In the

Supreme Court of the United States

FORD MOTOR COMPANY, et al.,)
)
Petitioners,)
)No. 78-1487
vs.,)
)
DENNIS MILHOLLIN, et al.,)
)
Respondents.)

Pages 1 thru 45

Washington, D.C.
December 4, 1979

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v. : No. 78-1487
DENNIS MILHOLLIN ET AL., :
Respondents. :
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Washington, D. C.

Tuesday, December 4, 1979

The above-entitled matter came on for argument at 1:53 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM M. BURKE, ESQ., Sheppard, Mullin, Richter & Hampton, 333 South Hope Street, 48th Floor, Los Angeles, California 90071; on behalf of the Petitioners.

STUART A. SMITH, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting Petitioners.

RICHARD A. SLOTTEE, ESQ., 1018 Board of Trade Building, 310 S.W. Fourth Avenue, Portland, Oregon 97204; on behalf of the Respondents

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Ford Motor Company, et al. v. Dennis Milhollin, et al.

Mr. Burke, are you ready.

ORAL ARGUMENT OF WILLIAM M. BURKE,

ON BEHALF OF PETITIONERS

MR. BURKE: Mr. Chief Justice, and may it please the Court:

The issue in these cases is whether or not the contractual right of acceleration in a consumer credit contract must be disclosed under the Truth In Lending Act, or Regulation Z, promulgated by the Federal Reserve Board.

The right of acceleration is not mentioned anywhere in the specific disclosure requirement of the Act or the regulation. In fact, acceleration isn't mentioned anywhere in any provision of the Act or the regultion.

Respondents have relied on two different sections of the regulation in an effort to gleam a requirement on the part of the Petitioners to disclose the acceleration clause.

In the District Court the Respondents relied upon Section 226.8(b)(4) dealing with default charges and I will come to that section in more detail in a moment.

In the Court of Appeals, the Ninth Circuit, the Respondents focused heavily upon 226.8(b)(7), which was not raised in the District Court, which deals with the creditor's

rebate policy upon pre-payment of the pre-computed consumer credit contract.

The facts in the case are simple and for the most part are undisputed. The Milhollin's and Mrs. Eaton entered into conditional sale contracts with the Petitioners for the purchase of motor vehicles. The contracts were immediately assigned to Ford Motor Credit Company. The contracts had provisions on both the front and the back side, with the front side serving as the Petitioner's disclosure statement required by the Truth In Lending Act and Regulation Z. The front side clearly disclosed all default charges imposed by the Petitioners in Paragraph 12.

Paragraph 14 advised the Respondents that in the event they pre-paid the consumer credit contract for any reason at any time, whether or not there was a default in acceleration, the consumer would receive a rebate in full of all unearned finance charges. This is consistent, by the way, with the Oregon rebate statute which requires such a rebate and was followed by the creditors as as the record indicates, at all times relevant.

The contract contained a default clause which contained the usual creditor remedies, including the right of acceleration. This clause was set forth clearly in paragraph 19 of the contract on the reverse side, but was not separately repeated on the front side of the contract, the

disclosure provisions of the Truth In Lending Act.

The District Court could find no provision of the Act or the regulation requiring disclosure of acceleration clauses. However, it held that the acceleration clause should be disclosed under the spirit of the Act, henceforth all creditors are required to do so.

QUESTION: When you say "disclosed," just what do you embrace in that? Is it the manner in which it is made known or is it the matter of making it known or not making it?

MR. BURKE: Well, the provisions of the Truth In Lending Act require certain types of disclosures of contractual provisions in consumer credit contracts; as an example the pre-payment disclosure, essentially what the Act and regulation require is that the creditor provide on the front side and on one page a disclosure of his pre-payment rebate policy. So when we talk about the disclosures we are talking about certain specific enumerated provisions of the Act and the regulation that must be put together on one side and on one piece of paper of the contract.

QUESTION: Is it the regulation that requires that one side --

MR. BURKE: Yes, 226.6(a), Mr. Justice Stewart.

QUESTION: That is not in the statute, is it?

MR. BURKE: It is in Section 226.6(a).

Now, the Respondents fell into default under the contracts. After efforts by Ford Motor Credit to bring the contracts current failed, the vehicles were repossessed and these Truth In Lending actions followed by the Respondents against the Petitioners.

The Ninth Circuit in its decision held that disclosures of acceleration clauses are never required under Section 226.8(b)(4), the default charge provisions of Regulation Z.

The court held that when a creditor accelerates payments, it accelerates the contract, it exercises the right of acceleration, that demand for payment is itself a pre-payment. And therefore was able to hold under 226.8(b)(7) the creditor must disclose whether it rebates finance charges upon acceleration, and not pre-payment.

In the process, the Ninth Circuit rejected the Federal Reserve Board's official staff interpretation of its own regulation. I might point out here that Section 226.8(b)(7) dealing with pre-payment, which is the basis of the Ninth Circuit decision below, has no counterpart in the Act. This is a provision only in the regulation and has been interpreted by the Federal Reserve Board through its official staff interpretation.

We submit that a careful analysis of the applicable sections of the regulation, an application of the Federal Reserve Board's official staff interpretation, and substantial

policy considerations dictate that the court's decision below should be reversed.

The Federal Reserve Board has issued an official staff interpretation saying the disclosure requirements incident to an acceleration clause, with respect to Ford, which is printed in full in our opening brief, that requires that the creditor disclose the amount or method of computing the amount of any default, delinquency, or similar charges that are payable in the event of late payment. The language in the Act is very similar. The Federal Reserve Board has include in its official staff interpretation that the right of acceleration is a creditor remedy, it is a contract right; it is not an amount that can be disclosed, nor is it payable with late payment of contract installments.

What the Board concluded in its OSI is that the right of acceleration need not be disclosed, that is what is referred to in (b)(4) is specific pecuniary charges that are payable with late payments of the type disclosed fully by the Petitioners in this case in paragraph 12 of their contract.

I might note right here that this issue has been considered by seven Circuit Courts and virtually every Circuit Court has unanimously agreed with the Board on this issue, that the right of acceleration need not be disclosed under Section (b)(4). There is no conflict on that point.

The Board has also concluded in its OSI that as long as the creditor rebates under its finance charges, upon pre-payment after acceleration in the same manner that it rebates upon voluntary pre-payment, no default charges are required.

And it is clear from the record in this case that practice is followed in these cases.

QUESTION: In the same manner, or in no less burdensome manner.

MR. BURKE: No less burdensome manner; you are right, Mr. Justice Stewart.

We submit therefore that the Petitioners' forms in these cases comply with the provisions of the Act and the regulation as interpreted by the Federal Reserve Board in its official staff interpretation.

This, incidentally, is the position that the United States has taken in its brief filed by the invitation of the Court.

I would like to point out on (b)(7) that the official staff interpretation with respect to (b)(7) is that a creditor need only disclose its rebate practice in general; it need not disclose what its rebate practice is. And by specifically spelling out acceleration, as long as it makes a general rebate disclosure of its rebate agreement with respect to pre-payment, that is sufficient.

QUESTION: Sum of the digits, or some of --

MR. BURKE: Rule 78, the sum of the digits are interchangeable.

QUESTION: S-u-m of the digits.

MR. BURKE: Yes, s-u-m.

QUESTION: Not s-o-m-e.

MR. BURKE: We submit that the Board's official staff interpretation should be followed. The decisions of this Court have consistently held that an agency interpretation of its own regulation, which is what is involved here, should be deferred to as long as it is not plainly erroneous, or as long as there are no compelling indications there. The agency's interpretation of its own regulation did not give the only possible construction of the legislation, nor what even a court might consider to be the principal construction, as long as it is not plainly erroneous.

We also submit that acceptance of the OSI in this case will further substantial policy considerations and will promote and facilitate the single most important purpose of the Truth In Lending Act, and that is to facilitate comparison shopping by consumers.

How will it do this? It will do it because it will facilitate comparison shopping for credit because disclosures can at last be uniform. If responsibility here is placed with a central agency, here the Federal Reserve Board, rather

than among scattered among appellate trial courts across the land, it will also facilitate comparison shopping to credit because disclosures can be made simple and shorter and uniform and more understandable to the consumers.

Once creditors realize that they can place a high degree of reliance upon the board and staff interpretations of their own regulations, they will no longer feel compelled to provide the lengthy and complex disclosure forms that are now provided in an effort to anticipate and fend off litigation of this type.

Respondents in their brief have urged this Court to amend the staff interpretation and to equate acceleration with pre-payment. What this amendment implies, they claim that under (b)(7) the creditor must disclose whether it rebates finance charges upon acceleration.

The first problem in this argument is that acceleration and pre-payment are distinct concepts; they are not the same. They are logically and legally antithetical and so raises a demand for payment. It is not in any sense of the word a pre-payment as claimed by the Respondents. Respondents have not cited any provision of the Act or the regulation or any other authority, for that matter, to support their argument that acceleration and pre-payment are identical.

QUESTION: Well, when a demand is complied with,

it is a pre-payment.

MR. BURKE: If there is a pre-payment following acceleration, that the Board has said is essentially a pre-payment. That is correct.

QUESTION: It is a grievance, compulsory perhaps.

MR. BURKE: A payment following accleration is a pre-payment --

QUESTION: In response to a demand.

MR. BURKE: That is right.

QUESTION: Voluntary.

MR. BURKE: Mr. Justice Stewart, the exercise of a right of acceleration may lead to a pre-payment but itself is not a pre-payment.

QUESTION: The Respondents have failed to demonstrate or really attempt to demonstrate in their briefs that the board's official staff interpretation is plainly erroneous.

Petitioners submit that the OSI is a reasonable construction of the Federal Reserve Board of its own regulation and should be followed.

In response to the alternative disclosure rule that the Respondents have asked this Court to accept, I can't put it any better than this Court did in the Mourning case, a case also dealing with Regulation Z, and I quote:

"That some other remedial provision might be preferable is irrlevant. We have consistently held that

where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority."

The Solicitor General will now present the view of the United States for ten minutes, and I would like to reserve five minutes for rebuttal.

Thank you.

CHIEF JUSTICE BURGER: Mr. Smith.

ORAL ARGUMENT OF STUART A. SMITH, ESQ.,

AS AMICUS CURIAE, SUPPORTING

PETITIONERS

MR. SMITH: Mr. Chief Justice, and may it please the Court:

I don't want to repeat what Mr. Burke has said. I think that he has made out a compelling case on the statute under Regulation Z for the correctness of the Board's official staff interpretation FC-0054 which is set forth at pages 52 through 56 of the Appendix to the petition.

If, as we submit, the Board concludes that this official staff interpretation of the Board has correctly construed the Act and Regulation Z with respect to the disclosure of acceleration clauses and the rebate policy on payment of unearned finance charges upon payment after

acceleration, I think it is clear that the judgment below has to be reversed.

What I would like to describe briefly for the Court, it is set forth in greater detail in Petitioners' reply brief in the Appendix to his reply brief, is the process pursuant to which official staff interpretations are issued.

The Court in the Mourning case has indicated that where reasonable minds may differ as to which of several remedial methods should be chosen, the Court should defer to the informed judgment of the agency. And here the agency that Congress has vested authority to promulgate rules and regulations is the Federal Reserve Board. The part of the Federal Reserve Board that deals with the Truth In Lending Act is the Office of Consumer Affairs of the Federal Reserve Board. And these official staff interpretations are the product of a specialized group of people within the staff of the Board which are expert in the area of consumer credit.

We think that is why they ought to be entitled to great deference.

To begin with, let me say at the outset before I begin to describe the process, that Congress itself has recognized that official staff interpretations of the Board are such that they ought to be given deference.

In 1974 Congress amended the Truth In Lending Act to provide for civil and criminal immunity if a person acts in good faith, relies upon the Board's interpretation. But two years later Congress determined that good faith reliance on the Board's interpretation was insufficient and they extended the immunity to good faith conformity with any interpretation or approval by a duly authorized official or employee of the Federal Reserve System.

In our view, this 1976 amendment demonstrates a congressional vote of confidence in the quality and reliability of these official staff interpretations. And the process which is set forth in the appendix to the Petitioner's reply brief we think confirms the correctness of this congressional vote of confidence.

Official staff interpretations are issued in response to inquiries by private parties, either debtors or creditors, to the Federal Reserve Board. And when the inquiry comes in the matter is assigned to a staff attorney to prepare a draft. And the reason I am going into this in great detail is because the other side has characterized these official staff interpretations as the work of a lone attorney or a lone Board employee. And really nothing could be further from the truth, because the draft is prepared by a lone person but then the process involves a very deep and

detailed consultation with other staff attorneys, section chiefs and officials of the Consumer Affairs Office of the Federal Reserve System. After the matter is then discussed with various officials who have demonstrated familiarity with the particular problem and the official staff interpretation is only issued after further review by a section chief and approval by two officials of the Consumer Affairs Office of the Federal Reserve Board.

Now, this is not the end of the matter, because then the official staff interpretation is sent to the Federal Register for publication. And in 1977, when this official staff interpretation -- the one at issue here -- was promulgated, the Board then had a practice of issuing some OSI's with immediately effective dates and some with delayed effective dates.

But the implication was the same and that is the public was entitled to make comments. By "the public," I mean not only the community of consumers but the banking community and the people who lend in the consumer credit area.

This particular OSI was issued with an immediate effective date but there was a provision, as I said, for reconsideration upon request. There was no request for reconsideration of this OSI.

Now, all OSI's were then and now reviewed quarterly by a Consumer Affairs Committee which is a committee of members of the Federal Reserve Board itself who have been assigned oversight responsibility over the work of the Office of Consumer Affairs -- I think it is called Community Consumer Affairs now -- of the Federal Reserve Board.

Now, as of April 19, 1978 the Board amended its procedure to provide for a delayed effective date of 30 days with respect to all official staff interpretations and a period of public comment. And the period of public comment is useful to provide the Board with input from people who are affected by these technical interpretations.

Between August 1976 and April 1978, 147 OSO's were issued under Regulation Z. Six were reconsidered pursuant to request and none were changed.

Under the new procedure where everything gets a delayed effective date, 20 official staff interpretations have been issued, nine have been considered; and again, none have been changed.

The point that we think is important here for the Court is that this entire process is marked by very careful consideration and it is the product of the special expertise of a group of highly trained people who have demonstrated deep familiarity with the consumer credit field. And it is

important that these official staff interpretations receive deference, because as counsel for the Petitioner has properly pointed out, these technical questions require authoritative answers by a central authority. And indeed the disarray in this case is indicative of the problems that arise. We now have five or six different circuits who have expressed themselves on the question of pre-payment under the finance disclosure charge policy and each have indicated slightly different ways that they would go about providing for this disclosure.

QUESTION: At this point, with all this disarray, the Board hasn't really done very much by way of rule-making to straighten out the disarray, have they?

MR. SMITH: Well, the Board has spoken in OSI FC-0054 which it believes is the --

QUESTION: But nothing by formal rule-making.

MR. SMITH: Nothing by formal rule-making although, Mr. Justice Blackmun, I would think that once the litigation commenced on this issue the Board might have -- it might have been inappropriate for the Board then --

QUESTION: The less the agency is going to do.

MR. SMITH: Well, yes. But I think that if this Court holds as we submit it should that official staff interpretations are entitled to deference, I think a lot of this technical kind of litigation over very small questions

under the Act, small disclosure questions will cease because I think the statistics in the briefs have indicated that the volume of Truth In Lending litigation has mushroomed enormously as people have challenged the propriety of a variety of questions of disclosure under the Act.

QUESTION: The courts rather typically and frequently have simply disregarded the OSI's, haven't they.

MR.SMITH: Yes, although -- no, no, I think not. I think not. My understanding is they generally have followed them and this case I think is an unusual instance where there has been a wide variety of judicial rule-making in this area. But I think, as our brief points out, generally they have been give the deference that we think they deserve.

And what I want to say in closing is simply that this judicial disarray has in our view hampered enforcement by the various agencies that are given the enforcement powers under the Act. Because while private debtors or consumers can bring actions under the Act, a variety of agencies such as the Federal Trade Commission, the Comptroller of the Currency -- they are all set forth in 15 U.S.C. 1507 -- have been given responsibility by Congress according to the kind of creditor to enforce the Act.

Now, these agencies necessarily have to look to and rely upon the official staff interpretations of the Board. And if they can't do that, then I think that the uniformity

Congress sought to impose in this area will be severely hampered.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Smith.

Mr. Slottee.

ORAL ARGUMENT OF RICHARD A. SLOTTEE, ESQ.,

ON BEHALF OF RESPONDENTS

MR. SLOTTEE: Mr. Chief Justice, and may it please the Court:

I respondent the Respondents in this case, Dennis and Michelle Milhollin and Miss Donna Eaton who were the consumers --

QUESTION: May I ask you a relevant question at this point: Is your client's name misspelled all the way through on court records?

MR. SLOTTEE: The Milhollin's spell it with two L's and we have spelled it with one L throughout the litigation, from the District Court, to the Ninth Circuit, up to and including all the briefs.

QUESTION: They haven't discharged you yet.

MR. SLOTTEE: They haven't discharged me yet.

QUESTION: It isn't M-u-l.

MR. SLOTTEE: It is M-i-l. It is Milhollin.

QUESTION: So it is all right with you to stay with the misspelling.

MR. SLOTTEE: That is correct.

-- and Miss Donna Eaton -- these were two separate transactions -- who purchased their automobiles from Ford Motor Credit Company.

I would like to add just one additional fact that was not brought out by the Petitioner and that is the Milhollin's were two payments late on their contract, when without prior notice Ford Motor Credit repossessed their automobile. On the same day as the repossession, the Milhollin's offered to pay Ford Motor the exact amount of the delinquent payments. In fact Ford Motor denied this and indicated that they accelerated the unpaid balance and they demanded the entire unpaid balance of the contract.

There are three points which I would like to make to the Court this afternoon.

First, all the parties concerned, the Federal Reserve Board staff, the Solicitor General, the consumers and Ford Motor Credit agree that in a contract like the one signed by the consumers in this case, the effect on the finance charge of the process of acceleration is important information to be disclosed to the consumers under the provisions of the Truth In Lending Act and Regulation Z.

Second, the consumers could prevail in this case under either the views expressed by the Federal Reserve Board staff or the rationale of the court below. We think that the lower court's opinion is the better rule since,

unlike the views of the Federal Reserve Board staff, it consistently guarantees the disclosure of meaningful information to the consumer in all credit transactions.

And third, the Federal Reserve Board itself has not made known its position on this matter.

QUESTION: Mr. Slottee, I don't mean to get anecdotal about this but supposing you have the most consumer-oriented court or Board in the world and it is trying to figure out what has to be disclosed and what hasn't. I can remember a committee I served on drafting a Truth in Land Sales Act and we were following a model of a State which had a three-page list of requirements that had to be disclosed. One of them, a particular disclosure was that during periods of high water all or parts of this lot may be under water. It didn't prevent the lot from selling at all. Whereas, had it been limited to just a few very important things it might have prevented the lot from selling.

I would think that from a consumer's point of view you would want a limited, but important, category of information disclosed; and not just every conceivable thing you can think of.

MR. SLOTTEE: I certainly agree with Your Honor and, in fact, it has been raised by some people that what in fact the Truth In Lending Act is doing is making disclosure statements more confusing rather than simpler.

And I have several answers to that remark.

The first is -- and if you will look at the Joint Appendix pages 9 and 10 -- the majority of the provisions on a contract are not those required by the Truth In Lending Act and Regulation Z. Rather, there are terms that are inserted by the creditors themselves, and is those extra terms that are the terms that are causing the contracts to become longer and more confusing.

QUESTION: But isn't it from fear of litigation like this that they insert them?

MR. SLOTTEE: No, Your Honor. The disclosures that are on the face of the contract or on a separate document -- they don't necessarily have to be on the contract -- are fairly limited in their scope. In this case the Petitioners could have remedied the violation by simply adding two words to their disclosure which would have given the meaningful information to the consumer that they needed prior to entering the contract to be able to judge the effect on the credit and the cost of credit, should default to the contract be accelerated.

The Solicitor General has stated several times in his brief that the Federal Reserve Board has in fact issued an official interpretation on this. And to this extent the Solicitor General is mistaken. The only interpretation that has been issued is an official staff interpretation and there

have been three unofficial staff opinions that have been issued. But there has been no award interpretation. And this is in fact the reason that the confusion among the circuits and the various disarray in the circuits has been created, is the Federal Reserve Board, granted as the agency authorized by Congress to implement the Truth In Lending Act, has failed to issue an interpretation which will solve the confusion which will answer the questions which will tell consumers and creditors alike what disclosures have to be made.

In that situation, it is natural that the courts have stepped in, taken over for the Federal Reserve Board itself, and tried to remedy the situation; and they have come up with six or seven different theories.

QUESTION: Why don't they follow the OSI?

MR. SLOTTEE: There has been one OSI official staff interpretation that was issued. And that was FC-54.

QUESTION: Have the Courts of Appeal followed that?

MR. SLOTTEE: We have had basically three different positions:

You have got the Ninth Circuit position, which didn't follow it.

You had several other circuits which followed it completely and several others which said disclosures never

have to be made about acceleration.

I will explain the problem to you with the OSI. The Ninth Circuit and the Federal Reserve Board official interpretations basically agree that the process of acceleration can affect the cost of credit and that an early termination of the contract will affect the amount of the finance charge that is going to be rebated and that is information to be disclosed to the consumer. That is the basis of the official staff interpretation and that is the basis of the Ninth Circuit opinion.

Where the two part company is on the situations when that disclosure has to be made to the consumer. The Federal Reserve Board staff is concerned with the affect on the consumer of acceleration, whereas the Ninth Circuit is concerned with the information that will be given to the consumer about acceleration and its affect on the finance charge. And I think a good example is represented by 54. One of the purposes of the Truth In Lending Act -- and it was indicated by the Petitioner -- is to promote comparative credit shopping by consumers. Now, if you take official staff interpretation 54 and apply it to a common situation with two creditors. The consumer is going out and trying to shop for credit, to decide which is going to be the best credit deal for that consumer. If these two creditors rebate upon acceleration or payment after acceleration by exactly

the same method, but they differ as to pre-payment since that one creditor rebates by the same method in both situations and the other creditor differs, the first creditor will only have to disclose the pre-payment method. The second creditor will have to disclose both the pre-payment method and the method for acceleration. The consumer will look at those contracts and, despite the fact that both creditors rebate upon acceleration by the same method, will see only one rebate disclosure for accleration. The consumer would reasonably believe that the first creditor has a better deal for him, or her, because there is no indication about any finance charge rebate or lack thereof on acceleration, and there is no way the consumer could reasonably meaningfully comparative shop in that situation.

QUESTION: Well, he could by reading paragraph 19, I suppose.

MR. SLOTTEE: On the reverse of the contract, and that is one of the things that Regulation Z says, that is that if you are going to have meaningful disclosure, the disclosure has to be on the face of the contract. And there is a very practical reason for that.

Pardon?

QUESTION: If there is room. Where do you draw the line with all these details?

MR. SLOTTEE: It is very easy to have, for instance,

a separate disclosure statement separate from the contract. In that case --

QUESTION: Have a bigger front page.

MR. SLOTTEE: Pardon?

QUESTION: Have a larger and longer front page.

MR. SLOTTEE: You can have a larger and longer front page. Or in this situation -- this is Ford Motor's contract -- simply an additional two words would have provided that consumer with the information that they needed.

QUESTION: Two words -- you mentioned that before. Where would you put the two words in?

MR. SLOTTEE: I would put the two words, Your Honor -- in paragraph 14, it says buyer may pre-pay his obligations, etc., upon pre-payment or acceleration buyer will receive a rebate of the unearned portion of the finance charge. "Or acceleration" would be the adequate disclosure.

QUESTION: Do you really think the automobile purchasers would be motivated to go ahead and compare contracts on the basis of those two words being added? Do you really think so?

MR. SLOTTEE: I think in fact they will, Your Honor, and --

QUESTION: Have you ever known a purchaser of an automobile to read all the fine print in one of these contracts? Maybe a fleet purchaser, but I don't know about

a little, ordinary --

MR. SLOTTEE: Reading the fine print on a contract is exactly the problem. Most purchasers do not read the fine print on a contract, which was the entire rationale for the Truth in Lending Act, put it on the front.

As Mr. Chief Justice --

QUESTION: Well, it is just as fine on the front. You don't call that big print that you just showed us.

MR. SLOTTEE: Well this is slightly reduced down for the purpose of the appendix.

QUESTION: It still looks like a lot of fine print to me.

MR. SLOTTEE: Compared to the back of the contract it is very large.

QUESTION: Well, if it is bigger print, it is a longer page too.

QUESTION: I think the size of the print is the same; there is a little more space between the lines.

MR. SLOTTEE: I don't think the size of the print is the issue.

The issue is to put the required disclosures, that credit information which is important for the consumer in one location at a certain time before the contract is entered so that it can be easily read and understood. You obviously can't legislate why he is credit shopping but what you can

legislate is the information to give the consumer the ability to make the wise credit shopping. Now, when you bury an acceleration clause and its effect on the finance charge on the reverse of the contract, you are taking away that ability for the majority of the consumers.

QUESTION: Counsel, you just said something about it being easily understood. I read you paragraph 14, which is the one you are centering on.

"Borrower may pre-pay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder. And if he does so, shall receive a rebate of the unearned portion of the finance charge computed under the sum of the digits method, after first deducting an acquisition fee of $15."

Do you think that is readily understood by the average --

MR. SLOTTEE: I think it is understood except for "the sum of the digits method," which if you read in most State statutes is really confusing. In fact that issue has been litigated in several circuits and the rationale behind upholding that disclosure is that the alternative to saying rule of 78, the sum of the digit method, is a disclosure which is just as complicated and much, much more lengthy. Putting out the mathematical formula or explanation of the rule of 78 is not going to provide meaningful information to anybody.

lawyers, judges, mathematicians, accountants.

The alternative in this case is simply a two or three word disclosure on a contract, but certainly no h adverse consequences.

QUESTION: What ordinary buyer would know what the word "acceleration" means, except in connection with a car, you put your foot on the foot feed.

QUESTION: That is one of the principal advertising factors, of cars that will accelerate from zero to 40 miles an hour in 18-1/2 feet.

QUESTION: It might be a person might eventually learn what "acceleration" is on a note; but it isn't an article of nature, is it?

MR. SLOTTEE: I agree but putting "acceleration" or some term other than acceleration, it explains the consequences of default. It certainly has to be better, it has to give more information to the consumer than simply having pre-pay and assuming that the consumer is going to understand that the term "pre-pay" also encompasses the concept of acceleration after default. More consumers are going to think that "pre-pay" means a voluntary payment prior to the maturity of the contract as, indeed, the contract indicates pre-payment has to be made before maturity of the final instalment. And you have acceleration or payment after acceleration or payment of the entire unpaid balance

in conjunction with an explanation to rebate, that is information that a consumer is going to have a better chance of understanding.

QUESTION: I hate to be slow on this but frankly I am. You have said to us two or three times, you only have to add two or three words. And you said you add them somewhere in paragraph 14. I can't figure out where you add them. I think you really have to rewrite the whole paragraph and make it much longer.

MR. SLOTTEE: Well, in fact you may have to change the words around in the paragraph.

QUESTION: So it isn't just a matter of adding two words, then.

MR. SLOTTEE: Well, in a number of contracts it would be a matter of simply adding --

QUESTION: Well, in this contract. You know we have to start somewhere. It would have to be rewritten with an additional contingency described, namely acceleration. You can't just throw the words "or accelerate" in the thing as it is written now -- at least I can't; and I don't think you can.

MR. SLOTTEE: I could change the words around in the paragraph very slightly to make it -- put "or acceleration" or "payment after acceleration."

QUESTION: Well, you can just add a sentence saying

the same terms shall be applicable to repayment after a demand after an acceleration demand.

MR. SLOTTEE: Exactly, Your Honor.

The second problem with staff interpretation 54 is it doesn't answer the question of what to do when the contract has a pre-payment disclosure on the front and an acceleration clause on the back that says that the creditor has the right to accelerate the unpaid balance but does not disclose the method by which that rebate for the finance charge will remain. And what the staff has said in this situation is you look to undisclosed non-binding creditor policy to determine what in fact the creditor will do. You basically say what is the policy of the creditor; if the policy of the creditor, regardless of the contract term, is to rebate the same as for pre-payment, then no disclosure has to be made. If the policy of the creditor is to rebate for other than pre-payment, then they have to make a separate disclosure. And there are numerous problems of this.

The first is: How is the consumer, the person whom the Act is intended to protect, going to be able to determine what the undisclosed policy of the creditor is.

Second, that policy is not binding. It is a non-written, undisclosed policy, it is not binding on the creditor and it is not binding on the creditor's assignee. And that in fact frustrates the enforcement mechanism of the Act.

It was indicated by the Solicitor General private consumers are in fact a primary enforcement mechanism of the Act. Since acceleration or rebate of the finance charge is not going to occur until there is a default, and that is when the policy of the creditor will in fact become known, that default may incur after a year; and the Act has a one-year statute of limitations. And if it occurs after the year, the consumer is simply not going to have any remedy. The creditor, who has a non-binding policy, in fact is going to be able to change that policy however they want.

The record in this case indicates that Ford Motor changed their policy twice, in the Milhollin case and in the Eaton case. But the contract disclosures state exactly the same.

In the first case, the affidavit indicated that upon the act of acceleration they rebated according to prepayment.

QUESTION: Does the record show how long the Ford Motor Company has been using this form?

MR. SLOTTEE: I don't think it does, Your Honor, unless you look at the bottom of the contract which will say --

QUESTION: Give a date?

MR. SLOTTEE: -- a certain addition, and I think it is 1973.

QUESTION: Any idea of how many contracts are outstanding?

MR. SLOTTEE: How many contracts are oustanding, I assume that they number in probably the millions.

QUESTION: Is it a contract that is fairly general in the industry or is this unique to Ford Motor?

MR. SLOTTEE: In the early 1970's acceleration clauses were normally on the back of the contract rather than on the front, and that is in fact what fostered most of the litigation that has worked its way up to the circuits. It is not in the record now,but we deal with a lot of these contracts and I think the normal rule now is to have the acceleration clause on the front of the contract rather than on the back. Creditors simply have not found that too much of a burden to change.

And you raise an interesting point, because one of the suggestions that has been made is that if this Court affirms the ruling in the Ninth Circuit or requires the disclosure of acceleration and its affect on the finance charge, it is instantly going to throw millions and millions of consumer contracts in default and it is going to cost the credit industry untold millions of dollars. And it is simply not the case.

There are two protections for the creditors in the Act. One protection is a one-year, very short statute of

limitations. You file your suit within one year from the date the contract is signed or you are out of luck. For all those creditors that have violated Milhollin or St. Germaine, the year has run and they have no --

QUESTION: There are still millions within the year.

MR. SLOTTEE: There are still millions within the year but --

QUESTION: Well, that is all you need, then. I mean that would satisfy the complaint, because there would be millions.

MR. SLOTTEE: But there is a second protection to cover those millions. And that is the Act provides an absolute protection to the creditor who in good faith relies on any official staff interpretation issued by the Federal Reserve Board, despite the fact that that official staff interpretation is later revoked or rescinded by a court.

So if this Court affirms the Ninth Circuit, rejects the rationale of the official staff interpretation, those creditors who in good faith --

QUESTION: Was there a conflicting case in this; there was, wasn't there?

MR. SLOTTEE: I am sorry, Your Honor.

QUESTION: Wasn't there a conflicting decision with the Ninth Circuit? Hasn't there been a Court of Appeals who

decided this case another way?

MR. SLOTTEE: There are several Courts of Appeals who have interpreted the official staff interpretation different than the Ninth Circuit.

QUESTION: Well, what about in those circuits?

MR. SLOTTEE: The rule would state the same.

QUESTION: Why would it? The court has struck it down in those circuits.

MR. SLOTTEE: Well, they haven't struck down the section of the Act.

QUESTION: How could you rely on those circuits upon any staff interpretation that has been invalided by a court?

MR. SLOTTEE: Because the statute specifically says that a creditor who in good faith relies on an official staff interpretation --

QUESTION: How can you be in good faith if the Court has told you that a staff interpretation is not worth a nickel?

MR. SLOTTEE: For those creditors who relied on the staff interpretation after the Circuit Court opinion came down, I think I agree with you.

QUESTION: I know, but that has been quite a while.

MR. SLOTTEE: I am sorry.

QUESTION: Well, there has been a long time go by since those cases have decided that the staff interpretation

was wrong. There have been a lot of creditors who certainly since then wouldn't be able to rely.

MR. SLOTTEE: The official staff interpretation in this case was in 1977.

QUESTION: Well --

MR. SLOTTEE: Now, any person --

QUESTION: Well, how many millions have bought automobiles since then, or even Fords?

MR. SLOTTEE: Any creditor who relied on that staff interpretation would be protected regardless of a subsequent Circuit Court opinion.

QUESTION: I didn't say subsequent. How about relying on it after those cases; how about the ones who relied on it since those courts have struck it down?

MR. SLOTTEE: And before the official staff interpretation.

QUESTION: No.

QUESTION: How does the average purchase of an automobile even go back to a staff interpretation?

MR. SLOTTEE: It don't. They get their disclosures from the face of the contract.

QUESTION: But does your point have any significance that this is an out for the companies who have these contracts outstanding?

MR. SLOTTEE: Well, I am not sure what --

QUESTION: All right, forget it.

QUESTION: My question may be off the mark. If what you tell us is true, why didn't that provision protect the creditor in this case, who is relying on a staff interpretation, not prior to the --

MR. SLOTTEE: The Milhollin contract was signed before the Act was amended to allow for that type of credit to be made.

QUESTION: I see.

MR. SLOTTEE: So there is no interpretation to rely upon, Your Honor.

QUESTION: I see.

QUESTION: Let's try again. Suppose you had a client and you want to prove reliance, what would you have to show; that he had read the Federal Register?

MR. SLOTTEE: As a creditor -- I had a client who was a creditor?

QUESTION: Yes.

MR. SLOTTEE: If I could put myself in that situation --

QUESTION: It would be difficult, would it.

MR. SLOTTEE: Probably.

-- I would show that in fact I had a department of my company that reviewed Truth in Lending official staff interpretations and compared them with the contracts. And in a suit I would simply put on an affidavit or the testimony

that says I in fact read this and I relied upon that when I drafted my contract. Whether that is going to be sufficient or not, I am not sure. But I think that is what Congress intended when they in fact passed the Act.

The Ninth Circuit has avoided these two particular problems, the one of undisclosed creditor policy for reliance and the one for comparative credit shopping by having a rule that consistently guarantees meaningful information to the consumer. And that is basically you always have to disclose the effect of the finance charge, the effect of acceleration on the finance charge rebate; whether or not it is the same for acceleration and/or pre-payment. That is the one way which the consumer will always be able to get the information they need.

QUESTION: But then there is no rule of law I have ever heard of that doesn't have close cases and that sort of thing, that breed litigation. And I would suspect the Ninth Circuit's rule is the same.

Are you suggesting that we adopt the Ninth Circuit's rule or that we leave the circuits free to interpret -- each circuit free to interpret for itself what deference it will give to Regulation Z?

MR. SLOTTEE: I think that is the heart of the matter, Your Honor. I think we have the same interest in this case as Ford Motor does, and that is the Federal Reserve Board

has not made known their position on this matter. And we want to get a uniform decision, something that everybody can rely upon.

We think that the decision should be that in accordance with the Federal Reserve Board's staff interpretation, the effect of acceleration on the finance charge rebate is credit information that has to be disclosed to the consumer; and

Second, the rationale or the disclosure method that should be used is not that as the Federal Reserve Board staff indicates, but that which the Ninth Circuit indicates.

QUESTION: To uphold a part of the staff interpretation but not all of it.

MR. SLOTTEE: Exactly. Exactly.

QUESTION: Well, how do you reach that result? How does one justify reaching that result?

MR. SLOTTEE: The deference that is to be accorded to a Federal Reserve -- to an agency interpretation, or the opinions of an agency, it would depend on a number of factors. the evidence in consideration, the validity of its reasoning, its consistency with prior and future pronouncements.

QUESTION: Did we put all those conditions on the Mourning opinion?

MR. SLOTTEE: It wasn't in the Mourning opinion, it was in another case, the Skidmore case. The Mourning

opinion had to do with the authority of the Federal Reserve Board to issue a regulation and whether they had that authority under the Act. And that is not the case here, we are talking about something different. We are not attacking the authority of the Federal Reserve Board to issue 226.8(b)(7) or 226.8(a). We think that 8(b)(7) is perfectly proper.

What we are questioning is the details of the application, of the staff's interpretation of that particular regulation.

I would just like to say one other thing in closing, and that is it has been indicated that there have been a lot of Truth in Lending suits filed in the United States and that the number is significantly increasing. And the implication, though it hasn't been said directly, is that a number of these suits are frivolous. I have several comments to that.

First, there is nothing in the record and there is no citation in any cases that I know of that says anything that these increased Truth in Lending suits are in fact frivolous. In fact, I think what they may represent is the increase in consumer credit in the United States and the lack of creditor compliance with the terms of Truth in Lending.

And I would also mention something that this Court stated just several months ago in Ryder v. Sonotone which authorized private class actions under the Antitrust Act.

That same concern was raised by Sonotone in that case and the Court said basically that is not an unimportant consideration but District Courts should be aware and vigilant for frivolous suits, but it is up to Congress to provide adequate funds for judges to handle the Truth in Lending suits or to handle the suits that may arise under the Antitrust Act.

I think the heart of the situation is not the deference to be accorded to the staff opinions but whether or not in the application of those opinions the consumer is going to receive the meaningful information that they are entitled to under the terms of the Act and under the statements of this Court in Mourning.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Burke?

REBUTTAL ARGUMENT OF WILLIAM M. BURKE, ESQ.,

ON BEHALF OF PETITIONERS

MR. BURKE: Mr. Chief Justice, and may it please the Court:

I won't take much more of the Court's time to respond. I would like to address a couple of points that were raised by Mr. Slottee in his presentation.

First of all, I do not want the Court left with the impression that the Respondents were mistreated in this case.

The Joint Appendix at pages 23 to 25 indicate the substantial efforts made by Ford to cause the Milhollin's to bring their contract current, which failed. Mrs. Eaton advised Ford that she could no longer continue to make payments on the contract, so Ford accepted the vehicle in full discharge of the indebtedness and did not seek a deficiency judgment.

In response to the questions by Mr. Justice Stevens, Mr. Slottee has said that the simple addition of two words would solve this problem. The words were that you disclose that you will rebate upon pre-payment or acceleration. Had we added those two simple words that Mr. Slottee says would have solved all the problems, we would be here today with Mr. Slottee arguing that you don't rebate upon acceleration. You have mis-advised the consumer. You say you will rebate upon pre-payment or acceleration, your own affidavits show that you don't rebate on acceleration. You rebate upon payment following acceleration. And we would be litigating that question here today.

There has been no change in Ford Credit's policy on rebate, as the Joint Appendix shows at pages 22 and 68.

I would like to conclude by emphasizing the terrible dilemma facing the credit industry today. The dilemma is the central theme of the three amicus curiae briefs filed by the Consumer Bankers Association, the California Bankers Association, the National Consumer Finance

Association, joined by General Motors Acceptance Corporation. And that dilemma is the consumer credit industry wants to comply with the Truth in Lending Act and Regulation Z and it is conscientiously attempting to do so.

However, the problem is the industry can't place any substantial degree of reliance upon the Board and staff interpretations if courts such as the court below refuse to pay deference to those interpretations. The industry can't afford to change their contract forms each time a new case comes down with an additional disclosure that that particular judge thought should be provided. And at the same time they can't afford not to change their forms because of the punitive liability aspects of the Act which could be ruinous to small creditors.

As a result, what they are doing is the logical thing: They are over-disclosing in an attempt to anticipate and fend off legal challenges of the type raised here.

The result is that the disclosure forms are long -- I have seen forms that are two or three feet long -- they are confusing, they are non-uniform, and that itself is a violation, or could be a violation of the Act and the regulation.

We submit that there is a simple way out. And that is if the official staff interpretation is followed and applied in this case, it will have two healthy effects.

First, the Board will be encouraged to continue to use its interpretive powers to attempt to bring some semblance of uniformity and simplicity into this area. This will benefit creditors, to be sure; but it will also benefit consumers, because the forms can be shorter and simpler and easier to understand, if creditors know that they can place reliance upon the Board's interpretive guidelines.

The second beneficial effect of following the OSI in this case is it will permit the system to operate the way Congress and the Board intended it to operate, and that is when the Board or the staff publishes an OSI for comment in the Federal Register, creditors, consumers, any interested person will make their views known to the Board at that time rather than to wait until subsequent litigation to attack the Board's views. The Board and staff can then assess the views and positions of all interested parties at that time, which will vastly improve its decision-making process. In short, it will no longer be possible for an interest group or a person to sit back, allow an OSI to be published for comment, allow it to become final, allow the industry to rely upon it, and then attack it in a trial court action, attempting to convince a trial judge that the Board could have done better, as was done in this case.

We submit therefore, for all of these reasons, that the decision of the court below should be reversed.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:45 o'clock, p.m., the case in the above-entitled matter was submitted.)

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