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Thomas C. Watkins

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for minority shareholders against a short form merger it should be formulated by a legislative or an administrative body taking all the relevant and unique considerations into account,⁷² not by courts seeking to apply rule 10b-5 to an area with which it was never intended to deal, in a misguided effort to provide needed protection for minority shareholders.

JOHNNY REID EDWARDS

Truth in Lending—Failure To Disclose a Right of Acceleration Held Not a Violation

The Truth in Lending Act¹ and Federal Reserve Board Regulation Z² provide, *inter alia*, that a creditor shall disclose to its customers any "default, delinquency, or similar charges payable in the event of late payments."³ Confronted with the issue whether a contractual right to accelerate total indebtedness is such a charge when state law requires a rebate of the unearned portion of the finance charge, the Third Circuit Court of Appeals in *Johnson v. McCrackin-Sturman*

in their good judgment may discern and apply. We will then have in the securities field our own *Erie v. Tompkins*.

Borden, *supra* note 1, at 1039 (footnotes omitted). This argument is relied upon heavily by defendants in *Green* in their petition for certiorari to the United States Supreme Court. Petitioner's Brief for Certiorari at 11, *Santa Fe Indus., Inc. v. Green*, 533 F.2d 1283 (2d Cir.), *cert. granted*, 45 U.S.L.W. 3222 (1976) (No. 75-1753).

72. It should be noted that the SEC has drafted proposed rules that would deal specifically with the application of rule 10b-5 to the types of situations discussed herein. If SEC rules are to be applied to these situations at all, it would certainly appear that the better route would be through the Commission's proposed rules. Two of these rules basically place disclosure requirements and substantive limitation on those planning to carry out transactions that would result in "going private." Proposed Rules 13e-3A & 13e-3B, Securities Act Release No. 5507 (Feb. 6, 1975), *reprinted in* [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,104, at 85,091-93.

1. 15 U.S.C.A. §§ 1601-1667 (West 1974, Cum. Supp. 1976 & Supp. Pamphlet No. 2, pt. 1 1976). The Truth in Lending Act is subchapter I of the Consumer Credit Protection Act, 15 U.S.C.A. §§ 1601-1691 (West 1974, Cum. Supp. 1976 & Supp. Pamphlet No. 2, pt. 1 1976).

2. 12 C.F.R. § 226 (1976). Regulation Z was promulgated by the Board of Governors of the Federal Reserve System pursuant to the authority granted by 15 U.S.C. § 1604 (1970). The Board's authority is designed to insure the effectiveness of the Consumer Credit Protection Act. *See Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973).

3. 15 U.S.C. § 1638(a)(9) (1970); 12 C.F.R. § 226.8(b)(4) (1976).

*Ford, Inc.*⁴ recently held that the right of acceleration is not a "charge" and that disclosure of the acceleration right is not mandated by section 128(a)(9) of the Truth in Lending Act⁵ and section 226.8(b)(4) of Regulation Z.⁶

The *McCrackin-Sturman* case arose out of a commonplace consumer transaction—financing the purchase of a used automobile through an installment loan contract.⁷ The contract, executed on January 20, 1973 by plaintiffs William and Joan Johnson, was originated by McCrackin-Sturman Ford, Inc. and assigned to Ford Motor Credit Company.⁸ Paragraph 20 of the contract contained a "time is of the essence" clause that specified the lender's right of acceleration upon borrower's fault.⁹ A disclosure statement and a copy of the contract were delivered to plaintiffs at the time of sale. The disclosure statement provided information about certain terms of the contract, including the amount of the charges assessable in the event of late payments¹⁰.

4. 527 F.2d 257 (3d Cir. 1975).

5. Section 128(a)(9) provides: "(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable: . . . (9) The default, delinquency, or similar charges payable in the event of late payments." 15 U.S.C. § 1638(a)(9) (1970).

6. Section 226.8(b)(4) provides: "(b) *Disclosures in sale and nonsale credit.* In any transaction subject to this section, the following items, as applicable, shall be disclosed: . . . (4) The amount, or method of computing the amount of any default, delinquency, or similar charges payable in the event of late payments." 12 C.F.R. § 226.8(b)(4) (1976).

7. Not all extensions of credit are covered by the Truth in Lending laws. Exempted transactions are set forth in 15 U.S.C.A. § 1603 (West 1974 & Cum. Supp. 1976).

8. Section 115 of the Consumer Credit Protection Act sets forth the following provision concerning the liability of assignees:

Except as otherwise specifically provided in this subchapter, any civil action for a violation of this subchapter which may be brought against the original creditor in any credit transaction may be maintained against any subsequent assignee of the original creditor where the violation from which the alleged liability arose is apparent on the face of the instrument assigned unless the assignment is involuntary.

15 U.S.C.A. § 1614 (West Cum. Supp. 1976).

9. Paragraph 20 of the contract provided as follows:

20. DEFAULT

Time is of the essence of this contract. *In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, or Seller deems the Property in danger of misuse or confiscation, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable*

527 F.2d at 261 (emphasis by the court).

10. The provision disclosing delinquency charges stated:

(13) Delinquency charges: Buyer may be required to pay a delinquency charge of 2% of any installment in default for each month, or fraction thereof in excess of 10 days, that such installment is in default, plus such

and the method of computing the rebate of the unearned finance charge upon prepayment of the loan,¹¹ but the statement did not provide any information about the creditor's right to accelerate payment. When plaintiffs defaulted in payment on the contract,¹² Ford Motor Credit exercised its rights under paragraph 20 of the contract and repossessed the automobile.

Alleging that the disclosure statement that they received did not meet the requirements of the Truth in Lending Act and Regulation Z, plaintiffs, in June 1973, sought statutory damages¹³ against McCrackin-Sturman Ford, Inc. and Ford Motor Credit in the United States District Court for the Western District of Pennsylvania. The district court granted summary judgment in favor of plaintiffs.¹⁴ The

expenses incurred by the seller in effecting collection under the Contract as may be allowed by law.

Id. at 261 n.4.

11. Paragraph 15 of the contract set forth the rebate provision:

(15) Prepayment rebate: Buyer may prepay his obligations under the Contract in full at any time prior to maturity of the final installment thereunder, 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 subject to retention by the Seller of a minimum finance charge of \$10.00. No rebate will be made if the amount is less than \$1.00.

Id. at 261 n.5.

12. Plaintiffs failed to make any payments under the contract. *Id.* at 261.

13. Section 130 of the Consumer Credit Protection Act sets forth the damages awardable for Truth in Lending violations. In pertinent part the section provides:

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E 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)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, 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 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 \$500,000 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.

15 U.S.C.A. § 1640 (West Supp. Pamphlet No. 2, pt. 1 1976).

14. *Johnson v. McCrackin-Sturman Ford, Inc.*, 381 F. Supp. 153, 156 (W.D. Pa. 1974). In the district court all parties had moved for summary judgment. The motions by McCrackin-Sturman Ford and Ford Motor Credit were denied; the motion by plaintiffs was granted against McCrackin-Sturman Ford alone. Plaintiff's motion for summary judgment against Ford Motor Credit, however, was denied without prejudice. *Id.* The court noted that in the event that plaintiffs were unable to collect

court held that a right of acceleration was a "default, delinquency, or similar charge" within the purview of section 128(a)(9) of the Truth in Lending Act and section 226.8(b)(4) of Regulation Z.¹⁵ In failing to disclose the right of acceleration, the court reasoned that defendant had not made precisely the "type of disclosure that the Truth-in-Lending Act was intended to require."¹⁶ Allegations of other violations of the Act were not considered in the summary judgment order.

On appeal of the summary judgment order against McCrackin-Sturman,¹⁷ the Third Circuit reversed, holding that when state law requires that the creditor rebate the unearned portion of the finance charge,¹⁸ the right of acceleration is not a "default, delinquency, or similar charge."¹⁹ Rather the court characterized the right as a contractual remedy,²⁰ and thus determined disclosure was not required by section 128(a)(9) of the Truth in Lending Act and section 226.8(b)(4) of Regulation Z.²¹ The court emphasized that it was not confronted with the issue whether a right of acceleration need be disclosed when there is no requirement that the creditor rebate the unearned portion of the finance charge.²²

The Third Circuit rejected the district court's determination that a "charge" was simply an "obligation."²³ Characterizing its own definition of the word as the meaning utilized by the consumer credit industry, the Third Circuit defined "charge" as a specific pecuniary sum assessed in addition to the regular payments.²⁴ Since Penn-

from McCrackin-Sturman, they would need to produce additional evidence to hold Ford Motor credit liable. *Id.* See note 8 *supra* for statutory provisions on the liability of assignees. Only the ruling against McCrackin-Sturman Ford was certified as an appealable final judgment pursuant to FED. R. CIV. P. 54(b). 527 F.2d at 262.

15. 381 F. Supp. at 156.

16. *Id.*

17. See note 14 *supra*.

18. The Pennsylvania Motor Vehicle Sales Finance Act provides in pertinent part:

Whenever all the time balance is liquidated prior to maturity by prepayment, refinancing or termination by surrender or repossession and re-sale of the motor vehicle, the holder of the installment sale contract shall rebate to the buyer immediately the unearned portion of the finance charge. Rebate may be made in cash or credited to the amount due on the obligation of the buyer.

PA. STAT. ANN. tit. 69, § 622(B) (Purdon 1965).

19. 527 F.2d at 265.

20. *Id.* at 267.

21. *Id.* at 266-67.

22. *Id.* at 260 n.3.

23. *Id.* at 265.

24. *Id.* at 266.

sylvania law, which the court held was fully incorporated into the contract,²⁵ requires a rebate of any unearned finance charge upon acceleration,²⁶ the court reasoned that no pecuniary sum in addition to the existing contractual obligation was being assessed.²⁷ Thus, there was no requirement that the right of acceleration be disclosed as a "default, delinquency, or similar charge." In reaching this conclusion the Third Circuit relied heavily on a Federal Reserve Board staff opinion letter,²⁸ issued subsequent to the district court decision, that also concluded that a right of acceleration was not disclosable as a charge when there was a requirement that unearned interest be rebated.²⁹ The court rejected the contention that it should not consider Pennsylvania's statutory rebate provisions and that, by merely setting forth in the contract a right to accelerate total indebtedness, defendants had violated the disclosure requirements.³⁰ The court also rejected the argument that the "meaningful disclosure" standard of the Truth in Lending laws required a right of acceleration to be disclosed.³¹

The legislative intent and text of the Consumer Credit Protection Act³² provide a backdrop against which the *McCrackin-Sturman* decision may be viewed. Enacted in 1968, the Act was developed to provide the consumer with meaningful information in order that he might intelligently "shop around" for credit sources.³³ Intended effects of the legislation included enhancement of economic stabilization and strengthening of competition among the various financial institutions.³⁴ Consumers litigating under the Truth in Lending laws

25. *Id.*; see text following note 69 *infra*.

26. PA. STAT. ANN. tit. 69, § 622(B) (Purdon 1965), set forth in note 18 *supra*.

27. 527 F.2d at 266.

28. 5 CONS. CRED. GUIDE (CCH) ¶ 31,173 (1974), quoted in 527 F.2d at 267 n.22.

29. 527 F.2d at 267.

30. *Id.* at 268.

31. *Id.* at 269.

32. 15 U.S.C.A. §§ 1601-1691 (West 1974, Cum. Supp. 1976 & Supp. Pamphlet No. 2, pt. 1 1976).

33. *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 364 (1973); 12 C.F.R. § 226.1(a)(2) (1976) (FRB statement of purpose of Consumer Credit Protection Act); [1968] U.S. CODE CONG. & AD. NEWS 1962 (legislative history of Consumer Credit Protection Act—House Report and Conference Report). See generally Boyd, *The Federal Consumer Credit Protection Act—A Consumer Perspective*, 45 NOTRE DAME LAW. 171 (1970).

34. 15 U.S.C. § 1601 (1970). This section also states that the purpose of the legislation was to assure a meaningful disclosure of credit terms so that the consumer could compare the various credit terms available and thereby avoid the uninformed use of credit. *Id.* Currently within the purview of the legislation are credit billing

have generally found the provisions construed liberally in order to foster the remedial purposes of the legislation.³⁵

Prior to the *McCrackin-Sturman* district court decision, the issue whether a creditor must disclose a right to accelerate had confronted the courts only in the class action of *Garza v. Chicago Health Clubs, Inc.*³⁶ In that case defendant had failed to disclose his right to accelerate the entire balance of the contract. Although the theory of recovery stated in the complaint was defective, the United States District Court for the Northern District of Illinois found on its own initiative a violation of the requirement of section 226.8(b)(4) of Regulation Z that requires a lender to disclose "charges payable in the event of late payments."³⁷ The court reflected on the informative purposes of the consumer credit statutes and held that it was clear that an acceleration of indebtedness provision should be disclosed as a "default, delinquency, or similar charge" within the meaning of sections 128(a)(9) of the Truth in Lending Act and 226.8(b)(4) of Regulation Z.³⁸ Relying on *Black's Law Dictionary*, the court adopted "obligation" and "claim" as synonyms for "charge."³⁹ The court also concluded that "charge" had been judicially defined as "a pecuniary burden or expense."⁴⁰ These definitions, later accepted by the district court in *McCrackin-Sturman*, were the gravamen of the holding in *Garza* that a right of acceleration was a disclosable "charge."⁴¹

Subsequent to the *McCrackin-Sturman* district court decision with its treatment of *Garza* as authoritative on the acceleration disclosure issue,⁴² but prior to the Third Circuit's decision in the case, numerous opportunities to consider the matter further were presented at the district court level. The first encounter with the issue was by a special master for the United States District Court for the Northern District

practices, credit card transactions and consumer leases. 15 U.S.C.A. § 1601 (West Cum. Supp. 1976 & Supp. Pamphlet No. 2, pt. 1 1976).

35. See, e.g., *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973); *Woods v. Beneficial Fin. Co.*, 395 F. Supp. 9, 12 (D. Ore. 1975); *Johnson v. Associates Fin., Inc.*, 369 F. Supp. 1121, 1122 (S.D. Ill. 1974). But see *Jones v. East Hills Ford Sales, Inc.*, 398 F. Supp. 402, 403 (W.D. Pa. 1975).

36. 347 F. Supp. 955 (N.D. Ill. 1972).

37. *Id.* at 959.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Johnson v. McCrackin-Sturman Ford, Inc.*, 381 F. Supp. 153, 156 (W.D. Pa. 1974).

of Georgia. In *Pollack v. Avco Financial Services, Inc.*,⁴³ and *Barksdale v. Peoples Financial Corp.*⁴⁴ the same special master followed *Garza* and the district court *McCrackin-Sturman* opinion in concluding that a right of acceleration was a charge that required disclosure. *Barksdale* is representative of this reasoning in which the master, after noting the absence of any special meaning or legislative definition for the word "charge," reported "[a]s a matter of law that a right of acceleration is a 'charge' that must be disclosed pursuant to Regulation Z § 226.8(b)(4)."⁴⁵

The District Court for the Northern District of Georgia further considered disclosure of acceleration clauses in the case of *McDaniel v. Fulton National Bank*.⁴⁶ In *McDaniel* the court adopted the findings of the special master⁴⁷ and developed a line of reasoning different from that of the earlier cases. Making observations about the general nature of "charges" as evidenced by sections 226.4(a) and 226.8(c) or Regulation Z,⁴⁸ the master had determined that the term "charges" referred to specific pecuniary sums that could be assessed against the customer in addition to the existing contractual obligations.⁴⁹ He concluded "that the *right* of the creditor, upon default of the debtor, to

43. 5 CONS. CRED. GUIDE (CCH) ¶ 98,766 (1974).

44. *Id.* ¶ 98,738.

45. *Id.* at 88,341. Although a report by the same master in *Hall v. Sheraton Galleries*, *id.* ¶ 98,737, was issued prior to the district court *McCrackin-Sturman* decision, the report cited *Garza* and concluded that a provision for collection of attorneys' fees and acceleration of indebtedness in the event of default was disclosable as a charge that may be imposed against the borrowing of money. *Id.* at 88,336.

46. 395 F. Supp. 422 (N.D. Ga. 1975).

47. *Id.* at 423. The master's findings are reported in *McDaniel v. Fulton Nat'l Bank*, 5 CONS. CRED. GUIDE (CCH) ¶ 98,683, at 88,263 (N.D. Ga. 1974).

48. Language in § 226.4(a) of Regulation Z is representative of that from which these observations were drawn. Charges required by this section to be included in the determination of finance charges are of the following types:

(1) Interest, time price differential, and any amount payable under a discount or other system of additional charges.

(2) Service, transaction, activity or carrying charge.

(3) Loan fee, points, finder's fee, or similar charge.

(4) Fee for an appraisal, investigation, or credit report.

(5) Charge or premiums for credit life, accident, health, or loss of income insurance, written in connection with any credit transaction

(6) Charges or premiums for insurance, written in connection with any credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property

(7) Premium or other charge for any other guarantee or insurance protecting the creditor against the customer's default or other credit loss.

(8) Any charge imposed by a creditor upon another creditor for purchasing or accepting an obligation of a customer if the customer is required to pay any part of that charge in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation.

12 C.F.R. § 226.4(a) (1976).

49. 5 CONS. CRED. GUIDE ¶ 98,683, at 88,263.

accelerate the unpaid balance, cannot reasonably be considered a 'charge' (expense or cost) in any context inasmuch as acceleration, in and of itself, does not increase the amount of the debt by one penny.⁵⁰ Coupling the master's findings with its interpretation that Georgia law prohibited the collection of any unearned interest,⁵¹ the district court determined that there was no need to disclose an acceleration provision as a "default, delinquency, or similar charge" since no additional tangible sum could be assessed.⁵² *Garza* and the *McCrackin-Sturman* district court opinion were not considered valid precedent in *McDaniel* because the court read those cases as not involving a prohibition on the collection of unearned interest such as that which the court interpreted Georgia law to require.⁵³

In *Barrett v. Vernie Jones Ford, Inc.*,⁵⁴ which also arose in the Northern District of Georgia, Chief Judge Edenfield pointed out that the court in *McDaniel* was in error in its interpretation of the Georgia law regarding collection of unearned interest.⁵⁵ The Georgia law, stated in *Vernie Jones*, was that an acceleration of total indebtedness clause was unenforceable only if it rendered the contract usurious.⁵⁶ When it considered the disclosure ramifications of a potentially enforceable acceleration clause, the *Vernie Jones* court concluded that, if a note "made no provision for rebate of unearned interest upon acceleration, the diminution of the period over which the finance charge would be spread"⁵⁷ would constitute a default charge to the consumer. In requiring disclosure of clauses that on their face provided for an acceleration of total indebtedness, the *Vernie Jones* court grounded its decision on a determination that congressional intent required that the consumer be made aware of all "charges" that *might* be assessed against him.⁵⁸ Whether the consumer would prevail in any subsequent litigation attacking the validity of the charge was not the focus of the inquiry. A supplemental opinion in *McDaniel v. Fulton National Bank* acknowledged the correct interpretation of Georgia law in the *Vernie Jones* case.⁵⁹

50. *Id.* at 88,264.

51. 395 F. Supp. at 423.

52. *Id.* at 426.

53. *Id.* at 423.

54. 395 F. Supp. 904 (N.D. Ga. 1975).

55. *Id.* at 907.

56. *Id.* at 907-08.

57. *Id.* at 907.

58. *Id.* at 908-09.

59. *See* 395 F. Supp. at 425. The supplemental opinion reversed the court's prior

Other district courts have utilized policy arguments in the decision to require disclosure of acceleration clauses. *Meyers v. Clearview Dodge Sales, Inc.*⁶⁰ required disclosure of a right of acceleration even though Louisiana law had provisions for a rebate of unearned interest. The court reasoned that disclosure of the right of acceleration furthered important goals of the Truth in Lending laws.⁶¹ Citing *Garza v. Chicago Health Clubs, Inc.*,⁶² *Meyers* viewed a "charge" as any pecuniary burden or obligation.⁶³ *Woods v. Beneficial Finance Co.*,⁶⁴ noting *Meyers* with approval, referred to a meaningful disclosure standard under the spirit of the Truth in Lending laws.⁶⁵ *Woods* did, however, acknowledge that fine semantic distinctions were necessary to equate "acceleration" with "charge."⁶⁶

Since it has been held axiomatic to judicial review that an administrative agency's interpretations of its own regulations are entitled to great deference by the courts,⁶⁷ it is hardly open to question that the Third Circuit properly relied on the Federal Reserve Board staff opinion letter that clearly interpreted "default, delinquency, or similar charges" not to include a right of acceleration when there is a require-

position and required a disclosure of the right to accelerate total indebtedness. *Id.* at 428. The opinion now reasoned that the congressional intent behind consumer credit legislation required disclosure of all charges that the lender asserts that he has a right to collect. *Id.* As in *Vernie Jones*, whether or not the state courts could be utilized to collect the charge was not a determinative issue. *Id.*

Prior to the supplemental opinion in *McDaniel*, the district court in *Barksdale v. Peoples Fin.*, 393 F. Supp. 112 (N.D. Ga. 1975), in reliance on the initial *McDaniel* opinion, overruled the special master's recommendation that the right of acceleration be disclosed as a "charge." *Id.* at 114. The court, following the incorrect conclusion in *McDaniel* that acceleration of total indebtedness clauses were per se unenforceable in Georgia, held that since no additional sums could possibly be assessed against the borrower there was no "charge" to disclose. *Id.* at 114.

60. 384 F. Supp. 722 (E.D. La. 1974).

61. *Id.* at 726-27.

62. 347 F. Supp. 955 (N.D. Ill. 1972), cited in 384 F. Supp. at 726-27.

63. 384 F. Supp. at 726-27.

64. 395 F. Supp. 9 (D. Ore. 1975).

65. *Id.* at 16.

66. *Id.* In light of these distinctions, *Woods* held prospectively that it was necessary that rights of acceleration be disclosed. *Id.* One district court case that did not require disclosure of the right to accelerate was *Jones v. East Hills Ford Sales, Inc.*, 398 F. Supp. 402 (W.D. Pa. 1975). This case was decided by another judge of the same district court that had required disclosure in *McCrackin-Sturman*. The *Jones* court, as did the Third Circuit in its disposition of *McCrackin-Sturman*, 527 F.2d at 267, afforded great weight to the Federal Reserve Board staff opinion letter (cited in note 28 *supra*), which made it clear that it was not necessary to disclose a right of acceleration as a charge when a rebate of unearned interest was required. 398 F. Supp. at 404. Interestingly, the *Jones* court did not refer to the Pennsylvania statutory rebate requirements. The court concluded that the rebate policy of the creditor involved sufficiently obviated the claim that the customer was being charged. *Id.*

67. *Allen M. Campbell Co. v. Lloyd Wood Constr. Co.*, 446 F.2d 261, 265 (5th

ment that unearned interest be rebated.⁶⁸ Acceptance of this Federal Reserve Board position also necessarily required departure from the determination of *Garza* and its progeny that a charge is simply an "obligation" or "burden" rather than a specific additional pecuniary sum.⁶⁹ The surprising part of the *McCrackin-Sturman* opinion is its decision to incorporate the Pennsylvania rebate provision into the loan contract. To incorporate the Pennsylvania statute, the Third Circuit relied on the famous language of *Von Hoffman v. City of Quincy*: "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."⁷⁰ Reflecting on this quotation, Professor Corbin has reasoned that the general terminology of such a statement precluded it from being accepted as correct.⁷¹ He acknowledged that the operation of a contract could only be determined with due reference to all applicable statutes but emphatically stated that the statutes were not incorporated into the contract.⁷²

At first blush it seems that with proper reference to the historical interpretation and purpose of consumer credit laws, the Third Circuit should have disregarded *Von Hoffman* and concluded that the acceleration clause should have been disclosed since *on its face* it created a charge, albeit an unenforceable one under Pennsylvania law. The court would have been supported in such a decision by the prior determination in *Vernie Jones* that a rebate provision should not be read into a silent acceleration clause.⁷³ A pro-disclosure opinion would also have been consistent with the general philosophy of consumer credit legislation.⁷⁴ Ironically, it was the consumer oriented Penn-

Cir. 1971); see *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bone v. Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974); *N.C. Freed Co. v. Board of Governors of the Fed. Reserve Sys.*, 473 F.2d 1210, 1217 (2d Cir. 1972), *cert. denied*, 414 U.S. 827 (1973).

68. 5 CONS. CRED. GUIDE (CCH) ¶ 31,173 (1974), *quoted in* 527 F.2d at 267 n.22.

69. See, e.g., *Meyers v. Clearview Dodge Sales, Inc.*, 384 F. Supp. 722, 726-27 (E.D. La. 1974); *Pollack v. Avco Fin. Servs., Inc.*, 5 CONS. CRED. GUIDE (CCH) ¶ 98,766 (N.D. Ga. 1974) (special master's report). For a discussion of the term "charge," see *Morris v. First Nat'l Bank*, 5 CONS. CRED. GUIDE (CCH) ¶ 98,568 (N.D. Ga. 1975); *McDaniel v. Fulton Nat'l Bank*, 5 CONS. CRED. GUIDE (CCH) ¶ 98,683 (N.D. Ga. 1974) (special master's report). See also 1 CONS. CRED. GUIDE (CCH) ¶ 4230 (1970) (definition of delinquency charge).

70. 71 U.S. (4 Wall.) 535, 550 (1886).

71. 3 A. CORBIN, CONTRACTS § 551, at 197 (1960).

72. *Id.*

73. 395 F. Supp. 904, 909 (N.D. Ga. 1975).

74. See *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 377 (1973).

See generally *Boyd*, *supra* note 33, at 174.

sylvania statute that allowed the Third Circuit to deviate from the "meaningful disclosure" standard that had often mandated disclosures in prior Truth in Lending cases.⁷⁵

Under Georgia law, as interpreted in *Vernie Jones*, acceleration of total indebtedness clauses are not per se unenforceable.⁷⁶ That court refused to read a rebate requirement into a silent clause because there was no certainty that a rebate would be required. A rebate of unearned interest was called for only if acceleration rendered the note usurious.⁷⁷ The Pennsylvania statute involved in *McCrackin-Sturman* is an unequivocal rebate requirement.⁷⁸ If the Third Circuit had interpreted the contractual right to accelerate total indebtedness as a disclosable "charge," the court would have been in the awkward position of requiring Pennsylvania lenders to disclose to their customers that the lender was asserting a right to a "charge" that a state statute made it impossible lawfully to collect. Thus, in the specific factual context of *McCrackin-Sturman*, the decision not to require disclosure of the acceleration clause was the practical resolution of the issue. However, the incorporation of the Pennsylvania statute into the contract does raise a broad collateral problem concerning the extent to which state law provisions may permeate a Truth in Lending case.⁷⁹

Although there is nothing really profound in the conclusion that an acceleration clause does not constitute a "default, delinquency, or similar charge" when there is a provision for rebate of any unearned interest, there is a certain gravity to a decision that disclosure of such a clause will not be required under the Truth in Lending laws. In its decision not to grasp "meaningful disclosure" as the sustaining philosophy of what would have been a technically weak position, the Third Circuit appropriately indicated that the standard of meaningful disclosure should not override the specific provisions of the Truth in Lending Act and Regulation Z. But since the opinion inevitably surfaces with an anti-consumer gloss, it is likely that *Johnson v. McCrackin-Sturman Ford, Inc.* will be viewed as a deviation from the direction that the courts have determined that consumer credit litigation must take.

75. See, e.g., *Woods v. Beneficial Fin. Co.*, 395 F. Supp. 9, 12 (D. Ore. 1975); *Johnson v. Associates Fin., Inc.*, 369 F. Supp. 1121, 1122 (S.D. Ill. 1974).

76. 395 F. Supp. at 909.

77. *Id.* at 910.

78. PA. STAT. ANN. tit. 69, § 622(B) (Purdon 1965). See note 18 *supra* for the provisions of the statute.

79. See *McDaniel v. Fulton Nat'l Bank*, 395 F. Supp. 422, 428 (N.D. Ga. 1975).

After a thorough consideration of the Third Circuit's opinion in *McCrackin-Sturman*, a district court recently concluded:

[E]ven if we accept the argument that acceleration of the defaulted loan does not impose a charge under 12 C.F.R. § 226.8(b)(4), the customer should be informed of the right of acceleration and its consequences under the requirement that there be a meaningful disclosure of the terms and conditions of the credit transaction

. . . .⁸⁰

Thus, even though it is a well reasoned opinion, *Johnson v. McCrackin-Sturman Ford, Inc.* does not seem destined for the authoritative treatment it deserves.

THOMAS C. WATKINS

80. *Burley v. Bastrop Loan Co.*, 407 F. Supp. 733, 781 (W.D. La. 1976) (supplemental opinion).

