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cient justification for prohibiting almost all roadway advertising.[78] In *Mitchell* there is the added factor of shock to some drivers caused by the word "abortion."

The *Mitchell* court's objection to the breadth of the regulation was also debatable. Instead of judging the ordinance by the type of abortion information proscribed,[79] the court should have noted that the only medium regulated was the billboard. This introduces the final consideration which demonstrates the probable constitutionality of the ordinance. As billboard advertising was the only medium the plaintiff was prohibited from using, he had many alternative means of communicating his information. The newspaper appears to be the most suitable, although radio and television are plausible. Mr. Mitchell might even be able to follow in the illustrious, and apparently immortal, footsteps of F.J. Chrestensen and disseminate his message by handbill.

JOHN MICHAEL KOPS

Consumer Protection—Truth-In-Lending Disclosures Not Timely at Closing

Recognizing that the American consumer was faced with inconsistent and noncomparable credit disclosure practices which were causing confusion about credit,[1] Congress enacted Title I (Truth in Lending) of the Consumer Credit Protection Act (the Act),[2] which became effective July 1, 1969.[3] The Board of Governors of the Federal Reserve System (the Board) was granted the power of prescribing regulations[4] for the Act. The implementing regulation, known as Regulation Z,[5] became

[78] *See* Markham Advertising Co. v. State, 73 Wash. 2d 405, 415-16, 439 P.2d 248, 254-55 (1968) (summary of expert testimony concerning the effect of billboards on highway safety).

[79] 335 F. Supp. at 741-42.

[1] S. REP. No. 392, 90th Cong., 1st Sess. 1 (1967).

[2] Consumer Credit Protection Act, 15 U.S.C. §§ 1601-81 (1970).

[3] Pub. L. No. 90-321, § 504(b), 82 Stat. 167.

[4] Truth in Lending Act § 105, 15 U.S.C. § 1604 (1970):

> 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.

[5] 12 C.F.R. § 226 (1971).

effective on the same date. The major thrust of the Act is in the direction of disclosure. So that meaningful disclosures might be made at the critical stages in credit transactions, the Act and Regulation Z seek to require appropriate disclosure with attention to the procedural and mechanical differences in the types of credit in use today.

The Act initially divides credit between "open-end credit"[6] and "credit other than open-end." Regulation Z further divides "credit other than open-end" into "credit sales" and "loans and other nonsale credit."[7] These categories are critical to the requirements of the Act, for the extent to which disclosures must be made depends upon the classification of the transaction.[8] In the disclosure requirements for home financing, the classification "loans and other non-sale credit" encompasses the majority of home financing transactions which involve a seller, a buyer-mortgagor, and a mortgagee. The mortgagee qualifies as a "creditor"[9] and thereby becomes subject to the provisions of the Act. Regulation Z sets out in great detail the disclosures required with first mortgage loans for residential dwellings.[10]

Since the most significant stage of a consumer loan is the point at which the consumer becomes obligated to the lender, the Act requires disclosures before the purchaser of credit enters into an obligation.[11] Section 1639(b) of the Act states that "disclosure shall be made before

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[6]12 C.F.R. § 226.2(r) (1971).

> "Open end credit" means consumer credit extended on an account pursuant to a plan under which (1) the creditor may permit the customer to make purchases or obtain loans, from time to time, directly from the creditor or indirectly by use of a credit card, check, or other device, as the plan may provide; (2) the customer has the privilege of paying the balance in full or in installments; and (3) a finance charge may be computed by the creditor from time to time on an outstanding unpaid balance. The term does not include negotiated advances under an open end real estate mortgage or a letter of credit.

[7]Jensen, *Effect of Federal Truth in Lending Act and Regulation Z on Real Estate*, 4 REAL PROP., PROB. & TR. J. 11, 21 (1969).

[8]Kintner, Henneberger, & Neill, *A Primer on Truth-in-Lending*, 13 ST. LOUIS U.L.J. 501, 527 (1969).

[9]12 C.F.R. § 226.2(m) (1971).

[10]12 C.F.R. §§ 226.8(b)(1)-(7), (d)(1)-(3) (1971) contain all the disclosures that must be made in a mortgage loan transaction. Some of the more important items are: (1) date at which finance charge begins to accrue, (2) total finance charge as an annual percentage rate (12 C.F.R. § 226.4(a) (1971) points out that the finance charge includes all charges payable as an "incident to or a condition of the extension of credit" such as interest, service charges, points, loan fee, credit reports, appraisal fees), (3) number, amount, and due dates of payments, (4) amount of any charges for lateness, (5) description of security interest, and (6) amount of credit. It is noteworthy that in 12 C.F.R. §§ 226.8(b)(3), (d)(3) (1971) the lender is exempted from two important disclosures: the total sum of the payments and the total amount of the finance charge.

[11]Kintner, Henneberger, & Neill, *supra* note 8, at 516.

the credit is extended."[12] Regulation Z extends this provision by specifying that disclosure "shall be made before the transaction is consummated."[13] While the Board has advised lenders and creditors on the proper interpretation of the disclosure time provision under the "loan and other non-sale credit" section,[14] the courts have had no opportunity until *Bissette v. Colonial Mortgage Corp.*[15] to consider this provision of the Act or to review the interpretation of it rendered by the Board in Regulation Z. This note will examine *Bissette* on two levels. First, the court's interpretation of the Act will be analyzed with reference to accepted doctrines of statutory construction. The note will conclude by considering the wisdom of the *Bissette* decision in terms of the policies it seeks to promote in the area of financial consumer protection.

In *Bissette* plaintiffs entered into an agreement with a seller to purchase a family dwelling, the agreement being contingent upon their obtaining satisfactory financing. Plaintiffs then met with defendant, Colonial Mortgage Corporation, to file an application for Federal Housing Administration (FHA) financing. At a later time plaintiffs were informed by defendant that FHA approval had been obtained, but defendant made none of the required disclosures until closing, one month later.[16] The Bissettes brought suit for damages under section 1640 of the Act claiming that disclosure of the credit information at closing is not timely because it comes too late to satisfy the purposes of the Act.[17] Upon cross-motions for summary judgment, the court held that "Truth in Lending disclosures made only at closing frustrate the Con-

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[12]Truth in Lending Act § 129(b), 15 U.S.C. § 1639(b) (1970).

[13]12 C.F.R. § 226.8(a) (1971).

[14]In Letter from Milton W. Schober, Assistant Director of FRB, Feb. 11, 1970, in 4 CCH CONSUMER CREDIT GUIDE ¶ 30,281 (1972), the Board informed lenders that consummation refers to a contractual relationship and that disclosure only need be made prior to consummation.

[15]340 F. Supp. 1191 (D.D.C. 1972). This case has been appealed to the U.S. Court of Appeals for the District of Columbia Circuit.

[16]The fact that plaintiffs entered into a pre-possession agreement with the seller after notification of FHA approval, and moved into the house 21 days before closing should be noted, as it seems to be significant in the court's resolution of the case. 340 F. Supp. at 1192.

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

> 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.

gressional intent and basic purpose of the Act, and as such, constitute a violation thereof."[18]

Defendant argued that the language in the first subsection of section 1639(b) of the Act, that disclosure "shall be made before the credit is extended,"[19] should be read to mean "any time" before credit is extended.[20] The court discarded this first contention by referring to the legislative intent of providing information in time to compare alternatives.[21] In citing this legislative goal as the reason for denying acceptance of defendant's interpretation, the court assumed that disclosure at "any time" before credit is extended would negate the possibility of credit comparison. In addition to relying upon this debatable assumption, the court deviated from many accepted doctrines of statutory construction in interpreting section 1639(b).

As early as 1854, Lord Coke formulated rules of legislative interpretation which today remain as the most reliable guide to proper judicial use of statutes.[22] In *Heydon's Case*,[23] after enumerating four factors to be considered in gaining a true interpretation of statutes, Lord Coke suggested that statutes be given such "construction as shall suppress the mischief, and advance the remedy, and . . . suppress subtle inventions and evasions for continuance of the michief . . . and . . . add force and life to the cure and remedy, according to the true intent of the makers of the Act . . . ."[24] While *Bissette* strives to suppress the mischief of the "uninformed use of credit,"[25] the decision fails to advance the remedy which the legislature "resolved and appointed to cure the disease."[26]

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[18]340 F. Supp. at 1194.

[19]Truth in Lending Act § 129(b), 15 U.S.C. § 1639(b) (1970).

[20]340 F. Supp. at 1193.

[21]*Id.*

[22]2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4501 (3d ed. F. Horack 1943).

[23]3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (Ex. 1584) (footnotes omitted):

> And it was resolved by them, that for the sure and true interpretation of all statutes in general . . . four things are to be discerned and considered:—
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> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy . . . .

[24]*Id.*

[25]Truth in Lending Act § 102, 15 U.S.C. § 1601 (1970); 12 C.F.R. 226.1(a)(2) (1971); *see* H.R. REP. No. 1040, 90th Cong., 1st Sess. 1, 18 (1967).

[26]Heydon's Case, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (Ex. 1584).

To overcome the problem of the uninformed use of credit, Congress provided a remedy of disclosure. The court's reading of section 1639(b), however, overlooks the legislative intent as to how the remedy should be applied. Congress has made it clear that the Act and its remedy of disclosure should be carried out according to the dictates of the Board[27] as related through Regulation Z. In making an interpretation of section 1639(b) contrary to that urged by defendant, the court shunned the interpretation of the body which Congress clearly appointed to direct the implementation of the Act.[28] The Board has spoken unmistakably on the meaning of the words in section 1639(b). In addition to the use of the phrase "before the transaction is consummated" in Regulation Z,[29] the Board has also given assurance that "consummation" refers to a contractual relationship between the extender of credit and the customer.[30] More specific to the contention of defendant, the Board has implied that disclosure any time before consummation is acceptable by stating that the only requirement is that the disclosure be made prior to the contractual relationship.[31] In *Bissette*, the court's decision probably resulted from an opinion that less preference should be given the interpretations of a regulatory agency than the court's own determination of legislative intent. Recognizing that application of law according to the spirit of the legislative body must always be the foremost objective,[32] the court was faced with a dilemma as to which spirit to honor: the one calling for authority in the regulatory body or the broader congressional spirit of meaningful disclosure?

Colonial Mortgage also argued that the last subsection of section 1639(b), which permits disclosure to "be made by disclosing the infor-

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[27]Truth in Lending Act § 105, 15 U.S.C. § 1604 (1970).

[28]The weight which Congress intended the interpretations of the Board to carry can be seen in the following House Report:

> All substantive regulations in connection with the full disclosure of the terms and conditions of finance charges in credit transactions . . . shall be issued by the Board of Governors of the Federal Reserve System. No one can deny their experience and expertise in these matters. Accordingly, it is the view of your committee that, for uniformity of application to all affected segments of the industries concerned, a single set of comprehensive regulations should be issued.

H.R. REP. No. 1040, 90th Cong., 1st Sess. 1, 18 (1967); *see* 15 U.S.C. § 1604 (1970).

[29]12 C.F.R. § 226.8(a) (1971).

[30]Letters from Milton W. Schober, Assistant Director of FRB, Aug. 27, 1969, in 4 CCH CONSUMER CREDIT GUIDE ¶¶ 30,146-47, at 66,060-61 (1972).

[31]Letter from Milton W. Schober, Assistant Director of FRB, Feb. 11, 1970, in 4 CCH CONSUMER CREDIT GUIDE ¶ 30,281, at 66,132 (1972).

[32]2 J. SUTHERLAND, *supra* note 22, § 4501.

mation in the note or other evidence of indebtedness to be signed by the obligor," should be read as allowing disclosure as late as the signing of the note at closing.[33] Basing its conclusion on "logic and the relevant legislative history,"[34] the court decreed that "the language relied upon merely states *how* Truth in Lending information may be disclosed and says nothing about *when*."[35] As support for its interpretation, the court cited the House Report[36] accompanying the Act and deduced from the report that the subsection of 1939(b) in question was intended "to facilitate compliance by making disclosure possible in a single instrument, to a single obligor."[37] Legislative history and logic could have also led the court toward defendant's point of view. Further inquiry into the legislative history reveals the Senate Report on section 1639(b) which discusses the last subsection under the heading *Time of disclosure*.[38] This heading[39] alone disproves the court's theory that the section of the Act in question is not relevant to the time of disclosure. Furthermore, the court's reply to defendant's contention is illogical. A provision which permits disclosure in certain specific documents inevitably affects the time for such disclosure. The time will be the time that the specified document is routinely used. It is hard to imagine that Congress would speak of documents upon which disclosure could be made, every document mentioned being of a type that appears at the end of a credit transaction, without intending to have some effect on time of disclosure.

The words of the statute, "evidence of indebtedness to be signed by the obligor,"[40] refer to a document giving rise to a contractual commitment. The fact that Congress drafted section 1639(b) with words dealing with the time of contractual commitment suggests that Congress

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[33]340 F. Supp. at 1193.

[34]*Id.*

[35]*Id.*

[36]H.R. REP. No. 1040, 90th Cong., 1st Sess. 1, 25 (1967).

[37]340 F. Supp. at 1193.

[38]S. REP. No. 392, 90th Cong., 1st Sess. 1, 15 (1967): "Section 4(b)—The original of S. 5 required disclosure 'prior to the consummation of the transaction.' The committee bill substitutes 'before the credit is extended' with a stipulation that the disclosure can be made on the contract or other document to be signed by the consumer. This obviates the need for a separate piece of paper showing the disclosure items."

[39]It is recognized that only slight value is usually given section headings in construing the words of a statute because of the possibility that they were inserted by a clerk only for reference and because they are not essential parts of the act. E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 207 (1940). The same reasoning should hold true with congressional reports. While headings might deserve little reliance when the question is legislative intent or the meaning of a word, they obviously hold more value in revealing the subject area being discussed.

[40]Truth in Lending Act § 129(b), 15 U.S.C. § 1639(b) (1970).

felt this particular time to be crucial to the mortgage loan context. By carefully providing for disclosure in a document which a consumer must see before he becomes legally obligated, Congress communicated its desire that disclosure be made before a contractual commitment is undertaken. Consequently, defendant's disclosure at closing should have been permissible as long as it preceded the borrower's signing of the note. In refuting this second argument by defendant, the court overlooked the Senate Report[41] and the Act's continual reference to points of finality in the loan process.

Defendant also attempted to defend on the grounds of impracticality of compliance with a pre-closing disclosure, arguing that all of the information relative to closing costs would not then be available.[42] The court disposed of this argument by referring to provision 226.6(f) of Regulation Z, which allows for an estimate of unknown or unavailable items when disclosure is made.[43] The court's treatment of defendant's argument[44] suffers because of the slight importance it attaches to the plea of impracticality of compliance. The court seemed to adopt the attitude that no court should be burdened with weighing the real problems of compliance. When section 226.6(f) is applied, the resulting use of estimates may lead to difficulties. Just as there are situations in which the information is not available for an exact disclosure, there will also be situations where the information upon which to base an estimate is unavailable. This possibility would be greater if disclosure is required near the beginning of a loan negotiation.

In many instances, the purposes of the Act[45] will not be promoted by the use of estimates because an estimate would not be "meaningful disclosure" to a consumer. One percentage point difference in the rate of interest can mean a great deal of money, so an estimate would often be of little value. The widespread use of estimates would also provide unscrupulous lenders the opportunity to take advantage of borrowers who might depend heavily on an estimate only to be told the higher percentage rate or dollar amount at closing.

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[41]S. Rep. No. 392, 90th Cong., 1st Sess. 1, 15 (1967).

[42]340 F. Supp. at 1193-94.

[43]12 C.F.R. § 226.6(f) (1971).

[44]Defendant's chances of impressing the court with the impracticality of requiring disclosure prior to closing were lessened by the fact that evidence was presented with the complaint showing that the required information was available to Colonial Mortgage well in advance of closing. 340 F. Supp. at 1194.

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

Finally, defendant urged that the ambiguity of the language, "before the credit is extended," in section 1639(b) does not lend itself to any absolute rule as to time of disclosure. The court in essence agreed with defendant and found it unnecessary to adopt an absolute rule as to disclosure time. It simply said that disclosures made only at closing are a violation of the Act. After declaring that the "sole issue presented for determination is when such disclosure must be made,"[46] the court was unable to determine a point in time antecedent to closing as the exact time when disclosure must be made. The administration of mortgage transactions varies among individual lenders[47] so that determining a precise pre-closing event as the legally correct time for disclosure is a challenging task. In reaching its conclusion, the court found itself unsuited to resolve the central issue before it, because it lacked the expertise and everyday experience[48] in the field of mortgage finance.

In considering whether the *Bissette* decision actually promoted the policy of meaningful disclosure,[49] one must remember that the court decided that disclosure at closing would be of no effective use to the consumer.[50] *Bissette* assumed that a borrower is committed when he attends closing even though he may not have signed the contract.[51] In assessing the wisdom of the assumption upon which *Bissette* rests, scrutiny of the practical setting of a loan closing is necessary. In *Bissette*, plaintiffs had been living in their new home for three weeks,[52] a fact showing a commitment of time and money, such that they were unlikely to rescind the transaction even if the credit terms varied from their expectations. Such a situation has a possibility of abuse to the borrower. Since the practice of occupying a home before a loan is closed is not prevalent, the *Bissette* decision and its assumption of commitment prior

[46]340 F. Supp. at 1192.

[47]The techniques used to process a loan in the period between the initial meeting with the borrower and the closing vary from lender to lender. Some lenders do not see the borrower until closing. Some extend verbal loan approval. Some mail written commitments. The time period between the first meeting and closing also varies, depending upon the urgency of the loan, the type of institution the lender is, the type of security interest involved, etc.

[48]*See* H.R. REP. No. 1040, 90th Cong., 1st Sess. 1, 18 (1967).

[49]By referring to the legislative history, the court showed that "meaningful disclosure" is a primary purpose of the Act. 340 F. Supp. at 1193.

[50]340 F. Supp. at 1193.

[51]The court assumed that even though a contractual relationship might not yet exist, disclosure at closing was too late for effective use by the consumer and left him no viable choice if he did not like the terms revealed at closing. The court saw a practical commitment before a legal commitment. *See* 340 F. Supp. at 1193.

[52]Note 16 *supra*.

to closing should be evaluated in the context of the typical approach to closing where a contract has not yet been signed. In the typical situation where the borrower does not occupy the dwelling prior to closing, the borrower is not absolutely committed, but still lacks any real alternative. Often the borrower has invested time, effort, and money in bringing the transaction to the point of closing. Even if faced with higher costs at closing than expected, he is likely to be more anxious to secure the loan and move into the new home than to begin the process anew.

The reaction of lenders to *Bissette*[53] has been one of knowing what the court said but not knowing its full impact. Lenders know that they cannot disclose at closing but are not sure at what time prior to closing disclosure must be made in order to be "meaningful." Lenders are adopting various approaches to comply with *Bissette*. Many mortgage bankers have begun using a ten-day rule, calling for the expiration of ten business days between disclosure and closing. Other lenders routinely send disclosures along with written confirmation of loan approval prior to closing. Whatever the particular practice adopted, lenders seem apprehensive about making disclosure at any time close to closing. While it would seem that the court's decision would impose a hardship on the lenders because of the unavailability of some information prior to closing, this has not been the case. Costs such as appraisal fees, origination fee, FHA insurance premium, and title search fees are standard in most situations and are not likely to change in the interim between disclosure and closing. A possible hardship to mortgage bankers could occur in a situation where discount points[54] are quoted during a season of rapid fluctuation in interest rates in the national money market. Discount points could change overnight, leaving the lender "boxed in" at the lower yield with a resulting difficulty in marketing his loan. Concern is also felt over the question of whether a borrower can waive the undefined period which *Bissette* seems to demand between disclosure and closing. There are occasions when a borrower desires to close a loan as soon as possible. Those lenders who have adopted a ten-day rule are wary of quick closings and look forward to a conclusive answer.

The *Bissette* decision makes disclosure requirements more strin-

[53]The author has interviewed various lenders to assess their reaction to and understanding of *Bissette* and to examine the steps they have taken to comply with its ruling.

[54]Discount points are charged by lenders and deducted in advance from a loan so that the loan's yield will equal the present interest rate in the money market. This practice is prevalent among mortgage bankers who finance FHA and VA loans which carry an interest ceiling.

gent for residential mortgage transactions. It should be noted that the other types of credit under the Act, particularly "open-end credit plans," "credit sales," and loans not secured by a first lien on a dwelling, are still ruled as to time of disclosure by reference to the time at which a contract is consummated. Different treatment of residential mortgages can be justified because homes are more of a necessity than the majority of items financed and also represent perhaps the largest investment a family will make. Whether in the future the time of contractual obligation will be abandoned as a reference point for those types of credit unaffected by *Bissette* depends upon whether a consumer is obligated as a matter of fact prior to signing a contract. If he is, the logic of *Bissette*[55] would compel a finding that disclosure at the time of execution of the contract was not meaningful. Such a finding would be unlikely, though, as the procedures and formalities unique to mortgage loan transactions which call for investments of time and money by a borrower before an obligation is undertaken do not exist with other kinds of credit such as car loans, revolving charge plans, and appliance financing. In these situations it is unlikely that a consumer would become so committed prior to entering into a contract that he has no meaningful opportunity to reject the contract.

The court in *Bissette* strived to reach a just decision on the facts before it. While straining accepted rules of statutory interpretation and brushing aside the opinions of the regulating authority, the decision in *Bissette* reflects the efforts of a court to assure consumers of disclosure of credit terms at a time when they still have a choice of accepting or rejecting the credit. The decision rests on an assumption of commitment prior to contract, an assumption which may not be universal in its application. The value of the holding can be questioned because of its failure to provide a definitive answer to the question of when disclosure must be made. The Federal Reserve Board has acted to fill this gap by proposing an amendment to Regulation Z[56] calling for disclosure ten business days before closing. This proposed amendment goes far to effectuate the goals of meaningful disclosure as discussed by the court.[57]

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[55]*See* note 51 *supra*; 340 F. Supp. at 1193.

[56]Proposed Truth in Lending Reg. §§ 226.8(a), (q), 37 Fed. Reg. 15522 (1972). The Federal Reserve Board proposed an amendment to Regulation Z which would require disclosure 10 business days before closing in any transaction involving the purchase of a dwelling.

[57]340 F. Supp. at 1194: "so they can decide for themselves whether the charges are reasonable and have the opportunity, if they wish, to compare that cost with other available credit arrangements."