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Consumer Credit--Truth in Lending Act--Creditor Defined and Damages and Rescission Jointly Awarded--Eby v. Reb Realty, Inc.

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remembered that the presumption favors the religious interests,[93] and unless the Commission can demonstrate some overriding state interest, the free exercise claims must prevail.

Consumer Credit —TRUTH IN LENDING ACT — CREDITOR DEFINED AND DAMAGES AND RESCISSION JOINTLY AWARDED — *Eby v. Reb Realty, Inc.*, 495 F.2d 646 (9th Cir. 1974).

In October, 1969, Betty Eby purchased a residential dwelling from Reb Realty, Inc., for $16,700. To finance the transaction, Eby assumed a Veteran's Administration mortgage and executed a second mortgage in favor of Reb Realty. Eby made subsequent payments on the first mortgage, but ultimately defaulted on both mortgages, whereupon Reb Realty properly reentered and took possession of the property. Eby sued in the United States District Court for the District of Arizona for rescission and damages based on Reb Realty's admitted nondisclosure of credit terms and rescission rights at the time of sale as required by the Truth in Lending Act (the Act).[1] Reb Realty argued that it was not a "creditor" within the meaning of the Act and thus not subject to its provisions. Alternatively, Reb Realty contended that Eby must elect her remedies in that she was not entitled to both rescission and damages. The district court granted summary judgment in Eby's favor, awarding both rescission and damages, and the Ninth Circuit Court of Appeals affirmed.[2]

I. BACKGROUND

The purpose of the Truth in Lending Act is to enhance economic stabilization and strengthen competition among those engaged in the extension of consumer credit. This purpose is accomplished by disclosure of certain credit terms to those who use such credit.[3] Among the matters required to be disclosed are the annual percentage rate of interest, the total amount financed, the amount of periodic payments, and

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[93] *See* text accompanying note 23 *supra*.

[1] 15 U.S.C. §§ 1601-65 (1970). For a general discussion of the Truth in Lending Act and related matters see *e.g.*, J. ABRAHAM, TRUTH IN REAL ESTATE LENDING (1970); Aldridge, *Truth-in-Lending in Real Estate Transactions*, 48 N. CAR. L. REV. 427 (1970); Boyd, *The Federal Consumer Credit Protection Act — A Consumer Perspective*, 45 NOTRE DAME LAW. 171 (1969); Griffith, *Truth-in-lending and Real Estate Transactions: Some Aspects*, 2 OHIO N.L. REV. 1 (1974); McLean, *The Federal Consumer Credit Protection Act*, 24 BUS. LAW. 199 (1968); Smyer, *A Review of Significant Legislation and Case Law Concerning Consumer Credit*, 6 ST. MARY'S L.J. 37 (1974); Warren & Larmore, *Truth in Lending: Problems of Coverage*, 24 STAN. L. REV. 793 (1972); Note, *Recent Developments in Truth in Lending Class Actions and Proposed Alternatives*, 27 STAN. L. REV. 101 (1974).

[2] Eby v. Reb Realty, Inc., 495 F.2d 646 (1974). The district court opinion is not officially reported.

[3] 15 U.S.C. § 1601 (1970).

a description of security interests taken.[4] Failure to make these disclosures can subject a creditor to damages of double the finance charge of the transaction.[5] In addition, when residential real property is retained as security, the creditor must disclose the consumer's right to rescind the transaction within 3 business days of consummation. This right of rescission is extended indefinitely if disclosure is not made.[6]

To be subject to its provisions, a lender must be a "creditor" within the meaning of the Act. This classification applies to those who arrange credit or regularly extend credit,[7] but thus far the courts have not interpreted this definition as it applies to those who extend credit at irregular intervals.[8] The *Eby* court addressed the issue as one of first impression.

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[4]*Id.* §§ 1635-39. These sections contain requirements of disclosure for open end consumer credit plans (defined at *Id.* § 1602(i)), consumer sales, and other plans. *See generally* Aldridge, *Truth-in-Lending in Real Estate Transactions,* 48 N. CAR. L. REV. 427, 448-49 (1970) [hereinafter cited as Aldridge]; Smyer, *A Review of Significant Legislation and Case Law,* 6 ST. MARY'S L.J. 37, 49-62 (1974).

[5]15 U.S.C. § 1640(a) (1970) states:

> Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of
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> (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and
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> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

Certain defenses are also provided by this section: (1) Liability will not be imposed if correction of an error in disclosure is made within 15 days of discovery and prior to notice or institution of suit by a debtor. Under this provision a creditor must also make proper adjustments to assure that a consumer does not pay a finance charge in excess of that actually disclosed. *Id.* § 1640(b). (2) Likewise, liability will not be imposed for unintentional violations of the Act where reasonable procedures are maintained to avoid such errors. *Id.* § 1640(c).

[6]*Id.* § 1635(a) states in part:

> Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so.

This section is limited to second liens; the right is not available where first liens are created or retained to finance acquisition of the consumer's personal residence. *Id.* § 1635(e).

The effect of rescission is: (1) the consumer is no longer liable under the agreement, (2) any security interest becomes void, and (3) the creditor must return all money and property received under the transaction. *Id.* § 1635(b).

[7]*Id.* § 1602(f); *see* note 19 *infra.*

[8]Courts have construed the definition of "creditor" insofar as it applies to an "arranger" of credit. *See* Kriger v. European Health Spa, Inc., 363 F. Supp. 343 (E.D. Wis. 1973); Philbeck v. Timmers Chevrolet, Inc., 361 F. Supp. 1255 (N.D. Ga. 1973), *rev'd on other grounds,* 499 F.2d 971 (5th Cir. 1974); Garza v. Chicago Health Clubs, Inc., 347 F. Supp. 955 (N.D. Ill. 1972). Courts have also considered whether parties are "creditors" even though no finance charge is

The second issue in the case concerned the propriety of awarding rescission and damages jointly. Courts have been in conflict over whether such a joint remedy is available for a violation of the Act. When the question was first addressed in *Bostwick v. Cohen,*[9] the Federal District Court for the Northern District of Ohio resorted to the traditional election of remedies doctrine[10] and held that rescission and damages were both remedial in nature and could not be jointly awarded. In a subsequent case, *Palmer v. Wilson,*[11] the United States District Court for the Northern District of California concluded that a literal reading of the Act would allow both remedies. By this time *Bostwick* had been effectively undermined by the United States Supreme Court's decision in *Mourning v. Family Publications Service, Inc.,*[12] wherein the Court indicated that damages provided for under the Act were actually in the nature of a "civil penalty."[13] With the *Bostwick* position that rescission and damages were both remedial measures thus questioned, the *Palmer* court granted both remedies.[14]

II. Instant Case

In the instant case the Ninth Circuit affirmed the trial court's grant of summary judgment holding that Reb Realty was a "creditor" within the meaning of the Act. The court concluded that there were no disputed issues of fact and that the creditor issue was neither so complex nor insufficiently highlighted as to warrant further factual elucidation. Considering definitions of a "creditor" under the Act and Regulations,[15] public position letters issued by the Federal Reserve Board,[16] and legis-

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imposed. *See* Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973); Rootberg v. American Express Co., 352 F. Supp. 949 (S.D.N.Y. 1972); Garland v. Mobil Oil Corp., 340 F. Supp. 1095 (N.D. Ill. 1972).

[9]319 F. Supp. 875 (N.D. Ohio 1970).

[10]The common understanding of the election of remedies doctrine is that where an aggrieved party "has two inconsistent remedies available to him for the redress of a single right, he must elect one of those remedies." Dobbs, *Pressing Problems for the Plaintiff's Lawyer in Rescission: Election of Remedies and Restoration of Consideration,* 26 Ark. L. Rev. 322, 325 (1972). The author states that an analysis of consistency begs the question; the result really depends upon whether the court believes both remedies "ought to be granted." *Id.* at 325 n.9.

[11]359 F. Supp. 1099 (N.D. Cal. 1973), *vacated and remanded,* 502 F.2d 860 (9th Cir. 1974) (lower court instructed to consider conditional rescission award).

[12]411 U.S. 356 (1973).

[13]*Id.* at 375-76.

[14]359 F. Supp. at 1103, 1104; *accord* Douglas v. Beneficial Finance Co., 334 F. Supp. 1166 (D. Alas. 1971) (granting rescission and damages but not addressing the issue directly), *rev'd on other grounds,* 469 F.2d 453 (9th Cir. 1972).

[15]12 C.F.R. § 226 (1974).

[16]"Public position letters" is a classification conceived and used by II R. Clontz, Truth-In-Lending Manual E-2 (3d ed. 1973) [hereinafter cited as II R. Clontz]. The correspondence

lative history, the court concluded that the Act would not apply to "those lenders whose extensions of credit are an occasional, isolated, and incidental portion of their business,"[17] but that Reb Realty's credit activities were not so limited.

The record indicated that Reb Realty was primarily a real estate broker arranging transactions between buyers and sellers of real property. On seven occasions during a period of 19 months, Reb Realty sold property on its own account. In three of these transactions Reb Realty extended credit. On the basis of these facts the court concluded that these credit sales were a significant aspect of Reb Realty's business and not so isolated and incidental as to exempt Reb Realty from the Act. The court reasoned that to hold otherwise might insulate a significant credit market from the Act's requirements, and that real estate brokers who deal constantly with credit would not likely be burdened or surprised by the Act's requirements.

The court also reviewed the propriety of the lower court's award of both rescission and damages. Recognizing that no interrelation between the two sanctions is suggested by statute or legislative history, the court considered but rejected the position taken by *Bostwick v. Cohen* that both remedies were remedial and only one could be elected. In *Mourning,* the Supreme Court classified the damage section of the Act as a penalty, which overcame the *Bostwick* objection that such damages were remedial and thus inconsistent with an award of rescission. Moreover, in the court's view, to refuse damage awards where rescission was also granted would undermine the effectiveness of the Act. Thus the Ninth Circuit affirmed the district court's joint award of rescission and damages.[18] The court nevertheless qualified its holding by stating that both remedies are not appropriate in all instances and that a court should use its equitable discretion to deny one of the remedies if harshness might result.

This note will address the two major issues that faced the circuit court in *Eby:* (1) the meaning of "creditor" under the Act; and (2) the propriety of awarding both rescission and damages.

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referred to is issued by the Federal Reserve Board to help solve problems arising in interpreting the Act. In 1970, letters numbered more than 1,000. Since then, approximately 852 of these letters have been given official numbers and indexed. These official letters are representative of the best correspondence. II R. CLONTZ; 4 CCH CONS. CRED. GUIDE at 65,951.

[17]495 F.2d at 649.

[18]*Id.* at 652. A review of the application of the rescission and damage sections of the Act shows that the district court erred in determining the amount of damages that should have been granted under the respective sections. The Ninth Circuit noted the possibility of error in granting rescission of the first mortgage but refused to take notice of it. *Id.* at 648 n.2. Because rescission is limited to second liens, granting rescission of the first mortgage was clearly error. As a result, Eby was awarded $601 too much in the rescission award; this amount represented payments made toward the first mortgage. *See* note 6 *supra. See generally* J. ABRAHAM, TRUTH IN REAL ESTATE LENDING § 14.10 (1970) [hereinafter cited as ABRAHAM]; Aldridge,

III. Analysis

A. Creditors

The Truth in Lending Act defines creditors as those "who regularly extend, or arrange for the extension of, credit."[19] Regulation Z[20] defines a creditor as one who regularly extends credit "in the ordinary course of business."[21] The only indication of the scope of these definitions is provided by Senate and House reports of the Act explaining that the provisions were not to cover "a small retailer who extended credit . . . in an isolated instance to accommodate a particular customer."[22]

Evidence pertinent to these standards showed that Reb Realty completed three credit transactions over a period of 19 months. The second credit transaction involved a loan of $4,200 to Eby for the purchase of a residential dwelling. With these facts before it, the Ninth Circuit concluded that these credit transactions were not "the type of isolated and incidental transactions the definition of creditor was meant to exempt."[23]

The court's affirmation of this issue initially appears to be well founded. In light of the Act's purpose of enhancing competition by disclosure, a liberal construction of the Act's terms is appropriate.[24] The broad definitions contained in the public position letters also suggest a

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supra note 4, at 448-49; Heimbuch, *Real Property — Truth in Lending,* 49 Mich. B.J. Aug., 1970, at 11, 14-15. The district court also miscalculated the amount of damages Eby was entitled to under the civil liability section; this mistake was apparently not noticed by the circuit court. The amount awarded was $478.82 — twice the interest Eby paid. According to the applicable section, 15 U.S.C. § 1640(a) (1970), *see* note 5 *supra,* Eby was entitled to twice the finance charge of the transaction, limited to a total award of $1,000. Considering the magnitude of the transaction, $4,200 at 8 percent simple interest, conceivably Eby was entitled to the full $1,000, not just double the interest paid. As a result of this error, the civil liability award was probably deficient by $521.18.

It is hard to understand why the court did not correct these two errors. Certainly the issue of damages was before the court. Confirmation of this result only adds confusion to the case law under the Act.

[19]15 U.S.C. § 1602(f) (1970). The definition in its entirety states:

> The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

[20]Regulation Z is the title given to the regulations issued by the Federal Reserve Board to implement the Act. 12 C.F.R. § 226 (1974).

[21]12 C.F.R. § 226.2(m) (1974). The definition in its entirety states:

> "Creditor" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

[22]H.R. Rep. No. 1040, 90th Cong., 1st Sess. 23-24 (1967); S. Rep. No. 392, 90th Cong., 1st Sess. 13 (1967).

[23]495 F.2d at 650.

[24]*See* N.C. Freed Co. v. Bd. of Governors, 473 F.2d 1210 (2d Cir.), *cert. denied,* 414 U.S. 827 (1973).

liberal construction.[25] Moreover, real estate brokers are not normally considered such small retailers as Congress apparently intended to exclude from the Act. Because of the magnitude of the brokers' transactions, the benefits of informed use of credit would seem to far outweigh the burdens of disclosure. This position presumes that brokers are constantly involved with credit matters and therefore have expertise necessary to implement the requirements of the Act.[26]

Nevertheless, there are weaknesses in the court's application of its "occasional, isolated, and incidental" standard and in the court's assumption that brokers are likely to be familiar with the requirements of the Truth in Lending Act.

1. Application of standard. When the court determined that Reb Realty's transactions were not occasional and isolated, the court did not clearly delineate the impact of its decision. The court found Reb Realty a "creditor" on the basis of three-credit transactions. Yet, at the time Eby contracted with Reb Realty only one previous credit transaction had occurred, that taking place 6 months earlier. The third credit transaction was consummated 10 months later,[27] 2 months after Eby instituted her suit.[28] Clearly, the court's conclusion would have rested on a more persuasive factual foundation, if the third transaction had been challenged rather than the second. But, the court found it sufficient to find Reb Realty a "creditor" on two credit transactions with a third following. This finding implies that Reb Realty may have been a "creditor" at its very first credit transaction. This result was not made clear by the court.

Because this standard for assessing whether an individual is a "creditor" was not made clear in the instant case,[29] a difficult burden has

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[25]*See* letters cited note 29 *infra*.

[26]495 F.2d at 650.

[27]*Id.* at 648.

[28]Brief for Appellant at 5-6, Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir. 1974). The third credit transaction may have been occasioned by the result of a default of the second credit transaction. The facts in the instant case indicate that out of the seven real estate transactions, one was necessitated by previous default. Only six lots were sold; the property involved in the instant case was sold twice. Brief for Appellee at 3, Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir. 1974). It is therefore possible that Eby's default of the second credit transaction induced the third credit transaction.

[29]The standards set by the public position letters for determining a creditor suggest no finer guidelines than do the statutory and regulatory definitions. One letter states that the standard for consideration is whether the credit transaction is "extremely isolated." Federal Reserve Board [hereinafter FRB] Letter No. 30, July 8, 1969, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,086. This letter was in answer to an inquiry about the applicability of the Act to a hospital. The response indicated that allowing an account to be paid in more than four installments in an extremely isolated instance would not bring the hospital within the Act. A subsequent letter makes no mention as to frequency or numbers except that exclusion would apply when the transactions were not an "integral" part of the lender's business. Federal Trade Commission [hereinafter FTC] Letter, August 1, 1969, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,329. The letter states that a corporation is not a creditor within the Act when it makes incidental loans to its officers and directors. It concludes that the loans

been imposed on lenders that make infrequent loans. They must comply with the Act for each credit transaction even if subsequent transactions are not presently contemplated.[30] If the lender does not comply with the Act's disclosure provisions and enters into subsequent credit transactions, he runs the risk of a court finding him to have been a "creditor" even on the first transaction. Therefore an occasional lender should comply with the Act's requirements or run the risk of having its credit transactions rescinded and damages awarded against it.

The court's conclusion that the transactions involved large amounts of money and thus were a significant aspect of Reb Realty's business is questionable. A single residential credit transaction by a firm that regularly handles large amounts of money may be only an "incidental *portion* of [the firm's] business."[31] Although the purchase of a home is generally a major undertaking for a consumer, the sale is not necessarily a significant portion of the realtor's business. The court should have required additional facts so that a comparison of Reb's questioned transactions with its total business revenues could be made to aid in determining whether its credit extension was merely incidental in nature. The term "portion" suggests such a comparison; this comparison can only be made if such additional facts are known.[32] From the record of the case,

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were not made in the ordinary course of business, that they were not an integral part of the corporation's operations nor in furtherance of its business purpose.

At most, the letters indicate that a lender could be exempt from the Act's mandates for plural credit transactions, FTC Letter, August 1, 1969, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,329; FRB Letter No. 30, July 8, 1969, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,086; the Board's letter cited by the court in the instant case contemplated protection from the Act for "casual isolated *sales*." FRB Letter No. 261, February 19, 1970, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,313 (emphasis added).

As a result the court may have placed too heavy a reliance on the public position letters even though such letters are sometimes disregarded as simply one man's view. *See* Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270, 278-79 (S.D.N.Y. 1971). *See also* FRB Letter No. 444, March 1, 1971, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,640. One example, showing the letters' limited worth, is provided by FRB Letter No. 396, August 7, 1970, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶30,580. There, a letter concludes that ordinarily a dealer in real estate is a creditor within the definition of Regulation Z. The flaw in this conclusion is obvious. The definition of "dealer in real property" would theoretically deserve the same type of analysis as does "creditor" under the Act: how many and how frequent need transactions be to make a dealer a "dealer"? This letter was not cited by the court although it was brought to its attention by Eby's counsel. Brief for Appellee at 5, Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir. 1974). The court concluded that though the letters are hardly binding, they do represent an experienced judgment to which a court might properly refer.

[30]FRB Letter No. 161, October 17, 1969, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,190.

[31]495 F.2d at 649 (emphasis added).

[32]An additional question raised as to the "incidental" aspect of the court's standard is whether it is measured in monetary terms or in terms of business activity. This type of approach would correspond much closer to a literal reading of the statutory and regulatory definition of a "creditor." This type of analysis is suggested by a Federal Trade Commission

then, it appears that additional evidence may have impelled the court to a finding contrary to the one it reached. Summary judgment was improper in this case. Even if the possibility of the contrary finding were only marginal, doubt would properly be resolved by remand for full trial.

2. Business or private lender. In construing the definition of "creditor," the court concluded that a realtor is "likely to be familiar with the general requirements of the Act."[33] This reference to the realtor's familiarity with the Act may be an overstatement. In the majority of transactions the realtor has no obligation to disclose. First, he does not generally extend credit; rather, credit is provided by financial institutions. Second, he does not generally arrange credit under the terms of the Act.[34] Thus, the realtor is not "likely" to know the requirements of the Truth in Lending Act.

The court also concluded that to exempt Reb Realty "might well insulate a significant credit market from the Act."[35] However, the statutory and regulatory definitions of a "creditor" do not provide for a determination of the issue on the basis of the market affected. If Congress had been concerned with inclusion of the various credit markets, it could have required disclosure in all instances where credit is extended. Surely the court would not require homeowners selling their homes on contract to comply with the Act on the ground that to do otherwise would "insulate a significant credit market from the Act."[36] Exclusion of significant credit markets, then, is not a sufficiently compelling public policy basis for the court's decision.

A more justifiable position for the court would have been to review the individual lender's expertise and familiarity with the Act's requirements. These facts are crucial regardless of whether the lender is a business or private lender.[37] Each alleged creditor is entitled to equal consideration

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letter which indicates that a corporation is not a creditor within the meaning of the Act when it makes incidental loans to its officers and directors; dollar amounts of the loans are not considered. FTC Letter, August 1, 1969, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,329.

[33]495 F.2d at 650.

[34]12 C.F.R. § 226.2(f) (1974); ABRAHAM, *supra* note 18, at 13-14. Only when a broker arranges credit for a fee or participates with the lender in the preparation of credit documents must he disclose. Even if he should arrange credit for a homeowner he is exempted from the requirements of the Act because an "arranger" must arrange credit for a "creditor."

[35]495 F.2d at 650.

[36]*Id.*

[37]An initial problem is determining a point of separation between the business sector and the private sector. How many transactions by a private individual are sufficient to place him in the business sector? The same problem exists under the tax laws; those engaged in business are entitled to ordinary business deductions including bad debt losses under INT. REV. CODE OF 1954, §§ 165, 166; *see, e.g.*, Mercer v. Commissioner, 376 F.2d 708 (9th Cir. 1967) (intent of taxpayer determinative of whether carrying on trade or business); Hickerson v. Commissioner, 229 F.2d 631 (2nd Cir. 1956) (determination of business loss dependent upon relation loss

of the facts relevant to its situation.[38] In this case the court did not have sufficient factual basis for its conclusion that Reb Realty "likely" had knowledge of the Act's requirements. Remanding the case to the district court for findings on this point would have been appropriate.

B. Remedies

With the creditor issue resolved against Reb Realty, the court next reviewed the propriety of the lower court's award of both rescission and damages. The problem of selecting appropriate remedies is inherent in the Truth in Lending Act because it fails to define the interrelation of rescission and damages.[39] The court in the instant case, reviewing the election of remedies doctrine,[40] concluded that the two remedies were not inconsistent and that the award of both rescission and damages was a proper exercise of the district court's discretionary power.[41]

1. Rescission. The Act provides for the rescission upon demand, with certain exceptions, within 3 days of consummation of a transaction when a security interest in any residential real property is obtained or acquired.[42] An examination of the legislative history shows that rescission was a hasty addition to the Truth in Lending Act. This provision first appeared after a joint Senate and House conference to resolve differences between the Senate and House versions of the Act.[43] Its predecessor, introduced by Representative Cahill, required disclosure of credit terms 3 days before consummation when secured transactions involved resi-

bears to trade or business); First Nat'l Bank v. Smith, 141 F. Supp. 722 (E.D. Pa. 1956) ("isolated" or "occasional" activities do not constitute a business). This approach under the internal Revenue Code suggests that all expenses, even those of a business, are not "business" expenses allowable under the Code. It is arguable that a lender need not fall within the "creditor" definition until he has also engaged in a business under the Internal Revenue Code. The Truth in Lending Act is concerned with different issues but the Act does recognize that a creditor need not be a "creditor" within the Act for all his transactions. FRB Letter No. 161, October 17, 1969, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,190. As courts weigh relevant factors under the Internal Revenue Code, so should they weigh factors under the Truth in Lending Act. *See* Warren & Larmore, *Truth in Lending: Problems of Coverage,* 24 STAN. L. REV. 793, 823-24 (1972) [hereinafter cited as Warren & Larmore].

[38]Warren & Larmore at 823-24 (suggesting expertise and familiarity should be considered in determining the "creditor" issue). *But cf.* FRB Letter No. 261, February 19, 1970, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30, 313.

[39]*See* Comment, *Private Remedies Under the Truth-in-Lending Act: The Relationship Between Rescission and Civil Liability,* 57 IOWA L. REV. 199 (1971) [hereinafter cited as *Private Remedies*]; 1971 TOLEDO L. REV. 573. A similar problem arises under state versions of the UNIFORM CONSUMER CREDIT CODE. Generally the rescission and damage sections of the Truth in Lending Act were adopted by the UCCC verbatim. Consequently the Code also fails to define the interrelation between the two provisions. *See e.g.,* IDAHO CODE ANN. §§ 28-35-203 to -204 (Supp. 5A 1974); UTAH CODE ANN. §§ 70B-5-203 to -204 (Supp. 7B 1973).

[40]*See* note 10 *supra.*

[41]495 F.2d at 652.

[42]15 U.S.C. § 1635(a) (1970); *see* note 6 *supra.*

[43]H.R. REP. No. 1397, 90th Cong., 2d Sess. 26 (1968).

dential real property.[44] Cahill intended the provision to end "vicious secondary mortgage schemes"[45] by allowing the consumer additional time to contemplate the seriousness of the obligations to be undertaken in these transactions.

The House adoption of Cahill's proposal indicates concern for the consumer in residential real property transactions, but there is nothing to explain why the joint conference adopted the right of rescission instead.[46] There are, however, two logical reasons for the conference change. First, consumers under Cahill's proposal were given 3 days *prior* to consummation of a transaction in which to consider the terms disclosed. This was to be accomplished in the privacy and unhurried atmosphere of the consumer's home. Yet, the pressures of zealous salesmen might still exist in this setting. In contrast, the Act presently provides the right to rescind for 3 days *after* the transaction is completed. Without the continued influence and possible harassment of a salesman, a consumer is much more likely to give the transaction the serious thought it deserves. This is most effectively encouraged by the present rescission section. Second, many consumers, even if not pressured by sales tactics, never fully realize the consequences of their acts until those acts are completed and the first payment is imminent. Only then do they carefully consider what they have done. The 3-day right of rescission provides time for reconsideration.

Legislative concern for the consumer's rights, reflected in the hastily added right of rescission, strongly suggests that the section is remedial in nature. This conclusion is bolstered when the effects of rescission are considered. The consumer is no longer liable under the agreement and receives all money and property previously conveyed to the creditor.[47]

There are punitive characteristics within the rescission section, however. As long as a creditor fails to disclose according to the Act's requirements, rescission is available to the debtor.[48] Most interpretations of the rescission section indicate there is no statute of limitations,[49] so that if proper disclosure is not made, rescission conceivably could be had at any

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[44]114 CONG. REC. 1610-11 (1968) (remarks of Representative Cahill).

[45]*Id.* at 1611.

[46]*But see* K. McLean, *The Federal Consumer Credit Protection Act,* 24 BUS. LAW. 199, 206 (1968) (suggesting enactment of recent door-to-door sales acts influenced the change).

[47]15 U.S.C. § 1635(a) (1970); *see* note 6 *supra.*

[48]*Id.*

[49]*See* FRB Letter No. 362, June 29, 1970, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,424; FRB Letter No. 235, January 30, 1970, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30,268; FRB Letter No. 219, December 30, 1969, [1969-1974 Transfer Binder] CCH CONS. CRED. GUIDE ¶ 30, 245; *see* Aldridge, *supra* note 4, at 448. *But see* Wachtel v. West, 476 F.2d 1062, 1065 (6th Cir.), *cert. denied,* 414 U.S. 874 (1973) (suggesting laches and estoppel may be interposed as defenses); ABRAHAM, *supra* note 18, at § 14.8[4] (suggesting state statutes of limitation may apply).

time in the future. In addition, if a creditor fails to act on the consumer's proper demand for rescission, the creditor will forfeit his property without compensation from the consumer.[50] In such a situation the consumer is the recipient of a windfall, and the creditor is penalized for failure to comply with the rescission section. But as long as the creditor does not disregard his duties under the Act, the remedial characteristics of the section are more significant than the penal characteristics.

2. Damages. Civil damages may be imposed for failure to comply with the Act's disclosure requirements.[51] The legislative history shows that the civil liability section of the Act was contemplated by both Houses of Congress prior to adoption of the final bill. This history provides some aid to interpreting this section.

Under the Senate version of the Act, primary enforcement of the Act's requirements was to be accomplished by institution of private civil actions under authority of the civil liability section. Creditors who failed to disclose, as required by the Act, would be subject to the "penalty" of this section.[52] In contrast, the House version anticipated that many unsophisticated consumers would not be provided adequate protection under the Act except through administrative enforcement. As a result, the House version provided that primary enforcement of the Act was to be accomplished by various federal agencies,[53] with secondary enforcement coming from the civil liability section.[54] Recoveries under the House version of the civil liability section were also classified as "penalties."[55]

As a result of this joint concern for effective enforcement, the Act, as adopted, provides for both administrative and private enforcement.[56] Thus enactment of the civil liability section was to provide a further deterrent to those seeking to avoid the disclosure requirements of the Act.[57] This concern for enforcement of the Act, rather than for compensation of injured consumers, suggests that the civil liability section is penal in nature rather than remedial.

Other characteristics of the section also indicate its penal nature. These include its arbitrary minimum and maximum limits for recovery, use of a double multiple to compute amount of recovery, the defenses provided by the section, the provisions allowing recovery of attorney's

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[50]15 U.S.C. § 1635(b) (1970).

[51]15 U.S.C. § 1640(a) (1970); *see* note 5 *supra*.

[52]S. REP. No. 392, 90th Cong., 1st Sess. 9 (1967).

[53]Primary enforcement was to be accomplished primarily through fines and imprisonment.

[54]H.R. REP. No. 1040, 90th Cong., 1st Sess. 18-19 (1967).

[55]*Id.* at 19.

[56]15 U.S.C. §§ 1607, 1640 (1970).

[57]*See Private Remedies, supra* note 39, at 209.

fees to encourage actions under its provisions, and finally, its lack of relation to actual consumer damage.[58]

There are, nevertheless, remedial characteristics in the section.[59] These characteristics are more apparent if discussed in a context where rescission is not available as a remedy. Where the civil liability section is the only section providing a recovery for violations of the Act, part of the recovery may offset actual damages. But since proof of actual damage is not necessary for recovery under the Act, the argument that the section is remedial becomes weak.[60] Indeed, in view of its legislative classification, its purpose, and its characteristics, it appears the civil liability section's penal nature far outweighs its remedial nature.

3. Remedy application. The court in the instant case concluded that the rescission and civil liability sections are not mutually exclusive and that a consumer should not be required to elect between the two. In *Bostwick* the district court observed: "It is possible, of course, to view the civil liability section of the Act as being punitive in nature rather than remedial. Such a view would lead to the conclusion that the election of remedies concept had no application . . . ."[61] This view is strongly supported by the Supreme Court's classification of damages under the civil liability section as a civil penalty.[62] Thus the Ninth Circuit's affirmation of the district court's award appears well founded.[63]

The court, however, added a caveat for future cases: "[W]e think a request for both forms of relief is addressed to a court's sense of equity and may properly be denied in appropriate cases."[64] The court was concerned with the harshness that might result from recoveries under both the rescission and damage sections and agreed that an award of both would not be appropriate in all instances.[65]

There are at least two situations where an award of both remedies might be inappropriate. They are directly related to the rescission section and its two punitive characteristics previously discussed.[66] First, rescission is available indefinitely if the Act's requirements of disclosure are not met.[67] Certainly over a period of time the harshness of granting rescission against a creditor increases. If the period between consumma-

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[58]*See id.* at 208-09; 1971 TOLEDO L. REV. 573, 581-84.

[59]*See Private Remedies, supra* note 39, at 208-09; 1971 TOLEDO L. REV. 573, 581-84.

[60]*See* 1971 TOLEDO L. REV. 573, 580.

[61]319 F. Supp. at 877.

[62]Mourning v. Family Publications Service, Inc., 411 U.S. 356, 375-76 (1973).

[63]*See* Griffith, *Truth-in-Lending and Real Estate Transactions: Some Aspects,* 2 OHIO N.L. REV. 1, 15-17 (1974) [hereinafter cited as Griffith]; *Private Remedies, supra* note 39, at 214; 1971 TOLEDO L. REV. 573, 584-85.

[64]495 F.2d at 652.

[65]*Id.*

[66]*See* text accompanying notes 48-50 *supra.*

[67]15 U.S.C. § 1635(a) (1970); *see* note 6 *supra.*

tion and rescission is great, an award of damages may indeed be unduly burdensome. Second, if a creditor fails to take the necessary steps to effectuate the consumer's rescission, the consumer is allowed to keep the property without obligation.[68] In such a case an additional award of damages may actually subject a creditor to two penalties; the caveat seeks to avoid this result.

Judge Wright, Circuit Judge of the Ninth Circuit, stated in *Palmer v. Wilson:* "[He] would limit the court's equitable discretion [to refuse a monetary award] to cases where a civil penalty would be an inequitable windfall to an overreaching [consumer]."[69] The two previous examples would fall within this category.

Allowing courts this discretionary power will have little effect upon the Act. The creditor is deterred in any event. He must disclose according to the Act's requirements, for a court would surely award penalties regardless of any resulting harshness if he deliberately fails to disclose. The ever-present threat of both sanctions insures creditor adherence to the Act; without this threat rescission might not be sufficient to enforce disclosure compliance.[70]

Criminal Procedure — PAROLE REVOCATION HEARINGS — REQUIRING THE REASONABLE DOUBT STANDARD OF PROOF AND THE APPLICATION OF DOUBLE JEOPARDY PRINCIPLES — *Standlee v. Smith,* 83 Wash. 2d 405, 518 P.2d 721 (1974).

Daryl Standlee, a Washington State parolee,[1] was charged with abduction, assault, attempted rape, and molesting a minor. Proceedings to suspend his parole began following the charges but were stayed pending a criminal trial. Even though Standlee was acquitted at trial on an alibi defense, the prison authorities, considering the same evidence, ruled he had violated his parole and revoked it. The only factual issue in either proceeding was the identity of the assailant. Standlee sought a writ of habeas corpus, contending that collateral estoppel[2] prevented the reliti-

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[68]15 U.S.C. § 1635(b) (1970). This result was reached in *Sosa v. Fite,* 498 F. 2d 114 (5th Cir. 1974), where 2 years after siding was installed on a consumer's residence the consumer was allowed to rescind the transaction because disclosure of credit terms had not been made. Because of the creditor's failure to effectuate rescission the consumer was allowed to keep the siding without obligation. In addition, it should be noted that the consumer was awarded attorney's fees even though the rescission section of the Act does not provide for them.

[69]502 F.2d 860, 864 (9th Cir. 1974) (Judge Wright, concurring in part and dissenting in part). Judge Wright dissented from the majority conclusion that a court could condition rescission on repayment by a debtor. He stated the right to rescind was unconditional.

[70]*See* Boyd at 182-83; Griffith at 16-17; *Private Remedies, supra* note 39, at 207.

[1]Standlee's prior conviction was for rape. Petitioner's Brief for a Writ of Habeas Corpus at iv, Standlee v. Smith, 83 Wash. 2d 405, 518 P.2d 721 (1974).

[2]

> Res Judicata necessitates an identity of causes of action, while the invocation of collateral estoppel does not. . . . Where there is a second action between the parties, or their privies,