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Truth in Lending -- Validity of Four Installment Rule of Federal Reserve Board's Regulation Z -- Mourning v. Family Publications Service, Inc.

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valent offer policy. There is a demonstrated need for the imposition of the Board's requirement, and sufficient evidence to indicate that it is unlikely to have detrimental effects. Under the Bank Holding Company Act, the Board is required to make an annual report to Congress on the administration of the Act.[125] The Board is also authorized to make "any recommendations as to changes in the law which in the opinion of the Board would be desirable."[126] It is submitted that the Board should propose and Congress should enact an amendment to the Bank Holding Company Act granting the Board authority to deny applications for approval of bank acquisitions by bank holding companies unless substantially equivalent price offers are made to all shareholders.

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Truth in Lending—Validity of Four Installment Rule of Federal Reserve Board's Regulation Z—*Mourning v. Family Publications Service, Inc.*[1]—Petitioner Leila Mourning contracted with Family Publications Service (FPS) for a five-year subscription to four magazines. The petitioner paid $3.95 at the outset and was to make monthly payments of $3.95 for thirty months. Thus, all payments for the sixty-month subscriptions were to have been completed during the first half of the contract term.

The contract contained an acceleration clause whereby on the default of the buyer, the entire balance would become immediately due. Mourning made no further payments after her initial payment, and FPS declared due the balance of $118.50. The contract given Mourning contained no recital of the total purchase price of the subscriptions, the amount due after the initial payment, or the amounts and rates of any service or finance charges. Therefore, alleging that FPS had failed to make the credit disclosures required by the Truth in Lending Act,[2] petitioner brought suit in federal district court[3] for recovery of the statutory penalty for nondisclosure.[4]

The central question in the litigation became the validity of the so-called "four installment" rule of the Federal Reserve Board's Regulation Z,[5] promulgated pursuant to authority granted in section

[125] 12 U.S.C. § 1844(d) (1970).

[126] Id.

[1] 411 U.S. 356 (1973). The statement of facts contained herein is taken from 411 U.S. at 358-61.

[2] 15 U.S.C. §§ 1601-65 (1970). The Truth in Lending Act comprises Title I of the Consumer Credit Protection Act of 1968, 15 U.S.C. §§ 1601-81t (1970).

[3] Mourning v. Family Publications Serv., Inc., 4 CCH Consumer Credit Guide ¶ 99,632, at 89,607 (S.D. Fla. Nov. 27, 1970).

[4] See Truth in Lending Act § 130(a)(1), 15 U.S.C. § 1640(a)(1) (1970).

[5] 12 C.F.R. § 226.2(k) (1973).

105 of the Truth in Lending Act.[6] In defining who is subject to the disclosure regulation of Truth in Lending, and under what circumstances, section 121(a) of the Act states:

> Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.[7]

The Act further defines the term "creditor," as used in the Act, to refer "only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required . . . ."[8] The Federal Reserve Board, however, seems to have extended the application of the disclosure provisions of Truth in Lending beyond the literal wording of the Act. The Board's Regulation Z defines "consumer credit" so as to make the disclosure requirements applicable to credit offered or extended to a natural person for personal, family, household or agricultural purposes, "for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be *payable in more than four installments*. . . ."[9] FPS asserted that it levied no finance charges in its transactions and was not a creditor within the meaning of the Truth in Lending Act, and that the four installment rule was invalid as beyond the scope of the Board's authority.

The district court ruled that the four installment rule was a valid exercise of the Board's authority, and granted plaintiff's motion for summary judgment.[10] The Court of Appeals for the Fifth

[6] 15 U.S.C. § 1604 (1970).

[7] 15 U.S.C. § 1631(a) (1970).

[8] Truth in Lending Act § 103(f), 15 U.S.C. § 1602(f) (1970).

[9] 12 C.F.R. § 226.2(k) (1973) (emphasis added). Though the *Mourning* Court assumed that under a literal reading of the Act itself, Truth in Lending does not cover transactions which do not involve a finance charge, it should be noted that the wording of the statute is actually ambiguous. Under Truth in Lending Act § 103(f), 15 U.S.C. § 1602(f) (1970), a "creditor" is one who "regularly extend[s] . . . credit for which the payment of a finance charge *is* required . . ." (emphasis added). However, § 121(a) of the Act, 15 U.S.C. § 1631(a) (1970), requires that each "creditor" make the disclosures prescribed in § 128 of the Act, 15 U.S.C. § 1638 (1970), "to each person to whom consumer credit is extended and upon whom a finance charge *is or may be imposed* . . ." (emphasis added). Thus, it seems that while the authors of the Act saw it as applying only to credit sellers who normally levied finance charges, they nevertheless contemplated application of the disclosure regulations to some transactions in which "creditors" did not levy finance charges.

It is possible that the "or may be imposed" language of § 121(a) was meant to apply to certain "open end" credit plans such as the revolving charge account, in which no finance charge is imposed on the balance for a particular period unless that balance is not paid within a specified time. However, the statute does not expressly indicate what its authors had in mind. For a discussion of these provisions and more general observations about statutory interpretation and Truth in Lending, see Note, 40 Geo. Wash. L. Rev. 1044, 1047-49 (1972), dealing with the Fifth Circuit's decision in *Mourning*. See also Garland v. Mobil Oil Corp., 340 F. Supp. 1095, 1098 (N.D. Ill. 1972).

[10] Mourning v. Family Publications Serv., Inc., 4 CCH Consumer Credit Guide ¶ 99,632, at 89,608 (S.D. Fla. Nov. 27, 1970).

Circuit reversed on the ground that the Federal Reserve Board had exceeded its statutory authority in promulgating the four installment rule.[11] The appellate court found that the rule conflicted with the Act in requiring that disclosures be made with regard to some credit transactions in which no finance charge was imposed,[12] or, alternatively, that the rule, in creating a conclusive presumption that credit transactions in which payment is made in more than four installments involve a finance charge, violated the due process clause of the Fifth Amendment.[13] On writ of certiorari, the Supreme Court reversed the Fifth Circuit decision, and HELD: that the Board had not exceeded its statutory authority in promulgating the four installment rule.[14] Four justices dissented on the ground that the Court had by-passed the issue of whether credit had actually been extended in the instant case.[15]

This note will first examine the legislative history of the Truth in Lending Act to show that the majority's reasoning in *Mourning* upholding the validity of the four installment rule is basically sound in that the continued effectiveness of Truth in Lending in the retail installment area depends on the rule's being sustained. It will then demonstrate, however, that the fact that the *Mourning* case came to the Supreme Court with an abbreviated factual record (because of

[11] Mourning v. Family Publications Serv., Inc., 449 F.2d 235, 241 (5th Cir. 1971).

[12] Id.

[13] Id. at 242.

[14] Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 371 (1973).

In so holding, the Court reasoned that the rule was reasonably related to its objective of preventing some creditors from evading the Act by "burying" credit charges in the price of an item. Id. at 366, 371. "Burying," when applied to credit charges, refers to the practice whereby a credit seller concerned about possible adverse effects of showing "extra" charges to cover the cost of extending credit decides to conceal such charges in the price of the goods or services and claim that he makes no charge for credit.

The Court further concluded that the Act's having mentioned disclosure only in regard to transactions in which a finance charge is in fact imposed did not preclude the Board from imposing similar requirements as to any other transactions, id. at 373, and that the fact that the four installment rule may require disclosure by some creditors who do not charge for credit does not mark the otherwise valid rule with the stamp of invalidity, since a reasonable margin is necessary to insure effective enforcement, id. at 374.

The Court also held: (1) that the fact that § 130(a) of the Act, 15 U.S.C. § 1640(a) (1970), based the civil penalty for nondisclosure on the amount of the finance charge does not preclude imposition of the minimum civil penalty where the finance charge is nonexistent or undetermined, 411 U.S. at 376; and (2) that the four installment rule does not contain a conclusive presumption that credit transactions of more than four installments involve a finance charge, but rather imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class, id. at 377.

[15] 411 U.S. at 383 (dissenting opinions). Justice Douglas, with whom Justices Stewart and Rehnquist concurred, agreed with the majority that the four installment rule of Regulation Z is valid and thus concurred in the reversal. Justice Douglas did not, however, believe that the instant case was a proper one for summary judgment, since, in his opinion, there remained a "genuine issue of material fact" as to whether the present case involved an extension of "consumer credit" within the meaning of the Act, and he would have remanded for resolution of that particular issue. Id. Justice Powell did not reach the issue of the four installment rule's validity, and would have affirmed the decision of the court of appeals on the ground that there was no extension of consumer credit within the meaning of the Act. Id.

the summary disposition at trial) makes it an unfortunate choice as a conduit for the Supreme Court's pronouncement of the validity of the four installment rule. Finally, it will be submitted that although the *Mourning* decision will serve as strong precedent for coverage of installment sales by Truth in Lending when the goods or services sold are delivered before payment, the Court's somewhat cavalier dismissal of the issue of whether FPS actually extended credit within the meaning of the Act leaves unclear the applicability of the disclosure requirements to installment sales in which delivery of merchandise, as well as payment therefor, is made over time.

The Truth in Lending Act was passed with the express legislative intent of enabling consumers to ascertain without undue searching and without complicated calculations exactly how much credit is being extended them in a particular transaction, and the cost of that credit, expressed both as a dollar amount and as an annual percentage rate.[16] By providing the consumer with uniform statements of the cost of alternative credit offers, the authors of the Act hoped to provide the means for intelligent "comparison shopping" for credit by consumers.[17]

The majority in *Mourning,* in upholding the Federal Reserve Board's action, emphasized that the Truth in Lending Act was not designed to meet *by itself* every exigency that might stand in the way of "informed use of credit." Chief Justice Burger noted that "Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation."[18] The Court further stressed that the Board was granted broad powers to implement the objectives of the Act and *to prevent circumvention or evasion thereof.*[19]

It was the threat of evasion of the Act (through concealment of finance charges) that led the Federal Reserve Board to extend the application of the disclosure provisions of Truth in Lending to all

[16] See Truth in Lending Act §§ 128(a)(1), (7), 15 U.S.C. §§ 1638(a)(1), (7) (1970).

[17] Section 102 of the Truth in Lending Act plainly states the Act's purpose:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter 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.

15 U.S.C. § 1601 (1970).

[18] 411 U.S. at 365.

[19] Id. at 365-66. The grant of authority to the Federal Reserve Board is contained in § 105 of the Truth in Lending Act, which provides:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

15 U.S.C. § 1604 (1970).

credit transactions of more than four installments, regardless of whether a finance charge was evident on the face of the transaction. A Federal Reserve Board Letter of March 3, 1970 stated that the Board felt that it was imperative to make transactions involving more than four installments subject to the Act's requirements, "since without this provision the practice of burying the finance charge in the cash price . . . would have been *encouraged* by Truth in Lending."[20]

It was recognized, of course, that the four installment rule, by requiring installment credit sellers to disclose applicable credit information, would not automatically force into the open finance charges hidden from view. Indeed, some commentators have contended that there is no feasible way in which to require a credit seller to "break out" a buried finance charge, especially if the seller's business is conducted entirely on a credit basis.[21] However, coverage by Truth in Lending at least insures disclosure of other relevant data about the transaction, such as the cash price of the goods or services,[22] the amount of the downpayment and of any service charges,[23] and the number, amount and due dates of payments scheduled to repay the indebtedness.[24] Additionally significant is the fact that coverage by the disclosure provisions means coverage also by the broad regulations of the Act which govern advertising of credit.[25] The Federal Reserve Board's Annual Report on Truth in Lending for 1971 (the year of the Fifth Circuit *Mourning* decision) expressed concern that if the Fifth Circuit's decision in *Mourning* should stand, "many creditors would not only escape the requirement of Truth in Lending disclosures prior to consummation of their contracts, but would also be free of the Act's prohibitions against 'bait' credit advertising."[26]

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[20] Federal Reserve Board Letter by J.L. Robertson, March 3, 1970, in 4 CCH Consumer Credit Guide ¶ 30,320, at 66,147 (1970) (emphasis added). "Burying" refers to the practice of some credit sellers to conceal finance charges in the price of the goods or services and claim that no charge is made for credit.

[21] See Warren & Larmore, Truth in Lending: Problems of Coverage, 24 Stan. L. Rev. 793, 817 (1972). Another author concludes that probably the only way under current law to eliminate the practice of burying credit charges is to consider the practice "unfair and deceptive" under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970). Whitford, The Functions of Disclosure Regulation in Consumer Transactions, 1973 Wis. L. Rev. 400, 421 n.81.

[22] Truth in Lending Act § 128(a)(1), 15 U.S.C. § 1638(a)(1) (1970).

[23] Truth in Lending Act §§ 128(a)(2), (4), 15 U.S.C. §§ 1638(a)(2), (4) (1970).

[24] Truth in Lending Act § 128(a)(8), 15 U.S.C. § 1638(a)(8) (1970).

[25] Truth in Lending Act §§ 141-44, 15 U.S.C. §§ 1661-64 (1970). Section 144(a) of the Act states that the provisions of the section governing advertising of other than open end credit plans apply to "any advertisement to aid, promote, or assist directly or indirectly *any consumer credit sale,* loan, or other extension of credit *subject to the provisions of this subchapter,* other than an open end credit plan." 15 U.S.C. § 1664(a) (1970) (emphasis added).

[26] Board of Governors of the Federal Reserve System, Annual Report to Congress for 1971 on Truth-in-Lending by Federal Reserve Board (Jan. 3, 1972), reprinted in R. Clontz, Jr., Truth in Lending Manual 3, 23 (Supp. 1972) [hereinafter cited as FRB Annual Report].

"Bait" credit advertising refers to the advertising of specified credit terms when, in fact,

Although the Supreme Court's decision in *Mourning* as to the validity of the four installment rule necessarily stood to determine whether or not a substantial block of consumer credit transactions would be covered by the disclosure and the advertising regulations of Truth in Lending, the import of the *Mourning* Court's holding for the future of general administrative rule-making and trouble-shooting in connection with the Truth in Lending Act may well be of far greater consequence than the Court's preservation of the four installment rule.[27] At stake in the question of the four installment rule's validity was the continued effectiveness of the Act's delegation of monitorial and curative functions to an agency with both the expertise to recognize possible malfunctions in Truth in Lending and the manpower to act without undue delay to correct them. Because the area of consumer credit which Congress attempted to regulate is particularly complex and changeable, it is vital to the proper functioning of the Act that the Federal Reserve Board be given a relatively free hand in performing its delegated functions. It is significant that three years after the Truth in Lending Act became effective, the Board reported that the Act and Regulation Z did not yet constitute a perfect set of rules and regulations, and that the scheme of Truth in Lending had to be constantly revised as new problems arose.[28]

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the seller has no intention of offering such terms once the consumer has responded to the advertisement and is in the store. Section 142 of the Truth in Lending Act attempted to curb such advertising by providing that:

> No advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit may state
>
> (1) that a specific periodic consumer credit amount or installment amount can be arranged, unless the creditor usually and customarily arranges credit payments or installments for that period and in that amount. . . .

15 U.S.C. § 1662 (1970).

[27] Had the Supreme Court invalidated the four installment rule, the way would have been open to Congress to remedy the resultant threat of evasion of the disclosure regulations of Truth in Lending by passage of a congressional four installment rule directly amending the Act, though there is, of course, no guarantee that Congress would have so acted. The Federal Reserve Board had urged Congress to enact a "four installment" provision after the Fifth Circuit held the Board's four installment rule invalid. Letter from J.L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System, to Sen. William Proxmire, Chairman, Subcommittee on Financial Institutions, Senate Committee on Banking, Housing and Urban Affairs, Feb. 28, 1972, in 4 CCH Consumer Credit Guide ¶ 30,811, at 66,355 (1972). No such clear-cut solution would have been available to repair the damage to the broad rule-making authority of the Federal Reserve Board that would have resulted from a judicial ruling that the four installment rule was invalid.

[28] FRB Annual Report, supra note 26, at 3. The applicability of the Act to creditors who might be led to conceal finance charges was not the only problem whose solution depended in large part on sustaining the Board's broad rule-making authority under the Act. Very similar issues have arisen, for instance, as to the Board's authority to extend another of the Act's disclosure requirements—that an obligor be notified of his right to rescind a credit transaction in which a security interest is retained or acquired in the residence of the person to whom the credit is extended, Truth in Lending Act § 125(a), 15 U.S.C. § 1635(a) (1970)—to cover also: (1) transactions in which a security interest *is or will be* retained or acquired, or (2) transactions in which the "security interest" is a lien created by operation of law. See 12 C.F.R. §§ 226.9(a), 226.2(z) (1973); N.C. Freed Co. v. Board of Governors of the Fed. Reserve Sys., 473

The list of courts that had considered the validity of the four installment rule before the issue reached the Supreme Court is a short one.[29] Only one case other than *Mourning*—*Strompolos v. Premium Readers Service*[30]—extensively discussed the validity of the rule.

Strompolos involved a transaction virtually the same as that in *Mourning*—a sixty-month magazine subscription for which payment was to be made in the first thirty months. In holding the four installment rule valid, the *Strompolos* court emphasized that the Federal Reserve Board had been granted broad power to prevent circumvention of the Act,[31] and that in designing Truth in Lending Congress had, "[c]onsistent with other complex regulatory legislation, . . . granted an administrative agency the power to apply the basic purposes of the Act to the everyday world."[32] The *Strompolos* fact situation, the court pointed out,

> may very well demonstrate why the four installment rule is not only sensible but also necessary to prevent the Truth in Lending Act from being a hoax and delusion upon the American public. Although the defendant contends that it charges the same unitary price for both credit and cash sales, . . . [m]erely because a so-called "cash" price is the same as for a thirty installment repayment plan does not indicate that the "cash" price does not include substantial financing charges in a very real sense.
>
> It is most logical that the Federal Reserve Board would, consistent with its power to prevent circumvention of the Act and consistent with the stated Congressional purposes of the Act, plug a loophole by which a substantial portion of long term credit dealers could escape from the Act's coverage.[33]

The court in *Strompolos* made plain its conviction that in upholding the validity of the four installment rule it was preserving the efficacy of the congressional scheme of credit disclosures. "Were the Board not to have promulgated this rule nor the courts to sustain it," the opinion stated, "the Truth in Lending Act might never achieve its stated goals."[34]

F.2d 1210, 1211 (2d Cir.), cert. denied, 414 U.S. 827 (1973); Gardner & North Roofing & Siding Corp. v. Board of Governors of the Fed. Reserve Sys., 464 F.2d 838, 839 (D.C. Cir. 1972).

[29] The four installment rule was held valid in the district court's *Mourning* decision and in Strompolos v. Premium Readers Serv., 326 F. Supp. 1100 (N.D. Ill. 1971). The rule was held invalid in the Fifth Circuit's *Mourning* decision and in Castaneda v. Family Publications Serv., 4 CCH Consumer Credit Guide ¶ 99,564, at 89,521 (D. Colo. Feb. 5, 1971).

[30] 326 F. Supp. 1100 (N.D. Ill. 1971).

[31] Id. at 1103. See Truth in Lending Act § 105, 15 U.S.C. § 1604 (1970), quoted in note 19 supra.

[32] 326 F. Supp. at 1104.

[33] Id. at 1103.

[34] Id. at 1104.

The approach taken by the district court in *Strompolos* and by the Supreme Court in *Mourning* is in accord with the practice of liberally construing remedial statutes so as to effectuate their purposes.[35] Substantial weight is generally given to the underlying goals of the remedial legislation viewed as a whole, and in the case of legislation regulating business practices, attention is focused upon the economic realities of the regulated field.[36]

While it is clear that the *Mourning* Court felt itself duty-bound to prevent Truth in Lending from being rendered ineffective by evasive creditor practices, it must seriously be asked whether Truth in Lending is, in fact, worth saving. Many commentators have questioned the very effectiveness of disclosure requirements in the consumer credit field,[37] and Professor Homer Kripke has demonstrated the folly of believing that passage of Truth in Lending could remedy all the evils in the area of consumer credit.[38] Professor Kripke points out that the major problems in the consumer credit area are problems of outright fraud and deception by creditors, and that no system of *disclosures* could be adequate to meet these conditions.[39] Yet, acknowledgment that a remedial statute is not a comprehensive answer to every problem in a particular area and that further legislation is necessary does not require the conclusion that the existing legislation should be abandoned.

Not all of the criticism leveled at the statute, however, is based on its lack of comprehensiveness or on asserted imperfections in its

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[35] See 3 J. Sutherland, Statutory Construction § 6604, at 284 (3d ed. 1943); Note, 40 Geo. Wash. L. Rev. 1044, 1049 (1972); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (holding the Securities Exchange Act to be remedial legislation which should be construed broadly to effectuate its purposes); N.C. Freed Co. v. Board of Governors of Fed. Reserve Sys., 473 F.2d 1210, 1214 (2d Cir. 1973) (holding that the Truth in Lending Act, as remedial legislation, must be construed liberally). It might be argued that the Truth in Lending Act's penalties for nondisclosure render the Act penal in nature rather than remedial. On this point, however, see Bostwick v. Cohen, 319 F. Supp. 875, 878 (N.D. Ohio 1970), where it was stated:

> The court remains steadfast in its position that the civil liability section is remedial rather than punitive in nature . . . . The court views [the] double damage provision only as an incentive for aggrieved debtors to initiate civil actions to protect their rights.

Accord, Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270, 282 (S.D.N.Y. 1971).

[36] Thus, in FTC v. Mandel Bros., Inc., 359 U.S. 385 (1959), the Supreme Court regarded the task of interpreting remedial legislation of a regulatory nature as being "to fit, if possible, all parts into an harmonious whole." Id. at 389 (citation omitted). And in Tcherepnin v. Knight, 389 U.S. 332 (1967), the Court stated that in defining "security" under the Securities Exchange Act, "form should be disregarded for substance and the emphasis should be on economic reality." Id. at 336 (citation omitted).

[37] See, e.g., Kripke, Gesture and Reality in Consumer Credit Reform, 44 N.Y.U.L. Rev. 1, 1-11 (1969); Jordan & Warren, Disclosure of Finance Charges: A Rationale, 64 Mich. L. Rev. 1285, 1303, 1320-22 (1966); Note, Truth in Lending: The Impossible Dream, 22 Case W. Res. L. Rev. 89, 107-12 (1970). See generally Whitford, The Functions of Disclosure Regulation in Consumer Transactions, 1973 Wis. L. Rev. 400.

[38] Kripke, supra note 37, at 1-11.

[39] Id. at 9-10.

design. Much of the criticism of the scheme of credit disclosures adopted by Congress has been based on the idea that Truth in Lending simply has not resulted in changed consumer behavior, either because consumers do not fully understand the information disclosed or because consumers are not making use of disclosed credit information in reaching purchase decisions.[40]

Such criticism notwithstanding, it is submitted that the Court's preservation of the statutory scheme of Truth in Lending was well-advised. The Act has not yet had sufficient time to prove that it can bring about "the informed use of credit."[41] The fact that movement in that direction has been slow does not compel the conclusion that the goal will not be achieved in the long run. It is to be expected that education of consumers and changes in their economic behavior will come about only gradually, and it is too early to conclude that the effort to induce intelligent use of information concerning credit terms should be abandoned.[42]

Given the direct relationship of the four installment rule (and of the unfettered authority of the Federal Reserve Board) to the effectiveness of Truth in Lending, and given the probability that changes in consumer behavior can be effected only over a long term, the Supreme Court's decision to sustain the apparent congressional intent to vest broad rule-making authority in the Board to effectuate the purposes of the Act and to prevent evasion thereof[43] is both predictable and sound. However, it is submitted that in its enthusiasm to preserve the congressional scheme for Truth in Lending, the majority in *Mourning* consciously disregarded issues basic to the question of the nature of the transaction in *Mourning* and to the question of whether the installment sale in the instant case was actually a "credit" transaction.

Among the materials admitted by FPS (and thus available to Mourning as support for summary judgment) were two "dunning" letters mailed to Mourning upon her default. The letters stated that Mourning's was "a credit account," that FPS had incurred obligations in her name by having had the subscriptions entered for the entire term, and that Mourning had incurred a concomitant obligation to repay FPS.[44]

[40] See, e.g., Comment, 9 B.C. Ind. & Com. L. Rev. 1020 (1968), in which the authors, extrapolating from experience with the Massachusetts Retail Installment Sales Act, speculated that such might be at least a temporary reaction to the Truth in Lending Act. Id. at 1031. See generally Whitford, supra note 37, at 403-04. Whitford discusses a number of empirical studies evaluating the effect of Truth in Lending which indicate that, while the Act has had minor positive effect on consumer awareness of prevailing annual percentage rates, it has had little or no effect on the relative lack of comparative interest rate shopping among consumers. Id. at 406-20.

[41] See Truth in Lending Act § 102, 15 U.S.C. § 1601 (1970).

[42] Cf. Whitford, supra note 37, at 431; Garwood, Truth-in-Lending After Two Years, 89 Banking L.J. 3, 28 (1972); Zeisel & Boschan, The Simple Truth-in-Lending, 116 U. Pa. L. Rev. 799, 828 (1968). But cf. Whitford, supra at 420.

[43] See Truth in Lending Act § 105, 15 U.S.C. § 1604 (1970), quoted in note 19 supra.

[44] 411 U.S. at 359-60. A third letter, written by FPS' office manager, stated that FPS

FPS denied in its answer, however, that its contract with Mourning had involved a "credit transaction," and at one point in its answer specifically averred:

> Under the contract executed by the customer and Defendant, the customer agrees to pay a stated amount per month for half of the life of the contract and Defendant agrees to supply the magazines for the full term of the contract. At all times the customer has prepaid for the magazines to be delivered. Under its arrangement with most of the publishers, Defendant reimburses the publisher periodically during the full term of the subscription.[45]

FPS' pleading also stated: "At no point during the life of the contract has Defendant paid money to a third person or supplied goods or services to the customer for which reimbursement is expected from the customer in the future."[46] The one affidavit which FPS submitted to the district court restated that the customer who ordered subscriptions from FPS was required to pay for all the magazines during the first half of the contract term, but did not directly controvert any of the statements in the dunning letters.[47]

On the evidence before it, the district court stated that the uncontroverted facts showed that consumer credit was extended to Mourning and that she received a present contract right—a subscription—in exchange for a promise to pay a certain sum in more than four installments. Finding, furthermore, that FPS had not made the disclosures required of creditors by the Act, the district court granted summary judgment in favor of Mourning.[48]

The Supreme Court admitted that in some cases in which a consumer pays in installments for a magazine subscription, credit may not have been extended to the consumer. The Court felt, however, that summary judgment was properly granted in view of the admissions that were before the district court and FPS' failure to controvert those admissions by affidavit.[49] In dissent Justice Doug-

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had fully invested in Mourning's contract and that upon acceptance of a contract, FPS acts solely as financier and co-guarantor of service with the various publishers. FPS admitted that this letter was sent, but denied that the office manager was authorized to send it. Therefore, the Supreme Court did not consider the facts stated in the letter to have been admitted by FPS. Id. at 360 n.5.

[45] Pleadings of FPS, quoted in *Mourning*, 411 U.S. at 379 (dissenting opinion).

[46] Id.

[47] 411 U.S. at 360-61.

[48] 4 CCH Consumer Credit Guide ¶ 99,632, at 89,608.

[49] 411 U.S. at 362 n.16. Fed. R. Civ. P. 56(e) states in part:

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, *if appropriate,* shall be entered against him.

[Emphasis added.] These two sentences were added to Rule 56(e) in 1963, and the Advisory Committee's notes on the amendment stated, inter alia, that the amendment was not designed

las pointed out, however, that the admissions made by FPS which Mourning submitted to the district court in support of her motion were not sufficient to establish the absence of a genuine issue of material fact, and that summary judgment was improper in spite of the failure of FPS to come forth with affidavits expressly controverting the matter admitted.[50] He noted that the admissions were not admissions in terms that credit was extended within the meaning of the Act,[51] and that an alternative inference could be that FPS advanced money on Mourning's account only after she ceased making payments.[52] On summary judgment, the materials presented to the court by the moving party should be viewed in the light most favorable to the party opposing the motion.[53]

Justice Douglas' arguments take on added weight when one contrasts the large, detailed body of facts necessary to the generation of an informed judicial judgment on the validity and applicability of an administrative regulation with the abbreviated factual record which results from a grant of summary judgment.[54] The *Mourning* Court decided that the four installment rule applied to a transaction which was arguably beyond the compass of Truth in Lending in the first place, and which, very possibly, the Court only half understood. The Court had no opportunity to discover from the record, for instance, the exact nature of FPS' reimbursement of the publishers, and was forced to rely on the unenlightening statements in

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to affect the ordinary standards applicable to the summary judgment motion, and that where "the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." Advisory Committee's Note to Amendment to Fed. R. Civ. P. 56(e), 31 F.R.D. 648 (1962).

[50] 411 U.S. at 381-83 (dissenting opinion). See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 160 (1970).

[51] 411 U.S. at 382 (dissenting opinion). "Credit" under the Act is "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." Truth in Lending Act § 103(e), 15 U.S.C. § 1602(e) (1970). Professor Corbin has stated:

> A transaction may be an instalment contract without being a credit transaction at all. Both parties may agree to perform in instalments without promising to render any performance in advance of full payment of the price of each instalment so rendered.

3A A. Corbin, Contracts § 687, at 246 (1960). According to Corbin, then, the key to whether credit has been extended in a particular transaction lies in whether one party has rendered part or all of his performance in advance of payment therefor. Id. It is interesting to note that, given the fact that Mourning had, at any point during the contract term, paid for more magazines than she had received, Mourning actually may have been extending "credit" to FPS.

[52] 411 U.S. at 382 (dissenting opinion).

[53] United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

[54] In many cases appellate courts have held that certain important issues demand a clear and complete factual record as a basis for adjudication, and that in such cases summary judgment is not appropriate. See, e.g., Black Students v. Williams, 443 F.2d 1350, 1351 (5th Cir. 1971); Menard v. Mitchell, 430 F.2d 486, 494-95 (D.C. Cir. 1970); Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967) (holding, inter alia, that summary judgment should not be granted when further inquiry into facts would be desirable to clarify application of the law).

FPS' letters to Mourning as to "subscriptions entered" and "obligations . . . incurred."[55]

The *Mourning* decision will undoubtedly constitute strong support for the Federal Reserve Board's broad authority to promulgate regulations under the Truth in Lending Act. However, because the underlying issue of whether there actually was an extension of "consumer credit" in *Mourning* was decided without the benefit of a complete factual record, the result is a decision that will probably have limited value as precedent for future cases involving the same class of transactions—sales of magazines and other goods or services in which delivery or performance, as well as payment, is made in installments. The issue of whether Truth in Lending disclosure requirements are applicable to that class of transactions is bound to be relitigated, possibly producing the result that, if creditors dealing as agents in the sale of goods delivered in installments arrange their affairs expediently, they will be able to avoid the provisions of Truth in Lending.[56] If and when such a judicial result is reached, Congress may be forced to consider amending the Act so as to guarantee coverage of this important class of installment sales by the disclosure requirements of Truth in Lending.

Considering the structure of the Truth in Lending Act and the grant of broad rule-making authority to the Federal Reserve Board, the four installment rule seems clearly valid. In following an understandable urge to preserve the rule, however, the *Mourning* Court paid too little heed to the particular facts of the case at hand and applied the rule to a transaction which very possibly involved no extension of "credit" within the meaning of the Truth in Lending

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[55] Letter from FPS to L. Mourning, Dec. 16, 1969, quoted in 411 U.S. at 359. The financial arrangements between FPS and the publishers are important to a determination of whether "credit" was extended to Mourning, since if FPS paid the publishers the full subscription price at the commencement of the contract, and if Mourning would have been obliged to do the same had she contracted directly with the publishers, FPS could feasibly be considered a financier, extending credit to Mourning by virtue of having allowed her to defer repayment of a loan. There was no evidence in the record, however—other than the vague statements in FPS' dunning letters—of the financial relationship between FPS and the publishers.

[56] The majority opinion in *Mourning* stated: "In some cases in which a consumer pays in installments for a magazine subscription, credit may not have been extended to the consumer." 411 U.S. at 362 n.16. The conditions that would seemingly have to be satisfied before installment sellers such as FPS could be judged "outside" of the provisions of Truth in Lending would be (1) that no actual performance be rendered by the installment seller in advance of payment therefor by the consumer, see note 51 supra, and (2) that the publication service make no payments to the publishers in advance of payments of the same amount to the publication service by the subscriber, see note 55 supra.

It is possible that the Supreme Court's treatment of the transaction in *Mourning* as a "credit" transaction might lead future courts, when called upon to consider whether transactions similar to that in *Mourning* involve an extension of credit, to label them almost automatically as "credit" transactions. Such an approach could not be justified, however, in view of the fact that the *Mourning* Court never actually considered the issue of whether credit was extended by FPS, but rather regarded the issue as not having been preserved on appeal. 411 U.S. at 362 n.16.

Act. The Court's reaffirmation of the consumer-protective four installment rule can be welcomed as having several possible salutary effects. The preservation of the rule will serve as a boon to the aware consumer anxious to put credit information to use in making purchase decisions, will leave open the invitation to the presently apathetic consumer to change his ways, and, at the very least, will clarify the scope of the Federal Reserve Board's authority for all future courts faced with Truth in Lending issues. However, by rendering so important a decision on the basis of a fact situation which is at best largely unrevealed and at worst beyond the scope of Truth in Lending altogether, the Court may have left future decision-making bodies the frustrating heritage of a rule now firmer because of judicial recognition of its necessity, but no clearer in range of application than before the matter reached the Supreme Court.

WILLIAM B. ROBERTS

Labor Law—Reasonableness of Union Disciplinary Fines—*NLRB v. Boeing Co.*[1]—Upon expiration of the collective bargaining agreement between Booster Lodge No. 405 of the International Association of Machinists and Aerospace Workers (IAM or Machinists) and the Boeing Company, the union called a lawful economic strike. During the strike, 143 of the 1900 production and maintenance employees crossed the union picket lines to work. Of these 143 employees, all were union members when the strike commenced, but 61 submitted written resignations before they crossed the picket lines and an additional 58 resigned after they had first crossed the lines.[2] After the strike ended, the union charged the 143 employees with violating the IAM constitution which provided penalties (including fines) for "improper conduct" such as "[a]ccepting employment . . . in an establishment where a strike . . . exists."[3] In accordance with union disciplinary procedures, including notice and opportunity for a hearing, the union fined each of the 143 workers $450 and barred them from holding union office for five years.[4]

[1] 412 U.S. 67 (1973), rev'g Booster Lodge 405, Machinists v. NLRB, 459 F.2d 1143 (D.C. Cir. 1972), rev'g Booster Lodge 405, Machinists, 185 N.L.R.B. 380, 75 L.R.R.M. 1004 (1970).

[2] 412 U.S. at 69 n.2.

[3] Id. at 69.

[4] Id. There had been no warning before or during the strike that members would be subject to disciplinary action for their strikebreaking activity. Id. at 80 (dissenting opinion). In addition, the local union had not fined any of its members in its two-year history. Brief for Booster Lodge No. 405, Machinists as Intervenor at 31, Booster Lodge No. 405, Machinists v. NLRB, 459 F.2d 1143 (D.C. Cir. 1972).

The fines of thirty-five employees who appeared at the union trial, apologized for their conduct, and pledged loyalty to the union were reduced to 50% of their strikebreaking earnings. 412 U.S. at 70 n.4.