CONSUMER LAW

INTRODUCTION

This consumer law survey will focus on recent Fifth Circuit decisions concerning the Truth in Lending Act[1] and Regulation Z.[2] The purpose of the Truth in Lending Act (TILA) is to require creditors to provide credit consumers with information that will lead to the "informed use of credit."[3] In order to further this purpose, the Federal Reserve Board has promulgated Regulation Z, which sets forth interpretations and regulations governing consumer credit transactions.[4] Enforcement of the TILA and Regulation Z is accomplished through the assessment of a statutory penalty in addition to recovery for actual damages and attorney's fees.[5] This article will cover two main topics: the TILA; and the TILA in conjunction with bankruptcy.

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1. 15 U.S.C. § 1601-1665 (1970).
2. 12 C.F.R. § 226 (1977).
3. 15 U.S.C. § 1601 (1970).
4. 12 C.F.R. § 226 (1977).
5. 15 U.S.C. § 1640(a) (1970 & Supp. V 1975) provides:

§ 1640. Civil liability—Individual or class action for damages; amount of award; factors determining amount of award

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2) (A) in the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $100,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability the costs of the action, together with a reasonable attorney's fee as determined by the court.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

I. THE TILA

A. *The Statutory Penalty*

In *Davis v. United States Cos. Mortgage and Investment, Inc.*,[6] the Fifth Circuit was faced with the question whether two statutory penalties should be awarded to a husband and wife as joint obligors in a credit transaction where the lender violated the duplicate instrument[7] requirement of Regulation Z. The plaintiffs had secured a consumer loan from defendant for the purpose of financing repairs to their home. The trial court found that the defendant violated the TILA and Regulation Z and, accordingly, awarded plaintiffs attorney's fees and a statutory penalty of $1000 pursuant to the civil liabilities section of the TILA.[8] On cross-appeal, the plaintiffs argued that they were entitled to two statutory penalties because they both signed the note and mortgage. The Fifth Circuit agreed and awarded plaintiffs an additional statutory penalty of $1000.[9]

In holding for the plaintiffs, the Fifth Circuit first concluded that under Louisiana law, a husband and wife are jointly and severally liable for the repayment of a note signed by both. Thus, both the husband and wife became debtors and both were legally obligated to pay off the note. The court then considered the wording of section 1631(a)[10] and section 1640(a)[11] to determine whether these sections authorize the recovery of two statutory penalties by dual debtors. The majority noted that section 1631(a) requires creditors to disclose required information to each person to whom consumer credit is extended.[12] Furthermore, section 1640(a) provides that "any creditor who fails to comply with *any requirement* imposed

6. 551 F.2d 971 (5th Cir. May, 1977).

7. 12 C.F.R. § 226.8(a) (1977).

8. 15 U.S.C. § 1640(a)(2) (1970 & Supp. V 1975).

9. Davis v. United States Cos. Mortgage & Inv., Inc., 551 F.2d 971, 972 (5th Cir. May, 1977). The Fifth Circuit also affirmed a $3,500 attorney's fee award and awarded an additional $500 for attorney services on appeal. *Id.*

10. 15 U.S.C. § 1631 (1970) provides:

§ 1631. General requirement of disclosure

(a) 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.

(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this part to more than one of them.

11. 15 U.S.C. § 1640(a) (1970 & Supp. V 1975). See note 5 *supra*.

12. Davis v. United States Cos. Mortgage & Inv., Inc., 551 F.2d 971, 972 (5th Cir. May, 1977).

under this part . . . with respect to *any person* is liable to such person . . . ."[13] The majority construed this language to mean that a creditor guilty of a TILA violation would be liable to any individual person to whom he extended credit notwithstanding the fact that the violation arose out of one credit transaction.[14] Thus, according to the court, multiple statutory penalties may be awarded if there are several obligors on a single consumer debt.

In reaching this conclusion, the Fifth Circuit recognized that other courts had reached contrary conclusions but dismissed them with the following statement: "We believe our result is more consonant with the plain language of the statute and the law of Louisiana."[15] Judge Jones, however, was not convinced by the majority's reasoning and maintained that the legislative history of the statute "shows that it was not intended that a double penalty should be imposed."[16] He contended that the TILA intended to limit the statutory penalty[17] to a maximum of $1000 in any individual credit transaction.[18] Judge Jones further insisted that a husband and wife constitute a single "family unit" and that a single loan to a single "family unit" is an individual credit transaction. Hence, according to Judge Jones, only one statutory penalty should have been permitted.[19]

Although Judge Jones' dissent seems sound upon initial analysis, further analysis reveals that his reasoning is weak in two respects. First, it is not clear that the legislature intended only one penalty to be allowed in the case of a recovery by joint obligors. In *Mirabal v. General Motors Acceptance Corp.*,[20] a case involving substantially the same problem presented in *Davis*, the Seventh Circuit found that the legislative history was unclear[21] and that it did not directly determine whether joint obligors could recover sepa-

13. *Id.*

14. *Id.*

15. *Id.* at 973. The Fifth Circuit also noted that it did not decide whether section 226.6(3) requires two disclosure statements to be furnished to joint obligors. If two disclosure statements are required, the right of joint obligors to two recoveries would have to be based on different reasoning. *Id.* at 973 n.5.

16. *Id.* at 973 (dissenting opinion).

17. Section 1640(a) also allows recovery for actual damages and attorney's fees. See note 5 *supra*.

18. Davis v. United States Cos. Mortgage & Inv., Inc., 551 F.2d 971, 974 (5th Cir. May, 1977)(dissenting opinion).

19. *Id.* The single "family unit" reasoning was also adopted in St. Marie v. Southland Mobile Homes, Inc., 376 F. Supp. 996 (E.D. La. 1974).

20. 537 F.2d 871 (7th Cir. 1976).

21. *Id.* at 881 n.19.

rate statutory penalties. Turning to section 1640(a),[22] the *Mirabal* court stated: "[Section 1640(a)] appears to indicate that Congress felt that the duty of the creditor ran to each obligor involved in a loan transaction and that for a failure to fulfill this duty each obligor could sue and recover."[23] Thus, the Seventh Circuit's interpretation of the legislative history is contra to Judge Jones' interpretation.

In addition, if a husband and wife both sign the note, they are both individually liable for the whole amount of the note, not merely one-half of it. Because the creditor has extended the full amount of credit to two individuals and because each individual may be harmed by the creditor's violation of the TILA, each individual should be entitled to the statutory penalty as compensation for that harm. Moreover, if the purpose of the TILA is to protect borrowers by forcing disclosure of credit terms,[24] it seems to follow that individual borrowers should not be offered less protection merely because they are married and thus constitute a "family unit."[25]

Because Judge Jones' dissent is based on the "family unit"—individual transaction theory—it is tenuous at best. In contrast, the majority decision in *Davis* is based on reasonable and sound statutory interpretation and conforms with the TILA's general objective of providing protection to credit-seeking consumers. Accordingly, the allowance of multiple statutory penalties in *Davis* is the better view.

B. *Attorney's Fees*

The Fifth Circuit also considered in *McGowan v. Credit Center, Inc.*[26] the amount of attorney's fees that should be awarded pursuant to section 1640(a)(3)[27] when the court has found a TILA violation.

22. 15 U.S.C. § 1640(a) (1970 & Supp. V 1975).

23. Mirabal v. General Motors Acceptance Corp., 537 F.2d 871, 881 (7th Cir. 1976). The Seventh Circuit also held that the duty to give both obligors proper disclosure was not relieved by section 1631(b). Although section 1631(b) states that if there is more than one obligor, a creditor need not give a statement of information to more than one of them, the court found that section 1631(b) was intended merely to reduce redundant paperwork and "did not mean to foreclose any right of recovery by a joint obligor." *Id.* at 882.

24. 15 U.S.C. § 1601 (1970).

25. As noted by the Seventh Circuit in Mirabal v. General Motors Acceptance Corp., 537 F.2d 871, 883 (7th Cir. 1976), if only one penalty were allowed to joint obligors, other troublesome problems would arise such as the following: (1) If only one obligor sued, would he be allowed the full penalty or only one-half of it? (2) If one obligor was granted the full penalty, could the other obligor sue for it? (3) Which obligor could bring the original suit—only the one who received the disclosure statement? (4) As between husband and wife, how would the court determine who received the disclosure statement?

26. 546 F.2d 73 (5th Cir. Jan., 1977).

27. 15 U.S.C. § 1640(a)(3) (1970 & Supp. V 1975).

In this case, the district court had held that the creditor violated section 226.8(d)(1) of Regulation Z,[28] but the court awarded $228 less than the amount claimed for in attorney's fees because the credit consumer was successful on only one minor charge. The Fifth Circuit did not agree with this reasoning and reversed and remanded with instructions to award the full amount of reasonable attorney's fees.[29] According to the court, a reduction in attorney's fees merely because the credit consumer was successful on only one charge "would be inconsistent with the Congressional policy of implementing enforcement of the Truth-in-Lending Act."[30]

The Fifth Circuit's decision in *McGowan* regarding the issue of attorney's fees is clearly correct. The purpose of the TILA is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid uninformed use of credit . . . ."[31] The attorney's fees provision of the TILA was inserted to insure that a credit consumer would not forfeit these rights because of a fear of possible prohibitive costs incurred in the enforcement of them. This safeguard would be significantly reduced if attorney's fees were contingent on the number of violations actually established by the credit consumer. This is true because arguably, credit consumers, fearing a reduction in their award of attorney's fees in a proportion equal to the number of claims not accepted by the court, will not assert all possible grievances.

The Fifth Circuit's decision is also consistent with the policy underlying the awarding of the statutory penalty.[32] The statutory penalty is not awarded according to the number of violations established; a credit consumer is allowed only one statutory penalty[33] notwithstanding the fact that numerous violations are established. It is also undisputed that a statutory penalty must be awarded even though only one minor violation is established.[34] Accordingly, the

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28. 12 C.F.R. § 226.8(d)(1) (1977). The district court in its second opinion found a violation based on the defendant's failure to correctly disclose the amount of credit disbursed for the borrower's actual use. McGowan v. Credit Center, Inc., 546 F.2d 73, 74-75 (5th Cir. Jan., 1977). The Fifth Circuit, on the other hand, found a violation based on the fact that the creditor failed to include the broker's fee as part of the prepaid finance charge. *Id.* at 77. See 12 C.F.R. § 226.8(d)(2) (1977).

29. McGowan v. Credit Center, Inc., 546 F.2d 73, 77 (5th Cir. Jan., 1977). The Fifth Circuit also awarded additional fees for the cost of appeal. *Id.*

30. *Id.*

31. 15 U.S.C. § 1601 (1970).

32. See 15 U.S.C. § 1640(a)(2) (1970 & Supp. V 1975).

33. *Id.*

34. *See* Grant v. Imperial Motors, 539 F.2d 506, 510-11 (5th Cir. 1976).

awarding of attorney's fees should also be based on the finding of a violation and not on the number of violations actually established.

II. THE TILA IN CONJUNCTION WITH BANKRUPTCY

In *General Finance Corp. v. Garner*,[35] the Fifth Circuit considered an alleged TILA violation that arose in the context of a Chapter XIII Bankruptcy proceeding.[36] The controversy in this case occurred when Garner, the bankrupt, filed a cross-claim, alleging a TILA violation, in response to a creditor's reclamation petition for repossession of Garner's automobile.[37] Garner claimed that the disclosure statement on the sales contract did not properly set forth the creditor's security interest in future indebtedness[38] as required by the TILA[39] and Regulation Z.[40] The bankruptcy judge held that the

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35. 556 F.2d 772 (5th Cir. July, 1977).

36. The bankruptcy aspects of the Fifth Circuit's decision will be briefly discussed. However, an in depth analysis of the bankruptcy issue is beyond the scope of this article.

37. After eleven payments were made on the car, Garner filed a petition for relief under Chapter XIII of the Bankruptcy Act. At that time, the monthly payments on the automobile were $86.19. In his petition, Garner proposed to reduce these monthly payments to $47.88 through the extension mechanism provided by Chapter XIII. Even though the full amount of the debt would be eventually paid, the creditor objected to this plan and filed a reclamation petition.

38. The future indebtedness or "dragnet" provision was set forth in small print on the back of the sales contract and stated:

> The security interest aforesaid shall, in addition to securing all presently existing debts and liabilities, secure all future advances made by the Seller to or for the account of the Buyer, including advances for loans, taxes, levies, insurance, repairs to or maintenance of the collateral and all reasonable costs and expenses incurred in the collection of any such indebtedness.

General Fin. Corp. v. Garner, 556 F.2d 772, 777-78 (5th Cir. July, 1977).

39. 15 U.S.C. § 1638(a)(10) provides in part:

> (a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items . . .:
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> (10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

15 U.S.C. § 1638(a)(10) (1970).

40. Regulation Z provides in part:

> (5) A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing

contract violated the TILA and awarded a $1000 statutory penalty and attorney's fees.[41] The judge did not, however, require the creditor to pay the penalty directly; rather, the $1000 penalty was deducted from the creditor's claim and the monthly payments were reduced to $47.88 pursuant to the extended payment plan proposed by Garner.[42] The district court and the Fifth Circuit affirmed the bankruptcy judge's decision.[43]

Before reaching the merits of the case, the Fifth Circuit had to first determine whether the bankruptcy court had jurisdiction over the TILA claim. The court concluded that there were adequate grounds for the bankruptcy court's exercise of jurisdiction because the controversy arose in relation to the bankruptcy proceedings and because the creditor did not object to the jurisdiction of the bankruptcy court.[44] The court then turned to the alleged TILA violation and considered the creditor's three justifications for nondisclosure.

The creditor first ingeniously argued that a provision of Regulation Z, section 226.8(j), excused its nondisclosure. Section 226.8(j) provides in pertinent part: "Any increase in an existing obligation to reimburse the creditor for undertaking the customer's obligation in perfecting, protecting or preserving the security shall not be considered a new transaction subject to this part."[45] The creditor contended that the future indebtedness clause served merely as notice that the automobile would secure any payments made by the creditor for the protection of the collateral. Because section 226.8(j) does not require disclosure of such future indebtedness provisions even when protective advances are *actually* made, the creditor argued that disclosure could not logically be required at a point in time *prior* to such advances. In other words, the creditor contended that section 226.8(j) operates to exempt from the TILA disclosure requirements certain provisions by stating that sums subsequently

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> the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

12 C.F.R. § 226.8(b)(5) (1977).

41. General Fin. Corp. v. Garner, 556 F.2d 772, 774 (5th Cir. July, 1977).

42. *Id.*

43. *Id.* at 774, 780.

44. For a general discussion of problems caused by consent to bankruptcy jurisdiction, *see* Ferguson, *The Consensual Basis of Subject-Matter Jurisdiction in Matters of Bankruptcy: Fact and Fiction*, 14 RUTGERS L. REV. 491 (1960).

45. 12 C.F.R. § 226.8(j) (1977).

spent to protect the collateral are secured by the collateral.[46] The creditor then concluded that the instant future indebtedness provision was not required to be disclosed because it was of the type exempted by section 226.8(j).

The Fifth Circuit noted that the future indebtedness provision was not narrowly limited to payments for the protection of collateral; it included sums advanced for loans.[47] Accordingly, the court held that the provision was "drawn too broadly to come within any protection section 228.8(j) might otherwise have provided."[48]

The creditor's second argument was that the disclosure would be sufficient if it were made at the time of the future advance because the creditor could then seek other credit if dissatisfied with the terms, and the purpose of the TILA[49] would still be fulfilled. The Fifth Circuit countered this argument by stating that section 226.8(b)(5) clearly indicates that a creditor may not wait until the future transaction to disclose the future indebtedness clause.[50]

Finally, the creditor asserted that a future indebtedness security interest is required to be disclosed only when the interest covers after-acquired property. This contention was based on the working of section 226.8(b)(5), which provides in pertinent part: "If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any *such property,* this fact shall be clearly set forth . . . ."[51] The crux of the creditor's argument was that the words "such property" referred only to after-acquired property rather than to any property to which the security interest might attach. The Fifth Circuit set forth three reasons for its rejection of this position.

First, the court concluded that the mere fact that after-acquired property provisions received special attention does not require a finding that existing collateral provisions need not be disclosed.[52] The court next stated that there was "no policy reason why

46. General Fin. Corp. v. Garner, 556 F.2d 772, 778 (5th Cir. July, 1977).

47. *Id.*

48. *Id.* at 778.

49. Section 1601 provides in pertinent part:"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 . . . ." 15 U.S.C. § 1601 (1970).

50. General Fin. Corp. v. Garner, 556 F.2d 772, 778 (5th Cir. July, 1977).

51. 12 C.F.R. § 226.8(b)(5) (1977)(emphasis added).

52. To support its reasoning, the Fifth Circuit stated that "the [Federal Reserve] Board may have concluded simply that such terms respecting existing collateral so obviously fall within the language of the Act . . . that explicit treatment is not necessary." General Fin. Corp. v. Garner, 556 F.2d 772, 779 (5th Cir. July, 1977).

future indebtedness terms covering after-acquired property should be subject to the disclosure requirement, while such terms covering existing collateral may be couched in small type on the back of a document."[53] Finally, the court noted that it had already decided this exact issue in *Pollock v. General Finance Corp.*[54] and that it was following this precedent in its present holding.

The Fifth Circuit's interpretation of this ambiguous regulation is apparently correct. In addition to the reasons given by the court, its interpretation of section 226.8(b)(5) is further supported by the fact that the words "such property" are used three times in reference to "property to which the security interest relates" before the specific reference to "after-acquired property" in the last sentence of the regulation.[55] Thus, it seems that the specific reference to "after-acquired property" was intended merely to clarify that an interest in after-acquired property is required to be disclosed rather than to limit the type of property interest subject to the disclosure requirements.

After concluding that there was a TILA violation, the Fifth Circuit next considered how to enforce the resulting statutory penalty against the creditor. The creditor contended that the bankruptcy judge's reduction of its claim against Garner by the amount of the penalty and subsequent reduction of the monthly payment was a forced acceptance of Garner's Chapter XIII wage earner's plan and, thus, deprived it of the right to repossess the automobile. In approving the bankruptcy judge's reduction of the monthly payments, the Fifth Circuit had to distinguish two prior decisions, *Terry v. Colonial Store Employees' Credit Union*[56] and *Thompson v. Ford Motor Credit Co.*[57]

In *Terry,* a debtor who had purchased an automobile sought to reduce his payments under a Chapter XIII wage earner's plan.[58] The bankruptcy judge denied the creditor's petition for reclamation, but the Fifth Circuit held that the reduction in monthly payments materially and adversely affected the creditor's interest. Therefore, the court granted the petition for reclamation.[59] *Thompson* also in-

53. *Id.* at 779.

54. 552 F.2d 1142 (5th Cir. May, 1977). In *Pollock,* the court also held that an interest in existing collateral as well as after-acquired property must be disclosed. *Id.* at 1145.

55. *See* 12 C.F.R. § 226.8(b)(5) (1977).

56. 411 F.2d 553 (5th Cir. 1969).

57. 475 F.2d 1217 (5th Cir. 1973).

58. Terry v. Colonial Stores Employees' Credit Union, 411 F.2d 553 (5th Cir. 1969).

59. *Id.* at 555.

volved a creditor's rights in the context of a Chapter XIII wage earner plan.[60] After affirming the denial of the creditor's reclamation petition[61] in *Thompson,* the Fifth Circuit set forth four guidelines to be used in determining whether a creditor should be allowed to repossess the collateral.[62] The *Garner* court felt compelled to make an exception to the fourth guideline, which provides that the owner of a secured indebtedness must not be required to accept less than the full periodic payment specified in the contract.[63]

In distinguishing *Terry* and *Thompson,* the Fifth Circuit focused on the fact that the court's analysis in each of the two decisions was based "on an assumption that the contract claim of the creditor accurately reflected the creditor's 'interest' . . . so that any reduction in the monthly payment . . . would 'materially and adversely' affect that interest."[64] The court then reasoned that this assumption did not hold true in Garner's case because the creditor's interest was reduced by the $1000 statutory penalty. Here, the creditor's net debt would actually be paid off in less time than was provided for in the original sales contract notwithstanding the fact that the monthly payments were reduced.[65] Accordingly, the Fifth Circuit denied the creditor's reclamation petition because it was not "materially and adversely" affected by the Chapter XIII plan.

The result reached by the Fifth Circuit in *Garner* was a sound one. The key factor to be considered was whether the creditor's interest would be "materially and adversely" affected by the periodic payment adjustment. It is difficult to see how the creditor's interest (after the deduction of the statutory penalty) would be adversely affected by the reduction of the periodic payments when, in fact, the remaining debt would be recovered at a slightly greater

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60. Thompson v. Ford Motor Credit Co., 475 F.2d 1217 (5th Cir. 1973).

61. In *Thompson,* the creditor filed his reclamation petition because the debtor had missed several payments under the wage earner's plan. Under the plan, the creditor was allowed payments "equivalent to the rate specified in the original sales contract." *Id.* at 1218.

62. The four guidelines set forth by the Fifth Circuit are the following:

> (1) General equitable considerations, including the debtor's good faith and ability to pay, should favor restraining foreclosure. (2) The injunction against foreclosure must be necessary to preserve the debtor's estate or carry out the Chapter XIII plan. (3) The injunction must not impair the security of the lien. (4) The owner of the secured indebtedness must not be required to accept less than the full periodic payments specified in the contract.

Id. at 1218-19 (citation omitted).

63. *Id.* at 1217-19.

64. General Fin. Corp. v. Garner, 556 F.2d 772, 780 (5th Cir. July, 1977).

65. *Id.* The Fifth Circuit noted that the creditor had in fact subsequently been paid in full by Garner. *Id.* at 780 n.14.

rate than the unadjusted debt would have been recovered under the unadjusted periodic payments. It would indeed be ironic to allow a guilty creditor to recover his post-TILA-violation debt at a significantly greater rate than that at which his pre-TILA-violation debt would have been recovered. Thus, in *Garner,* the Fifth Circuit properly carved out an important exception to the general rule that a secured creditor cannot be required to accept a wage earner plan that provides for monthly payments in an amount less than that specified in the original sales contract.

CONCLUSION

The Fifth Circuit is continuing its strict enforcement of the rules and regulations embodied in the TILA and Regulation Z. This attitude on the part of the court is commendable because it helps insure that credit consumers will receive all the information necessary to an informed and intelligent choice of credit. Hopefully, the TILA and Regulation Z will continue to be effective forces in the credit consumer's search for reliable, comprehensive and accurate credit information.

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