must then try to show how the lender has failed to meet the disclosure requirements.[12]

Many lenders have tried to avoid the challenge of the rescission procedure by coaxing the consumer into signing a form indicating that the consumer prematurely elects not to cancel the transaction.[13] A lender normally seeks this assurance before the three-day rescission expires in order to disburse the funds promptly without worrying about the consumer's change of heart. The lender's zeal to consummate a transaction often leads to disagreement about whether the lender gave the necessary clear and conspicuous disclosures when it mixed the premature election language with the notice of the consumer's right to rescind.[14] This Article will show both that the courts have consistently protected the consumer's right to rescind and that major difficulties ensue when lenders try to avoid the nuances of the rescission procedure.

Apart from the complications of rescission, a lender must confront the timing and form of the Truth in Lending disclosures.[15] A lender's disclosures mean much more to a consumer when the consumer has access to them for full review before consummation of the transaction. The problem in this context is whether the lender satisfies the regulatory requirement of giving its consumers a copy of the disclosures that they can keep prior to consummation. If all the copies of the disclosures are bound together, the consumer may argue that he does not have a copy he can keep, and then it is up to him to convince a court that he was unable to walk away

11. *See* NAT'L CONSUMER LAW CTR., *supra* note 4, § 6.3.1; ROHNER & MILLER, *supra* note 5, ¶ 8.01.

12. *See* Jones v. E*Trade Mortgage Corp., 397 F.3d 810 (9th Cir. 2005); Gaona v. Town & Country Credit, 324 F.3d 1050 (8th Cir. 2003); Jackson v. Grant, 890 F.2d 118 (9th Cir. 1989); England v. MG Investments, Inc., 93 F. Supp. 2d 718 (S.D. W. Va. 2000); Stanley v. Household Fin. Corp. (*In re* Stanley), 315 B.R. 602 (Bankr. D. Kan. 2004); Webster v. Centex Home Equity Corp. (*In re* Webster), 300 B.R. 787 (Bankr. W.D. Okla. 2003); Williams v. BankOne (*In re* Williams), 291 B.R. 636 (Bankr. E.D. Pa. 2003); Johnson v. Thomas, 794 N.E.2d 919 (Ill. App. Ct. 2003).

13. *See* Rodash v. AIB Mortgage Co., 16 F.3d 1142 (11th Cir. 1994); Rodrigues v. Members Mortgage Co., 323 F. Supp. 2d 202 (D. Mass. 2004); Adams v. Nationscredit Fin. Servs. Corp., 351 F. Supp. 2d 829 (N.D. Ill. 2004); Wiggins v. Avco Fin. Servs., 62 F. Supp. 2d 90 (D.D.C. 1999); Apaydin v. Citibank Fed. Sav. Bank (*In re* Apaydin), 201 B.R. 716 (Bankr. E.D. Pa. 1996).

14. *See Rodash*, 16 F.3d at 1144; *Adams*, 351 F. Supp. 2d at 830; *Wiggins*, 62 F. Supp. 2d at 93.

15. In closed-end transactions, the creditor must make the disclosures "clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 226.17(a)(1) (2007). With respect to timing, the creditor must make the disclosures "before consummation of the transaction." *Id*. § 226.17(b).

with a copy before committing himself to the transaction.[16] The argument usually is that the lender did not provide the disclosures in a form that the consumer could keep. Allied to this issue of the timing and form of the disclosures is the matter of the timing of consummation.[17] Any discussion of this issue must necessarily deal with the conditions that are attached to the financing of the transaction between the parties. An examination of the cases will show that the courts generally look to see whether the consumer was contractually obligated on the transaction or whether a condition prevented that from happening.[18]

Consumers may also be surprised about what awaits them once an agreement is in effect. That surprise may come as the result of a change-in-terms provision that the lender uses to its own advantage.[19] A consumer who is attracted by the lender's solicitations may later find that a promised term is short-lived because of another provision in the agreement that allows for a change in terms at the lender's behest. Occasionally that change is the insertion of an arbitration clause, and a court has to decide whether an arbitrator or a court should deal with a consumer's challenge.[20]

Finally there is the question of damages when a lender is found liable for a Truth in Lending violation. This Article will discuss the amounts

16. The problem normally arises when the disclosures are placed on the same document with the credit contract, and the document comprises multiple copies bound together. If the creditor gives the consumer these multiple copies clipped together, it is open to question whether the creditor has given the disclosures to the consumer in a form that the consumer may keep. The Official Staff Commentary recognizes that "[t]he consumer must be free to take possession of and review the document in its entirety before signing." 12 C.F.R. pt. 226, supp. 1, cmt. 17(b)(3) (2007). The staff of the Board issues interpretations of Regulation Z through the Official Staff Commentary and a creditor's reliance on the Commentary protects the creditor from civil liability under TILA. *See* 12 C.F.R. pt. 226, supp. 1 (2007).

17. 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) (2007).

18. *See* Bragg v. Bill Heard Chevrolet, Inc., 374 F.3d 1060, 1067 (11th Cir. 2004); Grimes v. New Century Mortgage Corp., 340 F.3d 1007, 1010 (9th Cir. 2003); Gaona v. Town & Country Credit, 324 F.3d 1050, 1054 (8th Cir. 2003); Graves v. Tru-Link Fence Co., 905 F. Supp. 515, 520 (N.D. Ill. 1995).

19. *See* Roberts v. Fleet Bank (R.I.) Nat'l Ass'n, 342 F.3d 260 (3d Cir. 2003); Rossman v. Fleet Bank (R.I.) Nat'l Ass'n, 280 F.3d 384 (3d Cir. 2002); Stone v. Golden Wexler & Sarnese, P.C., 341 F. Supp. 2d 189, 193 (E.D.N.Y. 2004); Perry v. FleetBoston Fin. Corp., No. 04-507, 2004 WL 1508518 (E.D. Pa. July 6, 2004).

20. *See Stone*, 341 F. Supp. 2d at 193; Bank One, N.A. v. Coates, 125 F. Supp. 2d 819, 821 (S.D. Miss. 2001); Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 275 (Ct. App. 1998).

that are available in lease and non-lease transactions,[21] and will identify the kinds of violations that give rise thereto.[22]

II. THE FINANCE CHARGE

A. Characterizing the Charge

The search for truth in lending spans a wide area. A creditor must disclose enough information so that consumers will be well informed about the essential ingredients of the loan that they are contemplating.[23] Perhaps the greatest challenge for a creditor is in disclosing the finance charge for the loan and expressing it as an annual percentage rate (APR).[24] Sometimes a creditor will have problems because it is unsure whether a particular item should be included in the finance charge. TILA provides some guidance about the meaning of "finance charge" by defining it as an amount that a creditor imposes "as an incident to the extension of credit" to the consumer.[25] Regulation Z uses slightly different

21. *See* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50 (2004) (applying the $100/$1,000 limits on TILA's statutory damages to both leases and non-real-estate loans under 15 U.S.C. § 1640(a)(2)(A)(i), (ii) (2000)).

22. The issue that crops up in this connection is whether a consumer can recover statutory damages for a creditor's failure to make timely disclosures. *Compare* Lozada v. Dale Baker Oldsmobile, Inc., 145 F. Supp. 2d 878, 889 (W.D. Mich. 2001) (holding that §1640(a) allows statutory damages to be awarded for violations of § 1638(b)(1)), *and* Walters v. First State Bank, 134 F. Supp. 2d 778, 781 (W.D. Va. 2001) (holding that consumer could recover statutory damages and any actual damages because creditor gave him a copy of disclosures only after the consumer signed the contract), *with* Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 871 (6th Cir. 2003) (holding that statutory damages are not available for dealer's failure to make timely disclosures under § 1638(b)(1)), *and* Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119, 123 (4th Cir. 2003) (finding that creditor's liability arose when consummation occurred under unfunded financing agreement), *rev'd on other grounds*, 543 U.S. 50 (2004), *and* Graham v. RRR, LLC, 202 F. Supp. 2d 483, 488 (E.D. Va. 2002) (holding that consumer must prove actual damages in order to recover for dealer's untimely disclosures under § 1638(b), since statutory damages are not available).

23. *See* 12 C.F.R. § 226.5a (2007) (disclosures in credit and charge card applications and solicitations); *id.* § 226.6 (initial disclosure statement in open-end credit); *id.* § 226.18 (content of disclosures in closed-end credit). "Open-end credit" contemplates repeated transactions between the consumer and the creditor, *id.* § 226.2(a)(20), while "closed-end credit" means consumer credit other than open-end credit, *id.* § 226.2(a)(10).

24. *See id.* § 226.7(f), (g) (periodic statements in open-end transactions), *id.* § 226.18(d), (e) (disclosures in closed-end credit). The terms "finance charge" and "annual percentage rate" must, with certain exceptions, be disclosed more conspicuously than any other disclosure. *Id.* § 226.5(a)(2); *id.* § 226.17(a)(2).

25. 15 U.S.C. § 1605(a) (2000). The congressional report explained the disclosure of the finance charge in these terms: "The basic disclosure concept contained in the proposed legislation is to require lenders and merchants to provide consumers with a statement of the 'finance charge' imposed by the creditor in connection with the particular consumer credit transaction." H.R. REP. NO. 90-1040, at 13 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1971. Then in its section-by-section analysis, the report

language by identifying the finance charge as "the cost of consumer credit" and then by stating that it includes any charge imposed "as an incident to or a condition of the extension of credit."[26] The similarity in language suggests that the Board tried its level best to capture Congress's intent by ensuring that a creditor must inform the consumer of the true cost of credit.

From time to time, disagreements arise over the proper designation of a charge, and it is then that a court must look to see whether the creditor has assessed the charge on the consumer "as an incident to or a condition of the extension of credit."[27] Not all charges are a part of the finance charge.[28] Regulation Z gives some examples of costs that are included in the finance charge, but it also specifically excludes others from the definition. One charge that the regulation excludes from the finance charge is that imposed on a consumer for exceeding a credit limit.[29] When the consumer in *Household Credit Services, Inc. v. Pfennig* complained about the creditor's failure to include such an item in the finance charge, it was left to the Supreme Court to decide whether the Board had gone too far by excluding such an over-limit fee.[30]

The Court had to decide first whether Congress had directly addressed the issue. If it had not, then the regulation would be controlling unless it was "arbitrary or capricious in substance, or manifestly contrary to the statute."[31] The Court recognized some ambiguity in the term "finance charge" as it related to over-limit fees in this transaction.[32] This was not surprising, given the requirement that the charge had to be "incident to

explained the definition of "finance charge" as "all mandatory charges imposed by a creditor and payable by an obligor as an incident to the extension of credit." *Id*. at 23, *reprinted in* 1968 U.S.C.C.A.N. at 1980. This "incident to" and "in connection with" language also came up again in the context of including voluntary debt cancellation fees in the finance charge. The Board interpreted the definition of "finance charge" to include "any fee charged by the creditor in connection with the loan, if it is not charged in comparable cash transactions and is not subject to an express exemption." Regulation Z, 61 Fed. Reg. 49,237, 49,239 (Sept. 19, 1996).

26. 12 C.F.R § 226.4(a) (2007).

27. *Id*.

28. *See id*. § 226.4(c)–(e).

29. *See id*. § 226.4(c)(3).

30. 541 U.S. 232 (2004).

31. *Id*. at 242 (quoting United States v. Mead Corp., 533 U.S. 218, 227 (2001)) (internal quotation marks omitted).

32. The Court explained: "While we acknowledge that there may be some fees not explicitly addressed by § 1605(a)'s definition of 'finance charge' but which are unambiguously included in or excluded by that definition, over-limit fees are not such fees." *Id.*

the extension of credit."[33] The Court was not sure whether the phrase "incident to" required a substantial connection between the charge and the credit, and therefore, there was some doubt whether the finance charge included over-limit fees.[34] The Court also observed that it was reasonable to characterize such fees as a penalty because a creditor imposes them only when the consumer exceeds his credit limit.[35] On the other hand, the creditor would not have imposed its fee if the consumer had not exceeded her credit limit. It was this feature that contributed to the ambiguity of the charge. It was this aspect of the transaction that led the court of appeals below to characterize the fee as a finance charge,[36] because the consumer seemed to benefit from an extension of credit, even though the creditor was not enthusiastic about it.[37]

Although TILA provides that a consumer may incur two types of charges in an open-end credit plan, namely a finance charge and other charges imposed as part of the plan, it does not specify which charges comprise each category.[38] This is a further example of the ambiguity that the *Pfennig* Court recognized in addressing the reasonableness of

33. 15 U.S.C. § 1605(a) (2000). In the case of an application or solicitation for a credit card account, TILA requires a creditor to disclose applicable percentage rates, annual fees, and other information. *Id*. § 1637(c)(1)(A)(i), (ii), (c)(1)(B). As part of the "other information" required, the creditor must disclose "[a]ny fee imposed in connection with an extension of credit in excess of the amount of credit authorized to be extended with respect to such account." *Id*. § 1637(c)(1)(B)(iii). The language "in connection with an extension of credit" is different from "incident to the extension of credit." This difference suggests that the over-limit charge does not fall within the finance charge and creates the ambiguity identified by the Court. See *Pfennig*, 541 U.S. at 241.

34. The Court agreed that there is *some* connection. *See Pfennig*, 541 U.S. at 241. But in making its point that the term "finance charge" is ambiguous standing alone, the Court explained: "[T]his Court has recognized that the phrase 'incident to or in conjunction with' implies some *necessary* connection between the antecedent and its object, although it 'does not place beyond rational debate the nature or extent of the required connection.'" *Id.* at 240–41 (quoting Holly Farms Corp. v. Nat'l Labor Relations Bd., 517 U.S. 392, 403 n.9 (1996)).

35. *See id*. at 243.

36. *See* Pfennig v. Household Credit Servs., Inc., 295 F.3d 522, 528–29 (6th Cir. 2002), *rev'd*, 541 U.S. 232 (2004). The consumer alleged that the card issuer "knowingly and routinely" allowed its customers to exceed the credit limits. *Id*. at 529 n.2.

37. The Supreme Court would not accept the distinction that the court of appeals had made between unilateral acts of default and acts of default when a consumer exceeds his credit limit. *See Pfennig*, 541 U.S. at 244. It was the Court's view that "a creditor's 'authorization' of a particular point-of-sale transaction [did] not represent a final determination that a particular transaction [was] within a consumer's credit limit because the authorization system [was] not suited to identify instantaneously and accurately over-limit transactions." *Id*.

38. Subsections 1637(a)(1)–(4) relate in one way or another to the finance charge, but paragraph 5 then requires disclosure of "other charges" which the creditor may impose under the open-end credit plan. 15 U.S.C. § 1637(a)(1)–(5) (2000). This suggests, therefore, that Congress contemplated other charges besides the finance charge. But TILA's examples of a finance charge do not include over-limit fees. *See id*. § 1605(a).

the regulation. However, this much is clear: Congress did not intend to include all charges within the finance charge.[39] The challenge is, therefore, in deciphering where each charge belongs. The drafters did not help much in clarifying the issue for the over-limit fee. They identified the specific items that a creditor had to disclose in applications and solicitations for credit, but they alluded to other information that must be disclosed to complete the picture. Included in that information was "[a]ny fee imposed in connection with an extension of credit in excess of the amount of credit authorized."[40] It was open to question whether Congress was sending a message that although this over-limit fee was not imposed "incident to the extension of credit," it was nevertheless a fee that a consumer should know about before applying for a credit card.[41] This could explain why Congress opted for the phrase "in connection with" rather than "incident to" when it dealt with mail applications and solicitations under § 1637(c)(1)(B)(iii). It wanted to give a complete picture of the credit transaction without necessarily fitting every conceivable expense into the category of a "finance charge."[42] TILA's definition of that term makes no mention of over-limit fees, but by the same token it does not specifically exclude them as it does with respect to other items charged to the consumer.[43] The Court in *Pfennig* seized on the ambiguity in TILA's treatment (or lack thereof) of the over-limit fees as an invitation to determine the reasonableness of the regulation in dealing with this matter.[44]

---

39. The statute recognizes disclosures that are related to the finance charge, 15 U.S.C. § 1637(a)(1)–(4), and also requires "[i]dentification of other charges which may be imposed as part of the plan," *id.* § 1637(a)(5).

40. *Id*. § 1637(c)(1)(B)(iii).

41. This is one place where the statute points out the difference between "in connection with" and "incident to" an extension of credit. *Compare id*. § 1605(a), *with id.* § 1637(c)(1)(B)(iii). The "in connection with" language appears in § 1637(c)(1)(B)(iii), dealing with disclosure in direct mail applications and solicitations for credit card accounts, but the reference to the over-limit fee relates to "other information" that the creditor must disclose besides matters concerning the finance charge.

42. For example, the finance charge does not include charges that are payable in a comparable cash transaction. *See id*. § 1605(a).

43. *See id*. § 1605(d)–(e).

44. The Court stated: "Because § 1605 is ambiguous, the Board's regulation implementing § 1605 'is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.'" Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232 (2004) (quoting United States v. Mead Corp., 533 U.S. 218, 227 (2001)).

Regulation Z excludes from the finance charge any charge "for exceeding a credit limit."[45] There is no doubt about what the Board had in mind here. The only question is whether this exclusion was reasonable in light of TILA's overall objective.[46] It is relevant that the regulation excludes charges from the finance charge not only when consumers exceed their credit limits, but also when they make unanticipated late payments, become delinquent, or default on an obligation.[47] These are all events that follow an extension of credit and a diligent consumer may avoid such charges by complying with the terms of his loan.[48] Therefore, this kind of charge looks more like a penalty than anything else, because it arises only when a consumer breaches the terms of his credit agreement, and it is not part and parcel of the original credit transaction.[49]

Although the Court in *Pfennig* recognized as reasonable the Board's decision to exclude the over-limit charge from the finance charge, such an exclusion seems to depend on events that are largely within the consumer's control. If the creditor in *Pfennig* did allow the consumer to exceed her original credit limit, some people would understandably treat this as an extension of credit, with any resulting fees being part of the finance charge.[50] This is not to say that it would be unreasonable for the

---

45. 12 C.F.R. § 226.4(c)(2) (2007).

46. The Supreme Court has held that an agency's regulation must be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

47. *See* 12 C.F.R. § 226.4(c)(2) (2007).

48. Some commentators note that such charges are imposed "not as a charge for the credit, but to compensate for the costs related to the occurrence of specified conditions." ROHNER & MILLER, *supra* note 5, ¶ 3.02[2][d]; *see also* 1 JAMES H. PANNABECKER, TRUTH-IN-LENDING MANUAL ¶ 2.01[3] (rev. ed. 2007).

49. In this connection, the Board made the following observation when it was considering a revision to Regulation Z to implement amendments that Congress had made to simplify TILA:

> [T]he regulation reflects an emphasis on disclosures that are relevant to credit decisions, as opposed to disclosures related to events occurring after the initial credit choice. In the Board's view, the primary goals of the Truth in Lending Act are not particularly enhanced by regulatory provisions relating to changes in terms on outstanding obligations and on the effects of the failure to comply with the terms of the obligation.

Credit; Truth in Lending; Revision of Regulation Z, 45 Fed. Reg. 80,648, 80,649 (Dec. 5, 1980).

50. The Supreme Court would not accept the Sixth Circuit's distinction between "'unilateral' acts of default and acts of default where a consumer exceeds his credit limit . . . ." Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 244 (2004). The Court did not see any negotiation between the creditor and the consumer for more credit. *See id*. However, more attention should be paid to whether an over-limit charge is akin to an unanticipated event, as distinguished from a routine occurrence that is intended to produce a greater yield for a lender. The exclusion for "exceeding a credit limit" appears in the context of "[c]harges for actual unanticipated late payment . . . or for delinquency, default, or a similar occurrence." 12 C.F.R. § 226.4(c)(2) (2007). This language leaves the impression that the over-limit event should not result from an agreement between the

Board to exclude all penalties from such a charge. But it is problematic for a creditor to set a credit limit and then routinely assess a fee whenever a consumer exceeds that unrealistic limit. If a creditor's authorization of a particular transaction does not represent a final decision that the transaction definitely falls within the consumer's credit limit, then it is understandable that the Supreme Court would uphold the Board's reasonable regulation. The Court was in effect saying that where the only outstanding arrangement is the original credit agreement, any subsequent advances that exceed that agreement will carry with it an attendant charge. Until there is some other extension of credit, the consumer's breach of the agreement leads to a charge that is akin to a late payment or a default charge.[51]

The difficulty in *Pfennig* is that § 1605(a) does not specifically cover over-limit fees and the Board filled the gap with its regulation covering such fees. Even when TILA mentions over-limit fees, the reference occurs in the context of the creditor's providing additional information to the consumer about fees that may be imposed in connection with the extension of credit, rather than incident thereto.[52] This provided a sufficient opening for the Court to recognize that imposition of fees in connection with the extension of credit does not clearly make such fees incident to the extension of credit.[53]

The definition of "finance charge" has caused problems in other contexts. In *Virachack v. University Ford*, a question arose about a rebate that was available to any consumer who paid cash or took a loan at a regular, nonpromotional rate.[54] The rebate was not available for a loan that carried the low promotional rate of 0.9%. The consumers argued that, because

parties for additional credit, but rather from an unexpected, nonroutine advance. This understanding of an over-limit charge flows from the context. *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:16 (6th ed. 2000); *see also* ROHNER & MILLER, *supra* note 5, ¶ 3.02[2][d].

51. The consumer undercut her case by alleging that the over-limit fee was imposed for every month when her balance exceeded her original credit limit. *See Pfennig*, 541 U.S. at 240.

52. *Compare* 15 U.S.C. § 1637(c)(1)(B)(iii) (2000) (imposing over-the-limit fee "in connection with an extension of credit in excess of the amount of credit authorized"), *with* 15 U.S.C. § 1605(a) (2000) (imposing finance charge "as an incident to the extension of credit").

53. *See Pfennig*, 541 U.S. at 241; *see also* NAT'L CONSUMER LAW CTR., *supra* note 4, § 3.9.3.2.

54. 410 F.3d 579 (9th Cir. 2005).

they did not qualify for the rebate, the creditor should have disclosed the difference in price as a finance charge.[55]

The court in *Virachack* looked to Regulation Z for a resolution of the question. The regulation includes within the definition of "finance charge" those discounts given "for the purpose of inducing payment by a means other than the use of credit."[56] In this case, the dealer did not offer a rebate to induce customers to use means other than credit, since the rebate was available to consumers who financed their purchase at the nonpromotional higher rate.[57] The creditor did not want to offer two incentives to the same consumer. The consumer could either get the 0.9% loan, or he could take the higher interest loan and qualify for the rebate. In a word, the manufacturer's subsidy was available only to customers who were not getting the subsidized interest rate.[58] There was an important element missing in the transaction if the consumers hoped to make their case for a hidden finance charge. They could not show that the dealer had any intention to induce cash payments, for the sales price was the same for both cash and credit transactions.[59] The rebate became relevant only after the dealer ascertained that the consumer was not getting the preferred interest rate.

In a rebate-type case, the appropriate comparison is not between consumers using the specific type of credit and cash customers. It is, instead, a comparison between credit customers as a group and cash customers. Under the arrangement in *Virachack*, some credit customers could benefit from the low interest arrangement, while others could not.[60] Therefore, one would have difficulty in finding the necessary inducement for a consumer to pay by some means other than credit. A consumer would undoubtedly want the benefits of both bargains: the rebate and also the low interest rate. But at least the rebate would still be available to a consumer who chose to finance at the higher interest rate.

55. *See id*. at 581.
56. 12 C.F.R. § 226.4(b)(9) (2007).
57. *See Virachack*, 410 F.3d at 582.
58. *Id*.
59. *Id*.
60. The manufacturer did not want to offer two incentives to the same consumer. It offered a rebate only to those customers who were not getting a subsidized interest rate. *Id*. But the rebate is not a finance charge either when it is available to both cash and credit customers. *See* 12 C.F.R. pt. 226, supp. 1, cmt. 4(a)-(1)(i)(B) (2007). In *Coelho v. Park Ridge Oldsmobile, Inc.*, 247 F. Supp. 2d 1004 (N.D. Ill. 2003), the same rebate was available to cash customers and to credit customers who did not use the promotional interest rate. The court held that the rebate was not a finance charge because "the rebate affect[ed] the customer's net out-of-pocket costs, but not the negotiated sale price the customer owed [the dealer]." *Id*. at 1009.

Therefore, it is not only the cash customer who benefits from a rebate, but credit customers as well.[61]

B. Incident to or Condition of Extension of Credit

The "incident to" phrase causes problems in another context. If a consumer has to pay a fee at some point after the initial extension of credit, it may be in connection with the transaction rather than incident to the extension of credit.[62] In that event, there is less attraction to the lender to categorize the fee as a finance charge. The consumer may not see it as something other than a finance charge if he is unable to consummate the transaction in the way he desires without paying the fee. In *Pechinski v. Astoria Federal Savings and Loan Association*, the consumers wanted to assign their loan to another lender as part of a refinancing arrangement in order to save mortgage recording tax.[63] That privilege carried with it an assignment fee charged by the assignor for transferring the old mortgage to the new lender.[64] The consumers viewed this fee as part of the finance charge on the ground that it was imposed "incident to, or as a condition of, the extension of credit."[65]

The lender imposed the assignment fee more than four years after the original loan and the consumers could not provide any evidence that the lender would not have made the loan in the absence of the consumers'

61. The finance charge includes "[d]iscounts for the purpose of inducing payment by a means other than the use of credit." 12 C.F.R. § 226.4(b)(9) (2007); *see also* Walker v. Wallace Auto Sales, Inc. 155 F.3d 927, 932 (7th Cir. 1998) (holding that higher costs for buying with credit qualified as finance charges); Knapp v. Americredit Fin. Servs., Inc., 245 F. Supp. 2d 841, 846 (S.D. W. Va. 2003) (holding that hidden acquisition fees for funding automobile purchases were finance charges because the consumer was required to pay the fees); 7 KENNETH M. LAPINE, BANKING LAW § 152.08 (2007) ("[A]n escrow fee normally imposed for both consumer credit and cash transactions is not a finance charge.").

62. A clear example of a charge not being assessed incident to the extension of credit is when it is payable in a comparable cash transaction. *See* Mayberry v. Ememessay, Inc. 201 F. Supp. 2d 687, 693–94 (W.D. Va. 2002) (finding that a fee to be paid to Department of Motor Vehicles was not a finance charge); Hodges v. Koons Buick Pontiac GMC, Inc., 180 F. Supp. 2d 786, 793 (E.D. Va. 2001) (holding that a processing fee was not a finance charge where it was imposed on both cash and credit customers); 12 C.F.R. pt. 226 supp. 1, cmt. 4(a)-1; NAT'L CONSUMER LAW CTR., *supra* note 4, § 3.6.5.2; *cf.* Hook v. Baker, 352 F. Supp. 2d 839, 844 (S.D. Ohio 2004) (finding that a document preparation fee was a finance charge when assessed against credit customers only).

63. 345 F.3d 78, 80 (2d Cir. 2003).

64. *Id.*

65. *Id.*

promise to pay the fee. This element undermined the consumers' position that this fee was imposed incident to the extension of credit.[66] The creditor demanded an assignment fee following the consumers' request for the lender to assign the mortgage to another lending institution. Far from extending credit, the lender was facilitating the transfer of the outstanding documents, and not refinancing a transaction.[67] In a sense, therefore, the lender was terminating its involvement with the consumers because it was extinguishing the debt. Thereafter, the consumers would owe the debt to someone else.

It is a different proposition, however, if a consumer is required to pay at the time of the loan for a subsequent assignment to a third party. In that case, any assignment fee should be regarded as a finance charge.[68] It seems, therefore, that when a fee is imposed pursuant to some arrangement that follows the initial transaction, it is harder to show that the fee is imposed incident to the extension of credit.[69]

In determining whether a charge is imposed as a condition of granting credit, one must ask whether the lender required the consumer to pay the charge before it would extend credit.[70] If the charge is merely for the accommodation of the consumer, it is easier to find that it is not part of the finance charge. This situation usually arises, for example, with courier fees, when the lender is anxious to have payoffs executed as promptly as possible in order to avoid additional interest. When the consumer has a choice in the matter, the charge is hardly one that is imposed as a

66. *See id.* at 82; *see also* Veale v. Citibank, F.S.B., 85 F.3d 577, 579 (11th Cir. 1996).

67. The consumers had contended that TILA required the creditor to disclose any refinancing penalty. *See Pechinski*, 345 F.3d at 81. The regulation explains that a refinancing occurs "when an existing obligation . . . is satisfied and replaced by a new obligation undertaken by the same consumer." 12 C.F.R. § 226.20 (2007). Although the court referred only to the dictionary's definition of "refinancing," it stated that section 226.18 was consistent with that definition. *Pechinski*, 345 F.3d at 82.

68. *See* Brown v. Credithrift of Am. Consumer Disc. Co. (*In re* Brown), 106 B.R. 852, 858–59 (Bankr. E.D. Pa. 1989) (finding that fee imposed at closing for contemplated assignment constituted finance charge); Cheshire Mortgage Serv., Inc. v. Montes, 612 A.2d 1130, 1132 (Conn. 1992) (holding that the fee charged for recording future assignments was a finance charge); 12 C.F.R. pt. 226, supp. 1, cmt. 4(e)-(1)(ii); NAT'L CONSUMER LAW CTR., *supra* note 4, § 3.7.8.

69. Adamson v. Alliance Mortgage Co., 861 F.2d 63, 65–66 (4th Cir. 1988), *overruled on other grounds by* Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990); Stutman v. Chem. Bank, No. 94-Civ.-5013 (MBM), 1996 WL 539845, at *3 (S.D.N.Y. Sept. 24, 1996).

70. *See* First Acadiana Bank v. Fed. Deposit Ins. Corp., 833 F.2d 548, 550 (5th Cir. 1987); Yazzie v. Ray Vicker's Special Cars, Inc., 12 F. Supp. 2d 1230, 1232 (D.N.M. 1998); Brodo v. Bankers Trust Co., 847 F. Supp. 353, 356–57 (E.D. Pa. 1994); James Lockhart, Annotation, *What Constitutes "Finance Charge" Under § 106(a) of the Truth in Lending Act (15 U.S.C.A. § 1605 (a)) or Applicable Regulations*, 154 A.L.R. FED. 431 (1999).

condition of the extension of credit.[71] Nevertheless, this does not mean that the "incident to" and the "condition of" elements are one and the same. In *Veale v. Citibank, F.S.B.*, the courier fee was not incurred "incident to the extension of credit" because the consumers could have refused the Federal Express service and the creditor did not require it.[72] This emphasis on the voluntariness of the consumer's conduct tends to have little effect on the "incident to" prong, which for all intents and purposes is not dependent upon the consumer's approval of the charge. Therefore, even if a lender does not impose a fee as a condition in a particular case, it may still turn out to be "incident to" the grant of credit. That was certainly the case in *Pendleton v. American Title Brokers*, where the consumer obtained a loan by pawning her car title, but then the creditor leased the car back to her at ten percent of the loan.[73] Although the consumer did not have to enter into the lease-back arrangement in order to get the loan in the first place, the rental fee was nevertheless incident to the extension of the underlying credit.[74] It may fairly be said, therefore, that voluntariness of the consumer's action does not alone determine whether an item is a part of the finance charge.[75]

A fee that is imposed as part of a transaction is likewise not necessarily a part of the finance charge. For example, in *Matlock v. Atomic Pawn, Inc.*, a pawnbroker forced the consumer to pay a fee for a lost pawn ticket before the consumer could redeem her property or refinance the loan.[76] The court concluded that the pawnbroker did not impose the fee

71. Cowen v. Bank United of Tex., FSB, 70 F.3d 937, 943 (7th Cir. 1995) (finding courier fee not imposed as condition of loan when title company made its own decision as part of settling transaction); Scott v. Indymac Bank, FSB, No. 03-C-6489, 2005 WL 730961, at *2 (N.D. Ill. Mar. 28, 2005) (holding courier fee was not a finance charge if not required or kept by lender).

72. 85 F.3d 577, 579 (11th Cir. 1996).

73. 754 F. Supp. 860, 861–62 (S.D. Ala. 1991).

74. *Id*. at 864. The consumer decided to take the lease-back of the car, but she did not have to do so to obtain the loan. Furthermore, the rental rate was determined by the amount of the loan, thus linking it to the extension of credit. *See* 12 C.F.R., pt. 226, supp. 1, cmt. 17(c)(1)-18 (2007).

75. The Board discussed this concept of voluntariness when it amended Regulation Z in 1996 to indicate when a creditor can exclude debt cancellation fees from the finance charge. It did not want to exclude all voluntary charges from the finance charge and expressed the view that "[i]n the case of debt cancellation agreements . . . the voluntary nature of the arrangement does not alter the fact that debt cancellation coverage is a feature of the loan affecting the total price paid for the credit." Truth in Lending, 61 Fed. Reg. 49,237, 49,239 (Sept. 19, 1996).

76. No. 3:04-CV-323, 2005 WL 2456963, at *1 (E.D. Tenn. Oct. 5, 2005).

"as an incident to or a condition of the extension of credit."[77] The consumer had to pay the fee only because she could not produce the ticket at maturity, and the pawnbroker imposed it only because of the additional record keeping involved to accommodate lost tickets.[78] There was no link between the fee and the extension of credit because the consumer did not have to refinance her loan when she could not produce her ticket. This was akin to a charge for "actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence."[79]

III. TIMING AND FORM OF DISCLOSURES

A. Keeping the Disclosures

Because Truth in Lending is a disclosure statute, a creditor is expected to make the necessary disclosures before consummation of a credit transaction.[80] There is nothing unusual about that. After all, the objective of Truth in Lending is to make sure that the creditor informs the consumer about the essential details of the credit transaction before the consumer is contractually bound,[81] and that magical moment of commitment is determined not by Truth in Lending, but instead by state law.[82]

The regulation requires the creditor to give the consumer the disclosures in a form that the consumer may keep.[83] The Official Staff Commentary explains that this requirement does not require a creditor to give the consumer two separate copies of the disclosure statement before

77. *Id*. at *4.

78. *See id.*; *see also Pawn Broker's Lost Ticket Fee Is Not a Finance Charge*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., Nov. 2005, at 5.

79. *Matlock*, 2005 WL 2456963, at *4 (quoting 12 C.F.R. § 226.4(c)(2)). Note here that the defendant imposed the fee only if the consumer could not produce the ticket, a contingency that had nothing to do with the extension of credit. A consumer may find himself in a similar situation if he pays late or becomes delinquent. *See* 12 C.F.R. § 226.4(c)(2) (2007).

80. 12 C.F.R. § 226.17(b) (2007).

81. TILA expresses the purpose of Truth in Lending in this way:

> It is the purpose of [Truth in Lending] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601(a) (2000).

82. The Official Staff Commentary explains that "[w]hen a contractual obligation on the consumer's part is created is a matter to be determined under applicable law; Regulation Z does not make this determination." 12 C.F.R. pt. 226, supp. 1, cmt. 2(a)(13)-1 (2007). 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) (2007).

83. 12 C.F.R. § 226.17(a) (2007).

consummation.[84] It is enough for the creditor to give the consumer a copy of the contract with the disclosures to read and sign, and then give the consumer a copy to keep for himself once the consumer is obligated.[85] The Commentary advises that it is not enough for a creditor to show the consumer the document containing the disclosures before the consumer signs on the dotted line.[86] The consumer must be able to take possession of the document and review it.[87] But the difficulty lies in ensuring that the consumer has the opportunity to do exactly as the Commentary suggests. If the consumer has before him a single copy of a document with the disclosures, he may be in doubt about how to proceed. If he signs the document and the creditor then gives him a copy, it can fairly be said that he had a copy of the disclosures before the transaction was consummated. But that is not all that Truth in Lending requires. The disclosures must be in a form that the consumer may keep.[88] If the creditor presents the copy for the consumer's signature, intending to give the consumer an unsigned copy for the consumer's records once the transaction is consummated, it is questionable whether the creditor has met all the disclosure requirements. It is true that in this scenario, the consumer will have preconsummation disclosures, but it is not altogether clear that he will have them at the time and in a form that he may keep.

This was the problem that confronted the court in *Polk v. Crown Auto, Inc*.[89] In *Polk* the creditor explained the credit terms to the consumer, but did not give them to him in writing in a form that he could keep before consummation. The court thus had to decide whether the creditor had to make the disclosures before consummation in a form that the consumer could keep, or whether the creditor could make such disclosures orally before consummation and give the consumer written disclosures after consummation. The creditor thought that it could make disclosures in any form prior to consummation, but that it had to make written disclosures

84. *See* 12 C.F.R. pt. 226, supp. 1, cmt. 17(b)-3 (2007).
85. *See id*. The Official Staff Commentary gives an example of how this works: "A creditor gives a consumer a multiple-copy form containing a credit agreement and TILA disclosures. The consumer reviews and signs the form and returns it to the creditor, who separates the copies and gives one copy to the consumer to keep. The creditor has satisfied the disclosure requirement." *Id*.
86. *Id*.
87. *Id*.
88. 12 C.F.R. § 226.17(a).
89. 221 F.3d 691 (4th Cir. 2000).

in a form that the consumer could keep only after consummation.[90] It was a good try, but the court would not accept the creditor's argument that sections 226.17(a)(1) and 226.17(b) referred to different disclosures.[91] The court accepted the plain meaning of the regulation to be that the creditor must give written disclosures in the form dictated by subsection (a)(1) at the time identified in subsection (b).[92] This was a logical result, given the congressional intent to promote meaningful disclosure of credit terms so that consumers can assess their options in the marketplace.[93]

The creditor in *Polk* therefore complied with one part of the regulation while ignoring the other. The preconsummation presentation of the disclosure form to the consumer did not really give him any time to reflect on the terms of the transaction. One can only imagine the scene as the parties prepared to conclude the sale. The creditor probably wanted to make sure that the consumer understood the details of the loan and set about in earnest to explain every nuance of the deal. The terms must have been in writing; if not, the creditor would not have had a script with which to operate. No one could therefore accuse the creditor of not making written disclosures. It goes without saying that if a consumer has to sign the sales contract containing the Truth in Lending disclosures, then the consumer will have the disclosures before him, even if only for one second before consummation. But that is all that the regulation requires in subsection (b). Having satisfied that element, the creditor must then ensure that it has given disclosures to the consumer in a form that the consumer may keep.[94] If the creditor expects the consumer to return the signed document to it before it returns a copy to the consumer, then one can hardly say that the creditor has satisfied all requirements before consummation.

A determination about a creditor's disclosure obligation depends in large measure on who determines whether the consumer may keep the

90. *See id*. at 692.
91. *See id*.
92. *Id*.
93. *See* 15 U.S.C. § 1601(a) (2000).
94. Having an opportunity to read the disclosures is not the same thing as having an opportunity to keep them. The court in *Nigh v. Koons Buick Pontiac GMC, Inc.*, seemed more concerned with the consumer's reading opportunity. *See* Nigh v. Koons Buick Pontiac GMC, Inc., 143 F. Supp. 2d 535, 548 (E.D. Va. 2001), *aff'd*, 319 F.3d 119 (4th Cir. 2003), *rev'd on other grounds*, 543 U.S. 50 (2004). The consumer in *Nigh* signed the documents immediately because he thought he would lose the chance to buy the truck he wanted. *See id*. So it did not matter to him whether or not he could keep a copy of the disclosures. Some courts have viewed the "may keep" element in section 226.17(a) as not subject to any preconsummation requirement. *See* Padin v. Oyster Point Dodge, 397 F. Supp. 2d 712, 722 (E.D. Va. 2005); Haun v. Don Mealey Imports, Inc., 285 F. Supp. 2d 1297, 1305 (M.D. Fla. 2003). This interpretation takes the sting out of the requirement that the consumer should be left free to review the disclosures at his own pace.

credit document before consummation.[95] The expectation attributed to the regulatory language does not reflect the reality of everyday transactions. Surely a creditor does not anticipate that a consumer who has one copy of the credit document in front of him for signature will suddenly call for a delay in proceedings to contemplate the possibility of getting a better deal elsewhere, even if he understands the elements of the transaction that is near consummation. The "may keep" language should carry more weight than the Official Staff Commentary gives it.[96] But the Commentary is not alone in underestimating the importance of that phrase. In *Diaz v. Joe Rizza Ford, Inc.*, for example, the dealer used a three-copy form for the transaction.[97] The consumer signed the top copy and the dealer then gave her that copy while retaining the others.[98] The court saw no meaningful distinction between separating the copies before or after the consumer signed the document.[99] In the court's view, the consumer could have left with the unsigned document if she desired.[100] But it is clear that the creditor did not intend the consumer to keep the retail installment contract containing those disclosures. It was after all a three-copy form that contemplated a further exchange between the parties. The consumer only found out after signing what she was going to keep after consummation. Once the consumer signed, the creditor found it convenient to let her have her copy, without any limitation on her review. By then, of course, she was already committed to the transaction and there was no doubt then about her ability to keep what she had.[101]

---

95. Some courts tend to reject a connection between the form and timing requirements of Regulation Z. *See* Spearman v. Tom Wood Pontiac-GMC, Inc., 312 F.3d 848, 851 (7th Cir. 2002); *Nigh*, 143 F. Supp. 2d at 548; Queen v. Lynch Jewelers, LLC, 55 P.3d 914, 919–20 (Kan. Ct. App. 2002).

96. The Official Staff Commentary makes the point: "The disclosure requirement is satisfied if the creditor gives a copy of the document containing the unexecuted credit contract and disclosures to the consumer to read and sign; and the consumer receives a copy to keep at the time the consumer becomes obligated." 12 C.F.R. pt. 226, supp. 1, cmt. 17(b)-3 (2007). It is arguable that the Commentary distinguishes between "reading" the document and "keeping" the document. The regulation requires the consumer to have the opportunity to keep the document *before* consummation of the transaction and not merely at the time of consummation. *See id*. § 226.17(b).

97. 210 F. Supp. 2d 959, 960 (N.D. Ill. 2001).

98. *Id*.

99. *See id*. at 961.

100. *Id*.

101. The *Diaz* court was satisfied that the plaintiff "was informed, and was protected because she took away her copy." *Id*. at 960. But the taking by itself does not satisfy the requirement that the lender must satisfy the "may keep" element before consummation of the transaction. *See* 12 C.F.R. § 226.17(a), (b) (2007). It is advantageous to

The *Diaz* approach indicates that a creditor will meet the disclosure requirements if it shows the consumer the disclosures on the retail installment contract before the consumer signs, because the consumer always has a choice to defer consummation by leaving with the contract in hand.[102] If the disclosure obligation ends there, it is questionable whether the language "in a form that the consumer may keep" has any room to do its work. The drafters could have achieved this objective by simply requiring the creditor to make disclosures in writing to the consumer before consummation of the transaction, and the creditor could then comply merely by presenting a form to the consumer for signature. After all, once the disclosures are there in the contract document, the consumer should have nothing to complain about as long as he gets something to take away with him after the transaction.[103] Therefore, in order to give full measure to the additional language in the section, it is reasonable to impose an obligation on the creditor to put the consumer in possession and control of his own copy of the document before, not after, consummation, so that the consumer will understand that his review of the document is an entirely separate event that may or may not lead to consummation.[104]

---

the creditor to keep together all copies of the contract document containing the disclosures. It creates an opportunity for the creditor to shorten the ceremonial part of the transaction, while assuring the consumer that he will soon get a copy of the document. In *Cannon v. Metro Ford, Inc*., 242 F. Supp. 2d 1322, 1329 (S.D. Fla. 2002), the consumer alleged that the dealer deliberately covered up the disclosures with his hand and retained physical control of the documents. The consumer successfully resisted the dealer's motion to dismiss. *Id.* at 1330. The objection to separation of the consumer's copy before any signing occurs simply contributes to the lender's inability to emphasize the consumer's right to keep the copy that is in the consumer's hands. *See also* Cunningham v. H.A.S., Inc., 74 F. Supp. 2d 1157, 1168–69 (M.D. Ala. 1999) (denying summary judgment for dealer because of consumer's allegations that dealer covered up the disclosure form that consumer signed).

102. *See Diaz*, 210 F. Supp. 2d at 960.

103. In *Lozada v. Dale Baker Oldsmobile, Inc*., 197 F.R.D. 321 (W.D. Mich. 2000), the consumer signed the contract containing the disclosures, but did not get a copy until some weeks later. The court held that the consumers did not get a copy in a form that they could keep. *Id*. at 337. The *Diaz* approach would dictate a finding that the dealer had complied with the disclosure requirement. Following this interpretation, one would be unable to find any violation even if the dealer never gave the consumer a copy, because the preconsummation activity surrounding the consumer's signing would take for granted that the consumer could always walk away with the document if he wanted to. *See Diaz*, 210 F. Supp. 2d at 960.

104. The court said it best in *Walters v. First State Bank*, 134 F. Supp. 2d 778, 781 (W.D. Va. 2001): "Surely, the requirement of Regulation Z, as interpreted in *Polk*, that the consumer be given written disclosures, in a form that she can keep, means more than that the consumer must be shown the disclosures on the original credit contract prior to signing it." *See also* Kilbourn v. Candy Ford-Mercury, Inc., 209 F.R.D. 121, 125 (W.D. Mich. 2002); *Lozada*, 197 F.R.D. at 336–37.

In *Nigh v. Koons Buick Pontiac GMC, Inc.*, the court read *Polk* as dealing only with the timing requirements, but not with the form of the disclosures.[105] The *Nigh* court saw no objection to the disclosures being made in the retail installment contract between the parties, and to support its position it harkened back to *Polk* on the ground that the court there did not see any problem with the disclosures being made in that way.[106]

The *Nigh* court thought it was unclear from the facts in *Polk* whether the sales contract contained all the proper disclosures when the parties signed it.[107] This characterization of the transaction allowed the *Nigh* court to focus on timing at the expense of form, thus leaving the impression that the *Polk* court had no objection to the inclusion of the disclosures in the sales contract. It is clear from *Polk* that the creditor "explained" the credit terms to the consumer, the parties then signed the sales contract with those terms included therein, and the creditor then gave the consumer a copy of the contract.[108] Significantly, the creditor in *Polk* conceded that it had not made the disclosures to the consumer before consummation in a form that the consumer could keep.[109] This concession flowed no doubt from the creditor's recognition of its preconsummation, oral explanation of the credit terms as the true moment of disclosure. Having met its obligation to make its preconsummation disclosures pursuant to section 226.17(b), the creditor then had to worry about section 226.17(a) concerning the need for written disclosures in a form that the consumers could keep.

The creditor had hoped that the court in *Polk* would read subsection (a) independently of subsection (b). In this way, a creditor could make preconsummation disclosures which did not have to be in writing, as long as it made written disclosures later in a form that the consumer could keep. This was not to be, for the court decided that "written disclosure in the form specified in subpart (a) must be provided to the consumer at the time specified in subpart (b)."[110] This formulation left

105. 143 F. Supp. 2d 535, 548 (2001), *aff'd* 319 F.3d 119 (4th Cir. 2003), *rev'd on other grounds*, 543 U.S. 50 (2004).
106. *See id*.
107. *See id*.
108. Polk v. Crown Auto, Inc., 221 F.3d 691, 691 (4th Cir. 2000).
109. *See id*. at 692.
110. *Id*. The court followed the plain meaning of the regulation. *Id*. The plain meaning rule is explained this way: "[The rule] generally means when the language of the statute is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning." 2A SINGER, *supra* note 50, § 46:01.

no doubt that this was more than a timing problem. The court was uncomfortable with the creditor's strategy of presenting the sales contract containing the disclosures for the consumer's signature after the creditor had gone through the ritual of an oral explanation. The preconsummation explanation seemed to constitute disclosure in some form, but the disappointment was that the consumer had nothing to take away with him.[111] The writing requirement came later, but in the creditor's scheme of things, the disclosures had already been made. When the creditor presented the completed contract for signature, there was no inkling at that moment that the parties contemplated a second opportunity for the consumer's reflection about the terms that the creditor had already spent time explaining. Even the creditor admitted as much in *Polk*, for the question for the court was whether, in light of the creditor's concession, the creditor had nevertheless satisfied Regulation Z by making the original disclosures orally and then following them up with disclosures in a form that the consumer could keep after consummation.

B. Separating the Copies Before or After Consummation

One court has taken the view that "there is no meaningful distinction between separation of a consumer's copy from the other copies of a credit contract containing the TILA disclosures before or after signature."[112] It is easy to disagree with that statement if one thinks that the Truth in Lending scheme requires meaningful disclosure.[113] If it does not matter whether the creditor drives home the point that the consumer has his own copy of the disclosures for preconsummation review, then one will find no meaningful distinction in separating the consumer's copy. It would be acceptable, therefore, for the creditor to remain passive and merely hand over all the copies to the consumer in a perfunctory manner for his signature, without any fanfare and with the objective of bringing the transaction to a prompt conclusion. It is only when the creditor gives the consumer the signed copy that the consumer will understand that he has a copy in a form that he may keep. It is open to question whether this is a satisfactory solution to the lurking ambiguity when a creditor says nothing about the consumer's right to keep the unsigned document.[114]

111. This is why the "disclosures" mentioned in the timing paragraph (b) must be construed as the same "disclosures" mentioned in paragraph (a)(1). *Compare* 12 C.F.R. § 226.17(a)(1) (2007), *with id*. § 226.17(b).

112. Queen v. Lynch Jewelers, LLC, 55 P.3d 914, 920–21 (Kan. Ct. App. 2002).

113. The purpose of Truth in Lending is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a) (2000).

114. If the creditor is deemed to fulfill its obligation at that point, and the consumer then signs the multicopy document, the creditor should be able to keep all the copies for

The Commentary's approach, relied upon by several cases, is to place the burden on the consumer to show that the creditor will not allow him to leave with the document if he decides not to sign it. In other words, there is a presumption that as a matter of principle the creditor will not object to the consumer's taking away the unsigned copy for review. There is no good reason why this should be a matter of conjecture, particularly in light of the congressional objective to make the consumer keenly aware of the terms of the transaction that he is considering. Although a court should give deference to the administrative agency that is charged with enforcing a statute,[115] the Official Staff Commentary itself observes that "[i]t is not sufficient for the creditor merely to show the consumer the document containing the disclosures before the consumer signs and becomes obligated."[116] But the Commentary goes on to emphasize that the consumer must be free "to take possession of and review the document in its entirety before signing."[117] The relevant inquiry, therefore, should be about the consumer's freedom to take possession of the document. Surely the creditor should use the document to alert the consumer to the fact that it intends to give the consumer free rein in deciding whether to move forward with the transaction. The creditor can achieve this not only by giving the consumer his own copy prior to signing, but also by including language that is more conspicuous than any other item in the disclosures that confirms the consumer's freedom to keep the document for review before signing it.[118]

---

itself and not be obligated to give the consumer anything. The "may keep" requirement applies to the preconsummation period, because once the consumer signs, he is committed. In a 2002 revision of the Commentary, the Board explained that "[t]he disclosure requirement is satisfied if the creditor gives a copy of the document containing the unexecuted credit contract and the disclosures to the consumer to read and sign; and the consumer receives a copy to keep at the time the consumer becomes obligated." 12 C.F.R. pt. 226, supp. 1, cmt. 17(b)-3 (2007). The consumer should have a copy to keep before he becomes obligated. Courts have generally emphasized that the consumer received a copy of the disclosures after consummation of the transaction. *See* Spearman v. Tom Wood Pontiac-GMC, Inc., 312 F.3d 848, 851 (7th Cir. 2002); Randolph v. Joe Holland Chevrolet, Inc., No. Civ.A. 2:00-1132, 2005 WL 2428164, at *4 (S.D. W. Va. Sept. 30, 2002). This is not really important if the preconsummation events determine whether the consumer has a right to keep a copy of the disclosures.

115. *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980) (mandating that courts give deference to the Board's regulations when interpreting TILA).

116. 12 C.F.R. pt. 226, supp. 1, cmt. 17(b)-3 (2007).

117. *Id*.

118. There is nothing unusual about this kind of disclosure. For example, a creditor must disclose the "annual percentage rate" and the "finance charge" more conspicuously than other disclosures except the creditor's identity. 12 C.F.R. § 226.17(a)(2) (2007).

The disclosure obligation raises another question about consummation: When does it occur? The regulation defines consummation as "the time that a consumer becomes contractually obligated on a credit transaction"[119] and state law determines when such an obligation arises.[120] The regulation identifies the consumer's commitment as the relevant event, because that is the time when the consumer is subject to the hazards of the creditor's failure to comply with the disclosure requirements. It is then that the creditor has it within its power to bind the consumer to the terms of the contract, and so the consumer should be advised about those terms before signing the contract, even though the lender's commitment may come later.[121] If it were otherwise, a creditor could give a consumer inaccurate disclosures, have the consumer commit himself, and then revise the disclosures before closing the transaction.[122]

C. The Contingent Contract

There is a variation on the consummation theme that merits attention. Sometimes the contract between the parties is contingent upon the consumer's success in obtaining financing. That was the situation in *Bragg v. Bill Heard Chevrolet, Inc.*, where the purchase contracts contained not only a condition precedent relative to financing, but also a provision that neither party would be bound until the credit terms were approved by the parties.[123] Despite this language, the Eleventh Circuit held that "in a financing agreement containing a condition precedent where the condition of obtaining financing is within the exclusive control of the seller and third-party lender, consummation occurs when the consumer signs the contract."[124]

This decision was a little surprising, given the Commentary's position that state law determines when a consumer becomes contractually obligated.[125] In this case, neither party was contractually bound under state law until the dealer obtained financing for the consumer.[126] Nevertheless, the court found that consummation had occurred, because it rejected the plain meaning of the regulation in order to avoid a result that it thought

---

119. *Id*. § 226.2(a)(13).
120. 12 C.F.R. pt. 226, supp. 1, cmt. 2(a)(13)-1 (2007).
121. *See* Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119, 124 (4th Cir. 2003), *rev'd on other grounds*, 543 U.S. 50 (2004); Bryson v. Bank of N.Y., 584 F. Supp. 1306, 1317 (S.D.N.Y. 1984); Madewell v. Marietta Dodge, Inc., 506 F. Supp. 286, 288–89 (N.D. Ga. 1980).
122. *Nigh*, 319 F.3d at 124.
123. 374 F.3d 1060, 1067 (11th Cir. 2004).
124. *Id*. at 1068.
125. *See* 12 C.F.R. pt. 226, supp. 1, cmt. 2(a)(13)-1 (2007).
126. *See Bragg*, 374 F.3d at 1067.

would be inconsistent with the policies of Truth in Lending.[127] In doing so, however, the court conferred a role on Truth in Lending not intended by Congress. The court's approach implied that TILA created substantive rights and duties for the parties, and that the court did not have to look to state law for a determination of the parties' contractual obligations. It is difficult to see how else the court could have arrived at its conclusion about the consumer's commitment.

The court was worried that a creditor would be protected in giving disclosures after the consumer had signed a conditional financing agreement. But disclosures that follow such a signing do not follow consummation if state law like that in *Bragg* is to be respected. The disclosures precede consummation because the consumer is not yet bound to the terms of the arrangement.[128] There is something to be said for giving a consumer an opportunity to consider all financing options. But in trying to do so in *Bragg*, the Eleventh Circuit ignored both the Official Staff Commentary and the state law on consummation.[129] This was not an argument about whether the consumer had preconsummation disclosures that he could keep, but rather whether consummation had occurred at all. If the parties are not to be bound until a condition is fulfilled, then there is no

127. *See id*. at 1068 (citing Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988)). While it is true that a statute should not be read literally when that would run counter to its purposes, 2A SINGER, *supra* note 50, § 46:07, the court's quarrel should not have been with Regulation Z, but rather with Florida law that recognizes the effect of a condition precedent. Truth in Lending did not confer any substantive rights on the consumer with respect to consummation. Allowing a lender to give disclosures after the consumer signs an agreement that is subject to a condition precedent will not create any more or less problems than allowing a lender to give the disclosures immediately before the consumer signs an agreement that has no conditions. *See Disclosures Required Though Consumer's Signature Does Not Contractually Obligate Him*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., Aug. 2004, at 4.

128. The focus must be on the consumer's commitment. A distinction must be drawn between a condition precedent to a lender's obligation and that relating to a consumer's obligation. *See* Gaona v. Town & Country Credit, 324 F.3d 1050, 1054 (8th Cir. 2003); Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119, 124 (4th Cir. 2003), *rev'd on other grounds*, 543 U.S. 50 (2004); O'Brien v. Aames Funding Corp., 374 F. Supp. 2d 764, 767 (D. Minn. 2005); 10 LAPINE, *supra* note 61, § 174.02.

129. The Official Staff Commentary stipulates that "[w]hen a contractual obligation on the consumer's part is created is a matter to be determined under applicable law; Regulation Z does not make this determination." 12 C.F.R. pt. 226, supp. 1, cmt. 2(a)(13)-1. Under Florida law, neither party was liable under the contract until the dealer had assigned the contract to a third party. *See Bragg*, 374 F.3d at 1067; King v. King Motor Co. of Ft. Lauderdale, Inc., 900 So. 2d 619, 623 (Fla. Dist. Ct. App. 2005); Huskamp Motor Co. v. Hebdon, 104 So. 2d 96, 98 (Fla. Dist. Ct. App. 1958).

consummation.[130] If a creditor is allowed to give disclosures after the consumer signs a conditional contract, it will not impair the consumer's chance to compare other financing opportunities. Under present conditions, a creditor can offer its disclosures to the consumer up until the very moment that a consumer signs a binding document. So, applying the plain meaning rule in this context does not put the consumer in any worse position than with an unconditional contract.[131] If a consumer will not have an adequate opportunity to consider competing financing offers from other lenders under the conditional arrangement, then one can say the same thing about the normal financing transaction. The creditor may have little or no time for reflection in either event. The objective is not to change the transaction when consummation occurs, but rather to ensure that the consumer knows that consummation is imminent and that he is agreeing to the terms he sees in front of him.

It is understandable that the court in *Bragg*[132] relied on the Fourth Circuit's decision in *Nigh v. Koons Buick Pontiac GMC, Inc.*, which involved an unfunded financing agreement. In *Nigh*, the consumer committed himself to the transaction and all that remained was for the dealer to sign off at its sole discretion if it could make an assignment to a lender.[133] The completion of the transaction remained solely within the dealer's control and did not affect the consumer's commitment. The consumer's signature signaled his obligation to perform and the consumer could not thereafter change the financing terms even though the dealer had not yet agreed to the contract.[134] The situation in *Bragg* was a little different in that neither party was bound until both parties approved the terms of credit.[135] The *Bragg* court did not reject the role of the condition

130. It has been said that "[a] court in construing an unambiguous statute must view the law as it is and not as it might wish it to be." 2A SINGER, *supra* note 50, § 46:02. The court in *Bragg* did not really explain how the plain meaning of the Truth in Lending statute was at variance with the policy of the statute. It should have ignored the plain meaning only if the result produced by applying the plain meaning rule was inconsistent with the policies underlying the statute. *See id.* § 46:02. The court's quarrel was really with the state law governing conditions. Truth in Lending governs disclosure and not the time when the consumer's commitment attaches. *See Disclosures Required Though Consumer's Signature Does Not Contractually Obligate Him*, *supra* note 127, at 5.

131. *See Disclosures Required Though Consumer's Signature Does Not Contractually Obligation Him*, *supra* note 127, at 5. In the same way that a creditor can give the consumer disclosures shortly before the consumer signs the documents, so too a consumer can use the time between the signing of the conditional documents and the funding of the transaction to engage in some comparison shopping.

132. *Bragg*, 374 F.3d at 1066.

133. *See Nigh*, 319 F.3d at 122.

134. The court emphasized that "Nigh, having signed the contracts and turned them over to Koons Buick, was committed to the transaction and obliged to perform upon counter-signature by Koons Buick." *Id.*

135. *See Bragg*, 374 F.3d at 1067.

precedent under Florida law, but instead rejected a reading of Regulation Z that it thought was inconsistent with Truth in Lending's goals.[136]

When the Fourth Circuit returned to the consummation issue in *Gibson v. LTD, Inc.*,[137] it remained true to the principles embraced in *Nigh*, while expressing satisfaction that the *Bragg* court had applied the *Nigh* court's approach to consummation.[138] In *Gibson*, the consumer could cancel the contract only "'if the seller agree[d] or for legal cause.'"[139] The document left no doubt that the consumer was bound and that he could avoid his obligation only if the dealer was unable to obtain outside financing "on terms acceptable to [the dealer]."[140] Unlike the contracts in *Bragg*, the contract in *Gibson* did not give the consumer any power to approve the financing that the dealer was seeking, and therefore there was a stronger argument in favor of consummation. The consumer could be released from liability only with the dealer's consent, or if no financing was available on the dealer's terms.

IV. THE RIGHT OF RESCISSION

A. Electing Not to Cancel

One of the important rights that Truth in Lending confers on a consumer is the right to rescind a credit transaction in which the lender acquires a security interest in the consumer's principal dwelling.[141] The consumer must exercise that right before midnight of the third business day after consummation of the transaction, delivery of notice of the right of rescission, or delivery of all material disclosures, whichever comes last.[142] If the lender fails to meet its disclosure obligations, the consumer's right of rescission will continue for up to three years after consummation of the

136. *See id*. at 1068. The court's approach puts the emphasis not on consummation, but rather on the consumer's execution of the document. A shift from consummation to signing may be desirable, but it flies in the face of the regulation's definition of "consummation." *See* 12 C.F.R. § 226.2(a)(13) (2007). It is the time that the consumer becomes contractually obligated that matters.

137. 434 F.3d 275 (4th Cir. 2006).

138. *See id*. at 282.

139. *Id*. at 278 (alteration in original).

140. *Id*. at 282.

141. *See* 15 U.S.C. § 1635 (2000); 12 C.F.R. § 226.23 (2007).

142. *Id.* § 1635(a); 12 C.F.R. § 226.23(a)(3). Regulation Z defines "material disclosures" as "the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in § 226.32 (c) and (d)." 12 C.F.R. § 226.23(a)(3) n.48.

transaction.[143] A lender can be quite surprised when a consumer rescinds long after the lender thinks that a transaction has been consummated. Sometimes a lender will seek reassurance that the consumer will not rescind by having the consumer sign a statement to that effect at the closing, postdating it at the same time to give some legitimacy to the document.[144] After all, the consumer only has three days in the first instance to rescind if everything is in order, and the consumer's contemporaneous election not to cancel serves as a protection for the lender that wants to wrap up a transaction without having to worry that the consumer may change his mind. Nevertheless, a lender is obligated to disclose "clearly and conspicuously" to the consumer the right of rescission and the procedure for realizing that right, and this premature election not to cancel usually runs afoul of this requirement.[145]

That was the situation in *Rodash v. AIB Mortgage Company*, when the consumer signed a separate statement acknowledging her receipt of the notice of the right to rescind, but also at the same time confirming her election not to cancel the transaction.[146] The ploy was destined to fail, for the court recognized that the lender's presentation of the so-called waiver form on the day of the transaction was a pure contradiction of the rationale for the three-day rescission period.[147] It deprived the consumer of the opportunity to reflect on the transaction. It seemed that the premature election cancelled out the acknowledgment of the notice of the right to rescind and the placement of these two competing messages could only have confused the consumer.[148] She may have thought that this was just part of the ritual and that she had to sign the election notice if she hoped to consummate the transaction.

This election mechanism does not really give a lender any advantage. A lender may think that it is expediting the transaction, but the borrower's certificate of nonrescission cannot be recognized as a waiver because Regulation Z sanctions a waiver only when the consumer has a bona fide personal emergency that requires an immediate extension of credit.[149] In

---

143. 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3).

144. *See* Rodash v. AIB Mortgage Co., 16 F.3d 1142, 1146 (11th Cir. 1994); Wiggins v. Avco Fin. Servs., 62 F. Supp. 2d 90, 95 (D.D.C. 1999); Apaydin v. Citibank Fed. Sav. Bank (*In re* Apaydin), 201 B.R. 716, 718–19 (Bankr. E.D. Pa. 1996).

145. For example, if the election form states that the rescission period has expired, this is inconsistent with the lender's simultaneous disclosure about the three-day rescission period. *See Wiggins*, 62 F. Supp. 2d at 96; *Apaydin*, 201 B.R. at 723; Mount v. LaSalle Bank Lake View, 926 F. Supp. 759, 765 (N.D. Ill. 1996).

146. *Rodash*, 16 F.3d at 1145.

147. *Id.* at 1147.

148. *Id.* at 1146.

149. *See* 12 C.F.R. § 226.23(e) (2007). The consumer's waiver must describe the emergency underlying the waiver and the consumer cannot use printed forms for the purpose. *Id.* § 226.23(e)(1). This is intended to avoid abusive practices, while at the

that event, the consumer must describe the emergency in a dated, handwritten statement.[150] In *Rodash*, the lender presented a preprinted form containing boilerplate language that had no relation to the borrower's financial situation, and that was not designed to drive home the seriousness of the decision about a waiver.[151] If the objective is to secure a quick disbursement of funds once the three-day period expires, the lender can do so by having the consumer certify that he has not cancelled the transaction, and then simultaneously disbursing the funds to him.[152] The *Rodash* scenario did not leave any room for the borrower to change her mind, and if perchance she had some reservations about the transaction the day after she signed, she might have been deterred from taking any action, knowing full well what she had signed. These contrasting statements, both appearing on the same page, did not add up to clear disclosure.[153]

A creditor's placement of an acknowledgment of receipt of the notice on the same page as a certificate of confirmation that the consumer has not rescinded does not automatically lead to a violation. After *Rodash*, the Eleventh Circuit had another opportunity to consider a similar scenario in *Smith v. Highland Bank*.[154] This time the notice of the right to cancel contained not only the consumer's acknowledgment of receipt, but also a certificate of confirmation relating to noncancellation of the transaction.[155] Although the certificate of confirmation and the acknowledgment of receipt were on the same page, they were in separate paragraphs and

same time making allowance for genuine cases of emergency. *See* 1 PANNABECKER, *supra* note 48, ¶ 6.03[5].

150. *See* 12 C.F.R. § 226.23(e)(1); *see also* Mills v. Home Equity Group, Inc., 871 F. Supp. 1482, 1485–86 (D.D.C. 1994) (holding that the attempted release of Truth in Lending claims as part of settlement claim was ineffective to waive right of rescission).

151. *See Rodash*, 16 F.3d at 1145 & n.2.

152. The lender in *Morris v. The Lomas & Nettleton Co*. succeeded with its quick disbursement strategy. 708 F. Supp. 1198, 1206 (D. Kan. 1989). The court recognized that "[t]he purpose of signing the election not to rescind portion of the form prior to the expiration of the three days was to allow the defendant to disburse the funds quickly after the expiration of the three-day period." *Id*. The court did not recognize the consumer's signing as a waiver, but merely as a predated statement of an election not to rescind, because the lender disbursed the funds after the three-day period had expired. *Id*.

153. *See Rodash*, 16 F.3d at 1147. Both TILA and Regulation Z require the creditor to make clear and conspicuous disclosure of the consumer's right to rescind. *See* 15 U.S.C. § 1635(a) (2000); 12 C.F.R. § 226.23(b)(1).

154. 108 F.3d 1325 (11th Cir. 1997).

155. *Id*. at 1326.

were to be signed separately.[156] However, in *Smith* the form clearly indicated that the consumers were not to sign the confirmation until the three-day rescission period had elapsed, and the certificate of confirmation was dated several days after the acknowledgment of receipt.[157] This arrangement was very different from that in *Rodash*, where the consumer signed the election not to cancel on the same date as the loan closing, thus leaving no doubt that she wanted to waive her right to rescind ahead of time.[158] Furthermore, in *Smith* there were provisions for two separate signatures, one acknowledging the consumer's receipt of the notice of her rescission right, and the other indicating that the consumer had not rescinded.[159] In *Rodash*, on the other hand, the consumer's single signature covered both the acknowledgment and the confirmation.[160] Therefore, although a lender could remove all doubt about the relationship between an acknowledgment of receipt and a confirmation of nonrescission by dealing with them in separate statements and postponing presentation of the latter until the expiration of the rescission period, the court in *Smith* made the point that it was unnecessary to extend *Rodash* to accommodate that situation.[161]

The *Smith* court seemed to be on the right track in holding that the use of a form like the certificate of confirmation involved there was not a violation per se.[162] But when the transaction goes beyond that by requiring the consumer's signature in advance of the expiration of the rescission period, then the creditor is sowing the seeds of confusion by creating doubts in the consumer's mind about the right of rescission. It is a contradiction in terms for the creditor to give a notice about rescission and then to seek the consumer's advance election not to rescind.

In *Adams v. Nationscredit Financial Services Corp*., the confirmation form warranted that "more than three business days [had] passed since

156. *Id*. at 1327.
157. *Id*.
158. *See Rodash*, 16 F.3d at 1146.
159. *See Smith*, 108 F.3d at 1327.
160. *See Rodash*, 16 F.3d at 1146.
161. The *Smith* court exercised restraint in favor of the lender this time around as a reaction to the seemingly harsh *Rodash* decision that characterized certain routine fees as part of the finance charge. Following *Rodash*, Congress gave its own reaction to the harshness of *Rodash* by enacting certain amendments to the TILA. *See* Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 271. Congress overrode a number of judicial decisions with these amendments, but it did not deal specifically with an election not to cancel. One might surmise that its failure to respond to that issue indicated its willingness to go along with the *Rodash* ruling on that point, but nevertheless the Eleventh Circuit deemed it necessary to restrict *Rodash* to its facts, thus sending a message that it wanted to exercise restraint in light of the congressional reaction to *Rodash*. *See* NAT'L CONSUMER LAW CTR., *supra* note 4, § 6.4.3.8.
162. *See Smith*, 108 F.3d at 1327 n.1.

receipt of the Notice of Right to Cancel . . ." and further warranted that the consumer had not rescinded the transaction.[163] Although the statement was untrue, consumers would still be confused about whether they still had a right to rescind. This so-called warranty of no rescission that accompanied the notice of the right of rescission could hardly be seen to promote the clarity that the statute demanded. In *Adams*, the lender's actions were no less blameworthy simply because the confirmation did not bear a date. The form did not even provide a line for the date. That missing element only served to accentuate the confusion that would ensue from the document.[164]

This practice of having a consumer sign both forms at the closing is objectionable because a consumer may be misled into thinking that he can no longer rescind once he has signed the confirmation of nonrescission.[165] The form that a lender provides to accommodate a consumer's election not to cancel is both "objectively false and internally inconsistent."[166] A lender usually places the confirmation and the notice of the right of rescission in the same document to produce a kind of waiver for the consumer. Of course, Regulation Z prescribes the format for a waiver and this mechanism is not an effective substitute for the formal requirements of a true waiver.[167] Nevertheless, the proximity of the two different statements leaves the consumer with the impression that he must sign on the dotted line if he wants to consummate the transaction. This is what the creditor relies on to persuade the consumer to complete the transaction.

Once a consumer rescinds a transaction, he cannot thereafter revive it by merely signing a "notice of confirmation" that is intended to reflect the parties' interest in consummating a new loan. In *Chapman v. Mortgage*

163. 351 F. Supp. 2d 829, 834 (N.D. Ill. 2004).

164. The court observed that "[t]he average borrower who was asked to sign such a statement at the closing would be confused about whether he was still entitled to a three-day 'cooling off' period." *Id.*

165. *See* Rodrigues v. Members Mortgage Co., Inc., 323 F. Supp. 2d 202, 209 (D. Mass. 2004); Latham v. Residential Loan Ctrs. of Am., Inc., No. 03-C-7094, 2004 WL 1093315, at *4 (N.D. Ill. May 6, 2004); Wiggins v. Avco Fin. Servs., 62 F. Supp. 2d 90, 96–97 (D.D.C. 1999).

166. *Wiggins*, 62 F. Supp. 2d at 96. It was contradictory for the lender to tell the borrower that the "cooling off" period had passed and that she could no longer rescind. *See id.*

167. Regulation Z stresses the significance of a waiver by requiring the signature of all consumers who are entitled to rescind. *See* 12 C.F.R. § 226.23(e) (2007). For example, if two spouses use their home as collateral, both must sign the waiver. 12 C.F.R. pt. 226, supp. 1, cmt. 23(e)-2 (2007); *see also* NAT'L CONSUMER LAW CTR., *supra* note 4, § 6.2.9.1.

One Corp., the lender thought that the consumer's notice of confirmation had done the trick, but the court held that TILA made no provision for the revival of a rescinded loan.[168] In any event, the postrescission discussions between the parties about a new loan did not lead to any written documentation, and because the new loan contemplated different terms, it could hardly be a revival of the old loan.[169] Furthermore, even if a common law revival was possible, the parties could accomplish it only by mutual consent, and there was still work to be done on the new terms.[170]

Nor did this "revival" concept work for the lender in another context. In *Stump v. WMC Mortgage Corp.*, the consumer accepted the loan proceeds after rescinding the loan transaction and the lender argued that the consumer should be estopped from enforcing his rescission.[171] The thinking was that the consumer's conduct in accepting the proceeds had ratified or "re-awakened" the loan and the consumer could not be heard thereafter to rescind the loan.[172] But the court in *Stump* recognized the consumer's rescission as voiding the contract, making ratification thereof legally impossible.[173]

If a creditor receives a rescission notice from a consumer, the creditor is well advised not to ignore it. If the creditor does not agree with the consumer's rescission, its best course of action is to bring its own lawsuit to settle the matter.[174] This approach would certainly avoid the possibility of a forfeiture resulting from the creditor's inaction.[175] After

168. 359 F. Supp. 2d 831, 833 (E.D. Mo. 2005).
169. *See id.*
170. A rescinded contract can be revived only by mutual consent. *See* 13 SARAH HOWARD JENKINS, CORBIN ON CONTRACTS § 67.8 (2003); 17B C.J.S. *Contracts* § 432 (1999).
171. No. Civ.A. 02-326, 2005 WL 645238, at *10 (E.D. Pa. Mar. 16, 2005).
172. *See id.*
173. *Id.*
174. *See* Abel v. Knickerbocker Realty Co., 846 F. Supp. 445, 450 (D. Md. 1994) (holding the creditor liable for damages for not taking steps to terminate security interest or at least for not seeking equitable relief before a court); Aquino v. Pub. Fin. Consumer Disc. Co., 606 F. Supp. 504, 509 (E.D. Pa. 1985) (holding that the creditor was free to petition the court to determine rights and obligations of the parties under 15 U.S.C. § 1635(b) (1982)); Lynch v. GMAC Mortgage Corp. of Iowa (*In re* Lynch), 170 B.R. 26, 31 (Bankr. D.N.H. 1994) (finding that "defendant could have mitigated its loss had it moved to protect its rights in a court of competent jurisdiction within the twenty-day statutory period").
175. *See* Gill v. Mid-Penn Consumer Disc. Co., 671 F. Supp. 1021, 1027 (E.D. Pa. 1987), *aff'd*, 853 F.2d 917 (3d Cir. 1988); Jackson v. US Bank Nat'l Ass'n Tr. (*In re* Jackson), 245 B.R. 23, 34 (Bankr. E.D. Pa. 2000); Ralls v. Bank of N.Y. (*In re* Ralls), 230 B.R. 508, 524 (Bankr. E.D. Pa. 1999); Family Fin. Servs. v. Spencer, 677 A.2d 479, 488 (Conn. App. Ct. 1996). *But see* Gerasta v. Hibernia Nat'l Bank, 575 F.2d 580, 584 (5th Cir. 1978); Mayfield v. Vanguard Sav. & Loan Ass'n, 710 F. Supp. 143, 145–46

all, a court can use its modification power to respect a lender's security interest, while working out an equitable solution in the context of the consumer's rescission.[176] If the lender has not received the consumer's rescission notice, it will become aware of a problem when the consumer seeks to enforce his rights. In that event, the lender will have to act on the rescission unless it has a basis for resisting.[177] But even then, the lender should not be liable for its failure to respond within the statutory twenty-day period if it did not receive the rescission notice, and a court should not be reluctant to use its modification power in that event.[178]

If the lender has received the consumer's rescission notice, it should not use dilatory tactics in dealing with the consumer's communication. Regulation Z requires the lender to act within twenty days after receiving a notice of rescission; thus a consumer may feel that he has no alternative to a lawsuit if he gets no response. In *Velazquez v. Homeamerican Credit, Inc.*, the lender responded within twenty days, assuring the consumer that it had "initiated the rescission process," and promising an itemized statement of the rescission amount.[179] The lender did not keep its promise, and then the consumer sued not only for a declaratory judgment concerning rescission, but also for damages.[180] The lender failed in its motion to dismiss the consumer's complaint, and with good reason.[181] Although the Commentary indicates that the lender need not complete the rescission

---

(E.D. Pa. 1989); Bilal v. Household Fin. Corp. III (*In re* Bilal), 296 B.R. 828, 840 (Bankr. D. Kan. 2003).

176. Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1142 (11th Cir. 1992); Brown v. Nat'l Permanent Fed. Sav. & Loan Ass'n, 683 F.2d 444, 447–48 (D.C. Cir. 1982); Rudisell v. Fifth Third Bank, 622 F.2d 243, 254 (6th Cir. 1980); Moazed v. First Union Mortgage Corp., 319 F. Supp. 2d 268, 272 (D. Conn. 2004); Ray v. Citifinancial Inc., 228 F. Supp. 2d 664, 668 (D. Md. 2002); Stanley v. Household Fin. Corp. III (*In re* Stanley), 315 B.R. 602, 612 (Bankr. D. Kan. 2004). *But see* Celona v. Equitable Nat'l Bank, 98 B.R. 705, 707–08 (E.D. Pa. 1989); Williams v. BankOne, Nat'l Ass'n, Tr. (*In re* Williams), 291 B.R. 636, 661 (Bankr. E.D. Pa. 2003).

177. *See* Belini v. Washington Mutual Bank, 412 F.3d 17, 20 (1st Cir. 2005); *Abel*, 846 F. Supp. at 448; Bell v. Parkway Mortgage, Inc. (*In re* Bell), 309 B.R. 139, 154 (Bankr. E.D. Pa. 2004). *But cf.* Webster v. Centex Home Equity Corp. (*In re* Webster), 300 B.R. 787, 802 (Bankr. W.D. Okla. 2003) (refusing to allow statutory damages for rescission violation when creditor promptly sought declaratory judgment).

178. *See* Wilson v. Homeowners Loan Corp., 263 F. Supp. 2d 1212, 1219 (E.D. Mo. 2003); NAT'L CONSUMER LAW CTR., *supra* note 4, § 6.6.4.1.

179. 254 F. Supp. 2d 1043, 1044 (N.D. Ill. 2003).

180. *See id*.

181. *See id.* at 1048.

procedure within the twenty-day period,[182] the lender cannot merely appease the consumer with a statement that the procedure has begun and then sit idly by. It must do more than that. In *Velazquez* the twenty-day period expired without the lender doing anything more, and the consumer waited patiently for some response.[183] But if there was any doubt about what the lender had in mind, its initial letter removed that doubt with the lender's promise to release its mortgage when the consumer paid the rescission amount.[184] The lender conditioned its performance on the consumer's return of the mortgage funds, and ignored the statutory prescription to carry out the consumer's rescission.[185] Furthermore, it was well nigh impossible for the consumer to fulfill the lender's conditions if the lender did not see fit to provide an itemized statement of the rescission amount, as it had promised. The consumer therefore had standing to pursue her claim.[186]

Despite the lender's inaction, the court was keen to point out that its ruling did not mean that the lender would forfeit the loan proceeds.[187] This was certainly in keeping with the judicial trend to avoid forfeiture

182. With respect to the creditor's action to terminate the security interest, the Commentary makes this point: "The 20-day period for the creditor's action refers to the time within which the creditor must begin the process. It does not require all necessary steps to have been completed within that time, but the creditor is responsible for seeing the process through to completion." 12 C.F.R. pt. 226, supp. 1, cmt. 23(d)(2)-3 (2007).

183. The creditor notified the consumer on December 17, 2002, that it was agreeing to rescind the consumer's loan. The creditor's letter indicated: "You will receive a letter shortly containing an itemized statement of the rescission amount. Upland will release its mortgage simultaneously with, or otherwise upon receipt of, payment of the rescission amount." *Velazquez*, 254 F. Supp. 2d at 1044. When the consumer filed suit on January 14, 2003, she still had heard nothing further from the creditor. *Id*.

184. The creditor promised to release its mortgage when it received payment. *See id*.

185. The court emphasized that the creditor could not unilaterally impose its will on the rescission process by making the consumer pay before it rescinded the loan. *See id*. at 1047. The consumer had given signs of its unwillingness or inability to perform. *See id*. If the creditor disrupted the consumer's right to rescind, it could have sought a judicial declaration of its rights and obligations. *See* Aquino v. Pub. Fin. Consumer Disc. Co., 606 F. Supp. 504, 508 (E.D. Pa. 1985); *see also* Lynch v. GMAC Mortgage Corp. of Iowa (*In re* Lynch), 170 B.R. 26, 31 (Bankr. D.N.H. 1994) (finding that "the defendant could have mitigated its loss had it moved to protect its rights in a court of competent jurisdiction within the twenty-day statutory period").

186. *Velazquez*, 254 F. Supp. 2d at 1047. The court compared the situation in *Velasquez* with that in *Personius v. Homeamerican Credit, Inc.*, 234 F. Supp. 2d 817, 819 (N.D. Ill. 2002), where the creditor actually produced the itemized statements it promised to the consumer and did so within ten days. *Velazquez*, 254 F. Supp. 2d at 1047. Nevertheless, the consumer in *Personius* filed suit two days after requesting rescission, that is, within the statutory twenty-day period allowed for the creditor's performance. *Personius*, 234 F. Supp. 2d at 819. The court in *Personius* denied the consumer standing to sue for rescission in light of these factors. *See id*. at 820.

187. *See Velasquez*, 254 F. Supp. 2d at 1047.

whenever possible,[188] but the court was also mindful of its authority to modify the rescission procedure if that was necessary to protect the lender.[189] But the lender could not unilaterally decide to impose its own will on the consumer, particularly when the consumer had not given any indication of his unwillingness to perform. If a lender is worried about a consumer's ability or willingness to perform,[190] it should seek a court's intervention to delay a release of the mortgage until the consumer repays the amount that is due on rescission.

B. Ambiguity in Language

When a consumer rescinds a transaction, the creditor must "return any money or property that has been given to anyone in connection with the transaction . . . ."[191] The consumer is not liable for any finance charge when he rescinds, and the creditor has to refund to the consumer any amount that is recognized as a finance charge.[192] The creditor must also refund all other charges even if the creditor is allowed to include them in the amount financed, rather than the finance charge.[193] If the consumer incurred costs outside the credit transaction such as for a building permit or a zoning variance, the creditor is not responsible for refunding these costs.[194] If the charge is a lock-in fee, however, the creditor must refund

---

188. *See* Gerasta v. Hibernia Nat'l Bank, 575 F.2d 580, 584 (5th Cir. 1978) (allowing recovery of damages for violation but not forfeiture of loan proceeds); Mayfield v. Vanguard Sav. & Loan Ass'n, 710 F. Supp. 143, 148 (E.D. Pa. 1989) (holding that where there is no fraud by lender and no tender of proceeds by consumer, consumer must return loan proceeds to lender); Bell v. Parkway Mortgage, Inc. (*In re* Bell), 314 B.R. 54, 60–61 (Bankr. E.D. Pa. 2004) (refusing to order forfeiture where lender could not tell from documentation that the consumer did not get the required rescission notice); Bilal v. Household Fin. Corp. III (*In re* Bilal), 296 B.R. 828, 839 (Bankr. D. Kan. 2003) (holding that consumer's only remedy for lender's failure to tender is damages and lender does not forfeit right to recover amounts due from consumer).

189. *See Velasquez*, 254 F. Supp. 2d at 1047.

190. *See id*.

191. 12 C.F.R. § 226.23(d)(2) (2007).

192. *See* Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 705 (9th Cir. 1986); Milbourne v. Mid-Penn Consumer Disc. Co. (*In re* Milbourne), 108 B.R. 522, 532 (Bankr. E.D. Pa. 1989).

193. For example, if the creditor meets certain criteria, it may include credit insurance premiums in the amount financed, rather than in the finance charge. See 12 C.F.R. § 226.4(d)(1) (2007). Certain security interest charges may also be excluded from the finance charge, but they must also be refunded to the consumer. *See id*. § 226.4(e).

194. 12 C.F.R. pt. 226, supp. 1, cmt. 23(d)(2)-2 (2007); NAT'L CONSUMER LAW CTR., *supra* note 4, § 6.6.4.2.

it if the consumer rescinds. The creditor in *Jones v. E*Trade Mortgage Corp.*[195] had an agreement with the consumer to refund the lock-in fee only if the creditor did not approve the loan because of credit problems.[196] The creditor wanted to treat the lock-in fee agreement as a separate transaction that was not related to the right of rescission under the loan.[197] The Ninth Circuit rejected the creditor's argument because the lock-in agreement was part of the application for credit and was simply one of the several steps in obtaining a loan.[198] It also did not matter that the consumer could not have obtained a refund if the loan did not close.[199]

In *Sampanetti v. E*Trade Mortgage Corp.*, the court took a different tack by recognizing that the refund language in the lock-in agreement applied only when the loan did not close.[200] It was left to speculation, therefore, whether the refund issue related to postclosing events. The creditor had dutifully used the Board's model rescission form, and no more could have been expected of it on that score.[201] It remained, therefore, for the court to explain that the rescission and refund provisions do not apply when a loan has not yet closed.[202] It seemed unlikely that there was a contradiction between the lock-in agreement and the notice of the right to rescind. The lock-in agreement dealt only with rescission of an application, whereas the notice related to a loan after it closed. It is

---

195. 397 F.3d 810, 814 (9th Cir. 2005).

196. The lender's application loan checklist provided that the lender "would verify property value, property conditions . . . and certain other information," and if the lender did not approve the loan for closing, the lock-in fee would be refunded. *Id.* at 813–14.

197. *See id*. at 813.

198. *See id*.; NAT'L CONSUMER LAW CTR., *supra* note 4, § 6.6.4.2; *Problems with the Non-Refundable Lock-in Fee*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., May 2005, at 1, 1–2.

199. The court made short shrift of the creditor's argument by stating that it was "irrelevant to this case." *Jones*, 397 F.3d at 813.

200. No. 02-C-3513, 2002 WL 31478269, at *1 (N.D. Ill. Nov. 5, 2002). The lock-in agreement stated in pertinent part:

> If you provide [ETrade] with all documentation requested of you (within 3 calendar days) to complete the underwriting review of your loan application . . . and, following such review, [ETrade] does not approve your loan for closing, based on income qualifying or credit, the lock-in fee will be refunded to you. If your loan fails to close for any other reason ([sic] including your decision to cancel the application, then the lock-in fee will not be refunded to you.

Id. at *1 (alterations in original).

201. *See id*. at *2. The Board has published certain model disclosure forms that creditors can use for their closed-end transactions. Among them is the rescission model form. *See* 12 C.F.R. pt. 226, app. H-8 (2007).

202. *Sampanetti*, 2002 WL 31478269, at *2. One usually thinks of the right of rescission as related to the closing or consummation of the transaction. It is one of the events that must occur for a consumer to be able to rescind. *See* 12 C.F.R. § 226.23(a)(3) (2007). In *Sampanetti*, the court was dealing with a lock-in fee relating to the consumer's application, not consummation. *See Sampanetti*, 2002 WL 31478269, at *1.

arguable, therefore, that Truth in Lending does not require the refund of a lock-in fee if a loan fails to close, but that does not affect a consumer's right to a refund if the loan closes and the consumer rescinds the transaction.[203]

A consumer's complaint about ambiguity and contradiction may arise in other contexts. In *Hamm v. Ameriquest Mortgage Co.*, the consumer was displeased because the lender did not adequately inform her of her right of rescission.[204] It was the lender's generosity that led to this complaint, because the lender gave the consumer not only the statutory notice explaining the three-day period for rescission, but also a separate form that provided for a one-week cancellation period in accordance with the lender's policy.[205] The one-week form reiterated the consumer's right to rescind under federal law, but then explained in a separate paragraph the lender's policy to give one week for rescission, so that a consumer would have more time to review the documents.[206] It was not clear how the one-week form negated the statutory three-day notice, but the consumer tried to convince the court of the inevitable confusion that would ensue by exposing the consumer to both.[207] It was to no avail in the court's view, because an ordinary customer would understand that the one-week cancellation option was merely a goodwill gesture that did not detract from the regulatory language.[208]

Nevertheless, there may be more to this than meets the eye. The court in *Jones v. Ameriquest Mortgage Co.* recognized the problems that might ensue from a creditor's generosity in giving a consumer a longer period to rescind.[209] Once the consumer goes beyond the three-day period, there is no guarantee that he will be entitled to remedies like damages or attorney's fees.[210] This was sufficient for the court in *Jones* not to grant summary judgment to either party.[211] The two rescission notices could confuse the

203. *See Problems with the Non-Refundable Lock-in Fee*, *supra* note 198, at 1.
204. No. 05-C-227, 2005 WL 2405804, at *1 (N.D. Ill. Sept. 27, 2005).
205. *See id*.
206. *See id*. at *3.
207. *See id.* at *2.
208. This was enough for the court to grant summary judgment to the creditor. *Id*. at *4. The court held that "no reasonable trier of fact could conclude that Ameriquest's disclosures regarding the right of recision were inadequate under TILA." *Id*. at *3.
209. No. 05-CV-0432, 2006 WL 273545, at *7 (N.D. Ill. Jan. 31, 2006).
210. *See id*.
211. In denying summary judgment, the court observed:

> A reasonable fact finder, then, could conclude that, for an ordinary consumer, the One-Week form detracts from the clarity of the federal form in that the One-Week form purports to be a mere extension of the TILA right but does not

borrower about the consequences of choosing one method of rescission over the other, for if the consumer decided to rescind sometime between the third day and the seventh day in accordance with the creditor's policy, she might place herself at a disadvantage if she could not benefit from the statutory benefits that would accrue under normal circumstances.[212]

If a creditor wishes to be more liberal about rescission than the regulation demands, it should make it quite clear that the consumer will continue to enjoy all the rights and privileges conferred on him by Truth in Lending, and that the creditor is merely extending the time for the consumer to act. The lender must be careful not to call the clarity of its disclosure into question by informing the consumer of the three-day period for rescinding and then giving an expiration date for rescission that is inconsistent with that period. The creditor's objective must be to avoid conflicting dates that may lead to a finding that the creditor has not given clear and conspicuous disclosures.[213]

C. Termination of the Right

If a lender fails to live up to its responsibility, the right of rescission can continue for three years.[214] However, the right will expire before that time if the consumer sells the property.[215] The "sale" contemplated by the statute occurs at the time of contract, rather than later at the time

---

> explain the differences, if any, in the rescission rights. Indeed, a fact finder is needed to determine whether those differences exist.

Id. at *8.

212. A similar situation arose in *Williams v. Empire Funding Corp*., 109 F. Supp. 2d 352, 355 (E.D. Pa. 2000), where the creditor notified the consumer that he could cancel within one day as allowed under state law, but also gave the rescission notice required under Truth in Lending for canceling within three days. The court concluded that the two different periods that the creditor mentioned for rescission rendered the TILA rescission notice unclear and therefore extended the rescission period for three years. *Id.* at 361; *see also* Porter v. Mid-Penn Consumer Disc. Co. (*In re* Porter), 961 F.2d 1066, 1077 (1992) (finding the H-8 form used by the creditor did not give consumer clear notice of the right to rescind in a refinancing transaction); Gibbons v. Interbank Funding Group, 208 F.R.D. 278, 284 (N.D. Cal. 2002) (finding that rescission form was misleading because creditor used the wrong form); NAT'L CONSUMER LAW CTR., *supra* note 4, § 6.4.3.7. *But see* Haw. Cmty. Fed. Credit Union v. Keka, 11 P.3d 1, 13 (Haw. 2000) (finding that no prejudice results to the consumer when the creditor gives the consumer more than the statutory three-day period to rescind).

213. Regulation Z requires a creditor to make disclosures "clearly and conspicuously." 12 C.F.R. § 226.17(a)(1) (2007). A creditor may have difficulty not only by providing two different rescission periods, but also by committing other errors such as failing to fill in the expiration date for rescission. *See* Semar v. Platte Fed. Sav. & Loan Ass'n, 791 F.2d 699, 704 (9th Cir. 1986); Williamson v. Lafferty, 698 F.2d 767, 768 (5th Cir. 1983); Reynolds v. D & N Bank, 792 F. Supp. 1035, 1038 (E.D. Mich. 1992).

214. 12 C.F.R. § 226.23(a)(3) (2007).

215. *Id*.

of conveyance.[216] Setting the earlier contract time as the cut-off for rescission carries out the congressional policy of avoiding a cloud on title.[217] A later date can have a negative impact on the rights of purchasers and lead to litigation. Adopting the earlier time avoids these possibilities and settles matters for the parties to the transaction.[218]

The result should not be any different if a consumer rescinds and then sells the property. In that event, a consumer cannot continue to press for rescission, because the sale terminates the right to rescind. Therefore, when the consumers in *Meyer v. Ameriquest Mortgage Co.* sold their home while their rescission lawsuit was pending, the sale terminated the consumers' right to rescind.[219] The *Meyer* court made it clear that the *Hefferman* pronouncement—that the consumer in the latter case should have sent her rescission notice before contracting to sell her property—did not mean that if an actual sale occurred, a rescission notice that preceded the sale would be valid.[220] The *Meyer* court thought it necessary to clarify the point that the time when a consumer rescinds does not control for all intents and purposes. So, a presale rescission notice will cease to be effective once a sale occurs.[221]

The Official Staff Commentary advises that "a foreclosure sale [will] terminate an unexpired right to rescind."[222] There is authority for the position that a sale is not complete until the consumer's right to redeem has expired,[223] but in *Marschner v. RJR Financial Services, Inc.*, the court

216. *See* Hefferman v. Bitton, 882 F.2d 379, 384 (9th Cir. 1989); Dailey v. Leshin, 792 So. 2d 527, 530 (Fla. Dist. Ct. App. 2001).

217. *See* 1972 FED. RES. BD. ANN. REP. ON TRUTH IN LENDING, *reprinted in* 119 CONG. REC. 4596–97 (1973).

218. *See Dailey*, 792 So. 2d at 531–32; Weber v. Langholz, 46 Cal. Rptr. 2d 677, 681 (Ct. App. 1995).

219. 331 F.3d 1028, 1029 (9th Cir. 2003), *amended by* 342 F.3d 899 (9th Cir. 2003).

220. *See* Meyer v. Ameriquest Mortgage Co., 342 F.3d 899, 903 (9th Cir. 2003).

221. *See id.* The *Meyer* court treated as dictum the suggestion of the court in *Hefferman v. Bitton*, 882 F.2d 379 (9th Cir. 1989), that the rescission notice that the consumer sent prior to contracting for sale of the property would have been effective. *Id.* at 900.

222. 12 C.F.R. pt. 226, supp. 1, cmt. 23(a)(3)-3 (2007).

223. *See* Bestrom v. Bankers Trust Co. (*In re* Bestrom), 114 F.3d 741, 745 (8th Cir. 1997); Walker v. Contimortgage (*In re* Walker), 232 B.R. 725, 732 (Bankr. N.D. Ill. 1999). *But cf.* Worthy v. World Wide Fin. Servs. Inc., 347 F. Supp. 2d 502, 507–08 (E.D. Mich. 2004) (holding that right of rescission terminated even though redemption period had not ended); Aames Funding Corp. v. Mores, 110 P.3d 1042, 1049–50 (Haw. 2005) (finding that nonjudicial foreclosure sale made deed valid and not affected by attempted rescission thereafter).

explained that the consumer's right of redemption was not an interest in land, but rather a legal right created by statute.[224] Therefore, the foreclosure sale cut off the consumer's right to rescind. But the court also pointed out that, even if the consumer's right of rescission continued through the redemption period, the consumer did not exercise his right in time because his filing an action for rescission with the court before the redemption period expired did not constitute notice to the lender of the consumer's rescission.[225] That notice came days later when the consumer served the lender with a summons in the suit for rescission.[226]

Regulation Z recognizes that the consumer's extended right to rescind can expire even before three years have gone by if the consumer transfers all his interest or when he sells the property.[227] This suggests that sales and transfers are two distinct events, and the Commentary states that "[a] sale or transfer of the property need not be voluntary to terminate the right to rescind."[228] It was this language that led the court in *Worthy v. World Wide Financial Services, Inc.*[229] to conclude that, although a foreclosure sale may not always transfer all of a consumer's interest because of the redemption feature, it always terminates the consumer's right of rescission.[230] The court would not ignore the Board's reasonable construction of the regulation and preferred to give an ordinary meaning to the phrases "foreclosure sale" and "transfer of all of the consumer's interest."[231] It was another victory for judicial deference to administrative interpretation, for the Commentary left little doubt about the effect of a foreclosure sale.[232]

A consumer's right of rescission may be called into question in another context: when a consumer tries to rescind a mortgage after paying it off. In an early post-TILA case, the Ninth Circuit denied the consumer the right to rescind after the consumer refinanced her loan, on the ground that there was nothing to rescind.[233] Nevertheless, both the Sixth Circuit[234] and the Seventh Circuit[235] have recently disagreed with the Ninth Circuit by emphasizing that there is a difference between merely rescinding a

---

224. 382 F. Supp. 2d 918, 921 (E.D. Mich. 2005).
225. *Id*. at 922.
226. *Id*.
227. 12 C.F.R. § 226.23(a)(3) (2007).
228. 12 C.F.R. pt. 226, supp. 1, cmt. 23(a)(3)-3 (2007).
229. 347 F. Supp. 2d 502, 507–08 (E.D. Mich. 2004).
230. *See id*. at 507; *see also Foreclosure Auction Is a "Sale" Ending Right to Rescind*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., Mar. 2005, at 4.
231. *Worthy*, 347 F. Supp. 2d at 507.
232. *See id*.
233. King v. California, 784 F.2d 910, 913 (9th Cir. 1986). The consumer was trying to rescind a loan that she had already refinanced. *See id*. Thus, the lien resulting from that loan was superseded by the later loan. *See id*.
234. Barrett v. JP Morgan Chase Bank, N.A., 445 F.3d 874, 880 (6th Cir. 2006).
235. Handy v. Anchor Mortgage Corp., 464 F.3d 760, 765–66 (7th Cir. 2006).

security interest and rescinding a transaction.[236] Although a rescission will void a security interest,[237] it also requires a lender to return any money or fees generated by the transaction.[238] Therefore, it is not only the security interest that is in play here, but also the fees and other charges that the consumer may have paid on consummation of the transaction.

Although a consumer will normally have three days after consummation to rescind, that period can extend as long as three years if the lender does not give the consumer a notice of the right to rescind, or if the lender makes a mistake with its material disclosures.[239] Nevertheless, even this extended right to rescind will end during that three-year period if the consumer transfers the interest in his home or sells the property, whichever happens first.[240] There is nothing in TILA or Regulation Z that allows another event, like a pay-off or refinancing of the transaction, to extinguish the consumer's right of rescission.[241] The consumer's payment of the loan will result in a termination of the lender's mortgage lien, but it will have no impact on the consumer's right to seek reimbursement of the charges that he could have avoided if the loan had not closed in the first place.[242] This is why the Sixth Circuit emphasized in *Barrett v. JP Morgan*

---

236. *See id.* at 765; *Barrett*, 445 F.3d at 880.

237. 15 U.S.C. § 1635(b) (2000); 12 C.F.R. § 226.23(d)(1) (2007). Although the statute and the regulation both suggest that the security interest becomes void automatically when a consumer rescinds, there is considerable authority for a court to modify the rescission procedures and condition the removal of the lender's lien on terms that are just and equitable. *See, e.g.*, Am. Mortgage Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007) (holding that "unilateral notification of cancellation does not unilaterally void the loan contract" and that unconditional rescission was inappropriate where borrowers could not repay loan); Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1172–73 (9th Cir. 2003) (holding that security interest becomes void only when "the right to rescind is determined in the borrower's favor" and that a court may consider rescission on borrower's tender); Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1142 (11th Cir. 1992) ("[A] court may impose conditions that run with the voiding of a creditor's security interest."); Ruiz v. R & G Fin. Corp., 383 F. Supp. 2d 318, 322 (D.P.R. 2005) (conditioning rescission on the borrower's tender of loan proceeds).

238. *See* 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d)(1)–(2).

239. 12 C.F.R. § 226.23(a)(3).

240. *Id*.

241. Regulation Z provides: "If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all the consumer's interest in the property, or upon sale of the property, whichever occurs first." *Id.*

242. It is a matter of returning to the status quo ante. *See* Handy v. Anchor Mortgage Corp., 464 F.3d 760, 765–66 (7th Cir. 2006); Barrett v. JP Morgan Chase Bank, 445 F.3d 874, 880 (6th Cir. 2006); Quenzer v. Advanta Mortgage Corp. USA, 288 B.R. 884, 888 (D. Kan. 2003). This is one way of protecting the consumer's right to recover his

Chase Bank, N.A. that the right of rescission applies to the transaction itself, and not merely to the security interest.[243] So, even though a lender may no longer have a security interest, the consumer still has the right to seek a return of finance charges and other costs in the transaction if the consumer is to enjoy all the incidents of the extended right of rescission.[244]

V. THE CHANGE IN TERMS

A. Change in Fees or APR

It is not unusual for a lender to include in its credit agreements a provision that allows it to change the terms thereof at a later time. But a lender must express this right to change the terms of the credit agreement in a way that does not detract from disclosures that reflect the legal obligation of the parties.[245] The disclosures must be clear and conspicuous, so that a consumer will have the opportunity to make a meaningful comparison between the credit terms available from various lenders.[246] When the disclosures indicate that a consumer will have to pay no annual fee once he signs up for a credit card, they play a significant role in attracting new customers to the lender. If the lender tries later to impose an annual fee, the customer may find that there is a provision somewhere in the credit card agreement that allows the lender to do so.

A consumer found herself in that predicament in *Rossman v. Fleet Bank (R.I.) National Ass'n*.[247] The lender sent the consumer an information leaflet that indicated there was no annual fee attached to the credit card.[248] Nevertheless, the lender listed other fees outside the disclosure box and also indicated that it reserved the right to change the benefit

transaction charges when the consumer's right of rescission continues for three years because of the lender's failure to comply, regardless of whether there has been a refinancing or not.

243. *Barrett*, 445 F.3d at 880; *see also* NAT'L CONSUMER LAW CTR., *supra* note 4, 6.3.2.3 (Supp. 2006).

244. *See Barrett*, 445 F.3d at 880; Pacific Shore Funding v. Lozo, 42 Cal. Rptr. 3d 283, 291 (Ct. App. 2006); *see also Two Appellate Courts Say That TILA Rescission Right is NOT Extinguished Upon Refinancing*, NCLC REPS., CONSUMER CREDIT & USURY EDITION, Mar.–Apr. 2006, at 17.

245. Regulation Z requires that "[d]isclosures shall reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c) (2007).

246. *See generally id.* § 226.5(a) (describing general disclosure requirements for open-end credit).

247. 280 F.3d 384 (3d Cir. 2002).

248. *See id.* at 387. The consumer information leaflet contained a table of basic credit card information in the so-called Schumer Box, named in honor of Representative (now Senator) Schumer, who was the principal sponsor of the House bill that led to the amendment of the Truth in Lending Act. *See* Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, § 2, 102 Stat. 2960, 2960–66.

features of the card at any time.[249] When the consumer received her credit card agreement, it contained the following provision: "No annual membership fee will be charged to your account."[250] However, the agreement also contained a change-in-terms provision that the lender used later to impose an annual fee.[251] The issue was whether the lender had violated the Act by misleading consumers with its "no-annual fee" credit card. The answer to that question depended on the meaning of the cardholder agreement. If the agreement did not allow the "no annual fee" pledge to be changed before the end of the first year, the lender's disclosure was satisfactory. If the agreement allowed such a modification, then the disclosure constituted a violation, and the only way for that to be determined was for the court to remand the case for the district court's consideration.

If the cardholder agreement gave the bank the right to impose an annual fee, the lender's solicitation materials were misleading. A reasonable consumer could read the solicitation language as rejecting an annual fee for at least one year.[252] The consumer should expect to have a year's use of the card without paying any fee, and therefore the lender's statement to the contrary was misleading. In the court's view, the lender's use of the "no annual fee" terminology was not a clear and conspicuous disclosure that permitted the lender to assess a fee before one year had expired.[253] Although the lender did not have an obligation to disclose the change-in-terms provision under the Act, it had an obligation to disclose annual fees and the "no annual fee" statement was misleading with respect to the duration of the offer.[254] Thus, if the cardholder agreement permitted the

249. *See Rossman*, 280 F.3d at 388.
250. *Id*.
251. *Id*.
252. *See id*. at 394. Professor Epstein read that result as "an eminently sensible effort to make commercial sense of an agreement, by using the term 'annual' in the disclosure form to benchmark the duration of the promise." Richard A. Epstein, *Behavioral Economics: Human Errors and Market Correction*, 73 U. CHI. L. REV. 111, 126 (2006).
253. *See Rossman*, 280 F.3d at 394. The court viewed the agreement as ambiguous at best because "[i]nterpreting the statement with an implied annual term [was] as natural as interpreting it with no such term." *Id*. Such ambiguity should be resolved in the consumer's favor because the Act should be construed liberally as a consumer protection statute because of its remedial nature. Roberts v. Fleet Bank, 342 F.3d 260, 266 (3d Cir. 2003); Begala v. PNC Bank, Ohio, N.A., 163 F.3d 948, 950 (6th Cir. 1998); Ellis v. GMAC, 160 F.3d 703, 707 (11th Cir. 1998); *see also* Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998).
254. There is a difference between having an obligation to disclose a change-in-terms provision and an obligation to disclose annual fees. *See* 15 U.S.C. § 1637(c)(1)(A)(ii)(I) (2000); 12 C.F.R. § 226.5a(b)(2) (2007).

lender to assess a fee before one year had gone by, the lender had an obligation to clarify the issue if it hoped to meet Truth in Lending requirements.[255]

On the other hand, if the agreement did not permit the lender to impose a fee, the original disclosure would have been consistent with the subsequent agreement and therefore would not have violated the Act.[256] There would be nothing misleading under such circumstances because the disclosure would have reflected the terms of the account that the lender was offering. This is why the court in *Rossman* remanded for a determination about the false or misleading nature of the disclosure. It all depended on the meaning of the agreement.

A change-in-terms provision can also lead to other difficulties. If a lender intends at the time of its disclosure to impose a fee later, it is questionable whether the lender should be free from liability simply because the agreement did not contemplate an annual fee. In a credit card solicitation, the disclosures which the lender gives to the consumer usually reflect the terms covered by the agreement between the parties. A consumer would not expect the lender to make certain disclosures, but then not advise the consumer that the disclosed terms would not last very long.[257] The

---

255. In *Rossman* the solicitation disclosure indicated that the lender had the right to change the card's benefit features. *See Rossman*, 280 F.3d at 388. The disclosure also contained a list of benefits, such as free rental car insurance and free year-end account summary, but said nothing about other features like lack of an annual fee. *See id.* at 394 n.10. All of this information was provided outside the Schumer Box and the lender's right to change any of the so-called benefits did not give a consumer any clue that an annual fee was covered by the benefits language.

256. In *Demando v. Morris*, 206 F.3d 1300 (9th Cir. 2000), the credit card company originally offered the consumer a permanent, fixed rate and later tried to increase it through a change-in-terms clause contained in the agreement. The court concluded that the notice of the rate change violated TILA because it disclosed a rate that was not permitted under the agreement. *Id.* at 1303. In *Rossman*, the consumer did not claim that the letter about the change in terms itself violated TILA. The TILA claim was viable only if the agreement between the parties allowed the lender to impose an annual fee. *See Rossman*, 280 F.3d at 395. The determination about the false or misleading nature of the "no-annual fee" promise depended on an evaluation of that part of the agreement that the no-annual fee statement purported to disclose. *See id*. The *Rossman* court read the lender's language as at least preventing the lender from imposing any fee for a year. *See id*. at 394; *see also* Epstein, *supra* note 252, at 126.

257. It has been said that these change-in-terms provisions detract from Truth in Lending's purpose of providing effective disclosure of credit terms. Many consumers probably fail to grasp the meaning of these provisions. *See* NAT'L CONSUMER LAW CTR., THE COST OF CREDIT § 11.7.2.4 (3d ed. 2005). In construing a change-in-terms provision one court took the following view:

> The Change in Terms provision is reasonably limited to terms previously contemplated by the original agreement, so long as cardholders do not accept the unilateral change by continuing to use their cards. Otherwise, credit card holders would find themselves in an Orwellian nightmare, trapped in agreements that can be amended unilaterally in ways they never envisioned.

intention not to extend credit on the disclosed terms puts the consumer in an untenable position. In the classic bait-and-switch situation, a consumer may be able to detect that the terms which a lender initially proposed are not the same that it is asking the consumer to accept once consummation approaches.[258] A consumer has the last clear chance to reject the transaction before consummation and thus stop the lender in its tracks before the damage has been done.[259] At least in such a case, a consumer has little to complain about once the lender makes the disclosures before consummation.

On the other hand, when a consumer enters into a contract with the lender without knowing that a change in the annual fee is imminent, he is at a serious disadvantage if he commits without being aware of the lender's intentions.[260] When the change occurs, the consumer may be heavily in debt to the lender and may not be able to pay off his debt immediately to avoid new terms that the lender knew was in the offing, but that the consumer did not anticipate. The Official Staff Commentary recognizes that, when a card issuer offers fees that are reduced or waived for a certain period, it must disclose the fee that will apply indefinitely, and

---

Perry v. FleetBoston Fin. Corp., 2004 WL 1508518, at *14 (E.D. Pa. July 6, 2004) (footnote omitted).

258. In *Clark v. Troy & Nichols Inc.*, 864 F.2d 1261 (5th Cir. 1989), the court recognized the bait-and-switch possibilities but did not see Truth in Lending as providing a remedy. The court observed that "[t]he fact that [the lender] may not have intended to loan money under the stated terms does not make [its] disclosures with respect to the stated terms inaccurate." *Id*. at 1264. There is no Truth in Lending violation in the "spot delivery" transaction where a dealer enters into a sales contract with a consumer at a low interest rate, knowing full well that the consumer will not qualify for the low rate, but nevertheless giving the consumer possession of the car in anticipation of qualifying the consumer for a higher rate once the original credit application is rejected. *See* Janikowski v. Lynch Ford, Inc. 210 F.3d 765, 769 (7th Cir. 2000). Nevertheless, there is a potential for abuse in spot delivery transactions. *See* Coleman v. Gen. Motors Acceptance Corp. 220 F.R.D. 64 n.10 (M.D. Tenn. 2004); Rucker v. Sheehy Alexandria, Inc., 228 F. Supp. 711, 719 (E.D. Va. 2002); Mayberry v. Ememessay, 201 F. Supp. 2d 687, 695 (E.D. Va. 2001).

259. The *Rossman* court distinguished *Clark v. Troy & Nichols*, 864 F.2d 1261 (5th Cir. 1989), this way:

> *Clark* was a classic bait-and-switch case. The plaintiff there was first attracted by a deceptive offer. Having obtained his audience, the lender attempted to switch the offer to a set of terms more favorable to itself and less favorable to the borrower. All of this occurred *before* the consummation of an agreement. Clark was able to, and chose to, refuse the switch based on accurate disclosures.

Rossman, 280 F.3d at 397 (emphasis added).

260. The deception about the lender's intentions may be even more troublesome than inaccurate disclosures. A consumer cannot get into the lender's mind to ascertain the true state of affairs. *See Clark*, 864 F.2d at 1266 (Thornberry, J., dissenting).

may disclose introductory rates only if it also indicates the period for which such rates are applicable.[261] If the lender has an obligation to set out the applicable rates in this situation, the same rule should apply when the lender harbors secret intentions to apply a fee where there was none before. It is surely misleading for a card issuer to solicit a consumer with a "no annual fee" or a low-rate pledge, and then promptly implement its secret strategy through a change-in-terms provision.[262]

Another example of the mischief caused by such a provision came in *Roberts v. Fleet Bank (R.I.)*.[263] This time the disclosure box—otherwise known as the Schumer Box[264]—in the solicitation materials assured the consumer of a 7.99% APR with the prospect of a change only if the consumer failed to meet any repayment requirements or he closed the account.[265] The cardholder agreement which the consumer later received repeated the same information in one provision, but in another stipulated that the creditor reserved the right to change the terms of the agreement at any time.[266] The question was whether the bank had clearly and conspicuously disclosed its right to change the APR, given the inconsistency between the information about the APR in the solicitation material and the bank's disclosure of its right to change the APR.

In reversing the district court and remanding for further proceedings, the court recognized that there was a material question of fact as to whether the bank had misled the consumer with its solicitations, and thus failed to live up to its responsibility to provide clear and conspicuous disclosures.[267] A reasonable consumer could conclude that the bank

261. *See* 12 C.F.R. pt. 226, supp.1, cmt. 5a(b)(1)1-5 (2007).

262. It has been said that "these expansive change-in-terms provisions deprive consumers of any 'benefit of bargain' and thus undermine the TILA's purpose in ensuring effective disclosure." Carolyn Carter et al., *The Credit Card Market and Regulation: In Need of Repair*, 10 N.C. BANKING INST. 23, 49 (2006). The authors go on to suggest that changes in terms should not be allowed in credit card contracts. *Id.* at 51. In some cases consumers are at the mercy of the creditor because state law may allow a creditor to change the terms of the agreement even without a change-in-terms clause. *See* NAT'L CONSUMER LAW CTR., *supra* note 257, § 11.7.2.4 (citing DEL. CODE ANN. tit. 5, § 952(a) (2005)).

263. 342 F.3d 260 (3d Cir. 2003).

264. For an explanation of the Schumer Box, see *id.* at 263 n.1; Greisz v. Household Bank, 8 F. Supp. 2d 1031, 1039 n.3 (N.D. Ill. 1998); NAT'L CONSUMER LAW CTR., *supra* note 4, § 5.4.2.2 & n.190.

265. *Roberts*, 342 F.3d at 263.

266. *Id.* at 264.

267. *Id.* at 269. Congress had hoped to encourage clear and transparent disclosures in the credit card industry by enacting the Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, § 2, 102 Stat. 2960, 2960–66. The Senate Report indicated as follows:

> It is estimated that U.S. consumers will receive over 2,400,000,000 solicitations for credit cards in 1987. Unfortunately, far too many of them do not disclose the basic cost information about the card. By law, such information need not

could change the APR only under the two specific conditions identified in the disclosure, and thus there was a question of fact about the adequacy of the bank's disclosures amidst conflicting language elsewhere that the bank could change the terms at any time. It is true that the bank could not legally include the change-in-terms provision in the disclosure box, but the question was whether the bank had properly disclosed the APR, and not whether it had properly disclosed that provision.[268]

Although Truth in Lending's requirements of clarity and conspicuousness apply to disclosures in the initial disclosure statement and the disclosure box,[269] this does not prevent a court from examining other statements that a creditor makes in its solicitation materials in order to decide whether a credit card issuer has complied with Truth in Lending requirements.[270] This is understandable, for a creditor might scrupulously follow the

---

> be disclosed until the consumer actually receives the card. Moreover, the information consumers receive with the cards covers the entire credit relationship and is often complicated and intimidating. While consumers are legally entitled to return the cards without incurring any charges if they are dissatisfied with the terms, the situation is obviously not conducive to comparison shopping. This lack of disclosure at the time of application or solicitation may help explain why credit card profits remain so high despite the large number of card issuers.
>
> The Committee believes that early disclosure of relevant cost information, coupled with widespread publication of the costs of different cards will help remedy the problem of enabling consumers to shop around for the best cards. The resulting competition should be good for both consumers and competition.

S. REP. NO. 100-259, at 2–3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3936, 3938.

268. The lender sought refuge in the fact that it could not legally include the change-in-terms provision in the Schumer Box. *See Roberts*, 342 F.3d at 269. But the Schumer Box disclosed that the rates could be changed for two reasons only, and the court was really concerned about the adequacy of the APR disclosure. *See id*. at 266. The defendant's counsel admitted the likelihood of an inconsistency in the language, thus giving substance to the argument that a reasonable consumer might find the materials confusing and misleading. *See id*. at 268 n.4.

269. *See* 15 U.S.C. § 1632(a), (c) (2000); 12 C.F.R. § 226.5(a)(1) (2007).

270. It would be difficult to achieve Truth in Lending's ultimate objective to require meaningful disclosure if a lender could ignore its obligations for any disclosure outside the Schumer Box. The Fair Credit and Charge Card Disclosure Act was intended to give consumers the necessary information for comparing the terms for credit cards available in the market place. *See Roberts*, 342 F.3d at 268. A lender should not be free to make misleading statements just because they are not literally false. *See* Rossman v. Fleet Bank (R.I.) Nat'l Ass'n, 280 F.3d 384, 390–91 (3d Cir. 2002); Taylor v. Quality Hyundai Inc., 150 F.3d 689, 692 (5th Cir. 1998); Smith v. Chapman, 614 F.2d 968, 975 (5th Cir. 1980). It is important for courts to consider the entire picture in deciding whether a lender has met the clear and conspicuous disclosure requirement, particularly when credit card agreements are relatively complex and pose a challenge to the average consumer. *See* Ronald J. Mann, *"Contracting" for Credit*, 104 MICH. L. REV. 899, 907 (2006).

disclosure requirements after misleading a consumer with statements in its solicitation materials.[271] Thus, the prescription for the disclosure box does not shield credit card companies from liability for placing misleading information outside the box. The consumer in *Roberts* must have been delighted with the bank's promise that the interest rate being offered was not an introductory rate and that "it won't go up in just a few short months."[272] She must have been assuaged also by the disclosure that the APR could be raised only under two conditions. The disappointment came later in the cardholder agreement with the change-in-terms provision. By then the consumer had fallen prey to the card issuer's solicitation, and the only question was whether this occurred because of the lack of clarity and conspicuousness on the card issuer's part.[273] Although the consumer's focus in cases like this may be on the Schumer Box, the card issuer should not be allowed to send mixed messages with conflicting language elsewhere, whether it is in the solicitation materials or in the cardholder agreement. A consumer who relies on the possibility of a change in terms under limited circumstances should not fear sudden confrontation with an open-ended clause that includes other possibilities. After all, Truth in Lending was designed to grant such protection to consumers in the marketplace.

A change-in-terms provision does not give a creditor free rein to change an agreement in any way it sees fit. Normally any modification is binding only if the parties have expressly or impliedly agreed to it. When a creditor makes changes that relate to terms such as the finance charge, rates, and credit limits, it is easier to fit the change within the

---

271. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 gives added protection to a consumer when the lender offers temporary or introductory rates. The lender must disclose in its solicitation materials the circumstances under which the lender may change its temporary APR and also indicate the APR that will apply thereafter. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1303(a), 119 Stat. 23, 210 (amending Truth in Lending Act § 127(c), 15 U.S.C. § 1637(c) (2000)); NAT'L CONSUMER LAW CTR., *supra* note 4, § 5.4.3.2.2.

272. *Roberts*, 342 F.3d at 263. The lender in *Roberts* used to mail the cardholder agreement containing information about rate changes after the consumer accepted the card. This was another element that put the consumer at a disadvantage. In any event, the issue still remained whether the cardholder agreement with the rate change language contradicted the teaser language in the introductory materials. The defendant's lawyer admitted that "arguably there [was] an inconsistency." *Id*. at 268 n.4. This seemed to be a concession that a reasonable consumer could find the materials confusing and misleading. *See id*.

273. Section 127(c) of TILA, amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, mentions at least four times the clear and conspicuous requirement for disclosing the conditions affecting introductory rates. *See* Pub. L. No. 109-8, § 1303(a), 119 Stat. 23, 210 (2005) (amending TILA § 127(c), 15 U.S.C. § 1637(c) (2000)); *see also* SHEILA M. WILLIAMS, BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005: LAW AND EXPLANATION § 6303 (2005).

latitude granted by the change-in-terms provision.[274] This is so because the matters that are subject to change are already contained in the original agreement, and it is reasonable to expect that the parties had those conditions in mind when they consummated the agreement. However, when the creditor seeks to introduce new features into the agreement, the consumer may feel that the change-in-terms provision does not support such an approach.

B. The Arbitration Clause

In recent times, questions have been raised about the introduction of an arbitration clause into an agreement through the change-in-terms provision.[275] An arbitration clause is not akin to a finance charge, or a periodic rate, or a payment term. It relates instead to the resolution of disputes between the parties, and therefore it is arguable that it adds a new term to the agreement that was not in contemplation of the parties at the time of consummation.

The court in *Badie v. Bank of America* certainly took this view of the arbitration clause, and from the perspective of contract interpretation, gave the new clause the emphasis it deserved because the original agreement contained nothing of the sort.[276] It was not sufficient, therefore, for the lender merely to follow the prescribed procedure for modifying the contract unilaterally if the modification was not consistent with the subject matter covered by the contract.[277] The *Badie* court observed the importance of good faith and fair dealing between the parties and rejected the proposition that there was no limitation on the nature of the

---

274. Regulation Z recognizes the importance of a consumer knowing about changes in the terms of credit. *See* 12 C.F.R. § 226.9(c)(1) (2007). Thus, the lender must give written notice of a change in any term that had to be disclosed originally when the lender solicited or opened the account. *See id*; *see also* Ralph J. Rohner & Thomas A. Durkin, *TILA "Finance" and "Other" Charges in Open-End Credit: The Cost-of-Credit Principle Applied to Charges for Optional Products or Services*, 17 LOY. CONSUMER L. REV. 137, 145–46 (2005). It is different when a lender simply introduces new terms that have no relation to anything contained in the original disclosures.

275. *See* Stone v. Golden Wexler & Sarnese, P.C., 341 F. Supp. 2d 189, 198 (E.D.N.Y. 2004); Badie v. Bank of America, 79 Cal. Rptr. 2d 273, 284 (Ct. App. 1998); Discover Bank v. Shea, 827 A.2d 358, 361 (N.J. Super. Ct. Law Div. 2001); Rashmi Dyal-Chand, *From Status to Contract: Evolving Paradigms for Regulating Consumer Credit*, 73 TENN. L. REV. 303, 331 & n.178 (2006); Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 174 & n.86 (2006).

276. 79 Cal. Rptr. 2d 273, 289 (Ct. App. 1998).

277. *See id*.

substantive changes that the bank could make unilaterally.[278] In this respect, the lack of any limitation on the change-in-terms provision bordered on the illusory nature of the contract, for a creditor could implement any changes it wanted without having to worry about the original terms that cemented the arrangement in the first place.[279] Any such implied limitation might be found in the universe of terms employed by the parties in the original agreement. Therefore, when an agreement covers matters that are integral to the bank-customer relationship like credit limits, finance charges, and late charges, and says nothing about a collateral matter like arbitration, it is reasonable to conclude that the parties did not intend to cover that topic in the original agreement.

In *Badie*, the agreement allowed the creditor to change any term, and some courts have construed that authority to change as not including additions to the agreement.[280] This was a way of explaining the *Badie* decision. But the important consideration in *Badie* was whether the bank could change terms, and not whether it could add new ones.[281] Some

278. The court made the point:

> Where . . . a party has the unilateral right to change the terms of a contract, it does not act in an "objectively reasonable" manner . . . when it attempts to "recapture" a forgone opportunity by adding an entirely new term which has no bearing on any subject, issue, right, or obligation addressed in the original contract and which was not within the reasonable contemplation of the parties when the contract was entered into.

Id. at 284 (quoting Lazar v. Hertz Corp., 191 Cal. Rptr. 849, 857 (Ct. App. 1983)); *see also* Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1698 (2006).

279. The *Badie* court observed that to avoid the label of illusoriness, it had to recognize some implied limitation on the change-in-terms provision. *See Badie*, 79 Cal. Rptr. 2d at 285. That limitation could be found by restricting any change to "the universe of terms included in the original agreements." *Id*. The court recognized this as the objective determinant that, when combined with the covenant of good faith and fair dealing, produced the limitation. *See id.* It is not unusual for courts to look for these elements in trying to save an agreement that might otherwise be suspect when one party seems to have the discretion of performing or not performing. *See* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.13 (3d ed. 2004).

280. It is open to question whether a change in terms should also include an addition. In *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424 (N.C. Ct. App. 2004), the lender modified its change-in-terms provision to allow it to "add" as well as "change" any terms. *Id*. at 427. The court construed the provision against the lender as the drafter of the instrument and construed it "as limiting any changes to modification of existing terms—a construction that is also consistent with contract principles, reasonable expectations, and the requirement of good faith." *Id*. at 434.

281. The controversy in *Badie* revolved around the meaning of "change." The court was skeptical that "change" meant "add" in this context. It explained:

> Not only does using the somewhat legalistic word "amend" to define the garden-variety word "change" appear to run counter to the spirit of section 1644, but the conclusion that "change" was intended to mean "add" is questionable in light of the fact that the phrase stating that the Bank could "add" new terms had been deleted from the revised version of the change of terms provision in the account agreements in effect when the ADR bill stuffer was mailed.

courts have agreed with *Badie* even when the credit agreements have permitted additions or accommodated the consumer's interest in opting out of the agreement.[282] The important issue was that the agreement made no mention of dispute resolution, and the consumer had no inkling that the creditor's unilateral action could subsequently obliterate his right to seek relief in a judicial forum. One court was concerned that the change-in-terms provision could have unlimited application beyond arbitration, and the consumer's failure to object under these circumstances could not be interpreted as consent to the new term.[283]

Nevertheless, consumers have not always prevailed in the battle of terms. In *Bank One, N.A. v. Coates*, the court was not sympathetic to the consumer's claims of procedural and substantive unconscionability.[284] Although the cardholder agreement was rather lengthy, it did indicate that the creditor could amend it from time to time by notifying the consumer, and there was no limitation on the bank's power to do so.[285] The notification gave the consumer the option of rejecting the arbitration provision,[286] and the court viewed this as an important feature of the arrangement because it identified this option as one of the elements missing in *Badie*.[287] But the court in *Badie* seemed more concerned with the kind of terms that the creditor was trying to impose on the consumer, and that was relevant to the terms that the parties contemplated at the time of their agreement.[288]

Badie, 79 Cal. Rptr. 2d at 285. The court also had to consider the "terms" that the parties had in mind in their original agreement. *See id*. at 285–86.

282. *See* Perry v. FleetBoston Fin. Corp., No. Civ.A.04-507, 2004 WL 1508518, at *2–5 (E.D. Pa. July 6, 2004); Myers v. MBNA Am. & N. Am. Capitol Corp., No. CV 00-163-M-DWM, 2001 WL 965063, at *3–5 (D. Mont. Mar. 20, 2001).

283. *See Perry*, 2004 WL 1508518, at *3–5; *see also* Stone v. Golden Wexler & Sarnese, P.C., 341 F. Supp. 2d 189, 197–98 (E.D.N.Y. 2004). *But see In re* Am. Express Merchs. Litig., No. 03-CV-9592(GBD), 2006 WL 662341, at *8 (S.D.N.Y. Mar. 16, 2006).

284. 125 F. Supp. 2d 819 (S.D. Miss. 2001).

285. *See id*. at 826.

286. *Id*.

287. *Id*. at 833 (citing Badie v. Bank of Am., 79 Cal. Rptr. 2d 273 (Ct. App. 1998)).

288. The *Badie* court made this point about the change-in-terms provision:

> All the provisions of the original credit account agreements concerned matters that were integral to that relationship. In this context, there is nothing about the original terms that would have alerted a customer to the possibility that the Bank might one day in the future invoke the change of terms provision to add a clause that would allow it to impose ADR on the customer.

Badie, 79 Cal. Rptr. 2d at 287.

The court in *Bank One* found that the notice about the arbitration clause was clear and that it was unlikely to cause the consumer any difficulty, as it addressed the simple topic of arbitration.[289] On the issue of substantive unconscionability, the consumer had the burden of showing that he would have to bear unreasonable costs in the arbitration setting.[290] He could not merely make that assertion and hope to prevail without evidence to that effect. Furthermore, a consumer would not be denied any remedy by submitting himself to arbitration, since an arbitrator could grant any relief that was available under substantive law.

The acceptance of the change-in-terms provision depends in large measure on whether it is viewed from the perspective of unconscionability or from a lender's authority to amend the agreement in this way. The latter approach leads to interpretation of the contract between the parties. That interpretation depends inevitably upon the parties' intent, but where the contract is ambiguous, it should be construed against the drafter. The change-in-terms provision in *Stone v. Golden Wexler & Sarnese, P.C.* was typically broad because it allowed the bank to "amend or change" any part of the agreement and to "add or remove requirements" at any time.[291] One could not have hoped for broader language than that, but nowhere in the agreement was there any mention of arbitration. The court sided with *Badie* in looking at the change-in-terms clause to determine the universe of terms affected by it, but it could find only references to annual percentage rate, periodic rates, fees, and other charges.[292] By interpreting the contract in this way, the court tried to avoid any allegations of illusoriness by preserving the elements of the bargain between the parties.

It is understandable that the court would take this approach; a court should concentrate on the kind of terms that the change-in-terms provision is intended to affect. If the provision purports to affect something that was totally outside the parties' contemplation at the time of their agreement, it runs counter to the idea that there should be a meeting of the minds for

289. The consumer had hoped to persuade the court on the issue of procedural unconscionability because "the circumstances surrounding the addition of the arbitration provision to the parties' alleged contract were so unfair as to compel a conclusion that there was no voluntary meeting of the minds." *Bank One*, 125 F. Supp. 2d at 830. The theory was that the small paragraph dealing with a change in terms gave no inkling of the possible addition of an arbitration provision. *See id.* at 830–31. This aspect of procedural unconscionability results from "an absence of meaningful choice." 1 FARNSWORTH, *supra* note 279, § 4.28.

290. It is true that the possibility of large arbitration costs could conceivably prevent a consumer from vindicating his statutory rights through arbitration. But a party must come forward and show that he is likely to incur such costs. *See* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000).

291. 341 F. Supp. 2d 189, 191 (E.D.N.Y. 2004).

292. *See id.* at 197–98.

the parties to be bound.[293] A change, whatever it is, should not come as a total surprise to the consumer, and it would be indeed, if it did not fall within that universe of terms covered by the agreement. As a matter of principle, the agreement should be construed against the creditor in this situation, and any ambiguity about the change-in-terms provision should be resolved in the consumer's favor.[294] There is surely a great disparity in the parties' bargaining power, and an ambiguous contract that is a product of the creditor's handiwork should not be construed against the consumer. Furthermore, a resolution of the problem should not depend upon whether the change that is the subject of contention is labeled an addition, alteration, or merely a change. The focus should be on the kind of term that the creditor is seeking to introduce.[295]

---

293. The *Badie* court identified the main issue as follows:

> Our focus is on whether the words of the original account agreements mean that the Bank's customers, by agreeing to a unilateral change of terms provision, intended to give the Bank the power in the future to terminate its customers' existing right to have disputes resolved in the civil justice system, including their constitutionally based right to a jury trial. In our view, the object, nature and subject matter of these agreements strongly support the conclusion that the customers did not so intend, and that they, as promisors with respect to the change of terms provision, had no inkling that the Bank understood the provision differently.

Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 288 (Ct. App. 1998).

294. This technique, contra proferentem, allows a court to construe an ambiguous provision in a contract against the drafter. *See* 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.27 (rev. ed. 1998). For example, in *Perry v. FleetBoston Fin. Corp.*, the court construed the provision under consideration as allowing the lender either "(1) to modify only those terms already contained or contemplated in the original Agreement, or (2) to both modify and insert additional, previously uncontemplated, terms to the original agreement." No. Civ.A.04-507, 2004 WL 1508518, at *4 (E.D. Pa. July 6, 2004). Recognizing the lender as being in the stronger bargaining position in relation to the consumer, the court construed the ambiguous language against the lender as the drafter, and held that the unilateral change-in-terms provision applied only to terms contemplated in the original agreement. *Id*.

295. *Compare In re* Am. Express Merchs. Litig., No. 03-CV-9592(GBD), 2006 WL 662341, at *8 (S.D.N.Y. Mar. 16, 2006) ("The change-in-terms clause . . . when coupled with other terms in the . . . contracts, rendered the arbitration amendment . . . a reasonable addition to the original contracts."), *with* Stone v. Golden Wexler & Sarnese, P.C., 341 F. Supp. 2d 189, 198 (E.D.N.Y. 2004) (holding that since the contract did not mention any terms relating to dispute resolution, the arbitration agreement was not within the universe of terms covered by the change-in-terms provision), *and* Union Planters Bank v. Rogers, 912 So. 2d 116, 120 (Miss. 2005) (finding no agreement on arbitration in absence of notice and negotiation of arbitration endorsement), *and* Maestle v. Best Buy Co., No. 79827, 2005 WL 1907282, at *6 (Ohio Ct. App. Aug. 11, 2005) (finding no meeting of the minds about including arbitration clause when contract formed). An arbitration provision can have a profound impact on the parties' agreement. If the

VI. THE QUESTION OF DAMAGES

A. The Statutory Limits

Except as otherwise provided, the statute in its current form imposes civil liability on a creditor that violates any provision.[296] A consumer may recover both actual damages and statutory damages.[297] In the case of statutory damages, a consumer does not have to show any detrimental reliance, because the purpose of the statute is to give a creditor an incentive to comply with the statutory requirements by allowing a consumer to act as a private enforcer.[298] It is not even necessary for a consumer to show that the creditor knew about the violation or that the consumer was misled by the creditor's conduct.[299]

When Congress passed TILA in 1968, it provided for statutory damages of twice the finance charge, but it set a minimum recovery of $100 and a maximum of $1000.[300] A 1974 amendment provided for the recovery of actual damages in addition to statutory damages, and also added a

---

arbitration itself is in dispute, a court may adjudicate the claim, but an arbitrator makes the decision about the contract itself. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967). The severability rule applies even when there is a claim that the contract containing the arbitration clause is void for illegality because of a usurious interest rate. Thus, the Supreme Court ruled in *Buckeye Check Cashing, Inc., v. Cardegna* that the arbitrator must rule on any such challenge because it went to the validity of the contract as a whole, and for that purpose there is no distinction between voidness and voidability. 546 U.S. 440, 449 (2006).

296. *See* 15 U.S.C. § 1640(a) (2000).

297. *Id*. § 1640(a)(1), (2).

298. *See* Edwards v. Your Credit, Inc., 148 F.3d 427, 442–43 (5th Cir. 1998); Rodash v. AIB Mortgage Co., 16 F.3d 1142, 1148 (11th Cir. 1994); Jones v. TransOhio Sav. Ass'n, 747 F.2d 1037, 1040 (6th Cir. 1984); Bizier v. Globe Fin. Servs., 654 F.2d 1, 2 (1st Cir. 1981); Dryden v. Lou Budke's Arrow Fin. Co., 630 F.2d 641, 647 (8th Cir. 1980); *Recovery of Damages Statutory and Compensatory*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., May 2005, at 6.

299. *See* Zamarippa v. Cy's Car Sales, Inc., 674 F.2d 877, 879 (11th Cir. 1982); Smith v. Chapman, 614 F.2d 968, 971 (5th Cir. 1980); Dzadovsky v. Lyons Ford Sales, Inc., 593 F.2d 538, 539 (3d Cir. 1979); Newton v. United Cos. Fin. Corp., 24 F. Supp. 2d 444, 459 (E.D. Pa. 1998); Haw. Cmty. Fed. Credit Union v. Keka, 11 P.3d 1, 18 (Haw. 2000).

300. The section governing statutory damages in 1968 provided in pertinent part:

> Except as otherwise provided in this section, any creditor who fails . . . to disclose to any person any information required . . . to be disclosed to that person is liable to that person in an amount equal 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, tit. 1, § 130(a), 82 Stat. 146, 157 (1968).

separate provision for class actions.[301] The separate subparagraph for statutory damages in an individual action maintained the previous $100/$1000 limits. A further amendment in 1976 added a clause dealing with consumer leases and restricted recovery thereunder to "25 per centum of the total amount of monthly payments under the lease," but the language dealing with the $100/$1000 limits then followed both clause (i) dealing with other consumer transactions and clause (ii) dealing with consumer leases.[302] After the 1976 amendment relating to consumer leases, it was generally agreed that the $100/$1000 limits applied to all consumer transactions—both non-lease transactions in clause (i) and lease transactions in clause (ii).[303]

Had there been no further amendments, there would hardly have been any difficulty with § 1640(a)(2)(A). But that was not to be, for Congress amended the section again in 1995 by adding a new clause (iii) dealing with statutory damages for violations in closed-end transactions secured by real property or a dwelling, and setting the $200/$2000 limits for such violations.[304] The section now had a clause (i) and clause (ii) followed by

---

301. The 1974 amendment converted the old paragraph (1) of the 1968 statute into a new paragraph (2) with two parts, (A) and (B). In order to accommodate this new framework, Congress had to change the word *paragraph* to *subparagraph*. The new section then read as follows:

> (2)(A) in the case of an individual action twice the amount of any finance charge . . . except that the liability under this *subparagraph* shall not be less than $100 nor greater than $1,000; or
>
> (B) in the case of a class action, such amount as the court may allow . . . and the total recovery in such action shall not be more than the lesser of $100,000 or 1 per centum of the net worth of the creditor . . . .

Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat. 1517, 1518 (emphasis added).

302. After the 1976 amendment, the statute allowed statutory damages as follows:

> (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease . . . 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 . . . .

15 U.S.C. § 1640(a)(2)(A) (Supp. V 1975), *amended by* Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 4(2), 90 Stat. 257, 260.

303. *See* Cowen v. Bank United of Tex., FSB, 70 F.3d 937, 941 (7th Cir. 1995); Mars v. Spartanburg Chrysler Plymouth, Inc., 713 F.2d 65, 67 (4th Cir. 1983); Dryden v. Lou Budke's Arrow Fin. Co., 661 F.2d 1186, 1191 n.7 (8th Cir. 1981); Williams v. Pub. Fin. Corp., 598 F.2d 349, 359 (5th Cir. 1979).

304. Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, § 6, 109 Stat. 271, 274.

the \$100/\$1000 limits, and clause (iii) followed by the \$200/\$2000 limits.[305] In light of the previous consensus that the \$100/\$1000 limits applied to both clauses (i) and (ii), the question then became whether the addition of clause (iii) wrought a change in the statute's interpretation so that the limits should thereafter apply to clause (ii) only, because the language restricted it to "this subparagraph," or whether it should apply to both clauses.

The Supreme Court answered the question in *Koons Buick Pontiac GMC, Inc. v. Nigh* when a consumer was trying to recover under clause (i) for a creditor's violation in a consumer transaction.[306] The Court acknowledged that the purpose of the 1995 amendment was to establish a more generous limit for closed-end mortgages, but that there was no congressional intent to repeal the accepted \$100/\$1000 limits in clause (i).[307] Before 1995, clause (i) covered closed-end mortgages and the 1995 amendment merely carved out such mortgages for special treatment in a new clause (iii) with respect to minimum/maximum limits.[308] The Court could find no evidence that Congress intended to change the pre-1995 interpretation that applied the \$100/\$1000 limits to the entire class of consumer credit transactions captured by clauses (i) and (ii), which at the time also included closed-end mortgages.[309]

The Court chose not to rely solely on the statutory language, for then it would have had to deal with the literal meaning of the word "subparagraph" in clause (ii).[310] In this context, the word could hardly have covered all of subparagraph (A) in light of the separate restriction for closed-end mortgages contained in clause (iii).[311] The Court was left then with the alternative of examining the statutory history and interpretative sources to glean congressional intent. Although Justice Stevens concurred, he thought it quite plausible to read clause (i) as prescribing the amount

305. *Id*.

306. 543 U.S. 50 (2004).

307. *See id*. at 63.

308. Clause (iii) now provides that a consumer may recover "in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$200 or greater than \$2,000." 15 U.S.C. § 1640(a)(2)(A)(iii) (2000).

309. *See Koons*, 543 U.S. at 62. The House Report clarified that "this amendment increases the statutory damages available in closed end credit transactions secured by real property or a dwelling." H.R. REP. NO. 104-193, at 99 (1995).

310. The Court explained that "[t]he word 'subparagraph' is generally used to refer to a subdivision preceded by a capital letter, and the word 'clause' is generally used to refer to a subdivision preceded by a lower case Roman numeral." *Koons*, 543 U.S. at 61.

311. There was no disagreement that Congress meant to establish a more generous scheme for closed-end mortgages. *See id*. at 62 (citing Strange v. Monogram Credit Card Bank of Ga., 129 F.3d 943, 947 (7th Cir. 1997)). This did not mean, however, that Congress intended to remove the accepted \$100/\$1000 limits in § 1640(a)(2)(A)(i) and apply such limits only to § 1640(a)(2)(A)(ii). *See id*.

of damages without setting minimum/maximum limits.[312] Nevertheless, he saw a way out of the "unambiguous statutory command" not by alleging that an absurd result would ensue, but by using common sense.[313] That approach led him to the statutory history which made it clear that Congress did not intend to tamper with the pre-1995 interpretation that applied the limits to both clauses (i) and (ii).[314] Justice Stevens did not regard himself, therefore, as constrained by any canon of statutory construction that allowed him to examine only legislative history for the resolution of ambiguities or the avoidance of absurdities. He was perfectly content to look at the whole picture in order to determine the place of the word "subparagraph" in clause (ii).[315]

It was not surprising that the Court applied the $100/$1000 limits to both clauses (i) and (ii). After all, there was no disagreement about the pre-1995 meaning of the section,[316] and Congress did not materially alter the text of clauses (i) or (ii) when it amended the statute in 1995 to accommodate a cap on closed-end mortgages. After the amendment, the statute remained ambiguous, as the reference to "subparagraph" could no

312. *See id*. at 65 (Stevens, J., concurring).

313. Justice Stevens made his point as follows: "Common sense is often more reliable than rote repetition of canons of statutory construction. It is unfortunate that wooden reliance on those canons has led to unjust results from time to time. Fortunately, today the Court has provided us with a lucid opinion that reflects the sound application of common sense." *Id*. at 65–66. Justice Stevens supported the majority's holding even though he found the statute unambiguous. *Id*. The Court saw an ambiguity and therefore looked to resolve it by examining the rest of the statutory scheme, including the statutory history. *See id*. at 60–62 (majority opinion).

314. *See id*. at 65 (Stevens, J., concurring).

315. On this point Justice Stevens acknowledged that "it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product." *Id*. In doing so, Justice Stevens interprets a statute in a way that implements congressional purpose even at the risk of departing from the statute's semantics. The opinions of the other Justices are to be contrasted with that of Justice Scalia who, in his dissent, gave a good example of the textualist approach by giving "dispositive weight to the structure of § 1640(a)(2)(A), which indicates that the exception is part of clause (ii) and thus does not apply to clause (i)." *Id.* at 70 (Scalia, J., dissenting). Thus, Justice Scalia was not keen to consider the statute's purposes even on the pretext of rescuing Congress from its drafting mistakes. *See id.* at 76 (citing Lamie v. United States Tr., 540 U.S. 526, 542 (2004)).

316. *See* Purtle v. Eldridge Auto Sales, Inc., 91 F.3d 797, 800 (6th Cir. 1996); Cowen v. Bank United of Tex., FSB, 70 F.3d 937, 941 (7th Cir. 1995); Mars v. Spartanburg Chrysler Plymouth, Inc., 713 F.2d 65, 67 (4th Cir. 1983); Dryden v. Lou Budke's Arrow Fin. Co., 661 F.2d 1186, 1191 n.7 (8th Cir. 1981); Williams v. Pub. Fin. Corp., 598 F.2d 349, 359 (5th Cir. 1979).

longer apply to all of subparagraph (A).[317] It was this ambiguity that led the Court to the statutory history and the previous judicial interpretation of the pre-1995 versions. The Court's examination of the overall statutory scheme[318] led to the conclusion that Congress had enacted a "scrivener's error" into law.[319] Although some members of the Court favored always looking at all available evidence of congressional intent, even when there seems to be no ambiguity in the statute,[320] the Court found solace in the statutory history because it detected an ambiguity.[321] It was a matter of ascertaining whether Congress intended in 1995 to do something other than merely adding clause (iii) to place a minimum/maximum cap on damages in closed-end mortgage transactions. Congress left things as they found them in 1995 after adding that clause, and that was enough to convince the Court that the $100/$1000 limits should apply to both clauses (i) and (ii).

B. Violations Covered

Disagreement over the liability section has arisen in other contexts. The statute requires a creditor to make certain disclosures in closed-end transactions and also dictates the form and timing of those disclosures.[322] The civil liability section imposes liability, except as otherwise provided, on

---

317. Congress could have removed the ambiguity by stating in clause (ii) "liability under this clause" instead of "liability under this subparagraph." That would have left no doubt that Congress intended to apply the $100/$1000 limits to consumer leases only. In reaching a sensible solution to the problem, the Court viewed clause (iii) as merely removing closed-end mortgages from clause (i)'s coverage only because clause (iii) provides $200/$2000 limits instead of 100/$1000 limits. *See Koons*, 543 U.S. at 62. The Court took a holistic approach in construing the statute by examining the statutory scheme, rather than looking at the statutory language in isolation. *See id*. at 60; *see also* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 41 n.174 (2006).

318. *See Koons*, 543 U.S. at 63.

319. *Id*. at 65 (Stevens, J., concurring).

320. Justice Breyer joined with Justice Stevens in suggesting that "it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product." *Id*.

321. *See id.* at 62 (majority opinion). In trying to come to some reasonable understanding of the statute's meaning, the Court looked to Congress' goals in enacting the statute. One commentator explains the difference between textualists and purposivists in this context. Professor Manning explains that "textualism means that in resolving ambiguity, interpreters should give precedence to semantic context . . . rather than policy context . . . ." John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 110 (2006). With respect to purposivism, "the dictates of legislative supremacy obligate the interpreter to help the legislature realize the statute's overarching goals." *Id*. The Court in *Koons* seemed to come down on the side of the purposivists, with Justice Scalia advocating for the textualist approach. *Compare Koons*, 543 U.S. at 62, *with id*. at 73 (Scalia, J., dissenting). For a discussion of the difference between the two camps, see Molot, *supra* note 317; Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005).

322. *See* 15 U.S.C. § 1638(a), (b) (2000).

a creditor that fails to comply with the disclosure requirements.[323] The section then goes on to say that in connection with the closed-end disclosures, a creditor will have liability only for failing to comply with the disclosure requirements of certain paragraphs of § 1638(a).[324] Therefore, not all disclosure failures will lead to statutory damages against a creditor. Section 1638(b) prescribes the form and timing requirements of disclosures for closed-end transactions, but § 1640 does not say what will happen if a creditor violates § 1638(b).[325] Here is where the disagreement arises. The question is whether § 1640 limits statutory damages to the violations specifically mentioned, or whether the section provides general liability for noncompliance in the absence of a specific exemption.

TILA stipulates that, except as otherwise provided, a consumer may recover both actual and statutory damages if a creditor fails to comply with any requirement. In *Lozada v. Dale Baker Oldsmobile, Inc.*, the consumers alleged that the creditor had not given them the required disclosures before it extended credit, thus becoming liable for statutory damages by violating § 1638(b)(1).[326] This set the stage for an interpretation of § 1638(b)(1) because § 1638(b)–(d) were not "disclosures referred to in section 1638" and thus did not fall within the exception to statutory damages covered in § 1640(a).[327] Section 1640(a) identifies the specific disclosures in § 1638(a) that attract statutory damages in case of a violation, but because § 1638(b) is not a disclosure section, the court could not find any support for excluding a § 1638(b) violation from eligibility for statutory damages.[328]

---

323. *See id.* § 1640(a).

324. The statute provides as follows:

> In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title . . . .

Id.

325. The specific sections mentioned in § 1640(a) are § 1635 and § 1638(a). *See id*.

326. 145 F. Supp. 2d 878, 882 (W.D. Mich. 2001).

327. *Id*. at 889.

328. The court explained as follows:

> The only "disclosures referred to in section 1638" are contained in subsection 1638(a), which is entitled, "Required disclosures by creditor." Of the disclosures mentioned in 1638(a), only the enumerated numbers are subject to statutory damages. No dispute exists that statutory damages are not available for disclosures referred to in § 1638(a) that are not listed—that is, §§ 1638(a)(1), (2) (in part), (7), (8), and (10)–(14).

In *Brown v. Payday Check Advance, Inc.*, the Seventh Circuit took a different tack on this issue by disallowing statutory damages for a violation that did not appear in § 1640(a).[329] This time the court concentrated on the word "only" in the paragraph which allows damages "*only* for failing to comply with the requirements of section 1635 . . . or of paragraph (2) (insofar as it requires a disclosure of the 'amount financed'), (3), (4), (5), (6), or 9 of section 1638(a)."[330] The court viewed the identification of the violations as a "closed list" that could not be judicially expanded to accommodate the consumer's complaint about the creditor's dereliction.[331]

In *Baker v. Sunny Chevrolet, Inc.*, the Sixth Circuit joined the Seventh Circuit in rejecting statutory damages for a § 1638(b)(1) violation.[332] The court viewed the statute as creating two types of violations: (1) complete nondisclosure of the stipulated items in § 1638(a), and (2) disclosure of such items, but not in the manner required by § 1638(b)(1).[333] The court treated the violation in (1) as eligible for statutory damages, but not the violation in (2).[334] But the court went further than that by holding that § 1640(b) protected the creditor because the creditor had corrected its error by making the necessary disclosures within sixty days after discovering it.[335] It was surprising that the court opted to apply this correction of error defense to a situation where the creditor failed to provide disclosures prior to consummation, because the defense is normally entertained only for disclosures that the lender has already made, not for those that it has failed to make.[336] Any other interpretation would allow a lender to avoid the form and timing requirements of § 1638(b) by

Id. at 888.

329. 202 F.3d 987 (7th Cir. 2000).

330. *Id.* at 991 (emphasis added by the court) (quoting 15 U.S.C. § 1640(a) (2000)).

331. *Id.*

332. 349 F.3d 862 (6th Cir. 2003).

333. *Id.* at 869.

334. *Id.*

335. *Id*. at 871. The statute provides a correction of error defense as follows:

> A creditor . . . has no liability under this section . . . for any failure to comply with any requirement imposed under this part . . . if within sixty days after discovering an error, . . . and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

15 U.S.C. § 1640(b) (2000).

336. *See* Thomka v. A.Z. Chevrolet, Inc., 619 F.2d 246, 251–52 (3d. Cir. 1980); Watson v. U.S. Bank Nat'l Ass'n, Inc., No. Civ.A 05-0244-CG-C, 2006 WL 328174, at *3 (S.D. Ala. Feb. 10, 2006); Jumbo v. Nestor Motors, Inc., 428 F. Supp. 1085, 1086 (D. Ariz. 1977); Ralls v. Bank of N.Y. (*In re* Ralls), 230 B.R. 508, 518 (Bankr. E.D. Pa. 1999).

forgiving late disclosures, when in fact Truth in Lending contemplates timely disclosures for a consumer's consideration.[337]

In any event, this defense requires a creditor to act within sixty days after discovering an error.[338] In *Baker*, there was nothing left to discover, for the creditor had intentionally failed to respond to the consumer's request at closing for a copy of the disclosures.[339] It is open to question, therefore, whether the court should have relied on § 1640(b) as an alternative ground for a resolution of the problem. It is not clear that if § 1640(b) is restricted to clerical or mathematical errors, it would duplicate § 1640(c) dealing with the bona fide error defense. After all, the correction of error defense has a time limit attached to it, and it protects the creditor if the creditor acts to correct the error, whereas the bona fide error defense is available if the error was unintentional and the creditor had procedures in place to avoid the problem.

The *Baker* court did not have to depend on § 1640(b) in order to deny statutory damages to the consumer. It could have recognized the consumer's complaint as one lodged "in connection with the disclosures referred to in section 1638"[340] and liability as attaching only for failing to comply with § 1635 or certain parts of § 1638(a).[341] The reference to § 1635 only

337. It is unlikely that Congress intended to allow a lender free rein to make its disclosures after the transaction without incurring any liability once it falls within § 1638(b). A consumer would surely be at a disadvantage in this context, because he would be deprived of an opportunity to reflect on the terms of the transaction. It has been said that "TILA's timing requirements have no meaning if disclosures always can be provided after-the-fact with no penalty." NAT'L CONSUMER LAW CTR., *supra* note 4, § 8.6.5.3.4 (Supp. 2006). *But see* ROHNER & MILLER, *supra* note 5, ¶ 12.05[3][a], at 839 ("Congress granted a creditor the right to cure 'any failure to comply with any requirement.'").

338. "A creditor . . . has no liability . . . for any failure to comply with any requirement imposed under this part or part E of this subchapter, if within sixty days after discovering an error, . . . the creditor . . . notifies the person concerned of the error . . . ." 15 U.S.C. § 1640(b) (2000).

339. The court recited the facts as follows: "[D]espite being asked for a copy of the signed contract, Defendant refused to provide Plaintiffs with a copy of either contract. Plaintiffs finally received a copy of the second contract approximately three weeks later . . . ." *Baker*, 349 F.3d at 864. It is open to question whether there was anything for the creditor in *Baker* to discover when it intentionally refused to give the consumer the disclosures at closing. *See id*. It is submitted that the sixty-day correction defense should not apply, as in this case, to an intentional violation. *See* NAT'L CONSUMER LAW CTR., *supra* note 4, § 8.6.5.3.4 n.404.3 (Supp. 2006).

340. The creditor's failure to comply with the requirements of § 1635 and certain parts of § 1638(a) gives rise to liability, but it is "[i]n connection with the disclosures referred to in section 1638." 15 U.S.C. § 1640(a) (2000).

341. The Seventh Circuit took this approach in *Brown v. Payday Check Advance*, when it denied statutory damages for a creditor's violation of the format requirements in

serves to emphasize the point that the drafters must have had other remedies in mind when they delineated the limits of liability in § 1640(a). In the same way that the drafters referred to § 1635 in discussing liability in connection with § 1638 disclosures, they could have included any other section they had in mind for statutory damages. Section 1638(b) plays a role in the disclosure scheme by requiring the creditor to act at a certain time, but such action still takes place "in connection with the disclosures referred to in § 1638." The court could have buttressed its position by emphasizing that § 1638(b) is not an independent mandate totally divorced from the § 1638 disclosures. As a matter of fact, § 1638(b) refers to "the disclosures required under subsection (a)." It seems, therefore, that the statutory damages contemplated relate to the same disclosures recognized by § 1638 and § 1640. While it is true that § 1638(b)(1) does not prescribe disclosures, it fulfills its mission by dictating the time when a creditor should make its disclosures, and in that sense justifies § 1640's reference to it.

VII. CONCLUSION

It is evident that Truth in Lending has stood the test of time and has weathered a storm of criticism over the years.[342] Nevertheless, there is

---

the statute. 202 F.3d 987, 991 (7th Cir. 2000); *see also* Kilbourn v. Candy Ford-Mercury, Inc., 209 F.R.D. 121, 126–27 (W.D. Mich. 2002); Stevens v. Brookdale Dodge, Inc., No. Civ. 00-2632 JELJGL, 2002 WL 31941158, at *4 (D. Minn. Dec. 27, 2002); Nigh v. Koons Buick Pontiac GMC, Inc., 143 F. Supp. 2d 535, 549 (E.D. Va. 2001), *aff'd* 319 F.3d 119 (4th Cir. 2003), *rev'd on other grounds*, 543 U.S. 50 (2004).

342. In the early days when Congress was considering Truth in Lending legislation, a House Report gave some inkling of the problems that consumers faced. It reported:

> Today the consumer is faced with a number of credit disclosure practices, most of which are not directly comparable to one another. With respect to rate, some creditors employ an "add-on" rate, which is based on the original balance of the obligation as opposed to the declining balance. This has the effect of underestimating the simple annual rate by approximately 50 percent.
>
> . . . .
>
> Other creditors add a number of additional fees or charges to the basic finance charge, such as credit investigation fees, credit life insurance, and various "service" charges. This permits a creditor to quote a low rate while actually earning a higher yield through the additional fees and charges.

H.R. REP. NO. 90-1040, at 13 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1970–71. Senator Paul Douglas introduced the first Truth in Lending bill in 1960, S. 2755, 86th Cong. (1960). When he introduced a 1963 version, he commented: "The consumer is faced with a bewildering and indeed incomprehensible variety of rate statements and charges when he borrows money or buys an article on the installment plan." 109 CONG. REC. 2029 (1963). When the Truth in Lending Act, Pub. L. No. 90-321, tit. 1, 82 Stat. 146 (1968), was passed in 1968, it set a new disclosure standard for consumer loans. It was only a question of time before Congress had to respond to the criticism of the constituencies affected by the new legislation. The 1980 Senate Report identified some of the problems: "There is considerable evidence, for example, that disclosure forms still work to be done to make the required disclosures palatable to lenders and consumers alike, and to remove some of the ambiguities in TILA. As the Supreme Court pointed out in *Household Credit Services, Inc. v. Pfennig*, the term "finance charge" standing alone is ambiguous,[343] and there is "some connection between the over-limit fee and an extension of credit."[344] But the Court agreed that the "incident to" language in the definition of "finance charge" does not clarify whether TILA requires a substantial connection, and where TILA deals with over-limit fees, it requires their disclosure "in connection with an extension of credit" rather than "incident to the extension of credit."[345] This ambiguity in the statutory language led the Court to rely on the regulation, which excludes over-limit fees from the definition of "finance charge."[346] But the *Pfennig* decision merely highlights the difficulty of categorizing the finance charge. Although Regulation Z defines it as the cost of credit,[347] there is no unanimity about the constituent elements thereof, and thus lenders have always tried to bring themselves within the exceptions recognized by TILA and Regulation Z.[348] The more charges a lender

---

given consumers are too lengthy and difficult to understand. Creditors, on the other hand, have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions." S. REP. NO. 96-368, at 16 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 252. As a result, Congress passed the Truth in Lending Simplification and Reform Act in 1980, which addressed most of the concerns about information overload and lengthy, legalistic disclosures. Pub. L. No. 96-221, tit. VI, 94 Stat. 168 (1980) (codified in scattered sections of 15 U.S.C.).

343. 541 U.S. 232, 242 (2004).

344. *Id*. at 240.

345. *Id*. at 241.

346. *See id*. at 240–41. Regulation Z, promulgated by the Federal Reserve Board pursuant to 15 U.S.C. § 1604(a) (2000), excludes "[c]harges . . . for exceeding a credit limit." 12 C.F.R. § 226.4(c) (2007).

347. Regulation Z defines the finance charge as follows:

> The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

12 C.F.R. § 226.4(a).

348. The Federal Reserve Board and the Department of Housing and Urban Development addressed concerns about the finance charge in a 1998 joint report to Congress. They made the following observations:

> The calculation and disclosure of the finance charge and the APR have been at the heart of the debate over both the usefulness and the regulatory burden of TILA. Much of the difficulty arises not from the mathematical requirements

can exclude from the finance charge, the better off it is in terms of disclosing the cost of credit.[349] Two lenders disclosing the same finance charge expressed as an annual percentage rate may in fact be charging the consumer different fees that are not included in the finance charge, but the consumer will never be any wiser about the matter. It is to the consumer's advantage, therefore, for lenders to be governed by a more reliable indicator of the cost of credit, and this can be accomplished by reducing as much as possible the exceptions relating to the finance charge.[350] Even though Regulation Z excludes "[c]harges . . . for paying items that overdraw an account,"[351] the exception applies unless the parties previously agreed in writing that such charges should be part of the finance charge.[352] This is but one example of a lender being able to opt for its own designation of a particular charge. In this instance, a lender may avoid the label of a finance charge simply by avoiding a written agreement with the consumer, even if the consumer habitually exceeds his credit limit without any objection from the lender. Something must be done to provide a more realistic definition of a finance charge.[353]

Truth in Lending has disappointed consumers in another area: the timing and form of disclosures. If the lender puts the Truth in Lending disclosures in the same document as the credit contract, some courts[354]

> for calculating the finance charge and the APR, but from the issue of what is a finance charge and what is not.

BD. OF GOVERNORS OF THE FED. RESERVE SYS. & U.S. DEP'T OF HOUS. & URBAN DEV., JOINT REPORT TO THE CONGRESS CONCERNING REFORM TO THE TRUTH IN LENDING ACT AND THE REAL ESTATE SETTLEMENT PROCEDURES ACT 9 (1998), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/tila.pdf [hereinafter FRB & HUD JOINT REPORT].

349. The FRB & HUD Joint Report made the point: "Whatever the initial intention, however, neither the finance charge nor its corresponding APR currently discloses a total cost of credit. From the start, the Congress narrowed the concept by carving out several fees from the definition of the finance charge." *Id*. at 8. It has been said that "Congress never uniformly rationalized the definition of the finance charge in light of the purpose of the TIL Act because it contains numerous exceptions to the general rule that cannot be justified theoretically even if they make sense practically or politically." ROHNER & MILLER, *supra* note 5, ¶ 3.02[1]; *see also* Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV. 1, 58 (2005).

350. *See* NAT'L CONSUMER LAW CTR., *supra* note 4, § 3.2.2; Rohner & Durkin, *supra* note 274, at 150; Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 901 (2003).

351. 12 C.F.R. § 226.4(c)(3) (2007).

352. *Id*.

353. *See* FRB & HUD JOINT REPORT, *supra* note 348, at 13–14; Rohner & Durkin, *supra* note 274, at 189.

354. *See* Spearman v. Tom Wood Pontiac-GMC, Inc., 312 F.3d 848, 850–51 (7th Cir. 2002); Haun v. Don Mealey Imports, Inc., 285 F. Supp. 2d 1297, 1304–06 (M.D. Fla. 2003); Nigh v. Koons Buick Pontiac GMC, Inc., 143 F. Supp. 2d 535, 547–49 (E.D. Va. 2001), *aff'd* 319 F.3d 119 (4th Cir. 2003), *rev'd on other grounds*, 543 U.S. 50 (2004).

and the Official Staff Commentary[355] agree that the consumer can review and then sign a multiple-copy contract, and then the lender can separate the copies and give one copy to the consumer. The lender does not have to give the consumer two separate copies of the document before consummation. The consumer's interests would be better served if the lender gave the consumer two copies of the document in such a transaction in order to remove any doubts that it has provided the disclosures before consummation in a form that the consumer may keep.[356] The Commentary advises that a lender complies with the law if it gives the consumer a copy of the document containing the credit contract and disclosures to read and sign, and the consumer then receives a copy to keep when he becomes obligated.[357] The Commentary also recognizes that the consumer must be free "to take possession of and review the document in its entirety before signing."[358] There is no better way of making that point than by giving the consumer a copy that will remain his at all cost, and then once he is satisfied, giving him another copy for signature. The essential feature of the transaction is to convince the consumer of the importance of his ability to keep a preconsummation copy of the document, and that he does not have to depend on a signing to keep it either before or after review.

A consumer needs more protection on another front. The change-in-terms provision which some lenders have used to cause mischief in the marketplace should be accommodated in some fashion as part of the required Truth in Lending disclosures. It is not satisfactory for a lender to entice a consumer into a transaction with attractive features, only to burden him shortly thereafter with less attractive terms that the consumer could not have anticipated. If it is important for a lender to highlight the salient terms of the credit offer, then it must be equally important for the lender to indicate in the same location the conditions under which those terms are subject to change. That disclosure framework should also make room for the possibility of arbitration, so that a consumer is not left wondering whether he must renounce a judicial forum in favor of arbitration.

355. *See* 12 C.F.R. pt. 226, supp. 1, cmt. 17(b)-3 (2007).

356. *See* Polk v. Crown Auto, Inc., 221 F.3d 691, 692 (4th Cir. 2000); Gillom v. Ralph Thayer Automotive Livonia, Inc., 444 F. Supp. 2d 763, 768 (E.D. Mich. 2006); Kilbourn v. Candy Ford-Mercury, Inc., 209 F.R.D. 121, 124 (W.D. Mich. 2002); Walters v. First State Bank, 134 F. Supp. 2d 778, 781–82 (W.D. Va. 2001).

357. 12 C.F.R. pt. 226, supp. 1, cmt. 17(b)-3.

358. *Id.*

Finally, now that the Supreme Court has spoken on the question of damages, there is no longer any doubt that the $100/$1000 limits apply to both lease and non-lease transactions.[359] However, one can only hope that any overhaul of the statute will take a neater approach to § 1640(a)(2)(A),[360] and while the drafters are at it, they may want to clarify the protection about damages for a violation of § 1638(b).

359. *See* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 51 (2004).

360. Section 1640(a) provides for damages in an individual action equal to the sum of:

> (1) any actual damage sustained by such person as a result of the failure;
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000 . . . .

15 U.S.C. § 1640(a)(1), (2)(A) (2000). The ambiguity that the Court in *Koons Buick Pontiac GMC, Inc. v. Nigh* had to deal with centered on the words "liability under this subparagraph." 543 U.S. 50, 54–55 (2004). The word "subparagraph" seems a little out of place in the literal sense.