Truth in Lending: Some Aspects

Elwin J. Griffith
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Although the Truth-in-Lending Act has made considerable progress in attaining meaningful disclosure of credit terms to consumers, various difficulties in interpreting the Act remain. Many of these difficulties are the product of a technical statute while others are due to conflicting judicial decisions. In this article, the author focuses on several aspects of Truth-in-Lending that have created problems for the courts. In conclusion, he suggests that Congress should resolve these problems and ambiguities by an amendment to the Truth-in-Lending Act.

INTRODUCTION

The Truth-in-Lending Act\(^1\) was enacted in 1968 "to assure a meaningful disclosure of credit terms so that the consumer [would] be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."\(^2\) In the last few years consumers have been provided with much more information about credit terms than they were accustomed to before Truth-in-Lending. In determining what disclosures are required, creditors have endured with remarkable fortitude the trials and tribulations of the Act and the ensuing Regulation Z.\(^3\) Sometimes the creditors' zeal has caused them to disclose too much. In such cases, they have run the risk of obscuring the basic information required under the Act and the Regulation. The prevailing error attributable to most violators, however, has been the tendency to disclose too little information or to vary somewhat from the statutory labels.\(^4\)

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* Associate Dean, University of Cincinnati Law School; B.A., Long Island University; J.D., Brooklyn Law School; LL.M., (International Law) New York University.

4. The creditor must use specific terms in disclosing the required information. For example, in loans and other non-sale credit he must disclose the "amount financed," and
One problem area is disclosure of the provision granting the creditor the right to accelerate in the event of the debtor's default. That provision usually is contained in the note or the credit agreement. The question is whether it should also be contained in the disclosure statement required under the Regulation.\(^5\) The Act and the Regulation call for disclosure of any "default, delinquency, or similar charges payable in the event of late payments."\(^6\) Thus, whether acceleration comes within the ambit of the disclosure requirements depends on the possibility of categorizing it as a charge. Therefore, it should be instructive to review the judicial interpretations of the disclosure requirements concerning the creditor's right to accelerate.

Another aspect of Truth-in-Lending that has generated frequent litigation is the problem of security interests affecting after-acquired property. The Regulation requires that if after-acquired property will be covered by the security interest, that fact shall be clearly stated in conjunction with the description or identification of the type of security interest.\(^7\) Frequently, a creditor's documents will apply the security interest to all consumer goods subsequently acquired by the debtor. However, the submission of all the debtor's consumer goods to the security interest is limited by section 9-204 of the Uniform Commercial Code\(^8\) which prohibits the attachment of the security interest to after-acquired consumer goods unless the goods are acquired within ten days after the creditor gives value. Thus, we shall examine the effect

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5. The disclosures required in credit transactions other than open-end transactions must be made together on either:
   (1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature; or
   (2) One side of a separate statement which identifies the transaction.
12 C.F.R. §226.8(a) (1976).

8. U.C.C. §9-204(2) (1972) provides as follows:
   No security interest attaches under an after-acquired property clause to consumer goods other than accessions (Section 9-314) when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.
of this state law limitation on security interests in after-acquired consumer goods.

In addition, some consideration is given to cases in which creditors have failed to comply with the Regulation and have asserted that such failure resulted from a bona fide error and was unintentional. Even the most conscientious debtors frequently have been perplexed about the application of this good faith defense. Our consideration of this aspect will be restricted primarily to the definition of intent and the type of errors protected. In conclusion, a brief review will be made of the nature of the civil remedy available to a debtor in case of a creditor's violation and the procedural problems that have arisen as a result of an ambiguously worded statute.

ACCELERATION AS A CHARGE

The Truth-in-Lending Act requires certain disclosures in the case of sales or consumer loans not under open-end credit plans. Under the Act a creditor must disclose "the default, delinquency, or similar charges payable in the event of late payments." Section 226.8(b)(4) of Regulation Z requires a disclosure of "the amount, or method of computing the amount, or any default, delinquency, or similar charges payable in the event of late payments." Thus, the pivotal question is whether acceleration is a charge that must be disclosed under the Act and the Regulation.

One of the first cases to deal with this question was Garza v. Chicago Health Clubs, Inc., in which the district court held that
the acceleration clause must be disclosed because it is a charge. The court noted the general definition of a charge as an obligation and its judicial definition as a pecuniary burden. Combining these definitions with the general purpose of the Act, the court decided in favor of disclosure. Subsequently, the Federal Reserve Board issued an opinion which classified an acceleration as a prepayment of the loan as opposed to a charge, and held that the disclosure requirements of section 226.8(b)(7) of Regulation Z were applicable. Section 226.8(b)(7) requires creditors to identify the method of computing any unearned portion of the finance charge that will be refunded if a loan is prepaid. The Board's opinion letter, therefore, introduced an additional consideration because it equated acceleration of the debt with voluntary prepayment and imposed the same disclosure requirements in both cases. The Board's approach suggested that if there were a rebate of unearned finance charges computed in the same manner as rebates because of voluntary prepayment, there were no additional charges payable and therefore the acceleration provision would not have to be disclosed under section 226.8(b)(4) as a "similar charge." However, if the acceleration provision utilized a different method of computing the unearned finance charge, it would have to be disclosed under section 226.8(b)(7) as if acceleration were a voluntary prepayment. It is submitted here, and my subsequent discussion will suggest, that the Board's characterization of acceleration as voluntary prepayment was incorrect.

The problem surfaced again in Johnson v. McCrackin-Spurman Ford, Inc. In Johnson, the disclosure statement did

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18. Another case, Woods v. Beneficial Fin. Co., 395 F. Supp. (D. Ore. 1975), bolstered the Garza opinion by holding in favor of such disclosure in order to sustain the "meaningful disclosure" standards of the Act. *Id.* at 16. Although the court did not categorize acceleration as a charge, it took the view that acceleration was within the type of information that must be disclosed under the spirit of the Act.
20. 12 C.F.R. §226.8(b)(7) (1976). Unearned interest may be included in the unearned portion of the finance charge because the creditor has received loan interest for a period after the loan has already been paid off.
not contain the acceleration provision, nor did it expressly provide for a rebate of the unearned finance charges in the event of acceleration. However, under Pennsylvania law, the creditor could demand only the outstanding principal and earned interest in the event of acceleration. The Third Circuit treated the Pennsylvania statutory provision governing rebate as part of the contract. Thus, the creditor would have to rebate any unearned finance charge upon acceleration. The court noted that the creditor had complied with section 226.8(b)(7) of Regulation Z, which called for a disclosure of the method used by the creditor in computing the unearned finance charge, by disclosing the rebate method applicable in the event of prepayment. Citing the Board's opinion letter, the court characterized acceleration as a form of prepayment. It then concluded that the creditor had fulfilled the disclosure requirements when it disclosed the method of rebate for prepayment as provided in section 226.8(b)(7).

While the disclosure statement in Johnson granted the debtor a prepayment privilege, the default provision of the contract gave the seller the right to accelerate the debt, along with other

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23. 527 F.2d at 268. The debtor contended that the Pennsylvania statute was irrelevant in determining whether Truth-in-Lending was violated by the omission of the acceleration clause. This argument was sustained in Barrett v. Vernie Jones Ford, Inc., 395 F. Supp. 904 (N.D. Ga. 1975). The court felt that once the creditor asserted the right to collect a charge, it should not matter for purposes of Regulation Z disclosure whether he could legally collect that charge. The Johnson court treated the Pennsylvania statute as part of the contract and regarded the rebate as mandatory. 527 F.2d at 268. In Termplan Mid-City, Inc. v. Laughlin, 333 So.2d 738 (La. App. 1976), the contract specifically incorporated Louisiana law which provided for rebate of unearned interest in acceleration. The court held that disclosure of the acceleration clause was not required because there was no charge under section 226.8(b)(4).
24. 527 F.2d at 261, 266 nn. 4 & 5.
25. Id. at 268-69. One of the specific disclosures required in credit other than open-end is as follows:

Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

26. 527 F.2d at 261 n.5.
remedies. The default provision contemplated a procedure initiated and controlled by the creditor to protect his security with the ultimate objective of satisfying his debt. Surely the event contemplated by the default provision did not approximate the voluntary payment described in the disclosure statement. The prepayment provision accommodated a true prepayment because it gave the buyer the option of prepaying his obligations. It is difficult, therefore, to understand how acceleration could be viewed as a prepayment in light of the remedial nature of the default provision.

It is interesting that in providing for rebate of the unearned finance charge, the Pennsylvania Motor Vehicle Sales Finance Act mentioned other events besides prepayment. The rebate was required if the balance was liquidated by "prepayment, refinancing or termination by surrender or repossession and resale of the motor vehicle. . . ." It is arguable that this statute recognized a difference between voluntary prepayment and acts occurring as a result of the debtor's default. If the court in Johnson regarded the state's rebate provision as a term of the acceleration clause, it should have noticed the statute's distinction between prepayment and liquidation occurring through repossession and resale. Such repossession action follows the creditor's acceleration and when the debt has been thus satisfied, it can hardly be said that the buyer had prepaid his debt. The author believes that the reliance by the Johnson court on the Board's opinion letter was misplaced and that it should have held that acceleration was neither a charge nor a prepayment.

One does not usually think of prepayment as an act dictated by the creditor because of the debtor's default. Accordingly, section 226.8(b)(6) requires the description of any penalty charge that may be assessed against the debtor by the creditor in the event of prepayment. The penalty envisaged by section

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27. Id. at 261. It confirmed his recourse to repossession through self-help and restated his preferred status as a secured party under the Uniform Commercial Code. The buyer agreed to pay all reasonable attorneys' fees and other expenses involved in collecting the debt or reselling the security.

28. Id.


30. 12 C.F.R. §226.8(b)(6) (1976) provides for the disclosure as follows:

A description of any penalty charge that may be imposed by the creditor or his
226.8(b)(6) is one usually imposed by the creditor incident to acceptance of the principal in advance of the maturity date.\textsuperscript{31} After all, in a mortgage transaction the creditor is not obligated to accept payment of the debt until the date agreed upon in the documents because the essence of his bargain may have involved the investment of a certain sum for a specific period.\textsuperscript{32} In consideration of his decision to compromise that agreement, the creditor may insist on an additional penalty payment as stipulated in the contract. Such a sum is a substitute device for the interest yield for which he contracted and which now vanishes because of the premature payment. Therefore, in the absence of evidence to suggest a contrary reading, the term "prepayment" should be accorded the same interpretation in both subsections (6) and (7).

It is also submitted that the classification of acceleration as a charge is incorrect. The burden flowing from the exercise of a right of acceleration indeed may be worthy of disclosure. However, the question is not whether the right imposes a burden, but rather whether it may result in the imposition of a default or delinquency charge. There is a meaningful distinction between the right of acceleration and the imposition of a charge pursuant to the exercise of that right.\textsuperscript{33} The acceleration provision by itself simply details a remedy available to the creditor in the event of the debtor's default.\textsuperscript{34} If there is a refund of the unearned finance assignee for prepayment of the principal of the obligation (such as a real estate mortgage) with an explanation of the method of computation of such penalty and the conditions under which it may be imposed.

\textsuperscript{31} See 12 C.F.R. §226.818 (1976) in which the Board interprets section 226.8(b)(6) as applying to transactions such as real estate mortgages in which the interest is computed on the unpaid balance, and section 226.8(b)(7) as applying to transactions involving precomputed finance charges which are included in the face amount of the obligation.

\textsuperscript{32} The draftsmen had this in mind because the Conference Report stated that the Federal Reserve Board and other regulatory agencies should provide for the disclosure to the obligor at the time of the completion of a consumer credit transaction of any prepayment penalties in connection with real estate mortgages.


\textsuperscript{34} If it is true that there is no charge on acceleration because no additional sum is imposed, then that should hold true even in the absence of a rebate provision.

\textsuperscript{35} It must be noted that acceleration may occur because of a default having nothing to do with a late payment. Thus an impairment of collateral could be an event of default. See, e.g., Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 261 (3d Cir. 1975).
charge, the debtor has not incurred any default or delinquency charges as a result of the acceleration.

It must be recalled that section 226.8(b)(4) deals only with “default, delinquency, or similar charges payable in the event of late payments.” If acceleration is regarded as synonymous with prepayment pursuant to the Board’s view, there is some difficulty in regarding the retained unearned finance charges as a “charge” under section 226.8(b)(4). The assessment of a charge because of a late payment presumes to some extent the continued existence of the obligation. Although the average creditor does not invite the debtor’s delinquency, he usually provides for that contingency by setting a late charge. A charge may be imposed, therefore, because the creditor has decided to accept a payment after its due date, not because he has decided to accelerate the obligation. As a matter of fact, the imposition of the charge is not at all related to the question of acceleration. The creditor may decide to accept the late payment together with the appropriate late charge or he may decide to accelerate the total debt because of recurring delinquencies. Thus, the Board’s categorization of the amounts retained by the creditor beyond those which would be rebated under the disclosed provisions is not accurate since the unearned finance charges arise not as a result of a late payment, but as a result of the creditor’s acceleration of the debt.

Would an acceleration under such circumstances be a charge? Even if it could be so considered, it would not be imposed because of a late payment. This further weakens the argument that acceleration is a charge within section 226.8(b)(4).


36. 1 CONS. CRED. GUIDE (CCH) §4230 explains it this way: “Delinquency charges—like deferral charges—are the compensation a creditor receives on a precomputed contract for the debtor’s delay in making timely installment payments.” See also CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 71-72 (1965).

37. If the creditor collects a charge for a late payment, it must be one that is similar to a default or delinquency charge; i.e., a specific sum. But additionally, if acceleration occurs, the creditor is in effect engaging in an act other than accepting the debtor’s late payment. That act of acceleration may even be instigated by an event of default totally unrelated to a delinquent payment. Is it, therefore, a charge as contemplated by section 226.8(b)(4)? The term “charge” must be taken in the context of a similarity to default or delinquency charges and must arise as incident to a late payment. How can acceleration be included within the term “similar charges” if the creditor does not receive compensation in addition to that for which the debtor is originally obligated?

Even if it is conceded that acceleration of a debt creates a charge, that event does not come within the coverage of section 226.8(b)(4). A default, delinquency, or similar charge can be assessed after late payment without acceleration and, therefore, there must be a distinction contemplated by the Act and the Regulation by restricting the condition to the event of late payment. If it is desirable to inform the consumer of the possibility that the creditor will retain unearned finance charges on acceleration, then the language of the Act and the Regulation would have to be amended to provide for the disclosure of "any default, delinquency, or similar charges payable in the event of late payments or unearned finance charges to be retained in the event of acceleration."

While the Johnson court held that the right of acceleration was not a "default, delinquency or similar charge," that decision was based essentially on an incorporation of the Pennsylvania statute that the unearned finance charge must be rebated in the event there is acceleration. That case did not answer the question concerning the requirement of disclosing acceleration in the absence of a provision rebating unearned finance charges upon acceleration.

However, in Martin v. Commercial Securities, Co., the Fifth Circuit did confront that issue and concluded that the Act referred only to charges imposed as a result of the late payment of an installment, not imposed because of acceleration. In Martin, the disclosure statement informed the debtor about charges payable in the event of late payments. In addition, it contained a

39. The "late payment" aspect is usually obscured in the cases by attempts to show acceleration as a charge. But even if it is a charge, it must occur in the event of late payment.

40. This language is suggested because the controversy surrounding acceleration has been about unearned finance charges. Therefore, that item must be somehow isolated from the present language dealing with "default, delinquency or similar charges."

See also St. Germain v. Bank of Hawaii, 413 F. Supp. 587 (D. Hawaii 1976) (acceleration treated as a "subsequent occurrence" under section 226.6(g) of Regulation Z and, therefore, not subject to disclosure at all).

41. 527 F.2d at 265.

42. 539 F.2d 521 (5th Cir. 1976); accord, Smith v. Avco Fin. Serv., Inc., 545 F.2d 242 (5th Cir. 1976); Whittlesey v. Ford Motor Credit Co., 542 F.2d 245 (5th Cir. 1976); Grant v. Imperial Motors, 539 F.2d 506 (5th Cir. 1976); Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976). Contra, LaGrone v. Johnson, 534 F.2d 1360 (9th Cir. 1976).
rebate provision covering prepayments,\textsuperscript{43} but did not have an applicable rebate provision in the event of acceleration as \textit{Johnson} did by virtue of the state statute. Thus, unearned finance charges could be retained by the creditor. The acceleration provision which appeared in the note\textsuperscript{44} was not included in the disclosure statement, however, and consequently the debtor claimed that the creditor had violated section 226.8(b)(4) of the Regulation by this omission.

The court in \textit{Martin} parted company with \textit{Johnson} in rejecting the Board's characterization of acceleration as a prepayment.\textsuperscript{45} The court took the view that "[i]n the installment credit context, prepayment and acceleration appear to be conceptually antithetical."\textsuperscript{46} In recognizing this distinction, the court grasped a concept that has evaded other courts, that is, the buyer prepays while the creditor accelerates. The terms are by no means synonymous. It was a recognition of this fundamental difference that compelled the court to conclude with confidence that the creditor's failure to disclose an acceleration clause and its rebate policy of retaining unearned finance charges did not violate the Act or the Regulation.

It must be observed that in section 226.8(b)(4), the words "default, delinquency or similar" qualify the term "charges." Therefore, the kind of charge contemplated by the Regulation is one that is akin to a default or delinquency charge and the latter type has been regarded consistently as an additional monetary obligation associated with a late payment. This interpretation is in keeping with traditional statutory construction.\textsuperscript{47} Considera-

\textsuperscript{43} 539 F.2d at 522, nn.4-5.

\textsuperscript{44} Id. at 522.

\textsuperscript{45} Id. at 529. The court declined to accept the Board's staff opinion by stating: "With deference, we find its one-sentence conclusion that an acceleration of payments is essentially a prepayment of the contract obligation to be an analytical construction of regulatory intent which has not been expressed in language that 'all who run may read.'"

\textsuperscript{46} Id. This language emphasized the voluntary nature of prepayment in this context. Whatever payment occurs after acceleration is usually involuntary.

\textsuperscript{47} There are several aids to statutory construction. The meaning of certain words may be gleaned from their association with other words in the statute. Accordingly, when it is associated with "default" and "delinquency," its meaning becomes rather clear. C. \textit{Sands}, 2A \textit{Sutherland, Statutory Construction} \S 47.16 (4th ed. 1973). Furthermore, in the absence of contrary legislative intent, words with established meanings in the consumer and commercial credit context are presumed to have those meanings in a statute covering the credit industry. \textit{See id. at} \S 47.31.
tion of the term "charges" in isolation would not accord due deference to the requirement of a similarity between the charge accruing from acceleration and that accruing from a default or delinquency. In pursuing this requirement, the Martin court not only put things in proper perspective, but it also declined to incorporate a disclosure requirement for acceleration within the general purposes of the Act. This approach placed the burden on the Board, for the Board could require the disclosure of an acceleration provision as clearly as it mandated the disclosure of the consequences of prepayment.

After Martin any conclusion that unearned finance charges retained by the creditor upon acceleration would make the acceleration a charge was laid to rest in McDaniel v. Fulton National Bank of Atlanta. In McDaniel the Fifth Circuit held on the basis of Martin that acceleration was not a charge. In its decision, the court emphasized that Martin's characterization of acceleration did not depend on the creditor's rebate policy on unearned finance charges. This was an appropriate response to the debtor's contention that Martin stood only for the proposition that acceleration of principal and earned finance charges was not a charge. In dismissing that contention, the McDaniel court correctly rejected the narrower holding of Johnson which had supported disclosure of acceleration as a charge only when the creditor claimed unearned finance charges.

It is submitted, therefore, that McDaniel properly characterized the Martin decision and that the Fifth Circuit took the correct stand in holding that the disclosure of acceleration is not required either under the Act or the Regulation. Finally, it must be noted that this exclusion of acceleration from the disclosure requirements is not contingent upon a consideration whether the

48. 543 F.2d 568 (5th Cir. 1976). This case was consolidated on appeal with two other cases from the federal district court in the Northern District of Georgia. Barrett v. Vernie Jones Ford, Inc., 375 F. Supp. 904 (N.D. Ga. 1975), and Barksdale v. Peoples Fin. Corp., 393 F. Supp. 112 (N.D. Ga. 1975). The basic question was "whether the Act as implemented by Regulation Z requires a creditor to disclose as a default charge the fact that the loan agreement gives him the contract right to accelerate and demand payment of the entire indebtedness, including unearned finance charges, when state law provides only that usurious unearned finance charges may not be exacted in a state court proceeding to collect the accelerated indebtedness." 543 F.2d at 569.

49. Id. at 570.
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CREDITOR STANDS TO BENEFIT FROM EARNED OR UNEARNED FINANCE CHARGES. THE FACT IS THAT ACCELERATION DOES NOT COME WITHIN THE DEFINITION OF "SIMILAR CHARGES." 50

SECURITY INTEREST AND AFTER-ACQUIRED PROPERTY CLAUSE

CERTAIN SPECIFIC DISCLOSURES ARE REQUIRED IN CLOSED-END CREDIT TRANSACTIONS. 51 AMONG THEM ARE THE DESCRIPTION OR IDENTIFICATION OF THE TYPE OF SECURITY INTEREST HELD BY THE CREDITOR AND A CLEAR

50. A COLLATERAL PROBLEM ARISING IN THE CASES IS WHETHER A CREDITOR IS REQUIRED TO DISCLOSE A FINANCE CHARGE WHICH MAY BE IN EXCESS OF THAT PERMITTED BY STATE LAW. IN BARRETT V. VERNIE JONES FORD, INC., 375 F. SUPP. 904 (N.D. GA. 1975), THE DISTRICT COURT CONSTRUED THE CONTRACT AS CALLING FOR THE PAYMENT OF USURIOUS INTEREST AND SUGGESTED THAT THIS LEGAL IMPROPRIETY DID NOT DETRACT FROM THE REQUIREMENT OF FULL DISCLOSURE BY THE CREDITOR. ID. AT 911. THE DEBTOR'S DEFAULT GAVE THE CREDITOR THE RIGHT TO ACCELERATE ALL UNPAID INSTALLMENTS AND SUCH INSTALLMENTS WOULD HAVE INCLUDED PRECOMPUTED INTEREST. THE CREDITOR'S INVOCATION OF THIS REMEDY WOULD HAVE LED TO HIS BENEFITING FROM UNEARNED FINANCE CHARGES. IF those finance charges collected by the creditor were in excess of those permitted by law, that should have no effect on the final determination of whether their disclosure should be required in the first place. This logically leads to the broader question whether the information to be disclosed under Regulation Z should be controlled by the remedies permitted under state law. In this connection, it must be recalled that neither the Act nor the Regulation was intended to control charges for consumer credit. 12 C.F.R. §226.1(a)(2) (1976). Therefore, it is entirely possible for a creditor to run afoul of the state's usury laws while complying with the requirements of Regulation Z. Whether that is a desirable prospect or not is subject to debate. One of the relevant considerations is that the consumer should be able to compare the various credit terms available from different lenders so as to make meaningful choices in his use of credit. If a creditor extends credit at an illegal rate of interest, a disclosure of that rate probably puts the consumer in a better position to compare the exorbitant rate of interest with the rate charged by other creditors in the market place. He then may be able to make a more meaningful choice and to that extent the disclosure of the illegal rate inures indirectly to his benefit. This is not to suggest that a lender should be absolved from liability for usury on this ground. However, a requirement of disclosure under Regulation Z ought not be affected by the illegality of the charge except to the extent that it may affect the consumer's meaningful choice of credit terms. 395 F. SUPP. AT 912. THE COURT IN BARRETT SAID THAT A 50% PER ANNUM INTEREST RATE WOULD NOT BE A TRUTH-IN-LENDING VIOLATION AS LONG AS IT WAS CLEARLY DISCLOSED BY THE ACT. ID. A CREDITOR'S CLAIM TO UNEARNED FINANCE CHARGES, ILLEGAL AS IT MAY BE, SHOULD NOT AFFECT THE CREDITOR'S DUTY TO DISCLOSE THOSE CHARGES. A CONTRARY INTERPRETATION MIGHT BE REGARDED AS CREATING AN ALLIANCE BETWEEN THE REQUIREMENT OF DISCLOSURE AND THE LEGALITY OF THE CHARGES DISCLOSED. ID. REGULATION Z EXPRESSLY DISAVOWS ITS INTENTION TO CONTROL CHARGES IMPOSED ON THE DEBTOR. SEE 12 C.F.R. §226.1(a)(2) (1976). IT IS PRIMARILY A DISCLOSURE STATUTE AND, AS SUCH, ITS PROVISIONS OUGHT NOT TO BE INTERPRETED AS IMPOSING A REQUIREMENT OF DISCLOSURE CONTINGENT UPON THE LEGALITY OF THE PROVISIONS DISCLOSED.

51. CLOSED-END TRANSACTIONS ARE CHARACTERIZED BY "A TOTAL FIXED AMOUNT TO BE REPAYED IN INSTALLMENTS. THIS AMOUNT IS USUALLY DETERMINABLE IN ADVANCE AND CONSISTS OF PRINCIPAL (THE CASH PRICE) AND A FINANCE CHARGE." SPEIDEL, SUMMERS & WHITE, COMMERCIAL AND CONSUMER LAW, PT. 2, CH. 15, §2, AT 433 (2D ED. 1974).
identification of the property to which that security interest relates. In addition, if the creditor wishes to subject after-acquired property to the security interest, that fact must be set forth clearly. Section 9-204(2) of the Uniform Commercial Code provides that no security interest can attach under an after-acquired property clause to consumer goods other than accessions unless the debtor acquires the goods within ten days after the creditor gives value. Thus, the creditor's security interest has very limited application to consumer goods acquired after the original credit has been extended. Occasionally, though, the creditor will use a general statement in his credit documents subjecting the debtor's after-acquired property to the security interest without stipulating the ten-day limitation set out in section 9-204(2) of the Code. The question arises, therefore, whether the creditor's failure to include this ten-day limitation within the security interest provision violates section 226.6(c) of Regulation Z because of its misleading nature or whether it violates section 226.8(b)(5) for failure to describe adequately the security interest.

One of the first cases to deal with the issue, Kenney v. Landis Financial Group, Inc., held that the creditor's failure to include the ten-day limitation in its security interest provision violated section 226.6(c) of Regulation Z because it was calculated to mislead or confuse the customer. The court did not regard it as a violation of section 226.8(b)(5). However, in Johnson v. Associates Finance, Inc., the court found a similar omission to be a violation of both sections 226.6(c) and 226.8(b)(5).

52. 12 C.F.R. §226.8(b)(5) (1976).
53. See note 9 supra.
56. 12 C.F.R. §226.6(c) (1976) provides in part as follows:
   (c) Additional information. At the creditor's option, additional information or explanations may be supplied with any disclosure required by this part, but none shall be stated, utilized, or placed so as to mislead or confuse the customer, or contradict, obscure, or detract attention from the information required by this point to be disclosed.
12 C.F.R. §226.8(b)(5) (1976) provides in part as follows:
   If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.
The Federal Reserve Board has issued an opinion on the requirements affecting disclosure of the after-acquired property clause. Initially it stated that the creditor should not disclose a security interest in after-acquired property beyond that permitted by state law. However, that opinion was later qualified to the extent that the Board deemed it permissible for the creditor merely to state the fact that after-acquired property was subject to the security interest and that there was no obligation for him to go further to define the limitations imposed by state law. In fact, a close examination of section 226.8(b)(5) reveals that it calls only for a disclosure of the fact that after-acquired property is subject to the security interest. Thus, a fair reading of the statute is in accord with the Board's later opinion.

In Sneed v. Beneficial Fin. Co. of Hawaii, 410 F. Supp. 1135 (D. Hawaii 1976) the creditor found himself facing allegations similar to those made in Kenney and Johnson. The creditor argued that his overstatement of the scope of his security interest should be excused because it made his credit terms seem less attractive to the debtor. Id. at 1142. He also sought to bring himself within coverage of section 226.6(h) of the Regulation which forgives an overstatement of the finance charge if it is not intended to circumvent or evade the disclosure requirements. 12 C.F.R. §226.6(h) (1976). The court felt that the statute should be strictly construed and, therefore, section 226.6(h) should be limited to the cases dealing specifically with the finance charge or percentage rate. Furthermore, even if the section did apply in this case, the burden of proof would be on the creditor to show that his overstatement of the security interest was not based on circumvention of the disclosure requirements. 410 F. Supp. at 1142.

See also Fed. Res. Bd. Interpretation, 12 C.F.R. §226.601 (1976) in which the Board states that section 226.6(h) is intended for an accidental overstatement of the annual percentage rate. Thus, even if section 226.6(h) could be interpreted as applying to a case like Sneed, it would not help the defendant because there was nothing accidental about the overstatement of the security interest. The courts have taken a strict line in dealing with situations where creditors have sought to avoid liability for disclosure errors. Forgiveness for the most part has been restricted to clerical errors. See, e.g., Turner v. Firestone Tire & Rubber Co., 537 F.2d 1296 (5th Cir. 1976); Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D. N.Y. 1971).

59. "If after-acquired property will be subject to the security interest . . . , this fact shall be clearly set forth . . . ." 12 C.F.R. §226.8(b)(5) (1976) (emphasis added).
60. In Willis v. Town Fin. Corp., 416 F. Supp. 10 (N.D. Ga. 1976), the court declined to accept the recommendation of a special master that the Regulation did not require the creditor to disclose the ten-day limitation with respect to after-acquired consumer goods. The creditor in Willis had relied on a Board "Staff Opinion Letter" dated January 5, 1975 which had clarified the previous Staff Letter No. 829 dated August 22, 1974, 5 Cons. Cred.
However, in Tinsman v. Moline Beneficial Finance Co.," the disclosure statement referred to a security interest covering all consumer goods owned or thereafter acquired by the debtor. The court found a violation of the Regulation because the creditor did not mention the ten-day limitation applicable to after-acquired consumer goods. But again the security interest disclosure went far beyond that required by section 226.8(b)(5). The language purported to cover all after-acquired consumer goods. There is a difference between that kind of statement and one that simply states the fact that after-acquired property will be covered by the security interest. Those cases that have dealt with the problem have been concerned with statements which not only went beyond legal possibilities, but also misled the consumer into thinking that all his future consumer acquisitions would be subject to the security interest. Furthermore, the clause in Tinsman not only ignored the ten-day limitation, but it purported to cover all consumer goods located on the debtor's property. Such breadth of coverage could not be tolerated when the clause might be interpreted as applying to consumer goods in the debtor's possession but belonging to someone else. The result in this case is not incon-

Guide (CCH) §31,151, and supported the approach that the creditor should state only the fact that after-acquired property would be subject to the security interest. The court was confronted with the view of the Fifth Circuit in Philbeck v. Timmers Chevrolet Co., 499 F.2d 971 (5th Cir. 1974), which held that the Board's opinions were entitled to some deference in interpreting the Regulation. Despite the admonition of the Philbeck court, the Willis court chose to emphasize the recent view of the Second Circuit in Ives v. W. T. Grant Co., 522 F.2d 749 (2d Cir. 1975), in which it was stated that the good faith defense could not be predicated on Board letters and pamphlets because they were not part of the Regulation. This was, indeed, a respectable escape for the Willis court for it seemed less interested in reaching a basic discussion of the issues than in ensuring that the Board's view did not prevail. However, the court was eager to commend the special master for his well-reasoned opinion and in furtherance of that commendation was willing to certify this question of disclosure to the Court of Appeals. 416 F. Supp. at 13.

61. 531 F.2d 815 (7th Cir. 1976).
62. Id. at 818. The controversial language was as follows:
All of the consumer goods of every kind now owned or hereafter acquired by Debtors in replacement of said consumer goods and now owned or hereafter located in or about the place of residence of the Debtors' at the address shown above . . . .
63. A disclosure that the security interest affects all after-acquired property certainly is different from a simple statement of the fact that after-acquired property may be subject to the security interest.
consistent therefore with the position advocated by the Board.\textsuperscript{64}

Section 226.8(b)(5) calls for a clear statement of the fact that after-acquired property will be subject to the security interest. That requirement does not seem to include a discourse on the various terms and conditions imposed by state law on such after-acquired property interest. As recently as May 28, 1976, the Board restated its position that a simple disclosure of the fact that after-acquired property was subject to security interest would be sufficient to comply with section 226.8(b)(5).\textsuperscript{65} However, the Board was careful to point out the distinction between such a simple disclosure and a disclosure which purported to subject all after-acquired property to the security interest.

It is submitted, therefore, that the difficulties experienced by creditors in the cited cases were a product of their own linguistic variations which went beyond the simple requirements of the statute. The alleged submission of all consumer goods subsequently acquired by the debtor to the creditor's security interest, is clearly a misstatement of law and indeed perplexing to the debtor. Furthermore, such incorrect information cannot be tolerated for it constitutes a violation of section 226.8(b)(5). As long as the creditor fulfills the requirements of describing or identifying the type of security interest held or retained in connection with the transaction, the only other requirement with respect to after-acquired property is a clear statement that such property will be subject to the security interest of the creditor. There should be no need to elaborate on the various limitatons of the particular state statute. Such an exercise simply might result in a failure to live up to the statutory mandates of section 226.8(b)(5).

**Bona Fide Error Defense**

The technical aspects of the Act and the Regulation have caused even the most cautious creditors to make errors in their disclosure statements. This possibility was contemplated during


\textsuperscript{65} FED. RES. BD. STAFF OPINION LETTER No. 1053, May 28, 1976, 5 CONS. CRED. GUIDE (CCH) §31,393.
hearings on the original Senate bill. As a result, an exemption was written into the Act excusing violations when the creditor could show that they were not intentional and that they resulted from bona fide errors in spite of the maintenance of procedures calculated to avoid such errors. This exemption became known as the "good faith defense."

Under the Act the good faith defense is available only if the error occurred in spite of procedures maintained to avoid it. The statutory reference to the maintenance of procedures is directed towards mathematical or clerical errors. This conclusion is confirmed by the legislative history which shows that the exemption was inserted to accommodate the concerns of creditors that the complexity of the statute would produce such clerical errors. A different approach would place a frustrating burden on debtors seeking a civil remedy under the Act since such debtors would have great difficulty in overcoming the creditors' good faith defense.

This statutory exemption does not apply to mistakes of law. A mistake of law caused by reliance on counsel's advice in making the appropriate disclosures does not detract from the deliberateness of the disclosure omissions and would not exempt the creditor from civil liability under the statute. In fact, not even reli-

68. See note 66 supra.
70. The first test came in Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971), in which the creditor neglected to disclose a nominal annual percentage rate in a billing statement mailed to a debtor under an open-end credit plan. The creditor's claim to exemption from liability was predicated basically on a genuine mistake of law. The court's view was that the statutory exemption did not apply to such mistakes. It was felt that the bank intended to omit the disclosure even though that intent was formulated on the basis of a misconstruction of the disclosure requirements. Accord, Turner v. Firestone Tire & Rubber Co., 537 F.2d 1296 (5th Cir. 1976); Mirabal v. General Motors Acceptance Corp., 537 F.2d 871 (7th Cir. 1976); Ives v. W. T. Grant Co., 522 F.2d 749 (2d Cir. 1975); Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974).
71. This was confirmed in Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974), in which the creditor sought comfort from the fact that its disclosure violations were unintentional. In spite of the creditor's assertions, the court concluded that the statutory requirement of intent concerned the acts performed rather than a knowing and willful violation of the law itself. Id. at 1166. By avoiding the "knowing and willful" connotation, the court in effect distinguished the civil liability and the criminal liability
ance on the Board's advice and publications relieves creditors from liability.\textsuperscript{72}

A deviation from this rule was enunciated in \textit{Wellmaker v. W. T. Grant Co.}\textsuperscript{73} In \textit{Wellmaker}, the court found that the creditor had acted in good faith when it relied on Board publications in making its disclosures and that the violation was not intentional but resulted from a bona fide error despite the maintenance of procedures adopted to avoid such error. The court thus suggested that the intent required by the statute was the intent to commit the violation rather than the intent to commit the act or omissions. The court did not see how the creditor in this case could have gone to any further lengths to comply with the statutory disclosures since some of its forms had received prior approval from the Federal Trade Commission.\textsuperscript{74} However, the creditor's responsibility, is one of continuing vigilance. Therefore, a creditor must maintain procedures to keep himself informed of decisions on disclosure requirements in order to avoid violations.\textsuperscript{75}

The Board recognized the difficulty caused when a creditor faithfully relies on a section of the Regulation only to have a court subsequently invalidate it. As a result, the Board suggested an additional type of good faith defense under which the creditor's compliance with the Regulation would not place him in legal difficulty if the Regulation subsequently was invalidated by a court decision.\textsuperscript{76} Section 1640 thus was amended to provide freedom from liability for any good faith act or omission resulting from reliance on any rule, regulation, or interpretation by the Board even if such rule, regulation, or interpretation thereafter


\textsuperscript{74}The Federal Trade Commission is charged with overall enforcement of the Act, except to the extent that some other agency is specifically assigned that task with respect to banks and certain other specialized institutions. 15 U.S.C.A. §1607 (1974 & Supp. 1976).

\textsuperscript{75}See Rolader v. Georgia Power Co., 5 CONS. CRED. GUIDE (CCH) ¶98684 (N.D. Ga. 1974) (when the creditor had failed to include the term "unpaid balance" in a credit sometime after other court decisions in the district had been rendered requiring that disclosure).

was rendered invalid for any reason.\textsuperscript{77} However, when the drafters considered that amendment, they apparently intended that reliance on Board staff letters or pamphlets would not suffice.\textsuperscript{78} Civil liability could be avoided only if a creditor relied on a formal rule, regulation, or interpretation of the Board itself, as opposed to merely an opinion from an employee of the Board. Thus, when the creditor's reliance was based on staff letters and staff pamphlets, the Second Circuit held that he could not depend on section 1640(f) to avoid civil liability for failure to use the term "unpaid balance."\textsuperscript{79}

Recently, the court in \textit{St. Germain v. Bank of Hawaii},\textsuperscript{80} accorded a degree of deference to staff opinion letters even though section 1640(f) did not mention them as a basis for the good faith defense. The court in \textit{St. Germain} said that it could not agree with the position that reliance on staff letters and pamphlets was legally insufficient under section 1640(f). Its view ultimately was sustained by a recent amendment to the Act which extended the section 1640(f) protection to any act done or omitted in reliance on any interpretation or approval by a duly authorized Federal Reserve official or employee.\textsuperscript{81} Such an amendment was reasonable in view of the tendency of creditors to regard such staff opinions with respect. After all, creditors could not be expected to consult any higher authority in their attempts to disseminate truth in lending. Creditors now will be able to plan their disclosures with the assurance that their reliance on Board staff opinions will not be misplaced. Hopefully, this will promote a better understanding of the technicalities of the Act and the Regulation.

\textbf{Rescission and Damages}

Except for certain limited exceptions, a customer has the right to rescind a credit transaction within three days if a security interest is taken in his principal residence.\textsuperscript{82} The customer also is
exempt from liability for any finance or other charge and the security interest in any of his property becomes void upon such rescission.\textsuperscript{83} In addition, the creditor is required to return any property belonging to the customer within ten days and to initiate action necessary to terminate the security interest. A literal interpretation of the statute suggests that the customer is obligated to return any property belonging to the creditor only if the creditor has completed those steps. Thus, the creditor’s performance under the rescission section seems to be a condition precedent to the performance of the customer’s obligation to return the creditor’s property.

Nevertheless, some courts have conditioned the exercise of the rescission right on the customer’s return of loan funds.\textsuperscript{84} It is arguable that imposition of such a requirement of tender on the debtor before the security interest can be removed destroys the effect of the statute because the security interest will in fact be

\begin{enumerate}
\item The creation, retention, or assumption of a first lien or equivalent security interest to finance the acquisition of a dwelling in which the customer resides or expects to reside.
\item A security interest which is a first lien retained or acquired by a creditor in connection with the financing of the initial construction of the residence of the customer, or in connection with a loan committed prior to completion of the construction of that residence to satisfy that construction loan and provide permanent financing of that residence, whether or not the customer previously owned the land on which that residence is to be constructed.
\item Any lien by reason of its subordination at any time subsequent to its creation, if that lien was exempt from the provisions of this section when it was originally created.
\item Any advance for agricultural purposes made pursuant to either:
\begin{enumerate}
\item Paragraph (j) of §226.8 under an open-end real estate mortgage or similar lien, provided the disclosure required under paragraph (b) of this section was made at the time the security interest was acquired by the creditor or at any time prior to the first advance made on or following the effective date of this part, or
\item Paragraph (p) of §226.8 under a written agreement, provided the disclosure required under paragraph (b) of this section was made at the time the written agreement was executed by the customer.
\end{enumerate}
\item Any transaction in which an agency of a State is the creditor.
\end{enumerate}

\textsuperscript{83} 12 C.F.R. §226.9(d) (1976).

\textsuperscript{84} For example, the court in Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974), held that in any case in which an obligor sought to rescind the transaction and also to recover statutory penalties, the court could condition the rescission right on the debtor’s tender of funds advanced by the creditor.
ineffectual once tender has been made.\(^8^5\) If the right of rescission was granted to allow the consumer to release himself from an ill-conceived transaction, then the procedural steps outlined in the Regulation must have been intended to assure him of the creditor's cooperation in achieving the status quo ante.\(^8^6\) The argument that the creditor would lose the security of his lien on the customer's rescission obviously was anticipated because the language of the statute provides that "any security interest becomes void upon statutory rescission."\(^8^7\)

The procedural problems of rescission were revealed in the recent case of *Powers v. Sims*.\(^8^8\) In that case, the creditor made a loan to the borrowers to pay for certain home improvements and to pay off an outstanding mortgage and property taxes. Some weeks later the borrowers attempted to rescind the transaction on the grounds that they had not received any of the disclosures required by the Truth-in-Lending Act. Consequently, on October 1, 1974, they offered to return the reasonable value of the home improvements. The creditor did not regard this gesture as sufficient because the borrowers had made no mention of the other funds advanced by the creditor to pay off their earlier indebtedness. Though the creditor was convinced that it had provided the necessary disclosures, it was willing to release the mortgage securing its loan if the borrowers were willing to make restitution.

The court read the October 1st letter as impliedly expressing the borrower's intent not to reimburse the creditor for funds used in discharging the prior obligations.\(^8^9\) The court, therefore,


\(^{86}\) 502 F.2d at 863 (Wright, J., dissenting). *See also* Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974).

\(^{87}\) 15 U.S.C. §1635(b) (1970) provides in part as follows:

> When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission . . .

\(^{88}\) 542 F.2d 1216 (4th Cir. 1976).

\(^{89}\) Plaintiffs' letter of October 1, 1974, reads as follows:

> Dear Sirs:

> I have received your letter dated September 25, 1974, denying my right to cancel and rescind the transaction we entered into on or about July 22, 1974. In my letter of September 20, 1974, notifying you of my decision to cancel the transaction, I neglected to offer to return to you the property constituting the
treated the debtors' letter as an anticipatory breach of contract stating that the creditor was entitled to retain both the initial payment of $50 and a security interest in debtors' property.\textsuperscript{90} The court reasoned that the creditor had ten days to act under the statute but that his obligation to act was discharged by the borrowers' refusal to return the payments made by the creditor to the previous mortgagees. Thus, the court held that it would condition rescission on the debtors' reimbursement to the creditor of the funds advanced under the transaction.

As noted previously, the debtors' reason for rescinding the transaction was based on their claim that they had not received any of the disclosures required by the Truth-in-Lending Act. Although the creditor disputed that contention, that issue was not critical because the court found a violation different from the one raised by the debtors. The violation discovered by the court was that the disclosure of the notice of rescission right gave the debtors only two days to rescind instead of the statutory three-day period.\textsuperscript{91} In such a case, the right to rescind continues until three days after the creditor has fulfilled the disclosure requirements. The creditor's misstatement of this material disclosure thus extended the debtors' right of rescission.\textsuperscript{92} Therefore, when the debtors sent their rescission notice to the creditor, they were clearly

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\textsuperscript{90} Id. at 1224 n.3.

\textsuperscript{91} Id. at 1221.

\textsuperscript{92} The customer has until midnight of the third business day following the date of consummation or the date of delivery of all required disclosures, whichever is later. 15 U.S.C. §1635(a) (1970 & Supp. IV 1974). A business day is any calendar day except Sunday, New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day and Christmas Day. 12 C.F.R. §226.9(a) & n.14 (1976). The rescission right expires three years after consummation of the transaction or on the date that the customer transfers his interest in the property, whichever is earlier. 15 U.S.C. §1635(f) (1974); 12 C.F.R. §226.9(h) (1976).

\textsuperscript{93} The right to rescind continues for three days following the date of consummation of the transaction or the date of all material disclosures, whichever is later. 15 U.S.C. §1635(a) (1970 & Supp. IV 1974); 12 C.F.R. §226.9(a) (1976).
within their prerogative to withdraw from the transaction although they were rescinding on a ground different from the one ultimately dealt with by the court.

When it is recalled that the Regulation does not require the statement of a reason for rescission, the debtors' letter of October 1st can be regarded as a gratuitous gesture to the extent that it discussed the reasons for the debtors' rescission. Moreover, had the letter been silent on the probable return of the home improvements, there could have been no inference that the debtors intended to withhold the loan refund. However, the debtors sought an equitable remedy, and they should have been prepared to do equity by not seeking unjust enrichment through rescission. Accordingly, it is suggested that if a debtor is unwilling or unable to make restitution in a case like Powers, the court should exercise its discretion to condition rescission on the debtor's return of the loan proceeds.

There should be no problem when the debtor rescinds within three days after the consummation of the transaction because the creditor is not expected to advance any funds until that three-day period has expired. Thus, the procedural problems involved in deciding whether the debtor's return of funds should precede removal of the mortgage lien should not exist in that situation. The difficulty arises in the case, such as Powers, in which the borrower has a right to rescind after the three-day period and the creditor has already disbursed the loan. This right may exist because the debtor did not make all the required disclosures or may have misstated the length of the period for rescinding. If it is shown that the creditor has not complied with the Regulation, the debtor obviously should be permitted to rescind but that right should not grant the debtor the unfettered discretion to withhold the proceeds of the transaction.

While it is true that the debtor is not required to state his reason for rescinding the transaction, it is submitted that the lack of this requirement creates some problems when the right to rescind is exercised more than three days after the transaction is consummated. If the creditor believes that he has complied with

93. 12 C.F.R. §226.9(a) (1976). "[T]he customer shall have the right to rescind . . . , by notifying the creditor by mail, telegram, or other writing of his intention to do so."
all requirements, he probably will not be eager to respond to the debtor's claim to rescission. Therefore, the creditor's willingness to contest the debtor's rescission in these circumstances should not deprive him of restitution. If a violation is found, the proper judicial approach should be to grant the creditor a ten-day period to return all charges to the debtor and remove the lien from the debtor's property. The debtor then should return all proceeds advanced by the creditor. The same approach should be taken when the debtor erroneously bases his rescission on a non-existent violation although another violation, which has escaped the notice of both the creditor and the debtor, does exist. Obviously, in that case the creditor will be firm in his contention that the debtor's basis for rescinding should not be sustained. This would be a legitimate position until a court reveals the real violation. It then would be appropriate to regard the debtor's rescission as timely and to preserve the creditor's right to restitution.

A collateral problem raised by Powers was whether the joint obligors, husband and wife in this case, were each entitled to the statutory penalty of $1,000. The Fourth Circuit disagreed with the district court's position on this question and held that there could only be a single recovery of $1,000. The court based its opinion on the fact that there was one credit transaction and referred to some legislative history indicating that Congress intended to impose a civil penalty of a minimum of $100 and a maximum of $1,000 on any "individual credit transaction." However, it should be noted that a creditor is obligated to make a clear and conspicuous disclosure to each person to whom credit is extended. The same provision facilitates disclosure to some extent by providing that a creditor need furnish a statement of

94. 15 U.S.C.A. §1640(a) (Supp. II 1976) states in part:
(a) [A]ny creditor who fails to comply with any requirement imposed under this part or part D of this subchapter with respect to any person is liable to such person in the amount equal to the sum of
(1) Any actual damage sustained by such person as a result of the failure;
(2) (A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000.
information to one obligor only when there is more than one involved in the particular transaction.97 Some courts have argued that this accommodation does not in any way detract from a creditor's obligation to disclose the appropriate information to all obligors and that the requirement of a single statement is simply a way of avoiding enormous paperwork for creditors.98 Thus, under this view an incorrect disclosure to one obligor may create civil liability towards several obligors in the transaction.99

If the creditor does not comply with the disclosure requirements with respect to any person, he is liable to that person not only for actual damage sustained, but also for a penalty between $100 and $1,000. If a creditor has made inaccurate disclosures to joint obligors, he has failed to live up to his obligations with respect to such persons and the statute should be interpreted as imposing liability on all obligors in such a case. Even if it is argued that the requirement of a single disclosure statement is generally applicable to joint obligors and therefore there should be a single recovery in the event of a violation, that argument does not withstand scrutiny in the case of a rescindable transaction. Section 226.6(e) of the Regulation provides for a single disclosure statement only in the case of transactions which are not subject to rescission under section 226.9. But in transactions which are subject to rescission, the creditor must make full disclosures to all obligors, including the notice of the right to rescind.100 The creditor's default with respect to any person should subject him to liability to such person to the extent of the penalty set out in the Act.101

At least in rescindable transactions, the creditor has a duty to make the necessary disclosures to each obligor whose property is being subjected to the security interest and, therefore, liability

99. 531 F.2d at 806.
101. See Simmons v. American Budget Plan, Inc., 386 F. Supp. 194 (E.D. La. 1974), in which the court distinguishes St. Marie v. Southland Mobil Homes, 376 F. Supp. 996 (E.D. La. 1974) on the ground that the creditor in the latter case was obligated to furnish only one disclosure because the transactions were not subject to rescission.
ought to extend from the creditor to all such parties in accordance with the language of the civil liability section. The court in *Powers* said that it was "not to be lightly supposed that that statutory maximum [was] to be doubled, trebled, or quadrupled, depending upon the number of the joint obligors in a single consumer credit transaction." Whether that language was to be taken as an expression of the harshness of the contemplated penalty is unclear. From time to time creditors have felt the full impact of the civil liability statute. For example, the class action section allows the court to impose liability to the extent of a total amount of the lesser of $100,000 or 1% of the net worth of the creditor. Therefore, the penalty for violations may be harsh indeed in appropriate circumstances. Furthermore, the legislative history relied upon by the court does not necessarily support the conclusion that there could only be one recovery. An examination of the same legislative history indicates the following language concerning civil penalties:

While primary enforcement of the Bill would be accomplished under the administrative enforcement section discussed above, further provision is made for the institution of civil action by an aggrieved debtor.

The question, then, is whether joint obligors can be aggrieved debtors within the meaning of the civil liability section. If a joint

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102. 542 F.2d at 1219.
   Any creditor failing to disclose required information would be subject to a civil suit with a penalty equal to twice the amount of the finance charge, with a minimum penalty of $100 and a maximum penalty not to exceed $1,000 on any individual credit transaction.

542 F.2d at 1219. If this language is to be interpreted as preventing recovery by other aggrieved debtors, the problem arises of dividing the spoils if the first plaintiff does recover the maximum $1,000. Can the passive joint obligor recoup later from the successful plaintiff? The cited passage is merely a description of the penalty provisions appearing in the legislative history and should not be used to displace the liability imposed on the creditor with respect to any person not receiving the appropriate disclosures.
obligor can be misled by faulty disclosures and if the creditor has an obligation under the statute not to mislead such an obligor, then it may be said that he is in fact an aggrieved debtor to the extent that the creditor has not fulfilled his statutory obligations. This position is even stronger when rescindable transactions are involved because it is clear in such cases that the disclosures, including the notice of the right to rescind, must be provided to all joint obligors. But even if the transaction is not rescindable, the duty to disclose to all obligors is not lessened, even if a disclosure statement need only be given to one of them.106

CONCLUSION

While there has been considerable progress in reaching the ultimate goal of truth in lending, there are still some difficulties in the process. Some of them are the natural product of a technical statute. Others are the result of judicial differences which arise from variable readings of legislative history. It is perhaps unfortunate that occasionally some courts have read more into the statute than a fair reading would suggest, thus contributing to confusion in the market place.107 Thus, some courts have regarded acceleration as a material ingredient of any disclosure statement.108 This argument is made on the general principal that the purpose of the Act is to reveal to the debtor all the basic terms of the loan. If acceleration is regarded as a necessary disclosure item, then it is submitted that an amendment to the Act and the Regulation is required. There is little basis for construing acceleration as a charge within the current provisions.

A similar comment may be made about other disclosure requirements discussed. The fact that after-acquired property will be subject to the creditor's security interest must be revealed in the disclosure statement.109 The state law limitations are not dis-

107. See, e.g., Woods v. Beneficial Fin. Co., 396 F. Supp. 9, 16 (D. Ore. 1975) (the court readily conceded that the creditor was not required to disclose the right of acceleration as an additional charge, but since it was an obvious concern to the borrower, the creditor was obligated to disclose it to comply with the "meaningful disclosure" provisions of the Act).
109. See notes 76 & 87 supra.
closures required by federal statute although it is certainly desirable to have an additional statement concerning the extent to which such after-acquired property may be affected by such security interest.110 The effect of the decisions on this point has been to indicate the need for an amendment which would require the disclosure of such restrictions as the ten-day limitation in the Code. Such a revision in the current statutory language would curtail the linguistic variations which creditors have used in order to harness their security. Disclosing too much can sometimes be as harmful as disclosing too little.

Concerning damages, it would seem that each aggrieved debtor should be entitled to recover the statutory penalty.111 The controlling language appears to be the creditor's failure to comply with the disclosure requirements with respect to any person.112 The creditor's avoidance of liability to more than one obligor in a transaction must be predicated on the theory that the duty of disclosure is not owed to more than one person in each transaction. If that is so, the creditor still must face the peculiarities of a rescindable transaction in which he must supply all parties to the transaction with the required disclosure statement.113 It is incongruous to suggest that such a duty exists but that a violation will result in liability for a penalty to only one of the parties.114 If the legislative intent is to restrict the creditor's liability, then clarification is needed to limit that liability and to avoid the conflict between the courts.115 Congress did resolve through an

110. However, such additional information must be given in such a way as not to be misleading and confusing. 12 C.F.R. §226.6(c) (1976).
111. 537 F.2d 871. This ability to recover must be predicated on the conclusion that the creditor's option to provide a single statement of information in the case of multiple obligors does not absolve him of the responsibility to all obligors concerning the accuracy of such disclosures. Thus, the general disclosure requirement of 15 U.S.C.A. §1631(a) is not displaced by the single statement option of 15 U.S.C.A. §1631(b).
113. 12 C.F.R. §226.9(a),(f) (1976).
115. The court in Mirabal v. General Motors Acceptance Corp., 537 F.2d 871 (7th Cir. 1976), remarked as follows on this question:

Furthermore, a holding that joint obligors could recover only one penalty would create problems in administering the Act. For instance, if one obligor sued would he be allowed the full penalty or only half of it? If granted the full penalty, could the other obligor sue the winner for his half?

Id. at 883.
amendment the problems surrounding Board staff opinions and the good faith defense.\textsuperscript{116} It is time for further action to resolve these other ambiguities and disagreements.