BENEFICIAL FINANCE CO. OF
ATLANTIC CITY,

Plaintiff-Respondent,

v.

ROBERT SWAGGERTY and
YVONNE SWAGGERTY,

Defendants-Appellants.

CONSUMERS FINANCIAL SERVICES,

Plaintiff-Respondent,

v.

THERESA A. TAYLOR,

Defendant-Appellant.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 16,528
TERM:

BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION OF DEFENDANTS-PETITIONERS, AND FOR APPLICATION TO FILE BRIEF AND PRESENT ORAL ARGUMENT AS AMICUS CURIAE.

LEGAL SERVICES OF NEW JERSEY, INC.
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POINT I

CERTIFICATION SHOULD BE GRANTED IN THIS APPEAL

A. THE OPINION OF THE APPELLATE DIVISION IS INCONSISTENT WITH THE NEW JERSEY POLICY FAVORING PROTECTION OF CONSUMERS IN UNEQUAL BARGAINING POSITIONS.

Throughout the modern era of the New Jersey Judiciary, our Supreme Court has enjoyed a national reputation for scholarship and leadership. The New Jersey Constitution of 1947, the reorganization of the structure of the courts and the Supreme Court's rule making powers have served as models which other states have followed. The Supreme Court has also been blessed with justices of exceptional ability who have distinguished themselves. The Court has assumed leadership in the consumer protection field with national landmark cases such as Hennigsen v. Bloomfield Motors Inc., 32 N.J. 358 (1960) and Unico v. Owen 50 N.J. 101 (1967). In both of these cases the Supreme Court said that the public policy of New Jersey is to protect consumers in consumer credit transactions from unfair exactions by creditors possessing superior bargaining power Unico v. Owen, supra at 110-113; Hennigsen v. Bloomfield Motors Inc., supra at 389 - 391. The policy of the United States in the Truth in Lending Act is the same: to put consumers in some measure of equality through knowledge of the true cost of credit. 15 U.S.C. 1601.

Hennigsen, Unico, and this present appeal are also all similiar in that they involve an attempt by the creditor to dodge responsibilities and and liabilities imposed by law which arise out of the same transaction. In Hennigsen the seller and manufacturer of defective goods tried to escape liability to an injured consumer based on an unconscionable fine print

disclaimer in the contract. The Supreme Court refused to allow it, 32 N.J. at 404, and the case spawned a national law of products liability. In Unico an assignee tried to escape responsibility for the buyer's defense that the goods were never delivered, based on a "waiver of defenses" clause. The Supreme Court refused to allow it and the nation followed suit. This unfair avoidance of a defense arising out of the identical transaction has been since outlawed by statute in many states, (including New Jersey N.J.S.A. 17:16C -36, 38, 38.1, 38.2, 64.1, 64.2; 17:11A - 52 (f)) and by federal regulation, Federal Trade Commission, Preservation of Consumers' Claims and Defenses, 16 C.F.R. §433. The present case is equally important as Hennigsen and Unico and involves the same type of consumer protection principles: here the creditor, which admittedly has violated the Truth in Lending Act in a loan transaction, nonetheless seeks to avoid all liability for that violation and retain all the benefits of that same loan transaction. This Court should not allow this dodge either. It is unfair to let a creditor separate the benefits of a transaction from its liabilities. The prestige of the New Jersey Judiciary should not be lent to this outmoded concept. The Court should grant certification to consider the soundness of the opinion below.

(B) THE SIZE OF THE CONSUMER CREDIT INDUSTRY AND CONGRESSIONAL CONCERN OVER ABUSIVE PRACTICES IN THAT FIELD MAKE ENFORCEMENT OF THE TRUTH IN LENDING ACT A MATTER OF PUBLIC CONCERN.

Consumer credit has become increasingly important to the United States economy. In 1945 outstanding consumer credit was $5.7 billion. House Report 90-1040, 1968 U.S. Code Congressional and Administrative News, 90th Congress, 2nd Session, Vol. 2, p. 1968. By 1978 consumer credit had jumped to $275 billion. 65 Federal Reserve Bulletin, A42 (September 1979). Unfortunately the rapid rise in consumer debt was not accompanied by an increase in consumer awareness of credit terms: Congress found that consumers were given misleading credit rates, yearly credit rates, monthly credit rates, "hidden charges" making rates useless, and sometimes no rates at all. House Report 90-1040, supra at 1970. Congress cited a 1964 survey which:

> ....asked 800 families to estimate the rate of finance charge they were paying on their consumer debts. The average estimate was approximately 8 percent, although the actual average rate paid was almost 24 percent or nearly three times higher. Juster and Shay, "Consumer Sensitivity to Finance Rates: An Empirical and Analytical Investigation", quoted in 1968 U.S. Code Congressional and Administrative News, Id. at 1968, 1970.

As the Supreme Court put it, "... because of the divergent, and at times fraudulent, practices by which consumers were informed of the terms of the credit extended to them, many consumers were prevented from shopping for the best terms available and at times were prompted to assume liabilities they could not meet..." Mourning v. Family Publications

Service Inc., 411 U.S. 356, 363 (1973).

To remedy these problems Congress enacted the Truth in Lending Act, so that disclosure of the true cost of credit would be mandatory. 15 U.S.C. 1601. Primary enforcement of the Act was left to a system of 'private attorneys general' whose private lawsuits would bring compliance with the regulatory scheme Sosa v. Fite, 498 F.2d 114, 121 (5th Cir. 1974); Ratner v. Chemical Bank, 329 F. Supp. 270, 280 (S.D.N.Y. 1971); Dole, "Private Enforcement of Consumer Credit Legislation", 26 Bus. L. 915 (1970-71), citing Senate Report 90-392, and House Report 90-1040, 90th Congress, 1st Session (1967).

Because of the short (one year) statute of limitations for affirmative Truth in Lending actions, 15 U.S.C. 1640, consumer enforcement of the Act through affirmative lawsuits was short circuited by the universal creditor practice of waiting more than one year before bringing suit.[1] Since the consumer would rarely recognize a Truth in Lending violation until he is sued and his attorney points it out to him, courts have recognized that to properly enforce the Act, recoupment defenses must be allowed, because

> To hold otherwise would be to frustrate the purpose of the Truth-in-Lending Act by creating the opportunity for abuse by non-complying creditors who wait to bring their actions until the time permitted for a defense based on the non-disclosure of

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[1] As appears from the affidavits in support of this motion, experienced New Jersey consumer attorneys have never encountered a consumer lawsuit brought by a creditor within one year of the transaction, but have encountered instances of creditor delay past the one year mark.

credit terms has elapsed. St. Mary's Hospital v. Torres, 370 A.2d 620, 621 (Conn. Sup. 1976); see also Ballew v. Associates Financial Service Co., 5 CCH Cons. Credit Guide ¶98,327 (D. Neb. 1976).

Consumer debt continues to reach record levels,[2] but is consumer ignorance of the true cost of credit still a problem? Unfortunately it still is. The Truth in Lending Act has been responsible for some increase in consumer awareness. In 1969 only 15% were aware of correct annual percentage rates, but by 1977 this figure had climbed to 55 percent. Senate Report 96-73, 96th Congress, 1st Session, p.2. However this would mean that 45% of consumers are still not aware of the true cost of credit. Despite the Act's being in effect ten years, blatant examples exist of nondisclosure of the most basic Truth in Lending terms, such as the annual percentage rate.[3]

The Truth in Lending Act is working at only 55% efficiency, and that is a matter of public concern. The only practical way to enforce the Act is to do it when the Act comes before the courts - in recoupment defenses.

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[2] In 1977 approximately one half of the families in the country had installment credit outstanding (excluding credit cards and mortgages); blacks used more installment credit than whites. Federal Reserve System, 1977 Consumer Credit Survey, p.93.

[3] See affidavits in support of petition for amicus curiae status.

(B)(1) DEFENSES BASED ON THE TRUTH IN LENDING ACT PROMOTE THE PUBLIC POLICIES OF RESTORING AN EQUALITY OF BARGAINING POWER BETWEEN CREDITOR AND CONSUMER AND OF PROMOTING EFFICIENT JUDICIAL ADMINISTRATION

New Jersey has recognized that in the consumer credit industry there is a subtantial inequality of bargaining power between creditors and consumers. Unico v. Owen, 50 N.J. 101, 110 (1967). Creditors have greater economic power; they are well organized corporations; they have greater knowledge enabling them to strengthen their position at the expense of consumers. Id. at 110. There is no real arms-length bargaining: the creditor prepares a preprinted contract of adhesion, and the only choice of the consumer is to take it or leave it. Id. at 111; Hennigsen v. Bloomfield Motors Inc., 32 N.J. 358, 390 (1960). As a consequence consumers are subjected to less than desirable consequences. In Small Loan transactions such as the two plaintiffs sue on, consumers are subjected to an interest rate of 24% on the first $500. N.J.S.A. 17:10-14. Small Loan Companies have been called "modern Shylocks," charging "legalize[d] unconscionable exactions in interest charges from those least able to pay" Ryan v. Motor Credit Co., 130 N.J. Eg. 531, 544 (Ch. 1941), aff'd 132 N.J Eg. 398 (E & A 1942). By way of example, a $500 small loan at 24% interest, payable in 36 installments, will result in the payment of $206.21 interest, see Lake's Monthly Installment and Interest Tables, A.V. Lake & Co., (6th Ed. 1973), pp. 8, 514[4]. The total finance charge is thus 41.24% of the principal. The consumer has no bargaining power to negotiate a lower interest rate. Small loan companies uniformly charge the maximum rate.

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4. One computes the interest from Lake's tables as follows: on p. 514, for principal $500, 24% interest, 36 payments, the monthly payment is $19.617. $19.617 x 36 = 706.21, (total of payments). $706.21 - 500 = $206.21 finance charge.

The credit industry in general has quite an impressive array of weapons against the consumer. It can repossess secured goods without prior notice. N.J.S.A. 12A:9-501 et seq. It takes nonpurchase money interests in the debtor's household goods. See N.J.S.A. 17:10-18. It can foreclose a first mortgage, second mortgage, or judgment lien on a consumer's home. It can bring suit on a note "under seal" sixteen years after the debtor defaults N.J.S.A. 2A:14-4. It can use the legal process to obtain judgments good for twenty years. It can garnishee wages; seize bank accounts; threaten to seize household goods. The credit indutry has also known to use harassing methods of debt collection, see Fair Debt Collection Practices Act, Congressional Findings of Fact, 15 U.S.C. 1692. And every year an increasing number of consumers are driven into bankruptcy by the twin burdens of their debts and the harsh collection practices of creditors. U.S. House of Representatives, Report of the Committee on the Judiciary on Bankruptcy Law Revision, Report No. 95 - 595, p. 116; 95th Congress, 1st Session, (1977).

Against that array of economic power backed by legal remedies, Congress in the Truth in Lending Act intended that consumers would not be entirely powerless: consumers were to be told the true cost of credit and all the other required disclosures - if not, civil liability would apply 15 U.S.C. §§1601, 1640. This was a small effort to remedy the inequality of bargaining power. Against the array of creditor weapons, the consumer is shielded only by his Truth in Lending defense. Now that consumers are able to obtain some small bargaining power from a recoupment defense, creditors are alarmed. But when we look to the reality of the situation, the experience of legal services attorneys shows that a recoupment defense aids the settlement of cases. Nor

need the courts be alarmed that such defenses will clog the trial calendars. Virtually all cases with Truth in Lending defenses are settled or disposed of before trial. The Truth in Lending Act has been effective since 1969, yet there have been only two reported decisions on the subject in New Jersey.[5]

Thus the Truth in Lending Act aids in efficient judicial administration. The decision below, in taking away the one effective shield consumers have against creditor power, will lead to fewer settlements, more litigated motions, more jury trials.

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[5] Washington Motor Sales v. Ferreira, 140 N.J. Super 529 (App. Div. 1976), aff'd 75 N.J. 136 (1977) and this consolidated case, Beneficial Finance Co. v. Swaggerty, 159 N.J. Super 507 (Cty. D. Ct. 1978), aff'd____N.J. Super___ (App. Div. 1979).

(C) THE DECISION BELOW IS CONTRARY TO MAJORITY FEDERAL AND NEW JERSEY LAW ON RECOUPMENT DEFENSES.

The issue in this appeal is whether a violation of the Truth in Lending Act, 15 U.S.C. 1601 et seq., used defensively by a consumer in a collection suit is a recoupment or a set off.

"Recoupment" was defined by the United States Supreme Court thus:

> Recoupment is in the nature of a defense arising out of some feature of the transaction upon which plaintiff's action is grounded. Bull v. United States, 295 U.S. 247, 262 (1945) (emphasis supplied).

New Jersey law is the same as federal law. Gibbins v. Kosuga, 121 N.J. Super 252, 257 (Law Div. 1972). What, then, is "set off?" New Jersey's leading decision said:

> set-off...seeks a reduction because of an offsetting claim arising out of a totally unrelated transaction. Gibbins v. Kosuga, supra at 258 (emphasis added).

Set off must arise "out of a completely independent and unrelated transaction" Guarantee Co. of North America v. Tandy & Allen Construction Co., 66 N.J. Super 285, 289 (Law Div. 1961). A recoupment defense is not subject to the statute of limitations and exists as long as the plaintiff's action exists. But a set off is bound by its own statute of limitations Bull v. United States, 295 U.S. 247 (1945); Gibbins v. Kosuga, 121 N.J. Super 252 (Law Div. 1972).

The opinion below misapplied the law of recoupment. The Appellate Division apparently thought that if plaintiff's claim and defendant's defense "involve[d] entirely separate questions of law and fact" (see slip opinion, p.4), then there could be no recoupment defense. But that

is not the test required by Bull v. United States, supra, and Gibbins v. Kosuga, supra. These leading decisions do not require a recoupment defense to be based on legal or factual issues identical to those necessary to prove plaintiff's case. Gibbins v. Kosuga perfectly illustrates this principle. In Gibbins the plaintiff-home buyer had bought a property from defendant-seller in 1961. In 1971 plaintiff-buyer discovered that a promised well was not really on the land sold. Plaintiff-buyer sued for the cost of digging a well. Defendant-seller set up as a defense that the buyer still had not completely paid for the property. Obviously the factual and legal issues in plaintiff's claim (breach of contract, misrepresentation, location of boundary line, cost of digging a well) were not the same as those in defendant's defense (failure to pay the promissory note). Yet the court in Gibbins allowed this defense as a recoupment because it arose out of the same transaction as plaintiff's claim (the sale of the property).

This "same transaction" test has been used by other courts to allow Truth in Lending defenses because they arise out of the same transaction - the consumer loan agreement - which plaintiff sues on Banker's Guaranty Corp. v. Gabburt, 5 CCH Cons. Credit Guide ¶98 716 (D.C. Super. Ct. 1977); Jewett City Trust Co. v. Gray, 390 A.2d 948, 35 Conn. Sup. 508 (1978); Continental Acceptance Corp. v. Rivera, 363 N.E. 2d 772, 50 Ohio App. 2d 338 (1976). In fact, the thirty-eight cases cited in defendant Taylor's brief (Db20,21) show that the overwhelming majority of jurisdictions allow a Truth in Lending claim to be raised as a recoupment defense.

Since this appeal involves a federal statute, this court should construe it uniformly so that it provides uniform protection throughout the country. Conversely, the law of recoupment must be applied to Truth in Lending defenses because, since both New Jersey and federal law recognize recoupment in general, the law would be unequally applied were recoupment not recognized in Truth in Lending cases.

Thus the law of recoupment is clear and settled. Since there is disagreement in this case on how to apply that law, our next point will demonstrate that a Truth in Lending defense, which arises out of the same contract documents as plaintiff's claim, is part of the "same transaction". In short, it is absurd to say that plaintiff's claim and defendant's defense, both based on the same contract documents, are "completely independent and unrelated transaction[s]" Guarantee Co. of North America v. Tandy & Allen Construction Co., 66 N.J. Super 285, 289 (Law Div. 1961).

(C)(1) IT IS UNFAIR, INEQUITABLE, AND DEFIES COMMON SENSE TO MAINTAIN THAT PLAINTIFF'S SUIT BASED ON ONE TERM OF THE CONTRACT (THE TOTAL OF PAYMENTS) AND DEFENDANT'S DEFENSE BASED ON OTHER TERMS OF THE CONTRACT (THE TRUTH IN LENDING TERMS) DO NOT ARISE FROM THE SAME TRANSACTION.

The Supreme Court should grant certification in this case because the opinion of the Appellate Division appears very illogical when it says that a creditor's suit for payment on a note and defendant's defense based on the note's Truth in Lending disclosures do not arise from the same transaction. The following is a simplified example to illustrate the unfairness of this holding. In a typical loan transaction, the contract will have the following terms on it (or on a separate sheet furnished contemporaneously):

1. Proceeds of Loan _____
2. Other Charges _____
   _____
3. Amount Financed _____
4. FINANCE CHARGE _____
5. Total of Payments _____
6. ANNUAL PERCENTAGE RATE _____

See 12 C.F.R. §§226.8(b) and 226.8(d). What the court below is saying is that the creditor's suit based on the "total of payments" term of the contract and a consumer's defense based on a failure to furnish or an incorrect furnishing of a Truth in Lending term of the contact (the

"annual percentage rate", for example) do not arise from the same transaction. We respectfully submit that one cannot get any closer to meeting "same transaction" test for allowing a recoupment defense (see Bull v. United States, 295 U.S. 247, 262 (1935); Gibbins v. Kosuga, 121 N.J. Super 252, 257 (Law Div. 1972) than when both plaintiff's claim and defendant's defense are to be found on the same contract paper(s).

Besides being physically located on the contact document(s), the Truth in Lending disclosures are, by force of law, automatically terms of every consumer credit transaction. It is a fundamental principle that the common law and statutes of the place where a contract is made are terms of and part of that contract. The United States Supreme Court so held in United States ex rel Von Hoffman v. City of Quincy, 71 U.S. 535, 550, 18 L. Ed. 403, 408 (1866):

> It is also well settled that the laws which subsist at the time and place of the making of the 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. 71 U.S. at 550.

Our own Supreme Court reaffirmed the principle in Hennigsen v. Bloomfield Motors Inc. 32 N.J. 358, 404, 161 A2d 69, 95 (1960):

> The [implied] warranty [of merchantibility] does not depend on the affirmative intent of the parties. It is a child of the law; it annexes itself to the contract because of the very nature of the transaction. 32 N.J. at 404.

This same principle that statutes are silent terms of each contract has been followed by federal courts in Truth in Lending cases: Johnson v. McCracklin-Sturman Ford Inc., 527 F. 2d 257, 268 (3rd Cir. 1975), N.C. Freed v. Board of Governors of Federal Reserve System, 473 F. 2d 1210,

1215 (2d. Cir.), cert. denied 414 U.S. 827 (1973), Gardner & North Roofing & Siding Corp. v. Board of Governors of Federal Reserve System, 464, F.2d 838, 842 (D.C. Cir. 1972); by federal courts in other types of cases: Farmer & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 660 (1923), Doyle v. Northrup Corp., 455 F. Supp. 1318 (D.N.J. 1978); and by our state courts: Gibraltar Factors Corp. v. Slapo, 25 N.J. 459, 465 (1957), aff'g 41 N.J. Super 381 (App. Div. 1956), Hennigsen v. Bloomfield Motors Inc., supra, Saffore v. Atlantic Casualty Co., 21 N.J. 300, 310 (1956), Red Bank Board of Education v. Warrington, 138 N.J. Super 564 (App. Div. 1976). Therefore violating the Truth in Lending Act is the same as breaching a term of the contract - the exact type of recoupment defense arising out of the same contract and same transaction which law and fairness say must be allowed even after the statute of limitations has run.

Since the courts must not be used as instruments of unfairness and injustice, United States v. Bethlehem Steel Corp. 315 U.S. 289, 326 (1942) (Mr. Justice Frankfurter) equity requires the Supreme Court to grant certification.

(D) THE OPINION BELOW RELIES HEAVILY ON DICTA AND MISCITED LAW.

The issue in this appeal, whether a Truth in Lending violation can be raised as a recoupment defense after the running of the statute of limitations, is a case of first impression in New Jersey, but the issue has been much litigated in other jurisdictions. The majority opinion is that the defense can be raised at any time. Defendant Taylor cited thirty-eight cases directly on point in support of that proposition (Db20,21). The opinion of the Appellate Division, while mentioning only one of these 38 cases, fails to discuss their rationales, much less distinguish them. Fairness and elemental legal scholarship demand an explanation of why cases on point (indeed the majority position) should not be followed. As amicus curiae we would take the opportunity to analyze the numerous precedents for the Court's benefit. We would also make the court aware of precedents in support of the Appellate Division's opinion, legal ethics not allowing us to ignore opposing cases. As amicus we would acquaint the court with the 1979 decision of the New York Court of Appeals on point, Public Loan Company v. Hyde, 47 N.Y. 2d 182, 417 N.Y. S. 2d 238 (1979), which allows the defense to be raised. We would explain that the portions of cases heavily relied on by the Appellate Division, Fenton v. Citizens Savings Association, 400 F. Supp. 874 (C.D. Mo. 1975), and Marshall v. Geo. M. Brewster & Son Inc., 37 N.J. 176 (1962) are dicta. We would show that in Marshall v. Geo. M. Brewster & Son Inc., supra, the Supreme Court held that the distinction between rights existing at common law and rights created by statute (stressed by the appellate court below, opinion, p.3) "would not appear to have any real significance" 37 N.J. at

186. Similarly we would point out that Spartan Grain & Mill Co. v. Ayer, 581 F. 2d 419 (5 Cir. 1978), heavily relied on by the Appellate Division to defeat the recoupment defense, actually allowed the possibility of a Truth in Lending equitable recoupment defense, and remanded to the District Court for further consideration of this defense 581 F. 2d at 430.

Our point is that the Appellate Division's opinion does not adequately explain its reasoning and the other legal precedents on this issue. New Jersey deserves a better statement of the law on this vital issue of public interest.

(E) THE DECISION BELOW CREATES A SERIOUS AMBIGUITY IN THE LAW WHICH WILL BE WORSENED BY THE PASSAGE OF THE TRUTH IN LENDING SIMPLIFICATION ACT (S. 108) AND WHICH WILL REQUIRE FURTHER LITIGATION TO RESOLVE.

On May 1, 1979, S. 108, the "Truth in Lending Simplification and Reform Act" was reported out of committee by Senator William Proxmire, the author of the original Truth in Lending Act. Congressional Record, p. S4984, May 1, 1979. This bill has been added to H.R. 4986 and this step has apparently insured passage prior to January 1, 1980.[6]

S. 108 includes a section showing the clear intent of Congress to permit consumers to raise Truth in Lending violations as recoupment defenses:

> This subsection does not bar a person from asserting a violation of this title in an action to collect the debt which was brought more than one year from the date of the occurence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by state law. S. 108, section 15(a)(4), in Congressional Record, p. S.4987, May 1, 1979 (emphasis added).

When S. 108 is passed, the question then will be: does New Jersey law 'otherwise provide?' The answer to that question is now ambiguous. New

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[6] A Federal Court of Appeals decision in April, 1979 held that millions of customers then using bank automatic transfer accounts ("N.O.W." accounts), inter alia, would lose these privileges unless federal banking statutes were amended before January 1, 1980. H.R. 4986 is the curative legislation, and it, along with S. 108, appears certain to pass before then. American Banker, "Elimination of Reg. Q Faces Two Barriers in Congress", October 1, 1979, page 1.

S.108 was passed by the Senate on May 1, 1979. Congressional Record, p. S4984-90. S.108 was added to H.R. 4986 and H.R.4986 passed the Senate on November 1,1979 and was sent to conference. New York Times, November 5, 1979, p.D2.

Jersey does recognize recoupment defenses Gibbins v. Kosuga, 121 N.J. Super 252 (Law Div. 1972). However New Jersey does not recognize recoupment defenses based on the Truth in Lending Act. Beneficial Finance Co. v. Swaggerty, 159 N.J. Super 507 (Cty. D. Ct. 1978), aff'd ___ N.J. Super___ (App. Div. 1979). It is also not clear whether Swaggerty turns on state law (recoupment) or a construction of federal law (15 U.S.C. 1640). Both interpretations can be argued . Thus Swaggerty creates an ambiguity: after passage of S. 108, trial judges are not going to know whether a Truth in Lending defense is to be allowed or not. Unless this Court resolves the ambiguity by reversing the Appellate Division, further appeals on this issue will be before this Court within a short time.

S. 108 will also have a second big effect. The bill drastically limits and simplifies the required Truth in Lending disclosures:

> This bill would narrow a creditor's civil liability for statutory penalties to only those disclosures which are of central importance in understanding a credit transaction's cost or terms. It is anticipated that this will eliminate litigation which is based on violations of a purely technical nature. Senate Report 96-73, 96th Congress, 1st Session, p. 7, April 24, 1979.

To the extent that the opinion below reflects an unspoken premise that Truth in Lending litigation is 'overly technical', the Truth in Lending Simplification Act will remedy that 'problem'. Such concerns should not be allowed to block the clear intent of Congress in S. 108 - to allow Truth in Lending recoupment defenses. If the opinion below was worried about technicalities, its impact was overbroad - the Appellate Division cut the heart out of the Act by refusing to allow consumers to raise any

Truth in Lending violation - obvious or technical - as a defense.

LEGAL SERVICES OF NEW JERSEY, INC. SHOULD BE GRANTED AMICUS CURIAE IN THIS APPEAL

The various legal services projects throughtout the State of New Jersey are independent non-profit corporations funded principally by the federal government through the Legal Services Corporation.[7] Sixteen projects serve the low income populations of twenty one counties of our state in civil matters.

To best represent their clients, these sixteen projects have voluntarily funded a state-wide back-up organization -Legal Services of New Jersey, Inc.- to train their lawyers, secure more adequate funding and concentrate on the various areas of substantive law relevant to indigent and low income clients.

It is with this background that Legal Services of New Jersey, Inc. (hereinafter LSNJ) requests amicus curiae participation at the suggestion of its Consumer Task Force. By bringing consumer specialists throughtout the state together for periodic meetings to analyze consumer issues and trends relevant to low income consumers, LSNJ can readily determine legal issues of paramount concern to its clients and other low-income consumers. See for example the previous amicus curiae application of LSNJ on a consumer case, Girard Acceptance Corporation vs. Wallace, 76 N.J. 434 (1978), where lenders

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7 The Legal Services Corporation Act of 1974, P.L. 95-355, July 25, 1974; 42 U.S.C. 2996

were taking a secured interest in consumers' homes as "supplemental collateral" to finance the sale of used cars.

It is indisputable that enforcing the Truth in Lending Act is a matter of national public policy.[8] However, the affidavits in support of this application make it clear that this goal is of special concern and relevance to low income and indigent consumers. Over the course of thirty months, one legal services attorney saw six clients who had been sued or dunned by creditors even though they had been given absolutely no disclosure of the cost of the credit they had purchased.[9] Another attorney saw three clients since January 1979 who likewise were given no disclosure of the interest rate at all.[10] In consumer cases, these figures are likely to be only the exposed tip of the iceberg. In addition to being subjected to extreme violations of the Act, legal services clients enter credit transactions over a broad spectrum.[11] It has been pointed out above that Black consumers have used more installment credit than White consumers.[12]

Low income consumers stand to have the most to gain from

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8 See pages 3-8, supra.

9 See affidavit of Neil J. Fogarty and its exhibits.

10 See affidavit of Sally L. Steinberg and its exhibits.

11 Affidavits of Neil J. Fogarty, paragraph 15, Steven P. McCabe, paragraph 7, and Sally L. Steinberg, paragraph 7.

12 See footnote 2, p.5, supra.

enforcement of the Truth in Lending Act because they generally pay the highest rates of interest because of their relatively low income and minimal assets. "A surprising number" of lenders are willing to extend credit to consumers on welfare or to those whose only income is from social security.[13]

Of particular relevance to low income consumers are consumer finance companies.In New Jersey these concerns are regulated by statute and permitted to lend money at rates of up 24% per year.[14] Nationwide these institutions held $39.6 billion in consumer credit at the end of 1976.[15] According to the National Consumer Finance Association, in 1975 28.9% of finance company borrowers had annual incomes of between $6,000.00 and $9,000.00, and 12.2% had incomes of less than $6,000.00.[16]

Because they so often pay the highest rates of interest allowed by law, low income consumers can most benefit by accurate disclosure of the amount, rates and terms of their consumer credit sales and loans. As they have the most to gain

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13 Report of the Presiding F.T.C. Officer on the proposed Trade Regulation Rule on Credit Practices, 16 C.F.R. 444, Public Record 215-42 (August, 1978) p.41.

14 N.J.S. 17:10-1 et seq.,Small Loan Law; N.J.S. 17:10-14

15 Report of the Presiding F.T.C. Officer, supra, at p.22.

16 Ibid., p.39

by accurate and adequate disclosure of the costs of credit, legal services clients will tend to be the most harmed by being unable to enforce the Truth in Lending Act for more than one year.[17]

LSNJ consists of trial attorneys active in consumer law, serving large numbers of low income consumers and extremely interested in the outcome of the issue before this court.[18] Itshould be permitted participation as amicus curiae.

CONCLUSION

Based on the foregoing arguments, we respectfully request that this Court grant certification in this appeal and permit Legal Services of New Jersey, Inc. to intervene as amicus curiae.

Respectfully submitted

LEGAL SERVICES OF NEW JERSEY, INC.

BY: Steven P. McCabe
Steven P. McCabe

Dated:November 8, 1979

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17 See Affidavit of Steven P. McCabe, paragraph 8.

18 See supporting affidavits.