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TRUTH IN LENDING AND THE STATUTE OF LIMITATIONS

In the state of nature there were no causes of action . . .

I. INTRODUCTION

While it is difficult to trace a legal idea to its origin, the proposition that a consumer-debtor can circumvent the 1-year statute of limitations applicable to Truth in Lending (TIL) actions by raising the TIL claims in recoupment to the creditor's action on the debt, apparently was first asserted in 1973 in Kilgore v. Kennesaw Finance Co. In Kilgore, a creditor brought suit against a consumer-debtor following default on a small loan. The debtor, in turn, raised the creditor's earlier violations of the Truth in Lending Act (Act) in recoupment to the claim, hoping to gain the benefit of the common law rule that claims asserted by way of recoupment survive the statute of limitations that would apply were the claims sued upon affirmatively. Although the debtor's claim was dismissed summarily by the Georgia Court of Appeals, the defendant's argument has since been raised, with varying success, in a number of cases throughout the country.

1. Section 130(e) of the Truth in Lending Act provides in pertinent part: "Any action under this section may be brought . . . within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e) (1970).
5. The appeal was dismissed for want of a final appealable order. 128 Ga. App. at 120, 195 S.E.2d at 800.

By exploring the background of both common law recoupment and the
Truth in Lending Act, the first part of this comment seeks to analyze the
proposition that TIL claims raised by a consumer in recoupment to a
creditor's action on the debt are not subject to the 1-year statute of limita-
tions provided by the Act. The second part considers the various objec-
tions that have been raised to the proposition, and concludes that TIL
recoupment claims are not subject to the 1-year limitation of the Act.

II. BACKGROUND

A. Recoupment

Together with setoff and counterclaim, recoupment is a device which
enables a defendant to raise claims against a plaintiff and have them
adjudicated at the same time and by the same court that considers the
claims of the plaintiff. With the exception of recoupment, a defendant at
common law had no right to raise his or her own claims in the plaintiff's
proceeding; if the requirements of recoupment were not satisfied, the
defendant was forced to institute a separate action. Later, procedures for
setoff and counterclaim were developed which permitted a defendant to
assert claims arising outside the strict transaction upon which the plaintiff's
claim was based. But while setoff and counterclaim were solely creatures
of statute, recoupment developed entirely under principles of common

Community Legal Services, Villanova University School of Law); Lynch v. Signal

As of September 1976, then, the boxscore showed a 5 to 5 tie between cases
permitting, and cases prohibiting, the TIL claim to be brought beyond the 1-year
period. However, cases have generally treated the issue superficially, and to date no
single opinion has fully explored its various aspects. For this reason, no attempt is
made in this comment to treat the cases in depth, although reference to individual
cases is made where pertinent to a particular issue.

7. In an early case, Stow v. Yarwood, 14 Ill. 424 (1853), the Illinois Supreme
Court defined recoupment's function: "This doctrine of recoupment tends to promote
justice, and to prevent needless litigation. It avoids circuity of action, and multiplicity
of suits. It adjusts by one action adverse claims growing out of the same subject
matter." Id. at 427; see T. Waterman, Law of Set-Off, Recoupment, and Counter
Claim 477-81 (2d ed. 1872) [hereinafter cited as Waterman].

8. For the requirements of common law recoupment, see notes 10-16 and
accompanying text infra.

Co., 98 Ark. 125, 135 S.W. 843 (1911).

10. The first setoff statute, allowing the defendant to assert certain extrinsic
claims against the plaintiff, appeared in England in 1729. Stat. 2 Geo. 2, c. 22, § 13
(1728-29), made perpetual by Stat. 8 Geo. 2, c. 24 (1734-35). See Waterman,
supra note 7, at 11.

One commentator perceptively noted:
In considering the question raised at the outset whether a counterclaim is
barred by expiration of the limitation period, it is essential to understand the
technical meaning of the counterclaim in light of its historical development. The
When the defendant's claim arose from the same transaction that was the subject of the plaintiff's cause, and was capable of being adjusted in the same proceeding, recoupment was allowed. While not strictly a defense, since it did not deny the plaintiff's claim, recoupment was in the nature of a defense — it reduced or struck the plaintiff's claim, but could not yield affirmative recovery.

Today, under modern procedure, a defendant may generally raise any claim arising from the same "transaction or occurrence" that constitutes the subject matter of the plaintiff's claim. For procedural purposes, the confusion and obscurity in this phase of procedural law arises from the failure of most courts to distinguish counterclaim, recoupment, and set-off.

Note, Counterclaim: Effect of Statute of Limitations, 31 Calif. L. Rev. 210, 211 (1943) [hereinafter cited as Counterclaim]. The differences between recoupment and setoff can be summarized as follows. First, recoupment is allowed only where the defendant's claim arises from the same transaction that is the subject matter of the plaintiff's claim, while certain unrelated claims may be set off. Second, recoupment is of common law origin, while setoff is strictly a matter of statute. Third, recoupment is permitted whether the defendant's claim is liquidated or unliquidated, while many statutes permit the setoff of liquidated claims only. Waterman, supra note 7, at 8-15. Also, a claim asserted by way of recoupment survives as long as the plaintiff's cause of action exists, while under a number of statutes, a setoff must be asserted before the running of the statute of limitations which would apply to the defendant's claim if it were sued upon affirmatively. See Annot., 16 A.L.R. 326 (1922).


16. In State v. Arkansas Brick & Mfg. Co., 98 Ark. 125, 135 S.W. 843 (1911), the Arkansas Supreme Court pointed out:

Recoupment [at common law] was considered a defense, and prior to the adoption of the Code, if the defendant's cross-demand against the plaintiff exceeded the plaintiff's demand, the defendant could use his demand in recoupment only by sustaining a loss of the excess. Hence, prior to the Code, the defendant could recover on his cross-demand to the full extent only in an independent action. Id. at 128, 135 S.W. at 844. See also Restatement of Judgments, Counterclaim, Recoupment and Set-Off, ch. 3, title C, at 217 (1942).

17. See, e.g., Fed. R. Civ. P. 13; Pa. R. Civ. P. 1031(a). Rule 13 of the Federal Rules of Civil Procedure divides counterclaims into two groups: "compulsory" counterclaims and "permissive" counterclaims. A counterclaim is compulsory, and must be asserted, when it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." Fed. R. Civ. P. 13(a). All other counterclaims under the federal rules are permissive and may be raised despite the
modern statutory counterclaim clearly encompasses most facets of the
common law device of recoupment. However, the separate significance
of common law recoupment has not been totally lost. Modern code pleading was designed only to liberalize the rules of civil procedure, not to abrogate common law rights. Hence, in both state and federal courts, a defendant’s right to assert a claim by way of recoupment to reduce or strike the plaintiff’s recovery is still recognized to exist.

One of the unique characteristics of common law recoupment is that it permits the defendant to raise a claim without regard to the statute of limitations which would apply if the defendant brought an affirmative action on the same claim. As one court observed:

Recoupment goes to the foundation of the plaintiff’s claim; it is available as a defense, although as an affirmative cause of action it may be barred by limitation. The defense of recoupment, which arises out of the same transaction as plaintiff’s claim, survives as long as the cause of action upon the claim exists. It is a doctrine of an intrinsically defensive nature founded upon an equitable reason, inhering in fact that they do not arise from the same transaction or occurrence as the plaintiff’s cause of action. Fed. R. Civ. P. 13(b).

Rule 1031(a) of the Pennsylvania Rules of Civil Procedure provides:

The defendant may set forth in the answer under the heading “Counterclaim” any cause of action or setoff which he has against the plaintiff at the time of the answer (1) which arises from the same transaction or occurrence or series of transactions or occurrences from which the plaintiff’s cause of action arose, or (2) which arises from contract or is quasi-contractual.

PA. R. Civ. P. 1031(a).

18. One commentator divides counterclaim into recoupment counterclaim, setoff counterclaim, and new counterclaim, according to the nature of the claim asserted by the defendant. Counterclaim, supra note 10, at 213-14.

It has also been stated that “[a] counterclaim . . . is a broader and more comprehensive term than either recoupment or setoff and, as a general rule, embraces both.” 4 Stan. Pa. Prac. 393 (1955).

19. See State v. Arkansas Brick & Mfg. Co., 98 Ark. 125, 129, 135 S.W. 843, 845 (1911). As one commentator has emphasized: “It was never contended that procedural changes engendered by the codes were to operate so as to deny substantive rights recognized at common law, and certainly those principles of equity which justified the common law right of recoupment are as applicable now as then.” Counterclaim, supra note 10, at 215 (footnote omitted).


the same transaction, why the plaintiff's claim in equity and good conscience should be reduced.\textsuperscript{23}

The doctrine that a defendant's claim raised via recoupment survives as long as the plaintiff's cause of action is consonant with the policy expressed by statutes of limitations generally. The United States Supreme Court articulated that policy most recently in \textit{United States v. Western Pacific Railroad}.\textsuperscript{24}

The purpose of [statutes of limitations] is to keep stale litigation out of the courts. They are aimed at lawsuits, not at the consideration of particular issues in lawsuits. . . . To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation. . . . If this litigation is not stale, then no issue in it can be deemed stale.\textsuperscript{25}

While it appears that a few minority jurisdictions have not recognized the doctrine,\textsuperscript{26} a line of tax cases led by \textit{Bull v. United States}\textsuperscript{27} has clearly established that, under federal common law, a defendant may raise a claim via recoupment as long as the plaintiff's cause of action survives.\textsuperscript{28} In light of the federal rule, then, the question presented is whether a creditor's violation of the Truth in Lending Act may be used by way of recoupment to reduce his or her recovery on the debt, despite the fact

\textsuperscript{23} Pennysylvania R.R. v. Miller, 124 F.2d 160, 162 (5th Cir. 1941) (footnotes omitted).
\textsuperscript{24} 352 U.S. 59 (1956).
\textsuperscript{25} Id. at 72.
\textsuperscript{26} See Annot., 1 A.L.R.2d 630 (1948). One commentator has suggested, however, that the minority jurisdictions have not rejected the rule so much as they have failed clearly to distinguish setoff, which generally must be raised before the applicable statute of limitation runs, from recoupment, which is not barred by a general statute of limitations. Counterclaim, supra note 10, at 214-15; see note 10 supra. After an extensive survey of the cases, another commentator concluded:

Almost without exception the cases which deal with recoupments, so recognized and named, run to the effect that if a defendant's claim is in fact a recoupment the general statutes of limitation do not defeat it; on the contrary it may be availed of defensively so long as the plaintiff's cause of action exists. Annot., supra at 666-67 (footnote omitted) (emphasis added).

\textsuperscript{27} 295 U.S. 247 (1935). To simplify the rather complicated fact situation in \textit{Bull}: it appears that the executor of a decedent's estate wrongly characterized certain payments made to the estate from the decedent's partnership as a return of capital, rather than as income to the decedent. \textit{Id.} at 252. Therefore, the executor paid estate taxes on the funds, instead of income tax. \textit{Id.} After the period in which the executor could sue for overpayment of the estate taxes had elapsed, the Internal Revenue Service sued for the income tax deficiency. \textit{Id.} The Supreme Court held that the executor could recoup the estate taxes from the United States, despite the fact that the statute of limitations would have barred a direct action for the overpayment. \textit{Id.} at 263.

that institution of affirmative suit under the Act is barred by the 1-year statute of limitations.\textsuperscript{29}

B. Truth in Lending

The Truth in Lending Act was designed to raise the credit consciousness of the consumer by ensuring full disclosure of credit costs.\textsuperscript{80} Lengthy legislative inquiry\textsuperscript{81} had established that the American credit industry presented a potential borrower with a bewildering variety of credit options, each described in a different terminology.\textsuperscript{32} As a result, the consumer was rarely able to determine the actual cost of credit.\textsuperscript{83} In response to these

\textsuperscript{29} For a fine discussion of the issue under the law of the State of Washington, see Comment, Constitution of a Consumer Remedy: Avoiding the Statute of Limitations, 10 Gonzaga L. Rev. 543 (1975). It should be noted, however, that the author assumes therein that where a creditor sues on a debt in state court, and the consumer-defendant raises the plaintiff's violation of the Truth in Lending Act by way of recoupment, the state law of recoupment applies. It is submitted that in the situation posited, the federal law of recoupment would properly apply. See note 38 infra.

\textsuperscript{30} Section 102 states the purpose of the Truth in Lending Act:

The informed use of credit results from an awareness of the costs thereof by consumers. It is the purpose of this title 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.\ldots


\textsuperscript{31} The first Truth in Lending Bill, S. 2755, 86th Cong., 2d Sess. (1960), was introduced in the Senate on January 7, 1960. In the 8 years before its enactment, the Act accumulated a massive legislative history. For the highlights of that history, see CCH Instal. Cr. Guide, Truth in Lending — Law and Explanation, No. 177, at 7 (May 24, 1968).

\textsuperscript{32} Paul H. Douglas, former Senator from Illinois, chairman of the National Commission on Urban Affairs, and original sponsor of the Truth in Lending Act, stated: “The American consumer has been bewildered and numbed by the confusion in credit, and, as a result, has been educated not to be price conscious.” Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. pt. 1, at 41 (1967) [hereinafter cited as Senate Hearings].

\textsuperscript{33} Senator Magnuson of Washington, noting that a recent credit survey had uncovered interest rates varying from 5.5\% to 192.5\%, commented: “The very existence of such a vast range in interest charges makes it clear that the consumer does not know how to shop for credit.\ldots” Senate Hearings, supra note 32, at 33.

General Counsel of the Treasury, Fred B. Smith, stated in a report submitted to the subcommittee:

Although the consumer credit industry provides a variety of credit plans which are designed to meet the different needs of different consumers, it is difficult to see how the average consumer can make a cogent comparison of credit costs and thereby make an intelligent choice as to alternative sources of credit.

Senate Hearings, supra note 32, at 31.

Former Senator Douglas raised as an illustration the situation in which a consumer buys a car and finances the purchase with dealer-arranged credit:

Car dealers frequently make more money on the finance charge than they do on the car.\ldots What many dealers do is to artificially reduce the cash price of the car to make a sale while making up the loss in the finance charge. Competition works in the sale of the car because buyers are well informed about price. But it does not work in the field of credit, because buyers are not informed about the price of credit or true interest.

findings, the Act struck sharply in two directions: 1) it created a lexicon to define the various types of credit, and 2) it required that creditors disclose to the consumer the material terms of the credit transactions. Thus creditors, under threat of civil and criminal penalties, were forced to translate the old credit idiom into the new language of Truth in Lending. It was theorized that if the terminology could be standardized and disclosure of the material terms compelled, the consumer would readily be able to compare diverse credit plans and seek the best credit buy. Faithful to the free enterprise philosophy, Congress assumed that an informed consumerate would not only protect itself, but privately police the industry as well. It was anticipated that comparison shopping for

38. The key terms in the language of Truth in Lending are “finance charge” and “annual percentage rate.” For the respective definitions of these terms, see Regulation Z, 12 C.F.R. § 226.4-5 (1976).
39. The House bill, H.R. 11601, 90th Cong., 1st Sess. (1967), which was partially incorporated into the final version of the Truth in Lending Act, was accompanied by a report which stated:

[F]ull disclosure would aid the consumer in deciding for himself the reasonableness of the credit charges imposed and further permit the consumer to “comparison shop” for credit. It is your committee's view that full disclosure of the terms and conditions of credit charges will encourage a wiser and more judicious use of consumer credit.


Parenthetically, it may be noted that some creditors have recently begun to advertise their credit price competitively. A recent radio spot for The Fidelity Bank, Philadelphia, Pennsylvania, for example, contains the following dialogue:

Announcer: How to use a bank to stretch your money... Here's Jean McGrory for Fidelity.
Jean: I could kick myself! I always shop around for the best price on a new car... I never thought of shopping around for a new-car loan. Fidelity Bank can save me $90!
Announcer: Borrow $4,000 for 36 months from a typical dealer, and the annual percentage rate is 11.08%. At Fidelity, its only 9.76%.
Jean: My payments are lower. I'd pay Fidelity $128.61 a month instead of $131.11. It begins to add up.
Announcer: It sure does add up. You'd pay the dealer back $4,720. You'd pay Fidelity only $4,630. That's $630 in finance charges instead of $720.
Jean: Now I can shop around for the best price on a new car. And on top of that Fidelity can save me an extra $90. That's like getting the radio for nothing.
Announcer: Fidelity Bank. Member F.D.I.C. Yes, we stretch your money.


40. The Attorney General of Wisconsin testified before the Senate Subcommittee as follows:

Our open-market free-enterprise system is predicated on the principle that the most efficient allocation of our resources will be made when buyers and sellers make their decisions to purchase on the basis of their own informed self-interest. If they are misinformed or uninformed then they cannot give their patronage to
credit would generate competition between creditors and, ultimately, reduce the cost of credit. Viewed from this perspective, the educative function of the Act was crucial; consumers educated by TIL disclosures would do more than protect themselves — they would force the entire industry into healthy competition.

In order to compel disclosure, Congress created a civil cause of action in favor of consumers who do not receive the required disclosures. To recover, an aggrieved consumer need not prove actual damages; he or she can institute suit for twice the amount of the finance charge on the credit transaction, with a minimum recovery of $100 and a maximum

the most efficient producer. A misallocation of our natural resources results. Senate Hearings, supra note 32, at 272 (Hon. Bronson C. La Follette, Attorney General of Wisconsin); see Mourning v. Family Serv. Publications, Inc., 411 U.S. 356, 364 (1973). Former Senator Douglas stated that "if markets are to function properly, there must be a free flow of information. Perfect competition requires perfect information." Senate Hearings, supra note 32, at 50.

41. Former Senator Douglas stated:

Aside from protecting the average person on individual credit transactions, the annual rate provision has an economic significance which may be even greater in terms of public benefit.

First of all, a rate is like a price. Thus, when creditors are required to display their prices it is bound to have an impact.

Creditors will begin to compete in terms of price. The overall aggregate effect may be to lower rates throughout the entire credit industry.

Senate Hearings, supra note 32, at 49; see Letter from Fred Smith, General Counsel of the Treasury, to Hon. John Sparkman, Chairman, Committee on Banking and Currency, April 12, 1967, in id. at 31.

42. Former Senator Douglas emphasized:

Even if after education most consumers still ignore rates, all is not lost. It only takes a small minority of price-conscious shoppers to police a market and force sellers to compete on price. Thus, annual rate disclosure can lead to price competition even if a majority of buyers ignore the rates.

Id. at 49–50.

House bill 11601 originally included a national interest ceiling which fixed the maximum allowable annual interest on a credit transaction at 18%. H.R. 11601, 90th Cong., 1st Sess. § 203(l)(2) (1967). During the hearings on the House bill, the provision was attacked on the grounds that it would tend to fix interest charges at the maximum allowable rate. James L. Robertson, Vice President of the Board of Governors of the Federal Reserve System, noted that "there is a tendency for ceilings to become floors as well." Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 90th Cong., 1st Sess., pt. 1, at 127 (1967) [hereinafter cited as House Hearings]. Joseph W. Barr, Under Secretary of the Treasury, expressed the view that the competition fostered by consumer credit shopping would bring down the cost of credit more effectively than a uniform federal interest ceiling. Id. at 119–20.


Section 130(a) of the Act establishes the prima facie liability of the offending creditor to the aggrieved consumer. 15 U.S.C. § 1640(a) (Supp. V, 1975). The burden is on the creditor to raise the affirmative defenses established by sections 130(b) and 130(c), 15 U.S.C. §§ 1640(b), (c) (1970).
recovery of $1,000.\textsuperscript{45} A successful consumer is also entitled to actual damages,\textsuperscript{46} if any, and to reasonable attorneys' fees.\textsuperscript{47} Instead of creating a new enforcement agency,\textsuperscript{48} Congress encouraged individual consumers to serve as private attorneys general, aiding in the enforcement of the statute.\textsuperscript{49} Thus, in the end, it is largely the creditors who are to bear the expense of their own regulation.

While TIL litigation has not been unanimously welcomed,\textsuperscript{50} the majority of courts have perceived the importance of the civil suit and have held that the Act is to be liberally construed to effectuate its ultimate goal.

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\textsuperscript{48} The method of enforcing TIL legislation was frequently discussed in the congressional hearings on proposed legislation. The House bill, H.R. 11601, 90th Cong., 1st Sess. (1967), provided for total administrative enforcement. The Senate bill, S. 5, 90th Cong., 1st Sess. (1967), provided for civil liability. The Senate's approach, supplemented with provisions for partial administrative enforcement, was eventually adopted.


\textsuperscript{49} In Buford v. American Fin. Co., 333 F. Supp. 1243 (N.D. Ga. 1971), the United States District Court for the Northern District of Georgia emphasized the importance of the civil action: "The Truth in Lending Act clearly contemplates substantial enforcement through individual consumers acting as 'private attorneys-general.' No federal agency is provided by the Act with enforcement powers other than the ones they already possess." Id. at 1248 (footnote omitted).

\textsuperscript{50} See, e.g., B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES 77–79 (Supp. 1975) [hereinafter cited as CLARK & FONSECA], wherein it is suggested that the Act sets a "trap for the unwary" and that many violations "involve innocent failure to realize that particular credit transactions fall within the scope of the [Act]." Id. at 77–78. In the same treatise, the authors flatly state:

In spite of the loud trumpets which heralded the 1968 victory for Truth in Lending after 8 years of struggle and volumes of hearings in Congress, it seems likely that the impact of the legislation will be marginal.

Id. at 151 (1972).
of consumer protection. The quantity of potential litigation under the Act, however, has been severely curtailed by the 1-year statute of limitations provided in section 130(e):

Any action under this section may be brought . . . within one year from the date of the occurrence of the violation.

Typically, an aggrieved consumer is unaware that, under federal law, he or she is entitled to disclosures in consumer credit transactions. Furthermore, the unsophisticated consumer is unlikely to be able to determine whether disclosures actually given are legally sufficient to satisfy the stringent requirements of Regulation Z, promulgated under the Act. As a consequence, a TIL violation frequently remains undiscovered until the consumer consults an attorney. Realistically, this means that many violations will not be discovered until the creditor institutes legal action to collect the debt, thereby forcing the consumer-debtor to seek counsel. Unless the default is immediate and the creditor promptly initiates suit, the TIL violation may not come to an attorney’s attention until after the statute has run. This situation has encouraged the exploration of various methods of avoiding the bar of the statute of limitations.


The scheme of the statute . . . is to create a species of "private attorney general" to participate prominently in enforcement. The language should be construed liberally in light of its broad remedial purpose. Id. at 280. See also Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1972); Littlefield v. Walt Flanagan & Co., 498 F.2d 133 (10th Cir. 1974); Thomas v. Meyers Dickson Furn. Co., 479 F.2d 740 (5th Cir. 1973); N.C. Freed v. Board of Governors, 473 F.2d 1210 (2d Cir.), cert. denied, 414 U.S. 827 (1973); Buford v. American Fin. Co., 333 F. Supp. 1243 (N.D. Ga. 1971). For a discussion of the argument that the Act is penal and, therefore, to be strictly construed, see note 132 infra.


53. 12 C.F.R. §§ 226 et seq. (1976). Regulation Z is not a single regulation, but the collection of all the regulations promulgated under the Act.

54. Referral of the consumer-debtor’s account to a collection agency often precedes the institution of suit, further reducing the likelihood that the violation will come to the attention of the consumer’s attorney before the statutory period has run.

55. A line of cases headed by Wachtel v. West, 476 F.2d 1062 (6th Cir.), cert. denied, 414 U.S. 874 (1973), considered the question of whether failure to make a disclosure required by the Act constituted a continuing violation sufficient to toll the statute of limitations. In Wachtel, the United States Court of Appeals for the Sixth Circuit held that the violation was not continuous; it occurred, and was complete, at the time that disclosures were required. 476 F.2d at 1065-66. But see District Judge Young’s dissent, arguing that failure to disclose constituted fraudulent concealment of the cause of action tolling the statute until time of discovery. Id. at 1066 (Young, J., dissenting).


In Chevalier v. Baird Savings Ass’n, 371 F. Supp. 1282 (E.D. Pa. 1974), the United States District Court for the Eastern District of Pennsylvania held that mere failure to disclose did not constitute fraudulent concealment and could not, alone, toll the statute of limitations in a TIL action. Id. at 1284. It was reasoned that since
The proposition that a violation of TIL by a creditor may be asserted by way of recoupment after the 1-year period provided for affirmative actions has run received early judicial approval in a 1974 New Mexico decision, *Collectors, Inc. v. Atrisco Association*. In a terse opinion, the Collectors court reasoned that the statute of limitations set forth in the Act preempts state law concerning the effect of recoupment on statutes of limitations. Consideration of the defendant's TIL claim, asserted via recoupment to the creditor's action on the debt, must therefore take place virtually all TIL causes of action are based upon the creditor's failure to make the required disclosures, a finding of fraudulent concealment would render section 130(e) of the Act, 15 U.S.C. § 1640(e) (1970), meaningless. *Id.* However, Chief Judge Lord, writing for the court, indicated that the fraudulent concealment doctrine would permit the statute of limitations to be tolled in a TIL action if scienter were alleged. *Id.* at 1284–85. Accordingly, he dismissed the complaint without prejudice to allow the inclusion of an allegation of fraudulent intention. *Id.* at 1285; see note 104 infra. *See also* Lynch v. Signal Fin. Co., .... Mass. ...., 327 N.E.2d 732 (1975).

In 1976, the United States Court of Appeals for the Seventh Circuit held that when the TIL violation at issue results from a misstated or mistaken disclosure (as opposed to an omitted disclosure) in an open-ended credit plan, the statute of limitations begins to run from the first date upon which a finance charge was actually imposed, rather than from the time the credit card was obtained or the first purchase was made. *Goldman v. First Nat'l Bank*, 532 F.2d 10 (7th Cir. 1976). The credit plan at issue in *Goldman* allowed consumers a “free ride” if they paid for their purchases within 30 days. Thus, no finance charge was imposed upon the plaintiff in *Goldman* until he failed to pay completely for a purchase within the following month. The court indicated that the 1-year statute of limitations began to run against the plaintiff on the date that the first finance charge was imposed, because that was the first time that the plaintiff could have discovered that the disclosures he received were incorrect. *Id.* at 21. *See also* Postow v. Oriental Bldg. Ass'n, 390 F. Supp. 1130 (D.D.C. 1975), wherein the United States District Court for the District of Columbia held a violation of the Truth in Lending Act continued from the time that the loan contract was made until the time that the contract was executed. *Id.* at 1139. The *Postow* court reasoned that the Act was violated at the time the contract was made; however, mindful of the fact that the consumer “continued to suffer from an inability to readily compare various credit terms and avoid the uniformed use of credit throughout the ensuing period of time,” the court concluded that the violation continued, and the statute of limitations was tolled, until the loan was actually made, 43 days later. *Id.* It might be extrapolated from the *Postow* court's reasoning that a creditor's failure to make credit disclosures presents a continuing violation whenever the consumer-debtor has a contractual right to prepay the loan and thereby avoid further finance charges. In such a situation, the debtor is continually harmed since he or she continually lacks the information necessary to decide whether or not to prepay.

In Littlefield v. Walt Flanagan & Co., 498 F.2d 133 (10th Cir. 1974), the United States Court of Appeals for the Tenth Circuit held that the 1-year statute of limitations applicable to civil actions brought to recover statutory damages was not applicable to rescission actions under section 125 of the Act, 15 U.S.C. § 1635 (1970), as amended (Supp. V, 1975) (adding a 3-year statute of limitations).

For treatment of the proposition that a creditor waives the defense of the statute of limitations by bringing suit on the debt, see cases cited in note 109 infra.

56. [1974–76 Transfer Binder] Pov. L. REP. ¶ 19,211, at 18,041 (N. Mex. Dist. Ct. 1974) (summary of opinion) (full text available from National Clearinghouse for Legal Services; copy on file in office of Villanova Community Legal Services, Villanova University School of Law). For other cases upholding the recoupment claim, see note 6 infra.

in light of the federal common law regarding recoupment. The court found that the federal common law rule permitted claims in recoupment to be raised as long as the plaintiff's claim remained timely, and held that the defendant could assert the TIL claim despite the lapse of the 1-year statute of limitations.

58. Id. The supremacy clause indicates that federal law is the supreme law of the land, notwithstanding anything in the laws of the states to the contrary. U.S. Const. art. VI, cl. 2. When a state court construes a federally-created right, it must refer to the federal law applicable to the right. Thus, a state court is bound to give effect to express federal statutes of limitation when construing federal causes of action. Engel v. Davenport, 271 U.S. 33 (1926). As one commentator has stated: [W]hen Congress qualifies a federally-created right by a specific limitations period intended to be operative in all courts, it is so operative by reason of paramountcy of federal law, and analysis in terms of whether or not it is procedural, or whether or not it is outcome-determinative, is simply irrelevant. A. Hill, Substance and Procedure in State FELA Action — The Converse of the Erie Problem?, 17 Ohio St. L.J. 384, 403-04 (1956).

A state court must resolve questions of construction of a federal statute under federal law. In Herb v. Pitcairn, 325 U.S. 77 (1945), the United States Supreme Court was required to construe the statute of limitations provided by the Federal Employer's Liability Act (FELA), which barred any actions not "commenced" within 2 years after the date the cause of action accrued. The plaintiff in Herb instituted his suit within 2 years of the accident in an Illinois state court. Unfortunately, that court did not have subject matter jurisdiction over the cause of action. Pursuant to Illinois state law, however, the court transferred the case to an Illinois court which did have subject matter jurisdiction. Because this transfer took place more than 2 years after the accident, the defendant set up the statute of limitations as a defense, and the plaintiff's cause was dismissed. The Supreme Court of Illinois affirmed the dismissal, holding that as a matter of state law, an action was "commenced" only when filed in a court of competent jurisdiction. The United States Supreme Court reversed, holding that as a matter of federal law, an action is "commenced" when filed in a state court which, under state law, may transfer the case to a court of competent jurisdiction. Id. at 78-79.

A federal statute of limitations does not exist in the void, but rather is surrounded by a body of federal common law governing its interpretation and construction. See Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). For example, in Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874), the United States Supreme Court held that a federal statute of limitations was tolled when the defendant fraudulently concealed the plaintiff's cause of action. Thus, in Holmberg v. Armbrecht, 327 U.S. 392 (1946), the Court recognized that the rule of Bailey v. Glover is "read into every federal statute of limitation." Id. at 397. See also Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir. 1961). A state court, bound to follow the express limitation in a federal act, may not apply the naked limitation unaccompanied by the interstitial federal law that surrounds it. The corollary to this principle, of course, is that a federal court in a diversity case may not ignore the state judicial law surrounding the state-created rights at issue. Guaranty Trust Co. v. York, 326 U.S. 99 (1945). See generally Hart & Wechsler, The Federal Courts and the Federal System 800-06, 825-29 (2d ed. 1973); Friendly, In Praise of Erie — And of the New Federal Common Law, 39 N.Y.U.L. Rev. 383 (1964).

A state court considering a TIL claim, then, is bound to give effect to the statute of limitations provided by the Act. Further, it is bound to construe that limitation in light of the federal common law concerning statutes of limitation. The federal rule that a claim asserted by way of recoupment survives as long as the plaintiff's cause of action (see text accompanying notes 26-28 supra) is part of the package of federal law surrounding the 1-year limitation provided by the Act, and hence should be applied by the state court.

59. [1974-76 Transfer Binder] Pov. L. Rep. ¶ 19,211, at 18,041. The court noted that the defendant could not sustain a judgment in excess of the plaintiff's claim. Id.
III. Analysis

A. The Transaction Test

In order to evaluate the merits of the theory that a TIL claim can be raised by way of recoupment after the 1-year statute has run, several points must be explored. First among them is the threshold question of whether a TIL claim satisfies the transaction test of common law recoupment. Recoupment is available only where the defendant's claim arises from the same transaction as the plaintiff's cause of action.\(^{60}\) In *Hodges v. Community Loan & Investment Corp.*,\(^{61}\) the consumer-defendants contended that their federal TIL claim could be raised via recoupment against the state contract claim of the plaintiff.\(^{62}\) The Georgia Court of Appeals disagreed, finding that the transaction test was not satisfied:

> Although the [Truth in Lending] claim arose contemporaneously with the execution of the contract, it is not a product of a breach of any obligation or covenant therein; nor is it related either to the subject matter of the contract or the plaintiff's suit. On the contrary, the borrower's claim for recovery of a penalty created by federal law is an intrinsic by-product of this transaction and is not dependent upon the lender's contractual obligations. It has no relationship to an infringement of the mutual obligations and stipulations of the transaction. In short, it is not a defense which goes to the justice of the lender's claim but an affirmative action which demands a penalty for an independent wrong. Accordingly, borrower's counterclaim is in the nature of setoff, not recoupment. As such it is subject to the statute of limitation stated in the federal statute creating the penalty.\(^{63}\)

The reasoning of the *Hodges* court is difficult to reconcile with the principles of common law recoupment, which do not require that the defendant's claim be of the same form, or controlled by the same body of law, as the plaintiff's.\(^{64}\) As long as the two claims arise from the same transaction

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60. See *Bull v. United States*, 295 U.S. 247 (1935). See also note 12 supra.
62. *Id.* at 343, 210 S.E.2d at 831.
63. *Id.* at 344, 210 S.E.2d at 832 (citations omitted).
64. As one commentator has observed:

> Although recoupment is only available where both demands spring from one transaction, . . . opposing claims, in order to be adjusted in this way in one action, need not be of the same character.

> Therefore, a claim originating in contract may be set up against one founded in tort, if the claims arise out of the same subject matter, and are susceptible of judgment in the same action.

*Waterman, supra* note 7, at 564. In Pennsylvania, for example, where a tort claim ordinarily cannot be counterclaimed against an action in assumpsit, recoupment is commonly used to raise the tort. 4 STAN. PA. PRACTICE 393 (1955). In *Bear v. Morrison*, 27 Pa. D. & C. 27 (1935), plaintiff brought suit for $110 owed on a contract for a year's farm services. Defendant asserted that plaintiff had negligently allowed his hogs to destroy two apple trees worth $50, and had willfully cut down two others. *Id.* at 28. The trial court permitted the defendant's claims to be raised by way of recoupment despite the fact that they sounded in trespass. *Id.* at 30. The court
and can be adjusted in the same proceeding, recoupment is available. In the typical TIL situation the transaction at issue will be an extension of credit. The main thrust of the Act is to put the consumer in possession of knowledge at the time that this transaction occurs. Wachtel v. West, rejected the argument that a failure to make TIL disclosures constituted a continuing violation of the Act sufficient to toll the statute of limitations. The teaching of Wachtel is that an aggrieved consumer's cause of action arises, and is complete, at the very instant that the transaction is consummated.

65. WATERMAN, supra note 7, at 480; see Stow v. Yarwood, 411 Ill. 424 (1853).
66. In Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971), Judge Frankel stated: "[The Act's] purpose is to put the borrower in possession of the pertinent information before the plunge, so that he may know and intelligently compare his options." Id. at 276.
67. 476 F.2d 1062 (6th Cir.), cert. denied, 414 U.S. 874 (1973) (cause of action accrues, and statute begins to run, at the time the disclosures were required but not given).
68. See note 55 supra.
69. Stevens v. Rocksprings Nat'l Bank, 497 F.2d 307 (10th Cir. 1974) (statute runs from the time the transaction is consummated); accord, Kristiansen v. John Mullin's & Sons, Inc., 59 F.R.D. 99 (E.D.N.Y. 1973); see Postow v. Oriental Bldg. Ass'n, 390 F. Supp. 1130 (D.D.C. 1975) (violation occurs at the time the transaction is consummated and continues until the time the contract is executed).
70. Were this not the case, an aggrieved consumer might be entitled to statutory damages without ever entering into a contractual relationship with the creditor. See Gary v. W.T. Grant Co., CCH CONSUMER CREDIT GUIDE ¶ 98,550 (N.D. Ga. 1975).
71. Regulation 226.8 provides in pertinent part: "GENERAL RULE. Any creditor when extending credit shall... make the disclosures required by this section... [S]uch disclosures shall be made before the transaction is consummated." Regulation Z, 12 C.F.R. § 226.8 (1976) (emphasis added).
72. Several federal courts have held that when a consumer brings a TIL action, the creditor must counterclaim for any outstanding indebtedness. Rollins v. Sears, Roebuck & Co., 21 Fed. Rules Serv. 2d 1088 (E.D. La. June 21, 1976); Mims v. Dixie Fin. Corp., 21 Fed. Rules Serv. 2d 1042 (N.D. Ga. May 6, 1976) (en banc) (overruling previous line of decisions to the contrary); Kenney v. Landis Fin. Group, Inc., 376 F. Supp. 852 (N.D. Iowa 1974). The cases reasoned that since the indebtedness had "arise[n] out of the transaction or occurrence that is the subject matter" of the TIL claim, the creditor's counterclaim was compulsory within the meaning of Rule 13(a) of the Federal Rules of Civil Procedure. See note 17 supra. While the transaction test of Rule 13(a) is probably less stringent than the transaction requirement of common law recoupment, the language of the cases is nonetheless persuasive. In Mims, for example, the court stated: "[M]anifestly, defendant's counterclaims arise out of the same transaction as plaintiff's Truth in Lending claims. Both... derive their basis from the same credit transaction." 21 Fed. Rules Serv. 2d at 1047.
73. The correlative principle has also been recognized. In Spartan Grain & Mill Co. v. Ayers, 517 F.2d 214 (5th Cir. 1975), the court held that when a creditor brings a federal action on the debt, the consumer-debtor must raise any TIL claims based upon the same extension of credit. But see Zeltzer v. Carte Blanche Corp., 414 F. Supp. 1221 (W.D. Pa. 1976).
since these claims are susceptible of adjustment in the same proceeding, it appears that the requisites of recoupment are satisfied.

B. Substantive v. Procedural Limitations

Application of the common law rule that a statute of limitations does not defeat a claim later raised by way of recoupment requires examination of the particular limitation involved. Traditionally, statutes of limitations have been characterized as either procedural or substantive. General statutes of limitation, such as those applicable to contract and tort actions, are characterized as procedural, while special statutes of limitations, such as the short term statutes which apply to wrongful death actions, are termed substantive. The general rule is that a procedural statute operates as a bar to a particular remedy, but does not affect the existence of the underlying right. The running of a substantive statute of limitations, however, is said to extinguish the statutory right itself. The distinction is important, for while a procedural statute of limitations can be tolled in the proper circumstances, a substantive limitation prohibits any extension of the period in which the plaintiff can bring suit.

The substantive-procedural analysis was applied to the TIL statute of limitation in Fenton v. Citizens Savings Association. In Fenton, plaintiff-consumers instituted a TIL action after the 1-year limitation had run, contending that the creditor's failure to disclose the required information constituted a continuing violation of the Act sufficient to toll the statute of limitations. The United States District Court for the Central District of Missouri dismissed the action, stating that the statute of limitations in the Act created a substantive limitation on the plaintiff's right to sue. The court reasoned that once the 1-year period had elapsed, the court no longer had jurisdiction over the subject matter of the action.

73. See notes 111 & 112 and accompanying text infra.
74. See generally Developments, supra note 14, at 1186-88.
76. Developments, supra note 14, at 1186-88.
77. The general rule has been expressed as follows:
[A] statute of limitations is regarded as barring, or running against, the remedy to which it applies, and not as discharging the debt or extinguishing, or even impairing, the right, obligation, or cause of action, either in law or in fact, and there is left available to the creditor every other lawful means of realizing on the debt or obligation.
53 C.J.S. Limitation of Actions § 6(d) (1959) (footnotes omitted). See also Developments, supra note 14, at 1186-88.
78. Thus, a mortgagor who finds action on the debt barred by limitations may still exercise the collateral remedy of foreclosure on the security. See, e.g., Riordan v. Ferguson, 147 F.2d 983 (2d Cir. 1945).
80. See text accompanying notes 85 & 86 infra.
82. Id. at 879.
83. Id. at 881.
84. Id. at 879 nn.5 & 6.
85. Id. at 879.
The reasoning of the Fenton court would presumably also bar extension of the period in which plaintiff could raise a TIL violation in the recoupment context. Once the 1 year has elapsed, it could be argued that a debtor-defendant's right to sue has been extinguished forever and cannot be rekindled by the common law rule concerning recoupment.86

Despite the holding of Fenton, it is submitted that the nature of the TIL statute of limitations is irrelevant to the question of extending the period wherein a TIL violation can be raised. This can best be illustrated in context of the historical development of the substantive-procedural dichotomy in the area of the statute of limitations. The concept that special statutes of limitations create substantive limits on actions was first articulated in an early decision, The Harrisburg,87 in which the United States Supreme Court dismissed a wrongful death action which had been brought after the applicable 1-year statute of limitations88 had run.89 In discussing the wrongful death statute, the Court noted:

The statute creates a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all . . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded.90

Subsequent decisions interpreted The Harrisburg as holding that whenever a statute created a cause of action that did not exist at common law, and in the same statutory breath limited the duration of that action, the limitation necessarily affected the right itself.91

More recently, however, the Supreme Court has abandoned the hard rule of The Harrisburg.92 In Burnett v. New York Central Railroad,93 the Court was presented with the question of whether the 3-year statute

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86. Likewise, the rationale of Fenton would prevent tolling the TIL statute of limitations for any reason. For cases permitting the tolling of section 130(e) of the Act, see notes 103 & 104 infra.
87. 119 U.S. 199 (1886).
89. 119 U.S. at 214.
90. Id.
92. In Midstate Hort. Co. v. Pennsylvania R.R., 320 U.S. 356 (1943), the Court began its retreat. While the Court found the statute of limitations at issue to extinguish the right, it noted:
   Origin of the right [in a statute] is not per se conclusive whether the limitation of time "extinguishes" it or "merely bars the remedy" . . . . Source is merely evidentiary, with other factors, of legislative intent whether the right shall be enforceable in any event after the prescribed time, which is the ultimate question. Id. at 360 (footnotes omitted).
of limitations in the Federal Employers' Liability Act\textsuperscript{94} was tolled when the plaintiff filed a timely suit in state court which was dismissed for improper venue.\textsuperscript{95} The United States Court of Appeals for the Sixth Circuit had reasoned below that since the limitation was found in the same act creating the right sued upon, the limitation was substantive.\textsuperscript{96} Thus, it held that that "failure to bring the action within the time prescribed extinguished the cause of action."\textsuperscript{97} The Supreme Court reversed, stating that the distinction between substantive and procedural statutes of limitations originated in conflict of laws cases and was of "little help in deciding questions of extending the limitation period."\textsuperscript{98}

By 1973, the distinction between substantive and procedural limitations had disappeared for purposes of deciding when to extend the period in which a cause of action could be brought. In \textit{American Pipe & Construction Co. v. Utah},\textsuperscript{99} the United States Supreme Court stated flatly that the test for tolling a statute of limitations "is not whether a time limitation is 'substantive' or 'procedural' but whether tolling the limitation in a given context is consonant with the legislative scheme.'\textsuperscript{100}

With regard to the statute of limitations provided in the Truth in Lending Act, the ultimate question, then, is not whether the statute provides a procedural or substantive limitation, but whether there are sound policy reasons, consistent with congressional intent, to extend the 1-year period when claims are raised by way of recoupment. The relevant considerations were articulated by the Supreme Court in the \textit{Burnett} decision:

Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation. . . .

\textit{This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights}.\textsuperscript{101}

\textsuperscript{95} 380 U.S. at 426.
\textsuperscript{96} Burnett v. New York Cent. R.R., 332 F.2d 529, 530 (6th Cir. 1964).
\textsuperscript{97} Id.
\textsuperscript{98} 380 U.S. at 427 n.2. The Court held that the federal statute was tolled during the pendency of the state proceedings. \textit{Id.} at 435–36. \textit{See also} Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959) (doctrine of equitable estoppel allows extention of statute); Midstate Hort. Co. v. Pennsylvania R.R., 320 U.S. 356 (1943) (intent of the legislature the ultimate question).
\textsuperscript{100} \textit{Id.} at 557–58. The Court continued, stating:

[T]he mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.
\textit{Id.} at 559.
\textsuperscript{101} 380 U.S. at 426–27 (citations and footnotes omitted) (emphasis added).
The exact purpose of the 1-year limitation does not appear from the legislative history. Yet, while the short limitation period was probably intended to counterbalance the highly technical nature of the disclosure required by the Act, courts have held that the 1-year statute may be tolled by the filing of a class action, or by fraudulent concealment of the TIL violation.

When there is a question of extending a limitation period, the Burnett Court indicated that the "policy of repose, designed to protect defendants" must be weighed against the "interests of justice." The general policy of repose which runs throughout our jurisprudence is based upon several considerations. First, as the Court noted, it is unfair for a party to delay suit for so long a period that evidence disappears and witnesses forget the matter in dispute. Second, if there is to be any certainty in the dealings of one person with another, there must be a time after which old wrongs will be forgotten. This consideration is of special importance in commercial areas because of the high cost of determining, evaluating, and insuring against dormant liabilities. Third, the goal of judicial economy and smooth functioning of the legal system is best served when parties are encouraged to bring their disputes to the courts promptly, so that they can be swiftly resolved therein.

Although the general policy of repose is an important consideration in determining whether to extend the TIL statute of limitations, the policy is not as weighty in the recoupment context as when affirmative suit is threatened. First, the problems of lost evidence and absent

105. See text accompanying note 101 supra.
107. Developments, supra note 14, at 1185-86.
108. Id.
109. When the creditor affirmatively sues on the indebtedness, it may be questioned whether the policy of repose, designed to protect defendants, is particularly applicable. See United States v. Capital Trans. Co., 108 F. Supp. 348 (D.D.C. 1952). In Capital there was a collision between defendant's vehicle and a vehicle owned by the government. The government brought suit for damages more than 2 years following the accident. The defendant counterclaimed for damages sustained in the collision. The government argued that the counterclaim should be dismissed because the 2-year statute of limitations of the Federal Tort Claims Act, 28 U.S.C. § 2401(b) (1970), had run. Noting the inequity in permitting the government to preclude defendant's counterclaim merely by waiting 2 years to bring its own action for damages, id.
witnesses, stressed in the *Burnett* decision,\(^{110}\) are unlikely to arise in TIL recoupment cases. Indeed, proof of a TIL violation requires very little evidence and few witnesses.\(^{111}\) Compliance can generally be determined from a single sheet of paper, and since a large part of the credit industry includes the required disclosures on the loan instrument itself, evidence of compliance with the Act should always be available to a creditor bringing an action on the debt.\(^{112}\) Second, if TIL recoupments were to be barred after the 1-year limitation period, a creditor that had failed to comply with the Act would be encouraged to delay suit on the indebtedness until after the statute had run against the consumer.\(^{113}\) Such a result would be anomalous in light of the policy that legal rights are to be promptly vindicated. Third, when a TIL violation is raised by way of recoupment, rather than by independent suit, duplicative litigation is avoided and judicial economy served.

On the other side of the balance, the “interests of justice” which are to be weighed against the policy of repose\(^{114}\) are especially strong in the recoupment context. As noted previously, the historical impetus underlying the doctrine of recoupment was the fundamental inequity present when the judicial system recognized one debt, but ignored another, where


In the TIL context, the same reasoning would seem to apply in those situations where the consumer defaulted on the contract within the 1-year period and the plaintiff made no effort to secure a judgment at that time.

10. See text accompanying note 101 supra.


13. A parallel situation was considered by the United States Supreme Court in United States v. Western Pac. R.R., 352 U.S. 59 (1956). In that case, a railroad which had shipped certain ammunition for the government brought suit against the United States for the difference between the tariff paid and that allegedly due. In defense, the United States raised the unreasonableness of the plaintiff’s shipping charges. The applicable statute of limitations for the plaintiff’s action was 6 years, but the United States’ claim was governed by a 2-year statute of limitations. The suit had been filed after the 2 years had run. Deciding that the United States could raise the matter of unreasonableness in defense to the plaintiff’s claim, the Court stated:

Only the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit.

*Id.* at 71.

Since one basic policy of statutes of limitations generally is to discourage litigants from sleeping upon their rights, *Developments*, supra note 14, 1186-88, it would be ironic if the short TIL statute of limitations discouraged creditors from prompt vindication of their contractual rights.

14. See text accompanying note 101 supra.
both debts sprang from the same transaction. In the Truth in Lending situation this inequity is amplified by the pressures which frequently prevent individual consumers from bringing affirmative suit. A consumer who is making payments over a long period of time will understandably be loathe to institute a TIL action for fear that the hostility generated by the suit will result in the creditor's refusal to service the product, or its insistence upon strict compliance with the form contract. Thus, it is submitted that, regardless of whether the 1-year limitation is termed substantive or procedural, strong policy factors compel application of the common rule concerning recoupment.

C. The 1974 Amendments

In 1974, section 130 of the Act was amended by the addition of subsection (h), which provides as follows:

A person may not take any action to offset any amount for which a creditor is potentially liable to such person under subsection (a)(2) against any amount owing to such creditor by such person, unless the amount of the creditor's liability to such person has been determined by judgment of a court of competent jurisdiction in an action to which such person was a party.

In the single decision to consider the meaning of this amendment to date, Associates Financial Service v. Smith, a Kentucky trial court interpreted section 130(h) as barring all setoffs or counterclaims not asserted within the 1-year period. The court stated:

In a word, the meaning of this Amendment appears, to this Court at least, that the debtor must bring his own action on the truth and lending cause of action against the creditor as a offset within a year, which of course would not affect the creditor's claim until this was done. Correspondingly, it would seem that an offset or counter-claim

115. See notes 7-16 and accompanying text supra. See generally Waterman, supra note 7.
116. As Circuit Judge Pell noted in 1974:

[N]o particular perceptiveness of modern society is needed for an awareness of a fact of life lying in the virtually perpetual monthly payment program of many families. As balances owing decline new purchases occur. The individual if aware at all of his claim under the Act is bound to have some reluctance to sue in his own name the supplier with whom he continues to do business and one who could be in a position to visit harsh remedies on the buyer in the event of a subsequent default.

Haynes v. Logan Furn. Mart, Inc., 503 F.2d 1161, 1165 (7th Cir. 1974). Of course, once the creditor institutes suit against the consumer, the reluctance noted by the court is likely to disappear.

The Haynes court also noted that the poor and uninformed would often fail to bring affirmative individual actions. Id.; see text accompanying notes 52-54 supra.

brought within a year of the date of the loan could serve the same purpose.\textsuperscript{118}

While the reasoning of the \textit{Associates} court is not altogether clear, it apparently proceeded from the notion that a counterclaim, or for that matter, recoupment, is an "action to offset" an amount for which the creditor is potentially liable, before liability has been "determined by a court of competent jurisdiction."\textsuperscript{120} It is submitted that this reading of section 130(h) is unsupportable.\textsuperscript{121} Rather, the term "action," as used in the statute, should be read as action in the ordinary nonlegal sense.\textsuperscript{122} So construed, the section forbids self-help withholding of statutory damages in reliance upon another's judgment.\textsuperscript{123} Under this reading, the effect

\begin{itemize}
\item \textsuperscript{119} Id. at 3 (slip opinion).
\item \textsuperscript{120} \textit{See also} Clontz, \textit{Current Developments in Truth-in-Lending}, in 1975 \textit{Consumer Credit} 156 (Practicing Law Institute ed. 1975).
\end{itemize}

The adoption of section 130(h) suggests a possible collateral argument in support of the creditor's position. By forbidding self-help withholding, Congress has indicated that the creditor is legally entitled to the contractual amount unreduced by statutory damages until the violation is adjudicated. This is to say, essentially, that a TIL violation is never a defense to liability on the debt. If recoupment is a defense, it is thus implicitly forbidden by section 130(h) of the Act. Cf. \textit{Clark} $&$ \textit{Fonseca}, \textit{supra} note 50, at 92.

There are, however, two problems with this argument. First, while recoupment is in the nature of a defense, it is not exactly a defense, for it does not deny the validity of the plaintiff's claim. Instead, a claim by recoupment seeks to reduce the plaintiff's recovery for the equitable reason that plaintiff is obligated to the defendant. See notes 14 & 15 and accompanying text \textit{supra}. Thus, in the technical sense postulated, recoupment is not a "defense" to the creditor's claim; it is a reduction in the amount of liability.

Second, if Congress had intended to abrogate the common law right of recoupment, it could have done so in a far clearer and more explicit fashion. Given the fundamental maxim that statutes in abrogation of the common law are to be harshly construed, an intent to bar recoupment would presumably have been implemented in a manner calculated to survive judicial construction.

\begin{itemize}
\item \textsuperscript{121} In response to the author's inquiry, Ralph J. Rohner, Staff Counsel for the Senate Committee on Banking, Housing and Urban Affairs, responded:
\begin{quote}
[Section 130(h)] was a concession to the card issuers' concern that consumers would allege Truth in Lending violations and simply unilaterally deduct the minimum penalty ($100) from their bills, forcing creditors either to absorb the loss or sue for the balance owing. This was apparently thought reasonable because successful consumer plaintiffs under Truth in Lending were assured not only the minimum recovery but also costs and attorney's fees in actions brought by the consumers themselves.

Parenthetically, I understand some bank lawyers are now promoting an interpretation of this subsection to the effect that when a card issuer sues for an unpaid balance the consumer defendant cannot even interpose a Truth in Lending violation as a defense or counterclaim unless that violation had been \textit{previously} adjudicated as such in a separate action brought by the consumer. This it seems to me, is a perversion of the section's intent.
\end{quote}

Letter from Ralph J. Rohner to Author, January 29, 1976 (on file in office of Villanova Community Legal Services, Villanova University School of Law).
\item \textsuperscript{122} \textit{Counterclaim}, \textit{supra} note 10, at 546.
\item \textsuperscript{123} \textit{See} \textit{Clark} $&$ \textit{Fonseca}, \textit{supra} note 50, at 92. The authors remark that self-help withholding has the "rather unsavory flavor about it of blackmail or settlement club." \textit{Id.}
of section 130(h) is twofold: 1) the consumer who withholds the statutory damages prior to a judgment on the claim is responsible for interest on the amount withheld until the date that liability is adjudged; 2) self-help withholding amounts to a breach of contract entitling the creditor to liquidated damages and attorneys' fees if so provided in the agreement. The single piece of legislative history associated with the section's adoption supports this interpretation:

This provision is intended to prevent consumers from simply deducting from their obligation to a creditor the minimum $100 award, which is provided for in individual actions, without being a party to an action in which such liability is determined by a court.124

Thus, unless an individual consumer is a party in a class or individual action where the TIL issue is actually litigated, the consumer cannot unilaterally offset the statutory damages.125 Nothing in this section, however, prevents a consumer from litigating the TIL issue by way of recoupment.


125. Many of the 1974 amendments to the Truth in Lending Act concerned the consumer class action. A line of cases led by Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971), had refused to allow TIL class actions. It was perceived that a recovery of the $100 minimum by each class member could impose a staggering burden upon the creditor, far beyond the contemplation of the drafters of the Act. In Ratner, for example, the creditor faced a liability of $13,000,000 for a "technical and debatable violation." Id. at 416. Loathe to impose a "horrendous, possibly annihilating punishment," id., the court found that the class action prerequisites of Federal Rule of Civil Procedure 23(b) (3) were not present, since a class action was not superior to individual recovery. Id.; see Alpert v. United States Indus., 59 F.R.D. 491, 500 n.6 (C.D. Cal. 1973), and cases cited therein.

The 1973 report to congress by the Board of Governors of the Federal System stated:

To reiterate the problem, the Act's required minimum recovery of $100 per consumer plaintiff, when coupled with a class action, could theoretically lead to immense class recoveries against major creditors defendants. The potential size of such recoveries apparently has led many judges to deny maintenance of Truth in Lending suits as class actions. The Board believes that if this judicial trend were to continue, the deterrent of potential class action liability which helps to ensure creditor compliance with the Act would be effectively lost.


The 1974 amendments expressly authorized consumer class actions, but set no minimum recovery per class member. 15 U.S.C. § 1640(a) (2) (B) (Supp. V, 1975), amending 15 U.S.C. § 1640(a) (1970). Instead, the amendments left the award to the court, listing several factors to be considered. Id. § 1640(a) (3). The maximum recovery was limited to the lesser of $100,000 or 1% of the net worth of the creditor. Id. § 1640(a) (2) (B).

The difference in recovery between individual and class actions probably necessitated the addition of section 130(h). 15 U.S.C. § 1640(h) (Supp. V, 1975), amending 15 U.S.C. § 1640 (1970). If self-help withholding were permitted, a class member would be wise to opt out of a class action, with its potentially smaller recovery, and simply withhold the $100 minimum statutory damages. If a number of individuals did this, the same staggering penalties seen before the amendments could result. Section 130(h) of the Act prevents reliance upon the favorable judgment of another, thus requiring a class member who opts out to relitigate the issue.
IV. Conclusion

Recognition that a defendant may raise a violation of the Truth in Lending Act by way of recoupment to reduce a creditor’s recovery in an action on the debt is not inconsistent with either precedent or Congressional intent. Yet, presently, a small- or medium-sized creditor is virtually assured of avoiding liability under the Act by postponing suit against defaulting consumers until a year has passed from the date of the loan. The practical success of the Truth in Lending Act depends upon grassroots litigation by the individual consumer. While class actions will force the large creditors to obey the law, achievement of the Act’s goals will be delayed until the neighborhood creditor discovers that a finance charge is not collectible from an aggrieved consumer.

As the Supreme Court has noted, “the burdens imposed [by the Act] on creditors are not severe when measured against the evils which are avoided.” Since the Act is remedial and to be construed in favor

126. See notes 30-59 and accompanying text supra.
127. See note 116 and accompanying text supra.
128. The Truth in Lending Act is a composite of a House bill, H.R. 11601, 90th Cong., 1st Sess. (1967), and a Senate proposal, S. 5, 90th Cong., 1st Sess. (1967). See note 48 supra. The House bill provided purely administrative enforcement. The Senate bill, on the other hand, proposed the civil liability section that was ultimately adopted. During the Hearings on S. 5, Senator Proxmire commented on the civil enforcement provisions: “Is it not true that . . . the law would be largely — I would anticipate — self-enforcing; that a consumer who felt that the law had been violated can sue in court, and in general it would be my understanding that the law would be enforced in this way.” Senate Hearings, supra note 32, at 682.

129. Two commentators have observed that “most little merchants will probably not come into compliance until they have been caught a couple of times.” CLARK & FONSECA, supra note 50, at 91. The Board of Governors of the Federal Reserve System has noted annually that the compliance record of the smaller creditors is not as good as that of the larger creditors. For the most recent statement, see FED. RES. BD., 1975 TRUTH IN LENDING ANNUAL REP. 11, in CCH INSTAL. CR. GUIDE, No. 379, part II (Jan. 14, 1976).

However, a line of cases has held that the civil liability provisions of section 130 of the Act are penal. See Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975); Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir. 1974); Lynch v. Signal Fin. Co., ___ Mass. ___ 90 N.E.2d 732 (1957).

It should be noted, however, that Congress created the civil cause of action solely in favor of the aggrieved consumer, not any consumer interested in being a private attorney general. See note 70 supra. The Act reflects a recognition that damages to the aggrieved consumer are difficult to measure, although the injury caused is no less actual. In Bostwick v. Cohen, 319 F. Supp. 875 (N.D. Ohio 1970), the United States District Court for the Northern District of Ohio stated:
of the consumer, construction of section 130(e) should be narrowly confined to its express message:

Any action under this section may be brought . . . within one year from the date of the occurrence of the violation.

In other words, while suits instituted more than 1 year following the violation are barred, claims raised by way of recoupment to an action already before the court are not subject to the Act's statute of limitations.

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It was noted in the legislative history of the Act that some consumers would lack the means to institute their own civil actions. Moreover, it would seem that in many transactions the actual damage sustained by the consumer would be so small that he would not think it worth his time and effort to institute a civil action. Statutes which provide for minimum damages as an incentive to the injured person to invoke the remedy are not, of course, strangers to the law. Id. at 878 (citations omitted).

While the majority of courts have followed the conclusion of the Ratner court that "the 'remedial' character of the provision for civil recovery quite over-whelms its allegedly 'penal' aspect," 329 F. Supp. at 282, it is unnecessary to decide whether the section is penal or remedial. The distinction is nothing but a guide to legislative intent. See 3 J. Sutherland, Statutes and Statutory Construction 65 (3d ed. 1943) [hereinafter cited as Sutherland]; text accompanying note 132 infra. Here, the intent of Congress is manifest even in the title of the Act: The Consumer Credit Protection Act. The burden that the statutory damages impose upon noncomplying creditors cannot change the conclusion that the civil liability section of the Act should be broadly construed to effectuate the congressional intent. As Sutherland notes in his treatise on statutory construction:

[W]here the hardships imposed upon the individuals by penal statutes are relatively small or insignificant, the same impelling reasons are present for putting greater emphasis on the policy of the legislation. Consequently, statutes imposing relatively mild punishments will be treated with less strictness. One point of demarcation here will be found in statutes which impose criminal penalties on the one side, and statutes which impose penalties recoverable in civil actions by private individuals on the other.

Sutherland, supra at 67.
