Truth And Consequences

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"Truth has become a very elusive item since the Federal Government undertook to define it."

The initial proposed title for this article was "The Truth Shall Make You A Fee." The article will discuss some of the complexities that have arisen under the Truth in Lending (TIL) Act, a federal law designed to make vital information more available to consumers in a clear and meaningful form. It is hard to be opposed to a concept such as Truth. The illustrations set forth herein will demonstrate, however, that the attempt to define Truth in clear and meaningful terms has been largely a failure. Perhaps the problem is that the regulators, the courts, the creditors, and the debtors cannot reach a clear and meaningful consensus on what is clear and meaningful.

We have reached a day where Acts are labeled in terms indicating noble and moral undertakings, or perhaps the correction of ignoble or immoral activities. In 1968 we had Truth-in-Lending, in 1970 Fair Credit Reporting and Fair Credit Billing, in 1974 Equal Credit Opportunity, and, in 1977, Fair Debt Collection Practices. The contradictions of these various purposes are spotlighted in section 804 of the Fair Debt Collection Practices Act, which makes it a violation of the Act to tell the truth when the recipient of a debt collector's telephone call asks why the debtor is being sought. This rule is apparently premised on the reasoning that it could be demeaning to tell someone that the person is being sought to try to collect a debt. A good argument could be made that the prior-restraint-of-free-speech concept of the first amendment has been largely by-passed by these various acts, which require a communication of truth only in specific terms in some cases and prohibit truth in others. The command, "In this way and this way only shall you speak the truth," is hard to square with first amendment concepts.

The discussion of various cases herein, and their criticism, is not neces-
sarily a criticism or disparagement of the particular judges involved. They were given the job of applying a federal statute, the Truth-in-Lending Act ("The Act"), of 57 sections, and a federal regulation, Regulation Z, of 43 pages in the Code of Federal Regulations, which in turn have produced over 600 staff rulings (official and unofficial) and interpretations by the Federal Reserve Board. In 1977 alone, there were more than 100 official staff rulings and about 300 unofficial staff rulings. If perhaps if the statute and Regulation Z had been held to the "clear and meaningful" standard to which creditors were referred, all of these interpretations and the more than 8000 federal court cases filed would not have been necessary.

The Federal Reserve Board has promulgated Regulation Z to implement and explain the Truth-in-Lending Act. Under Act Sections 105 and 130(f) this Regulation is effectively the controlling standard. Hereinafter references to the substantive provisions of truth-in-lending will be to the Regulation only, except where the Act is specified.

We will discuss a few holdings that we think demonstrate some of the problems—uncertainty as to the fundamental nature and purpose of truth-in-lending, ambushes in the Regulation, fanatical insistence on terminology, and impossible requirements. One big problem for a creditor is finding reliable guidance. When a judge tells you the law, it is too late. Some creditors try to obey the law by consulting lawyers, or the Federal Reserve Board. Our first step is to see the results of such efforts.

I. GOOD FAITH AS TO A CONFUSING LAW WAS NOT THE TEST: OR, WHOM CAN YOU TRUST?

Advice of Counsel

Section 130(c) of the Act provides that a creditor is not liable for a truth-in-lending violation if he can show "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." The exact scope of this defense is not yet clear.

Seeking and taking the advice of an attorney has turned out not to be a procedure reasonably adapted to avoid error. Creditors have argued that section 130(c) should protect them in cases where they have followed the advice of their attorneys, but that defense has been held inadequate.

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8 For the year ending June 30, 1977, there were 2183 cases filed under truth-in-lending. 1977 Ann. Rep. of Dir. of Admin. Off. of U.S. Courts at 106. This figure does not include cases in which truth-in-lending issues arose after filing. For preceding years, the corresponding figures were 1974-1682, 1975-2237, and 1976-2147. Id. Figures are not available for earlier years.
(Courts have not defended this conclusion by disparaging lawyers or by saying even lawyers cannot understand TIL.) The first, and leading, case on this point is Ratner v. Chemical Bank New York Trust Co., which held that section 130(c) protected only a creditor who had made a clerical error. In that case, the creditor had failed to disclose an annual percentage rate where (the court held) he ought to have disclosed it. The court said that the section 130(c) defense was not available: "It is undisputed that defendant carefully, deliberately—intentionally—omitted the disclosure in question. That defendant . . . mistook the law does not make its actions any less intentional." The court held that the defense was available only for clerical errors—and, in addition, the creditor must show that he had procedures designed to avoid such clerical errors. Regardless of the presence of good faith or avoidance procedures, the defense of unintentional error was not available for a mistake of law. It is hard to imagine what more a creditor could do to ensure compliance with the law than follow the advice of an attorney who is fully informed of the facts; but this is not enough for truth-in-lending. One reason given by the court for reaching its conclusion is that there is no such thing as a "procedure" to avoid a mistake of law. In short, seeing a lawyer is not an acceptable "procedure" to enable a creditor to take advantage of the section 130(c) defense under truth-in-lending.

The Ratner decision that the section 130(c) defense is not available for mistakes of law, but only for clerical errors, has been generally followed. Indeed, one court indicated that the procedures to avoid an error necessarily included a double check, and if there were no double checks the defense did not apply. The court specifically said that it would not be enough merely to have a well-trained clerk to do the work carefully, but it would be enough if he were then double checked by another well-trained clerk or if he himself then checked his figures against a table. "Good faith", then, triggers an additional expense, to be passed on to the consumer, the "beneficiary" of truth-in-lending.

Other courts have agreed less extravagantly that the defense applies only to clerical errors; but it is still not entirely clear that this necessarily must be the law. For instance, in Haynes v. Logan Furniture Mart, the

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14  Id. at 281.
15  We submit that the court was wrong on this point. Such procedures could be devised, including regular consultation with lawyers who are experienced in truth-in-lending and who keep up with developments, scrupulous adherence to their advice, printing of limited quantities of forms with repeated consultation with counsel before new quantities were printed, and so forth. There is no guarantee that those procedures, though expensive and well-intentioned, will succeed, but the same is true of procedures intended to avoid clerical errors.
18  503 F.2d 1161, 1166-67 (7th Cir. 1974).
The court said the exception applied only to clerical errors, and expressed concern that requiring a borrower to prove that a violation was intentional would make the civil remedy "a hollow one."\(^9\) The court indicated, however, that the creditor's counsel had refused to give advice as to one of the points that evidently proved to be a violation, and gave no advice as to another.\(^2\) If that is what happened, the true rule of this case is not that there is no defense where the error was "judgmental with respect to legal requirements of the Act and not clerical in nature" as the court said.\(^3\) Instead the rule may simply be that advice of counsel is not a procedure to avoid the error where counsel does not advise on the point. Similarly, \(\text{Palmer v. Wilson}^{22}\) recited that the defense applies only to clerical errors, but in fact there were so many mistakes in \(\text{Palmer},\) including the omission of the name of the creditor,\(^23\) that perhaps there really was no procedure at all.

One of the commonly cited cases for the "clerical errors only" proposition is \(\text{Buford v. American Finance Co.}^{24}\) There, the creditor had sent its employees to seminars and had used forms that it thought were reliable since they were furnished by presumably well-informed credit life insurance companies. The court said that the omission of required notary's fees from the finance charge was not covered by the section 130(c) defense, since the fee had been imposed intentionally. Yet the opinion goes out of its way to mention that the creditor had not sought legal advice and had not inquired of the Federal Reserve Board. Again, while the language of the opinion refers to "clerical errors only," on the facts such a rule was not necessarily required. This case also raised the fear that TIL would be stultified if a debtor had to prove intent, a point for which it was cited by the \(\text{Haynes}^{\text{court.}}\) Neither court tried to reconcile this concern with the purpose of section 130(c) and neither suggested letting the creditor bear the burden of disproving intent.

Similarly, the "clerical only" rule was announced in \(\text{Johnson v. Associates Finance, Inc.}^{25}\) where the creditor's reckless (?) reliance on the "tan pamphlet"\(^26\) resulted in two of the three errors found. Evidently there was virtually no procedure at all except reliance on the tan pamphlet (which really should have been enough). In \(\text{Douglas v. Beneficial Finance Co.}^{27}\) also stating the "clerical only" rule, the creditor quite likely never even

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\(^{10}\) The approach of letting the debtor show the error and then letting the creditor come forward to demonstrate that the error was "unintentional" is not discussed by the court.

\(^{20}\) Id. at 1166 n.5.

\(^{21}\) Id. at 1167.

\(^{22}\) 502 F.2d 860, 861 (9th Cir. 1974).

\(^{23}\) \text{See Palmer v. Wilson, 359 F. Supp. 1099, 1101 (N.D. Cal. 1973).}


\(^{26}\) The so-called "tan pamphlet" is the Federal Reserve Board booklet on "What You Ought To Know About Truth-in-Lending," giving the text of Regulation Z, some questions and answers, and some forms said to comply with the Act.

thought of the problem. There was a confess judgment clause in a note, which evidently did not permit judgment without notice under Alaska law; the court thought the clause was a “security interest” since it might be enforced without notice in some other state, and therefore it should have been disclosed. This decision was reversed,28 on the grounds that since the clause did not create a security interest under Alaska law, it could not be held to be a security interest without taking all meaning out of Board Interpretation 226.202,29 which says a confess judgment clause is a security interest “in those States” where there is no requirement of notice.

Thus, while the statement is well-established that the protection of section 130(c) applies only to clerical errors, the rule itself is not so clear,30 and a later court might still reject the rule since it was announced mainly in cases where it did not apply.

The Federal Reserve Board Was Not Reliable

Apparently the courts think creditors are not the only ones who can be confused by the Act and Regulation—so can the Board. Some cases held that a creditor was liable even if he had followed the Board’s interpretations.31 Although interpretation of the law was committed by Congress to the Federal Reserve Board, under these decisions a creditor could not rely on the forms prepared by the Federal Reserve Board and its staff.32

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28 469 F.2d 453 (9th Cir. 1972).
30 This problem is also presented in McGowan v. King, Inc., 569 F.2d 845 (5th Cir. 1978).
There, a retailer had obtained disclosure forms from the lender that regularly financed its sales. The forms had been prepared by a law firm that had been expressly asked to comply with truth-in-lending, but evidently had failed to do so, not disclosing the “deferred payment price” as required by § 226.8(c)(8)(ii). Again, relying on counsel was not enough. As to good faith, there was apparently no doubt that the creditor had tried, but the installment creditor was liable for twice the finance charge plus the debtor’s attorneys fees. Again, it is hard to see what more a creditor could do in his effort to obtain proper forms than get forms from an institutional lender, prepared by the lender’s lawyers.

32 But see Welmaker v. W. T. Grant Co., 365 F. Supp. 531, 540-45 (N.D. Ga. 1972), where the court held that a creditor’s improper disclosures did not subject him to liability, in view of the fact that he had relied on the tan pamphlet. In fact the creditor had had its forms reviewed by both the Federal Reserve staff and—three times—by the Federal Trade Commission staff. The Court concluded:

It is difficult to imagine any more efforts to comply than those shown here. Prior approval of all forms and indeed duplication of the sample form recommended by the supervising governmental agency is the optimum any party can do in the exercise of good faith. Indeed if the good faith defense envisioned by the Congress is to have any meaning whatsoever, these efforts must suffice. To state simply that “every man is presumed to intend the consequences of his acts” and then to infer lack of good faith because no act is done gives no meaning to the phrase “resulted from bona fide error” and cancels out the defense entirely. Section 1840(c) considers
Many of these cases should be reversed by the amendments to section 130(f), which provide a defense under the Act if an action or omission was "in good faith in conformity with any rule, regulation, or interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals . . . ." This provision was added in 1974, and amended to include the interpretations by officials or employees in 1976.

Note that the statute requires "conformity with" and not "reliance on." Nonetheless, it has been held that reliance is an essential element of this defense. The effect of the imposition of a reliance requirement is that a creditor must pay the penalty even if his mistake was so reasonable that the Board or its staff made the very same mistake, unless the Board happened to make the mistake first and the creditor happened to know it. And although the creditor in good faith makes the same mistake as the Board the creditor suffers a financial penalty, even though the Federal Reserve, which made the same error despite a supposedly greater expertise, does not pay a penalty, and does not have to argue that it acted in good faith.

II. THE PURPOSE AND NATURE OF TRUTH IN LENDING

Several issues have arisen that require analysis of the fundamental purpose and nature of the truth-in-lending requirements. The courts have not agreed on some of these issues, which suggests that at least some of the courts have misunderstood, though of course each creditor must understand or pay heavily. Even where the courts do agree, the holdings sometimes "look pretty odd."

Void for Vagueness

The large number of official and unofficial interpretations of Regulation Z, and the thousands of cases alleging violations, indicate that the requirements are none too clear. Some of the burden created by this lack of clarity necessarily falls on the judges who must ascertain the law. One such judge, evidently exasperated, wrote that "it may effectively be argued that the Truth-in-Lending regulations themselves give rise to such 'confusing' disclosure statements that all such statements are per se viola-

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Id. at 544.


24 "If an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, though it may do several things that look petty odd." Holt, C.J., in City of London v. Wood, 12 Mod. 689, 697 (1701).
The authors note with mixed emotion that in *Franklin v. First Money, Inc.* 35 a challenge to the Truth-in-Lending statute in a federal court in Louisiana, on a basis comparable to the "void for vagueness" theory raised in some other contexts, was unavailing. The court held that a law is not unenforceable or void for vagueness merely because courts cannot agree what it means.

This conclusion was reached notwithstanding the accepted—and obvious—character of the double-finance-charge provision in section 120(a) as a penalty. 37 Indeed, the *Franklin* court itself acknowledged that this provision is a penalty. 38 Note, however, that in *Franklin* the challenged result was merely a finding that a "deferral charge" was really a "delinquency charge" that should have been disclosed on the initial disclosure sheet. The distinction between deferral charges and delinquency charges would seem to be one not truly raising the constitutional issue.

Perhaps the problem is inevitable in that all language is ambiguous, and some language is more ambiguous than other. One cannot help but ponder whether a statute directed at more violent or reprehensible conduct would have received more careful scrutiny. 39 At any rate, the Supreme Court did not find a vagueness problem 40 nor has any other court, so it seems unlikely that the Act or Regulation will be struck down on this ground. Nonetheless the problem of vagueness may add weight to the argument that consulting an attorney is a good faith procedure for complying with the law.

### This Penalty Is Not Penal

The Act provides for damages in a civil suit. The damages are calculated as the actual damage suffered by the plaintiff, *plus twice* the amount of the finance charge, *plus costs* and attorney's fees. 41 This is a stiff penalty, since the finance charge is the creditor's income out of which he pays expenses, including those that make his services available to persons needing them (and pay his lawyer to advise him on TIL): he loses *twice* that in

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39 Perhaps we are wrong in our concepts of reprehensibility. We note that a person might be penalized more heavily for an innocent truth-in-lending violation than for stealing the entire Total of Payments.
addition to making the debtor whole even where he meant no harm and actually tried to obey the law, and even though the debtor suffered no harm.42

At a casual glance, an unwary observer might think that the twice-the-finance-charge element is a penalty—perhaps a civil penalty but nonetheless a penalty. And indeed, that is the law today. The Supreme Court itself referred to it as a civil penalty in Mourning v. Family Publications, Inc.,43 and the Courts of Appeals have relied on its nature as a penalty to support allowing its award in addition to allowing rescission under section 125.44 But this has not always been the law; before Mourning set them straight two federal courts had ruled that the awards under Truth-in-Lending were merely remedial, not penal. One would have been hard put to explain to a mistaken creditor (in clear and meaningful terms) how he had not been penalized.

In one early leading case, Ratner v. Chemical Bank New York Trust Co.,45 the argument was raised that the defendant should not be liable for a penalty in view of the fact that its interpretation of the statute was reasonable.46 The court said this argument “may be rejected speedily,” since “the ‘remedial’ character of the provisions for civil recoveries quite overwhelms its allegedly ‘penal’ aspect.” The court thought it would be “grossly subversive” of the goal of protecting consumers if “reasonable” violations were exempt from the civil penalty. According to this court, the only penal sanction in the statute is section 112 (imprisonment and fines for willful violations).

To somewhat the same effect is Bostwick v. Cohen,47 concluding that “the civil liability section is remedial rather than penal.” The distinction may have been hard to grasp for a creditor who acted in good faith but was still stuck for refunding twice the hoped-for income, on top of damages and attorney’s fees, and all without regard for his expenses or intentions.

One problem that may have concerned the defendant in the Ratner case was that there were a great many possible plaintiffs, and Ratner was seeking to bring the action as a class action. Possible damages were $13,000,000.48 The statute today provides for a ceiling on recoveries in class actions, limiting them to “the lesser of $500,000 or 1 per centum of the net worth of the creditor.”49 That can be a great deal of money, but it at least limits the possible liability under the twice-the-finance-charge

42 The twice-the-finance-charge penalty has a $1,000 ceiling, providing some restraint in large transactions. 15 U.S.C. § 1640(a)(2)(A)(i) (1976). There is also a $100 floor, id., perhaps to be sure the creditor notices the penalty in small transactions.
44 See, e.g., Sellers v. Wollman, 510 F.2d 119, 122-23 (5th Cir. 1975); Eby v. Reb Realty, Inc., 495 F.2d 646, 651-52 (9th Cir. 1974).
46 Id. at 282.
(or $100 to $1,000) provision. If there are more than 5,000 members of the class, the creditor is benefited by this amendment to the Act even if only the minimum $100-per-plaintiff penalty would have been awarded; obviously, if a higher penalty would have been awarded then the benefit is greater. Even so, a $500,000 nonpunitive punishment is quite a blow for a creditor who, for instance, has committed no fault more serious than saying "finance charges" when he should have said "finance charge," as in Powers v. Sims & Levin, discussed below (though Powers was not a class action suit).

Moreover, it may be that this limitation will prove illusory. One district court recently refused to certify a class action: one stated reason was that the class-action recovery limit would mean that the class members in effect waived over 90 percent of the penalty. This is a rather ominous indication of the court's attitude toward creditor liability.

What If There Is No Finance Charge?

Even though the purpose of truth-in-lending is to permit comparison of finance charges, the Regulation and the Act require disclosure when there is no finance charge, if the obligation is payable in more than four installments. In this event the question arises: if there is no finance charge, what is there to compare? Obviously, something other than a finance charge—perhaps the total of payments. But if one proposed extension of credit is payable over six months with no finance charge for total payments of $105.00 and in another extension the cash price is $102.00 with interest at 12% payable over twelve months with $109.00 (approximately) total payments, which is the better deal?

Is Rescission Equitable?

Section 125 of the original Truth-in-Lending Act of 1968 conferred "the right to rescind" on debtors where credit was extended upon the security of the residence of the person to whom the credit was extended. Section 226.9(a) refers to "principal residence." The creditor was required to inform the debtor of his right to rescind within three business days following consummation or the delivery of the disclosures required under Truth-in-Lending, whichever was later.

"Rescission" may have had a well-known connotation or definition prior to this, as the remedy of annulling, abrogating, or unmaking a con-

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The principal reason for refusing to certify the class, however, was apparently that the individual plaintiff was in default on the obligation, and was, therefore, not representative of the entire class. This is an eminently reasonable basis for the decision, at least in cases where defaulters and non-defaulters may have different interests.
tract, placing the parties to it in the status quo ante. There were some traps here. The confess judgment clause under which a creditor might obtain the same type of liens as under any other judgment was held to be a security interest entitling the debtor to rescission rights. Two cases have gone so far as to hold that a potential mechanic's lien gives rise to rescission rights.

One significant exclusion from the class of transactions subject to statutory rescission was the creation of a first lien against a dwelling to finance its acquisition. Even here there was another trap: the grant of the right of rescission in section 125(a) refers to real property that is "used or is expected to be used as the residence" of the borrower, but the exception in section 125(e) provides for its non-application to the creation or retention of a first lien "against a dwelling to finance the acquisition of that dwelling . . . ." To paraphrase Polly Adler's famous observation that "A House Is Not A Home," Truth-in-Lending lawyers came up with the phrase that "A Residence Is Not A Dwelling." In short, a residence might be improved or unimproved real estate whereas the dwelling could only be improved. The section 125(e) exception applies only to dwellings, so a purchase of vacant land is not within the exception.

Another trap in section 125 as originally passed was the lack of any effective statute of limitations if the creditor failed to give the notice or if there was some material error in the truth in lending disclosures. That was because the right to rescind lasted for three days after consummation of the transaction or delivery of all rescission disclosures and all other material disclosures—whichever was later. Thus the three-day rescission period did not begin until disclosures were made correctly. This defect or oversight was corrected by Congress in 1974 by enactment of a new subsection 125(f), providing that an obligator's right of rescission expires three years after the consummation of the transaction, or upon the sale of the property, whichever occurs earlier, regardless of when disclosures were

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45 See Charnita, Inc. v. FTC, 479 F.2d 684, 685-86 (3d Cir. 1973); Douglas v. Beneficial Finance Co., 469 F.2d 453, 458 (9th Cir. 1972). Virginia amended § 8-359 of the Virginia Code (present § 8.01-434) to provide that the judgment so confessed would not become a lien against the debtor's principal residence until after the passage of time, enabling the debtor to enter any defense which he might have under Virginia law.


49 Littlefield v. Walt Flanagan & Co., 498 F.2d 1133, 1136 (10th Cir. 1974); Sosa v. Fite, 498 F.2d 114, 120 (5th Cir. 1974).

50 But see Wachtel v. West, 376 F.2d 1062, 1065 (6th Cir.), cert. denied, 414 U.S. 874 (1973), (seemingly applying the doctrine of laches).
made. *Jamerson v. Miles* held that the three-year limitation was applicable to causes of action arising prior to the effective date of the 1974 enactment as well as those arising thereafter. The court indicates that this limitation is jurisdictional.

The traditional equitable doctrine of rescission contemplates restoration to prior status. The statutory rescission right may be conditioned upon tender of repayment by the customer. The court in *LaGrone v. Johnson* conditioned rescission of a consumer loan upon tender of the net amounts advanced by the creditor, noting expressly that the violations "were not egregious and the equities heavily favor the creditors." Yet, in *Burley v. Bastrop Loan Co.*, it was held that the lender was not entitled to return of the loan proceeds from the borrower. Upon the borrower's attempted rescission, the lender had refused to return the down payment or to terminate the security interest; this was also true in *Powers v. Sims & Levin*, and the *Burley* court relied on the later-reversed district court decision in *Powers*. A like decision was reached in *Gerstra v. Hibernia National Bank*. *Sosa v. Fite* appears to reject an incorporation of the equitable concepts. In *Rachbach v. Cogswell*, the court of appeals permitted a lower court to order payment of interest notwithstanding section 125(b), since rescission is an equitable remedy—but held that tender by the borrower was not a condition for rescission.

Generally speaking, a plaintiff who elects the equitable remedy of rescission under state law or common law principles waives damages. This is not necessarily true in the case of Truth-in-Lending, with the courts generally holding that the debtor is entitled to both rescission and damages.

We would observe that the combined grant of rescission and damages can hardly be seen as merely returning the parties to their prior positions. In fact, an earlier case had held that the remedies of rescission and damages were inconsistent and that an election to seek rescission constitutes abandonment of the damages claimed.

A recent bright light, at least from the creditor's standpoint, was *Ivey v. HUD*, in which the plaintiff sought rescission because of an $11.30

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42 Powers v. Sims & Levin, 542 F.2d 1216, 1221-22 (4th Cir. 1976); Palmer v. Wilson, 502 F.2d 860, 862-63 (9th Cir. 1974).
43 534 F.2d 1360, 1362 (9th Cir. 1976).
46 407 F. Supp. 775.
48 498 F.2d 114, 119 (5th Cir. 1974).
49 547 F.2d 502, 505 (10th Cir. 1976).
50 See *Powers v. Sims & Levin*, 542 F.2d 1216 (4th Cir. 1976); *Sellers v. Wollman*, 510 F.2d 119 (5th Cir. 1975); *Eby v. Reb Realty Inc.*, 495 F.2d 646, 651-52 (9th Cir. 1974).
disclosure error in a transaction involving total payments of $12,066.50. The schedule and amounts of payments were evidently disclosed correctly, but the “total of payments” was incorrectly disclosed as $12,055.20. The court denied rescission, holding that under section 125 “material disclosures” means “important disclosures.”’

The significance of the requirement that the notice of the rescission right be given after the consummation of the transaction or the entering into of a legal contract (which by definition thereupon becomes a voidable contract) is demonstrated in the case of Doggett v. County Savings & Loan Co. There, the notice of rescission was given at the time the borrower made the loan application and entered into a home improvement contract, but before the acceptance of the application by the lender, or the disclosure of the dollar information required by Truth-in-Lending. The notice of the right to rescind was held to have been given prematurely and to be ineffective. In Doggett, the time between the giving of the notice and the entering of the loan transaction was so substantial that the notice can hardly be seen as part of the same transaction. The law purports to require a rigid schedule—disclosures, then consummation, then notice of right to rescind. The language in Doggett suggests that strict adherence to this is necessary. In a closer case, however, it is submitted that a creditor who gave notice immediately before the transaction was consummated, but at the time of the application, would feel that he had been “trapped” by an overly technical reading of this law.

The answer to the question of whether rescission is an equitable remedy under Truth-in-Lending, unfortunately, seems to depend upon the particular judge involved, not upon a clear and meaningful statute or regulation.

A Question For The Jury

Is a truth-in-lending action an action “at common law” within the meaning of the seventh amendment? It is not clear whether a party in a truth in lending case has a constitutional right to a jury trial. In Mosley v. National Finance Co., Chief Judge Gordon, relying on a Fourth Circuit decision in an age discrimination case, held that a jury trial was required. The Northern District of Georgia had apparently held to the contrary. According to one report, this issue arose in Georgia when the Northern District was so overwhelmed with truth-in-lending cases that the judges began assigning them routinely to the bankruptcy judges sitting as special

74 See also Burley v. Bastrop Loan Co., 407 F. Supp. 773 (W.D. La. 1975) (failure to disclose an acceleration right was held to trigger the right of rescission even though the Fifth Circuit was later to hold this was not even a required disclosure). Martin v. Commercial Securities Co., 539 F.2d 521, 529 (5th Cir. 1976).
masters. The Mosley court cited the Georgia case but declined to follow it, since the Fourth Circuit precedent seemed to control.

Itemizing Single-Component Finance Charges

Another line of cases held that a single component of a finance charge must be given another name. Under the former language of the Regulation, which said a description was necessary for each component of the finance charge, many cases found a requirement that the single component of a finance charge be disclosed. On the other hand, some cases found that no further disclosure of a single component was required.

The number of cases on this point indicates that the statute and regulation were not clear and meaningful. Perhaps one half of the judges construing the statute saw differing "clear and meaningful" interpretations. A prudent lawyer probably advised his clients that although he did not believe the Regulation required the disclosure of the description of a single "component" of a finance charge, the safer course was to disclose anyhow. Neither the courts nor the prudent lawyers reached the question of the benefit to the consumer of relabeling the single-component finance charge as either "interest" or "time-price differential." As far as facilitating shopping for credit, which is the primary avowed purpose of the Act, the consumer could be presented with the problem of whether an 11% "time-price differential" is a better deal than a 10% "interest rate," which in turn could depend on the "cash price" or "total of payments." The labeling of the single component finance charge does not and could not enhance his ability to shop for credit. The present version of sections 226.8(c)(8) & (d)(3) clearly requires separate disclosure of components only "where the total charge consists of two or more types of charges."

III. SOME UNCLEAR AND INCONSPICUOUS RULES

"The Act, although remedial, must nonetheless be read to provide clear meaning to both lender and borrower. It should not have hidden meanings."

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79 The Board later issued Interpretation 226.820 saying what Regulation Z meant, then amended §§ 226.8(c)(8) & (d)(3) to their present form and rescinded the Interpretation. See Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511, 517 (5th Cir. 1976), cert. denied, 431 U.S. 929 (1977).
The Act and Regulation require disclosures to be clear, conspicuous, and in "meaningful sequence." 8 The law is not held to the same standard, and some rules discovered by courts were not clear or conspicuous until the opinions were handed down. To give the flavor of truth in lending, it may be useful to look briefly at some of the surprising rules that have appeared. These are rules that are not necessarily irrational or even unreasonable, but were so unpredictable that efforts to comply with truth in lending take on some features of playing a slot machine.

**Prepaid Finance Charges**

It would seem that the language "prepaid finance charge" taken at face value would mean than the finance charge had been prepaid. Such definition of the term as is found in Regulation Z section 226.8(d) refers to it in legalese as "any amount referred to in paragraph (e) required to be excluded from the amount in subparagraph (1) . . . ." Subsection (e) seems to require exclusion of any "finance charge paid separately, in cash or otherwise . . . to the creditor . . . or withheld by the creditor . . . ." 85 (Emphasis added.)

In *Jones v. Community Loan & Investment Corp.*, 88 the creditor imposed a loan fee or service charge which was added to (not deducted from) the principal amount of the loan, to be collected over the life of the loan. Interest was chargeable under Georgia law on this unpaid service charge, and was in fact charged. The Fifth Circuit held that the charge was "prepaid" at the time of the loan closing, since it was a one-time charge, not subject to rebate. Therefore, the court thought it was an integral part of "the credit of which the customer had the actual use" at the time the note was signed. Thus, the word "prepaid" seems to mean "earned" and not "collected," at least in the Fifth Circuit.

On rehearing the court reasoned that the limiting of the term "prepaid finance charge" to charges already paid or withheld would render the term "meaningless." One would be hard put to explain to the average debtor, or average creditor, or even the average lawyer, in meaningful terms, that a charge which had been "prepaid" must nevertheless be again "paid." Thus, in the gigantic area of the Fifth Circuit, the word "prepaid" has no connotation as to whether or not the charge has in fact been paid (or withheld), there can be an unpaid prepaid finance charge.

There is an answer that would protect the creditor but which would hardly benefit the consumer. The creditor could require the loan fee to be paid in cash, or withheld at closing, but not permit it to be added to the principal balance and collected over the life of the loan.

**Acceleration on Default**

An acceleration provision, or the right to call a loan, is something of which we suspect all, or nearly all, consumers know—that the loan will be

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88 526 F.2d 642 (5th Cir. 1976).
called and the collateral repossessed upon default. And we submit this is not an area where credit shopping is going to reveal significant variances. Neither the Act nor the Regulation requires disclosure of this right, at least not in express or "clear and meaningful" terms. Nonetheless, the issue has been raised repeatedly in litigation, with varying results.

One court of appeals concluded that acceleration is not a charge and need not be disclosed unless unearned interest is accelerated. Two others concluded that acceleration is not a charge and no disclosure is required. Still another concluded that acceleration is a charge, relying on an earlier opinion involving late charges. Some district courts have concluded that acceleration is not a charge and no disclosure is required. Others have held that acceleration is a charge and disclosure is required. A third group has said that acceleration is not a charge but disclosure is required for a meaningful disclosure. Still others ruled that acceleration is not a charge, unless the acceleration is of unearned interest. Finally, some held that acceleration is a subsequent occurrence exempt from disclosure. Recent Fifth Circuit decisions may change the law under the district court decisions from Georgia and Louisiana. Though nothing in the Act or Regulation mentions acceleration as

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8 Begay v. Ziems Motor Co., 550 F.2d 1244 (10th Cir. 1977); Martin v. Commercial Securities Company, Inc., 539 F.2d 521 (5th Cir. 1976); Meyers v. Clearview Dodge, Inc., 539 F.2d 511 (5th Cir. 1976); Grant v. Imperial Motors, 539 F.2d 506 (5th Cir. 1976).
9 LaGrone v. Johnson, 534 F.2d 1380 (9th Cir. 1976); cf. Ljepava v. M.L.S.C. Properties, Inc., 511 F.2d 935 (9th Cir. 1975) (disclosure statement inadequate because of failure to state how charges for late payments calculated). The Ninth Circuit has also said acceleration is a prepayment rather than a default. St. Germain v. Bank of Hawaii, 5 CONS. CRED. GUIDE (CCH) ¶ 98,051 (9th Cir. Dec. 30, 1977). LaGrone was distinguished on the ground that it merely assumed that disclosure was required.
15 See note 88 supra.
something to be disclosed, the prudent course seems to be to disclose it.

For a lawyer preparing forms for his client, this may give plenty of cases to analyze, and justify a more significant fee. The disclosure does not seem to benefit the consumer; and the efficient creditor must pass the expense on, while the merely greedy creditor does likewise.

Rule of 78's

The regulation requires identification of the method of computing the rebate of a pre-computed finance charge when the customer pays a closed-end account in advance. Probably the most common ways of computing the rebate are pro rata and by the Rule of 78. On the pro rata basis, the amount refunded bears the same ratio to the total finance charge (or total interest) as the time remaining on the obligation bears to the originally agreed time. The Rule of 78 is not susceptible to such a simple explanation, and would pose difficulties for lenders seeking to explain it. In fact, it would be an unusual court that would characterize any specific, detailed explanation of this Rule as clear and meaningful. We note that the courts critical of the short-form identification (Rule of 78's) did not have the temerity to suggest a model form for explaining the rule. The regulation does not require an "explanation" of the method, however, but only an "identification." Nonetheless, two courts have held that it was not enough merely to identify "the Rule of 78."

It is not clear that an explanation of the Rule of 78, in terms sufficient to be understood by all consumers, can be drafted; if it could be drafted, it might well detract from the other disclosures, and could make it impossible to include all disclosures on one side of a piece of paper of normal length. For those reasons, the Federal Reserve Board has issued an official Board interpretation to the effect that the section 226.8(b)(7) requirement for identification of the rebate method "is satisfied simply by reference by name to the 'rule of 78's' or other method, as applicable." That this interpretation is within the power of the Board would seem obvious. It was evidently not obvious to some people, but it was so held in Bone v. Hibernia Banks, and Beneficial Discount Co. v. Johnson.

After-Acquired Property

The Regulation requires disclosure of security interests. Many security agreements by their terms cover after-acquired property. It seems reasonable to assume that after-acquired property in a loan subject to truth-in-lending will be consumer goods; and of course, in the case of consumer goods, Uniform Commercial Code section 9-204 limits the effect of after-acquired-property clauses to property acquired within ten days after the giving of value. Nonetheless, the forms in the tan pamphlet presented a short legend stating that “after-acquired property is included,” with no further explanation. Many creditors made similar disclosures. About seven years after the promulgation of Truth-in-Lending, many cases discovered that this disclosure was defective, in that it failed to disclose the limitations of the U.C.C. upon an after-acquired property clause as to consumer goods.

Regulation Z May Not Contain All Of The Required Disclosures

It would seem at first blush that if a creditor were to comply with Regulation Z (and specifically section 226.8, expressly dealing with disclosures in other than open-end credit), the creditor would be protected. All he would have to do is make the disclosures outlined at length therein. The creditor tried this method of compliance in Pollock v. General Finance Corp. In that case, the creditor disclosed the “Amount Financed” (Reg. Z section 226.8(d)(1)), the “Finance Charge” (Reg. Z section 226.8(d)(3)), and the “Total of Payments” (Reg. Z section 226.8(b)(3)). However, because of insurance charges of $16.08, voluntarily elected by the debtor, the “Amount Financed” was higher than the amount of cash given to the debtor.

The Fifth Circuit found the statement defective in this respect, notwithstanding its conformity to Regulation Z. Relying upon the requirement under section 129(a) of the Act to disclose “the amount of credit of which the obligor will have the actual use,” the court found that failure

105 535 F.2d 295 (5th Cir. 1976).
to disclose these “proceeds” (sometimes referred to as “cash in fist”) separately was a violation.\textsuperscript{107}

This analysis was rejected in \textit{DeJaynes v. General Finance Corp.},\textsuperscript{108} where the court stated that the disclosure was not required by Regulation Z. The court said the congressional scheme of having just one Regulation Z promulgated by one designated agency—the Federal Reserve—was preferable to having various Regulation Z’s as interpreted (or “promulgated”) by the various federal courts across the country. The court even found it to be the Congressional intent that

the purveyors of consumer credit be sufficiently apprised of their obligations under the statute that they may act with confidence that their compliance with existing regulations will protect them from multifarious litigation.\textsuperscript{109}

How does one advise a client? In the Fifth Circuit, \textit{Pollock} seems to control. The denial of \textit{certiorari}, although not binding on the Supreme Court, does lend a further dignity to the \textit{Pollock} opinion; but the other violations found in the \textit{Pollock} case may render the denial of \textit{certiorari} less persuasive on this single point. Consider, however, that another court might find the additional term “loan proceeds” confusing and thus a violation of section 226.6(c). Perhaps the answer is to try to rely upon unofficial staff ruling number 1162 of March 14, 1977\textsuperscript{110} which provides that no separate disclosure of “loan proceeds” is required but that the figure disclosed as “amount financed” should include any itemized charges such as insurance or recording fees.

\section*{IV. THE PUNCTILIO OF A TERMINOLOGY THE MOST SENSITIVE}

Disclosures “shall be made . . . in the terminology prescribed [by Regulation Z].”\textsuperscript{111} Creditors are held to this requirement with a rigor reminiscent of the standards Judge Cardozo prescribed for trustees.\textsuperscript{112} The Act expressly authorizes terminology “different from that employed in this

\begin{itemize}
\item Id. at 380.
\item Id. ¶ 31,555.
\item 12 C.F.R. § 226.6(a) (1977).
\item Writing for the court in \textit{Meinhard v. Salmon}, 249 N.Y. 458, 164 N.E. 545, 546 (1928), Judge (later Justice) Cardozo said:
\begin{quote}
A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions.
\end{quote}
\end{itemize}
if it conveys substantially the same meaning," but this was left up to the Board and the Board preferred to prescribe. Up to a point, of course, the purpose of the Act necessitates uniform language so that prospective debtors can shop around. Some cases may have passed that point.

One of the most striking recent cases on the importance of literal compliance, *Desselles v. Mossy Motors, Inc.*, reaches a result that is both indefensible and clearly correct. The creditor obviously did not comply strictly with the Regulation; but to penalize it was a mockery of any noble goals Congress may have had in mind. A debtor bought a car and signed a "sale and chattel mortgage" agreement, which was then assigned to a finance company. The debtor knew—that the debt was going to be assigned, but the disclosure statement did not identify the finance company as a creditor. The court held this was a violation and awarded the penalty. It is clear that the creditor did not comply with section 226.6(d); yet it is also clear that in fact the information was given to the debtor—he knew the information, and was not injured by its absence from the disclosure form. The creditors sought relief because the debtor already knew of the finance company, but this was dismissed as an argument "of equity which seemingly has no place in Truth-in-Lending," a striking characterization of an act with such noble intentions. From this and other cases on actual knowledge, it appears that truth-in-lending is like the ancient English rules of pleading; substance counts for little, but the forms must be followed.

Several other cases have similarly demanded rigid compliance, with little attention to the value of the disclosures omitted or made incorrectly. These results do not always even seem to be required by the Regulation.

**Arithmetic**

A disclosure which does not tell the consumer the sum of 59 plus one is in violation. The Regulation requires disclosure of the total number of payments. One could argue that telling a debtor that his payments are "equal monthly installments of $65.00 each for a period 59 months, and the balance is due and payable five years after date" was a clearer method of disclosure in this area. The federal district court in *Powers v. Sims & Levin Realtors* thought otherwise, concluding that there was a violation in not disclosing the "total" of 59 and one. Regrettably, the Court of Appeals for the Fourth Circuit found it unnecessary to comment on this.

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115 *Id.* at 903.
116 *Id.* at 902.
117 *See* text accompanying notes 118 to 143.
and six other technical violations found by the lower court in *Powers* since it affirmed on other grounds. This inability or unwillingness to comment on the Act in detail speaks loudly as to the clarity and meaningfulness of the Act's language. Perhaps the legislators should be subject to the same penalty for failure to use clear and meaningful language as is the creditor who so fails.

In passing, one cannot resist commenting that the unfortunate debtor who hypothetically cannot add 59 and one will hardly be helped by the more involved disclosures under Regulation Z.

**The Scarlet Letter**

Use of the plural form to describe a plural concept may be a violation. The district court in *Powers* found a violation in the use of the phrase "TOTAL FINANCE CHARGES" rather than "FINANCE CHARGE." Again the Court of Appeals expressly declined to comment whether this was right or wrong. One can characterize the use of the word "Total" and the plural form as more descriptive and more accurate. *Bussey v. Georgia BankAmericard* and *Mims v. Dixie Finance Corp.* found no violation in the phrase "TOTAL FINANCE CHARGE," so perhaps the decisive point was the letter "s," which the Regulation had not prescribed.

**How Late Is Late?**

In one case, a creditor disclosed that if payments were not paid when due, a $4 late charge would be assessed. The debtor contended this was misleading or confusing, because the note itself provided for a late charge only when an installment was paid "more than 15 days after the due date thereof." The judge agreed, and found a violation under section 226.6(c). The court here apparently relied partly on the broad statements of purposes in Section 102 of the Act. The probable result is that if a creditor has to disclose the actual number of days before a late charge is imposed, it will shorten the period. Too many consumers tend to take the full grace period if it is forcefully called to their attention. A well-intentioned decision thus probably results in a shorter period for permissible late payments, to the prejudice of those consumers who may occasionally need that grace period.

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123 542 F.2d 1216, 1219 (4th Cir. 1976). Similarly, see *Carney v. Worthmore Furniture, Inc.*, 561 F.2d 1100 (4th Cir. 1977), where the trial court found inadequate a disclosure of "13 monthly installments of $36.00 (final payment to be $33.12)," since it was unclear whether there were 13 or 14 total payments (the truth was 14). The court of appeals again refused to decide if this was a violation, but the refusal is more understandable here since the issue was merely one of ambiguity, not of the Act's requirements as in *Powers*.
125 542 F.2d at 1219.
126 516 F.2d 452, 455 (5th Cir. 1975).
Trade Name

One district judge has held that it is not enough to disclose a creditor's trade name in a situation where the creditor is an individual person doing business under a trade name. The regulation provides that a proper disclosure statement is one "on which the creditor is identified." This court thought this required the legal name of the creditor, reasoning that the trade name would be of no use in taking legal action. Such reasoning may be accurate in states where trade names need not be recorded with any government agency, and yet it is hard to believe the debtor would not have been able to sue knowing the trade name and—the location.

As a related matter, it may be noted that a creditor is not necessarily identified unless his street address is given. In Welmaker v. W. T. Grant Co., a case in which a creditor was part of a national chain and had identified itself on the disclosure statement as "store #70," the court held the street address should have been given, even though the Chicago address of the home office appeared on the form. The court did not have before it, of course, the issue of the sufficiency of some lesser address. A later case, Houston v. Atlanta Federal Savings & Loan Ass'n, did conclude that disclosure of just the name of the creditor was sufficient; the case involved a savings and loan association that did business only in the Atlanta metropolitan area, so the name alone may have been of more value to the debtor than the name of W. T. Grant Co. in Welmaker. We submit, however, that no one was misled or deprived of access to the creditor's address in Welmaker. The decision would be easier to rationalize if it had involved a lesser-known creditor.

V. THE LIFE OF THE LAW HAS NOT BEEN LOGIC

Occasional holdings under the Truth in Lending Act have been strikingly detached from reason. Not only have they not lived on logic, but they have defied experience as well. The demands placed on creditors are startling in these cases, especially in the "illegality" situation next discussed, where the creditor evidently did not know the fact it was penalized for failing to disclose.

Illegality

In one fairly recent case, James v. American Finance System, the
creditor—apparently inadvertently—violated Georgia law in such a way that the contract was null and void. The debtor had no enforceable obligation to make payments. The court quite seriously held that it was a violation of the Truth-in-Lending Act not to disclose to the consumer that he had the privilege of not paying the loan at all. In one sense, of course, this is irrefutable, because that may well be the single most material fact about the transaction. It would certainly facilitate comparison shopping—the best deal of all is not having to pay the loan back. On the other hand, it seems unlikely that a creditor would knowingly get into that situation; even the most wicked loan shark expects to get his money back. Ordinarily, commercial institutions intend to do it legally, and design their forms to this end. This strange holding is not mitigated by the fact that it appears to have been reached by a special master, and merely confirmed by the District Judge. Pinkett v. Credithrift of America, Inc., No. 2,133 a later case, rejected the James result, noting that creditors normally attempt to prepare enforceable notes. Pinkett requires that the disclosure statement merely disclose what the note purports to require.134 The creditor-defendant in Pinkett offered samples of the possible disclosure of voidness, which demonstrate the absurdity of requiring such a disclosure.

In Pinkett, it was argued by the defendant that if the note was unenforceable, then there was no transaction subject to truth-in-lending. This argument was, not unreasonably, rejected: "[I]t simply makes no sense to exempt a creditor from liability for defects in his disclosure statement merely because the loan agreement is later found to have been in violation of state law . . . ."

Property Insurance Proceeds

Are the rules regarding property insurance clear? One might have thought so. Section 106(c) of the Act135 states that if liability or property insurance is required, the charge or premium shall be included in the finance charge unless there is a clear, specific statement in writing setting forth the cost and stating that the debtor may choose the person through which insurance is to be obtained. The word "person" is indefinite, so one could argue that the language "through which the insurance is to be obtained" refers only to the agent, not the insurer itself, because it does not say "from which." Regulation Z is no more precise. Section 226.4(a)(6) enunciates this anti-tie-in provision that found its way into a disclosure law, stating that unless the debtor is told he has his choice of persons through whom he may purchase, the property and liability insurance premiums are included in the finance charge.137 The Regulation also states,

134 But see the after-acquired property cases discussed above at text accompanying notes 103-04 supra, requiring disclosure of the limitations under U.C.C. § 9-204.
135 430 F. Supp. at 115.
by way of footnotes, that a policy owned by the customer and assigned or otherwise made payable to a creditor is not insurance "written in connection with" a credit transaction, which would mean the premiums are not part of the finance charge.138

Section 129(a)(8) of the Act139 specifies that in an extension of credit, other than open end credit, a description of any security interest held or to be retained or acquired by a creditor, and a clear identification of the property to which it relates, must be disclosed. Section 226.8(b)(5) of Regulation Z similarly requires description or identification of any security held or to be retained or acquired by the creditor. The "tan pamphlet" contains six sample disclosure forms. Of these, Exhibits C and E refer to insurance and to security interests, and disclose that insurance coverage is voluntary. Exhibit E conveys a security interest in chattels, i.e., motor vehicles, household goods and appliances, and "other." It discloses insurance if purchased through the creditor, but apparently insurance is not required, or if it is required acquisition through the creditor is not. The authors estimate that property insurance is required in almost all secured financing where real estate with significant improvements is involved; in transactions involving motor vehicles, it is generally required if the creditor takes a security interest in a motor vehicle. We thought it fair to assume that the Federal Reserve Board was aware of this, especially since the Board's bank examination forms facilitate criticism—even invite criticism—of lenders if insurance policies do not reside in the bank files when a security agreement or real estate deed of trust is involved.

In 1977, however, the Third Circuit decided Gennuso v. Commercial Bank & Trust Co.140 The court held that disclosure was required of a security interest in the property insurance where the debtor granted a security interest in a car and agreed to insure it with a loss-payable clause to the creditor. So far as truth in lending goes, the creditor may require insurance, and in secured financing he ordinarily does. In fact, insurance is now recognized under section 9-306 of the Uniform Commercial Code, 1972 revision, as "proceeds" of the collateral. Are we to suppose that creditors all along had been disclosing that, if there was a security interest in the collateral, then there was a like security interest in any required insurance if there was a loss-payable clause?141 Or did the plaintiff in the Gennuso case find a technical requirement that had previously escaped the sharp eyes of the promulgator of Regulation Z and of the multitudes of creditors who have been trying to comply with the law, and the lesser multitudes of plaintiffs who are trying to find errors in the disclosure forms? We suspect the latter.

140 566 F.2d 437 (3d Cir. 1977) (per curiam).
141 Indeed, there may be a security interest in the proceeds of even non-required insurance regardless of the loss payee. See U.C.C. § 9-306(1).
Moreover, we note that the insurance proceeds (and refund of unearned premium) did not exist at the time of disclosures. The Gennuso court did not consider the applicability of section 226.6(g), even though the creation of insurance proceeds would seem to be an unanticipated subsequent occurrence just as much as is a default—unless, of course, the creditor knows in advance that the debtor is going to wreck the collateral.

CONCLUSION

We would hope the mishmash of cases presented here would demonstrate that the statute and regulation have not themselves been clear and meaningful. If we might paraphrase one creditor in the earlier days of Truth-in-Lending, it might illustrate the point. He commented that if he were going to bilk the poor and uneducated of the ghetto, he would proceed in the same manner as Truth-in-Lending and give the consumer more information than he can possibly comprehend.

The benefit of Truth-in-Lending is hard to discern. The annual reports of the Federal Reserve Board to Congress comment that the Board believes there is a more informed consumer and a more informed use of credit. Interest rates on consumer loans have risen since 1969, however, and in the early 1970's economic conditions forced consumer interest rates and other interest rates even higher, to levels that Truth-in-Lending could not stem. Perhaps consumer interest rates would have been higher still without the advent of Truth-in-Lending but one wonders. One lawyer mentions with amusement a client who came to him about 1969 or 1970, commenting that he had gotten a real good deal on a first mortgage, about 11%, because with the advent of Truth-in-Lending he knew that oil companies and credit card companies charged 18%. Truth-in-Lending had not taught him the difference between mortgage credit and convenience credit, and might be characterized as having misled him. Most of the disclosures seem too esoteric or too obvious for an Act of Congress.

A side effect of Truth-in-Lending has been to benefit the credit card industry, by effectively putting small creditors out of the business of extending credit because they could not afford the legal talent necessary to

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112 12 C.F.R. § 226.6(g) (1977) provides that the Act is not violated where subsequent events cause the information originally disclosed to become inaccurate.

113 The Gennuso court also found a violation in that the “Note and Security Agreement” included a reference, in boldface type, to a “foregoing warrant of attorney to confess judgment,” while there was no such warrant. The disclosure statement did not mention such a warrant, perhaps because there was none, but the court said it was confusing to have the reference in the Note and Security Agreement. 566 F.2d at 443. That is, there was no warrant, and no warrant was disclosed, but it was held illegal to have a reference to it on the Note and Security Agreement even though neither the Act nor the Regulation purports to control the contents of anything except the disclosure statement. Indeed the whole purpose the disclosure statement is supposedly to clear up confusion resulting from Notes and Security Agreements.

114 Perhaps we will eventually have a law merely requiring debtors to read contracts before they sign, and forbidding them to sign if they do not understand.
comply with the complex subtleties of Truth-in-Lending and other consumer legislation. The bank credit card offers other benefits to the small merchant as well, of course, and we may be amiss in pointing the finger at Truth-in-Lending as forcing the small merchant out of the credit business; however, it was a factor.

Truth-in-Lending was a well-intended statute. Unfortunately, it seems to serve mostly as a trap for the unwary creditor, increasing the cost of credit extensions and eliminating the small credit extender from the market as opposed to achieving benefits for the consumers on whose behalf it was enacted. Consumers have gotten windfalls because of creditors' errors, some of which were unintentional and meaningless. This is not exactly the policy of benefiting consumers attributed to Congress when it enacted this legislation.

It would be much better for debtors as well as creditors if Congress would limit Truth-in-Lending disclosures to the Annual Percentage Rate (to permit rate comparison and shopping), the Total Finance Charge (the cost of credit), and the Total of Payments (or the total burden on the consumer). This might be more meaningful, and certainly would be simpler and less of a trap.

Writing this article, the authors were apprehensive that they were being unduly critical of Truth in Lending. This concern was relieved by a federal judge when the article was nearly finished. Holding against a creditor, Judge Charles Clark wrote for the Fifth Circuit that "[o]nce again, despite proper and reasonable efforts to comply, an installment sales creditor falls victim to the complex disclosure requirements of the Truth in Lending Act." No national policy or public interest requires such a result, and no law should.

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142 A reasonable case could also be made for requiring disclosure of prepayment provisions, which may vary between creditors and which debtors may not otherwise understand.

143 McGowan v. King, Inc., 569 F.2d 845, 847 (5th Cir. 1978), discussed at n.30 supra.