



Fall 9-1-1978

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Recommended Citation

Judicial Erosion Of The Rescission Right Under Truth In Lending, 35 Wash. & Lee L. Rev. 979 (1978).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol35/iss4/3>

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NOTES & COMMENTS

JUDICIAL EROSION OF THE RESCISSION RIGHT UNDER TRUTH IN LENDING

The use of consumer credit in this country expanded rapidly after the end of World War I, from \$5.6 billion to nearly \$96 billion in 1967.¹ Despite the growing use of credit, few consumers understood the nature and cost of such transactions.² The myriad and sometimes fraudulent methods by which creditors informed consumers of credit terms prevented many people from shopping effectively in the credit market.³ After years of study and debate,⁴ Congress concluded that uninformed use of credit impeded efficient functioning of the economy and warranted corrective measures.⁵ Therefore, Congress adopted Title I of the Consumer Credit Protection Act, commonly known as the Truth in Lending Act [TILA].⁶ The Act

¹ *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 363 (1973); H.R. REP. NO. 1040, 90th Cong., 1st Sess. 10-11, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 1962, 1966-67 [hereinafter cited as H.R. REP. NO. 1040, U.S. CODE CONG.]; Garwood, *A Look at Truth in Lending—Five Years After*, 14 SANTA CLARA LAW. 491, 491 (1974) [hereinafter cited as Garwood].

² H.R. REP. NO. 1040, *supra* note 1, at 13, U.S. CODE CONG. at 1970; S. REP. NO. 392, 90th Cong., 1st Sess. 203 (1967) [hereinafter cited as S. REP. NO. 392]; Garwood, *supra* note 1, at 491-92.

³ S. REP. NO. 392, *supra* note 2, at 1-2. Before regulation by Congress, creditors used divergent methods to inform consumers of the cost of a proposed credit transaction. Many creditors stated only weekly or monthly interest rates while others made no disclosures at all. Some creditors quoted accurate interest figures, but did not inform customers of hidden costs of the transaction, such as credit investigation fees, credit life insurance, and other service charges. Such partial, and often misleading, disclosure frustrated informed comparison shopping for credit. H.R. REP. NO. 1040, *supra* note 1, at 13, U.S. CODE CONG. at 1970.

⁴ For legislative history documenting congressional concern for the consumer's plight in the credit market, see generally CONF. REP. NO. 1397, 90th Cong., 1st Sess., reprinted in [1968] U.S. CODE CONG. & ADM. NEWS 2021; H.R. REP. NO. 1040, *supra* note 1, U.S. CODE CONG. at 1962; S. REP. NO. 392, *supra* note 2; *Hearings on H.R. 11601 before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess. 76 (1967); *Hearings on S.5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 41 (1967); *Hearings on S.750 before the Subcomm. on Production and Stability of the Senate Comm. on Banking and Currency*, 88th Cong., 1st & 2d Sess. 1303 (1963-1964); *Hearings on S.1740 before the Subcomm. on Production and Stability of the Senate Comm. on Banking and Currency*, 87th Cong., 1st & 2d Sess. (1961-1962).

⁵ H.R. REP. NO. 1040, *supra* note 1, at 13, U.S. CODE CONG. at 1970. In § 1601(a) of the Truth in Lending Act, Congress stated that "economic stabilization would be enhanced" through the informed use of consumer credit. 15 U.S.C. § 1601(a)(1976). See generally Comment, *The Truth in Lending Act: A Summary of the Consumer's Remedies*, 22 S.D.L. REV. 322, 323 (1977) [hereinafter cited as *Consumer's Remedies*].

⁶ Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146, § 101 (1968) codified at 15 U.S.C. § 1601 (1976). For an introduction to the TILA, see Kintner, Henneberger, & Neill, *A Primer on Truth in Lending*, 13 ST. LOUIS U.L.J. 501 (1969). See generally R. CLONTZ, *TRUTH-IN-LENDING MANUAL* (1969); Boyd, *The Federal Consumer Credit Protection Act—A*

requires that creditors disclose important credit information in a uniform manner, thus enabling consumers to make intelligent comparisons of credit terms.⁷ Because the TILA applies to most consumer credit transactions⁸ and imposes strict penalties on creditors who fail to comply,⁹ the Act

Consumer Perspective, 45 NOTRE DAME LAW. 171 (1970) [hereinafter cited as Boyd]; Schober, *Truth in Lending: Analysis of Act and Regulation Z*, 4 REAL PROP., PROB. AND TRUST J. 305 (1969); Note, *Truth in Lending: The Impossible Dream*, 22 C.W. RES. L. REV. 89 (1970). The Consumer Credit Protection Act is implemented by Federal Reserve Board Regulation Z, 12 C.F.R. § 226 (1977).

⁷ Garwood, *supra* note 1, at 492-93; Note, *Truth-in-Lending; Judicial Modification of the Right of Rescission*, 1974 DUKE L.J. 1227, 1227 n.2. The Act requires that the creditor disclose finance charges and the annual percentage rate of interest applied in the credit transaction in addition to other credit terms. The disclosure requirements are codified in 15 U.S.C. §§ 1631, 1635-39 (1976) and 12 C.F.R. § 226.6-.9 (1977). Through these disclosure requirements, Congress intended that credit information would be made available in uniform terms, thus facilitating comparison shopping in the credit market and enabling consumers to choose intelligently between available credit and personal resources. Comment, *Private Remedies Under the Truth-in-Lending Act: The Relationship Between Rescission and Civil Liability*, 57 IOWA L. REV. 199, 199-200 (1971) [hereinafter cited as *Private Remedies*].

⁸ 15 U.S.C. § 1602(e)-(i) (1976); 12 C.F.R. § 226.2(p)-(u) (1977); see note 17 *infra*.

⁹ The Act exposes creditors who fail to comply with disclosure requirements to criminal and civil liability. 15 U.S.C. §§ 1611, 1640 (1976). A creditor who willfully and knowingly violates the disclosure requirements may be fined up to \$5,000, or imprisoned for not more than one year, or both. *Id.* § 1611. A creditor may also incur a civil penalty under § 1640 of the Act for his noncompliance. Under that section, Congress granted consumers, individually and as a class, the right to sue creditors who have failed to disclose the necessary credit information. If the borrower establishes a breach by the creditor in the credit transaction, the creditor is liable for any actual damage sustained by the borrower and for a penalty of twice the amount of the finance charge. In no case may the penalty be less than \$100 or greater than \$1,000. *Id.* § 1640(a)(1)-(2)(A). Nonetheless, in a class action the penalty is set by the court, and there is no minimum recovery. The total recovery in such an action, however, may not exceed the lesser of \$100,000 or one percent of the creditor's net worth. *Id.* § 1640(a)(2)(b). In either type of action, the borrower may recover reasonable attorney's fees if the creditor's liability is established. *Id.* § 1640(a)(3).

A creditor may escape liability under § 1640 in two ways. First, within fifteen days after discovering an error and prior to institution of a suit under the section, the creditor may notify the borrower of the error. The creditor then must adjust the borrower's account to ensure that the borrower will pay no greater finance charge than that actually disclosed. *Id.* § 1640(b). A creditor may also avoid liability under the section by proving that his violation of the disclosure requirements resulted from a bona fide error. *Id.* § 1640(c). A bona fide error, however, has been construed to encompass only clerical errors. *Ratner v. Chemical Bank N.Y. Trust Co.*, 329 F. Supp. 270, 281-82 n.17 (S.D. N.Y. 1971); accord, *Turner v. Firestone Tire & Rubber Co.*, 537 F.2d 1296, 1298 (5th Cir. 1976); *Ives v. W. T. Grant Co.*, 522 F.2d 749, 756-58 (2d Cir. 1975); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974). But see *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 878-79 (7th Cir. 1976). A borrower may recover a statutory penalty under section 1640 only by bringing suit within one year of the occurrence of the violation. 15 U.S.C. § 1640(e)(1976).

In granting borrowers the right to recover penalties against creditors who have violated the Act, Congress accorded consumers the status of "private attorneys general" to assist in the enforcement of the Truth in Lending Act. Thus, the civil penalty and attorneys' fees provisions serve to compensate individuals whose action helps to implement the Act's regulatory scheme. *Thomas v. Myers-Dickson Furn. Co.*, 479 F.2d 740, 748 (5th Cir. 1973); *Ratner v. Chemical Bank N.Y. Trust Co.*, 329 F. Supp. 270, 280 (S.D.N.Y. 1971).

has strengthened competition among lenders by facilitating the informed use of credit by consumers.¹⁰

The Act protects consumers from creditors who violate the disclosure requirements by allowing the borrower to recover from the creditor actual damages sustained plus twice the amount of the finance charge of the transaction.¹¹ Additionally, the Act provides consumers with the right to rescind certain of these transactions.¹² When asked to enforce a borrower's decision to rescind, however, courts have disagreed as to whether such enforcement should be contingent upon prior tender by the borrower to the creditor of the principal received in the transaction.¹³ This conflict may be resolved by examining the congressional intent in creating the statutory rescission right,¹⁴ by determining the effect that conditioning rescission on a prior tender of the principal has on the enforcement provisions of the Act,¹⁵ and by evaluating whether such a prerequisite accords with general equitable principles.¹⁶

¹⁰ *Wachtel v. West*, 476 F.2d 1062, 1064 (6th Cir.), *cert. denied*, 414 U.S. 874 (1973); *see Garwood*, *supra* note 1, at 491-92.

¹¹ 15 U.S.C. § 1640(a)(1976); *see* note 9 *supra*.

¹² 15 U.S.C. § 1635 (1976); *see* text accompanying notes 17-20 *infra*. The language of the statute does not state whether the civil penalty and rescission are inconsistent and thus mutually exclusive remedies or whether the borrower may pursue both forms of redress. *Private Remedies*, *supra* note 7, at 203. In *Bostwick v. Cohen*, 319 F. Supp. 875 (N.D. Ohio 1970), the court found these rights to be mutually exclusive and required a borrower to elect his remedy before proceeding against the creditor. *Id.* at 877. The *Bostwick* court based its holding on a finding that the civil penalty available to a borrower under § 1640 is remedial in nature and designed to restore the borrower to his pre-contract position. *Id.* at 877-78. The court reasoned that because a borrower who had rescinded a transaction already had been restored to the *status quo ante*, an additional claim for damages would be inappropriate. *Id.* Because the legislative history was silent on the question, the court held that a borrower must comply with the traditional rule requiring an election of remedies. *Id.* *See generally* *United States v. Oregon Lumber Co.*, 260 U.S. 290, 294-95 (1922); *Robb v. Vosa*, 155 U.S. 13, 41-43 (1894); *Sylvania Indus. Corp. v. Lillienfeld's Estate*, 132 F.2d 887, 893 (4th Cir. 1943); *Private Remedies*, *supra* note 7, at 204.

In *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973), the Supreme Court undermined the rationale of *Bostwick*. The Court characterized § 1640 damages as a "civil penalty" levied because of the creditor's failure to disclose credit information, rather than as a remedial provision designed to restore the borrower to *status quo ante*. *Id.* at 375-76. Because § 1640 was not intended as a remedy, that section is not inconsistent with the remedial rescission right of § 1635. Thus, a borrower may pursue both forms of recourse without electing between the two. *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 651-52 (9th Cir. 1974); *accord*, *White v. Arlen Realty & Dev. Corp.*, 540 F.2d 645, 651 (4th Cir. 1975); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974); *Burley v. Bastrop Loan Co.*, 407 F. Supp. 773, 779 (W.D. La. 1975). *See generally* *Private Remedies*, *supra* note 7, at 203-11; *Comment Consumer Protection - Truth In Lending Act "Creditor" Definition And Election of Remedies*, 21 WAYNE L. REV. 977 (1975).

¹³ Compare *Sosa v. Fite*, 498 F.2d 114 (5th Cir. 1974) and *Burley v. Bastrop Loan Co.*, 407 F. Supp. 773 (W.D. La. 1975) with *Powers v. Sims & Levin Realtors*, 542 F.2d 1216 (4th Cir. 1976) and *Palmer v. Wilson*, 502 F.2d 860 (9th Cir. 1974).

¹⁴ *See* text accompanying notes 33-35 & 46-55 *infra*.

¹⁵ *See* text accompanying notes 56-69 *infra*.

¹⁶ *See* text accompanying notes 70-77 *infra*.

To protect the public from noncomplying creditors, Congress provided in section 1635 of the Act that a consumer has an absolute right to rescind any consumer credit transaction¹⁷ in which a security interest is taken in the borrower's principal residence.¹⁸ This section unconditionally empowers a borrower to rescind such a transaction within three days following either consummation of the transaction,¹⁹ or disclosure by the creditor of all material information required by the Act, whichever is later.²⁰ The

¹⁷ 15 U.S.C. § 1635(a) (1976). A consumer credit transaction is defined under the Act as a transaction in which credit is extended to a person, enabling the person to obtain money, property, or service primarily for personal, family, household, or agricultural purposes, 15 U.S.C. § 1602(e)-(i) (1976); 12 C.F.R. § 226.2(p)-(u) (1977). A borrower under § 1635, however, may rescind such a transaction only if the creditor regularly extends, or arranges for the extension of consumer credit payable in more than four installments or for which a finance charge is imposed. 15 U.S.C. § 1602(f) (1976); 12 C.F.R. § 226.2(s) (1977). This definition of "creditor" has been construed to exclude only creditors extending credit as an occasional, isolated, and incidental part of their business. *Eby v. Reb. Realty, Inc.*, 495 F.2d 646, 649 (9th Cir. 1974); *James v. Ragin*, 432 F. Supp. 887, 892 (W.D.N.C. 1977). See generally *Consumer Remedies*, *supra* note 5, at 328; Comment, *Truth in Lending: Problems With the Right of Rescission*, 7 WILLAMETTE L.J. 119, 121-23 (1971).

The rescission right is not available to a borrower in transactions involving: (1) a first lien created, retained, or assumed against a dwelling in which the borrower resides or expects to reside; (2) a first lien retained or acquired in connection with financing the initial construction of the borrower's residence; (3) a lien exempt from the § 1635 rescission right when created which subsequently has been subordinated; (4) a loan for agricultural purposes obtained either under an open-end real estate mortgage or under a written agreement for indeterminable agricultural credit extensions; and (5) a loan obtained from a state agency. 12 C.F.R. § 226.9(g) (1977); see 15 U.S.C. § 1635(e) (1976); *Consumer's Remedies*, *supra* note 5, at 333-34.

¹⁸ Section 1635 empowers a borrower to rescind any consumer credit transaction "in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property" used or expected to be used as the borrower's principal residence. 15 U.S.C. § 1635(a) (1976); 12 C.F.R. § 226.9(a) (1977). Through the grant of this rescission right, Congress intended to counteract abuses resulting from creditor use of second mortgages as security devices, while encouraging the disclosure of credit terms to facilitate informed credit decisions by consumers. *N. C. Freed Co. v. Board of Governors*, 473 F.2d 1210, 1213-14 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973). At the same time, Congress was concerned with protecting consumers from abuses flowing from the use of other types of liens to secure credit agreements. *Id.* These types of liens include security interests under the Uniform Commercial Code, deeds of trust, mechanic's, materialmen's, artisan's, and vendor's liens, among others. 12 C.F.R. § 226.2(gg) (1977); see *N.C. Freed Co. v. Board of Governors*, 473 F.2d 1210, 1213-14 (2d Cir. 1973); *Gardner & North Roofing & Siding Co. v. Board of Governors*, 464 F.2d 838, 841-42 (D.C. Cir. 1972); *Private Remedies*, *supra* note 7, at 202. See generally Garwood, *supra* note 1, at 497-98; Comment, *The Right of Rescission and the Home Improvement Industry*, 37 ALBANY L. REV. 247, 267-70 (1973).

¹⁹ For the purpose of determining the borrower's rights under § 1635, a transaction is considered consummated when a contractual relationship is created between the creditor and the borrower, regardless of the time of performance of either party. 12 C.F.R. § 226.2(kk) (1977).

²⁰ Section 1635 extends the borrower's rescission right "until midnight of the third business day following the consummation of the transaction or the delivery of . . . all . . . material disclosures . . . , whichever is later." 15 U.S.C. § 1635(a) (1976) (emphasis added). This rescission right expires, however, three years after consummation of the transaction or on the date the borrower transfers all his interest in the property, whichever is earlier. 15 U.S.C. § 1635(f) (1976); 12 C.F.R. § 226.9(h) (1977); see note 19 *supra*.

borrower may exercise his right to rescind merely by notifying the creditor in writing.²¹ In the event of rescission, the creditor must return all consideration received within ten days and take whatever action is necessary to terminate the security interest.²² After the creditor fulfills these obligations, the borrower must tender the principal received under the transaction.²³ If the creditor fails to take possession of the property within ten days

By tying expiration of the § 1635 rescission right to the creditor's disclosure of material credit information, Congress created a stringent enforcement mechanism to encourage creditor compliance with the requirements of the Act. A creditor may cut off the borrower's rescission right, however, without having complied fully with those requirements. The borrower's right to rescind terminates three days after the creditor makes all material disclosures. Disclosures are material under the Act if they would alter significantly a reasonable consumer's view of the proposed transaction. *See Ivey v. HUD*, 428 F. Supp. 1337, 1340-43 (N.D. Ga. 1977). If the creditor's failure to disclose is not "material" under the reasonable consumer standard, the borrower's rescission right will not continue beyond the three day "cooling off" period. *Id.* at 1341.

Until the expiration of the three day "cooling off" period, the creditor is proscribed from disbursing any money other than in escrow, making any physical changes in the borrower's property, performing any work or service for the borrower, making any deliveries to the borrower's residence, or otherwise beginning performance under the transaction. 12 C.F.R. § 226.9(c) (1977). This cooling off period facilitates comparison credit shopping and minimizes the threat from high pressure salesmen who "fast-talk" homeowners into improvident credit arrangements. *N.C. Freed Co. v. Board of Governors*, 473 F.2d 1210, 1214-15(2d Cir. 1973); 114 CONG. REC. 14388 (remarks of Rep. Sullivan), 1611 (remarks of Rep. Cahill) (1968); Boyd, *supra* note 6, at 188. For several examples in which consumers were "fast-talked" by salesmen into superficially attractive but substantively disastrous credit transactions, see *Matthews v. Aluminum Acceptance Corp.*, 1 Mich. App. 570, 137 N.W. 2d 280 (1965); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964); *Burchett v. Allied Concord Financial Corp.*, 74 N.M. 575, 396 P.2d 186 (1964).

The creditor may avoid all burdens and risks connected with rescission if the borrower waives his rescission right. *See* 15 U.S.C. § 1635(d) (1976). Such a waiver may be sustained, however, only if three prerequisites are satisfied. First, the creditor must show that the borrower needed the extension of credit to meet a bona fide, immediate, personal emergency. Second, the creditor must demonstrate that the borrower determined that a delay of three business days in the creditor's performance would have jeopardized the health, safety, or welfare of persons or property for which the borrower is responsible. Finally, the creditor must obtain from the borrower a separate, dated, and signed personal statement, not on a printed form, which describes the emergency and modifies or waives the rescission right. 12 C.F.R. § 226.9(3) (1977); *see Consumer's Remedies*, *supra* note 5, at 333-34. Failure to satisfy any of the conditions voids the waiver. *See, e.g., Ljepava v. M.L.S.C. Properties, Inc.*, 511 F.2d 935, 943 (9th Cir. 1975) (foreclosure on property was not imminent and, thus, there was not an emergency).

²¹ 15 U.S.C. § 1635(a) (1976); 12 C.F.R. § 226.9(a) (1977). A borrower exercises his rescission right by notifying the creditor by mail, telegram, or other writing of his decision to rescind. *Id.* Notice by mail is considered given at the time mailed; notice by telegram is considered given at the time filed for transmission; and notice by other writing is considered given at the time delivered to the creditor's place of business. *Id.* In 12 C.F.R. § 226.9(b) (1977), the creditor is required to furnish the borrower with two copies of a standard form set out in that regulation which may be completed by the borrower and mailed as his notice of rescission.

²² 15 U.S.C. § 1635(b) (1976); 12 C.F.R. § 226.9(d) (1977); *see* text accompanying notes 56-63 *infra*; note 68 *infra*.

²³ 15 U.S.C. § 1635(b)(1976); 12 C.F.R. § 226.9(d) (1977). The borrower must tender to

after tender, ownership of the principal vests in the borrower without any obligation on his part to pay for it.²⁴

The protection afforded a borrower under section 1635 differs significantly from that available under common law. At common law, a party seeking to rescind a credit transaction could proceed either in equity or at law.²⁵ A borrower seeking relief from an equity court petitioned "for" rescission,²⁶ and the contested transaction could be annulled by court decree.²⁷ In equity, the borrower had no duty to tender consideration received from the creditor before bringing suit. Rather, the court, relying on its equitable power and discretion, would hear the suit even though the borrower had made no tender of consideration. The court would protect the creditor's interest, however, by making tender by the borrower a prerequisite to a decree of rescission.²⁸

Rescission at law,²⁹ on the other hand, occurred immediately upon notification of the creditor and tender of consideration by the borrower. The court of law became involved only when the borrower sought judicial assistance in recovering the consideration paid to the creditor.³⁰ At law, the borrower was said to sue "on" rescission because the rescission had taken place before the parties went to court. The court determined whether rescission was justified on substantive grounds,³¹ and whether the borrower had given proper notice and tender to the creditor. Thus, rescission at law took effect upon notice and tender, not upon the issuing of the judicial decree.³²

the creditor the reasonable value of the consideration received if tender of the consideration itself is impracticable. *Id.*

²⁴ 15 U.S.C. § 1635(b)(1976); 12 C.F.R. § 226.9(d) (1977); see text accompanying notes 64-69 *infra*.

²⁵ D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 4.3, 4.8, 9.4 (1973) [hereinafter cited as DOBBS].

²⁶ *Id.* § 4.8; see *Gould v. Gayuga County Nat'l Bank*, 86 N.Y. 75 (1881).

²⁷ DOBBS, *supra* note 25, at §§ 4.3, 9.4.

²⁸ An equity court performed two functions when ruling upon a petition for common law rescission. First, the court reviewed the allegations put forth by the petitioner to determine whether rescission should be granted. *Id.* A decree of rescission could be founded on an agreement between the parties or upon fraud, misrepresentation, or mistake which had tainted the transaction. *Id.* § 4.3. Second, the court conditioned its decree to restore both parties to *status quo ante*. *Id.* § 9.4. By properly shaping the relief granted, an equity court could unwind the credit transaction while safeguarding the creditor's rights in the principal.

²⁹ *Id.* § 4.3.

³⁰ *Id.* § 4.8. Rescission at law is analogous to an action for replevin because the borrower, having rightfully cancelled the contract and having returned the creditor to his pre-contract position by a tender of consideration received, is then entitled to recover his property held by the creditor. Because the borrower's tender has protected the creditor's interest in the principal, the law court's only remaining function in rescission at law is to restore the borrower. See *id.*

³¹ See note 28 *supra*.

³² Both in equity and at law, rescission would occur only after the borrower had fully restored the creditor. Thus, the borrower's liability under the transaction and any related security interest would remain in force until the creditor was returned to *status quo ante*. See DOBBS, *supra* note 25, at §§ 4.3, 4.8.

As with rescission at law, section 1635 rescission takes effect immediately when the consumer notifies the creditor.³³ The statutory rescission right differs from rescission at law, however, because the borrower may cancel the underlying contract without a prior tender of the principal and without regard to future performance by either party.³⁴ Thus, Congress eliminated from the statutory rescission process the common law prerequisite of tender by the borrower and the concern for full restoration of the creditor.³⁵ Because tender is eliminated as a condition to rescission under the Act, consumers are able to protect themselves from noncomplying creditors, and creditors are encouraged to comply with TILA disclosure requirements.

In *Sosa v. Fite*,³⁶ the Fifth Circuit recognized that the statutory policy requires unconditional enforcement of the borrower's rescission order.³⁷ The court observed that immediately upon giving notice of rescission, the borrower's liability under the transaction ceases, and any security interest

³³ 15 U.S.C. § 1635(b) (1976); 12 C.F.R. § 226.9(a),(d) (1977); see e.g. *Powers v. Sims and Levin Realtors*, 542 F.2d 1216, 1224 (4th Cir. 1976) (Winter, J., concurring and dissenting); *Palmer v. Wilson*, 502 F.2d 860, 861-62 (9th Cir. 1974); *id.* at 863 (Wright, J., concurring and dissenting); *Sosa v. Fite*, 498 F.2d 114, 119, 121-22 (5th Cir. 1974).

³⁴ Section 1635 of the Act states that after the borrower exercises his rescission right, "he is not liable for any finance or other charge, and any security interest given . . . becomes void." 15 U.S.C. § 1635(b) (1976). Acting pursuant to rulemaking authority granted by 15 U.S.C. § 1604 (1976), Regulation Z, see note 6 *supra*, the Federal Reserve Board has stated that regulations promulgated by the Board are designed to implement "the provision of the Act under which a consumer has a right in certain circumstances to *cancel* a credit transaction which involved a lien on his residence." 12 C.F.R. § 226.1(a)(2) (1977) (emphasis added). A principal sponsor of the Truth in Lending Act gave further evidence of Congress' intent that exercise of the borrower's rescission right cancels the credit transaction and protects the borrower from contractual liability:

Any credit transaction which involves a security interest in . . . the consumer's residence—other than in a purchase-money first mortgage . . .—carried a 3-day cancellation right When the creditor [sic] gives notice of intention to rescind, that voids the mortgage absolutely and unconditionally, regardless of whether either the debtor or the creditor does any of the things that section . . . [1635] requires be done subsequent to the giving of notice of intention to rescind.

114 CONG. REC. 14388 (1968) (remarks of Rep. Sullivan).

³⁵ The protection granted the borrower under the Truth in Lending Act evinces the congressional departure from the common law rule, "let the buyer beware" to the policy "let the seller disclose," a policy best implemented by judicial enforcement of the regulatory scheme. *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 377 (1973); *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973).

³⁶ 498 F.2d 114 (5th Cir. 1974). In *Sosa*, the plaintiff rescinded a home improvements contract and properly notified her creditor. The creditor refused to honor her rescission order, however, and did not clear the record of his security interest and return money paid by the plaintiff. *Id.* at 117. To enforce her rights under § 1635, Mrs. Sosa brought suit and then appealed imposition of a judgment lien against her for the balance owing under the rescinded contract. *Id.* The Fifth Circuit vacated the judgment lien, ordered the creditor to return all money paid, and declared a forfeiture by the creditor of the home improvements made. *Id.*

³⁷ See *id.* at 118-21. The Fifth Circuit observed in *Sosa* that the § 1635 rescission right is self-operating. When properly exercised, the right abrogates the contract between the parties without the need for judicial ratification and imposes duties on the creditor and borrower to facilitate a return to *status quo ante*. *Id.* at 121-22.

given becomes void.³⁸ Basing its ruling on the plain language of the statute, the court held that proper exercise of the borrower's rescission right cut off the borrower's contractual liability, voided the creditor's security interest in the borrower's home, and triggered the statutory duties set out in section 1635.³⁹

In *Palmer v. Wilson*,⁴⁰ however, the Ninth Circuit refused to enforce the borrower's rescission order and instead remanded the case, instructing the district court to determine whether rescission should be conditioned on the borrower's tender of the principal to the creditor.⁴¹ Because the borrowers in *Palmer* sought to enforce their rescission right as well as to recover the statutory penalty provided by section 1640 for creditors' violations of disclosure requirements,⁴² the court of appeals reasoned that unless the principal was tendered, the result could be unduly harsh on the creditor.⁴³ Thus, the *Palmer* court held that when a borrower seeks relief under both sections 1635 and 1640 of the Act, a court is empowered to condition its grant of rescission on the borrower's compliance with an order to tender to the creditor the principal received in the transaction.⁴⁴ The decision to impose such a conditional decree, the court concluded, should depend on the equities present in each case, the policy underlying the Act promoting full disclosure, and the remedial-penal nature of the private enforcement provisions created by Congress.⁴⁵ In so holding, the Ninth Circuit applied common law rules governing rescission in equity.⁴⁶ Rather than enforcing

³⁸ *Id.* at 118. The statute states that "[w]hen an obligor exercises his right to rescind . . . , he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void." 15 U.S.C. § 1635(b) (1976); see 12 C.F.R. § 226.9(a) (1977). Because the borrower's liability under the contract ceases, and the security interest given becomes void at the moment the borrower gives notice of rescission, the creditor becomes a general creditor by operation of law with a claim for restitution of consideration given. See Boyd, *supra* note 6, at 191.

³⁹ 498 F.2d at 118-19; text accompanying notes 17-24 *supra* & 56-68 *infra*.

⁴⁰ 502 F.2d 860 (9th Cir. 1974).

⁴¹ *Id.* at 862.

⁴² *Id.* at 861; see text accompanying note 8 *supra*.

⁴³ 502 F.2d at 862.

⁴⁴ *Id.* In *Palmer*, the Ninth Circuit held that a court may condition enforcement of a borrower's exercise of his § 1635 rescission right on a prior tender by the borrower to the creditor of consideration received. The court supported its holding by concluding that a request for conjunctive relief under §§ 1635 and 1640 of the Act is directed to the court's sense of equity. *Id.* Thus, the court has the equitable power to condition the relief granted to do full justice. *Id.*

⁴⁵ *Id.* The Ninth Circuit set forth three factors to be weighed by a court in determining whether to condition enforcement of § 1635 rescission in conjunction with the grant of a statutory penalty. The factors are the equities of the case, the full disclosure policy of the Act, and the remedial-penal nature of the private enforcement provisions of Truth in Lending. The court gave no indication how these criteria should be applied in any given case. In *LaGrone v. Johnson*, 534 F.2d 1360 (9th Cir. 1976), however, the Ninth Circuit expanded on its position in *Palmer* and held that a court could condition enforcement of § 1635 rescission on the borrower's tender even though the borrower does not also seek a statutory penalty. *Id.* at 1362.

⁴⁶ See text accompanying notes 26-28 *supra*.

the rescission order to protect the borrowers from harm resulting from the credit transaction induced by the creditors' failure to disclose, the Ninth Circuit allowed the district court to require the borrowers to restore the creditor fully, as at common law, before granting relief.⁴⁷

By conditioning enforcement of the borrowers' rescission order on tender of the principal to the creditor, the Ninth Circuit defeated the congressional intent underlying the TILA.⁴⁸ Instead of modifying the section 1635 remedy out of concern for the welfare of the creditor, courts should apply the provisions of the statute in accordance with the legislative intent.⁴⁹ A conditional enforcement order is clearly inconsistent with the absolute language of section 1635 which creates the borrower's rescission right.⁵⁰ Moreover, the position that a borrower's rescission may be conditioned upon any action other than proper notice to the creditor was explicitly rejected by a principal sponsor of the Act.⁵¹ Mere notice of rescission was intended to void creditors' security interests "absolutely and unconditionally," without regard to subsequent conduct of either borrowers or creditors.⁵² Immediately upon rescission, section 1635 grants the borrower rights in the principal and broad protection from liability under the credit transaction,⁵³ but requires the creditor to perform specific acts as prerequisites to exercise of his right of restitution.⁵⁴ Only by giving uncondi-

⁴⁷ 502 F.2d at 862.

⁴⁸ *Id.* at 864 (Wright, J., concurring and dissenting); see *Powers v. Sims & Levin Realtors*, 542 F.2d 1216, 1224 (4th Cir. 1976) (Winter, J., concurring and dissenting). See generally Note, *Truth in Lending Act Litigation: Concurrent Recourse to Rescission and the Civil Penalty*, 43 GEO. WASH. L. REV. 840, 871-72 (1975) [hereinafter cited as *Concurrent Recourse*]; Note, *Truth in Lending—Right of Rescission*, 1975 WIS. L. REV. 192, 200-02 [hereinafter cited as *Right of Rescission*].

⁴⁹ See 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 45.09, 54.03, 58.05, 58.06 (4th ed. 1973). In *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973), the Supreme Court affirmed a Federal Reserve Board regulation implementing the Act's disclosure requirements. In affirming the regulation and calling for strict enforcement of the TILA, the Court stated that "[t]he statutory scheme is within the power granted to Congress under the Commerce Clause. It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner." *Id.* at 377-78. The courts should, therefore, give effect to the plain language of the statute.

⁵⁰ *Palmer v. Wilson*, 502 F.2d 860, 864 (9th Cir. 1974) (Wright, J., concurring and dissenting); *Sosa v. Fite*, 498 F.2d 114, 116 (5th Cir. 1974); see note 68 *infra*.

⁵¹ See note 34 *supra*.

⁵² 114 CONG. REC. 4118 (1968) (remarks of Rep. Sullivan).

⁵³ 15 U.S.C. § 1635(b)(1976); 12 C.F.R. § 226.9(d)(1977). See generally *Powers v. Sims & Levin Realtors*, 542 F.2d 1216, 1224-25 (4th Cir. 1976) (Winter, J., concurring and dissenting); *Palmer v. Wilson*, 502 F.2d 114, 119-20 (5th Cir. 1974); *Concurrent Recourse*, *supra* note 48, at 873-74. During the ten day period following rescission, the borrower may retain any property received from the creditor without any obligation to pay for it. 15 U.S.C. § 1635(b)(1976); see text accompanying notes 17-24 *supra*.

⁵⁴ Section 1635 provides that "[w]ithin ten days after receipt of a notice of rescission, the creditor shall return to the . . . [borrower] any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary . . . to reflect the termination of any security interest created under the transaction." 15 U.S.C. § 1635(b)(1976); see text accompanying notes 17-24 *supra*; note 68 *infra*.

tional effect to a borrower's rescission order and by strictly enforcing the obligations imposed on the parties by section 1635⁵⁵ will a court carry out the congressional intent of encouraging the disclosure of material credit information while safeguarding borrowers from noncomplying creditors. The position that a court may invoke its equitable powers to condition enforcement of a borrower's rescission order is thus inconsistent with the plain language of the statute and contrary to the legislative intent embodied in the Act.

Not only does the equity approach to enforcement of a section 1635 rescission order conflict with the language and purpose of that section and of the TILA generally, but the approach also undermines the enforcement provisions of the Act.⁵⁶ The *Palmer* court's holding that a court may condition enforcement of a borrower's rescission order on his tender to the creditor of the principal received disregards the statutory procedure for rescission set forth in section 1635.⁵⁷ Requiring tender of the principal as a prerequisite to enforcement of rescission has two significant consequences. First, the creditor's security interest is preserved intact and may be voided only if the borrower complies with the tender requirement.⁵⁸ Second, by requiring the debtor to tender before rescission is enforced, the court effectively reversed the sequence of tender by the parties established in the statute.⁵⁹ This return to common law rules governing rescission is in direct conflict with the statutory procedure afforded the borrower to enforce his remedy.⁶⁰ That procedure clearly is designed to give immediate effect to the borrower's decision to rescind a transaction in which the creditor has not complied with the disclosure requirements of the Act.⁶¹ Section 1635 not only voids the creditor's security interest and terminates the borrower's liability under the credit transaction upon the borrower's notice of rescission, but the statute also requires the creditor to restore the borrower to *status quo ante* before the latter has a duty to tender the consideration

⁵⁵ See text accompanying notes 56-63 *infra*; note 68 *infra*.

⁵⁶ See generally *Concurrent Recourse*, *supra* note 48, at 872-74.

⁵⁷ *Id.* at 873; *Powers v. Sims & Levin Realtors*, 542 F. 2d 1216, 1224 (4th Cir. 1976) (Winter, J., concurring and dissenting); *Sosa v. Fite*, 498 F.2d 114, 119 (5th Cir. 1974); *Yslas v. D. K. Guenther Builders, Inc.*, 342 So.2d 859, 860 n.2 (Fla. App. 1977); text accompanying notes 17-24 *supra*.

⁵⁸ The *Palmer* court implicitly found that the borrowers' notice of rescission did not void the creditor's security interest, the effect required by the statute. Instead, the court found the security interest to be merely voidable by a subsequent tender by the borrowers of consideration received. See 502 F.2d at 862. In adopting this view, the court ignored the express language of section 1635 and denied the borrower the protection established by that section. See 15 U.S.C. § 1635(b) (1976); text accompanying notes 17-24 *supra*.

⁵⁹ In *Ljepava v. M.L.S.C. Properties, Inc.*, 511 F.2d 935 (9th Cir. 1975), the Ninth Circuit explicitly reversed the sequence of tender by the parties established by section 1635. *Id.* at 944. Although the statute expressly requires the creditor to fully restore the borrower before seeking restitution, the court stated "that the statute should not be read as requiring the lender to perform first." *Id.*

⁶⁰ *Concurrent Recourse*, *supra* note 48, at 873-74; *Right of Rescission*, *supra* note 48, at 201; see text accompanying notes 17-24 *supra*; note 68 *infra*.

⁶¹ *Concurrent Recourse*, *supra* note 48, at 873-74; see note 34 *supra*.

received.⁶² Because the sequence of events prescribed by the statute governing rescission is unambiguous, the position that a court may condition enforcement of rescission on the borrower's tender of the principal is erroneous.⁶³

The conditional remedy advanced by the *Palmer* court also would frustrate operation of the forfeiture provision of section 1635, which creates a sequence of statutory duties binding the borrower and creditor throughout the rescission process.⁶⁴ Some creditors refuse to honor borrowers' decisions to rescind, and borrowers must seek judicial enforcement. The *Palmer* court, however, failed to consider the effect of the creditor's noncompliance with his statutory duties.⁶⁵ The *Sosa* court, on the other hand, recognized that section 1635 requires a creditor to act expeditiously upon receipt of notice of rescission in performing his statutory duties.⁶⁶ Because a creditor's failure to comply with the disclosure requirements prevents effective comparison shopping for credit, thereby subverting the purpose of the Act, the statute places a burden on the creditor to rectify his actions.⁶⁷ Only by restoring the debtor to *status quo ante* immediately can the creditor preserve his right of restitution under the statute.⁶⁸ Congress provided for

⁶² *Rachbach v. Cogswell*, 547 F.2d 502, 505 (10th Cir. 1976); *Powers v. Sims & Levin Realtors*, 542 F.2d 1216, 1224 (4th Cir. 1976) (Winter, J., concurring and dissenting); *Sosa v. Fite*, 498 F.2d 114, 119 n.6 (5th Cir. 1974); *Gerasta v. Hibernia Nat'l Bank*, 411 F. Supp. 176, 191 (E.D. La. 1976); *Burley v. Bastrop Loan Co.*, 407 F. Supp. 773, 778 (W.D. La. 1975); 15 U.S.C. § 1635(b) (1976); 12 C.F.R. § 226.9(d) (1977).

The *Palmer* court explicitly recognized that the Truth in Lending Act abolished tender of consideration received as a prerequisite to rescission under section 1635 of the Act. 502 F.2d at 861. Nevertheless, the court imposed precisely that condition on borrowers exercising the section 1635 rescission right. *Id.* at 862; *Ljepava v. M.L.S.C. Properties, Inc.*, 511 F.2d 935, 944 (9th Cir. 1975).

⁶³ *Concurrent Recourse*, *supra* note 48, at 874.

⁶⁴ See *Sosa v. Fite*, 498 F.2d 114, 118-20 (5th Cir. 1974); *Yslas v. D. K. Guenther Builders, Inc.*, 342 So.2d 859, 860 n.2 (Fla. App. 1977); text accompanying notes 17-24 *supra*; note 68 *infra*.

⁶⁵ Several courts have held that the creditor's failure to honor the borrower's rescission notice and to fully restore the borrower within ten days after rescission automatically works a forfeiture of the principal to the borrower under § 1635. *E.g.*, *Gerasta v. Hibernia Nat'l Bank*, 411 F. Supp. 176, 191 (E.D. La. 1976); *Powers v. Sims and Levin Realtors*, 396 F. Supp. 12, 25-26 (E.D. Va. 1975), *affirmed in part and reversed in part*, 542 F.2d 1216 (4th Cir. 1976); *Yslas v. D. K. Guenther Builders, Inc.*, 342 So.2d 859, 860 (Fla. App. 1977).

⁶⁶ 498 F.2d at 119.

⁶⁷ See *id.* at 119-20; text accompanying notes 17-24 *supra*.

⁶⁸ 498 F.2d at 119 & n.6, 120. Section 1635 unambiguously defines the duties and rights of a creditor subsequent to statutory rescission under the Truth in Lending Act:

Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. . . . Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor. . . .

15 U.S.C. § 1635(b) (1976). The statute prescribes a course of action to be followed by the creditor within a specific time limit by which he must fully restore the borrower to *status quo ante*. *Sosa v. Fite*, 498 F.2d 114, 119-20 (5th Cir. 1974); *Gerasta v. Hibernia Nat'l Bank*,

forfeiture under the Act in specific situations to provide a strong incentive for compliance by creditors with the established disclosure and procedural rescission requirements. Only through strict enforcement of the forfeiture provision against creditors who ignore their duties under the statute will courts give vitality to the congressional efforts to create an opportunity for the informed and intelligent use of consumer credit. Because the equity approach to enforcement of section 1635 rescission ignores this important statutory tool, that approach undermines the effectiveness of the enforcement provisions of the Truth in Lending Act.⁶⁹

In addition to vitiating the enforcement provisions of the Act, the equity approach advanced by the Ninth Circuit is inconsistent with elementary principles of equity. Courts of equity universally recognize that a party seeking equity must do equity,⁷⁰ and that if a party's equitable claim arises out of his own misconduct, he will be barred from equitable relief.⁷¹

411 F. Supp. 176, 191 (E.D. La. 1976); *Powers v. Sims & Levin Realtors*, 396 F. Supp. 12, 25-26 (E.D. Va. 1975), *affirmed in part and reversed in part*, 542 F.2d 1216 (4th Cir. 1976). Under the statute, the creditor retains rights in the principal in the hands of the borrower and possesses a right of restitution. 15 U.S.C. § 1635(b)(1976). The creditor's right to demand a tender of that property from the borrower, however, is conditioned explicitly on the creditor's compliance with the rescission procedure under section 1635. That is, within ten days after rescission, the creditor must fully restore the borrower and clear all records of any security interests related to the transaction. If the creditor fails to satisfy these duties within the allotted time, his right to a tender of the principal will never accrue. *Sosa v. Fite*, 498 F.2d 114, 118-20 (5th Cir. 1974); *Gerasta v. Hibernia Nat'l Bank*, 411 F. Supp. 176, 191 (E.D. La. 1976); *Powers v. Sims & Levin Realtors*, 396 F. Supp. 12, 25-26 (E.D. Va. 1975); *see Boyd, supra* note 6, at 192.

In *Sosa*, the borrower informed the creditor at the time of rescission that she was ready, willing, and able to tender to him the principal of the transaction. 498 F.2d at 119-20. From the time of the borrower's notice of rescission, however, the creditor ignored the rescission order, refused to perform his duties required by section 1635, and ignored the borrower's tender. The creditor effectively prevented a timely tender by the borrower by failing to abide by the section 1635 rescission process. Because the creditor's conduct in *Sosa* made a proper tender by the borrower impossible, the Fifth Circuit held that that conduct excused the borrower's tender and triggered the ten-day period after which ownership of the principal would vest in the borrower without any obligation to pay. *Id.*, *accord*, *Powers v. Sims & Levin Realtors*, 396 F. Supp. 12, 25-26 (E.D. Va. 1975), *affirmed in part and reversed in part*, 542 F.2d 1216 (4th Cir. 1976). *See generally* 5A A. CORBIN, CORBIN ON CONTRACTS § 1233 (2d ed. 1964); 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 834 (3d ed. 1962).

⁶⁹ For a brief discussion of additional deleterious effects of the Ninth Circuit's conditional enforcement of § 1635 rescission on remedial benefits afforded by that section, *see Concurrent Recourse, supra* note 48, at 874.

⁷⁰ *See generally* 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 385 (5th ed. 1941) [hereinafter cited as POMEROY]; DOBBS, *supra* note 25, at § 2.4; *Sosa v. Fite*, 498 F.2d 114, 120 (5th Cir. 1974); *Burley v. Bastrop Loan Co.*, 407 F. Supp. 773, 778 (E.D. La. 1975).

In *Precision Instrument Mfg. Co. v. Automotive Maint. Machinery Co.*, 324 U.S. 806 (1945), the Supreme Court refused to grant equitable relief because the petitioner in equity had failed to disclose knowledge of perjured testimony to Patent Office officials. *Id.* at 814-15. The Court noted that equity requires that the party seeking relief must have acted fairly and without fraud or deceit as to the matter in issue. *Id.* *See also* *R. H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934); *Wheeler v. Sage*, 68 U.S. (1 Wall.) 518, 529 (1863).

⁷¹ POMEROY, *supra* note 70, at §§ 397, 398, 404. Under the maxim "He who comes into equity must come with clean hands", the conduct of the party in the transaction who seeks

In the section 1635 setting, the creditor clearly has an equitable claim for restitution upon the borrower's rescission even though the underlying contract and accompanying security interest have been voided.⁷² The section defines this claim as a contingent right to a tender of the principal by the borrower which becomes choate only if the creditor complies with his statutory duties.⁷³ In situations like *Palmer* and *Sosa*, however, creditors claim their rights of restitution after refusing to comply with the express obligations imposed on them.⁷⁴ In fact, the creditors' claims for restitution arose because of initial failures to comply with disclosure requirements of the Act and subsequent refusals to comply with section 1635 procedure. Thus, creditors assert their claims with "unclean hands," and should not be entitled to equitable relief.⁷⁵ Before entering into credit transactions, creditors are on notice of the Act's disclosure requirements and the risks entailed by proceeding without having complied fully. The power to prevent what creditors characterize as an "inequitable result" lies solely with the creditors. Creditors can cut off the borrower's rescission right, however, by making the required disclosures.⁷⁶ Moreover, any creditor can mitigate his potential loss by adhering to the statutory procedure for rescission. A creditor's willful disregard of the disclosure requirements and subsequent refusal to carry out his obligations pursuant to statutory rescission taint the creditor's claim for equity and should bar relief.⁷⁷

Congress granted consumers a right of rescission under the Truth in Lending Act to protect homeowners from high-pressure salesmen whose sales tactics often produced credit transactions which consumers may not have wanted and which could result in foreclosure on consumers' homes. Congress also sought to encourage creditors to make timely disclosures of

equitable relief must have been conscientious, just, and in good faith. *Id.* § 398. Any willful act by that party in the transaction in question which has violated fundamental concepts of equity will bar the party from equitable relief. *Id.* §§ 397, 404. See generally DOBBS, *supra* note 25, at § 2.4; Chafee, *Coming Into Equity with Clean Hands* (pt. 1), 47 MICH. L. REV. 877, 880-81 (1949); see also *Creath v. Sims*, 46 U.S. (5 How.) 192, 208 (847) (violation of statute proscribing importation of slaves bars equitable relief); *Danciger v. Stone*, 187 F.853, 862 (E.D. Okla. 1909); *Downey v. Charles F. S. Gove Co.*, 201 Mass. 251, 87 N.E. 597 (1909). In *Danciger* and *Downey*, the courts held that petitioners' violation of statute prohibiting solicitation of purchase of liquor bars equitable relief.

⁷² See *Sosa v. Fite*, 498 F.2d 114, 119-20 (5th Cir. 1974); DOBBS, *supra* note 25, at § 4.1.

⁷³ See note 68 *supra*.

⁷⁴ *Palmer v. Wilson*, 502 F.2d 860, 862 (9th Cir. 1974); *Sosa v. Fite*, 498 F.2d 114, 119-20 (5th Cir. 1974).

⁷⁵ In disposing of the creditors' claim for equitable relief, the *Sosa* court stated, "[T]he creditors . . . failed to carry out any of their statutory duties, and thus their lament of any inequity being visited upon them is utterly unpersuasive, for the power was completely theirs to prevent this parade of creditor horrors from ever occurring." 498 F.2d at 120. See also *Powers v. Sims & Levin Realtors*, 542 F.2d 1216, 1225 (Winter, J., concurring and dissenting); *Burley v. Bastrop Loan Co.*, 407 F. Supp. 773, 778 (W.D. La. 1975).

⁷⁶ *Palmer v. Wilson*, 502 F.2d 860, 864 (9th Cir. 1974) (Wright, J., concurring and dissenting).

⁷⁷ See *Sosa v. Fite*, 498 F.2d 114, 119-20 (5th Cir. 1974); *Gerasta v. Hibernia Nat'l Bank*, 411 F. Supp. 176, 191 (E.D. La. 1976); POMEROY, *supra* note 70, at §§ 397, 398, 404.

material information to facilitate informed comparison credit shopping. The Ninth Circuit's conditional enforcement of section 1635 rescission, however, frustrates exercise of that right and thereby vitiates its effectiveness as an enforcement tool under the TILA. Such enforcement also conflicts with the unambiguous language of the statute and the congressional intent embodied in the Act. Furthermore, the conditional approach is in direct conflict with the statutory rescission procedure and ignores the equitable taint which undermines the creditor's claim for restitution. To give vitality to Congress' regulatory scheme and restore meaning to the right of rescission, courts should reject the equitable discretion approach advanced by the Ninth Circuit and grant relief in accordance with the plain language of the statute.

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