

# Consumer Credit Sale Disclosure in California

## I. INTRODUCTION

### A. (1.1) THE THREE ACTS—UNRUH, REES-LEVERING, AND TRUTH IN LENDING

Consumer credit has had its greatest development since World War II. Today, the United States is a nation that lives on credit. The rise of consumer credit has unfortunately been accompanied by increases in unethical practices and abuses by dishonest creditors.

Consumer credit sale protection legislation was initiated in California with the enactment in 1945 of the Automobile Sales Act. In 1959 the California legislature enacted the Unruh Act<sup>1</sup> which established a regulatory scheme devised to end certain abuses existing in the credit sale of consumer goods (other than motor vehicles) and services. In 1961 the Rees-Levering Motor Vehicle Sales and Finance Act<sup>2</sup> was enacted repealing the old Automobile Sales Act which had provided only limited protection to the motor vehicle consumer and had contained many ambiguities. The purpose of the RLA was to provide comprehensive protection for the unsophisticated motor vehicle consumer.<sup>3</sup>

Federal regulation has been a relative late comer to the field of consumer credit protection. The first substantial federal statutory

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<sup>1</sup>CAL. CIV. CODE §§ 1801 *et seq.* (West Supp. 1971). See Article, *Unruh Act: A Legislative History*, 4 U.C.D. L. REV. (1971).

<sup>2</sup>CAL. CIV. CODE §§ 2981 *et seq.* (West Supp. 1971). [hereinafter cited as RLA].

<sup>3</sup>15 ASSEMBLY INTERIM COMMITTEE REPORTS No. 24 at 39 (1960) (Final Report of Assembly Interim Committee on Finance and Insurance) [hereinafter cited as RLA FINAL REPORT].

intervention in this field occurred with the enactment of the Consumer Credit Protection Act<sup>4</sup> in 1968. Title I of the CCPA is better known as the "Truth in Lending Act."<sup>5</sup> The purpose of the Truth in Lending Act, as implemented by Regulation Z,<sup>6</sup> is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."<sup>7</sup> TIL has made a substantial change in the way creditors are required to disclose (1) the terms of a consumer credit transaction and (2) the costs the consumer must pay.<sup>8</sup>

The Federal TIL Act and the two California Acts have the same basic purpose of consumer credit protection. However, the approach by which each act attempts to achieve that purpose is somewhat different. The TIL Act is essentially a disclosure statute. The California Acts are more than just disclosure statutes. They assume that disclosure alone is inadequate protection for the consumer.<sup>9</sup> In addition to prescribing disclosure requirements, they contain non-disclosure regulatory provisions: for example, maximum finance charges, prohibition of certain credit sale contract provisions, and limitations on the repossession and resale of consumer goods. See § 3.6, *infra*.

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<sup>4</sup>Pub. L. No. 90-321, 82 Stat. 146 (1968) [hereinafter cited as CCPA]. The CCPA contains five titles: Title I (Truth in Lending Act) requires disclosure of the terms of a consumer credit transaction and regulates credit advertising; Title II makes extortionate extensions of credit illegal; Title III regulates garnishment; Title IV establishes the National Commission on Consumer Finance; and Title V contains general provisions.

<sup>5</sup>CCPA § 101. [hereinafter referred to as TIL Act].

<sup>6</sup>12 C.F.R. § 226 [hereinafter referred to as Reg Z]. Reference to TIL should be understood to refer to these implementing regulations as well as the TIL Act itself.

<sup>7</sup>15 U.S.C. § 1601 (Supp. V, 1965-1970) amplified in 12 C.F.R. § 226.1(a)(2).

<sup>8</sup>Butler, *Truth and Confusion in Lending*, 55 A.B.A.J. 27 (1969).

<sup>9</sup>*Project: Legislative Regulation of Retail Installment Financing*. 7 U.C.L.A. L. REV. 618, 670 (1960) [hereinafter cited as UCLA PROJECT].

Diagram No. 1  
THE THREE STAGES OF A  
CONSUMER CREDIT SALE TRANSACTION

<u>PRE-CREDIT SALE</u>		<u>CREDIT SALE</u>		<u>POST-CREDIT SALE</u>		
Sub- Stages	<b>ADVERTISING</b> (media-to-person representations)	<b>PRE-SALE TECHNIQUES</b> (person-to-person representations)	<b>CREDIT SALE DOCUMENT</b> (e.g., retail installment contract)			<b>CONSUMER DEFAULTS</b>
	false advertising "bait advertising and switch selling"	misrepresentations as to the true nature of the goods or services high pressure salesmanship	<b>Disclosure Statement</b>	<b>Non-Disclosure Aspects of Credit Sale Document</b>	goods not delivered services not performed defective goods inferior services	abusive collection practices prohibited garnishment
	California Legal Remedies Act CAL. CIV. CODE §§ 1750-1784 CAL. BUS. & PROF. CODE §§ 17500-17537 Federal Trade Commission Act 15 U.S.C. §§ 41-58 TIL Act 15 U.S.C. §§ 1661-1665 12 C.F.R. § 226.10	creditor has consumer sign a blank contract misstatements as to the true finance charge, APR, etc.	document contains a prohibited contract provision excessive finance charge	Unruh Act, e.g., CAL. CIV. CODE § 1804.1 Rees-Levering Act, e.g., CAL. CIV. CODE § 2983.7	Song-Beverly Consumer Warranty Act CAL. CIV. CODE §§ 1790-1795	15 U.S.C. §§ 1671-1677
Examples of Unethical Credit Sale Practices			Unruh Act CAL. CIV. CODE §§ 1801 et seq. Rees-Levering Act CAL. CIV. CODE §§ 2981 et seq. TIL Act 15 U.S.C. §§ 1601 et seq. 12 C.F.R. § 226			
Applicable Laws						

## B. (1.2) CONSUMER CREDIT SALE PROTECTION LAWS IN PERSPECTIVE

A typical consumer credit sale transaction can be divided into basically three stages: pre-credit sale, credit sale, and post-credit sale.<sup>10</sup> A consumer in each of these stages can be subjected to a variety of unethical credit sale practices. See *Diagram No. 1*. Over a considerable time span, the California Legislature and Congress have attempted to eliminate some of these unethical practices by enacting various statutes.

Today, in California, the credit sale of a defective consumer good, such as a defective refrigerator or television, by a dishonest creditor could result in the following federal and state laws being violated: *for false advertising*, the California Consumers Legal Remedies Act,<sup>11</sup> the False Advertising sections of the California Business and Professions Code<sup>12</sup>, and the Federal Trade Commission Act<sup>13</sup>; *for disclosure violations*, the Unruh Act and the TIL Act; *for the inclusion of a prohibited contract provision in the retail installment contract*, the Unruh Act<sup>14</sup>; *for the inclusion of a prohibited wage garnishment provision in the retail installment contract*, the CCPA<sup>15</sup>; and *for the sale of a defective consumer good*, the California Song-Beverly Consumer Warranty Act.<sup>16</sup> The above constitute only the major legislation in this field.<sup>17</sup>

The extent of the above legislation may at first seem impressive, however, they were enacted over a considerable time span in an attempt to eliminate only particular areas of unethical practices at acute stages of development. As a result, they form a patch-work scheme of sometimes overlapping federal and state law. Unfortu-

<sup>10</sup>Lorenz, *Consumer Fraud and the San Diego District Attorney's Office*, 8 SAN DIEGO L. REV. 47, 54 (1971). This three-stage analysis is also applicable to non-credit consumer sale transactions.

<sup>11</sup>CAL. CIV. CODE §§ 1750-1784 (West Supp. 1971).

<sup>12</sup>CAL. BUS. & PROF. CODE, §§ 17500-17537 (West 1964).

<sup>13</sup>15 U.S.C. §§ 41-58.

<sup>14</sup>CAL. CIV. CODE § 1804.4 (West Supp. 1971). For example, a provision giving the creditor the authority to enter upon the buyer's premises unlawfully in the repossession of consumer goods.

<sup>15</sup>15 U.S.C. 1671-1677 (Supp. V, 1965-1970). See Article, *Attachment and Garnishment in California—In Need of Reform*, 4 U.C.D. L. REV. (1971).

<sup>16</sup>CAL. CIV. CODE §§ 1790-1795 (West Supp. 1971).

<sup>17</sup>Examples of other California consumer protection statutes are: CAL. CIV. CODE §1720 (West Supp. 1971) (creditor response to consumer inquiries), CAL. CIV. CODE §§ 1725-1736 (West Supp. 1971) (swimming pool contracts), CAL. CIV. CODE §§ 1812.80-1812.96 (West Supp. 1971) (Health Studio Act), CAL. VEH. CODE § 11713 (West Supp. 1971) (misrepresentation, odometer turn back).

nately, they are not a comprehensive and well-integrated scheme of consumer protection laws. Still, this patch-work scheme is better than nothing and certain gaps in the law can be filled by general contract, sales, and tort law.

Because no single federal or state act regulates even one complete stage of a consumer credit sale transaction, the attorney should keep each federal and state law in perspective in order that he may effectively match the practice in question with the applicable statute or regulation. As his reward, the attorney will better know and understand: (1) the unethical practices which the law in question attempts to remedy and (2) the relationship of the law in question to the other federal and state laws within the patch-work scheme which may also have been violated.

Disclosure requirements attempt to remedy only *one* aspect of possible creditor abuse among the three stages of a consumer credit sale transaction, that of omissions and misrepresentations in the credit sale document or disclosure statement as to the true cost and terms of the credit sale.<sup>18</sup> Therefore, it is necessary for the attorney to examine all applicable federal and state consumer protection laws and general contract, sales, and tort law when ascertaining the correctness of a specific consumer credit sale transaction.

### C. (1.3) TYPES OF PROVISIONS; FOCUS OF ARTICLE

TIL contains basically three types of provisions:

- (1) scope;
- (2) disclosure; and
- (3) enforcement.

In contrast, the Unruh Act and the RLA contain basically four types of provisions:

- (1) scope;
- (2) disclosure
  - (a) disclosure requirements which are *substantially similar* or identical to the TIL disclosure requirements,
  - (b) disclosure requirements which are *inconsistent* with the TIL disclosure requirements, and
  - (c) disclosure requirements which require disclosure of information *collateral* to (in addition to) the TIL disclosure requirements;
- (3) non-disclosure regulatory provisions (see § 3.6, *infra*); and
- (4) enforcement.

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<sup>18</sup>This constitutes only the left side of the credit sale stage in *Diagram No. 1*.

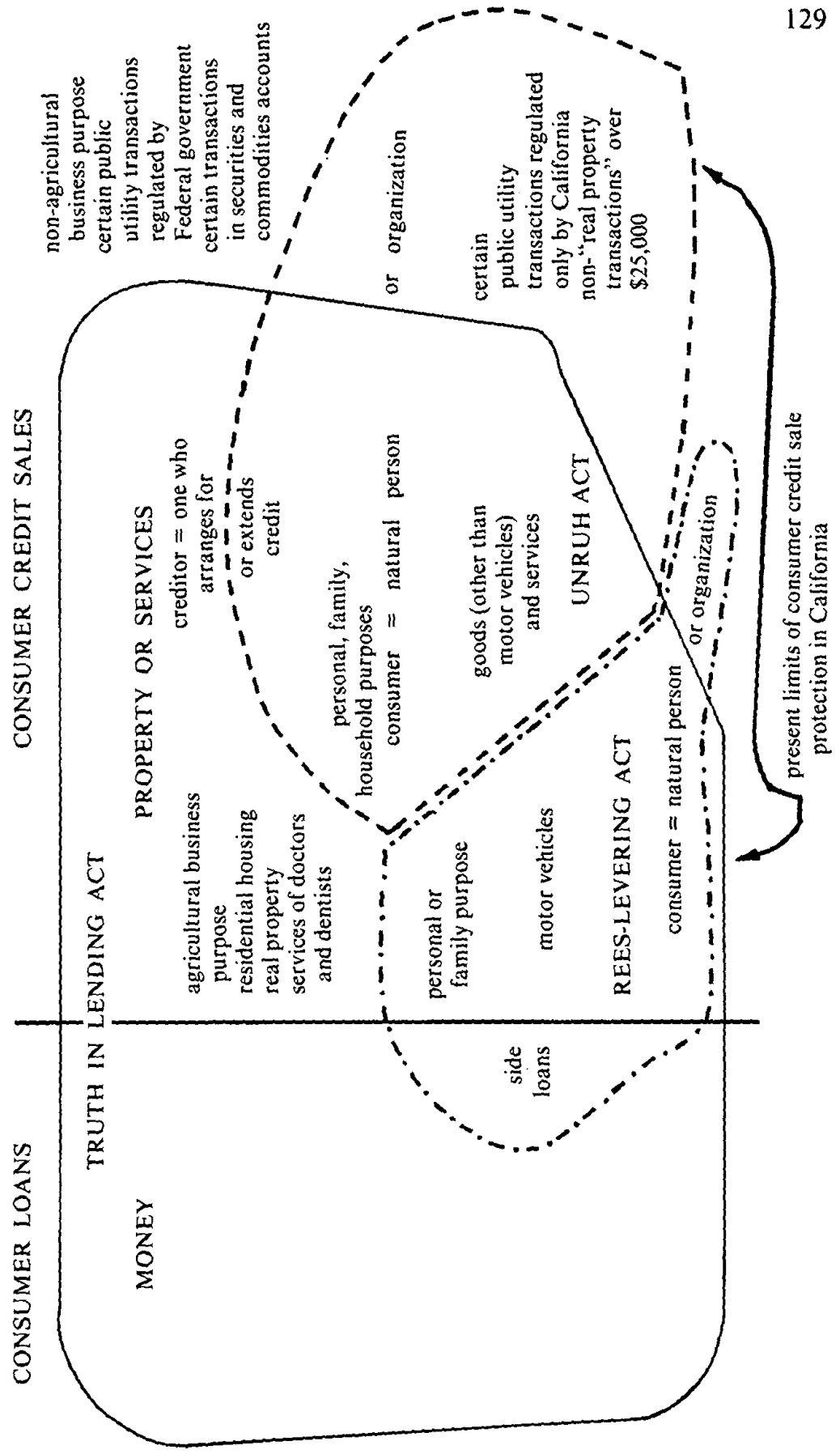
This article will examine the present state of federal and California statutory law relating to consumer credit sale disclosure. The focus will be on the interrelationship between the Federal Truth in Lending Act as implemented by Regulation Z and California's Unruh Act and Rees-Levering Act as to their scope and disclosure provisions. TIL's effect upon the California Acts' non-disclosure regulatory provisions will be discussed only briefly. See § 3.6 *infra*. The interrelationship between the TIL Act and the California Acts' enforcement provisions will not be examined.<sup>19</sup>

Part II of this article will examine the overlap in scope between TIL and the California Acts. Part III will examine significant inconsistencies between TIL and the California Acts' disclosure requirements.

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<sup>19</sup>There is a complex interrelationship between TIL and the California Acts' private enforcement provisions. An example of this complexity are those transactions in which the creditor through a *single* act or omission violates both a TIL and a RLA disclosure requirement. The judgment for the consumer could amount to (1) rescission of the contract, CAL. CIV. CODE §§ 2983, 2983.1 (West Supp. 1971), (2) a monetary award equal to twice the amount of the finance charge, 15 U.S.C. § 1640(a)(1) (Supp. V, 1965-1970), and (3) reasonable attorney's fees and court costs, CAL. CIV. CODE § 2983.4 (West Supp. 1971), 15 U.S.C. § 1640(a)(2) (Supp. V, 1965-1970). This raises questions as to the nature and the relationship between the TIL Act and the California Acts' civil penalties. Are they compensatory, remedial, or punitive? Must the aggrieved consumer elect between his federal and state civil penalties or are they cumulative? These and many other important questions are beyond the limits of this article.

Diagram No. 2  
SCOPE DIAGRAM



## II. SCOPE OF THE ACTS

### A. INTRODUCTION

#### 1. (2.1) SCOPE—THE INITIAL DETERMINATION

In investigating a possible consumer credit sale transaction, it must be determined initially which, if any, of the three acts apply. In other words, whether the transaction under investigation comes within the scope of the TIL Act, the Unruh Act, or the RLA. This determination is a relatively easy one to make but it should not be overlooked.

TIL has a much broader scope or coverage than the Unruh Act and the RLA combined. See the *Scope Diagram, Diagram No. 2*. TIL encompasses consumer loans as well as consumer credit sales. TIL consumer credit sales include credit sales of real property as well as credit sales of personal property and services. The RLA regulates only those consumer credit sales in which the primary subject of the transaction is a vehicle required to be registered under the California Vehicle Code, while the Unruh Act regulates the retail installment sale of goods (other than motor vehicles) and services.

It should not be assumed that just because the creditor has made disclosures that (1) the transaction is subject to the disclosure requirements of TIL or that (2) the transaction is subject to the disclosure requirements of either the Unruh Act or the RLA. In this day of standard contract forms, there is always the possibility that a creditor will make disclosures in a transaction which comes within the scope of only one of the three acts or none at all. Therefore, there should be two independent scope determinations: first to determine if either the Unruh Act or the RLA applies and then to determine if TIL applies.

#### 2. (2.2) THE FOCUS OF THIS PART

This part will focus on two things:

(1) It will examine the factors which determine the scope of each of the three acts and

(2) It will determine to what extent the scope of the TIL Act overlaps with the scope of the California Acts; i.e., determine which transactions are within both, are exempted from both, and which are within one but not the other.



### 3. (2.3) TRUTH IN LENDING'S EFFECT UPON STATE SCOPE PROVISIONS

TIL has no effect upon state scope provisions. 15 U.S.C. § 1610(b) provides that the TIL Act does not “annul, alter or affect in any manner the meaning, scope or applicability of the laws of any state, . . . nor does this title extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.”

### B. (2.4) BASIC SCOPE OVERVIEW

The basic scope of each of the three acts is determined by the statutory definitions of key terms. These definitions, when arranged in an useable order, form a checklist of elements which must be present in a transaction for that transaction to come within the basic scope of the act. However, certain types of transactions which would otherwise come within the scope of the act have been expressly exempted by the legislature or Congress. SCOPE = BASIC SCOPE - STATUTORILY EXEMPTED TRANSACTIONS.

After the attorney has obtained a basic understanding of the basic scope elements and of the statutory exemptions, the *Basic Scope Chart* and the *Statutorily Exempted Transactions Chart, Charts No. 1 and 2*, will hopefully prove to be a handy check list for determining whether or not a transaction comes within the scope of any of the three acts.

### 1. (2.5) THE TRUTH IN LENDING ACT

Reg Z's definition of “consumer credit” (12 C.F.R. § 226.2(k)) provides the most useful expression of the basic scope elements of a TIL transaction. 12 C.F.R. § 226.2(k) lists the basic scope elements as follows:

- (1) “credit [15 U.S.C. § 1602(e), 12 C.F.R. § 226.2(l)] offered or extended
- (2) [by a creditor, 15 U.S.C. § 1602(f), 12 C.F.R. § 226.2(m)]
- (3) “to a natural person [consumer, 15 U.S.C. § 1602(h), or customer, 12 C.F.R. § 226.2(o)],
- (4) “in which the
  - (a) “money,
  - (b) “property, or
  - (c) “service“which is the subject of the transaction is

- (5) “primarily for
  - (a) “personal, family, household, or
  - (b) “agricultural purposes [12 C.F.R. § 226.2(c)] and
- (6) “for which either
  - (a) “a finance charge [15 U.S.C. § 1605, 12 C.F.R. § 226.2(q)] is or may be imposed or
  - (b) “which, pursuant to an agreement, is or may be payable in more than 4 instalments.”

## 2. (2.6) *THE UNRUH ACT*

The basic scope elements of the Unruh Act are derived from its definitional provisions (CAL. CIV. CODE §§ 1802.1-1802.7). A transaction comes within the basic scope of the Unruh Act if the transaction is

- (1) A sale of goods or a furnishing of services (CAL. CIV. CODE § 1802.5)
- (2) by a retail seller (CAL. CIV. CODE § 1802.3)
- (3) to a retail buyer (CAL. CIV. CODE § 1802.4)
- (4) who bought either
  - (a) goods “primarily for personal, family or household purposes” (CAL. CIV. CODE § 1802.1) or
  - (b) services for “other than a commercial or business use” (CAL. CIV. CODE § 1802.2)
- (5) under either
  - (a) a retail installment contract (CAL. CIV. CODE § 1802.6) entered into or performed in this state, which provides for
    - (I) (A) repayment in installments and
    - (B) (1) in which a finance charge is computed upon and added to the unpaid balance at the time of sale or
    - (2) where no finance charge is added but the goods or services are available at a lesser price if paid by cash or
    - (3) where the buyer, if he had paid cash, would have received any additional goods or services or any higher quality goods or services at no added cost over the total amount he pays in installments, or
    - (II) payment in four or more installments, *or*
  - (b) a retail installment account (CAL. CIV. CODE § 1802.7) established by an agreement entered into in this state pursuant to which
    - (I) the buyer promises to pay, in installments, to the retail

seller, his outstanding balance incurred in retail installment sales, *and*

(II) which provides for a finance charge which is expressed as a percent of the periodic balances to accrue thereafter providing such charge is not capitalized or stated as a dollar amount in such agreement.

### 3. (2.7) *THE REES-LEVERING ACT*

A transaction comes within the basic scope of the RLA when it is

(1) A sale of a vehicle required to be registered under the California Vehicle Code (CAL. CIV. CODE § 2981(j))

(2) by a seller (CAL. CIV. CODE § 2981(b))

(3) to a buyer (CAL. CIV. CODE § 2981(c))

(4) who bought the motor vehicle “primarily for personal or family purposes” and not “primarily for business or commercial purposes” (CAL. CIV. CODE § 2981(j))

(5) either under

(a) a contract in which the seller retains either title to or a security interest in the motor vehicle (CAL. CIV. CODE § 2981(a)(1), (3)), *or*

(b) a lease or bailment by which the lessee or bailee

(I) agrees to pay as compensation a sum substantially equivalent to the value of the motor vehicle, *and*

(II) is bound to become, or has the option of becoming, the owner of the motor vehicle upon full compliance with the terms of the contract (CAL. CIV. CODE § 2981(a)(2)).

Chart No. 1  
BASIC SCOPE CHART

<u>ELEMENTS</u> operative date	<u>TRUTH IN LENDING</u> July 1, 1969	<u>UNRUH ACT</u> (CAL. CIV. CODE § ____) Jan. 1, 1960	<u>REES-LEVERING ACT</u> (CAL. CIV. CODE § ____) Jan. 1, 1962
extension of credit	REQUIRED credit sales loans  15 USC 1631(a) 12 CFR 226.2(k)	REQUIRED retail sale of goods or services  1802.5	REQUIRED sale of motor vehicles 2981(j)  side loan transactions 2982.5
lease or bailment	included if in fact a disguised conditional sale  15 USC 1602(g) 12 CFR 226.2(n)	1802.6	included if in fact a disguised security interest (conditional sale) 2981(a) (2)
nature of creditor	"creditor" extends or arranges for the extension of credit  15 USC 1602(f) 12 CFR 226.2(m)	"retail seller" engages in the business of selling  1802.3	"seller" engages in the business of selling  2981(b)
nature of consumer	"consumer" "customer"  natural person  15 USC 1602(h) 12 CFR 226.2(o)	"retail buyer"  natural person or organization  1802.4 1802.15	"buyer"  natural person or organization  2981(c) 2981(d)
purpose for obtaining subject of transaction			
personal, family or household purposes	money, property, or services  15 USC 1602(h) 12 CFR 226.2(k)	goods 1802.1 services "other than business or commercial use" 1802.2	motor vehicles "primarily for personal or family purposes" 2981(j)
agricultural business purpose	money, property, or services  15 USC 1602(h) 12 CFR 226.2(k) 226.3(a)	EXEMPT  1802.1 1802.2	EXEMPT  2981(j)
non-agricultural business purpose	EXEMPT  15 USC 1603(1) 12 CFR 226.3(a)	EXEMPT  1802.1 1802.2	EXEMPT  2981(j)

<u>ELEMENTS</u>	<u>TRUTH IN LENDING</u>	<u>UNRUH ACT</u>	<u>REES-LEVERING ACT</u>
imposition of a finance charge	alternate requirement to payment in more than 4 installments  12 CFR 226.2(k)	contract— alternate requirement to payment in 4 or more installments 1802.6 account— required 1802.7	NOT A REQUIREMENT
where no finance charge, payment in more than 4 installments	alternate requirement to imposition of a finance charge  12 CFR 226.2(k)	contract— “4 or more installments” alternate requirement to imposition of a finance charge 1802.6 account— finance charge required 1802.7	NOT A REQUIREMENT
presence of a security interest	NOT A REQUIREMENT	NOT A REQUIREMENT 1802.6 1802.7	REQUIRED 2981(a)(1) 2981(a)(3)  includes leases which are in fact security interests 2981(a)(2)

Chart No. 2  
 STATUTORILY EXEMPTED TRANSACTIONS CHART

	<u>TRUTH IN LENDING</u>	<u>UNRUH ACT</u> (CAL. CIV. CODE § ____)	<u>REES-LEVERING ACT</u> (CAL. CIV. CODE § ____)
purpose for obtaining subject of transaction			
agricultural business purpose	money, property, or services 15 USC 1602(h) 12 CFR 226.2(k) 226.3(a)	EXEMPT 1802.1 1802.2	EXEMPT 2981(j)
non-agricultural business purpose	EXEMPT 15 USC 1603(1) 12 CFR 226.3(a)	EXEMPT 1802.1 1802.2	EXEMPT 2981(j)
limitation on amount financed	EXEMPTS credit transactions other than real prop. transactions (12 CFR 226.2(x)) in which the total amount financed exceeds \$25,000 15 USC 1603(3) 12 CFR 226.3(c)	NO LIMITATION	NO LIMITATION
certain transactions in securities or commodities accounts	EXEMPTED 15 USC 1603(2) 12 CFR 226.3(b)	NOT APPLICABLE 1802.1 1802.4	NOT APPLICABLE
certain public utility transactions (PUT)	EXEMPTS both state and federally regulated PUT 15 USC 1603(4) 12 CFR 226.3(d)	EXEMPTS only federally regulated PUT 1802.2	NOT APPLICABLE
construction and/or sale of an entire residence; sale of real property	INCLUDED	EXEMPTED 1801.4	NOT APPLICABLE
services of physicians and dentists	INCLUDED	EXEMPTED 1802.2	NOT APPLICABLE

## C. A COMPARISON OF THE BASIC SCOPE ELEMENTS

### 1. (2.8) EXTENSION OF CREDIT

The extension of credit is a basic requirement for all transactions coming within the scope of any of the three acts.

TIL gives the clearest pronouncement of this requirement in 15 U.S.C. § 1631(a) (“consumer credit is extended”) and 12 C.F.R. § 226.2(k) (“credit offered or extended”). “Credit” is defined in 15 U.S.C. § 1602(e) as “the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.” 12 C.F.R. § 226.2(l) adds “or purchase property or services and defer payment therefor.”

The extension of credit requirement can be inferred in the Unruh Act from its definition of “retail installment sale” as “the sale of goods or the furnishing of services by a retail seller to a retail buyer for a deferred payment price payable in installments.” CAL. CIV. CODE § 1802.5.

RLA’s definition of “conditional sale contract” (CAL. CIV. CODE § 2981(a)) focuses on the requirement of a security interest taken or retained by the seller; it does not expressly require a deferring of payment. However, the extension of credit requirement can be inferred from its disclosure provisions requiring the disclosure of any finance charge. CAL. CIV. CODE §§ 2982(a)(7), 2981(h).

All three acts include within their scope leasing or bailment arrangements which are in reality disguised conditional sales. 15 U.S.C. § 1602(g) and 12 C.F.R. § 226.2(n) provide:

The term [credit sale] includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

This provision is substantially the same as the Unruh Act provision, CAL. CIV. CODE § 1802.6, and the RLA provision, CAL. CIV. CODE § 2981(a)(2).

### 2. (2.9) CREDITOR, RETAIL SELLER, SELLER

All three acts require that the credit be extended by and the property or services be sold by a person or persons variously described by the terms “creditor,” “retail seller,” and “seller.”

Both the Unruh Act's "retail seller" (CAL. CIV. CODE § 1802.3) and the RLA's "seller" (CAL. CIV. CODE § 2981(b)) focus on a "person engaged in the business of selling."

The TIL Act defines "creditor" as a person "who regularly extend[s] or arrange[s] for the extension of credit." 15 U.S.C. § 1602(f). Reg Z modifies this definition by defining creditor as "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." 12 C.F.R. § 226.2(m).

TIL introduces an important innovation by defining creditor to include not only the person who extends the credit but also the person who "arranges" for its extension.<sup>20</sup> 12 C.F.R. § 226.2(f) provides in part that

"Arrange for the extension of credit" means to provide or offer to provide consumer credit which is or will be extended by another person

- [1] under a business or other relationship
  - [2] pursuant to which the person arranging such credit
    - [a] receives or will receive a fee, compensation, or other consideration for such service *or*
    - [b] has knowledge of the credit terms *and* participates in the preparation of the contract documents required in connection with the extension of credit.
- (Emphasis added.)

This innovation has a significant impact on at least two areas of consumer credit protection: side loan transactions and liability of assignees. How the two personalities of the TIL creditor — the extender and the arranger of credit — apply to typical fact situations in these two areas are illustrated by the following hypotheticals.

Suppose Consumer *B* is buying a \$3,000 automobile from Dealer *D*. *D* requires a cash downpayment of \$500. *D* arranges a side loan<sup>21</sup> of \$500 for *B* from Lender *L*. *D* finances \$2,500 of the cash price with a finance charge of \$300.<sup>22</sup> *D* has knowledge of the credit terms of the side loan for two reasons: (1) he participated in the preparation of the side loan documents and (2) California Civil Code § 2982.5<sup>23</sup> requires

<sup>20</sup>JOHNSON, JORDAN, & WARREN, ATTORNEY'S GUIDE TO TRUTH IN LENDING 5 (California Continuing Education of the Bar, 1969) [hereinafter cited as GUIDE].

<sup>21</sup>A side loan is a loan which the seller arranges for the buyer from a lender, such as a bank or a finance company, to pay a portion of the purchase price.

For examples, see RLA FINAL REPORT, *supra* note 3, at 17-19.

<sup>22</sup>GUIDE, *supra* note 20, at 69-74.

<sup>23</sup>For a discussion of CAL. CIV. CODE § 2982.5 before it was amended in 1970, see GIACOMINI, CALIFORNIA RETAIL INSTALLMENT SALES 27-29 (California Continuing Education of the Bar, 1969) [hereinafter cited as CRIS]. Ch. 1003, § 3, [1970] Cal. Stats. 1804. The Unruh Act does not have a comparable provision.



him to disclose on the face of the conditional sale contract the amount of the side loan, the finance charge, the total thereof, the number of installments scheduled to repay the side loan, and the amount of each such installment. In this case, *L* is the extender of credit and *D* fits perfectly 12 C.F.R. § 226.2(f)'s definition of a person who arranges for credit.

Suppose Consumer *B* has just purchased a refrigerator on credit from Seller *S*. After *S* decided that *B* met the minimum credit standards set by *S*'s assignee *A* (a finance company), *S* wrote up the credit sale on a retail installment contract form provided by *A*. The form contract contained an assignment clause with *A*'s name printed therein as the assignee. *S* imposed the finance charge at the rate set by *A*. Following standard procedure, *S* immediately assigned the contract to *A* who buys all of *S*'s retail installment contracts. For each assignment, *S* is given a portion of the finance charge as compensation. This is not an atypical relationship between a retail seller and his assignee. Courts could very easily find that the assignee extends the credit rather than the seller. The seller fits perfectly 12 C.F.R. § 226.2(f)'s definition of a person who arranges for credit.<sup>24</sup>

Thus, the effect of 12 C.F.R. § 226.2(f) in conjunction with the TIL definitions of creditor is to find in certain seller-lender relationships and in certain seller-assignee relationships

- (1) that the seller is the arranger of credit,
- (2) that the side loan lender or the assignee is the extender of credit, and
- (3) that both are thereby subject to the duties and liabilities of the TIL Act as original creditors. This gives increased protection to the consumer in at least two important areas of consumer credit, however, it also raises some very complex issues relating to disclosure in side loan transactions and liability of assignees which cannot be dealt with in this article. Reference should be made to the materials cited in the footnotes to this section.

### 3. (2.10) CONSUMER, CUSTOMER, RETAIL BUYER, BUYER

TIL provides that consumer credit may be extended only to a "natural person." 12 C.F.R. § 226.2(k),(o); 15 U.S.C. § 1602(h). "Natural person" is not defined in either the Act or Reg Z. However, they both define "person" as a "natural person or an organization." 15 U.S.C. § 1602(d); 12 C.F.R. § 226.2(v). This suggests that natural person and organization are mutually exclusive categories. This is supported by both 15 U.S.C. § 1603(1) and 12 C.F.R. § 226.3(a)

<sup>24</sup>GUIDE, *supra* note 20, at 199-200.

which exclude from the scope of TIL transactions extending credit to organizations. "Organization" is defined as "a corporation, trust, estate, partnership, cooperative, association, government, or governmental subdivision, agency, or instrumentality." 12 C.F.R. § 226.2(s); 15 U.S.C. § 1602(c).

Both the Unruh Act and the RLA include within their respective definitions of "retail buyer" (CAL. CIV. CODE § 1802.4) and "buyer" (CAL. CIV. CODE § 2981(c)) organizations as well as individuals (natural persons). Both acts define the buyer as a "person." The Unruh Act defines "person" as "an individual, partnership, corporation, association or other group, however organized." CAL. CIV. CODE § 1802.15. The RLA defines "person" to include "an individual, company, firm, association, partnership, trust, corporation, or other legal entity." CAL. CIV. CODE § 2981(d).

#### 4. PURPOSE FOR OBTAINING THE SUBJECT OF THE TRANSACTION

##### a. (2.11) *Personal, Family, or Household Purpose*

All three acts essentially adopt the "consumer purpose" test—*i.e.*, the subject of a consumer credit sale transaction must be acquired "primarily for personal, family, or household purposes."<sup>25</sup> The consumer purpose test has been the most common standard for determining the applicability of consumer credit protection legislation. It requires the creditor to determine the subjective purpose of the buyer in order to determine whether the transaction is covered by the applicable consumer credit protection legislation.<sup>26</sup>

None of the three acts define the phrase "primarily for personal, family, or household purposes." Credit transactions involving both a consumer and a non-consumer (business) purpose are resolved by the requirement that the subject of the transaction be acquired *primarily* for personal, family, or household purposes. The use of the word "primarily" indicates an intent to include within the scope of all three acts transactions in which there is a subsidiary non-consumer purpose.

##### b. (2.12) *Agricultural Business Purpose versus Non-Agricultural Business Purpose*

TIL makes an important and significant expansion of the consumer purpose test by including "agricultural purposes" as well.<sup>27</sup> 15 U.S.C.

<sup>25</sup>15 U.S.C. § 1602(h) (Supp. V, 1965-1970), 12 C.F.R. § 226.2(k), CAL. CIV. CODE §§ 1802.1, 1802.2, and 2981(j) (West Supp. 1971).

<sup>26</sup>GUIDE, *supra* note 20, at 6-7.

<sup>27</sup>See Article, *The Effect of Truth-in-Lending on Agricultural Transactions*, 4 U.C.D. L. REV. (1971).

§ 1602(h); 12 C.F.R. § 226.2(k).

12 C.F.R. § 226.2(c) defines “agricultural purpose” as:

a purpose related to the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures those agricultural products. “Agricultural products” includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

A farmer who grows and sells peaches to a cannery is no less a businessman than a retailer who sells a television to the farmer. Since people engaged in agriculture normally are engaged in a business or commercial enterprise, property or services bought primarily for an agricultural purpose are also bought primarily for a business or commercial purpose. This raises a conflict between 15 U.S.C. § 1603(1) which exempts extension of credit for business or commercial purposes from the scope of the Act and 15 U.S.C. § 1602(h) and 12 C.F.R. § 226.2(k) which include extensions of credit for agricultural (business) purposes within the scope of the Act. This conflict is resolved by 12 C.F.R. § 226.3(a) which redefines the business purpose exemption to exclude an agricultural business purpose. Therefore, under TIL, business or commercial purpose and agricultural purpose are mutually exclusive categories; an agricultural business purpose being included within and a non-agricultural business purpose being excluded from the scope of the Act.

The Unruh Act and the RLA simply do not extend their protection to property or services bought primarily for an agricultural purpose. A transaction involving personal property bought primarily for an agricultural business purpose would be exempt from the scope of both acts as a transaction involving a business or commercial purpose. See § 2.17, *infra*.

##### **5. (2.13) IMPOSITION OF FINANCE CHARGE OR PAYMENT IN MORE THAN FOUR INSTALLMENTS**

The TIL Act requires disclosure only in transactions in which “a finance charge is or may be imposed.” 15 U.S.C. § 1631(a). The Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) pursuant to its regulatory authority under 15 U.S.C. § 1604 made a significant amendment<sup>28</sup> of 15 U.S.C. §

<sup>28</sup>Soloman, *Federal Reserve Board Letter of July 25, 1969*, 4 CCH CONSUMER CREDIT GUIDE, ¶ 30,114.

1631(a) by including within the definition of "consumer credit" transactions in which no finance charge is imposed but "which, pursuant to an agreement, is or may be payable in more than 4 installments." 12 C.F.R. § 226.2(k). This reflected the Board's position that consumers need protection not only in those transactions in which there is an identifiable finance charge but also in those transactions in which the seller "buries" the finance charge in the cash price and sells on installment. The Board apparently believes that in transactions payable in more than four installments the creditor is actually charging for credit even though no finance charge is separately disclosed, since no credit can be extended free if the creditor is to recover his own capital.<sup>29</sup>

In attempting to conform the Unruh Act to TIL, the California Legislature amended the Unruh Act's definition of "retail installment contract" (CAL. CIV. CODE § 1802.6) to include transactions in which the contract provided for "payment in *four or more* installments."<sup>30</sup> This was in fact an extension upon an extension since 12 C.F.R. § 226.2(k) in essence requires five or more installments. The California Legislature did not amend the definition of "retail installment account" (CAL. CIV. CODE § 1802.7).

The effect of both TIL and the Unruh Act is to exempt from their scopes 30-60-90-day payment plans available from some stores where no finance charge is imposed.

As to this basic scope element, discrepancies still exist. For example, a California creditor who does not impose a finance charge but who requires payment in five or more installments on a retail installment contract is required to make both TIL and Unruh Act disclosures; while, if he requires payment in only four installments, he is only required to make Unruh Act disclosures. The discrepancies are shown below in *Chart No. 3*.

*Chart No. 3.*  
*Applicability of the Unruh Act and Truth in Lending*  
*to Those Transactions in Which No Finance Charge Is Imposed.*

Number of Installments	Retail Installment Contract	Retail Installment Account
More than Four	Unruh Act Truth in Lending	Truth in Lending
Four	Unruh Act	_____
Less than Four	_____	_____

<sup>29</sup>GUIDE, *supra* note 20, at 11.

<sup>30</sup>Ch. 1192, § 1, [1969] Cal. Stats. 2322 (emphasis added).

Imposition of a finance charge or payment in more than four installments are not factors in the determination of whether a transaction comes within the basic scope of the RLA.

#### 6. (2.14) PRESENCE OF A SECURITY INTEREST

Whether or not the seller takes or retains a security interest is not a factor in determining if the transaction is within the basic scope of the TIL Act or the Unruh Act. However, under the RLA the presence of a security interest taken or retained in the motor vehicle by the seller is an essential basic scope element. CAL. CIV. CODE § 2981(a).

#### 7. (2.15) BASIC TYPES OF TRANSACTIONS

Under both TIL and the Unruh Act, transactions which come within the basic scope of either act and which are not statutorily exempt are classified into one of two basic categories or types of transactions. In TIL these two basic types are "open end credit"<sup>31</sup> and "credit other than open end"<sup>32</sup> which is also referred to as "closed end credit." In the Unruh Act, the basic types are the "retail installment account"<sup>33</sup> and the "retail installment contract."<sup>34</sup>

The two acts have different approaches to defining their two basic types of transactions. The Unruh Act defines both "retail installment account and retail installment contract."<sup>35</sup> This has the effect of excluding from the scope of the Unruh Act all transactions which do not fit within either definition. For this reason the definitions of the two basic types have a direct bearing on the determination of the scope of the Unruh Act and, therefore, are included within the Act's basic scope elements. See § 2.6, *supra*.

In contrast, TIL utilizes a single-definition-residual-category approach, in that it defines only open end credit and has an undefined residual category of credit other than open end. In this way, TIL avoids the Unruh Act problem of excluding transactions from the protection of the Act because they fail to come within either Unruh Act definition.

The RLA only applies to closed end credit transactions. RLA's definition of conditional sale contract (CAL. CIV. CODE § 2981(a))

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<sup>31</sup>15 U.S.C. § 1602(i) (Supp. V, 1965-1970), 12 C.F.R. § 226.2(r). See GUIDE, *supra* note 20, at 82-84.

<sup>32</sup>12 C.F.R. § 226.8. 12 C.F.R. § 226.203 distinguishes open end credit from credit other than open end.

<sup>33</sup>CAL. CIV. CODE § 1802.7 (West Supp. 1971).

<sup>34</sup>CAL. CIV. CODE § 1802.6 (West Supp. 1971).

<sup>35</sup>CRIS, *supra* note 23, at 173.

seems to encompass open end credit transactions; however, the Act's disclosure provisions are exclusively closed end disclosure provisions, very similar to the Unruh Act's disclosure provisions for retail installment contract sales and Reg Z's disclosure provisions for closed end credit sales. See § 3.20, *infra*. Also, California Civil Code § 2981(i) specifies that the installment payments are to be based upon the original total of payments and are not to include obligations later incurred by the buyer, such as repair bills. This would preclude an open end credit sale under the RLA.

### C. (2.16) STATUTORILY EXEMPTED TRANSACTIONS

Transactions fail to come within the scope of the TIL Act, the Unruh Act, or the RLA for one of two reasons, either

(1) they fail to contain one or more of the basic scope elements required for a transaction to come within the basic scope of the act in question or

(2) they are one of the act's statutorily exempted transactions; *i.e.*, transactions which otherwise contain all the requisite basic scope elements but are expressly excluded from the scope of the act by a specific statutory provision.

#### 1. (2.17) *BUSINESS OR COMMERCIAL PURPOSE*

As was indicated in § 2.12, under TIL business or commercial purpose and agricultural purpose are mutually exclusive categories. Transactions involving property or services bought primarily for an agricultural business purpose are within the scope of the TIL Act, while transactions involving property or services bought primarily for a non-agricultural business purpose are exempt.

Under both the Unruh Act and the RLA, an agricultural business purpose is treated as a business or commercial purpose since neither act differentiates between a business or commercial purpose and an agricultural purpose.

Goods bought primarily for a business or commercial purpose are exempted from the scope of the Unruh Act by negative implication of California Civil Code § 1802.1 which requires that tangible chattel be bought primarily for personal, family or household purposes. Services obtained for a "commercial or business use" are expressly exempted. CAL. CIV. CODE § 1802.2.

California Civil Code § 2981(j) provides that any transaction involving a motor vehicle "which is bought for use primarily for business or commercial purposes" is exempted from the scope of the RLA.

## 2. (2.18) *LIMITATION ON THE AMOUNT FINANCED*

15 U.S.C. § 1603(3) exempts from the scope of the TIL Act “credit transactions, other than real property transactions,<sup>[36]</sup> in which the total amount to be financed exceeds \$25,000.”<sup>37</sup> 12 C.F.R. § 226.3(c) adds “or in which the transaction is pursuant to an express written commitment by the creditor to extend credit in excess of \$25,000.” For the purpose of 12 C.F.R. § 226.3(c) as it applies to credit sales, the amount financed is the amount which is required to be disclosed under 12 C.F.R. § 226.8(c)(7).<sup>38</sup>

Neither the Unruh Act nor the RLA limits its scope by the value of the personal property or services sold or by the amount of the amount financed.

## 3. (2.19) *CERTAIN TRANSACTIONS IN SECURITIES OR COMMODITIES ACCOUNTS*

TIL exempts transactions in securities and commodities accounts with a broker-dealer registered with the Securities and Exchange Commission. 15 U.S.C. § 1603(2), 12 C.F.R. § 226.3(b). Such transactions are exempted on the theory that they are already adequately regulated by the Securities and Exchange Commission.<sup>39</sup>

The legislative history of the Unruh Act is devoid of any reference to these kinds of transactions.<sup>40</sup> Securities transactions do not come within the scope of the Unruh Act since they deal with intangibles and not tangible chattel. CAL. CIV. CODE § 1802.1. The investor is also not a retail buyer within California Civil Code § 1802.4 since he invests in securities and commodities principally for the purpose of resale.

## 4. (2.20) *CERTAIN PUBLIC UTILITY TRANSACTIONS*

The TIL Act exempts “[t]ransactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charge for delayed payment, and any discount allowed for early payment.” 15 U.S.C. § 1603(4). Reg Z affects this exemption in three ways:

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<sup>36</sup>“Real property transaction” is defined as “an extension of credit in connection with which a security interest in real property is or will be retained or acquired.” 12 C.F.R. § 226.2(x).

<sup>37</sup>GUIDE, *supra* note 20, at 8-10.

<sup>38</sup>12 C.F.R. § 226.3, n. 1. *See* § 3.21.

<sup>39</sup>17 C.F.R. § 240.15c2-5.

<sup>40</sup>ASSEMBLY INTERIM COMMITTEE ON FINANCE AND INSURANCE, FINAL REPORT OF SUBCOMMITTEE ON LENDING AND FISCAL AGENCIES, 2 APPENDIX TO JOURNAL OF THE ASSEMBLY, (Reg. Sess. 1959).

(1) it restricts exempted transactions to those “involving services provided through pipe, wire or other connected facilities;”

(2) it requires that the charges for such public utility services, the charges for delayed payment, and any discount allowed for early payment be “filed with, reviewed by, or regulated by” an appropriate regulatory agency; and

(3) it expands the appropriate regulatory agencies to include agencies of the Federal Government and of state political subdivisions.<sup>41</sup> 12 C.F.R. § 226.3(d).

The Unruh Act exempts “services for which the tariffs, rates, charges, costs or expenses, including in each instance the deferred payment price, are required by law to be filed with and approved by the federal government or any official, department, division, commission or agency of the United States.” CAL. CIV. CODE § 1802.2. The Unruh Act does not exempt public utility transactions regulated solely by the State of California or a political subdivision thereof. Thus, those public utility transactions which contain the requisite Unruh Act basic scope elements and which are regulated solely by the State of California or political subdivision thereof come within the scope of the Unruh Act.

## 5. ADDITIONAL CALIFORNIA EXEMPTIONS

### a. (2.21) Construction or Sale of Residential Housing; Sale of Real Property

The California Supreme Court in *Morgan v. Reasor Corporation*, 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 3 (1968), extended the scope of the Unruh Act to include installment contracts for the construction of residential housing. The California Legislature quickly amended the Unruh Act by adding California Civil Code § 1801.4,<sup>42</sup> which provides

The provisions of this chapter shall not apply to any contract or series of contracts providing for the construction, sale, or construction and sale of an entire residence or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest therein, or for the sale of a lot or parcel of real property, including any site preparation incidental to such sale.

Section 2 of the amending act expressly provided that the act was “intended to abrogate any contrary rule in *Morgan v. Reasor Corp.*”

Though consumer credit transactions for the construction, sale,

<sup>41</sup>GUIDE, *supra* note 20, at 12-13.

<sup>42</sup>Ch. 554, § 1, [1969] Cal. Stats. 1180.



or construction and sale of an entire residence with or without a parcel of real property, or for the sale of a parcel of real property are exempt from the Unruh Act, they come within the scope of the TIL Act and are subject to its requirements.

*b. (2.22) Services of Physicians and Dentists*

Services rendered by physicians and dentists are exempted from the scope of the Unruh Act. CAL. CIV. CODE § 1802.2. The reason for this exemption is that these professions are already subject to disciplinary procedures for unethical practices.<sup>43</sup>

Congress was not moved to follow California's example on this matter, the services rendered by physicians and dentists as well as attorneys are subject to the TIL Act if all other requisite elements of a TIL transaction are present.<sup>44</sup>

### E. (2.23) SUMMARY OF SCOPE

The scope of the TIL Act encompasses not only nearly all transactions subject to the Unruh Act or the RLA, but more importantly, extends its protection to many transactions formerly unregulated by any consumer credit protection act. See the *Scope Diagram, Diagram No. 2*. Most significantly, the TIL Act extends its protection to

(1) agricultural business transactions, which is of special significance to California, the number one agricultural state, and

(2) transactions for the construction, sale, or the construction and sale of residential housing, and the sale of parcels of real property entered into primarily for personal, family, household, or agricultural purposes.

The overlap in scope, at least from the viewpoint of the Unruh Act and the RLA, is extensive. This means that TIL transactions which come within the scope of either the Unruh Act or the RLA are given increased protection by the California Act's collateral disclosure requirements, non-disclosure regulatory requirements, and enforcement provisions.

The overlap in scope raises some important questions as to those consumer credit sale transactions which come within the scope of TIL and either the Unruh Act or the RLA. Questions such as the following will be analyzed in the next part on disclosure requirements: What effect does TIL have upon the disclosure provisions of the California Acts? In what ways are the California Acts in conflict

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<sup>43</sup>UCLA PROJECT, *supra* note 9, at 636.

<sup>44</sup>See Article, *The Attorney as an Extender or Arranger of Credit*, 4 U.C.D. L. REV. (1971).

with TIL? The answers to these and other questions will give assistance in understanding the complexity of the interrelationship between TIL and the California Act and the effect TIL has had upon consumer credit sale protection law in California.

### III. DISCLOSURE REQUIREMENTS

#### A. INTRODUCTION

##### 1. (3.1) THE NATURE OF TIL DISCLOSURE REQUIREMENTS

Since TIL applies to most Unruh Act and RLA transactions and since it also preempts any inconsistent state disclosure requirements,<sup>45</sup> TIL disclosure requirements *are* California's minimum consumer credit sale disclosure requirements.

The purpose of the TIL Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."<sup>46</sup> Disclosure is the heart of the TIL Act. In order to achieve uniform national disclosure, the TIL disclosure requirements are very technical and detailed, thus eliminating to a large extent creditor discretion as to what could be put into a disclosure statement to possibly mislead or confuse a consumer or what could be left out of a disclosure statement to possibly keep the consumer uninformed as to the true cost and terms of credit.

##### 2. (3.2) TRUTH IN LENDING'S EFFECT UPON STATE DISCLOSURE REQUIREMENTS

The TIL Act has a selective effect upon State disclosure requirements. The following hypothetical (hereinafter referred to as the *Disclosure Hypothetical*) will be used to help illustrate this effect:

Suppose a Reg Z disclosure provision requires that *CP* ("cash price") and *TP* ("total of payments") be disclosed. The corresponding provision of the RLA requires that *CP* ("cash price"), *TP* ("total of payments") *or* *CB* ("contract balance"), and *N* (a prescribed notice to the buyer) be disclosed. Relating this to § 1.3's discussion on the types of provisions, all are disclosure requirements: *CP* and *TP*

<sup>45</sup>See § 3.3.

<sup>46</sup>15 U.S.C. § 1601 (Supp. V, 1965-1970), 12 C.F.R. § 226.1(a)(2).

are substantially similar state disclosure requirements; *CB* is an inconsistent state disclosure requirement when Reg *Z* requires that *TP* be disclosed and *CB* is disclosed instead; and *N* is a collateral state disclosure requirement.

*a. (3.3) Inconsistent State Disclosure Requirements*

15 U.S.C. § 1610(a) provides:

This subchapter does not annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, *except to the extent that those laws are inconsistent with the provisions of this subchapter or regulations thereunder, and then only to the extent of the inconsistency.* (Emphasis added.)

The clear inference from 15 U.S.C. § 1610(a) is that inconsistent state disclosure requirements are annulled and have no further effect.<sup>47</sup> However, only the inconsistent requirement itself is annulled, all other requirements within the affected state disclosure provision must be complied with unless they too are inconsistent with TIL. Utilizing the *Disclosure Hypothetical*, *CB* (“contract balance”) is an inconsistent state disclosure requirement and, therefore, annulled.

It is also clear from 15 U.S.C. § 1610(a) that state disclosure requirements which are not inconsistent with TIL are valid and must be complied with. Failure to comply with a valid state disclosure requirement can subject the creditor to civil and possible criminal liability. Therefore, in the *Disclosure Hypothetical*, *supra*, the creditor, in addition to complying with the Reg *Z* disclosure requirements, must also comply with the valid state disclosure requirements, *CP*, *TP*, and *N*. It should be noted that by merely complying with Reg *Z*, the creditor also complies with the identical RLA requirements, *CP* and *TP*, however, he would fail to comply with RLA’s collateral disclosure requirement *N* and would, therefore, be in violation of the RLA

*b. (3.4) Inconsistency—The Problem of Double Disclosure*

Though it may be clear that inconsistent state disclosure requirements are annulled, the real difficulty is in determining which state disclosure requirements are in fact inconsistent with TIL. Some guidance as to what are inconsistent state disclosure requirements is given in 12 C.F.R. §§ 226.6(b)<sup>48</sup> and 226.604.<sup>49</sup> However, because

<sup>47</sup>GUIDE, *supra* note 20, at 210.

<sup>48</sup>12 C.F.R. § 226.6(b) gives instances wherein state law is inconsistent with the TIL Act and Reg *Z*. It provides:

With respect to disclosures required by this Part, State law is inconsistent with the requirements of the Act and this Part, within the meaning of section 1610(a) of the Act, to the extent that it

of the possibility of civil and criminal liability for failing to comply with valid state disclosure requirements, the prudent creditor should disclose both the TIL and state disclosure requirements pursuant to 12 C.F.R. § 226.6(c).

Realizing the difficulty of determining inconsistent state disclosure requirements and the possibility that creditors may be subject to civil liability for failing to comply with a state disclosure requirement, the Board prescribed 12 C.F.R. § 226.6(c) which provides:

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 Part to be disclosed. *Any creditor who elects to make disclosures specified in any provision of State law which, under paragraph (b) of this section, is inconsistent with the requirements of the Act and this Part may*

(1) Make such inconsistent disclosures *on a separate paper* apart from the disclosures made pursuant to this Part, *or*

(2) Make such inconsistent disclosures *on the same statement* on which disclosures required by this Part are made; provided:

(i) All disclosures required by this Part appear separately and above any other disclosures,

(ii) Disclosures required by this Part are identified by a clear and conspicuous heading indicating that they are made in compliance with Federal law, and

(iii) All inconsistent disclosures appear separately and below

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(1) Requires a creditor to make disclosures different from the requirements of this Part with respect to  
form,  
content,  
terminology, or  
time of delivery;

(2) Requires disclosure of the amount of the finance charge determined in any manner other than that prescribed in § 226.4; or

(3) Requires disclosure of the annual percentage rate of the finance charge determined in any manner other than that prescribed in § 226.5.

<sup>49</sup>12 C.F.R. § 226.604 states that 12 C.F.R. § 226.6(b) (1) "refers to disclosures of the kinds of information covered by Regulation Z, and *not* to other or collateral information such as

[1] a statement telling the customer that he should read the contract carefully, or that there should be no blanks in the contract.

[2] Similarly, it does not refer to headings that State law may require on a contract such as 'Retail Installment Contract.'

[3] Similarly, a specification in a State law that certain size type must be used is not necessarily inconsistent with the requirements of Regulation Z."

a conspicuous demarcation line, and are identified by a clear and conspicuous heading indicating that the statements made thereafter are inconsistent with the disclosure requirements of the Federal Truth in Lending Act. (Emphasis added.)

If the creditor uses a separate federal disclosure statement (12 C.F.R. § 226.6(c)(1)), he is relieved of the burden of determining what state disclosure requirements are inconsistent with TIL. The creditor can comply with each disclosure law, federal and state, as though the other did not exist. However, if the creditor uses a combined federal and state disclosure statement (12 C.F.R. § 226.6(c)(2)), then he is compelled to determine which state disclosure requirements are inconsistent under 12 C.F.R. § 226.6(b).

The 1970 California Legislature added to the Unruh Act and the RLA, respectively, California Civil Code §§ 1801.5<sup>50</sup> and 2982(g),<sup>51</sup> which are identical in all material respects, to help alleviate some of the burden of double disclosure. However, these provisions are of only limited assistance, permitting the seller to disclose (1) any information required to be disclosed by the Unruh Act and the RLA in *terminology* required or permitted by Reg Z and (2) any additional information required or permitted to be disclosed under Reg Z.

The best solution to the problems and uncertainties of inconsistent state disclosure requirements is for the California Legislature to bring California law into substantial compliance with TIL. The California Legislature has amended both the Unruh Act and the RLA attempting to bring them into substantial compliance with the federal law, however, inconsistencies still exist.

*c. (3.5) Substantially Similar State Disclosure Requirements; Collateral State Disclosure Requirements*

State disclosure requirements which are not inconsistent with TIL are either substantially similar to the federal requirements or require disclosure of information collateral to the federal requirements. In the *Disclosure Hypothetical* (§ 3.2, *supra*), *CP* and *TP* were substantially similar state disclosure requirements and *N* was a collateral state disclosure requirement.

<sup>50</sup>Ch. 546, § 1, [1970] Cal. Stats. 1041; CAL. CIV. CODE § 1801.5 (West Supp. 1971) provides:

Notwithstanding any other provision of this chapter to the contrary, any information required to be disclosed in a retail installment contract or other document under this chapter may be set forth in terminology required or permitted under Regulation Z, as in effect at the time such disclosure is made. Nothing contained in this chapter shall be deemed to prohibit the disclosure in such contract or other document of additional information required or permitted under Regulation Z, as in effect at the time such disclosure is made.

<sup>51</sup>Ch. 1003, § 2, [1970] Cal. Stats. 1801.

TIL does not annul, alter, or affect, or exempt any creditor from complying with state disclosure requirements which are substantially similar or collateral to the federal disclosure requirements. 15 U.S.C. § 1610(a). Examples of collateral state disclosure requirements are given in 12 C.F.R. § 226.604.<sup>52</sup>

### 3. (3.6) *Truth in Lending's Effect upon State Non-Disclosure Regulatory Provisions*

Both the Unruh Act and the RLA contain regulatory provisions which do not relate directly to scope, disclosure, or enforcement. Examples are provisions relating to finance charge rate regulation<sup>53</sup> and those regulating the repossession and resale of consumer goods by creditors.<sup>54</sup> They have been classified in this article as “state non-disclosure regulatory provisions.”

15 U.S.C. § 1610(b) provides:

This subchapter does not otherwise<sup>55</sup> annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, *but not limited to*, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply. (Emphasis added.)

12 C.F.R. § 226.1(a)(2) provides:

*Neither the Act nor this part is intended to control charges for consumer credit, or interfere with trade practices except to the extent that such practices may be inconsistent with the purpose of the act. (Emphasis added.)*

The Act and Reg Z clearly state that they do not intend to directly regulate finance charges or any other charges for consumer credit or to annul present state law regulating these charges.<sup>56</sup> State non-disclosure regulatory provisions in general are not affected by TIL since they are neither “information” within the context of 15 U.S.C. § 1610(a) nor inconsistent with any TIL provision since the federal law contains no corresponding provisions.

<sup>52</sup>*Supra* note 49.

<sup>53</sup>CAL. CIV. CODE §§ 1805.1, 1810.2, and 2982(c) (West Supp. 1971).

<sup>54</sup>CAL. CIV. CODE §§ 1812.2-1812.5 and 2983.2 (West Supp. 1971).

<sup>55</sup>“Otherwise” means other than provided for in 15 U.S.C. § 1610(a) (Supp. V 1965-1970) relating to inconsistent state disclosure requirements.

<sup>56</sup>“Title I, the truth in lending and credit advertising title, neither regulates the credit industry, nor does it impose ceilings on credit charges. It provides for full disclosure of credit charges, rather than regulation of the terms and conditions under which credit may be extended.” H.R. REP. NO. 1040, 90th Cong., 2d Sess. 2 (1968).

#### 4. (3.7) *The Nature of California Disclosure Requirements*

The California disclosure requirements can be categorized into three basic types based on their relationship to the federal disclosure requirements (see § 1.3 *supra*):

- (1) substantially similar (or identical),
- (2) inconsistent, and
- (3) collateral.

Failure to disclose a California disclosure requirement which is substantially similar or identical to a federal disclosure requirement results in a violation of *both* the federal and applicable California Act. Inconsistent California disclosure requirements raises the problem of double disclosure and highlights the need for additional amendments of the affected California Act.

Violations of collateral California disclosure requirements normally occur when the creditor fails to comply altogether with the applicable California Act. The creditor may have overlooked the California Act in a desire to comply with TIL or he may have been under the mistaken notion that TIL preempted an otherwise valid and applicable California Act. In addition there is the possibility of violations of applicable California Act's non-disclosure regulatory provisions.

#### 5. (3.8) *THE FOCUS OF THIS PART*

An extensive technical comparison of the federal and California disclosure requirements is beyond the purpose of this article. This part will attempt to give only an introduction into the similarities, differences, and inconsistencies between the federal and California disclosure requirements. Emphasis is placed on inconsistent California disclosure requirements.

### B. FINANCE CHARGE

#### 1. (3.9) *FINANCE CHARGE DEFINITIONS AND CATEGORIES OF CHARGES*

The two most important items of disclosure under the TIL Act and Reg Z are the dollar amount of the finance charge and the annual percentage rate of the finance charge.

How each of the three acts determine the composition of its finance charge is really the question of how each act handles the disclosure of charges which a consumer must pay in excess of the cash price. The cost of credit to the consumer theory would include all such charges in the finance charge, however, all three acts use fundamentally a rate regulation theory which focuses on the economic re-

turn to the creditor. The rate regulation theory distinguishes between those charges which the creditor actually receives for his own use and those charges which never reach the pocket of the creditor but are passed on to others. The former are included in the finance charge, while the latter are excludable from the finance charge.<sup>57</sup>

Though all three acts use fundamentally a rate regulation approach in determining what charges are to be included in the finance charge and though both the Unruh Act and RLA have relatively broad definitions of finance charge, inconsistencies exist between the federal and California methods for determining the finance charge in consumer credit sale transactions. Certain charges which would be included within the TIL finance charge are excluded from the Unruh Act and RLA finance charges. The result is that in certain consumer credit sale transactions, one would calculate a different dollar amount and a different annual percentage rate for the finance charge in the same transaction depending upon whether the finance charge was determined according to federal or California law.

This subpart will focus primarily on the inconsistencies between the federal and California methods for determining the finance charge. It should be remembered that the Unruh Act and RLA methods for determining the finance charge, to the extent they are inconsistent with it, are annulled by the TIL Act.<sup>58</sup> See § 3.3, *supra*. For an overview of the similarities and differences, see the *Finance Charge Chart, Chart No. 4*.

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<sup>57</sup>GUIDE, *supra* note 20, at 15-17.

<sup>58</sup>15 U.S.C. § 1610(a) (Supp. V, 1965-1970), 12 C.F.R. § 226.6(b) (2).



Chart No. 4  
**FINANCE CHARGE CHART**

Charges enumerated in 12 C.F.R. 226.4	How Handled by the Unruh Act (CAL. CIV. CODE § ___)	How handled by the Rees-Levering Act (CAL. CIV. CODE § ___)
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**Charges Automatically Included:**

[1] time price differential 12 CFR 226.4(a)(1)	INCLUDED 1802.10	INCLUDED 2981(h)
[2] fee for an appraisal, investigation, or credit report 12 CFR 226.4(a)(4)	INCLUDED “all charges incident to investigating” 1805.4, 1810.4	INCLUDED a charge in excess of the “unpaid balance” 2981(h)

**Charges Conditionally Included:**

[3] premiums for credit life, accident, health, or loss of income insurance 12 CFR 226.4(a)(5) See § 3.15	EXCLUDED 1802.10	“Any such cost . . . <i>may</i> be included in the finance charge” 2981(g), 2982(a)(4)
[4] premiums for property or liability insurance 12 CFR 226.4(a)(6) See § 3.16.	EXCLUDED 1802.10	EXCLUDED 2981(g), 2982(a)(4)
[5] premiums for vendor’s single interest insurance 12 CFR 226.4(a)(7) See § 3.17.	EXCLUDED 1802.10	Compliance with Reg Z constitutes compliance with RLA 2982(f)

**Excludable Charges:**

[6] official fees for perfecting or releasing a security interest 12 CFR 226.4(b)(1)	EXCLUDED 1802.10, 1802.14	See [9] below.
[7] insurance in lieu of perfecting any security interest 12 CFR 226.4(b)(2)	No similar provision	No similar provision
[8] taxes <i>not</i> included in the cash price 12 CFR 226.4(b)(3)	“The cash price may include any taxes.” 1802.8	taxes must be included in the cash price 2981(e)
[9] license, certificate of title, and registration fees imposed by law 12 CFR 226.4(b)(4)	EXCLUDED 1802.10, 1802.14	EXCLUDED 2982(a)(5)
[10] late payment, delinquency, default, and reinstatement charges 12 CFR 226.4(c) 12 CFR 226.8(a)(4) requires that the amount or method of computing the amount of the charge be disclosed.	EXCLUDED and Regulated 1802.10, 1803.6, 1810.4	EXCLUDED and Regulated 2982(c) (2nd sent.)

*a. (3.10) The Truth in Lending Act*

TIL broadly defines what charges should be included in the finance charge. 15 U.S.C. § 1605(a); 12 C.F.R. § 226.4(a). 12 C.F.R. 226.4(a) defines finance charges as follows:

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 credit*, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party. (Emphasis added.)

After analyzing TIL's definitions of finance charge, Professors Robert W. Jordan and William D. Warren developed a workable test for determining when a charge is to be included in the finance charge. They state the test as follows:

a charge is part of the finance charge if it is tied by the creditor to the grant of the credit and would not have had to be paid by the debtor except for the grant of the credit.<sup>59</sup>

15 U.S.C. § 1605(a)-(c) and 12 C.F.R. § 226.4(a) list specific types of charges which must be included in the finance charge, however, this does not purport to be an exclusive list.<sup>60</sup> 15 U.S.C. § 1605(d) and 12 C.F.R. § 226.4(b)-(c) list types of charges which are excludable from the finance charge; it is probably an exclusive list. All of the above charges can be divided into three categories:

(1) charges which are automatically included in the finance charge (12 C.F.R. § 226.4(a)(1)-(4));

(2) charges which are included in the finance charge unless certain conditions in addition to itemization and disclosure are met (12 C.F.R. § 226.4(a)(5)-(7)); and

(3) charges which are excludable from the finance charge if they are itemized and disclosed to the customer (12 C.F.R. § 226.4(b)-(c)).

*b. (3.11) The Unruh Act*

California Civil Code § 1802.10 defines finance charge as follows:

the amount however denominated or expressed which the retail buyer contracts to pay or pays for the privilege of purchasing goods or services to be paid for by the buyer in installments; *it does not include* the amounts, if any, charged for *insurance premiums, delinquency charges, attorney's fees, courts costs, collection expenses or official fees*. (Emphasis added.)

Additional guidance is given by California Civil Code §§ 1805.4 and 1810.4. California Civil Code § 1805.4 (relating to finance

<sup>59</sup>GUIDE, *supra* note 20, at 18-19.

<sup>60</sup>*Id.* at 19.

charges in retail installment contracts) provides that “[t]he finance charge shall be inclusive of all charges incident to investigating and making the contract and for the extension of the credit provided for in the contract.” California Civil Code § 1810.4 (relating to finance charges in retail installment accounts) provides that “[t]he finance charge shall include all charges incident to investigating and making the retail installment account.”

From the above provisions, it would seem that the Unruh Act has only two rather clear cut categories:

(1) charges which are expressly excluded from the finance charge, such as insurance premiums, delinquency charges, and official fees, and (2) charges which come within the Unruh Act’s definitions of finance charge and are not expressly excluded.

*c. (3.12) The Rees-Levering Act*

The RLA takes a different approach than the Unruh Act and TIL by defining finance charge as “any amount which the buyer agrees to pay to the seller in excess of the unpaid balance.” CAL. CIV. CODE § 2981(h). “Unpaid balance” is defined as the difference between the cash price and the downpayment, plus all insurance premiums (except for credit life or disability insurance when the amount thereof is included in the finance charge) which are included in the total of payments, plus the total amount paid or to be paid (1) to any public officer in connection with the transaction and (2) for license, certificate of title, and registration fees imposed by law. CAL. CIV. CODE § 2981(g).

The charges under the RLA can be divided into three categories, which are slightly different than TIL’s three categories:

(1) charges which are automatically included in the finance charge, that is, any charge in excess of the “unpaid balance”;

(2) credit life or disability insurance *may* be included in the finance charge when the amount thereof is separately stated on the face of the contract (CAL. CIV. CODE §§ 2981(g), 2982(a)(4)); and

(3) charges which are expressly excluded from the finance charge, that is, all charges which would be included in the “unpaid balance.”

**2. (3.13) CHARGES AUTOMATICALLY INCLUDED IN THE FINANCE CHARGE — CHARGES IN GOODS OR SERVICES**

The Unruh Act defines finance charge (CAL. CIV. CODE § 1802.10) to mean in part

*the amount however denominated or expressed* which the retail buyer contracts to pay or pays for the privilege of purchasing goods

or services to be paid for by the buyer in installments. (Emphasis added.)

The Unruh Act in defining retail installment contract (CAL. CIV. CODE § 1802.6) states in part

. . . in which a finance charge is computed upon and added to the unpaid balance at the time of sale or *where no finance charge is added but*

[1] the goods or services are available at a lesser price if paid by cash or

[2] where the buyer, if he had paid cash, would have received any additional goods or services or any higher quality goods or services at no added cost over the total amount he pays in installments. (Emphasis added.)

An example of Situation [1] in California Civil Code § 1802.6 is where a merchant sells a television for \$300 if bought on credit, but will sell for \$250 if paid for in cash. An example of Situation [2] is where a merchant sells a television set for \$300 if bought on credit, but, if the \$300 is paid in cash gives a radio in addition to the television set.

California Civil Code § 1802.6 appears to indicate that the Unruh Act finance charge, at least those relating to retail installment contracts, include only monetary charges computed upon the unpaid balance, while charges such as the \$50 in the Situation [1] example and the price of the radio in Situation [2] example are excluded from the finance charge and need not be disclosed to the buyer. This interpretation would seem to be incorrect in the light of the broad wording of California Civil Code § 1802.10,<sup>61</sup> however, an ambiguity and even, perhaps, an internal conflict exists between the two provisions.

If this rather strict interpretation is the correct interpretation, then the Unruh Act is inconsistent with TIL to the extent that these charges are excluded from the Unruh Act finance charge. In both situations, the buyer is paying more or getting less only because he is buying on credit. These charges would be included in the TIL finance charge since they are charges "imposed directly . . . by the creditor as an incident to or as a condition of the extension of credit" within 12 C.F.R. § 226.4(a) and would come within 12 C.F.R. § 226.4(a) (1) as a "time price differential . . . or other system of additional charges." The same result with perhaps a clearer understanding could be reached by applying Professors Jordan and Warren's test: the charges were "tied by the creditor to the grant of the credit and would

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<sup>61</sup>52 OP. CAL. ATT'Y. GEN. 242, 245 (1969).

not have had to be paid by the debtor except for the grant of the credit.”<sup>62</sup>

The California Legislature can avoid this ambiguity and conform California Civil Code § 1802.6 to the wording of TIL, 12 C.F.R. § 226.2(k), by

- (1) substituting “in which a finance charge is or may be imposed” for the above quoted portion of California Civil Code § 1802.6 and
- (2) placing Situations [1] and [2] of California Civil Code § 1802.6 in California Civil Code § 1802.10 as illustrations of “the amount however denominated or expressed.”

### ***3. (3.14) CHARGES WHICH ARE CONDITIONALLY INCLUDED IN THE FINANCE CHARGE — THE SPECIAL PROBLEM OF INSURANCE***

TIL requires that certain types of insurance be included in the finance charge unless certain prescribed conditions are met by the creditor.

TIL concerns itself with three types of insurance:

- (1) credit life, accident, health, or loss of income insurance;
- (2) property or liability insurance; and
- (3) insurance protecting the creditor against the customer’s default or other credit loss, such as vendor’s single interest insurance.

As to the procurement of insurance, the customer can be confronted with a variety of situations, this discussion is limited to the six most common situations represented by the following matrix diagram:

	insurance required by the creditor	insurance <i>not</i> required by the creditor
insurance procured from and financed by the creditor	A	X
insurance procured from a separate insurance broker but financed through the creditor	B	Y
insurance procured by the customer from a separate insurance broker	C	Z

#### ***a. (3.15) Credit Life Insurance***

Credit life, accident, health, and loss of income insurance protect the creditor from the possibility that the customer will be unable to pay for the goods or services purchased on credit because of death, accident, or loss of income.

<sup>62</sup>GUIDE, *supra* note 20, at 18-19.

15 U.S.C. 1605(b) and 12 C.F.R. 226.4(a)(5) provide that if any charge or premium for credit life, accident, health or loss of income insurance, written in connection with any consumer credit transaction, is *required by the creditor* then the charges or premiums must be included in the finance charge. This means that the amount of the premiums paid by a customer in Situations *A*, *B*, and *C* must be included in the TIL finance charge.

This type of insurance can be excluded from the finance charge if

- (i) the insurance coverage is *not required* by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and
- (ii) any customer desiring such insurance coverages gives specific dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance. [12 C.F.R. § 226.4(a)(5).]

This means that if the above conditions are met by the creditor, the insurance premiums for this type of insurance would be excluded from the finance charge in Situations *X*, *Y*, and *Z*. However, in Situations *X* and *Y*, the premiums must be included in the amount financed and disclosed in accordance with 12 C.F.R. § 226.8(c)(4).

In contrast, the Unruh Act expressly excludes all insurance premiums from the finance charge but requires it to be included in the amount financed. CAL. CIV. CODE §§ 1802.10, 1803.3(g). This makes the Unruh Act inconsistent with TIL in Situations *A*, *B*, and *C* where the insurance is required by the creditor. Situations *X*, *Y*, and *Z* would be treated the same under both acts.

The RLA permits the premium for credit life or disability insurance to be included in the finance charge when the amount thereof is separately stated on the face of the contract. CAL. CIV. CODE §§ 2981(g), 2982(a)(4). However, a seller would likely be reluctant to include premiums for any type insurance in the finance charge since (1) it might raise the amount of the finance charge above the limits prescribed by California Civil Code § 2982(c) and (2) it would result in a higher annual percentage rate.

The RLA is inconsistent with TIL to the extent that the RLA permits a seller to exclude premiums for credit life and disability insurance in Situations *A*, *B*, and *C*.

The ramifications of the Unruh Act and RLA inconsistencies can be illustrated in the following hypothetical: (This hypothetical also applies to the discussions following on property and liability insurance and on vendor's single interest insurance.)

Suppose customer *H* wants to buy on credit a television from creditor *S*. *S* states that he will sell the television to *H* on credit if *H* ob-

tains credit life and disability insurance. *H* agrees and procures the insurance from *S*. This is Situation *A* in the matrix diagram. *S* makes disclosure #1 in conformity with the Unruh Act. Disclosure #2 is the same transaction but disclosed in accordance with TIL.

	Disclosure #1 Unruh Act		Disclosure #2 Truth in Lending
Cash Price	\$500.00		\$500.00
Downpayment	<u>-0-</u>		<u>-0-</u>
Unpaid Balance of Cash Price	\$500.00		\$500.00
Insurance	50.00		-0-
Official Fees	<u>-0-</u>		<u>-0-</u>
Amount Financed (unpaid balance)	\$550.00		\$500.00
FINANCE CHARGE	100.00	(\$100.00 = finance charge on \$550.00)	140.90
			(\$50.00 = required insurance; \$90.90 = finance charge on \$500.00)
Total of Payments	<u>\$650.00</u>		<u>\$640.90</u>
Payable in 22 installments as follows * * *			Payable in 22 installments as follows * * *
Deferred Payment Price	\$650.00		\$640.90

ANNUAL PERCENTAGE RATE	18.00%	27.25%
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The differences in the two disclosures are quite evident. The TIL disclosure resulted in a total of payments \$9.10 less than under the Unruh Act disclosure but an annual percentage rate 9.25% higher. This inconsistency results because the Unruh Act (1) excludes all insurance from the finance charge and (2) requires the insurance to be included in the amount financed.

*b. (3.16) Property or Liability Insurance*

Property and liability insurance protect the creditor from loss or damage to the collateral of the security agreement from such risks as fire, theft, or collision.

15 U.S.C. § 1605(c) and 12 C.F.R. § 226.4(a)(6) provide that if any charge or premium for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property is *required* by the creditor and is *obtained from or through the creditor*,

then the charge or premium must be included in the finance charge unless certain conditions are met.

Premiums for property and liability insurance can be excluded from the finance charge, even if required by the creditor, if the creditor furnishes the customer "a clear, conspicuous, and specific statement in writing . . . setting forth the cost of the insurance if obtained from or through the creditor and stating that the customer may choose the person through which the insurance is to be obtained." 12 C.F.R. § 226.4(a)(6). If the above conditions are met and if the customer elects to procure the insurance otherwise than from or through the creditor (Situation *C*), then the creditor is not required to disclose the cost of the insurance or include the premium in the finance charge. However, if the cost of such insurance is to be financed through the creditor (Situations *A* and *B*), the premiums must be included in the amount financed and disclosed under 12 C.F.R. § 226.8(c)(4), but the premiums are not included in the finance charge. 12 C.F.R. § 226.405.

In contrast, both the Unruh Act and the RLA exclude the premiums for property and liability insurance from the finance charge<sup>63</sup> and, instead, include them in the amount financed. Therefore, the Unruh Act and the RLA are inconsistent with TIL to the extent they do not require the premiums for property and liability insurance to be included in the finance charge when such insurance is required by the creditor, obtained either from or through him, and he failed to meet the above conditions.

*c. (3.17) Vendor's Single Interest Insurance*

15 U.S.C. § 1605(a)(5) and 12 C.F.R. § 226.4(a)(7) provide that a "[p]remium or other charge for any other guarantee or insurance protecting the creditor against the customer's default or other credit loss" must be included in the finance charge. 12 C.F.R. 226.4(a)(7).

Vendor's single interest insurance, hereinafter referred to as V.S.I. insurance, is the major kind of insurance covered by 15 U.S.C. § 1605 (a)(5) and 12 C.F.R. § 226.4(a)(7). V.S.I. insurance is written only in connection with a credit transaction and indemnifies the creditor against, among other perils, conversion, embezzlement, and secretion of the collateral by the customer. Amounts payable on account of loss are payable only to the creditor. The amount of any indemnity payable under the policy is directly related to the amount of the credit loss, in that indemnity can never exceed the amount of the unpaid principal balance of the credit sale. A claim under the policy is not valid unless the customer has defaulted in payment. Additionally,

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<sup>63</sup>CAL. CIV. CODE §§ 1802.10, 2981 (g)-(h), and 2982(a) (6) (West Supp. 1971).



many V.S.I. policies indemnify the creditor against expense incurred in transporting the collateral to the creditor from the place of repossession. 12 C.F.R. § 226.404.

12 C.F.R. § 226.404 makes the inclusion of the premium for V.S.I. insurance into the finance charge conditional. It provides that charges or premiums for V.S.I. insurance may be excluded from the finance charge if

(1) the insurer waives all right of subrogation against the customer and (2) the creditor makes disclosures pursuant to 12 C.F.R. § 226.4(a)(6). However, if the insurer does not waive subrogation, then the premiums for the V.S.I. insurance must be included in the finance charge.

The Unruh Act is again inconsistent with TIL in excluding all insurance premiums from the finance charge (CAL. CIV. CODE § 1802.10), however, California Civil Code § 2982(f) of the RLA provides:

Notwithstanding any other provision of this chapter to the contrary, in any instance in which vendor's single interest insurance is to be written in connection with a conditional sale contract, a conditional sale contract complying with the applicable disclosure requirements of Regulation Z, as in effect on the date of such contract, shall be deemed to comply with the requirements of paragraphs 1 to 8, inclusive, of subdivision (a), *irrespective of any difference* between the provisions of that regulation and this chapter with respect to any information to be disclosed, the terminology, form or content of such disclosures, the amounts to be included in or manner of determining the unpaid balance, the finance charge or any other item of information to be disclosed, or otherwise. (Emphasis added.)

The RLA is, therefore, consistent with Reg Z's requirements as to V.S.I. insurance. California Civil Code § 2982(f) further provides that it will not apply to any amount which is a factor in computing the maximum permissible finance charge under California Civil Code § 2982(c) or the refund of any unearned portion of the finance charge under California Civil Code § 2982(d) or for the purpose of computing any penalty under California Civil Code § 2983.1.

### C. (3.18) ANNUAL PERCENTAGE RATE VERSUS ADD-ON RATE

TIL's annual percentage rate gives the consumer a basis by which he can make a meaningful comparison of the various costs of credit available to him, thus enabling him to shop more effectively for credit.

The annual percentage rate (hereinafter referred to as APR) is computed according to what is known as the actuarial method of computation.<sup>64</sup> This is the method traditionally used in first mortgage real estate financing. It is the true annual rate of the finance charge computed on the declining unpaid balance of the amount financed (the principal balance) in which payments are applied first to the accumulated finance charge and then to the reduction of the unpaid balance of the amount financed.

APR is closely comparable to the interest rate the consumer receives on his savings, thus placing the consumer in a better position of determining whether to use savings rather than credit or to postpone the use of credit and save.<sup>65</sup>

The add-on method of computation, used in the Unruh Act and the RLA, simply states the finance charge as so many dollars per hundred per year. The add-on method does not make allowance for the reduction of the amount financed (the principal balance) as the consumer makes payments. This results in the APR which is computed on a declining balance ordinarily being approximately twice the add-on rate.<sup>66</sup> Because disclosures by the add-on method would be misleading and because it is not the method used by actuaries to reflect the true cost of credit, it is not permitted by Reg Z for purposes of disclosure. The add-on method may, however, be used to determine the amount of the finance charge. In all cases, the APR of the finance charge must be disclosed to the consumer in accordance with the federal requirements.

The following chart gives a rough indication of the relationship between the TIL APR and the maximum finance charge rates allowed in the Unruh Act and the RLA:

*Chart No. 5*  
*California's Maximum Finance Charge Rates and the Annual Percentage Rate*

<i>Unruh Act</i>	Maximum Finance Charge Rate Under California Law	Annual Percentage Rate
Retail Installment Contract CAL. CIV. CODE § 1805.1	\$10 per \$100/year (10%) on first \$1,000	18.0%
	\$ 8 per \$100/year (8%) on amounts over \$1,000	14.5%
Retail Installment Accounts CAL. CIV. CODE § 1810.2	1½%/month on first \$1,000	18.0%
	1 %/month on amounts over \$1,000	10.9%
<i>Rees-Levering Act</i> CAL. CIV. CODE § 2982(c)	12%/year (1%/month)	21.5%

<sup>64</sup>15 U.S.C. § 1606 (Supp. V, 1965-1970), 12 C.F.R. § 226.5, and Supplement I to Reg Z.

<sup>65</sup>GUIDE, *supra* note 20, at 37.

The above chart will be misleading in certain transactions because of inconsistencies in determining the TIL and the Unruh and RLA finance charges. Refer back to the hypothetical illustration in § 3.15. In that illustration, if the creditor *S* had disclosed Disclosure #1's APR, the above chart would indicate that the creditor had not exceeded the maximum finance charge for an Unruh Act retail installment contract, however, he would be in violation of TIL. If he correctly disclosed the APR as 27.25% (Disclosure #2), he would be in compliance with TIL, but according to the above chart he would be in violation of the Unruh Act even though he actually would not be.

Until the inconsistencies between the federal and California methods for determining finance charges are resolved, the attorney will have to make separate calculations to determine (1) that the disclosed APR is the correct TIL APR and (2) that the finance charge does not exceed the rate permitted by California law.

#### D. (3.19) OPEN END CREDIT SALE DISCLOSURE

Open end credit sales disclosure is a very complex area of consumer credit protection law,<sup>67</sup> however, there does not appear to be any inconsistencies between TIL and the California Acts. This is mainly because (1) the RLA does not apply to open end credit sales of motor vehicles (see § 2.15, *supra*) and (2) the California Legislature has incorporated into the Unruh Act nearly all of Reg Z's disclosure requirements for open end credit accounts.

In 1969, the California Legislature made a substantial revision of the Unruh Act provisions dealing with retail installment accounts. The Legislature incorporated nearly all of 12 C.F.R. § 226.7(a)-(c), (e) (including the TIL terminology) dealing with specific disclosures in open end credit accounts.<sup>68</sup> See *Cross-Reference Chart, Chart No. 6*. In 1970, the Legislature amended the 1969 provisions in an attempt to bring them in conformity with Unruh Act terminology.<sup>69</sup>

As can be seen from the *Cross-Reference Chart*, the Unruh Act retail installment accounts disclosure provisions are substantially the

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<sup>66</sup>CRIS, *supra* note 23, at 11.

<sup>67</sup>See generally GUIDE, *supra* note 20, at 81-105. Clontz, *Open-end Credit Under Truth-in-Lending*, 19 AMER. UNI. L. REV. 236 (1970).

<sup>68</sup>Ch. 625, §§ 13-23, [1969] Cal. Stats. 1269.

<sup>69</sup>Ch. 546, §§ 29.5-32, [1970] Cal. Stats. 1051. "Open end credit" was changed to "retail installment," "creditor" to "seller," and "customer" to "buyer;" however, "creditor" is still used in CAL. CIV. CODE § 1810.1(f) (West Supp. 1971), "customer" in CAL. CIV. CODE § 1810.3(b) (West Supp. 1971), and "annual percentage rate" in CAL. CIV. CODE § 1810.1(d). (West Supp. 1971).

same as, if not identical to, the Reg Z open end credit accounts disclosure provisions. The major omission from the Unruh Act is 12 C.F.R. § 226.7(b)(6) requiring disclosure of the annual percentage rate in the periodic statement. However, note that the disclosure of the annual percentage rate was included in the Unruh Act as to the initial statement. 12 C.F.R. § 226.7(a)(4), CAL. CIV. CODE § 1810.1(d). Disclosure of the Comparative Index of Credit Cost was also omitted from the Unruh Act, however, this is an optional disclosure item under Reg Z. 12 C.F.R. §§ 226.7(a)(5), 226.7(b)(7), and 226.11.

Chart No. 6  
CROSS-REFERENCE CHART SHOWING  
RELATIONSHIP BETWEEN REGULATION Z  
OPEN END CREDIT ACCOUNT PROVISIONS AND  
UNRUH ACT RETAIL INSTALLMENT ACCOUNT PROVISIONS

	Regulation Z (12 C.F.R. § _____)	Unruh Act (CAL. CIV. CODE § _____)
Opening New Account—		
Initial Statement	226.7(a)	1810.1 substantially similar, except as noted below
Comparative Index of Credit Cost	226.7(a)(5)	omitted
Special Penalty for failing to deliver initial statement to buyer	not present	1810.1
Maximum Allowable Finance Charges	not present	1810.2
Periodic Statement	226.7(b)	1810.3(a) substantially similar, except as noted below
Disclosure of annual percentage rate	226.7(b)(6)	omitted [Note: CAL. CIV. CODE § 1810.1(d) is identical to 12 C.F.R. § 226.7(a) (4) requiring disclose of annual percentage rate in initial statement.]
Comparative Index of Credit Cost	226.7(b)(7)	omitted
Location of Disclosures	226.7(c)	1810.3(b) 1810.3(b)(1) & (2) contain deletions and additions from 12 C.F.R. 226.7(c)(1) & (2); 1810.3(b)(3) & (4) identical to 226.7(c)(3) & (4).
Finance Charge Imposed at Time of Transaction (applies to creditor who imposes a finance charge for honoring another creditor's credit card)	226.7(d)	omitted
Change in Terms	226.7(e)	1810.3(c)
Open End Credit Accounts Existing on July 1, 1969 (the date the TIL Act went into effect)	226.7(f)	substantially similar omitted

## E. (3.20) CLOSED END CREDIT SALE DISCLOSURE

This subpart will limit its discussion to two areas of closed end credit sale disclosure:<sup>70</sup> (1) disclosure of numerical items in the standard closed end credit sale and (2) disclosure in add-on sales and rewrites. These two areas are chosen as examples of the nature of the inconsistencies and differences between TIL and the California Act in closed end credit sale disclosure. It should not be assumed that these are the only two areas of inconsistencies and differences. Inconsistencies in the inclusion of insurance premiums in the finance charge were discussed previously. See §§ 3.14-3.17, *supra*. Other possible areas include mail or telephone orders,<sup>71</sup> refinancing, deferrals, and extensions,<sup>72</sup> and side loans in conjunction with closed end credit sales.<sup>73</sup>

## 1. (3.21) DISCLOSURE OF NUMERICAL ITEMS

Reference should be made to the *Closed End Credit Sale Disclosure Chart, Chart No. 7*, Disclosure Items [1] through [13].

Several inconsistencies and omissions exist between TIL and the California Acts as to the disclosure of numerical items in the standard closed end credit sale.

Creditor anxiety caused by inconsistent federal and state disclosure terminology and the burden of double disclosure has been alleviated to an extent by the addition of California Civil Code §§ 1801.5 and 2982(g) which permit the creditor to disclose any required Unruh Act and RLA information in terminology required or permitted by Reg Z. See § 3.4 *supra*.

*Unpaid Balance and Amount Financed.* Reg Z uses the term "amount financed" to describe the difference between the unpaid balance and any prepaid finance charge. If there is no prepaid finance charge, presumably there would be no figure to be disclosed as "amount financed." However, since "amount financed" is obviously the crucial term, it has been suggested that perhaps the safest approach for creditors when there is no prepaid finance charge is to disclose the figure as "Amount Financed (unpaid balance)."<sup>74</sup> This ap-

<sup>70</sup>See generally, GUIDE, *supra* note 20, at 107-150. 12 C.F.R. § 226.203 distinguishes open end credit from credit other than open end.

<sup>71</sup>15 U.S.C. § 1638(c) (Supp. V, 1965-1970), 12 C.F.R. §§ 226.8(g) and 226.802, CAL. CIV. CODE § 1803.8 (West Supp. 1971).

<sup>72</sup>12 C.F.R. §§ 226.8(j) and 226.8(1), CAL. CIV. CODE §§ 1807.1 and 1807.2 (West Supp. 1971).

<sup>73</sup>See § 2.9. 12 C.F.R. §§ 226.6(d) and 226.8(b)-(d), CAL. CIV. CODE § 2982.5 (West Supp. 1971).

<sup>74</sup>GUIDE, *supra* note, at 124.

proach also avoids any possible conflict with the Unruh Act and the RLA.

*Finance Charge and Other Charges.* Inconsistencies exist between the TIL and the California Acts' finance charge provisions as they relate to insurance charges. See §§ 3.14-3.17, *supra*. To the extent that TIL and a California Act are inconsistent in a specific transaction, the differences would be reflected in Disclosure Items [4] and [8].

*Total of Payments.* As was indicated in the Disclosure Hypothetical (§ 3.2, *supra*), the Unruh Act's "time balance" and the RLA's "contract balance" are inconsistent with TIL to the extent that either term is used instead of TIL's "total of payments" in a transaction subject to the disclosure requirements of TIL and either California Act.

*Balloon Payments and Deferred Payment Price.* The RLA does not require that any balloon payments or the deferred payment price be disclosed.

*Annual Percentage Rate.* Neither the Unruh Act nor the RLA provide for disclosure of the annual percentage rate of the finance charge in closed end credit sales. See § 3.18, *supra*.

Chart No. 7  
CLOSED END CREDIT SALE  
DISCLOSURE CHART

	<u>TRUTH IN LENDING</u>	<u>UNRUH ACT</u> (CAL. CIV. CODE § ___)	<u>REES-LEVERING ACT</u> (CAL. CIV. CODE § ___)
Time of Disclosure	before credit is extended 15 USC 1638(b)	before signing of contract 1803.4	before signing of contract 2982(a)
	before the consumer credit transaction is consummated 12 CFR 226.8(a) 226.2(cc)		

TIL DISCLOSURE ITEMS — (\*indicates section in which the item is defined.)

[1] "cash price"	12 CFR 226.2(i)*  12 CFR 226.8(c)(1) 15 USC 1638(a)(1)	1802.8*  1803.3(b)	2981(e)*  2982(a)(1)
[2] downpayment "cash downpayment" "trade-in"  "total downpayment"	12 CFR 226.8(c)(2) 15 USC 1638(a)(2)	1803.3(c)	2981(f)* 2982(a)(2)
[3] "unpaid balance of cash price" [1] - [2] = [3]	12 CFR 226.8(c)(3) 15 USC 1638(a)(3)	1803.3(d)	2982(a)(3)
[4] other charges	12 CFR 226.4(b)* 12 CFR 226.4(a)(5)-(7) 15 USC 1605(d)*  12 CFR 226.8(c)(4) 15 USC 1638(a)(4)	insurance 1803.3(e)  official fees 1802.14*  1803.3(f)	insurance 2982(a)(4)  official fees 2982(a)(5)
[5] "unpaid balance" [3] + [4] = [5]	12 CFR 226.8(c)(5)	"amount financed" or "unpaid balance" 1802.11* 1803.3(g)	"unpaid balance" only 2981(g)* 2982(a)(6)
[6] "prepaid finance charge" "required deposit balance"	12 CFR 226.8(e)* 12 CFR 226.8(c)(6)	no similar provision	no similar provision
[7] "amount financed" [5] - [6] = [7]	12 CFR 226.2(d)* 12 CFR 226.8(c)(7) 15 USC 1638(a)(5)	See Item [5]	See Item [5]

TRUTH IN LENDINGUNRUH ACTREES-LEVERING ACTTIL DISCLOSURE ITEMS

[8] "finance charge"	12 CFR 226.2(q)* 226.4* 15 USC 1605*	1802.10* 1805.4*  1803.3(h)	2981(h)*  2982(a)(7)
[9] "total of payments" [7] + [8] = [9]	12 CFR 226.8(b)(3)	"total of payments" or "time balance" 1802.12*  1803.3(i)	"total of payments" or "contract balance" 2981 (i)*  2982(a)(8)
[10] number, amount, and due dates of payments scheduled to repay the indebtedness	12 CFR 226.8(b)(3) 15 USC 1638(a)(8)	1803.3(i)	2982(a)(8)
[11] "balloon payments"	12 CFR 226.8(b)(3)	1807.3* 1803.3(k)	no similar provision
[12] "deferred payment price" [1] + [4] + [8] = [12]	12 CFR 226.8(c)(8)(ii)	1802.9*  1803.3(j) [1] + insurance + official fees + [8] = [12]	no similar provision
[13] "annual percentage rate"	12 CFR 226.2(e)* 226.5* 15 USC 1606*  12 CFR 226.8(b)(2) 15 USC 1638(a)(7)	no similar provision	no similar provision
[14] date on which finance charge begins to accrue if different from date of transaction	12 CFR 226.8(b)(1)	no similar provision	no similar provision
[15] charges for late payments	12 CFR 226.8(b)(4) 15 USC 1638(a)(9)	1803.6	2982(c)



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UNRUH ACT

REES-LEVERING ACT

TIL DISCLOSURE ITEMS

[16] description of type of security interest; identification of collateral	12 CFR 226.8(b)(5) 15 USC 1638(a)(10)	related provisions 1803.2(b) 1804.3	related provisions 2981(a) 2984.2
[17] prepayment penalty	12 CFR 226.8(b)(6)	prohibited see [18]	prohibited see [18]
[18] prepayment rebate	12 CFR 226.8(b)(7)	CC 1806.3* 1803.2(c)*  CC 1803.3(1)	CC 2982(d)* 2982(a)(10)*  no similar disclosure requirement
[19] notice of customer's right of rescission, if applicable	12 CFR 226.9* 15 USC 1635*  12 CFR 226.9(b)	no similar provision	no similar provision

## 2. ADD-ON VERSUS REWRITE

### a. (3.22) The Fundamental Differences

Suppose buyer *B* had previously purchased a television from seller *S* on a retail installment contract. The outstanding balance (the unpaid total of payments) on this contract is \$300.00; the amount financed and the finance charge yet to be paid are \$250.00 and \$50.00, respectively. *B* is now making a second credit purchase, this time of furniture, from *S*. The total of payments on the second credit purchase is \$700.00; the amount financed and the finance charge are \$600.00 and \$100.00, respectively. *B* wants the two credit purchases consolidated so he will have only one schedule of payments.

The add-on and the rewrite are the two recognized methods for consolidating two or more credit sales into one. Assuming that all other statutory requirements are met, the following computations using the figures from the above hypothetical illustrate the basic differences between the rewrite and the add-on sale:

<i>REWRITE</i>		<i>ADD-ON</i>	
<i>First Sale</i> (treated as prepaid)		<i>First Sale</i>	
unpaid total of payments	\$ 300.00	unpaid total of payments	\$ 300.00
unearned finance charge	<u>-50.00</u>		
net amount financed to be consolidated	\$ 250.00		
<i>Second Sale</i>		<i>Second Sale</i>	
amount financed	600.00	amount financed	\$600.00
	<u>        </u>	finance charge	<u>100.00</u>
consolidated amount financed	\$ 850.00	total of payments	<u>700.00</u>
finance charge	<u>150.00</u>		
new total of payments	\$1,000.00	new total of payments	\$1,000.00

In a rewrite, the seller treats the first credit sale as if it were prepaid. The amount of any unearned finance charge is rebated to the buyer by deducting it from the outstanding balance (the unpaid total of payments) of the first credit sale. The net is the amount of the unpaid amount financed of the first sale. This net amount financed is added to the amount financed of the second credit sale<sup>75</sup> resulting in a consolidated amount financed. The finance charge is computed on this consolidated amount financed. The finance charge plus the consolidated amount financed gives the new total of payments from which a new schedule of payments is arranged. In short, the seller has rewritten the two credit sales in order to consolidate them into a new contract, hence the name "rewrite."

In an add-on sale, unlike the rewrite, the seller does *not* treat the first credit sale as if it were prepaid. The seller imposes a finance charge on the second credit sale separately. The total of payments of the second credit sale is added to the outstanding balance (the unpaid total of payments) of the first credit sale for a new total of payments from which a new schedule of payments is arranged. In short, the seller has added the second credit sale on to the first credit sale, hence the name "add-on."

The fundamental differences between the add-on sale and the rewrite are muddled in the complex interrelationship among the TIL Act, Reg Z, and Unruh Act as to requirements for an add-on sale, time disclosures must be made, allocation of payments among the various credit sales, and what disclosures must be made.<sup>76</sup>

Correctly classifying the consolidation of the above two credit sales is an essential task. *S* must properly classify the consolidation as to both the federal and California law. Improper classification would result in improper disclosure and possible civil liability.

*b. Add-on*

*(1)(3.23) The Elements of the TIL Act Add-on Provision*

15 U.S.C. § 1638(d) of the TIL Act provides:

*If a consumer credit sale is*

- [1] one of a series of consumer credit sales transactions made pursuant to an agreement

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<sup>75</sup>This discussion assumes that there has been only two credit sales, however, the same rules will apply if the seller makes more than two credit sales to the buyer.

<sup>76</sup>"The RLA specifies that the installment payments are to be based upon the original contract balance [total of payments] and not to include obligations later incurred by the buyer, such as repair bills. [CAL. CIV. CODE § 2981(i) (West Supp. 1971).] This precludes the use of the 'add-on' and is a desirable measure of consumer protection." Note, *Recent Legislation: The Rees-Levering Motor Vehicle Sales and Finance Act*, 10 U.C.L.A. L. REV. 125, 135-136 (1962).

- [2] providing for the addition of the *deferred payment price* of that sale to an existing outstanding balance, and
  - [3] the person to whom the credit is extended has approved in writing both
    - [a] the annual percentage rate or rates and
    - [b] *the method of computing the finance charge or charges*, and
  - [4] the creditor retains no security interest in any property as to which he has received payments aggregating the amount of the sales price including any finance charges attributable thereto,
- then* the disclosure required under subsection (a) for the particular sale may be made at *any time not later than the date the first payment for that sale is due*.
- For* the purposes of this subsection, in the case of items purchased on different dates, the *first purchased shall be deemed first paid for*, and in the case of items purchased on the same date, the lowest price shall be deemed first paid for. (Emphasis added.)

To facilitate comparison of the TIL Act, Reg Z, and the Unruh Act, reference in this subpart will be made to the “If,” “then,” and “For” clauses, and Requirements [1] through [4] of the “If” clause of 15 U.S.C. § 1638(d). Requirements [1] and [2] describe the basic elements of an add-on sale discussed in § 3.22. The “pursuant to an agreement” requirement (Requirement [1]) is normally satisfied by a clause in the first credit sale’s contract. Requirement [3] lists two disclosures which must be made before the current sale is consummated but not necessarily at the time of the first sale. Requirement [4] states the rule that no security interest can be retained in any property which has been fully paid. The “then” clause gives the time period during which disclosure for the second credit sale may be given if the preceding four requirements are satisfied. If any of the four requirements are not satisfied, then the consolidation of the two credit sales will be treated under 12 C.F.R. § 226.8(j) as a rewrite. 12 C.F.R. § 226.805. The “For” clause states how payments are to be allocated to the various debts owed by the consumer to the creditor. It requires that payments be allocated first to fully pay off the first debt, then the second debt, and so forth. Borrowing from accounting, this is sometimes called the “first-in, first-out” method of allocation. When a debt has been fully paid, the creditor must release any security interest he retained in the property which secured the debt (Requirement [4]).

(2) (3.24) *A Comparison of the TIL Act, Reg Z, and Unruh Act Add-on Provisions*

The Unruh Act has two types of add-on provisions, CAL. CIV. CODE §§ 1808.1-1808.2 and 1808.3. California Civil Code §§ 1808.1-1808.2 are best described as a hybrid, a mixture of add-on and rewrite characteristics. They will be discussed in § 3.26.

California Civil Code § 1808.3 consists of two parts. The first part is an adaptation of Reg Z's add-on provision (12 C.F.R. § 226.8(h)). The California Legislature made two structural changes in adapting 12 C.F.R. § 226.8(h) to the Unruh Act, however, the changes were of no substantive significance.<sup>77</sup>

Reg Z and the Unruh Act make three changes in the TIL Act's add-on provision. The first change is in Requirement [2], where the phrase "amount financed plus the finance charge" is substituted for "deferred payment price." The deferred payment price is equal to the downpayment, if any, plus the amount financed plus the finance charge. This appears to be a valid change by the Board pursuant to its authority under 15 U.S.C. § 1604.

The second change is in Requirement [3] [b]. Reg Z and the Unruh Act require that the consumer approve "the method of treating any unearned finance charge on an existing outstanding balance in computing the finance charge or charges." Professors Robert W. Jordan and William D. Warren were referring to this change when they said:

This reference makes no sense in add-on transactions. The seller there can presumably ignore it as not applicable. An unearned finance charge results only if the first debt is treated as prepaid. This is the method followed in a rewrite. The language of the regulation is, therefore, internally inconsistent and inconsistent with the act. No mention of an unearned finance charge appears in section 128(d) [15 U.S.C. § 1638(d)].<sup>78</sup>

Since this change makes no sense, the Unruh Act seller can presumably ignore it. The TIL creditor should comply instead with the TIL Act Requirement [3] [b] which provides that the consumer must approve in writing "the method of computing the finance charge or charges."

The third change is in the "then" clause and it relates to the disclosure requirements for the second credit sale. Reg Z requires that the disclosures be made in accordance with 12 C.F.R. § 226.8(a)-(c). This is a valid change by the Board pursuant to its authority under

<sup>77</sup>The California Legislature made the "then" clause of the TIL Act and Reg Z add-on provisions into a fifth requirement of the "If" clause and made the "For" clause into the "then" clause.

<sup>78</sup>GUIDE, *supra* note 20, at 144-145.

15 U.S.C. §§ 1604 and 1632(a). The Unruh Act requires that the disclosures be made in accordance with the second part of California Civil Code § 1808.3. California Civil Code § 1808.3 has substantially the same disclosure requirements as Reg Z but with the addition of two collateral California disclosure requirements (CAL. CIV. CODE § 1808.3(j) and (k)). The Unruh Act seller in order to comply with TIL should also disclose the total of payments of the second credit sale and the annual percentage rate of the second credit sale.<sup>79</sup>

*c. (3.25) The Reg Z Rewrite Provision*

The TIL Act does not contain a rewrite provision. Reg Z's rewrite provision is 12 C.F.R. § 226.8(j), which provides in part:

If . . . two or more existing extensions of credit are consolidated, . . . such transaction shall be considered a new transaction subject to the disclosure requirements of this Part. For the purpose of such disclosure, any unearned portion of the finance charge which is not credited to the existing obligation shall be added to the new finance charge and shall not be included in the new amount financed.

An add-on is also a consolidation within 12 C.F.R. § 226.8(j) since in an add-on two or more extensions of credit are consolidated. However, any possible conflict between 12 C.F.R. § 226.8(h) and 12 C.F.R. § 226.8(j) has been resolved by a Board interpretation, 12 C.F.R. § 226.805.

The third paragraph of 12 C.F.R. § 226.805 provides:

If there is no agreement, or if the agreement does *not* meet all of the requirements of § 226.8(h), the disclosures required in connection with any subsequent sale, which is added to a previously outstanding balance shall be made under the provisions of § 226.8(j). For example, the fact that an agreement provides a method of computing an unearned portion of the finance charge in the event of prepayment, but does not otherwise meet the requirements of § 226.8(h), will not qualify transactions made pursuant to that agreement for disclosure under the terms of § 226.8(h).

Ironically, the example given is Reg Z's Requirement [3] [b] which Professors Jordan and Warren have stated makes no sense in add-on transactions. See § 3.24 *supra*.

It is clear from 12 C.F.R. § 226.805 that those consolidations which do not meet all the valid requirements of Reg Z's add-on provision (12 C.F.R. § 226.8(h)) will be subject to Reg Z's rewrite provision (12 C.F.R. § 226.8(j)).

The important characteristics of Reg Z's rewrite provision are as follows:

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<sup>79</sup>Schober, *Federal Reserve Board Letter of March 6, 1970*, 4 CCH CONSUMER CREDIT GUIDE, ¶ 30,524.

- (1) it is the residual category of Reg Z's add-on provision;
- (2) the customer must consent to the consolidation, but the consolidation need not be pursuant to an agreement in the first credit sale's contract;
- (3) since a rewrite is considered a new transaction, disclosure for the rewrite must be made before the transaction is consummated (12 C.F.R. §§ 226.8(a), 226.2(cc)); this is in contrast with an add-on sale in which disclosure for the second credit sale may be delayed until the date the first payment for that sale is due;
- (4) no specific method of allocating payments is required; and
- (5) disclosures must be made in accordance with 12 C.F.R. § 226.8(a)-(c).

*d. (3.26) The Inconsistent Unruh Act Hybrid*

California Civil Code §§ 1808.1 and 1808.2 should be considered together. Together they form a hybrid, a mixture of add-on and rewrite characteristics.

The Unruh Act hybrid does not stand alone but must conform to the applicable TIL standards. Here the applicable standards are Reg Z's add-on and rewrite provisions. As was indicated in § 3.25, if the consolidation in question does not meet all the requirements of Reg Z's add-on provision (12 C.F.R. § 226.8(h)), the consolidation would be subject to the requirements of Reg Z's rewrite provision (12 C.F.R. § 226.8(j)).

The Unruh Act hybrid fails to meet the Reg Z add-on requirements for the following reasons:

(1) Instead of providing for the addition of the second sale's amount financed and the finance charge computed on that amount financed to the existing outstanding balance, California Civil Code § 1808.2 requires that any unearned finance charge from the first sale be rebated to the buyer by deducting it from the existing outstanding balance and that the finance charge be computed on the consolidated amount financed; and

(2) Instead of requiring that payments be allocated first to fully pay off the first debt, then the second debt, and so forth, California Civil Code § 1808.2 gives the seller the option of choosing between two methods of prorated allocation.<sup>80</sup>

Therefore, the Unruh Act hybrid is subject to the requirements of the Reg Z rewrite provision. Since the Reg Z rewrite provision does not require a specific method of allocating payments, California Civil Code § 1808.2's two methods of prorated allocation appear to be permissible under TIL. California Civil Code § 1808.2 has substantially

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<sup>80</sup>CRIS, *supra* note 23, at 172.

the same disclosure requirements as Reg Z, however, the seller should also disclose the deferred payment price and the annual percentage rate.

Because disclosure for a rewrite must be made before the transaction is consummated, California Civil Code § 1808.2 is inconsistent with the Reg Z rewrite provision to the extent that it allows the seller to delay disclosure until the due date of the first installment payment.

#### IV. (4.1) CONCLUSION

There is an extensive overlap of the scope of TIL with that of the California Acts as to consumer credit sales of personal property and services. This means nearly all Unruh Act and RLA transactions are subject to TIL.

The TIL Act is primarily a disclosure statute. The Unruh Act and the RLA are not limited to disclosure; they give the California consumer additional protection through their non-disclosure regulatory provisions. Congress intended that the TIL Act would build upon and not preempt consistent state law.<sup>81</sup> Thus, the TIL Act does not affect the California Acts' scope provisions, substantially similar and collateral disclosure requirements, and non-disclosure regulatory provisions. Only inconsistent California disclosure requirements are annulled.<sup>82</sup>

The result of the extensive scope overlap and the absence of federal preemption of consistent state law is that creditors must comply with the disclosure requirements of *both* TIL and the applicable California Act in most consumer credit sales of personal property and services in California.

The California Legislature has attempted to place the Unruh Act and the RLA in substantial compliance with TIL, however, inconsistencies still exist which prevent this result. The major problem area is the disclosure of insurance. Other areas were discussed in this article as illustrations of other possible inconsistencies.<sup>83</sup> Legislative action is needed to remove the uncertainties of inconsistent California law. Until the California Acts are placed in substantial compliance with TIL, the creditor is burdened with double disclosure and the consumer is burdened with a complicated disclosure statement which causes more confusion than understanding.

*Roger K. Masuda*

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<sup>81</sup>H.R. REP. NO. 1040, 90th Cong., 2d Sess. (1968).

<sup>82</sup>See §§ 1.3, 2.3, 3.2-3.6.

<sup>83</sup>See §§ 3.14-3.17, 3.20-3.26.