THE TRUTH-IN-LENDING SIMPLIFICATION AND REFORM ACT—A MUCH-NEEDED REVISION WHOSE TIME HAS FINALLY COME—PART II*

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VIII. RIGHT OF RESCISSION

A. *When the Right to Rescind Attaches*

One of the more important and also more controversial provisions of the truth-in-lending law is the right to rescind, without cause, during a three-day "cooling off" period, any consumer credit transaction in which a security interest is acquired in any real property used or expected to be used as the residence of the debtor.[842] Rescission of the transaction also rescinds the security interest.[843] The right to rescind was added as a response to abuses in consumer credit financing, especially in the home improvement field.[844] Numerous questions have arisen with respect to the operation of this section. Some are resolved by, or at least addressed in, the amended law. Others are not.

Under prior law, the right to rescind was available only where a security interest in real property existed.[845] The extent of this security interest was determined by state law.[846] Under the law of many states,

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* Part I of this article appeared in 23 ARIZ. L. REV. 1 (1981). As in Part I, the unrevised version of Regulation Z, 12 C.F.R. § 226.1 *et. seq.* (1980), will be referred to as "Regulation Z" or "present Regulation Z." *See* Boyd, Part I, note 19 *supra*. The revised Regulation Z which was effective April 1, 1981 and as to which compliance is optional until April 1, 1982, will be referred to as "Revised Regulation Z." Boyd, Part I, *id.*

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842. *See* 15 U.S.C. § 1635 (1976) (amended 1980); Regulation Z, 12 C.F.R. § 226.9 (1980).

843. *Id.*

844. *See* Boyd, *The Federal Consumer Credit Protection Act—A Consumer Perspective*, 45 NOTRE DAME LAW. 171, 188 n.136 (1970).

845. *See* 15 U.S.C. § 1635 (1976) (amended 1980); Regulation Z, 12 C.F.R. § 226.9 (1980).

846. Regulation Z, 12 C.F.R. § 226.2(dd) (1980).

mobile homes are personalty.[847] Consequently, the cooling-off period protection against high pressure sales tactics has not been available to large numbers of people whose residences are mobile homes. The amendments expressly make the right of rescission available to such persons. This is accomplished by revising section 125(a) to include security interests "in *any* property which is used as the principal dwelling of the person to whom credit is extended . . ."[848] and then defining "dwelling" to mean "a residential structure or mobile home which contains one to four family housing units, or individual units, or individual units of condominiums or cooperatives."[849] The expansion of the protection to include mobile home dwellers is accompanied, however, by a number of significant restrictions on the availability of the right of rescission.

Under prior law, the right to rescind was available where a security interest was taken in "real property which [was] used or [was] expected to be used as the residence of the [debtor]."[850] Residence is defined in Regulation Z to mean "any real property in which the customer resides or expects to reside."[851] Thus, the right of rescission was available in transactions involving security interests in vacant land.[852] Moreover, although there was a purchase money first lien exception to rescission in the prior law,[853] the right still existed as to first liens arising in the acquisition of land to be used as a residence. This was so because the purchase money first lien exception applied only to liens on dwellings[854] and dwelling was defined in Regulation Z to mean "a residential type structure."[855]

The revisions expressly limit the right of rescission to transactions involving security interests "retained or acquired in any property which is used as the principal *dwelling* of the [debtor]."[856] Consequently, the right of rescission will not be available to defeat security interests, purchase money or otherwise, in vacant land.[857] Since the rescission

847. *See* U.C.C. § 2-105(1); FRB Letter No. 995, [1974-77 Correspondence Transfer Binder] 5 CONS. CRED. GUIDE (CCH) ¶ 31,348 (Jan. 23, 1976).

848. 15 U.S.C.A. § 1635(a) (Supp. 1975-80) (emphasis added).

849. *Id.* § 1602(v).

850. 15 U.S.C. § 1635(a) (1976) (amended 1980).

851. 12 C.F.R. § 226.2(ff) (1980).

852. *See* Boyd, *supra* note 844, at 189.

853. 15 U.S.C. § 1635(e) (1976) (amended 1980).

854. *Id.*

855. 12 C.F.R. § 226.2(v) (1980).

856. 15 U.S.C.A. § 1635(a) (Supp. 1975-80) (emphasis added). *Compare* Revised Regulation Z § 226.23, 46 Fed. Reg. 20,904-5 (1981) (closed-end). *See also id.* § 226.15, 46 Fed. Reg. 20,900-1 (1981); text & notes 892-99 *infra* (open-end).

857. "Dwelling" is defined in the amended statute to mean a residential *structure*. 15 U.S.C.A. § 1602(v) (Supp. 1975-80). *Compare* Revised Regulation Z § 226.2(a)(19), 46 Fed. Reg. 20,893 (1981); FRB Section by Section Analysis of Revised Regulation Z, 46 Fed. Reg. 20,852 (1981) [hereinafter Analysis]. The proposed Official Commentary points out that although "dwelling"

remedy was directed to abuses in the home improvement industry, it may well be that its availability in vacant land cases, especially those involving purchase money liens, was essentially fortuitous. The right of rescission has been available, however, to serve as a deterrent to, as well as an additional remedy for, widespread wrongdoing in land sales.[858] It is not apparent why that remedy and deterrent should be eliminated, especially without discussion.[859]

The 1980 amendments narrow the scope of the right of rescission in another less obvious way. The language "or expected to be used"[860] which also appears in Regulation Z[861] has been eliminated.[862] This change, which is not discussed in the legislative history, means that the right of rescission will exist only where the property involved is used as the consumer's principal dwelling *at the time the security interest is created*.[863] On the other hand, the right arises whenever a security interest "is or will be retained or acquired. . . ."[864] Therefore, even a security interest that is not retained at consummation of the transaction may give rise to a right of rescission.[865] It is necessary, however, that the security interest be retained as part of the credit transaction.[866] Therefore, a lien obtained by a contractor who is not a party to the credit transaction and who merely receives proceeds of an unsecured loan does not result in a rescindable transaction.[867]

The scope of the right to rescind is further narrowed by an expansion of the purchase money first lien exception to the right to rescind. This expansion is accomplished by making the right of rescission unavailable in "residential mortgage transactions."[868] A "residential mortgage transaction" is one in which a consensual security interest "is

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may include a residence other than the "principal" residence, the rescission right attaches only to the principal dwelling and hence is not available as to vacation or second homes. 46 Fed. Reg. 208,564, 208,565, 208,601 (1981) [hereinafter Proposed Commentary].

858. *See* Boyd, *supra* note 844, at 189.

859. Perhaps Congress concluded that the interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720 (1976), which also includes a right of rescission, *id.* § 1703, provided the necessary protection. That law, however, limits the opportunity to rescind to 48 hours in cases where a "property report" is not provided within 48 hours of the signing of the contract.

860. 15 U.S.C. § 1635(a) (1976) (amended 1980).

861. 12 C.F.R. § 226.9(a) (1980).

862. 15 U.S.C.A. § 1635(a) (Supp. 1975-80).

863. *See* 46 Fed. Reg. 20884 (1981).

864. 15 U.S.C.A. § 1635(a) (Supp. 1975-80).

865. The FRB has offered the example of a materialman's or mechanic's lien that does not arise until performance has begun. *See* Analysis, *supra* note 857, at 20886. *See also* text & notes 914-20 *infra*.

866. Analysis, *supra* note 857, at 20884.

867. *Id.* In its proposed commentary, the FRB provides examples of cases where a security interest is and is not retained as part of the credit transaction. Proposed Commentary, *supra* note 857, at 208,601. *Cf.* Smith v. Stewart's Mobile Homes, Inc., 496 F. Supp. 1258 (N.D. W. Va. 1980) (no right to rescind contract with seller paid from proceeds of loan obtained from bank).

868. 15 U.S.C.A. § 1635(a) (Supp. 1975-80); Revised Regulation Z § 226.23(f)(1), 46 Fed. Reg. 20897 (1981).

created or retained against the consumer's dwelling to finance the acquisition *or initial construction* of that dwelling."[869] The effect is to exempt a lien created in connection with acquisition or construction, whether or not it has a first priority.[870]

The revised statute also exempts refinancing transactions to the extent now provided for in an FRB interpretation.[871] Under the amendment, there is a right of rescission as to a refinancing by the same creditor only to the extent of any new advances.[872] A refinancing through a different creditor would, however, be subject to the right of rescission in its entirety.[873]

A number of the rules governing related situations, and now embodied in FRB and staff interpretations,[874] would continue to operate under the revised regulation.[875] Thus, the addition of a security interest to an existing obligation would be a transaction subject to the right of rescission.[876] The right would, however, apply only to the added security interest and not the existing obligation.[877] Moreover, only notice of the right to rescind would have to be given.[878] Other material disclosures,[879] assuming they were made initially, would not have to be made again.[880] By contrast, notice would not be necessary in connection with either advances in a series of advances or a series of single payment obligations treated as a single transaction.[881] This is true again, so long as the notice was given at the outset.[882] The matter of subordination, which is the subject of present section 226.9(g)(3),[883] would be eliminated on the ground that because the exemption of the right of rescission no longer depends on the priority status of the lien,[884] any such rule is now unnecessary.[885]

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869. 15 U.S.C.A. § 1602(w) (Supp. 1975-80) (emphasis added). The construction financing extension is taken from Regulation Z, 12 C.F.R. § 226.9(g)(2) (1980).

870. *See* Analysis, *supra* note 857, at 20,886. Loans to acquire an existing dwelling and make improvements are exempt to the extent the loans are treated as a single transaction. *Id.* Proposed Commentary, *supra* note 857, at 28,603.

871. *Compare* 15 U.S.C.A. § 1635(e)(1)(B) (Supp. 1975-80) *with* FRB Int. Rul., 12 C.F.R. § 226.903 (1980).

872. 15 U.S.C.A. § 1635(e)(1)(B) (Supp. 1975-80). *See* Analysis, *supra* note 856, at 20,886.

873. *Id.*

874. *See* Report No. 304, CONS. CRED. GUIDE (CCH) ¶ 2201-2203 (May 5, 1980).

875. Revised Regulation Z § 226.15, 46 Fed. Reg. 20,900-1 (1981) (open-end); *id.* § 226.23, 46 Fed. Reg. 20,904-5 (1981) (closed-end).

876. *Id.* § 226.23(a)(1) n.47, 46 Fed. Reg. 20,904 (1981) (closed-end); *Compare id.* § 226.15(a)(ii), 46 Fed. Reg. 20,870 (1981) (open-end).

877. *Id.*; Analysis, *supra* note 857, at 20,884.

878. *Id.*

879. *See* text & notes 969-79 *infra*.

880. Revised Regulation Z § 226.23(a)(1) n.47, 46 Fed. Reg. 20,904 (1981).

881. *Id.* § 226.23(f)(4), 46 Fed. Reg. 20,905 (1981). *See* Analysis, *supra* note 857, at 20,886.

882. *Id.*

883. 12 C.F.R. § 226.9(g)(3) (1980).

884. *See* text & notes 868-69 *supra*; Proposed Commentary, *supra* note 857, at 28,603.

885. *See* Report No. 319, CONS. CRED. GUIDE (CCH) (Dec. 4, 1980), at 93. According to the proposed commentary, where a home buyer assumes an existing first mortgage and executes a

Under the prior law, the right to rescind did not attach where a state agency was the creditor.[886] This exemption is preserved in the revised statute.[887] An early version of the revised regulation would have extended the exemption to cases involving federal agencies as creditors[888] because of the FRB's belief that "the policy reason for exempting state agencies is equally applicable to federal agencies."[889] The final version of the revised regulation makes no reference to the question of whether the right of rescission attaches where a federal agency is the creditor.[890] There is no discussion of why the earlier position was abandoned.[891]

Under a 1978 amendment to Regulation Z, an exception to the right of rescission was created for open-end credit advances made pursuant to an existing plan and secured by a previously acquired interest in the consumer's residence.[892] The change served only to excuse a creditor from repeating the notice required in connection with credit transactions subject to the right of rescission,[893] and then only if the creditor did not change the terms of the consumer's account or increase the line of credit without first allowing the customer an opportunity to refuse the change in terms or increase in the line of credit.[894] Nonetheless, the change generated controversy and was repealed effective March 31, 1980.[895] The FRB, however, then delayed the revocation to May 31, 1980, pending the anticipated enactment of the revised statute.[896]

Under the revisions, a right to rescind does not attach to "advances under a *preexisting* open end credit plan *if a security interest has already been retained or acquired* and such advances are in accordance with a *previously established credit limit* for such plan."[897] By virtue of a House modification, however, the exemption ceases to be effective three years after the effective date of the law.[898] During this three year period it is to be determined whether the arrangement is beneficial to

second mortgage to finance the balance of the purchase price, the transaction is not rescindable. Proposed Commentary, *supra* note 857, at 28,603.

886. 15 U.S.C. § 1635(r) (amended 1980); Regulation Z, 12 C.F.R. § 226.9(g)(5) (1980).

887. 15 U.S.C.A. § 1635(e)(1)(C) (Supp. 1975-80).

888. Revised Regulation Z § 226.23(f)(3), 46 Fed. Reg. 20,905 (1981) (closed-end), *id.* § 226.15(a) n.31, 46 Fed. Reg. 20,870 (1981) (open-end).

889. Report No. 304, *supra* note 874, at 69.

890. Revised Regulation Z § 226.23(f)(3), 46 Fed. Reg. 20,905 (1981).

891. *See* Analysis, *supra* note 857, at 20,885.

892. 12 C.F.R. § 226.9(g)(6) (1980), 43 Fed. Reg. 3411 (1978) (added July 26, 1978). As to the meaning of open-end credit under the revised law, see Part I, at notes 781-94 *supra*.

893. 12 C.F.R. § 226.9(g)(6)(ii) (1980).

894. *Id.* § 226.9(g)(6)(iii).

895. 43 Fed. Reg. 50,673 (1978).

896. Report Letter No. 302, CONS. CRED. GUIDE (CCH) ¶ 102 (Mar. 20, 1980).

897. 15 U.S.C.A. § 1635(e)(1)(d) (Supp. 1975-80) (emphasis added).

898. *See* 15 U.S.C.A. § 1635(e)(2) (Supp. 1975-80).

both creditors and consumers.[899]

The FRB has interpreted the statutory revision to mean that although rescission rights generally apply to each transaction made on an open-end account,[900] if the extensions are made in accordance with a previously established credit limit for the plan, a creditor *need not* provide the right to rescind at the time of each transaction.[901] Rather, a creditor may choose only to allow rescission of the plan at the time the plan is opened, or rescission of an increase in the credit limit when the credit limit is increased, or, as noted,[902] rescission of a security interest when one is added or increased to secure an existing open-end plan.[903] It would seem desirable that the right to rescind would attach as the result of other events such as a change in important credit terms. The FRB may yet so extend the rule.[904] Consistent with the three-year limit found in the statute, the option to allow rescission otherwise than as to each transaction will be available only until March, 1985.[905] Presumably, further action by Congress will be necessary to render this particular attempt at simplification effective beyond the three-year period.[906]

Under prior law, it could be argued that a security interest in fixtures supported the right of rescission. Fixtures are personal property that become attached to real property in such a way as to give a real estate party an interest in that personal property.[907] Fixtures attached to a residence, therefore, were part of the residence insofar as the right of rescission was concerned.[908] With one qualification, the amendments do nothing to render such reasoning improper. This qualification is that under the amendments, a right of rescission exists only where there is a security interest in a dwelling.[909] Consequently, under the revised statute a security interest in fixtures could support a right of rescission.

Under the revised regulation, however, the result would be different. The broad definition of "security interest" provided for in the present regulation[910] is significantly narrowed by the revised regula-

899. H.R. REP. No. 96-842, 96th Cong., 2d Sess. 80 (1980) (accompanying H.R. 4986).

900. *See* Report No. 304, *supra* note 874, at 47.

901. Revised Regulation Z § 226.15(a)(ii), 46 Fed. Reg. 20,900 (1981); Analysis, *supra* note 857, at 20,871; Proposed Commentary, *supra* note 857, at 28,586.

902. See text & note 876-80 *supra*.

903. Revised Regulation Z § 226.15(a)(ii), 46 Fed. Reg. 20,900 (1981). *See* Proposed Commentary, *supra* note 857, at 28,586.

904. *See* Report No. 304, *supra* note 874, at 47-48.

905. Revised Regulation Z § 226.15(a)(1)(ii) n.32, 46 Fed. Reg. 20,900 (1981).

906. It might be argued, however, that if the FRB had the power to make the original change, it also could make permanent the change effected by Congress—if and when it decides the change is beneficial. See text & note 899 *supra*.

907. *See* U.C.C. § 9-313(1)(a) (1972 Version).

908. *Id.*

909. 15 U.S.C.A. § 1635(a) (Supp. 1975-80).

910. Regulation Z 12 C.F.R. § 226.2(gg) (1980) provides:

tion. Under the new definition, "[security interest] does not include incidental interests such as an interest in proceeds, accessions, additions, [or] *fixtures*. . . ."[911] This important change, whose desirability is uncertain, finds virtually no support in the amended statute or legislative history.

To justify the change, the FRB invokes a passage from a Senate report which the FRB suggests indicates congressional intent to so narrow the meaning of "security interest."[912] That passage, however, is addressed to the reduction in the technicalities of disclosure.[913] It does not support a restriction of the concept of security interest. Consequently, it remains to be seen whether because the FRB was the source of definition in the first place, it may now narrow that definition.

In one important respect, the definition will not be narrowed. Under section 226.2(gg) of present Regulation Z,[914] security interest is defined to include both consensual and non-consensual liens, including mechanics and materialman's lien.[915] The revised statute refers to the security interest which will support a right of rescission as "including any such interest arising by operation of law."[916] An earlier version of the Simplification Act would have limited the right of rescission to transactions involving consensual interests and confessed liens.[917] The broader scope of the adopted version presumably reflects the view that the need for special protection transcends the situations in which consumers have expressly created a security interest in their dwellings.[918] The revised regulation honors the statutory mandate by drawing a distinction between the concept of a security interest insofar as rescission is concerned and the concept of such an interest as it affects the creditor's disclosure obligations. Thus, interests arising by operation of law would not have to be disclosed as security interests,[919] but would sup-

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

911. Revised Regulation Z § 226.2(a)(25), 46 Fed. Reg. 20,894 (1981) (emphasis added).

912. Report No. 319, *supra* note 885, at 17.

913. S. Rep., No. 96-73, 96th Cong., 1st Sess. 16 (1979). *See* Part I, at text & notes 612-46 *supra* (discussion of sec. int. disclosures).

914. Regulation Z, 12 C.F.R. § 226.2(gg) (1980).

915. *Id.*

916. 15 U.S.C.A. § 1636(a) (Supp. 1975-80).

917. *See* S. 1846, 95th Cong., 1st Sess. (1977).

918. *Cf.* Charnita, Inc. v. Federal Trade Comm'n, 479 F.2d 684, 687 (3d Cir. 1973) (upholding the FRB power to include confessed liens as security interests).

919. *See* Part I, at text & notes 612-46 *supra* (discussion of sec. int. disclosures).

port a right of rescission.[920]

It will continue to be true that the right to rescind is available only in *consumer credit* transactions.[921] Thus, for example, interests in a dwelling to secure a loan for a business or commercial purpose will probably not support a claim for rescission.[922] In this regard, the change in the business purpose exclusion and the elimination of the agricultural purpose from the definition of consumer credit transaction[923] will clarify the application of the rescission provision. The definition of dwellings as structures containing one to four family housing units[924] should also eliminate some of the uncertainties in deciding what transactions are for an investment purpose outside the scope of the section.[925]

Under prior law there also was a question whether the right to rescind was available against a non-professional seller who retained a second mortgage. The purchase money first lien exception did not preclude the existence of such a right.[926] For the TIL to apply, however, there had to be a creditor.[927] A non-professional seller did not regularly extend credit and hence was not a creditor under the TIL.[928] It was argued that the presence of a broker who "arranged" credit was enough to make the right of rescission available.[929] The 1980 amendments appear to make any such argument unavailing. The definition of creditor has been revised to make it explicit that a person who regularly arranges for an extension of consumer credit "from persons who are not creditors is a creditor."[930] As noted, however, the amendments broaden the purchase money first lien exception to include any consensual security interests, first lien *or otherwise*, created or retained "to finance the acquisition" of a dwelling.[931] Therefore, although the new

920. Revised Regulation Z § 226.2, 46 Fed. Reg. 20,893 (1981); Proposed Commentary, *supra* note 857, at 28,566, 28,586, 28,601-02.

921. *See* 15 U.S.C.A. § 1635(a) (Supp. 1975-80); Boyd, *supra* note 844, at 189.

922. *But see* note 925 *infra*.

923. *See* Part I, at text & notes 60-136 *supra*.

924. *See* text & note 849 *supra*.

925. Problems of deciding whether certain kinds of investment credit are consumer credit, however, will continue to arise. *See* Part I, at text & notes 60-136 *supra*. In Tower v. Home Constr. Co., 5 CONS. CRED. GUIDE (CCH), ¶ 97,352 (5th Cir. 1980), the court concluded that credit extended to a homeowner in connection with repairs and improvements to the home was consumer credit even though the home was being rented to a third person. More bothersome from the creditor's point of view, is the case of Anderson v. Lester, 382 So. 2d 1019 (La. App. 1980), *cert. denied* 101 S. Ct. 936 (1981). In *Anderson*, the court concluded that a person who took a mortgage on his home to raise money to pay business creditors had a right to rescind because the borrower's ultimate purpose was to save his home from seizure by his creditors. *See generally*, 15 U.C.C. L. Letter No. 2 (1981).

926. *See* 15 U.S.C. § 1635(e) (1976) (amended 1980).

927. *See* Part I, at text & notes 137-42 *supra*.

928. *See* Part I, at text & note 140 *supra*.

929. Landers, *The Scope of Coverage of the Truth-in-Lending Act*, 1976 A.B.F. RES. § 565, 598.

930. 15 U.S.C.A. § 1602(f) (Supp. 1975-80).

931. See text & note 868-70, 885 *supra*; 15 U.S.C.A. § 1635(e) (Supp. 1975-80).

law supports the claim that the second mortgage transaction meets the requirement that there be a creditor, the argument for the existence of a right of rescission would fail because of the expansion of the purchase money exception.

A related question is whether an unsecured bank loan, the proceeds of which are used to finance construction, becomes rescindable because the contractor, who receives the proceeds, obtains a materialman's lien or other such security interest, on the consumer's dwelling.[932] Although there clearly is a creditor within the meaning of the TIL, the security interest technically does not arise in connection with the bank loan. For this reason, the bank loan should not be rescindable.[933] In contrast, where the contractor and financier are the same person, the transaction does involve a right of rescission. The security interest is retained or acquired by the creditor.[934] Because the subcontractor may be considered to be acting as an agent for the creditor-contractor,[935] the same should be true where a materialman's lien is retained by a subcontractor of a creditor-contractor.

B. *Persons Entitled to Rescind; Notice*

Prior law required that notice of the right to rescind be disclosed "in accordance with regulations of the Board" to "any obligor."[936] Present Regulation Z requires notice to be furnished to "the customer."[937] "Customer" is defined in the regulation to include a person to whom credit is extended and also persons, such as co-workers or sureties, who are obligated to repay the debt.[938] Present Regulation Z also defines the content of the notice and mandates that the customer receive two copies of the notice, "one of which may be used by the customer to cancel the transaction."[939] These requirements were understood to mean that notice had to be given to each customer including each obligor.[940]

This scheme is left intact by the revised statute, and the language requiring notice to any obligor in accordance with FRB regulations is

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932. *See* 15 U.S.C.A. § 1625(a) (Supp. 1975-80).

933. Analysis, *supra* note 857, at 20,884.

934. *Id.*

935. *Id. See* FRB Int. Rul., 23 C.F.R. § 226.901 (1980). *See also* Boyd, *supra* note 844, at 180 n.84. *See generally*, Proposed Commentary, *supra* note 857, at 28,601.

936. 15 U.S.C.A. § 1635(a) (1976) (amended 1980).

937. 12 C.F.R. § 226.9(b) (1980).

938. *Id.* § 226.2(a).

939. *Id.* § 226.9(b).

940. *See* Gerasta v. Hibernia Nat'l Bank, 411 F. Supp. 176, 188 (E.D. La. 1976). *Cf.* Regulation Z, 12 C.F.R. § 226.6(e) (1980) (providing for single disclosure in multiple consumer cases except where the right of rescission is involved).

retained.[941] Nevertheless, the revised regulation does make some important changes. The definition of a "customer" is collapsed into the definition of a "consumer."[942] As noted, the revised definition considerably narrows the range of persons who are entitled to receive TIL disclosures.[943] For purposes of rescission, however, "consumer" also "includes a natural person in whose principal dwelling a security interest is or will be retained, if that person's ownership interest in the dwelling is or will be subject to the security interest."[944] Thus, even a person who is not liable on the credit obligation is entitled to rescind the transaction if that person's home is subject to risk of loss.[945]

Each person entitled to rescind must be given notice of the right to rescind.[946] The notice must "clearly and conspicuously disclose, in accordance with the regulations of the Board," the rights of the consumer.[947] As is true under the present regulation,[948] the revised regulation would require the creditor to provide two copies of the notice.[949] The revised regulation, however, no longer specifies the exact terminology of the notice.[950] Instead, the regulation simply stipulates the required content of the notice.[951]

In closed-end transactions, notice would have to be on a separate document;[952] in open-end cases, notice could either be separate from or combined with the other required rescission disclosures.[953] In either case, the type of transaction would have to be identified.[954] The accompanying discussion indicates that giving the date would suffice to identify the transaction.[955] The creditor would also be required to dis-

941. *See* 15 U.S.C.A. § 1635(a) (Supp. 1975-80).

942. Revised Regulation Z § 226.2(a)(10), 46 Fed. Reg. 20,893 (1981); Report No. 304, *supra* note 874, at 7.

943. Part I, at text & notes 226-44 *supra*; Revised Regulation Z § 226.2(a)(1), 46 Fed. Reg. 20,893 (1981).

944. *Id.*

945. Analysis, *supra* note 857, at 20,851; Proposed Commentary, *supra* note 857, at 28,562, 28,601.

946. *See* 15 U.S.C.A. § 1636(a) (Supp. 1975-80); *id.* § 1631(a). According to the FRB such a person is entitled to receive the material disclosures, *see* text & notes 968-78 *infra*, as well as the notice of the right to rescind. Analysis, *supra* note 857, at 20,851.

947. 15 U.S.C.A. § 1635(a) (Supp. 1975-80).

948. 12 C.F.R. § 226.9(b) (1980).

949. Revised Regulation Z § 226.15(b), 46 Fed. Reg. 20,901 (1981); *id.* § 226.23(b). The statute simply requires the creditor to provide a form appropriate for exercising the right to rescind. 15 U.S.C.A. § 1635(a) (Supp. 1975-80).

950. *Id. See* Analysis, *supra* note 857, at 20,871, 20,884.

951. *Id.* Model forms are provided. 46 Fed. Reg. 20,926 app. H-8.

952. Revised Regulation Z § 226.23(b), 46 Fed. Reg. 20,905 (1981).

953. *Id.* § 226.15(b). *See* Analysis, *supra* note 857, at 20,871, 20,884.

954. Revised Regulation Z § 226.15(b), 46 Fed. Reg. 20,901 (1981); *id.* § 226.23(b), 46 Fed. Reg. 20,905.

955. Report No. 319, *supra* note 885, at 92. *See also* Proposed Commentary, *supra* note 857, at 26,801-02.

close the date of expiration of the rescission period.[956]

According to the amended statute, the creditor must provide a form appropriate for exercising the right of rescission.[957] Under the revised regulation, however, the form may be separate or may be combined with other required rescission disclosures.[958] There are model forms provided for use in both open and closed-end credit.[959]

At present, the right to rescind may be waived to meet certain personal emergencies.[960] In what could prove to be a rather significant change, the rules governing waiver would be revised by the regulation in the direction of easing compliance. The emergency no longer need endanger persons or property.[961] It would be enough that the customer determined that the credit is needed to meet a bona fide personal financial emergency.[962] To prevent abuse of the exception, preprinted forms would still be prohibited.[963] The FRB rejected recommendations by creditors that a waiver automatically insulate a creditor from liability for failure to provide a right to rescind.[964] Therefore, before accepting a waiver, a creditor should assure itself that the reasons for the waiver are both "substantial and credible" and that the waiver is "in all respects bona fide."[965] The FRB has emphasized that the record retention requirements of the revised regulation[966] apply to rescission waivers.[967]

C. *The Period for Rescission*

A bothersome problem under prior law was that the statute and Regulation Z provided that the consumer could exercise the right conferred for three days after the delivery of both the required notice of right to rescind "and [of] all other material disclosures required by this chapter."[968] These provisions were understood to extend the right to rescind beyond the three-day cooling-off period, and, until 1974, indefi-

956. Revised Regulation Z § 226.15(b)(5), 46 Fed. Reg. 20,901 (1981); *id.* § 226.23(b)(5), 46 Fed. Reg. 20,905 (1981).

957. 15 U.S.C.A. § 1635(a) (Supp. 1975-80).

958. Analysis, *supra* note 857, at 20,884.

959. 46 Fed. Reg. 20,918 app. G-7, 20,919 app. G-8, 20,926 app. H-8, 20,927, app. H-9 (1981).

960. 15 U.S.C. § 1635(d) (1976); Regulation Z, 12 C.F.R. § 226.9(g) (1980).

961. Revised Regulation Z §§ 226.15(e), 226.23(e), 46 Fed. Reg. 20,901 (1981). *See* Report No. 19, *supra* note 885, at 65, 93.

962. Analysis, *supra* note 857, at 57, 89.

963. Revised Regulation Z § 226.15(e), 46 Fed. Reg. 20,901 (1981); *id.* § 226.23(e), 46 Fed. Reg. 20,905 (1981).

964. Analysis, *supra* note 857, at 20,872, 20,885.

965. *Id.*

966. Revised Regulation Z § 226.25, 46 Fed. Reg. 20,906 (1981) requires creditors to retain evidence of compliance with the TIL for a period of two years.

967. Analysis, *supra* note 857, at 20,872, 20,885.

968. 15 U.S.C. § 1635(a) (1976) (amended 1980); Regulation Z, 12 C.F.R. § 226.9(a) (1980).

nitely[969] if the creditor failed to make any of the required disclosures.[970] The resulting problem was not so much that the rescission period was tied to the general disclosure scheme but that the meaning of "material disclosures" was uncertain.[971]

Under the 1980 amendments, "material disclosures" is expressly defined to mean the disclosure "of the annual percentage rate [APR], the method of determining the finance charge and the balance upon which a finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number and amount of payments, and the due dates or periods of payments scheduled to repay the indebtedness."[972]

The revised regulation adds that the rescission period runs from the date of consummation, delivery of the required rescission notice or delivery of the material disclosures, whichever occurs last.[973] According to the accompanying discussion, the rescission notice and material disclosures need not be delivered at the same time.[974] Except in the case of the addition of a security interest,[975] the material disclosures must be given whenever an event giving rise to a right of rescission takes place.[976] In the FRB's view, however, the definition of "material disclosures" provided by the statute and the regulation is all-inclusive.[977] In this view, "material disclosures" does not include an itemization of the amount financed or information regarding the security interest and need not be accompanied by descriptors.[978]

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969. In LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir. 1976), rescission was considered timely despite the fact that the one-year statute of limitations applicable to remedies for disclosure violations, 15 U.S.C. § 1640(e) (1976) (amended 1980), generally barred recovery of civil damages. 534 F.2d at 1361-62. In Littlefield v. Walt Flanagan & Co., 498 F.2d 1133, 1136 (10th Cir. 1974) it was held that the one-year statute of limitations applicable to disclosure violations does not apply to rescission. In 1974, the law was amended to impose a three-year statute of limitations upon the right to rescind. *See* 15 U.S.C. § 1635(f) (1976) (amended 1980).

970. *See* LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir. 1976); Ljepava v. M.L.S.C. Properties, 511 F.2d 935, 943-44 (9th Cir. 1975). *See generally* Boyd, *supra* note 844, at 190-92.

971. S. Rep., *supra* note 913, at 14-15; *see* Boyd, *supra* note 844, at 190, n.149.

972. 15 U.S.C.A. § 1602(u) (Supp. 1975-80). As is discussed at notes 1055-58 *infra*, the law is also changed to preclude damages for "purely technical" violations. S. Rep., *supra* note 913, at 17.

973. Revised Regulation Z § 226.15(a)(3), 46 Fed. Reg. 20,900-1 (1981); *id.* § 226.23(a)(3), 46 Fed. Reg. 20,884.

974. Report No. 319, *supra* note 885, at 63, 91.

975. *See* text & notes 876-78 *supra*.

976. Report No. 319, *supra* note 885, at 63, 91.

977. *Id.* at 91. *See also*, Analysis, *supra* note 857, at 20,871, 20,884.

978. *Id.* at 63, 91. The descriptors are discussed in Part I, at text & notes 378-79, 446, 477, 540 *supra*. The FRB points out that for a variable rate program, the material disclosures would include the required information on the circumstances under which the rate might increase, limitations on the increase, and the effect of any increase. *See* Analysis, *supra* note 857, at 20,871. *See also* Proposed Commentary, *supra* note 857, at 28,586, 28,601. As to variable rate disclosures generally, *see* Part I, at text & notes 554-61 *supra*. As the FRB also notes, although the failure to give non-material disclosures does not affect the rescission period, it may result in civil or administrative liability. Proposed Commentary, *supra* note 857, at 28,586, 28,601. *See generally* text & notes 1042-1125, 1128-64 *infra*.

As noted, the statute was amended in 1974 to place some outside limits on the period during which a consumer could rescind even where the creditor failed to make proper disclosure.[979] Specifically, under the 1974 amendment the right to rescind expired three years after consummation or upon a sale of the property.[980] The 1980 revisions retain the three-year limitation[981] but include an important modification. If any agency empowered to enforce the act institutes a proceeding within three years after consummation of the transaction and finds a violation of section 125, then, if the obligor's right to rescind is based upon the matter involved in the proceeding, the obligor's right of rescission is extended for "one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof."[982] This change preserves the right to rescind where an enforcement agency "institutes a proceeding and ultimately concludes a consumer was not informed of his right to rescind."[983]

The proviso that the right to rescind expires upon a sale of the property also is retained.[984] The revised regulation specifically refers to a sale of the property as a terminating event.[985] It adds, however, that any transfer of all the consumer's interest in the property,[986] whether voluntary (including gifts and bequests) or involuntary (foreclosure sales) also will terminate the right to rescind.[987]

The revised regulation also clarifies the law in an important respect. If notice of rescission is by mail or telegram, notice would be deemed given when mailed or filed for transmission.[988] If by other means, notice would be deemed given when delivered to the creditor's place of business.[989]

A bill introduced earlier would have made rescission unavailable after the three-day period if a creditor gave proper notice of the right to rescind and in good faith delivered a disclosure statement which contained an accurate APR.[990] The 1980 amendments are not as forgiving.

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979. *See* text & note 969 *supra*.
980. 15 U.S.C. § 1635(f) (1976) (amended 1980).
981. *See* 15 U.S.C.A. § 1635(f) (Supp. 1975-80).
982. *Id.*
983. S. Rep., *supra* note 913, at 15.
984. 15 U.S.C.A. § 1635(f) (Supp. 1975-80).
985. Revised Regulation Z § 226.15(a)(3), 46 Fed. Reg. 20,900-01 (1981); *id.* § 226.23(a)(3), 46 Fed. Reg. 20,905 (1981). *See* Analysis, *supra* note 857, at 20,871, 20,884.
986. There must be a transfer of all, not just part, of the consumer's interest. *See* Report No. 319, *supra* note 885, at 63, 91-92.
987. Revised Regulation Z § 226.15(a)(3), 46 Fed. Reg. 20,900-01 (1981); *id.* § 226.23(a)(3), 46 Fed. Reg. 20,905 (1981). *See* Analysis, *supra* note 857, at 20,871, 20,884.
988. Revised Regulation Z § 226.15(a)(2), 46 Fed. Reg. 20,900 (1981); *id.* § 226.23(a)(2), 46 Fed. Reg. 20,904 (1981). *See* Report No. 319, *supra* note 885, at 91.
989. Revised Regulation Z, § 226.15(a)(2), 46 Fed. Reg. 20,900 (1981); *id.* § 226.23(a)(2), 46 Fed. Reg. 20,904 (1981).
990. *See* S. 1846, 95th Cong., 1st Sess. (1977).

Errors in the terms will be exclused only to the extent that the creditor may assert an otherwise available defense.[991] The new definition together with the simplification of disclosure of the various "material" terms probably justifies the more restrictive approach.

D. *The Mechanics of Rescission*

Perhaps the most troublesome aspects of the rescission scheme relate to its operation in practice. It was clear that the security interest was void,[992] but the parties' obligations in response to the rescission were unclear. Under prior law, a creditor was obligated to return any property and monies paid within ten days of the notice of rescission.[993] After the creditor had complied with this requirement, the consumer had to tender property in kind, or its value, and if the creditor failed to take possession within ten days, the property vested in the consumer.[994] So described, the scheme seemed relatively straightforward. But questions abounded.

First, it was unclear whether a customer had to make an offer of tender in connection with an exercise of the right of rescission. Most courts that considered the issue held that because rescission was rooted in equity, any formal tender obligation that might be associated with it was abolished by the TIL.[995] The courts, however, have been concerned about protecting the creditor where the debtor is not in a position to make restitution after the creditor has performed its duties upon receiving notice of rescission.[996] At least one court concluded that judicially decreed rescission may be conditioned upon the debtor's tender of loan proceeds.[997] In a recent decision, it was held that although the rescission was not conditioned on tender by the debtor, the creditor could offset the value owed him so as to minimize losses in a case where the debtor would be unable to tender back proceeds.[998] It also has been held, however, that where a creditor fails to return money and property and cancel any security interest upon receipt of notice of rescission, the debtor's duty to tender following performance of the creditor's duties is discharged.[999]

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991. *See* text & notes 1044-1125 *infra*.
992. 15 U.S.C. § 1635(b) (1976) (amended 1980).
993. *Id.*
994. *Id.*
995. *See, e.g.*, Gerasta v. Hibernia Nat'l Bank, 575 F.2d 580, 583-84 (5th Cir. 1978); Palmer v. Wilson, 502 F.2d 860, 861 (9th Cir. 1974).
996. *See, e.g.*, Harris v. Tower Loan, 609 F.2d 120, 123 (5th Cir. 1980); Palmer v. Wilson, 502 F.2d 860, 861 (9th Cir. 1974).
997. Palmer v. Wilson, 502 F.2d 860, 861-62 (9th Cir. 1974). In Rachbach v. Cogswell, 547 F.2d 502, 505 (10th Cir. 1976), the court held it was not an abuse of discretion for a trial court to condition rescission on payment of interest owing on the unpaid balance of a note.
998. Harris v. Tower Loan, 609 F.2d 120, 123 (5th Cir. 1980).
999. Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974).

A question also arose concerning whether a consumer who sought to rescind beyond the three-day period had to identify the defect in the disclosures. The courts appeared to be split on that issue.[1000] This question was actually part of the broader issue of what the creditor should do if he disputed the consumer's claim of a violation. Under prior law, the creditor had only ten days to decide whether to go along with or resist the attempt to rescind.[1001] The risk inherent in the scheme was that the creditor who made the wrong decision could suffer a forfeiture.[1002] The cases appeared to be split on that issue as well. Some courts were quite sympathetic to creditors who acted in good faith;[1003] others were much less so.[1004]

The 1980 amendments do not respond directly to these complicated legal and practical difficulties. The basic scheme is retained in essentially unaltered form.[1005] The two ten-day periods are extended to twenty days,[1006] and creditors will be assisted by this lengthening of the periods within which the hard choices must be made.[1007] But doubling the number of days will be of little help where there are serious disputes regarding compliance with the disclosure obligations. Simplification of the disclosure obligations,[1008] coupled with the addition of a definition of "material disclosures"[1009] should serve to avoid some problems. It will continue to be up to the courts, however, to monitor rescission claims so as to fairly account for the equities on both sides. The revisions expressly acknowledge this important role for the courts. Amended section 125(b) states that "the procedure prescribed by this section shall apply except when otherwise ordered by a court."[1010] The Senate report accompanying the amendments states that a court may modify the scheme "upon application by a consumer or creditor."[1011] Perhaps no better solution is possible.[1012] The revised regulation does,

1000. *Compare* Sosa v. Fite, 498 F.2d 114, 118 n.4 (5th Cir. 1974) *with* Powers v. Sims & Levin, 542 F.2d 1216, 1218 n.3 (4th Cir. 1976).

1001. 15 U.S.C. § 1635(b) (1976) (amended 1980).

1002. *See* text & note 994 *supra*.

1003. *See* LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir. 1976); Palmer v. Wilson, 502 F.2d 860, 862 (9th Cir. 1974).

1004. *See* Sosa v. Fite, 498 F.2d 114, 118 (5th Cir. 1974) (good or bad faith not considered); Gerasta v. Hibernia Nat'l Bank, 411 F. Supp. 176, 189-90 (E.D. La. 1976). Many courts have concluded, however, that no forfeiture could result until the debtor had made a tender unless the debtor's duty of tender had been discharged by the creditor's failure to perform on its part. *See* Kovalik v. Delta Inv. Corp., 125 Ariz. 602, 611 P.2d 955 (Ct. App. 1980); Anderson v. Lester, 382 So. 2d 1019 (La. Ct. App. 1980), *cert. denied*, 101 S. Ct. 936 (1981).

1005. *See* 15 U.S.C.A. § 1635(a) (Supp. 1975-80).

1006. *See id.* § 1635(b).

1007. See S. Rep., *supra* note 913, at 14, 15.

1008. *See* Part I, at text & notes 218-841 *supra*.

1009. 15 U.S.C.A. § 1603(u) (Supp. 1975-80); *see* text & notes 972-73 *supra*.

1010. 15 U.S.C.A. § 1635(b) (Supp. 1975-80).

1011. S. Rep., *supra* note 913, at 15.

1012. A scheme by which the creditor risks a specific penalty rather than a complete forfeiture

however, address certain issues not addressed by the statutory amendments.

To begin with, a card issuing creditor is relieved of liability where a third party with no knowledge that an event giving rise to a right of rescission has taken place, provides materials or services to a consumer within the rescission period.[1013] This is true, however, only so long as the creditor does not take a security interest in a dwelling as the result of debts incurred during that period.[1014] In addition, the revised regulation permits a consumer to retain possession of any money or property received from the creditor until the creditor has performed its obligation to return payments by the consumer[1015] and to tender goods and material at the location of the property or the consumer's residence.[1016] Money, however, would have to be tendered at the creditor's place of business.[1017]

More important, the FRB appears to have rejected the suggestion that the creditor be able to utilize an offset,[1018] escrow, or other arrangement designed to protect the creditor in meeting its responsibility to tender money and property where the consumer will not be able to perform his tender obligation.[1019] The reason given is that "the act's specificity regarding the creditor's obligations" preclude such alternatives to strict compliance.[1020] Whether under the power given to them to modify the usual procedures[1021] courts will be able to mitigate the impact of this rather rigid interpretation of the statute remains to be seen. The revised regulation contains an express authorization to the courts to modify the procedures,[1022] but the only example offered by the FRB to indicate when modification would be appropriate is where a consumer has entered bankruptcy and would be prohibited by law

might better serve to eliminate bad faith resistance without simultaneously forcing creditors to forego good faith objections.

1013. Regulation Z, 12 C.F.R. § 226.9(c) (1980) prohibits a creditor from performing, other than by placing funds in escrow, until the right to rescind has terminated and the creditor is reasonably satisfied that it will not be exercised. This provision for delay in performance is continued in Revised Regulation Z § 226.15(c), 46 Fed. Reg. 20,901 (1981) (open-end) and *id.* § 226.23(c), 46 Fed. Reg. 20,884 (1981).

1014. Revised Regulation Z § 226.15(c), 46 Fed. Reg. 20,901 (1981); Analysis, *supra* note 857, at 20,871.

1015. The revised regulation obligates the creditor to return "any amount." Revised Regulation Z § 226.15(d)(1), 46 Fed. Reg. 20,901 (1981); *id.* § 226.23(d)(1), 46 Fed. Reg. 20,905 (1981). *See* Analysis, *supra* note 857, at 20,871, 20,872, 20,885. *See also* text & notes 1024-26 *infra*.

1016. Revised Regulation Z § 226.15(d)(6), 46 Fed. Reg. 20,901 (1981); *id.* § 226.23(d)(5), 46 Fed. Reg. 20,907 (1981).

1017. *Id. See* Report No. 319, *supra* note 885, at 64, 92.

1018. *See* text & note 998 *supra*.

1019. *See* Report No. 319, *supra* note 885, at 65, 93.

1020. *Id.*

1021. *See* text & notes 1010-11 *supra*.

1022. Revised Regulation Z § 226.15(d)(ii), 46 Fed. Reg. 20,901 (1981); *id.* § 226.23(d)(4), 46 Fed. Reg. 20,901 (1981).

from returning anything to the creditor.[1023]

Under the revised regulation, the creditor's obligation to return money clearly extends to money paid to third parties.[1024] According to the FRB,[1025] this obligation stems from the statutory mandate that the creditor return "any money or property given as earnest money, downpayment, or otherwise."[1026]

E. *Election of Remedies; Attorney's Fees; Effect on Assignees*

Another question raised under the prior law was whether a consumer could have both rescission and relief for violations of the disclosure requirements unrelated to rescission. In an early decision, it was suggested that a consumer must make an election of remedies.[1027] Since then most courts have held otherwise on the theory that the relief for improper disclosure is punitive and not remedial.[1028] Some, however, did indicate that the decision to allow or deny relief in addition to rescission was discretionary depending upon the precise facts.[1029] The amendments expressly state that relief in addition to rescission may be awarded[1030] and that a right of rescission is not barred by relief under the civil penalty section.[1031] An element of discretion may have been incorporated to the extent the law now states that a court "may" award relief other than rescission.[1032] According to a new provision, "the procedures prescribed by this subsection shall apply except when otherwise ordered by a court."[1033] As just explained, however, this section arguably pertains only to the mechanics of rescission and does not affect the election of remedies problem. It is clear under the revisions that damages and a civil penalty are available for failure to make the required disclosures as to the right of rescission itself. Such a failure is treated as material insofar as civil liability is concerned.[1034]

1023. Report No. 304, *supra* note 874, at 68.

1024. Revised Regulation Z § 226.15(d)(1), 46 Fed. Reg. 20,901 (1981); *id.* § 226.23(d)(2), 46 Fed. Reg. 20,905 (1981) requires the creditor to return "any amount." The accompanying explanation emphasizes that this obligation includes amounts paid to third parties. Analysis, *supra* note 857, at 20,871-02, 20,885. The FRB adds, however, that "any amount" does not refer to cash advances or property given to the consumer by the creditor or to money given to third parties unrelated to the credit transaction. *See* Analysis, *supra* note 857, at 20,871-02, 20,885.

1025. Report No. 319, *supra* note 885, at 65, 93.

1026. 15 U.S.C.A. § 1635(b) (Supp. 1975-80).

1027. Bostwick v. Cohen, 319 F. Supp. 875, 877-78 (N.D. Ohio 1970).

1028. *See* Ljepava v. MLSC Properties, Inc., 511 F.2d 935, 945 (9th Cir. 1975).

1029. *See* Eby v. Reb Realty, Inc., 495 F.2d 646, 651 (9th Cir. 1974).

1030. 15 U.S.C.A. § 1635(g) (Supp. 1975-80). *See* S. Rep., *supra* note 913, at 15.

1031. 15 U.S.C.A. § 1640(d)(6) (Supp. 1975-80).

1032. *See id.* at § 1635(g).

1033. *Id.* § 1635(b).

1034. *See id.* at § 1640(a)(1)-(2) and text & notes 1050-58 *infra*. A different sort of election of remedies problem was presented in Massey v. Stephens, 155 Ga. App. 243, 270 S.E.2d 796 (1980). *Stephens* held that a lender and seller were jointly liable and when the consumer settled with the lender it lost its right to rescind as against the seller. The amended law obviates this problem by

Under prior law, uncertainties existed as to the availability of attorney's fees in rescission cases. Some courts concluded such fees were recoverable whenever court action was necessary.[1035] At least one court concluded recovery of attorney's fees was not possible unless the consumer was entitled to relief in addition to rescission.[1036] This conclusion was possible because attorney's fees were provided for only in the section governing relief apart from rescission.[1037] The revisions explicitly make attorney's fees available in rescission actions.[1038] They more generally seem to make the remedies provided for disclosure violations available for violations of the rescission section.[1039]

The amendments also make clear that the right of rescission is available against assignees.[1040] Although not expressly so provided, assignees who hold in due course also ought to be subject to the right of rescission. The language of section 125(b) indicating that the effect of rescission is to render void a security interest supports such an interpretation.[1041] Because assignees are often holders in due course, any other interpretation could seriously limit the protection.

IX. PRIVATE REMEDIES

The TIL includes a comprehensive public enforcement scheme[1042] and there is some indication that this scheme has been given increased emphasis under the revised law.[1043] But private remedies have been seen as essential to effective operation of the law and likely will continue to have considerable importance. Numerous issues have arisen with reference to the private remedial scheme. One is whether so-called "technical" violations should support a civil penalty. At least one court has held it had no discretion to refuse to impose a penalty for small or technical violations because the scheme is aimed at inducing compliance, not compensating debtors.[1044] Nevertheless, the technical

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virtually eliminating the possibility that there will be more than one creditor responsible for disclosure and notice. See Part I, at text and notes 199-208 *supra*.

1035. *See* Sosa v. Fite, 498 F.2d 114, 121 (5th Cir. 1974); Gerasta v. Hibernia Nat'l Bank, 411 F. Supp. 176, 193 (E.D. La. 1976).

1036. *See* Rachback v. Cogswell, 547 F.2d 502, 506 (10th Cir. 1976).

1037. *See* 15 U.S.C. § 1640(a)(3) (1976) (amended 1980).

1038. *See* 15 U.S.C.A. § 1640(a)(3) (Supp. 1975-80).

1039. *See id.* at § 1640(a)(1).

1040. *See id.* at § 1641(c).

1041. *See* 15 U.S.C. § 1635(b) (1976) (amended 1980); U.C.C. § 3-305(2). *Cf.* Stewart v. Thornton, 116 Ariz. 107, 568 P.2d 414 (1977) (indicating that a transferee of a note given in connection with a land sale subject to recission under the Interstate Act, 15 U.S.C. §§ 1701, 1703(b) (1976), could not be a holder in due course).

1042. *See* text & notes 1125-63 *infra*.

1043. The FRB has noted that there is a shift in the revised statute away from the TIL as a defense or leverage device for beleagured debtors to the "original goals" of protection regarding credit information and that this shift is reflected in a deemphasis of private enforcement. 46 Fed. Reg. 20,948 (1981).

1044. Grant v. Imperial Motors, 539 F.2d 506, 510 (5th Cir. 1976).

nature of a violation clearly has influenced the courts in their response to class suits[1045] and in their implementation of the 1974 amendments[1046] conferring discretion upon courts in devising appropriate relief.[1047] The 1974 amendments sought to preserve the class suit device while imposing limits upon the potentially devastating liability that could result under the pre-1974 law.[1048] Those amendments, however, did not fully achieve either objective.[1049]

The 1980 revisions work a number of important changes.[1050] In response to the concern about technical violations, the scope of civil liability for violations of the other than open-end credit requirements has been limited essentially to errors as to material disclosures.[1051] Consequently, with reference to such credit, the minimum recovery or statutory penalty is available only as to the requirements governing rescission and the disclosures of such terms as the amount financed, finance charge, and APR.[1052] The statutory penalties continue to attach, however, for most disclosure violations in connection with open-end credit.[1053] A committee report argues that continuation of such liability is appropriate because of the importance of the information contained in the disclosures and because compliance with the open-end disclosure requirements is less difficult.[1054] The amendments do eliminate liability for errors regarding the date and identity of a purchase appearing on the monthly billing statement.[1055] This change was made on the ground that the Fair Credit Billing Act[1056] provides an adequate remedy.[1057] Elimination of liability does not, however, extend to inac-

1045. *See* Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230, 235 (10th Cir. 1975); Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

1046. *See* 15 U.S.C. § 1640(a) (1976) (amended 1980), which provides for recovery in a class action "of such amount as the court may allow" and spells out the factors to be considered. *Id.*

1047. Goldman v. First Nat'l Bank, 532 F.2d 10, 14-16 (7th Cir. 1976).

1048. S. REP. No. 93-278, 93rd Cong., 1st Sess. 15 (1973); Goldman v. First Nat'l Bank, 532 F.2d 10, 14-16 (7th Cir. 1976).

1049. *See The Concept of Qui Tam in Relation to Truth in Lending Act*, 30 PERSONAL FINANCE L.Q. 45, 46 (1976). *Cf.* Boyd, *supra* note 844, at 58-59 (criticizing the revised Uniform Consumer Credit Code preclusion of class suits in civil penalty cases).

1050. Congress recently amended the Simplification Act to make clear that creditors who elect to comply with revised law during the optional compliance period are subject to the civil liability provisions of the new law. See CONS. CRED. GUIDE (CCH) ¶ 104 (July 22, 1981).

1051. Under 15 U.S.C.A. § 1640(a) (Supp. 1975-80), a creditor is liable only for failure to comply with the requirements of *id.* § 1635 (rescission) or *id.* §§ 1638(a)(2) (insofar as it requires disclosure of the amount financed), 1638(a)(3), 1638(a)(4), 1638(a)(5), 1638(a)(6), 1638(a)(9). These sections, with the exception of *id.* § 1638(a)(9) governing disclosure of security interests, pertain to what are considered the material disclosures under the amended statute. Changes such as these presumably have led the FRB to conclude that private enforcement has been deemphasized under the revised law. See note 1043 *supra*.

1052. *See* 15 U.S.C.A. § 1602(u) (Supp. 1975-80).

1053. *See* § 1640(a).

1054. *See* S. REP., *supra* note 913, at 17.

1055. *See id.*

1056. 15 U.S.C. §§ 1666-1666j (1976), *as amended by* Pub. L. No. 96-221, §§ 620, 621, 94 Stat. 184 (1980); 15 U.S.C.A. §§ 1666, 1666d (Supp. 1975-80).

1057. S. Rep., *supra* note 913, at 17.

curate disclosure of the amount purchased because such an error would also produce an inaccurate disclosure of the monthly closing balance.[1058]

Actual damages continue to be recoverable.[1059] The availability of such damages, however, often will provide little or no effective remedy for the consumer and will have correspondingly little deterrent effect upon creditors.[1060] For this reason, the statutory penalties for violations of important obligations have been retained.[1061]

In what appears to be a further attempt to preserve the viability of the class suit device, the revisions clarify a creditor's maximum liability in cases where several class actions are instituted against a creditor as a result of the same disclosure violation.[1062] Under the amendments, maximum aggregate liability may not exceed $500,000 or 1 percent of the creditor's net worth, whichever is less.[1063]

Under prior law, the cases split on the question whether relief could be awarded each obligor where more than one was involved. The litigation stemmed largely from an ambiguity in the law as to which obligors were entitled to disclosure.[1064] As noted, the amendments have sought to resolve this ambiguity by requiring disclosure to be made only to the "primary" obligor.[1065] The effectiveness of that change will depend on the success with which the meaning of "primary" can be satisfactorily defined.[1066] The amendments more effectively dispose of the multiple liability question. They explicitly provide that "there shall be no more than one recovery of damages under subsection (a)(2) . . . ."[1067] A 1974 amendment already limited recovery for repeated errors to a single recovery.[1068]

Under prior law, there also was uncertainty about the recovery

1058. *Id.* This is true even though an item under the revisions (failure to disclose the amount purchased) would not result in liability. *See* 15 U.S.C. § 1640(a)(2) (1976) (amended 1980). The reason for the revision is that the computation of the amount purchased affects the disclosure of the closing balance, an item as to which errors in disclosure will produce liability. *See id.*

1059. 15 U.S.C.A. § 1640(a) (Supp. 1975-80).

1060. S. Rep., *supra* note 913, at 18.

1061. *Id.*

1062. 15 U.S.C. § 1640(a)(2)(B) (1976) (amended 1980) provided:

> [I]n the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor . . . .

The amendments delete the phrase "in such action" and substitute the language: "under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor." *See* 15 U.S.C.A. § 1640(a)(2)(B) (Supp. 1975-80).

1063. *See* note 1062 *supra*; S. Rep., *supra* note 913, at 18.

1064. *See* Part I, at text & notes 230-32 *supra*.

1065. *See* Part I, at text & note 238 *supra*.

1066. *See* Part I, at text & notes 238-41 *supra*

1067. 15 U.S.C.A. § 1640(d) (Supp. 1975-80).

1068. 15 U.S.C. § 1640(g) (1976) (amended 1980).

available where multiple creditors were involved.[1069] The amendments state that, except as to assignees, "liability shall be imposed only upon the creditor required to make disclosure. . . ."[1070] As previously noted, the amendments also attempt to more carefully identify the creditor responsible for disclosure and in fact narrow the likelihood of there being more than one creditor within the meaning of the TIL.[1071]

It was asserted under prior law that, except to the extent the rescission period might be extended,[1072] the presence of TIL violations did not affect the debt.[1073] The remedies for such violations were said to be independent of the underlying contractual obligations. A 1974 amendment reinforced the assertion of independence by providing that a consumer could not simply deduct a statutory penalty from the debt balance.[1074] At least one court relied upon the asserted independence and upon the 1974 amendment to preclude a consumer from raising a TIL violation by way of counterclaim in cases where a creditor had sued on the debt.[1075] That was plainly wrong. The revised law makes clear that a counterclaim is permissible.[1076]

Prior law provided three basic defenses for creditors. The revised statute broadens and clarifies these defenses and makes them available to assignees.[1077] The first defense absolved a creditor from any liability if, within fifteen days after discovering an error and prior to the institution of a suit or receipt of written notice of the error, the creditor notified the consumer and made a proper adjustment.[1078] This defense is modified in several respects. To begin with, the fifteen-day period is expanded to sixty days.[1079] It is further provided that the creditor may escape liability even where he learns of the error as the result of administrative or criminal action.[1080] Finally, the meaning of a proper adjustment is clarified.[1081] The expansion of the time period is probably

1069. *See* Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511, 520-21 (5th Cir. 1976).
1070. 15 U.S.C.A. § 1640(a) (Supp. 1975-80).
1071. *See* Part I, at text & notes 159-76 *supra*. The scheme of the revised law should incidentally avoid the pitfall encountered where a consumer who settled with a lender could be denied relief against a seller held to be jointly liable. *See* Massey v. Stephens, 155 Ga. App. 243, 270 S.E.2d 796 (1980).
1072. *See* text & notes 969-71 *supra*.
1073. 15 U.S.C. § 1610 (1976) (amended 1980); Charter Fin. Co. v. Henderson, 60 Ill. 2d 323, 328-29, 326 N.E.2d 372, 376 (1975).
1074. 15 U.S.C. § 1640(h) (1976) (amended 1980).
1075. *See* Ken-Lu Enterprises, Inc. v. Neal, 29 N.C. App. 78, 84, 223 S.E.2d 831, 835 (1976).
1076. *See* 15 U.S.C.A. § 1640(h) (Supp. 1975-80).
1077. *See id.* at § 1640(b).
1078. 15 U.S.C. § 1640(b) (1976) (amended 1980).
1079. *See* 15 U.S.C.A. § 1640(b) (Supp. 1975-80).
1080. *See id.*
1081. *See id.* A proper adjustment means making "whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower." *Id.*

desirable as, realistically, the fifteen-day period was too short. It is less clear that the creditor should be able to avoid liability as a result of action by public agencies. The theory apparently is that if the consumer has not initiated the action, the public enforcement scheme has been adequate and the statutory penalty mechanism is unnecessary. The initiation of public action, however, does not assure a resolution of the case that will deter future violations.

Under prior law, a creditor also could escape liability if he showed, by a preponderance of the evidence, that the violation was not intentional and resulted from a bona fide error despite the maintenance of procedures reasonably adapted to avoid such error.[1082] It was consistently held that this defense encompassed only "clerical" errors and did not excuse errors of law.[1083] The revisions explicitly state that "an error of legal judgment with respect to a person's obligations under this title is not a bona fide error."[1084] They also provide, however, that bona fide error includes not only clerical and calculation errors but also computer malfunction and programming and printing error, assuming again the maintenance of proper procedures to avoid such error.[1085]

A third defense, added in 1974, allowed a creditor to escape liability for "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee [of the FRB authorized by the FRB to issue such interpretations or approvals]."[1086] According to a section of Regulation Z added in 1976,[1087] FRB interpretive rulings and official staff interpretations regarding clarification of technical ambiguities (as distinguished from policy matters), but not unofficial staff opinions and letters, are within the scope of the defense.[1088]

Under the revised regulation, officials in the FRB's Division of Consumer and Community Affairs are authorized to issue official staff interpretations that will provide protection pursuant to the good faith

1082. 15 U.S.C. § 1640(c) (1976) (amended 1980).

1083. McGowan v. King, Inc., 569 F.2d 845, 849 (5th Cir. 1978); Hinkle v. Rock Springs Nat'l Bank, 538 F.2d 295, 297 (10th Cir. 1976); Ives v. W.T. Grant Co., 522 F.2d 749, 757 (2nd Cir. 1975). In Hennings v. Daniels, No. 80-1539 (4th Cir. June 22, 1981) it was held that the maintenance of proper procedures did not entail an examination for errors by a person other than the one who filled out the form. Such a procedure might, however, be good practice.

1084. 15 U.S.C.A. § 1640(c) (Supp. 1975-80).

1085. *Id.* In light of this statutory defense against liability for errors resulting from good faith use of calculation tools, the revisions to Regulation Z eliminates 12 C.F.R. § 226.5 (1980), which deals with such errors. 45 Fed. Reg. 29,719 (1980).

1086. 15 U.S.C. § 1640(f) (1976) (amended 1980).

1087. 12 C.F.R. § 226.1(d) (1980).

1088. *Id.*

reliance defense.[1089] As earlier noted, except in unusual circumstances, interpretations will not be issued separately and will instead be incorporated as part of the Official Commentary.[1090] The revised regulation provides that except as to "forms, statements, tools or methods whose use is required or sanctioned by a government agency," no staff interpretations approving creditors' forms, statements or calculation tools or methods will be issued.[1091]

The courts have indicated that the creditor must be prepared to show actual reliance including knowledge of the ruling or interpretation relied upon.[1092] The Supreme Court may have increased the significance of the good faith reliance defense in its decision in *Ford Motor Co. v. Milhollin*.[1093] In the *Milhollin* opinion, the Court underscores the important role of the FRB and its staff in implementing the TIL.[1094] The opinion coincidentally emphasizes the necessity of allowing creditors to rely on the official Board and staff position even in the face of conflicting interpretations by courts.[1095]

The good faith reliance scheme is left essentially intact by the 1980 statutory amendments. One notable change is the addition of the provision that a creditor "shall be deemed to be in compliance with the disclosure provisions of this title with respect to other than numerical disclosures if the creditor [uses model forms published by the FRB including use with such revision as is permitted]."[1096] This protection is available to creditors who revise the model forms so long as the revisions are not so extensive as to affect the substance, clarity, or meaningful sequence of the forms.[1097] Under another new section, creditors who use forms "required" by a federal agency also are protected.[1098]

1089. Revised Regulation Z, Appendix C, 46 Fed. Reg. 20,888 (1981). *See* Analysis, note 857 *supra*, 46 Fed. Reg. 20,888 (1980).

1090. *Id. See* Part I, at note 19 *supra*.

1091. Revised Regulation Z, Appendix C, 46 Fed. Reg. 20,888 (1981).

1092. *See* Jones v. Community Loan & Inv. Corp., 544 F.2d 1228, 1231 (5th Cir. 1976); Lewis v. Walker-Thomas Furniture Co., Inc., 416 F. Supp. 514, 518 (D.D.C. 1976). Actual knowledge of the correct disclosure by a consumer is, by contrast, not a defense. *See* White v. Arlen Realty & Development Corp., 540 F.2d 645, 650 (4th Cir. 1975); Lewis v. Walker-Thomas Furniture Co., Inc., *supra*, at 517.

1093. 444 U.S. 555 (1980).

1094. In Montoya v. Postal Credit Union, 630 F.2d 745, 748 (10th Cir. 1980), the court invoked this aspect of *Milhollin* in accepting the staff position on proper disclosure of after-acquired property interests.

1095. 444 U.S. 555, 565-67.

1096. 15 U.S.C.A. § 1604(b) (Supp. 1975-80). See Part I, at text & notes 324-43 *supra*.

1097. See Proposed Official Commentary, note 857 *supra*, 46 Fed. Reg. 20,886. The FRB offers a number of examples of changes that will not deny protection, including such things as using the first person, instead of second in referring to the borrower, using "borrower" and "creditor" instead of the pronouns employed in the model forms, and rearranging the sequence of disclosures. *Id.*

1098. *See* 15 U.S.C.A. § 1612(c), (d) (Supp. 1975-80). S. Rep., *supra* note 913, at 20. The new section also requires agencies that prepare such forms to consult with the FRB to assure compliance with the TIL. *Id.*

Under both the original and revised law successful plaintiffs may recover attorneys fees and costs.[1099] In determining the amount to be awarded, courts have taken an approach similar to that employed generally in the federal courts.[1100] They have looked to such factors as the time actually expended, the skill of the attorney involved, the complexity of the issues, the precedential value of the litigation, and the extent to which the attorney had to forego other opportunities to handle the case.[1101] In addition, it seems that the significance of the issues to other consumers and any effect to further the purposes of the Act are factors entitled to special weight.[1102] There has been a continuing debate as to whether, or to what extent, the amount recovered should affect the size of the award of attorneys fees.[1103] An argument against any direct correlation between the two awards might be supported by reference to Congress' decision to provide for minimum recovery irrespective of the damages actually suffered by the particular plaintiff.[1104]

In the 1980 amendments, Congress did not address itself to the matter of how attorneys fees are to be determined. Its failure to do so may reflect the general belief that the determination of "reasonable" fees, as distinguished from their availability in the first instance,[1105] is a matter largely within the discretion of the courts.[1106] Consistent with such a distinction, Congress did address the important question of whether attorneys fees may be recovered in an action where rescission is the only relief obtained.[1107] The amendments make clear that they may.[1108]

TIL claims are cognizable in a federal court without reference to

1099. 14 U.S.C. § 1640(a)(3) (1976) (amended 1980). The fees are recoverable by a debtor represented by a legal aid society. *See* Kessler v. Associates Financial Services, 639 F.2d 498, 499 (9th Cir. 1981).

1100. *See, e.g.*, Mirabel v. General Motors Acceptance Corp., Inc., 576 F.2d 729, 731 (9th Cir. 1978); McGowan v. King, Inc., 569 F.2d 845, 850 (5th Cir. 1978); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974).

1101. *See* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); Liebman v. J.W. Peterson Coal & Oil Co., 63 F.R.D. 684, 701 (N.D. Ill. 1974). *See generally* Hammond, *Stringent New Standards for Awards of Attorneys' Fees*, 32 BUS. LAW 532 (1977).

1102. *See* Mirabel v. General Motors Acceptance Corp., 576 F.2d 729, 731 (7th Cir. 1978); Welmaker v. W.T. Grant Co., 365 F. Supp. 531, 554-55 (N.D. Ga. 1972).

1103. *See* Mirabel v. General Motors Acceptance Corp., 576 F.2d 729, 731 (7th Cir. 1978). *See generally* R. CLONTZ, TRUTH-IN-LENDING MANUAL ¶ 3.10[6] (4th ed. 1976).

1104. *See* 15 U.S.C. § 1640(a)(2)(A)(i) (1976); Mirabel v. General Motors Acceptance Corp., 576 F.2d 729, 730-31 (7th Cir. 1978); Welmaker v. W.T. Grant Co., 365 F. Supp. 531, 553-54 (N.D. Ga. 1972).

1105. In Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) the Supreme Court concluded that only in exceptional circumstances may a court award attorneys' fees not expressly authorized by statute. *Id.* at 269.

1106. *See* Barber v. Kimbrell's Inc., 577 F.2d 216, 226 (4th Cir. 1978); Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740, 748 (5th Cir. 1973).

1107. *See* Rachbach v. Cogswell, 547 F.2d 502, 506 (10th Cir. 1976); Sosa v. Fite, 498 F.2d 114, 121 (5th Cir. 1974).

1108. *See* 15 U.S.C.A. § 1640(a)(3) (Supp. 1975-80).

the amount in controversy.[1109] Despite a trend in some recent consumer protection legislation to limit such jurisdiction,[1110] the revisions make no change here. Under prior law, there was a question whether a federal court had jurisdiction over a counterclaim based on the debt where a creditor is sued in federal court for TIL violations. A number of courts have indicated they lack jurisdiction unless such a counterclaim is compulsory, and most have concluded the claim is permissible.[1111] Obviously, if the creditor cannot assert a counterclaim, he is at a distinct disadvantage. A resolution of this problem would have been desirable but none is offered.

On the debtor's side, two somewhat related problems have arisen. The first is whether federal courts may exercise pendent jurisdiction over state claims in connection with a TIL suit. The benefits in terms of judicial economy are clear enough.[1112] Courts have, however, been fearful of allowing federal courts to become a forum for litigating essentially state claims.[1113] At the very least, there should be a distinct factual relationship between the TIL violation and the state claim.[1114] The 1980 amendments do not address this issue. This is not surprising, however, since pendent jurisdiction is a creature of judicial inspiration and development.[1115]

The second problem concerns the limitations period. The TIL contains a one-year statute of limitations.[1116] It has generally been held that the statute runs from the date of the consummation of the transaction.[1117] Several courts have rejected the notion that TIL violations continue during the term of the debt relationship.[1118] Furthermore,

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1109. *See* 15 U.S.C. § 1640(e) (1976).

1110. *See* 15 U.S.C. § 2310 (1976).

1111. Valencia v. Anderson Bros. Ford, 617 F.2d 1278 (7th Cir. 1980). The Fourth and Seventh Circuits have held the claim permissive on the ground that the debt claim and the TIL Claim are not logically related to one another. *Id.* at 1291-92; Whigham v. Beneficial Fin. Co., 599 F.2d 1322, 1323-24 (4th Cir. 1979). The Fifth Circuit, applying the same "logical relationship" test, has reached the opposite conclusion and held the claim compulsory. Plant v. Blazer Fin'l Services, Inc., 598 F.2d 1357, 1358-61 (5th Cir. 1979). *See* Rumsey, Part I, *supra* note 7, at 391-94.

1112. *See* Ives v. W.T. Grant Co., 522 F.2d 749, 752-54 (2d Cir. 1975); Ball v. Connecticut Bank & Trust Co., 404 F. Supp. 1, 2-3 (D., Conn. 1975).

1113. *See* Campbell v. Liberty Fin. Planning, Inc., 422 F. Supp. 1386, 1390 (D. Neb. 1976); Ball v. Connecticut Bank & Trust Co., 404 F. Supp. 1, 2-3 (D. Conn. 1975).

1114. *See* cases cited note 1113 *supra*.

1115. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 72-77 (1976). In Bilderback v. City Nat'l Bank & Trust Co., 639 F.2d 331 (6th Cir. 1981) it was held that a consumer who suffered a dismissal of a TIL claim brought in a *state* court had to appeal that dismissal in the state system and that the state decision would be res judicata in a federal court. *Id.* at 332.

1116. 15 U.S.C. § 1640(e) (1976) (amended 1980). In Sherwood v. Serubo Cadillac Co., 514 F. Supp. 167 (E.D. Pa. 1981) it was held that because of the ten-day period within which a creditor was to respond to a notice of rescission, the limitations period for a suit for damages for violating the rescission provisions was one year and ten days.

1117. *See, e.g.*, Stevens v. Rock Springs Nat'l Bank, 497 F.2d 307, 310 (10th Cir. 1974); Wachtel v. West, 476 F.2d 1062, 1065 (6th Cir. 1973), *cert. denied*, 414 U.S. 874 (1974); Fenton v. Citizens Sav. Ass'n, 400 F. Supp. 874, 879-80 (C.D. Mo. 1975).

1118. *See* cases cited note 1117 *supra*.

repetitions of an error apparently do not start the statute running again.[1119] Most of the cases to date, however, have involved other than open-end credit. A different treatment of at least some open-end credit issues might be in order. For example, there may be a question whether the statute should run from the date of the initial statement containing a misleading disclosure as to the method of computing the finance charge or from the date of receipt of a periodic statement. One court of appeals has held that the statute should run from the date of the periodic billing because the misleading nature of the initial disclosure was not revealed until receipt of the periodic statement.[1120] The revised law does not address these technical aspects of the running of the statute of limitations. It does, however, address another frequently litigated issue of whether a TIL violation may be asserted by way of a counterclaim in a suit brought by the creditor after the one-year statute has run.

Prior to the 1980 amendments, a number of courts insisted that TIL violations were essentially independent of the debt transaction and that a claim survived the running of the statute only if there was express statutory authorization.[1121] Other courts held that the assertion of a TIL violation in response to a suit on the debt was essentially in the nature of a claim for recoupment rather than set-off and the running of the statute was not a bar.[1122] The revised law states, somewhat awkwardly, that the statute of limitations

> does not bar a person from asserting a violation of this title in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.[1123]

Presumably, under this amendment the statute of limitations will not bar assertion of a TIL violation by way of response unless state law prohibits the claim. Thus, it is not necessary for a state to authorize the

1119. *See* Fenton v. Citizens Sav. Ass'n, 400 F. Supp. 874, 880 (C.D. Mo. 1975).

1120. *See* Goldman v. First Nat'l Bank, 532 F.2d 10, 21 (7th Cir. 1976). *But see* Fenton v. Citizens Sav. Ass'n, 400 F. Supp. 874, 880 (C.D. Mo. 1975).

1121. *See* Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 430 (5th Cir. 1978); Ken-Lu Enterprises, Inc. v. Neal, 29 N.C. App. 78, 82, 223 S.E.2d 831, 835 (1976). In Basham v. Fin. Am. Corp., 583 F.2d 918, 928 n.19 (7th Cir. 1978), the court expressed doubts about the ability of a state statute to modify a federal claim controlled by an explicit federal statute of limitations.

1122. *See* Wood Acceptance Co. v. King, 18 Ill. App. 3d 149, 151, 309 N.E.2d 403, 404 (1974); Continental Acceptance Corp. v. Rivera, 50 Ohio App. 2d 338, 344, 363 N.E.2d 772, 776-77 (1976), *cert. denied*, 434 U.S. 857 (1977). In Lincoln First Bank of Rochester v. Rupert, 60 A.D.2d 193, 400 N.Y.S.2d 618, 621 n.4 (1977), the court stated it was not necessary to decide whether the counterclaim was technically a recoupment in order to conclude that Congress did intend such a counterclaim to survive the one year limit. *But see* Aetna Fin. Co. v. Pasquali, CONS. CRED. GUIDE (CCH) ¶ 97,243 holding that a TIL claim is not in the nature of recoupment and is barred by a one year statute of limitations.

1123. 15 U.S.C.A. § 1640(e) (Supp. 1975-80).

claim, but it may prohibit the claim.[1124]

This approach represents something of a "cop out." The question of when claims created under federal law may be asserted properly is decided by Congress, not the states. The relevant inquiry is whether allowing the claims to be asserted after the statute has run furthers the purposes of the TIL generally and the private enforcement scheme in particular. Arguably it does. Reliance on the conclusion that TIL claims are independent of actions on the debt seems artificial. Credit terms are an integral part of the contract. To this extent the TIL claims are not "stale" so long as the debt continues. Moreover, if recoupment claims are viewed as being barred by the statute of limitations, creditors can wait until the period has expired to sue on the debt. Finally, it is no answer that consumers simply must be vigilant in scrutinizing creditors' actions for TIL violations. Many consumers are unlikely to have either the awareness or the inclination to press TIL claims until they are themselves threatened with legal action.[1125]

X. PUBLIC ENFORCEMENT

The TIL provides for public enforcement.[1126] Private remedies were included because of a recognition that public enforcement is not always adequate.[1127] The 1980 amendments alter the administrative regulatory mechanism in a way that could markedly increase the significance of public enforcement. Indeed, the FRB has suggested that changes wrought by the amendments are intended to deemphasize the role of private remedies and shift the primary enforcement burden to the public sector.[1128]

A new subsection provides for restitution to consumers in cases where the APR or finance charge has been inaccurately disclosed.[1129] It is important to note that the restitution section is effective immediately.[1130] When an agency determines that a disclosure error "resulted from (A) a clear and consistent pattern or practice of violations, (B) gross negligence, or (C) a willful violation which was intended to mislead the person to whom the credit was extended," the agency "shall require" restitution.[1131] Because violations probably most often result

1124. Deciding whether state law prohibits the counterclaim will not be a simple matter. See Ken-Lu Enterprises, Inc. v. Neal, 29 N.C. App. 78, 82, 223 S.E.2d 831, 835 (1976).

1125. *See* Wood Acceptance Co. v. King, 18 Ill. App. 3d 149, 151, 309 N.E.2d 403, 404 (Ill. App. 1979).

1126. 15 U.S.C. §§ 1607, 1611 (1976). 15 U.S.C. § 1611 (1976); *id.* § 1607 (amended 1980).

1127. Boyd, *supra* note 844, at 185.

1128. 46 Fed. Reg. 20,948 (1981). *See also* text & notes 1043, 1049 *supra*.

1129. *See* 15 U.S.C.A. § 1607(e) (Supp. 1975-80). *See also* Boyd, *supra* note 884, at 185.

1130. Simplification Act § 608(b), Part I, at note 14 *supra*.

1131. 15 U.S.C.A. § 1607(e)(2) (Supp. 1975-80).

from faulty procedures or ignorance,[1132] the last two bases for mandatory restitution will likely prove to be relatively unimportant. Many violations, however, may be characterized as involving a "pattern or practice."[1133] Required restitution, therefore, could be a frequent occurrence.[1134] In other cases, the agencies are given discretion to order such restitution as they determine to be equitable.[1135] Both required and permitted restitution are, however, subject to certain limitations.

Under the Senate bill,[1136] restitution could not be ordered where it would have a "significantly adverse impact upon the safety or soundness of the creditor."[1137] A Senate report indicates a balancing process was contemplated.[1138] A particular concern was the "hardships which would be associated with a creditor's resulting bankruptcy."[1139] An agency was not, however, barred from ordering partial restitution consistent with the need to preserve a creditor's solvency.[1140] The House generally accepted the Senate approach to restitution,[1141] but the version which emerged from conference requires full restitution as to credit extended after the effective date of the new law.[1142] This more stringent restitution demand is qualified to the extent that a creditor may spread payments over an "extended period of time which the agency considers to be reasonable."[1143] A "reasonable" period apparently means a payment schedule that will not "cause bankruptcy."[1144]

Because of the inordinate cost of mailing, restitution may not be required for amounts less than $1.00.[1145] If, however, more than one year has elapsed since the date of the violation, an agency may require such amounts be paid into the United States Treasury.[1146] The thinking here is that, in the aggregate, the sums involved might be substantial.[1147] The one-year qualification corresponds to the one-year statute

1132. S. REP., *supra* note 913, at 12.
1133. *Id.*
1134. *See* note 1135 *infra*.
1135. *See* 15 U.S.C.A. § 1607(e)(2) (Supp. 1975-80). An exception is created insofar as restitution must be ordered for violations of the credit life disclosure requirements in connection with transactions consummated after two years after the effective date of the restitution provisions. *Id.* § 1607(e)(2)(A). See text & note 1129 *supra*.
1136. *See* Part I, at note 14 *supra*.
1137. S. 108, 96th Cong., 1st Sess. § 8 (1979).
1138. S. REP., *supra* note 913, at 12.
1139. *Id.*
1140. *Id.*
1141. *See* 15 U.S.C.A. § 1607(e) (Supp. 1975-80); Conference Report, *supra* note 899, at 80.
1142. *See* 15 U.S.C.A. § 1607(e)(3)(A) (Supp. 1975-80).
1143. *Id.*
1144. Conference Report, *supra* note 899, at 80.
1145. *See* 15 U.S.C.A. § 1607(e)(3)(B) (Supp. 1975-80); S. Rep., *supra* note 913, at 12-13.
1146. 15 U.S.C.A. § 1607(e)(3)(B) (Supp. 1975-80).
1147. S. REP., *supra* note 913, at 13.

of limitations on private claims[1148] and is intended to protect the creditor from future liability to consumers.[1149]

Of considerable importance is the fact that creditors who discover an error and cure the mistake are not subject to an order to make restitution. This applies to creditors who notify the consumer within sixty days after discovering an error[1150] and make an adjustment which assures that the consumer will not have to pay a finance charge in excess of that actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.[1151]

A time limitation is also imposed on the restitution device. Except as to willful disclosure violations intended to mislead a consumer, no restitution may be ordered as to open-end credit more than two years after the violation.[1152] As to other than open-end credit, again excepting willful violations, restitution is not possible either after the credit agreement has been performed or two years after the agreement was consummated, whichever is later.[1153] Moreover, restitution is only available where credit was extended after October 28, 1974.[1154] This date represents "a compromise which corresponds to the effective date of earlier amendments to the act making creditors civilly liable for actual damages, the equivalent of restitution adjustments."[1155]

The general mandate of the restitution remedy established by the Senate bill was that the creditor be ordered to make an adjustment to the account of the consumer "to assure that such person [would] not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed, whichever [was] lower."[1156] In cases involving non-willful violations, agencies were required to apply tolerances devised by the bill for application depending upon whether the disclosure error involved the APR or the finance charge.[1157] The House generally concurred in this approach.[1158] It added, however, a specific requirement that restitution be made in credit transactions consummated between

1148. *See* 15 U.S.C. § 1640(e) (1976) (amended 1980).
1149. S. REP., *supra* note 913, at 13. Because of the possibility of counterclaims. *See* text & notes 1116-25 *supra*.
1150. Discovery may be made pursuant to a written final examination report or the creditor's own procedures. *See* 15 U.S.C.A. § 1607(e)(6) (Supp. 1975-80).
1151. *Id.* § 1607(e)(6).
1152. *Id.* § 1607(e)(3)(c).
1153. *Id.* For closed end credit, consummation occurs on the date of violation. See text & notes at 741-56. Therefore, the limits for open-end and closed-end are basically consistent. The time limits referred to in the text are outside limits. Certain specifically narrower limits are also stated. See 15 U.S.C.A. § 1607(e)(3)(C)(i), (ii) (Supp. 1975-80).
1154. *See* 15 U.S.C.A. § 1607(a)(5) (Supp. 1975-80).
1155. S. REP., *supra* note 913, at 13.
1156. *Id.*
1157. S. 108, note 1137 *supra*.
1158. 15 U.S.C.A. § 1607(e)(1) (Supp. 1975-80).

1977 and the effective date of the new law,[1159] where an APR disclosure error "exceeds a tolerance of one-quarter of one percent less than the actual rate, determined without regard to section 107(c)."[1160] Otherwise, in "view of the complexity of the subject," agencies are given the latitude to fashion a remedy.[1161]

In ordering restitution, enforcement agencies which have been authorized to employ cease and desist orders are required to follow cease and desist procedures.[1162] Agencies not authorized to issue such orders must hold a hearing as provided for in the Federal Deposit Insurance Act[1163] at least thirty, but not more than sixty days after a notice of a violation is served on a creditor.[1164]

XI. CONCLUSION

It should be apparent that the TIL Simplification Act is legislation of manifest importance to creditors and consumers alike. Not surprisingly, the Act does not respond to or adequately dispose of all the deficiencies of the prior law. But it nonetheless constitutes a laudable effort to make the TIL scheme effective for the purposes for which it was designed. Creditors will be relieved to discover that their obligations are both reduced and clarified.

For the most part, this relief for creditors is achieved without serious adverse effect on consumers. It is true that TIL will be less readily available to provide defenses or negotiating leverage to debtors. And, given the fact that, generally speaking, consumers are at a disadvantage in disputes with creditors, this change will be viewed by many consumer protection advocates as regressive. But the argument that consumer grievances should not be dealt with by turning a law aimed at accuracy of disclosure regarding credit information into a device for producing costly litigation[1165] is certainly legitimate. The amendments reflect a judgment that the TIL scheme had to be revised to return it to its original purpose to regulate credit disclosures.

On balance the effort appears to have been successful. The "information overload" which had rendered the TIL disclosure statement "just another legal document" has been eliminated. Under the revised scheme, the disclosure statement should simply and concisely provide

1159. *See id.* § 1607(e)(7). Irregular mortgage lending transactions are excepted from this requirement. *Id.*
1160. *Id.*
1161. S. REP., *supra* note 913, at 13.
1162. 15 U.S.C.A. § 1607(4)(A) (Supp. 1975-80).
1163. 12 U.S.C. § 181(h) (1976).
1164. 15 U.S.C.A. § 1607(4)(B) (Supp. 1975-80).
1165. See Part I, at note 6-7 *supra*.

consumers with the information needed to engage in informed use of credit.