

The Attorney As An Extender And Arranger Of Credit

I. INTRODUCTION

A basic understanding of the provisions of the Truth in Lending Act¹ is important for all practicing attorneys. An attorney, even if his practice does not directly touch consumers or creditors, must be concerned with the provisions of the Act since it applies to professional persons, attorneys included, as well as any individual or organization “that extends or arranges credit for which a finance charge is or may be payable or which is repayable in more than four installments.”²

The purpose of this article is to discover and analyze common situations where it may become necessary for attorneys to make truth-in-lending disclosures.³ These situations occur when attorneys become “extenders or arrangers” of consumer credit in the course of their daily practices. Four hypotheticals, representing recurring situations, will be discussed in detail as examples of when an attorney might qualify as an arranger or extender of consumer credit. The first hypothetical discusses the “more than four installment rule” in the setting of a typical billing procedure. The second hypothetical deals with the unique problem of an attorney arranging for credit in the payment of

¹The Truth in Lending Act comprises Title I of the Consumer Credit Protection Act of 1968. (15 U.S.C. Sections 1601 *et seq.* (Supp. V, 1970)).

²Board of Governors of the Federal Reserve Board, WHAT YOU OUGHT TO KNOW ABOUT TRUTH IN LENDING 3 (1969) (hereinafter referred to as WHAT YOU OUGHT TO KNOW ABOUT TRUTH IN LENDING).

³The specific disclosure requirements of the Act are discussed elsewhere in this volume and for that reason are not discussed in detail here. The general disclosure requirements are found in 12 C.F.R. § 226.6.

a judgment debt. The third hypothetical focuses on the attorney as an arranger of credit; and the fourth hypothetical concerns the special area of real property transactions.

Because the hypotheticals deal extensively with the terms defined with the Act or within Regulation Z,⁴ it is first necessary to review some of the important basic concepts.

II. IMPORTANT BASIC CONCEPTS

A. CREDIT

The Act defines "credit" as "the right granted by a creditor to a debtor to defer payment of a debt or to incur debt and defer payment thereof."⁵ Regulation Z modifies this definition by adding the phrase "or purchase property or services and defer payment thereof."⁶ This is only a slight modification and it makes no substantive change.⁷ It apparently was added to reinforce the concept that the Act applies to a broad range of credit transactions.

Credit, therefore, as defined by the Act, requires two conditions. First, there must be the existence of a debt or the right to incur a debt; and secondly, the creditor must allow deferred repayment of the debt. This definition is not as inclusive as it appears at first glance, as it is limited by other sections of the Act and Regulation Z. The meaning of this definition necessarily depends upon the further definition of the words "creditor" and "debt." The term "creditor," discussed in detail in the following section, generally limits the coverage of the Act to professional creditors.⁸ The term "debt," although not defined by either the Act or Regulation Z, is considered by the Staff of the Board of Governors of the Federal Reserve Board to be limited to only those transactions which constitute "consumer credit."⁹

⁴12 C.F.R. § 226 (Regulation Z).

⁵15 U.S.C. § 1602(e) (Supp. V, 1970).

⁶12 C.F.R. § 226.2(1) (1970).

⁷R. JOHNSON, R. JORDAN & W. WARREN, *ATTORNEY'S GUIDE TO TRUTH IN LENDING*, (Comm. on Continuing Education of the Bar, State Bar of California) 2 (1969) (hereinafter referred to as *ATTORNEY'S GUIDE*).

⁸*Id.* at 4.

⁹The Staff of the Board of Governors of the Federal Reserve Board answers correspondence concerning the meaning of the provisions of the Act and Regulation Z. Certain letters, which are considered of general interest, are published by *COMMERCE CLEARING HOUSE* in Volume IV of the *CONSUMER CREDIT GUIDE*. (hereinafter referred to as *CONSUMER CREDIT GUIDE*). These letters are important, not as binding authority, but as indicators of the positions that the Board is likely to support. In this instance the Staff expressed its opinion in a letter found at § 30, 390.

B. CREDITOR

The Act requires every "creditor" who extends consumer credit and charges a finance charge to disclose his charges in accordance with regulations.¹⁰ The Act states that "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. . . ."¹¹ This is a broad and inclusive definition since it applies to all creditors who fulfill two requirements. First, the creditor must regularly extend or arrange for the extension of credit, and secondly, a finance charge must be imposed. The Act further indicates the breadth of this definition by stating that the Act should apply to "any such creditor, irrespective of his or its status as a natural person or any type of organization."¹²

Regulation Z modifies the Act's definition by introducing the concept of "the ordinary course of business" into its definition of "creditor."

"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.¹³

The Regulation effectively limits the coverage of the Act to those persons who during the ordinary course of their business extend or arrange for the extension of credit. An attorney, therefore, who extends credit to his clients for services is an extender of credit. The Act applies equally to merchants, retailers and professionals.¹⁴

Although the term "in the ordinary course of business" is not defined within the Act or Regulation Z, it was apparently the intent of the Board to exclude from the Act's coverage random or casual transactions by persons who are not professional creditors.¹⁵ This concept also allows a professional creditor to extend credit on a purely personal basis outside his business without coming under the coverage of the Act. This idea is discussed in more detail in the third hypothetical.

C. ARRANGER

Congress significantly expanded the coverage of the Act by includ-

¹⁰15 U.S.C. § 1631 (Supp. V, 1970).

¹¹15 U.S.C. § 1602(f) (Supp. V, 1970).

¹²15 U.S.C. § 1602(f) (Supp. V, 1970).

¹³12 C.F.R. § 226.2(m) (1970).

¹⁴WHAT YOU OUGHT TO KNOW ABOUT TRUTH IN LENDING, *supra* note 2, at 3.

¹⁵ATTORNEY'S GUIDE, *supra* note 7, at 4.

ing persons who "arrange for the extension of credit" within the definition of "creditor."¹⁶ This addition included an entirely new class of persons in the coverage of the Act; a class of third parties who gain their status through their relationship with the central transaction. Considering the importance of this concept, the Act surprisingly contains no definition of "arrange for the extension of credit." Regulation Z, however, does include a definition.

"Arrange for the extension of credit" means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such services or has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit. It does not include honoring a credit card or similar device where no finance charge is imposed at the time of that transaction.¹⁷

This definition establishes the basic criteria which must be met before a person will be considered an arranger. Initially some relationship must exist between the extender of credit and the person arranging for its extension. In determining whether such a relationship exists, two basic tests are presented. First, a person becomes an arranger when he receives a "fee, compensation, or other consideration" for his services. Secondly, a person may become an arranger if he has knowledge of the terms of the transaction *and* aids in the preparation of the necessary contract documents. It is important to note, however, that even if a person meets these requirements he still will fail to qualify as an arranger and consequently will not be a creditor, if the transaction does not concern "consumer credit."

D. CONSUMER CREDIT

The Act requires each creditor to make the requisite disclosures to each "person to whom consumer credit is extended and upon whom a finance charge is or may be imposed."¹⁸ The term "consumer credit," like the term "arrange for the extension of credit," is not defined by the Act. The Act does, however, include a definition of the word "consumer."

The adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the

¹⁶15 U.S.C. § 1602(f) (Supp. V, 1970).

¹⁷12 C.F.R. § 226.2(f) (1970).

¹⁸15 U.S.C. § 1631 (Supp. V, 1970).

money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.¹⁹

The term "consumer," therefore, in the phrase "consumer credit" serves to limit the coverage of the Act to credit transactions involving debtors who are (1) natural persons, and (2) who use the extended credit primarily for personal, family, or agricultural purposes. The Act is thereby limited to specific types of credit transactions where consumer credit is extended *and* a finance charge is imposed.

Regulation Z substantially changes the Act by extending its coverage to transactions which contain no finance charges. The Act, as emphasized previously, requires disclosure only when a creditor extends or arranges to extend consumer credit and imposes a finance charge.²⁰ Regulation Z, in contrast, requires disclosure when a finance charge is imposed or when "pursuant to an agreement," repayment is in more than four installments.²¹ This change is so substantial that it effectively operates as an amendment to the Act.²² Because the Board clearly has no authority to amend the Act, the validity of this addition must depend upon the interpretation of the authority delegated to the Board to create regulations necessary to implement the Act. The Act states that the Board shall prescribe regulations that are necessary in the judgment of the Board "to effectuate the purpose of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith."²³ The Board believes that the "more than four installment rule" is necessary to prevent evasion of the Act.²⁴ However, it is not clear whether an addition as substantial as the "more than four installment rule" is within the scope of the Board's regulatory power. It is apparent, regardless of the questionable authority of this regulation, that the rule will be enforced until the question is fully litigated.

Introduction of the "more than four installments" rule greatly expands coverage of the Act by requiring disclosure even when no finance charge is involved. However, the rule was not intended to expand coverage of the Act to transactions in which there is no finance charge *per se*. Its purpose is to include within the coverage of the Act those transactions in which the creditor inflates the cash price by including the finance charge.

¹⁹15 U.S.C. § 1602(h) (Supp. V, 1970).

²⁰15 U.S.C. § 1631.

²¹12 C.F.R. § 226.2(k) (1970).

²²ATTORNEY'S GUIDE, *supra* note 7, at 10.

²³15 U.S.C. § 1604 (Supp. V, 1970).

²⁴CONSUMER CREDIT GUIDE, *supra* note 9, at § 30,228.

The Board considers this to be a rather significant part of the Regulation, intended as a deterrent to those who might personally cease to charge a finance charge, but, instead, inflate their so-called "cash" price and thus avoid compliance. In addition it is the Board's feeling that, generally in connection with indebtedness payable in more than four installments, customers are entitled to receive the applicable disclosures, even though no finance charge is involved. For example, included in the required disclosures in such instances are the number, amount and due dates of payments.²⁵

This concept of inflating the cash price with a finance charge and thereby avoiding the requirements of the Act is often referred to as "burying" the finance charge. The Board apparently had two primary reasons for creating this rule. First, the rule suggests that the Board is attempting to protect consumers from evasive creditor practices. "These regulations reflect the Board's position that the kind of transaction in which the consumer needs the protection of the Act is not only one in which there is an identifiable finance charge but also one in which the merchant 'buries' the finance charge in the price and sells on installments."²⁶ Secondly, the Board believed that if it did not introduce this type of regulation, the Act would encourage "burying" finance charges and leave the consumer in a worse position.

We believe that without this general provision (the more-than-four-installments rule) the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would be encouraged to a great extent by Truth in Lending. In order to prevent this ironic result we felt it imperative to establish the more than four payment rule.²⁷

The genesis of the more than four installments rule is therefore imbedded in the Board's belief that requiring disclosure of the number of payments, amount due and due dates of payments would help to discourage the practice of burying finance charges. It is not so clear, however, whether this rule serves that purpose. It is possible that the minor inconvenience to the creditor of making a few basic disclosures may be outweighed by the effect of using documents with formats which indicate no finance charge. This question has yet to be fully investigated; however, there is nothing to indicate that the Board has changed its mind.

This rule is extremely important to professional men, including attorneys, for although the rule was designed to apply to transactions

²⁵*Id.* § 30,180.

²⁶ATTORNEY'S GUIDE, *supra* note 7, at 11.

²⁷CONSUMER CREDIT GUIDE, *supra* note 9, at § 30,180.

involving "buried" finance charges, it is equally applicable to transactions which do not include finance charges. Difficulties which may occur in professional billing practices are discussed in the first hypothetical.

III. HYPOTHETICAL SITUATIONS

A. HYPOTHETICAL I: MORE THAN 4 INSTALLMENTS

Attorney A customarily bills his clients for the full amount due each month. The attorney and his clients do not reach an agreement to pay in installments; however, when his clients inform him that they cannot pay within one month, the attorney replies that they should pay "as soon as possible." The clients, as a result of such procedures, often pay in more than 4 installments. Is this arrangement within the coverage of the Act?

This hypothetical squarely poses the question of whether this type of common billing arrangement is covered by the Act because of the more than four installments rule. The hypothetical also raises the collateral question of whether the goals of the Act are furthered by requiring limited disclosure in transactions which do not contain finance charges.

At first glance it appears that the attorney in the hypothetical falls within the coverage of the Act since there is no question that repayment will be in more than four installments. Regulation Z, however, places an important qualification on this rule which effectively limits its application. Not only must repayment be in more than four installments, it must also be made "pursuant to an agreement."²⁸ The requirement that the payment be made "pursuant to an agreement" is especially important when applied to the billing situation contained in this hypothetical.

After the passage of the Act and the publication of Regulation Z, the Board received many letters from concerned professional people, especially doctors and dentists, inquiring about the more than four installments rule. The doctors and dentists were understandably concerned because their billing procedures very often allowed their patients to pay in more than four installments. In response to these inquiries, the Board, while emphasizing that the Act applies to professionals such as doctors and dentists, indicated that a patient's failure to pay in full each month does not, *per se*, lead to a violation

²⁸12 C.F.R. § 226.2(k) (1970).

of the Act.²⁹ The Board felt that absent a specific agreement to pay in installments, a patient's decision not to pay the full amount due is only a unilateral action and therefore the payment is not considered "pursuant to an agreement."³⁰ This is true even when the patient decides to pay whenever he can.³¹

The primary factor, therefore, in determining whether this type of billing procedure falls under the four installments rule is the existence of a specific agreement. Whenever a specific agreement, either oral or written, is reached between the parties, at that point the doctor must disclose the applicable information.³² The Board has also indicated that the bill must always be for the full amount due.³³ This requirement naturally follows from the concept that no agreement has been reached. A bill requiring something less than the full amount due would be sufficient evidence that an agreement had been reached between the parties. The Board further indicated that the fact that these installments or partial payments are accepted by the doctor does not in itself constitute an agreement.³⁴ The Board apparently reasons that the doctor is merely accepting the patient's unilateral offer of a partial payment rather than creating an agreement to pay in a specific number of installments. This is a reasonable interpretation and is consistent with the Board's analysis of these types of billing arrangements.

Returning to the facts of the hypothetical, the focus is necessarily on the question of the existence of an agreement. The attorney's statement that his client should "pay as soon as possible" probably lacks sufficient specificity to qualify as an agreement to pay in more than four installments. If the attorney billed his client in full each month, he would not have to disclose.

The important lesson of this hypothetical is that specific agreements with clients to pay in more than four installments should be avoided. Clients should simply be billed in full each month and their partial payments accepted. A statement to "pay as soon as possible" seems to avoid the danger of specificity, whereas an agreement to "pay within a year" might be sufficiently specific to require disclosure.

The purpose of requiring a professional, such as a doctor or lawyer, to disclose under the four installments rule is not entirely clear. If the main reason for this rule, as was indicated earlier, is to dis-

²⁹CONSUMER CREDIT GUIDE, *supra* note 9, at § 30,180.

³⁰*Id.* §§ 30,180, 30,434.

³¹*Id.* § 30,180.

³²*Id.* §§ 30,228, 30,434.

³³*Id.* §§ 30,228, 30,434.

³⁴*Id.* § 30,228.

courage the practice of “burying” finance charges, the rule serves no purpose in professional billing arrangements containing no such charges. Furthermore, disclosure in these cases does little to aid the consumer in “credit shopping” other than indicate that no finance charge is imposed. The Board recognized that “a very good argument can be advanced that doctors and dentists should not be subject to the four installment rule.”³⁵ They were concerned, however, that many other creditors who do not impose finance charges are in the same position.

Consequently it appears that to exempt doctors and dentists (or all professional men, vague as that concept might be) from the Regulation might well invite similar legitimate requests from other creditors. The effect could be to either have to draw an extremely arbitrary line by refusing to grant additional exemptions, or begin what might be a never ending process of whittling away at the more than four payment concept.³⁶

The Board felt that neither one of these alternatives would be desirable, and it, therefore, refused to make any exceptions.³⁷ This same question was also discussed by the Advisory Committee on Truth in Lending which also favored the continuation of the more than four payments rule.³⁸

It is apparent that the Board believes that it must enforce the more than four payments rule against all creditors in order to discourage the practice of “burying” finance charges. As a result, doctors and dentists, as well as attorneys, must be aware of the consequences of agreements to repay debts in more than four installments.

B. HYPOTHETICAL II: REPAYMENT OF A JUDGMENT

A client, a professional creditor, is unable to collect on a final judgment and comes to Attorney A. The client asks Attorney A to help him collect the judgment and further authorizes Attorney A to arrange credit terms if that seems necessary. Attorney A negotiates for a payment of the judgment and arranges for terms which include a finance charge of 7% and repayment in twenty install-

³⁵*Id.* § 30,228.

³⁶*Id.* § 30,228.

³⁷*Id.* § 30,228.

³⁸*Id.* § 30,228.

ments. The attorney also prepares the documents for his client. For his efforts the attorney charges a fee, both for preparation of the documents and time spent in negotiating. Will the attorney be liable if the creditor does not disclose?

The answer to this question involves two basic concepts: (1) is the attorney an extender or arranger of consumer credit; and (2) is the repayment of a judgment a transaction which requires disclosure? Clearly the attorney is not an extender of credit, as the credit is being extended by the client. Therefore, the attorney cannot qualify as a "creditor" unless he fits into the rubric of a person "who arranges for the extension of consumer credit."³⁹

As was indicated earlier, to "arrange for the extension of credit" means "to provide or offer to provide consumer credit" which is or will be extended by another person pursuant to some business relationship with the extender.⁴⁰ The relationship between the extender and the arranger exists if the arranger receives a "fee, compensation, or other consideration for such services or has knowledge of the credit terms and participates in the preparation of the contract documents. . . ."⁴¹ In the hypothetical the attorney not only prepared the documents with knowledge of the credit terms, but he also received a fee for his services. Clearly, a sufficient relationship exists between Attorney A and his client. Therefore, the attorney would be a person who "arranges for the extension of *consumer* credit" and would qualify as a "creditor" if the payment of a judgment is considered "consumer credit."

The question of whether the repayment of a judgment qualifies as "consumer credit" is not precisely answered by the Act or Regulation Z. "Consumer credit" is basically credit extended to a natural person "in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household or agricultural purposes," and for which either a finance charge is imposed or the payment is in more than four installments.⁴² It is possible, without considering whether the subject of the transaction falls within one of the enumerated categories, to find that a judgment does not constitute "consumer credit" by focusing on the word "credit."

"Credit," as was summarized earlier, essentially means "the right granted by a *creditor* to a customer to defer payment of debt. . . ."⁴³

³⁹15 U.S.C. § 1602(f) (Supp. V, 1970).

⁴⁰12 C.F.R. § 226.2(f) (1970).

⁴¹12 C.F.R. § 226.2(f) (1970).

⁴²12 C.F.R. § 226.2(k) (1970).

⁴³15 U.S.C. § 1602(e) (Supp. V, 1970).

Two requirements must be met, therefore, before a right granted by a person can qualify as "credit." First, there must be a debt. A money judgment is one "which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be restored or transferred."⁴⁴ A "money judgment" is said to create a "judgment debt," "one which is evidenced by matter of record."⁴⁵ Because the hypothetical calls for the payment of the debt in installments, it is clear that the first part of the test set forth in the definition of credit is satisfied.

The second qualification expressed by the definition is that the person permitting the deferral of payment must be a "creditor." A "creditor" is a person who regularly extends credit in "the ordinary course of business."⁴⁶ Even though the limits of the term "in the ordinary course of business" are not precisely established, they are not broad enough to include a "judgment creditor."⁴⁷ The Act applies to persons who regularly extend credit in the course of their business, not to court created debts. Therefore, a judgment debt does not qualify as "credit" and consequently it cannot qualify as "consumer credit." The Staff, without stating its reasoning, has reached the same conclusion.

A debt which accrues as a result of a judgment awarded by a court does not constitute "consumer credit" and the method of satisfying that judgment does not constitute a consumer credit transaction. This is true irrespective of whether the person to whom the judgment is awarded is a creditor, permits payment to be made in more than four installments, or imposes a charge for deferring satisfaction of the judgment.⁴⁸

This conclusion is consistent with the idea that the purpose of the Act is to promote "credit shopping." After a money judgment has been rendered by a court, a debtor is in no position to "credit shop" for a better judgment. This result does not mean that the Board condones inflated finance charges in the repayment of judgment debts, but rather that these transactions are outside the Act's scope.

It should be noted, however, that if an agreement is reached between parties after default, but before judgment, this transaction

⁴⁴Fuller v. Aylesworth, 75 F. 694 (6th Cir. 1896).

⁴⁵Colonial Building-Loan Ass'n v. Mongeillo Bros., 120 N.J.Eq. 270, 184 A. 635 (1936).

⁴⁶12 C.F.R. § 226.2(m) (1970).

⁴⁷One who has obtained a judgment against his debtor, under which he can enforce execution. Baxter v. Moses, 77 Me. 465, 1 A. 350 (1885).

⁴⁸CONSUMER CREDIT GUIDE, *supra* note 9, at § 30,390.

would fall under the Act.⁴⁹ An agreement in this situation is basically an extension of some previous agreement upon which the debtor has defaulted. If the original agreement involved the extension of "consumer credit," any new agreement, being a substitute for the first agreement, must necessarily also involve the extension of "consumer credit." The "creditor" in this situation remains in his original status as a person who regularly extends "consumer credit" in the course of his business. There is nothing in the new arrangement which changes the status of the parties, except the fact that the debt is already in existence. The Staff apparently believes that this difference should not enable a creditor to avoid further disclosure.⁵⁰ This interpretation is consistent with the concept of allowing the debtor to "credit shop" because it provides the opportunity to compare the new agreement with other available sources of financing. For example, if the creditor's offer seems too high, the debtor can attempt to arrange a loan from a bank or finance company.

Returning to the hypothetical question of whether the attorney will be liable if the creditor does not disclose, it seems clear he will not be liable as he does not qualify as an arranger of consumer credit. He arranged, not for the extension of "consumer credit," but for the repayment of a judgment debt. The distinction is important, for the attorney would be required to disclose as an arranger in the former instance but not in the latter one.

C. HYPOTHETICAL III: ORDINARY COURSE OF BUSINESS

Mr. Jones is an automobile dealer who regularly extends credit in the course of his business. After many years of successful business, he decides to sell his house, and because he is a business man, he decides to extend credit to the buyer. Mr. Jones goes to his attorney, informs him of the transaction and the finance charge involved, and asks him to draw up the necessary papers and negotiate the final details. Has the attorney arranged for the extension of consumer credit, and if so, must he disclose?

This hypothetical contains many of the same problems discussed in the previous hypothetical. The focus is again on the concept of an attorney as a person who arranges for the extension of consumer

⁴⁹*Id.* § 30,390.

⁵⁰*Id.* § 30,390.

credit. If the attorney fits into the category of an arranger for the extension of consumer credit, he becomes a "creditor" and must disclose in accordance with the regulations.⁵¹ In the previous hypothetical the attorney was not categorized as an arranger because the repayment of a judgment debt was not considered "consumer credit." A similar test must necessarily be applied in this problem since a person cannot be labeled an "arranger," unless "consumer credit" is being extended by a qualified "creditor."⁵² In other words, if Mr. Jones is a non-creditor, the attorney cannot become liable as an arranger of consumer credit.

Mr. Jones is a creditor if he is "a person who in the ordinary course of business regularly extends . . . consumer credit"⁵³ The facts included in the hypothetical indicate that Mr. Jones fits into this definition, at least to the extent that he is dealing with his automobile business. The question posed by this hypothetical is whether Mr. Jones' status as a professional creditor follows him outside his normal business activities. The answer to this question depends upon the interpretation given to the phrase "in the ordinary course of business."

The effect of this language is not clear. However, the Board has indicated that the phrase "in the ordinary course of business" refers "to the particular business of the creditor so as to exclude credit which does not arise from that business."⁵⁴ This means that Mr. Jones is not a creditor in his real estate transaction.

If a creditor who generally sells automobiles sells his own home and extends or arranges consumer credit in that transaction, he is not a creditor for the purpose of that latter (real estate) transaction, because he is not regularly engaged in the ordinary course of business in extending or arranging real property credit.⁵⁵

It has been suggested that the Board used inapt language in its attempt to exempt this type of transaction.⁵⁶ "In the example the credit was not extended in the ordinary course of the lender's business, but it was extended by a creditor who in the ordinary course of his business regularly extends consumer credit."⁵⁷ Thus the Act would seem to apply to this transaction. Even though this analysis seems analytically correct, the Board has adopted an opposite view as indicated in the letter cited above. It seems likely, therefore, that Mr.

⁵¹12 C.F.R. § 226.2(m) (1970).

⁵²12 C.F.R. § 226.2(f) (1970).

⁵³12 C.F.R. § 226.2(m) (1970).

⁵⁴CONSUMER CREDIT GUIDE, *supra* note 9, at § 30,190.

⁵⁵*Id.* § 30,190.

⁵⁶ATTORNEY'S GUIDE, *supra* note 7, at 4.

⁵⁷*Id.* at 5.

Jones would not be considered a “creditor” by the Board and would not have to disclose in the real estate transaction.

The attorney’s status as an arranger depends on the classification of the extender of the credit, for if the extension of the credit is by a non-creditor, the attorney cannot be considered an arranger of consumer credit. Since Mr. Jones is not a creditor, the attorney is not a “creditor” who arranges for the extension of consumer credit.

Likewise, the mere fact that an attorney prepares the loan documents does not affect the status of the credit transaction.

The fact that a lawyer prepares loan documents for a non-creditor would not cause that individual to fall within the definition and consequently the transaction would not be brought under the Act simply as a result of the presence of the lawyer.⁵⁸

The status of the transaction is dependent on the categorizing of the extender of the credit. An attorney may prepare documents for a non-creditor without changing the transaction into a consumer credit transaction.

D. HYPOTHETICAL IV: REAL PROPERTY TRANSACTIONS

Mr. Smith, a real estate developer, regularly extends credit in the course of that business. On one occasion Mr. Smith asked his attorney to negotiate a sale and prepare the deed and related documents. The attorney also prepared the loan documents with knowledge of the credit terms. He charged his client a reasonable fee for his services in preparing the documents and for negotiating the transaction. Mr. Smith passed the cost of the attorney’s fee to the customer by including it in the total price. Should the fee be considered part of the finance charge?

The general rule for determining the finance charge states:

Except as otherwise provided in this section, the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit⁵⁹

The attorney’s fee outlined in the hypothetical seems to fall within the meaning of this regulation. The charges were imposed directly

⁵⁸CONSUMER CREDIT GUIDE, *supra* note 9, at § 30,496.

⁵⁹12 C.F.R. § 226.4(a) (1970).

on the customer and they were incident to the extension of credit. This conclusion cannot be avoided unless some specific exception is applicable to this type of transaction.

In determining whether an exception exists, it is important to focus on the type of transaction involved. In this case a partial exclusion is possible since the transaction concerns real property. Certain special charges are excluded from the determination of the finance charge in real property transactions provided "they are bona fide, reasonable in amount and not for the purpose of circumvention or evasion" of the spirit of the regulations.⁶⁰ "Fees for preparation of deeds, settlement statements, or other documents" are specifically excluded.⁶¹ In terms of the hypothetical this means that the portion of the attorney's fee dealing with the preparation of documents may be excluded from the determination of the finance charge even though it is incident to the extension of credit. The portion of the fees which are attributable to the attorney's services as a negotiator is not specifically excluded and, to the extent that it has been passed on to the customer, it must be included within the finance charge and disclosed as a prepaid finance charge.⁶²

The facts of this hypothetical also suggest that the attorney has acted as a person who arranges for the extension of credit. He offered, through his role as negotiator, to provide consumer credit pursuant to a business relationship for which he received a fee. He also prepared the documents with knowledge of the credit terms. Inasmuch as either of these conditions is sufficient to cause an individual to qualify as a creditor who arranges for the extension of credit, it is necessary for the attorney to concern himself with the disclosure requirements of Regulation Z.⁶³

This hypothetical illustrates the significant consequences, for both parties, of an attorney-client relationship. In this case, because the cost of the attorney's services was passed to the customer by Mr. Smith, it became necessary to include these costs within the finance charge. The attorney was likewise drawn into the coverage of the Act due to his status as an arranger for his client. The resulting disclosure problems, as well as the possible liabilities created,⁶⁴ are important reasons for every attorney to familiarize himself with the basic provisions of the Act.

⁶⁰12 C.F.R. § 226.4(e) (1970).

⁶¹12 C.F.R. § 226.4(e) (1970).

⁶²CONSUMER CREDIT GUIDE, *supra* note 9, at § 30,282.

⁶³12 C.F.R. § 226.2(f) (1970).

⁶⁴15 U.S.C. §§ 1611, 1640 (Supp. V, 1970).

IV. CONCLUSION

This discussion has illustrated a few of the many problems created by the Truth in Lending Act. The focus has been exclusively on how the Act operates in common situations faced by practitioners. The hypotheticals are illustrative of the concept that the Act applies to attorneys in the same way that it applies to other professional creditors. The first hypothetical was an example of how an attorney might be considered an extender of credit as a consequence of his billing technique. The other three hypotheticals were examples of situations in which attorneys might qualify as arrangers of consumer credit.

The significance of being classified as an extender or an arranger of consumer credit results from the disclosure requirements of the Act and from the liabilities from failure to properly disclose. The hypotheticals, while by no means exhaustive, were designed to be illustrative of problems to be encountered by the practitioner and to serve to alert attorneys of the need to be familiar with the provisions of the Truth in Lending Act.

Moreover, the more than four installment rule is an excellent example of difficulties surrounding "administrative legislation." The policy behind the rule is understandable; however, in application the rule appears not to be a significant aid to the consumer. When applied to doctors, lawyers and other professional persons who do not "bury" finance charges, the rule makes very little sense. It merely extends the coverage of the Act to areas not apparently anticipated by Congress.

The rule, at least until challenged in court, remains an important aspect of Regulation Z, particularly to attorneys and other professional persons. It could be a stumbling block to the unwary or unconcerned, and for that reason it cannot be ignored.

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