

Contents

CD-Rom Contents	xli
---------------------------	-----

Chapter 1

Overview

1.1 Introduction	1
1.1.1 The Purpose of Truth in Lending	1
1.1.2 The Role of Truth in Lending in Consumer Advocacy	3
1.2 Legislative History	4
1.2.1 Original Act	4
1.2.2 Truth in Lending Simplification	5
1.2.3 1988 Consumer Protection Amendments	7
1.2.4 The Home Ownership and Equity Protection Act of 1994	7
1.2.5 Truth in Lending Act Amendments of 1995	8
1.2.6 The 2005 Bankruptcy Amendments Affecting TILA	9
1.2.7 Federal Reserve Board Review of Regulation Z	10
1.3 Outline of the Truth in Lending Act	10
1.4 Sources of Law in Truth in Lending Cases	11
1.4.1 Introduction	11
1.4.2 The Statute	11
1.4.2.1 General	11
1.4.2.2 The Pre-Simplification Statute	12
1.4.2.3 Statutory Construction Principles	12
1.4.2.3.1 Liberal construction	12
1.4.2.3.2 Strict liability	13
1.4.3 Regulation Z and the FRB Staff Commentary	13
1.4.3.1 History of Regulation Z and the FRB Interpretations	13
1.4.3.2 Validity of Regulation Z and Commentary	14
1.4.4 Case Law	15
1.4.5 Treatises	16
1.5 Organization of This Book	16
1.6 Getting Started: Quick Reference Checklist (Closed-End)	17

Chapter 2

Scope

2.1 Introduction	19
2.1.1 Overview	19
2.1.2 Devices to Evade TILA: Substance of Transaction, Not Form, Dictates	19
2.1.3 Opting-In to TIL Coverage	20
2.2 Consumer Credit	21
2.2.1 General	21
2.2.2 Consumer	21
2.2.2.1 Defined	21
2.2.2.2 Accommodation Parties	21
2.2.3 Primarily for Personal, Family, or Household Purposes	22

Truth in Lending

2.2.4	Credit	22
2.2.4.1	Definition of “Credit”	22
2.2.4.2	Credit Sales and Leases	23
2.2.4.2.1	General Definition	23
2.2.4.2.2	Leases	23
2.2.4.2.3	Balloon payment financing with leasing characteristics	24
2.3	Creditor	24
2.3.1	Introduction	24
2.3.2	Person	24
2.3.2.1	General	24
2.3.2.2	Attorneys and Trustees	25
2.3.3	Regularly Extends Consumer Credit	25
2.3.4	The Finance Charge or More Than Four Installment Requirement	27
2.3.4.1	Introduction	27
2.3.4.2	Finance Charge as a Trigger for TIL Coverage	27
2.3.4.3	Payable by Written Agreement in More Than Four Installments	27
2.3.5	To Whom the Obligation Is Initially Payable	28
2.3.5.1	General	28
2.3.5.2	Status and Liability of Assignees	28
2.3.5.3	Status and Liability of Servicers	30
2.3.5.4	Arrangers of Credit	30
2.3.6	HOEPA Mortgages: Special Definition of Creditor	31
2.3.7	Credit Card Issuers: Special Definition of Creditor	32
2.4	Exempt Transactions	33
2.4.1	Overview	33
2.4.2	Business, Commercial, or Agricultural Credit	33
2.4.2.1	Primary Purpose	33
2.4.2.2	Business Credit	35
2.4.2.2.1	Determining a business purpose	35
2.4.2.2.2	Losing exemptions through refinancing	37
2.4.2.3	Telephone Credit Cards	38
2.4.2.4	Agricultural Purpose	39
2.4.3	Extensions of Credit to Organizations	39
2.4.4	Credit Over \$25,000 Not Secured by Real Property or a Dwelling	40
2.4.4.1	Scope of the Exemption	40
2.4.4.2	Credit Secured by the Consumer’s Principal Dwelling	40
2.4.4.3	Loss of Exemption Through Refinancing	41
2.4.5	Student Loans	41
2.4.5.1	TIL Student Loan Disclosure Requirements	41
2.4.5.2	Non-TIL Student Loan Disclosure Requirements	42
2.4.6	Public Utility Credit	43
2.4.7	Securities or Commodities Accounts	43
2.4.8	Home Fuel Budget Plans	44
2.4.9	Commentary Exemptions	44
2.4.9.1	General	44
2.4.9.2	Layaway Plans	44
2.4.9.3	Tax Liens and Tax Assessments	44
2.4.9.4	Court Judgments and Reaffirmations of Debts in Bankruptcy	44
2.4.9.5	Insurance	45
2.4.9.5.1	Insurance premium payment plans	45
2.4.9.5.2	Insurance premium financing contracts	45
2.4.9.5.3	Borrowing against insurance policies	45
2.4.9.5.4	McCarran-Ferguson Act	45
2.4.9.6	Home Improvement Progress Payment Transactions	46
2.4.9.7	Mortgage Assistance Plans Subsidized by a Government Agency	47

Contents

2.4.9.8 Borrowing Against a Pension Account 47
2.4.9.9 Investments, Letters of Credit, and Option Contracts. 47
2.5 Disguised Credit and Credit Sales: Maybe; Maybe Not. 47
2.5.1 Introduction. 47
2.5.2 Pawn Transactions; Auto-Pawns 47
2.5.3 Sale/Leasebacks; Sale/Repurchase Requests 48
2.5.3.1 Is the Transaction a Loan Secured by the Consumer’s Home? 48
2.5.3.2 TILA’s Numerical Requirements 49
2.5.4 Rent to Own (RTO) 50
2.5.5 Payday Loans/Check Advancement Loans 51
2.5.6 Refund Anticipation Loans 52
2.5.7 Bank Overdraft Loans. 53
2.5.7.1 What Is an Overdraft Loan? 53
2.5.7.2 Overdraft Loans Are “Credit”. 54
2.5.7.3 “Creditor” Issues for Overdraft Loans 55
2.5.7.4 ATM and Debit Cards that Access Overdraft Loans 55
2.6 State Disclosure Law. 55
2.6.1 Introduction. 55
2.6.2 Exemptions 56
2.6.3 Preemption 57
2.7 Miscellaneous: Use of Rule of 78 Prohibited. 59

Chapter 3

Finance Charge

3.1 Introduction 61
3.1.1 Overview; Purpose of the Finance Charge Disclosure. 61
3.1.2 Organization of Chapter 61
3.2 A Primer on the Finance Charge 62
3.2.1 The General Concepts Underlying TILA’s Definition 62
3.2.2 Allocating the Components of the Debt: Finance Charge or Amount
Financed? 62
3.2.3 Distinctions: TIL Finance Charge and Interest; TIL APR and Interest
Rate; TIL Amount Financed and Loan Principal 64
3.2.4 A Regulatory Road Map: Outline of TILA’s Finance Charge Rules 66
3.3 Finance Charge As a Trigger to Coverage Under TILA 66
3.4 Statutory Construction of TILA’s Finance Charge Rules 67
3.5 Basic Definition of Finance Charge: 15 U.S.C. § 1605(a); Reg. Z § 226.4(a) 67
3.6 Elements of the Basic Definition 68
3.6.1 Any Charge. 68
3.6.1.1 General 68
3.6.1.2 Required Debt Consolidations or Reaffirmations; Collateral
Purchases 69
3.6.1.3 Interest Forfeitures and Offsets May Be a Credit Charge 70
3.6.2 Charges Payable Directly or Indirectly by the Consumer; Creditor’s Costs
of Doing Business 71
3.6.3 Charge Imposed Directly or Indirectly by the Creditor 72
3.6.3.1 Charges Need Not Be Retained by the Creditor to Be “Imposed
by the Creditor” 72
3.6.3.2 Taxes Imposed on the Creditor Which Are Passed on to the
Borrower; Intangible Taxes 73
3.6.3.3 Charges Incurred by Settlement Agents. 74
3.6.3.4 Car Dealers—Packing in the Extras 75
3.6.4 Incident to or a Condition of the Extension of Credit. 77
3.6.5 Charges Payable in a Comparable Cash Transaction. 81
3.6.5.1 General 81

Truth in Lending

3.6.5.2	Examples: Document Fees, Service Contracts, Notary Fees, and Sundry Other Items	81
3.6.5.3	“Cash Price”; Charges Buried in the Cash Price	84
3.7	Examples of Finance Charges: 15 U.S.C. § 1605(a); Reg. Z § 226.4(a) and (b) . .	85
3.7.1	General.	85
3.7.2	Interest; the Time-Price Differential.	86
3.7.2.1	The Basic Interest Cost	86
3.7.2.2	Failure to Rebate Unearned Charges: When Refinancing Creates Finance Charge in the New Loan.	87
3.7.2.2.1	General	87
3.7.2.2.2	Practical tips: determining whether there are unearned charges in a refinanced pay-off balance	87
3.7.2.2.3	Federal rebate law prescribes method of calculating unearned interest in long-term transactions.	89
3.7.3	Service, Transaction, Activity, and Carrying Charges	90
3.7.3.1	General	90
3.7.3.2	Checking Account Charges	90
3.7.3.3	Membership or Participation Fees	91
3.7.3.4	Courier and Express Delivery Fees.	91
3.7.4	Brokers Fees	92
3.7.4.1	Overview of Roles Played by Brokers	92
3.7.4.2	Current Rule and Impact of 1995 Amendments	94
3.7.4.3	Pre-1995 Amendments: Mortgage and Non-Mortgage Broker Fee Analysis.	96
3.7.5	Points, Loan Fees, Assumption Fees, and Finder’s Fees	96
3.7.5.1	General	96
3.7.5.2	Exception for Seller’s Points	97
3.7.6	Appraisal, Investigation, and Credit Report Fees	98
3.7.7	Default and Credit Loss Insurance; Residual Value Insurance	98
3.7.8	Assignment Fee or Discount	98
3.7.9	Credit Insurance—Unless Excluded.	99
3.7.10	Debt Cancellation Coverage; GAP Insurance.	100
3.7.11	Discounts and Surcharges.	100
3.8	Prepaid Finance Charges	101
3.8.1	Overview; Definition.	101
3.8.2	Relationship of Prepaid Finance Charge to the Amount Financed.	103
3.8.3	Practice Tip: Working Examples	104
3.9	TILA’s “Exclusionary” Rules: Taking Charges Out of the Finance Charge: 15 U.S.C. § 1605(a)–(e); Reg. Z § 226.4(a)(1) & (2), (c)–(e)	105
3.9.1	Overview	105
3.9.2	Application Fees.	106
3.9.3	Late Charges, Over-the-Limit Fees, and Other Delinquency Charges.	106
3.9.3.1	General	106
3.9.3.2	Over-the-Limit Fees	106
3.9.3.3	Overdraft Loan Fees.	107
3.9.3.4	When Late Charges Are Finance Charges; Late Charges As a Finance Charge Triggering TIL Coverage	109
3.9.4	Credit Insurance	110
3.9.4.1	Overview	110
3.9.4.2	Relationship of TILA to McCarran-Ferguson Act; State Laws Regulating Credit Insurance.	111
3.9.4.3	Credit Insurance and Non-Credit Insurance Distinguished.	112
3.9.4.4	Credit Insurance “Written in Connection with a Credit Transaction”: Preexisting Policies and Post-Consummation Policies; Force Placed Insurance.	113

Contents

3.9.4.4.1	General	113
3.9.4.4.2	Force placed insurance	114
3.9.4.5	Loss of Income Insurance: Credit Life, Accident, Health, and Unemployment Insurance	115
3.9.4.5.1	General	115
3.9.4.5.2	Coverage must not be required	116
3.9.4.5.2.1	Voluntariness disclosure	116
3.9.4.5.2.2	Voluntariness may be a factual issue	117
3.9.4.5.2.3	Of parol evidence; proof of coercion	118
3.9.4.5.3	Premium cost disclosure	122
3.9.4.5.4	Term disclosure	124
3.9.4.5.5	Affirmative written request for insurance	124
3.9.4.6	Credit Property Insurance	125
3.9.4.6.1	General	125
3.9.4.6.2	Choice of provider disclosure	126
3.9.4.6.3	Premium cost disclosures	127
3.9.4.6.4	Term disclosures	128
3.9.4.7	GAP Insurance; Debt Cancellation Agreements	128
3.9.4.8	Single Interest Insurance (VSI)	130
3.9.5	Third Party and Closing Agent Charges: 15 U.S.C. § 1605(a); Regulation Z § 226.4(a)(1) & (2)	133
3.9.6	Real Estate and Residential Mortgage Transaction Charges: 15 U.S.C. § 1605(e); Reg. Z § 226.4(c)(7)	134
3.9.6.1	General	134
3.9.6.2	Classes of Real Estate Closing Charges: What Is Excludable; What Is Not	134
3.9.6.2.1	Overview	134
3.9.6.2.2	Real property, title-related fees	135
3.9.6.2.3	Document fees	135
3.9.6.2.4	Closing agent/attorney fees	137
3.9.6.2.5	Notary, appraisal, and credit report fees	138
3.9.6.2.6	Escrow costs	139
3.9.6.2.7	Fees for post-consummation services	140
3.9.6.3	The Charges Must Be Bona Fide and Reasonable	140
3.9.6.3.1	Definition of “bona fide and reasonable”	140
3.9.6.3.2	How much of the fee is part of the finance charge?	143
3.9.7	Security Interest Charges; Filing and Recording Fees: 15 U.S.C. § 1605(d); Reg. Z § 226.4(e)	144
3.9.7.1	Overview	144
3.9.7.2	Taxes; Recording and Filing Fees Prescribed by Law	145
3.9.7.3	Nonfiling Fees	146
3.10	Hidden Finance Charges in the Cash Price of Goods or Services	148
3.11	Using This Chapter: Walking Through a Case	153
3.11.1	Collecting the Papers	153
3.11.2	Checking the Papers	155
3.11.2.1	Level One	155
3.11.2.2	Level Two	156
3.11.3	Looking Behind the Papers	157

Chapter 4

Closed-End Credit Disclosures

4.1	Introduction	161
4.1.1	The Scope of This Chapter and Sources of Law	161
4.1.2	What Is Closed-End Credit?	161
4.1.3	Who Is Required to Make Closed-End Disclosures?	162

Truth in Lending

4.1.4	Who Must Receive Disclosures	163
4.2	Form of Disclosures	163
4.2.1	General	163
4.2.2	Model Forms	163
4.2.3	Meaningful Disclosures	164
4.2.4	Clear and Conspicuous	165
4.2.5	Additional Inconsistent Information	168
4.2.6	More Conspicuous: Annual Percentage Rate and Finance Charge	169
4.2.7	Written Disclosures in a Form the Consumer May Keep	171
4.2.7.1	General Standards	171
4.2.7.2	Effect of Written Acknowledgment of Receipt	172
4.2.8	Segregating the Disclosures: The Federal Box	174
4.2.9	Electronic Disclosures	176
4.2.9.1	Overview	176
4.2.9.2	Authority of Agencies to Interpret Electronic Disclosure Standards	177
4.2.9.3	Interim Rule	177
4.2.9.4	E-Sign's Requirements for Consumer Consent to Receive Electronic Disclosures	179
4.2.9.5	E-Sign's Effect on TIL Requirement That Disclosures Be Made in a Form That the Consumer May Keep	180
4.2.9.6	E-Sign's Effect on TIL Timing Requirements	181
4.2.9.7	E-Sign's Effect on TIL Format Requirements	182
4.2.9.8	Manner of Transmitting Electronic Notices	182
4.2.9.9	Penalties for Violation of Electronic Disclosure Safeguards	183
4.2.10	Advertising Rules for Closed-End Loans	183
4.3	Timing of Disclosures	184
4.3.1	General	184
4.3.2	Consummation Defined	185
4.3.3	Exceptions to Timing Rule: Mail or Telephone Orders and Series of Sales	189
4.3.4	Timing Rules for Residential Mortgage Transactions Subject to RESPA	189
4.3.5	Timing Rules for Variable Rate Transactions Secured by the Consumer's Principal Dwelling	190
4.3.6	Timing Issues in Car Sales	191
4.4	Basis of Disclosures	194
4.4.1	Disclosures Reflect the Legal Obligation	194
4.4.2	Affect of Unenforceable Term or Contract on the "Legal Obligation" Rule	195
4.4.3	Effect of Changes in the Legal Obligation	196
4.4.4	Multiple Transactions	196
4.4.5	"Yo-Yo" or "Spot Delivery" Car Sales	196
4.4.6	Proving Yo-Yo or Spot Delivery-Related TIL Violations	201
4.4.6.1	General	201
4.4.6.2	Establishing the Chain of Title	201
4.4.6.3	Use of Power of Attorney and Reassignment Forms	201
4.4.6.4	Misuse of Dealer License Plates	202
4.4.6.5	Requiring Hazard Insurance When Title Is Not Transferred	202
4.4.7	Estimated Disclosures	203
4.4.8	Effect of Subsequent Events on Early Disclosures: When Do New Disclosures Have to Be Made?	205
4.4.9	Effects of Minor Variations and Irregularities	206
4.4.10	Demand Obligations	206
4.4.10.1	Special Demand Obligation Disclosures	206
4.4.10.2	Tax Refund Loans As Demand Obligations	206

Contents

4.4.11 Multiple Advances	208
4.5 Determining Which Disclosures Are Required	208
4.5.1 Meaning of “As Applicable”	208
4.5.2 Distinguishing Disclosure Errors by Their Consequences	209
4.6 Disclosures Tied to Special Consumer Relief	209
4.6.1 Introduction	209
4.6.2 Disclosure of the Amount Financed	209
4.6.2.1 General	209
4.6.2.2 Disclosures for Down Payments and Trade-Ins	210
4.6.2.3 Negative Equity	210
4.6.2.4 Pickup Payments	212
4.6.2.5 Other Amounts That Are Financed	213
4.6.2.6 Prepaid Finance Charge	213
4.6.2.7 Premiums and Rebates	213
4.6.2.8 Tolerances Affecting the Amount Financed	213
4.6.3 Disclosure of the Finance Charge	214
4.6.3.1 General Disclosure Rules	214
4.6.3.2 Tolerance Levels for Amount Disclosed	214
4.6.3.2.1 General	214
4.6.3.2.2 Tolerances for credit other than mortgage loans	215
4.6.3.2.3 Tolerance for rescission in foreclosure defense	215
4.6.3.2.4 Tolerances for real-estate-secured transactions consummated after September 30, 1995	215
4.6.3.2.5 Retroactive tolerances for transactions consummated before September 30, 1995	216
4.6.3.2.6 Effect of finance charge tolerances on related disclosures	217
4.6.3.2.7 Padded fees	217
4.6.3.2.8 Tolerance chart	218
4.6.3.3 More Conspicuous Than Other Disclosures	219
4.6.4 Annual Percentage Rate Disclosure	219
4.6.4.1 General Disclosure Rule	219
4.6.4.2 More Conspicuous Than Other Disclosures	220
4.6.4.3 Calculation of the Annual Percentage Rate for Fixed Rate Transactions	221
4.6.4.4 Calculation of the Annual Percentage Rate in Variable Rate Transactions	222
4.6.4.5 Calculation of the APR in Single-Advance Single-Payment Transactions	223
4.6.4.6 Accuracy of the Annual Percentage Rate	224
4.6.4.6.1 General rules on tolerance	224
4.6.4.6.2 Overstated APR	225
4.6.4.6.3 Other accuracy rules	227
4.6.4.7 Proving the Accurate APR in Litigation	228
4.6.5 Disclosure of the Payment Schedule	229
4.6.5.1 General	229
4.6.5.2 Number of Payments	229
4.6.5.3 Amounts Included in Payment Schedule	229
4.6.5.4 Abbreviated Disclosures When Every Payment Is a Different Amount	231
4.6.5.5 Timing of Payments	231
4.6.5.6 Demand Obligations	232
4.6.5.7 Alternate Payment Schedules	233
4.6.6 Disclosure of the Total of Payments	233
4.6.6.1 General Disclosure Requirements	233

Truth in Lending

4.6.6.2	Exceptions to Disclosure of Total of Payments: Single-Payment and Demand Obligations	234
4.6.7	Disclosure of Security Interests	234
4.6.7.1	General Disclosure Requirements	234
4.6.7.2	Definition of Security Interest	235
4.6.7.3	Purchase Money Security Interests	237
4.6.7.4	Nonpurchase Money Security Interests	237
4.6.7.4.1	General	237
4.6.7.4.2	Identification of the collateral	238
4.6.7.4.3	Overinclusive description of collateral	238
4.6.7.4.4	Underinclusive disclosure of security interests	240
4.6.7.5	Mixed Purchase Money and Nonpurchase Money Collateral	241
4.6.7.6	Property Already Secured: “Spreader Clauses”	241
4.6.7.7	Disclosure of Interests in Property Not Owned by Debtor	242
4.7	Disclosure Requirements Tied to Actual Damage Relief Only	242
4.7.1	Overview	242
4.7.2	Disclosure of the Creditor	242
4.7.3	Itemization of the Amount Financed	243
4.7.3.1	General	243
4.7.3.2	Amount of Any Proceeds Distributed Directly to the Consumer	244
4.7.3.3	Amount Credited to the Consumer’s Account with the Creditor	244
4.7.3.4	Any Amounts Paid to Other Persons by the Creditor on the Consumer’s Behalf	245
4.7.3.4.1	General	245
4.7.3.4.2	Car dealer mark-ups and commissions	245
4.7.3.5	Prepaid Finance Charge	248
4.7.4	Disclosure of a Demand Feature	249
4.7.5	Disclosure of the Total Sale Price	249
4.7.6	Prepayment Disclosures	250
4.7.6.1	General	250
4.7.6.2	Interest-Bearing Transactions	250
4.7.6.3	Precomputed Transactions	251
4.7.6.4	Prepaid Finance Charge	252
4.7.6.5	Mixed Transactions	252
4.7.7	Disclosure of Late Payment Charges	252
4.7.8	Disclosure of Insurance Charges and Debt Cancellation Agreements	253
4.7.9	Disclosure of Security Interest Charges	254
4.7.10	Disclosure That Information Can Be Found Elsewhere in the Contract	255
4.7.11	Disclosure of Mortgage Lenders’ Assumption Policy	255
4.7.12	Disclosure of Required Deposits	256
4.8	Special Disclosures for Variable Rate Loans	257
4.8.1	Introduction	257
4.8.2	Variable Rate Disclosures for Adjustable-Rate Mortgages (ARMs)	259
4.8.2.1	Rate Cap Disclosure	259
4.8.2.2	Other Disclosures for ARMs with Terms of More Than One Year Secured by the Consumer’s Principal Dwelling	260
4.8.2.2.1	General	260
4.8.2.2.2	Early ARM disclosures: general	261
4.8.2.2.3	ARM brochure	261
4.8.2.2.4	Specific early ARM disclosures	261
4.8.2.2.5	Historical example disclosure	263
4.8.2.2.6	ARM disclosures at consummation	264
4.8.2.2.7	ARM disclosures after consummation: adjustment or change notices	264
4.8.3	Variable Rate Disclosures for Other Transactions	266

Contents

4.8.3.1 Introduction 266

4.8.3.2 When Must Variable Rate Disclosures Be Made 266

4.8.3.3 Substitution of Other Federal Agencies’ Variable Rate Disclosures 266

4.8.3.4 General Variable Rate Disclosure Rules 267

4.8.3.5 Disclosure of Circumstances Under Which the Rate May Increase . 267

4.8.3.6 Disclosure of Any Limitations on the Increase 268

4.8.3.7 Disclosure of the Effect of an Increase 268

4.8.3.8 Disclosure of an Example of the Payment Terms That Would Result from an Increase 268

4.9 Disclosure Requirements for Subsequent Occurrences 268

4.9.1 General Rule 268

4.9.2 Refinancings 269

4.9.2.1 General Requirements 269

4.9.2.2 “Loan-Splitting” and Refinancing 270

4.9.3 Rate Adjustments in Variable Rate Transactions 271

4.9.3.1 Adjustable-Rate Mortgages 271

4.9.3.2 Other Variable Rate Transactions 272

4.9.4 Renewals: Single Payment Obligations and Payday Loans 274

4.9.5 APR Reduction 274

4.9.6 Court Agreements 275

4.9.7 Workout Agreements 275

4.9.8 Insurance Renewals 275

4.9.9 Refinancing Disclosures; Unearned Finance Charge 276

4.9.10 Disclosure Requirements for Assumptions 276

4.9.10.1 General Rule 276

4.9.10.2 “Existing” Residential Mortgage Transaction 277

4.9.10.3 Creditor’s Express Acceptance of the Subsequent Consumer . . . 277

4.9.10.4 Assumption Disclosures 277

4.9.10.5 Abbreviated Disclosures 278

Chapter 5

Open-End Credit: Disclosures and Billing Rights

5.1 Introduction 279

5.1.1 Overview of TILA and Open-End Credit 279

5.1.2 Organization of This Chapter 279

5.1.3 Non-TIL Credit Card Issues 279

5.2 Definition of Open-End Credit Terms 280

5.2.1 General 280

5.2.2 “Open-End Credit” 280

5.2.2.1 Elements of the Definition 280

5.2.2.2 “Reasonably Contemplates” Repeat Transactions 280

5.2.2.3 Finance Charge on Unpaid Balance 281

5.2.2.4 Reusable Credit Line 281

5.2.3 “Spurious” Open-End Credit 282

5.2.3.1 General 282

5.2.3.2 Past Congressional and Regulatory Action 282

5.2.3.3 Federal Reserve Board Attention to the Problem 283

5.2.3.4 *Benion v. Bank One* and Subsequent Cases 284

5.2.3.5 Assessing an Open-End Transaction 286

5.2.4 Special TIL Definitions for Credit Cards 288

5.2.4.1 Credit Card 288

5.2.4.2 Charge Cards 289

5.2.4.3 Special Definition of “Creditor” 289

5.2.4.3.1 Credit cards for open-end plans 289

Truth in Lending

5.2.4.3.2	Card accounts without a finance charge or installment payments	289
5.2.4.3.3	Any card issuer extending closed-end credit	289
5.2.4.3.4	Card issuer	290
5.2.4.3.5	Visa and MasterCard not creditors	290
5.2.4.3.6	Person who honors a card	290
5.2.4.4	Assigned Credit Card Debt	291
5.2.4.5	Cardholder	291
5.3	General Format for Open-End Disclosures	292
5.3.1	Introduction	292
5.3.2	Clear and Conspicuous	292
5.3.2.1	General	292
5.3.2.2	Clear	292
5.3.2.3	Conspicuous	292
5.3.2.4	Required Terms Must Be More Conspicuous	293
5.3.3	In Writing	294
5.3.4	In Form That a Consumer May Keep	294
5.3.5	Integrated Document	295
5.3.6	Electronic Disclosures	295
5.4	Credit and Charge Card Applications and Solicitations and Advertising	296
5.4.1	Introduction	296
5.4.2	General Rules	297
5.4.2.1	Timing of Disclosure	297
5.4.2.2	Form of Disclosures	297
5.4.2.3	Exceptions	298
5.4.2.4	Fees Based on a Percentage	298
5.4.2.5	Fees That Vary by State	298
5.4.3	Required Disclosures	298
5.4.3.1	General	298
5.4.3.2	APR Disclosure	299
5.4.3.2.1	General rule	299
5.4.3.2.2	Teaser rates	299
5.4.3.2.3	Variable rate disclosure	300
5.4.3.2.4	Penalty rates	301
5.4.3.2.5	Higher introductory rates	301
5.4.3.3	Fees for the Issuance or Availability of a Card	301
5.4.3.4	Minimum Finance Charge	302
5.4.3.5	Transaction Charge for Purchases	302
5.4.3.6	Grace Period for Purchases	303
5.4.3.7	Balance Computation Method for Purchases	303
5.4.3.8	Due and Payable Statement	304
5.4.3.9	Cash Advance, Late, and Over-Limit Fees	304
5.4.3.10	Balance Transfer Fees	304
5.4.4	Specific Disclosure Rules for Different Types of Applications and Solicitations	304
5.4.4.1	Direct Mail Applications and Solicitations	304
5.4.4.2	Telephone Applications and Solicitations	304
5.4.4.2.1	Coverage	304
5.4.4.2.2	General disclosure rule	305
5.4.4.2.3	Alternative disclosure	305
5.4.4.3	Applications and Solicitations Made Available to General Public	305
5.4.4.3.1	General	305
5.4.4.3.2	Required credit disclosures	305
5.4.4.3.3	Limited initial credit disclosures	305
5.4.4.3.4	No credit disclosures	306

Contents

5.4.4.3.5	Prompt response.	306
5.4.4.4	Electronic Applications and Solicitations	306
5.4.5	Special Charge Card Rule—Card Issuer and Person Extending Credit Not the Same Person.	307
5.4.6	Preemption of State Laws for Credit Card Applications and Solicitations. . .	307
5.4.7	Model Forms and Clauses	307
5.4.8	Remedies for Credit and Charge Card Application and Solicitation Disclosure Violations.	307
5.4.9	Credit Card Advertising.	307
5.5	TIL Open-End Initial Disclosures	308
5.5.1	General.	308
5.5.2	Timing of Initial Disclosures	308
5.5.3	New Initial Disclosures When Reopening Closed or Suspended Accounts . .	309
5.5.4	Required Terminology for Initial Disclosures: Finance Charge, Annual Percentage Rate	309
5.5.5	Content of Initial Disclosures	309
5.5.5.1	General Requirements.	309
5.5.5.2	Disclosure of the Finance Charge Accrual Date	310
5.5.5.3	Disclosure of the Periodic Rate, Range of Balances, and APR . . .	310
5.5.5.4	Disclosure of the Balance Method	311
5.5.5.5	Determination of the Amount of the Finance Charge	311
5.5.5.6	Disclosure of Charges Other Than Finance Charges	312
5.5.5.6.1	Overview of “other charges”	312
5.5.5.6.2	Required “other charge” disclosures	313
5.5.5.6.3	Excluded charges	313
5.5.5.6.4	Real-estate-related charges	314
5.5.5.7	Disclosure of Security Interests	314
5.5.5.8	Disclosure of Billing Error Rights	315
5.5.5.9	Miscellaneous Disclosures.	315
5.5.5.10	Initial Disclosures for Variable Rate Transactions	315
5.5.5.10.1	Disclosure of the rate	315
5.5.5.10.2	Disclosure of rate change triggers	315
5.5.5.10.3	Disclosure of maximum rate for home-secured open-end plans.	316
5.5.5.10.4	Rate cap disclosures for non-home-secured plans.	317
5.5.5.10.5	Discounted or “teaser” variable rate plans	317
5.6	Periodic Statements	318
5.6.1	Overview	318
5.6.2	Timing of Periodic Statements	318
5.6.3	Disclosure of Beginning Balance.	319
5.6.4	Periodic Statement’s Identification of Each Credit Transaction	319
5.6.4.1	General	319
5.6.4.2	Sale Credit	320
5.6.4.2.1	Sale credit described.	320
5.6.4.2.2	Sale credit rules where creditor provides copies of credit documents	320
5.6.4.2.3	Sale credit rules where “related” creditor does not provide copies of credit documents	320
5.6.4.2.4	Sale credit rules where “unrelated” creditor does not provide copies of credit documents	321
5.6.4.3	Nonsale Credit	321
5.6.5	Disclosure of Credits.	322
5.6.6	Disclosure of Each Periodic Rate	322
5.6.7	Disclosure of the Balance on Which the Finance Charge Is Computed . . .	323
5.6.8	The Amount of the Finance Charge.	325

Truth in Lending

5.6.9	Disclosure of the Effective Annual Percentage Rate	326
5.6.9.1	Calculation of the Effective APR	326
5.6.9.2	Importance of the Effective APR	326
5.6.10	Disclosure of Other Charges	327
5.6.10.1	Required “Other Charge” Disclosures	327
5.6.10.2	Charges Excluded from “Other Charges”	328
5.6.11	Disclosure of the Outstanding Balance at the End of the Period	328
5.6.12	Disclosure of the Free Ride or Grace Period	328
5.6.13	Payment Deadlines and Late Payment Fees	328
5.6.14	The Billing Error Address	329
5.6.15	Disclosure of Cardholder’s Liability for Unauthorized Use	329
5.6.16	Minimum Monthly Payment Disclosures	329
5.7	Subsequent Disclosure Requirements	331
5.7.1	General	331
5.7.2	Periodic Statements of Customer’s Billing Error Rights	331
5.7.3	Disclosure of Change in Terms	331
5.7.3.1	The Change-in-Terms Notice	331
5.7.3.2	Timing: When the Notice Must Be Given	331
5.7.3.3	Changes That Require a Change-in-Terms Notice Fifteen Days in Advance	332
5.7.3.4	Changes That Require a Notice Any Time Prior to the Change	332
5.7.3.5	Notice Requirements for the Addition of a New Credit Feature or Device	333
5.7.3.6	Changes That Do Not Require a Change-in-Terms Notice	333
5.7.3.7	Substantive Limitations on Changes in Terms	334
5.7.3.8	Delivery of Notice	335
5.7.4	Special Subsequent Disclosures for Credit Cards	335
5.7.4.1	General	335
5.7.4.2	Disclosures upon Renewal of Credit or Charge Card	335
5.7.4.2.1	Notice prior to renewal	335
5.7.4.2.2	Delayed notice	336
5.7.4.2.3	Notification on periodic statements	336
5.7.4.3	Change in Credit Card Account Insurance Provider	336
5.7.4.3.1	General	336
5.7.4.3.2	Notice prior to change	336
5.7.4.3.3	Notice of new insurance coverage	337
5.7.4.3.4	Definition of substantial decrease	337
5.7.4.3.5	Preemption of state law	337
5.8	The Fair Credit Billing Act	337
5.8.1	Overview of FCBA	337
5.8.2	Scope of Billing Error Procedures	337
5.8.3	Relationship of Billing Error Procedures to Other Claims	338
5.8.4	Definition of Billing Error	339
5.8.5	Notice of Billing Error	341
5.8.6	Creditor’s Interim Steps upon Notice of Billing Error	343
5.8.6.1	General	343
5.8.6.2	Acknowledgment of Receipt	343
5.8.6.3	Right to Withhold Payment	343
5.8.6.4	Collection of Disputed Amount	343
5.8.6.5	Credit Reports and Billing Errors	344
5.8.7	Creditor’s Billing Error Investigation	345
5.8.8	Resolution of Error	346
5.8.8.1	Resolution Favoring the Consumer	346
5.8.8.2	Resolution Not Favoring the Consumer	346
5.8.8.3	Charges for Error-Resolution Procedure	347

Contents

5.8.9 Remedies for Billing Error Violations	347
5.8.10 Other FCBA Open-End Credit Provisions	348
5.8.10.1 Prompt Crediting of Consumer Payments	348
5.8.10.2 Treatment of Credit Balances	349
5.8.10.3 Record Retention Requirements	349
5.8.10.4 Prohibition on Terminating Accounts	349
5.8.11 FCBA Preemption	349
5.9 TILA's Substantive Credit Card Protections	350
5.9.1 Overview	350
5.9.2 Restrictions on Issuing a Credit Card	350
5.9.2.1 General	350
5.9.2.2 Adding Credit Features to a Card	350
5.9.2.3 Replacement of an "Accepted" Card: Renewal and Substitute Cards	351
5.9.2.3.1 General	351
5.9.2.3.2 One-for-one rule	351
5.9.2.3.3 Acceptance of a credit card	352
5.9.2.4 Protections Apply to All Types of Credit Cards Including Telephone	352
5.9.2.5 Enforcement of the Prohibition Against Unsolicited Issuance	352
5.9.3 No Offset Against Consumer's Deposit Account for Credit Card Debt	353
5.9.3.1 General	353
5.9.3.2 Allowable Interests in the Consumer's Deposit Account	354
5.9.4 Customer's Liability for Unauthorized Use of a Credit Card	354
5.9.4.1 General	354
5.9.4.2 Misuse by Authorized Users	354
5.9.4.2.1 Definition of authorized user	354
5.9.4.2.2 Unauthorized use protections and misuse by authorized users	355
5.9.4.2.3 Authority of the user	356
5.9.4.3 Benefit to the Cardholder	357
5.9.4.4 Conditions for Creditor Imposing \$50 Liability	357
5.9.4.5 Cardholder Notice to Card Issuer of Unauthorized Use	358
5.9.4.6 Investigation Procedures	358
5.9.4.7 Resolution; Adverse Credit Reports	359
5.9.4.8 Remedies to Enforce Unauthorized Use Protections	359
5.9.4.9 Protections Apply to All Types of Credit Cards Including Telephone	360
5.9.5 Cardholder's Claims and Defenses	360
5.9.5.1 General	360
5.9.5.2 When Is a Credit Card Issuer Subject to Claims and Defenses?	361
5.9.5.3 Types of Actionable Claims and Defenses	361
5.9.5.4 Preconditions for Cardholder Asserting Claims or Defenses	362
5.9.5.5 Resolution Process; Adverse Credit Reports While Cardholder Asserts Claims and Defenses	363
5.9.6 The Creditor-Merchant-Cardholder Relationship	363
5.9.6.1 General	363
5.9.6.2 Tie-Ins	364
5.9.6.3 Prompt Crediting of Refunds	364
5.9.6.4 Discounts and Surcharges	364
5.10 Home Equity Lines of Credit (HELCs)	365
5.10.1 Introduction	365
5.10.1.1 General	365
5.10.1.2 Scope	366
5.10.1.3 Sample and Model Disclosure	366

Truth in Lending

5.10.1.4 APR	366
5.10.2 Additional Advertising Rules for HELCs	366
5.10.3 Substantive Limitations on HELCs	367
5.10.3.1 General	367
5.10.3.2 Indices for Variable Rate HELCs	367
5.10.3.3 Early Termination of HELCs	367
5.10.3.3.1 General	367
5.10.3.3.2 Early termination of reverse mortgages	368
5.10.3.4 Unilateral Change in Terms	368
5.10.3.5 Refund of Fees	370
5.10.3.6 Nonrefundable Fees	370
5.10.4 Early HELC Disclosures	370
5.10.4.1 General	370
5.10.4.2 Form of Disclosures	370
5.10.4.3 Time of Disclosures	371
5.10.4.4 Duties of Third Parties	372
5.10.4.5 Content of Disclosures	372
5.10.4.5.1 General	372
5.10.4.5.2 Retention of information	372
5.10.4.5.3 Conditions for disclosed terms	372
5.10.4.5.4 Security interest and risk to home	372
5.10.4.5.5 Possible actions by creditor	372
5.10.4.5.6 Payment terms	373
5.10.4.5.7 Annual percentage rate	374
5.10.4.5.8 Fees imposed by the creditor	374
5.10.4.5.9 Fees imposed by third parties to open a plan	374
5.10.4.5.10 Negative amortization	375
5.10.4.5.11 Transaction requirements	375
5.10.4.5.12 Tax implications	375
5.10.4.5.13 Disclosures for variable rate plans	375
5.10.4.5.14 Brochure	377
5.10.5 Initial HELC Disclosures	377
5.10.6 Additional Billing Error Rights for HELCs: RESPA	378
5.10.7 TIL Damages Are Available for All HELC Violations	378
5.11 Summary of Remedies for Violations	379
5.12 Summary of TIL Credit Card Disclosures	379

Chapter 6

Truth in Lending Rescission Rights

6.1 TIL Rescission Overview	383
6.2 Transactions and Persons Protected by TIL Rescission Rights	384
6.2.1 Overview of Scope of Rescission	384
6.2.2 Consumer Credit Transaction; Creditor	385
6.2.3 Security Interest	386
6.2.3.1 Basic Definition	386
6.2.3.2 Adding a Security Interest to Existing Transaction; Open-End Credit	386
6.2.3.3 Interests Arising by Operation of Law	386
6.2.3.4 Effect of Spreader Clauses	387
6.2.4 Secured by Principal Dwelling	388
6.2.4.1 General	388
6.2.4.2 Manufactured Home Transactions	389
6.2.5 Disguised Transactions; Sale/Leaseback and Sale/Repurchase Agreements	389
6.2.6 Transactions Exempt from Rescission	390
6.2.6.1 Transactions to Purchase or Construct a Residence Are Exempt	390

Contents

6.2.6.2	Rescission Rights Limited to the New Advance in a Refinancing by the Same Creditor	391
6.2.6.2.1	Overview	391
6.2.6.2.2	New advance	392
6.2.6.2.3	Same creditor	392
6.2.6.3	Conversion of Open-End to Closed-End Account	393
6.2.6.4	State Agency As Creditor	393
6.2.6.5	Open-End Credit Exclusions	393
6.2.6.6	Series of Advances	394
6.2.7	“Opting-In” to Rescission Rights: Contracting for Coverage; Waiving Exemptions	394
6.2.7.1	Introduction	394
6.2.7.2	Incorporating Rescission Rights As a Contract Term	394
6.2.7.3	Equitable Estoppel	396
6.2.8	Who Has Rescission Rights	396
6.2.8.1	Any Consumer with Ownership Interest	396
6.2.8.2	Where More Than One Consumer Has Rescission Rights.	398
6.2.8.3	Standing to Rescind	398
6.2.9	Waiver of Right to Rescind	399
6.2.9.1	General	399
6.2.9.2	Revocation of Rescission As Prohibited Waiver	399
6.2.9.3	Former Temporary Waiver Rules for Disaster Areas	400
6.2.10	Interrelationship Between FTC Cooling-Off Period, State Cooling-Off Periods and TIL Rescission	400
6.3	Time Period for Exercising the Right to Rescind	401
6.3.1	The Three-Day Unconditional Right; Trigger Times.	401
6.3.2	The Extended Right to Rescind.	402
6.3.2.1	General	402
6.3.2.2	Termination of Extended Right by Sale or Transfer of Property	403
6.3.2.2.1	General.	403
6.3.2.2.2	Bankruptcy does not constitute a transfer.	404
6.3.2.3	Payoff or Refinancing Should Not Terminate the Extended Right	405
6.3.3	The Three-Year Rule and Exceptions to It	407
6.3.3.1	General Interpretation of the Three-Year Rule	407
6.3.3.2	Recoupment and <i>Beach v. Ocwen Federal Bank</i>	408
6.3.3.3	Rescission by Recoupment Under State Disclosure Laws	408
6.3.3.4	Rescission by Recoupment Under State UDAP Statutes.	409
6.3.3.5	Rescission by Recoupment Where Consumer Attempted to Exercise Rescission Within the Three-Year Period.	410
6.3.3.6	Bankruptcy Filing May Toll Period for Rescinding	410
6.3.3.6.1	Extension of rescission period	410
6.3.3.6.2	Extension of time to file suit to enforce rescission.	411
6.3.3.6.3	Time limits when lender files bankruptcy	411
6.3.3.7	Extension of Rescission Period Due to Agency Enforcement Action	412
6.3.3.8	Class Action May Suspend Running of Rescission Period	412
6.3.3.9	Extension of Rescission Period Due to Delay in Consummation of Transaction	413
6.3.3.10	Equitable Tolling	413
6.3.3.11	Assertion of Damage Claims by Way of Recoupment	413
6.3.3.12	Recoupment in Non-Judicial Foreclosure States	413
6.4	Violations Giving Rise to the Extended Right to Rescind	414
6.4.1	Overview	414
6.4.2	Failure to Make Material Disclosures Properly	414
6.4.2.1	General	414

Truth in Lending

6.4.2.2	Material Disclosures in Closed-End Transactions	415
6.4.2.3	Material Disclosures in Open-End Transactions	416
6.4.2.4	HOEPA Loans.	416
6.4.2.5	Evaluating the Accuracy of the Material Disclosures.	417
6.4.3	Violations Regarding the Notice of Right to Rescind	418
6.4.3.1	General	418
6.4.3.2	All Consumers with Rescission Rights Must Receive Two Copies of Notice	418
6.4.3.3	Content of Notice	419
6.4.3.4	Physical Format of Notice.	420
6.4.3.5	Unclear or Ambiguous Notice	421
6.4.3.6	Creditor’s Grant of Longer Right to Rescind	421
6.4.3.7	Creditor’s Provision of Supplemental Information That Undermines Notice of Right to Rescind	422
6.4.3.8	Misstatement or Omission of Dates on Notice	422
6.4.3.9	Use of Premature Election Not to Cancel	425
6.4.3.10	Use of Wrong Model Form	426
6.4.4	Non-Delivery of Disclosures or Notice of Right to Cancel	427
6.5	Delay of Performance Rule.	430
6.5.1	Creditor Must Delay Performance During Rescission Period	430
6.5.2	Does Violation of Delay of Performance Rule Extend the Right to Rescind?	431
6.5.3	“Spiking”: Premature Performance in Home Improvement Transactions	432
6.5.3.1	Described.	432
6.5.3.2	The “Two-Contract Dodge”	433
6.5.3.3	Special Issue: Tender in a Spiking Case	435
6.5.3.4	Non-TIL Claims for Spiking	435
6.6	How Rescission Works: A Three-Step Process After Consumer Gives Notice	435
6.6.1	Introduction and Overview.	435
6.6.2	Triggering the Process by Consumer’s Written Notice of Cancellation	437
6.6.2.1	Basic Requirements	437
6.6.2.2	Drafting a Cancellation Letter	437
6.6.2.2.1	Whether to specify the TIL violations and surrounding circumstances	437
6.6.2.2.2	Addressing tender issues in the rescission letter	438
6.6.2.3	Delivering the Rescission Letter.	439
6.6.2.4	To Whom Should the Rescission Letter Be Sent?	440
6.6.2.4.1	Rescission letter should be sent to the original creditor, all assignees, and other involved parties.	440
6.6.2.4.2	Identifying the assignee.	440
6.6.2.4.3	<i>Miguel</i> and the role of notice to a servicer	442
6.6.2.5	Can a Complaint Serve As the Consumer’s Notice of Cancellation?	443
6.6.3	Step 1: Automatic Termination of Security Interest and Cancellation of Consumer’s Liability to Pay Finance or Other Charges.	444
6.6.3.1	Automatic Termination of Security Interest	444
6.6.3.2	Cancellation of Consumer’s Liability for Finance Charges or Other Charges	445
6.6.4	Step 2: Creditor’s Obligation to Return Money or Property and Reflect the Termination of the Security Interest	446
6.6.4.1	Overview	446
6.6.4.2	Return of “Any Amount” or Property	447
6.6.4.3	Action to Reflect Termination of Security Interest.	448
6.6.4.4	Effect of Creditor’s Erroneous Payment of Proceeds After Rescission	449

Contents

6.6.5	Step 3: Consumer’s Tender (General)	449
6.6.5.1	Timing of the Tender Obligation	449
6.6.5.2	Return of Money	450
6.6.5.3	Return of Property or Its Reasonable Value	451
6.6.5.4	Circumstances in Which the Consumer Need Not Tender	452
6.7	The Court’s Equitable Modification Authority and Conditional Rescission	452
6.7.1	Overview	452
6.7.2	The Extent of the Court’s Authority to Modify the Rescission Steps	453
6.7.2.1	General	453
6.7.2.2	Pre-Simplification Cases	454
6.7.2.3	Post-Simplification Cases	455
6.7.3	Making the Arguments on the Equities	459
6.7.3.1	General Principles	459
6.7.3.2	Creditor Conduct	461
6.8	Tender Issues	462
6.8.1	Determining the Amount	462
6.8.1.1	Basic Calculations	462
6.8.1.2	Calculations in Refinancing Cases	462
6.8.1.3	Tender in Foreclosure Rescue Scam Cases	463
6.8.1.4	Strategic Considerations in Addressing Disputes About Calculation of Tender Amount and Offsets	464
6.8.2	Planning for Tender	464
6.8.3	Continuing Installment Payments While Right to Rescind Is Litigated	467
6.8.4	Tender in Bankruptcy	468
6.9	Remedies	469
6.9.1	Overview	469
6.9.2	Assignees Are Fully Subject to Rescission	470
6.9.3	Damages for Rescission Violations	472
6.9.4	Attorney Fees	475
6.9.5	The Consumer’s Right to Keep the Property or Proceeds	477
6.9.5.1	Vesting of Ownership in the Consumer If the Creditor Does Not Accept Tender	477
6.9.5.2	Elimination of Consumer’s Tender Obligation If Creditor Does Not Respond to the Rescission Notice	477
6.9.5.3	Equitable Modification	479
6.9.6	Raising Rescission As a Defense to Foreclosure	479
6.9.6.1	General	479
6.9.6.2	1995 Amendments and Tolerances	480
6.9.6.3	TIL Monetary Damage Claims in Foreclosures; Distinguished from Rescission Claims	481
6.9.7	Forum Selection; Rescission in Bankruptcy	481
6.9.8	Settlement	484
6.9.8.1	Valuing the Rescission Case	484
6.9.8.2	Settlement Strategy	485
6.9.9	Exercising Rescission Rights in a Class Action	486

Chapter 7

Creditor Defenses and Counterclaims

7.1	Introduction	489
7.2	TILA’s Statute of Limitations	489
7.2.1	General; Status as Affirmative Defense or Jurisdictional Prerequisite	489
7.2.2	Calculating the One-Year Limitations Period	490
7.2.2.1	General	490
7.2.2.2	Closed-End Credit Disclosure Violations	491
7.2.2.3	Open-End Credit Requirements	492

Truth in Lending

7.2.2.4	Rescission Violations	494
7.2.2.5	Does a Rescission Claim Extend the Limitations Period for Underlying Disclosure Violations?	495
7.2.2.6	Repeat Transactions and Continuing Violations.	496
7.2.3	Equitable Tolling and Fraudulent Concealment	496
7.2.3.1	Fraudulent Concealment Tolls the Limitations Period	496
7.2.3.2	Pleading and Proving Fraudulent Concealment	499
7.2.4	Other Tolling Rules.	501
7.2.4.1	State Court Action May Toll the Limitation Period in Federal Court	501
7.2.4.2	Limitation Period for Individual Claim Is Tolloed During Pendency of Class Action	502
7.2.4.3	Mental Incompetency	502
7.2.4.4	Servicemembers Civil Relief Act	502
7.2.5	TIL Recoupment Claims After the Limitations Period Has Run	503
7.2.5.1	TILA Explicitly Allows Recoupment for Damage Claims	503
7.2.5.2	Nature of Recoupment	503
7.2.5.3	State Law	504
7.2.5.4	Recoupment in Bankruptcy	505
7.3	Limitations on Assignee Liability	507
7.3.1	Overview	507
7.3.2	Damages Liability for Violations Apparent on the Face of the Documents	508
7.3.2.1	General Rule.	508
7.3.2.2	Identifying and Evaluating the Documents Assigned in Transactions Not Secured by Real Property	509
7.3.2.3	Identifying and Evaluating the Relevant Documents in a Real-Property-Secured Transaction.	510
7.3.2.4	Types of Violations That Are Apparent on the Face of the Documents	511
7.3.2.5	Impact of Assignee’s Actual Knowledge	512
7.3.3	Right of Rescission Against Assignees.	514
7.3.4	Assignee’s Liability for TIL Defenses and Setoffs Raised in Recoupment	514
7.3.5	Involuntary Assignments	514
7.3.6	Servicers	515
7.3.7	Assignees of HOEPA Obligations	515
7.3.8	Series of Assignments	515
7.3.9	Effect of Written Acknowledgment of Receipt in Suits Against Assignees	516
7.3.10	Effect of FTC Holder Rule and HOEPA Assignee Liability Provision	516
7.4	TIL Statutory Defenses	517
7.4.1	Overview	517
7.4.2	Good Faith Conformity with Federal Reserve Board Rulings and Official Interpretations	518
7.4.2.1	Scope of the Defense	518
7.4.2.2	Elements of the Defense	518
7.4.3	Use of Model Forms	520
7.4.4	Bona Fide Error Defense	520
7.4.4.1	Introduction; Scope	520
7.4.4.2	Burden of Proof.	521
7.4.4.3	Unintentional Error	521
7.4.4.4	Types of Bona Fide Errors	522
7.4.4.5	Maintenance of Procedures	525
7.4.5	Faulty Calculation Tool Defense	527
7.4.6	Correction of Error Defense	527
7.4.6.1	Introduction; Scope	527
7.4.6.2	Determining Whether Creditor’s Corrections Are Timely	527

Contents

7.4.6.3	Not All Errors Are Correctable	528
7.4.6.4	Correction and Notification Efforts Must Be Sufficient.	529
7.4.6.5	Correction of Error Does Not Affect Rescission	530
7.4.7	Effect of Subsequent Occurrence.	530
7.4.8	Governmental Agencies Acting as Creditors	531
7.4.9	Tolerances	531
7.4.10	Special Retroactive Defenses Created by 1995 Amendments	532
7.4.10.1	Historical Background and Overview	532
7.4.10.2	What Transactions Are Subject to Retroactive Immunity; Special Rules for Defensive Rescission	532
7.4.10.3	Errors in Disclosing Certain Closing Costs.	533
7.4.10.4	Errors in Disclosing Mortgage Broker Fees	533
7.4.10.5	Selecting the Wrong FRB Model Rescission Form	533
7.4.10.6	Retroactive Tolerances for Errors in Finance Charge and Related Disclosures	533
7.4.11	Limits on Debtor's Attempt to Offset Obligation; Creditor's Attempt to Offset TIL Claim	534
7.5	Creditor Defenses Not Expressly Provided by TILA.	534
7.5.1	Technical Violations	534
7.5.2	Consumer Not Misled by TIL Violation.	537
7.5.3	Consumer Contribution to TIL Violation	538
7.5.4	Consumer's Waiver of TIL Rights.	538
7.5.5	Invalidity of Underlying Loan as TIL Defense	539
7.5.6	Retroactivity of Judicial Decisions and FRB Amendments	540
7.5.7	Other Defenses Claimed by Creditors	541
7.6	Selected Jurisdictional and Procedural Defenses and Issues	542
7.6.1	General Jurisdiction Requirements.	542
7.6.1.1	Consumer's Option to File in Federal or State Court.	542
7.6.1.2	Federal Jurisdiction in States Exempted from TILA	542
7.6.1.3	Personal Jurisdiction Over Out-of-State Creditors	542
7.6.2	Removal of TIL Claims to Federal Court	543
7.6.3	Supplemental Federal Court Jurisdiction.	545
7.6.3.1	A Consumer's Non-TIL Claim.	545
7.6.3.2	A Creditor's Collection Counterclaim	546
7.6.4	Concurrent Litigation of TIL Case in State and Federal Courts	547
7.6.5	Res Judicata and Related Doctrines	548
7.6.5.1	Introduction	548
7.6.5.2	Res Judicata	548
7.6.5.2.1	Elements.	548
7.6.5.2.2	Identity of parties.	549
7.6.5.2.3	Identity of causes of action	549
7.6.5.2.4	Final judgment on the merits	552
7.6.5.3	Collateral Estoppel.	552
7.6.5.4	Judicial Estoppel	552
7.6.5.5	Acceptance of Rule 68 Offer of Judgment	552
7.6.6	Pleading	552
7.6.7	Burden of Proof Issues	554
7.6.8	Raising TIL Counterclaims in Foreclosure and Eviction Actions	554
7.7	TIL Claims and Arbitration Clauses.	555
7.7.1	Introduction	555
7.7.2	Arbitration Clauses and TIL Rescission	555
7.7.2.1	General	555
7.7.2.2	Where No Dispute That Rescission Is Effective	556
7.7.2.3	Where Relief Sought from Bankruptcy Court	556
7.7.2.4	Where Arbitration Clause Excludes Self-Help Remedies	556

Truth in Lending

7.7.3 Classwide Relief Despite Arbitration Clause 557
7.7.3.1 Classwide Relief Generally Available in Arbitration 557
7.7.3.2 Why Proceed in Arbitration on a Classwide Basis. 557
7.7.3.3 Can Creditors Prohibit Classwide Arbitrations? 558
7.7.4 Are High Costs in Individual Arbitration Inconsistent with TILA? 559
7.7.5 Arbitration Clause Cannot Limit TIL Remedies. 560

Chapter 8

Consumer Remedies

8.1 Introduction 563
8.2 Standing 563
8.2.1 General. 563
8.2.2 Co-Obligors. 564
8.2.3 Forgery Victims 565
8.2.4 Bankruptcy Issues: Standing and Judicial Estoppel. 565
8.2.4.1 Standing In and After Bankruptcy 565
8.2.4.2 Judicial Estoppel 567
8.3 Who Is Liable? Creditors, Multiple Creditors, and Assignees. 568
8.4 Declaratory and Injunctive Relief. 569
8.4.1 Availability of Declaratory and Injunctive Relief 569
8.4.2 Declaratory and Injunctive Relief When There Is a Related State Court
Case. 569
8.4.2.1 Introduction 569
8.4.2.2 *Younger* Abstention 570
8.4.2.2.1 Nature of *Younger* abstention 570
8.4.2.2.2 Does *Younger* abstention apply to eviction or
foreclosure proceedings between private parties? 570
8.4.2.2.3 Eviction or foreclosure case may not meet other criteria
for *Younger* abstention 571
8.4.2.3 The Anti-Injunction Act 571
8.4.2.3.1 The Act and its exceptions. 571
8.4.2.3.2 Injunctions against institution of state court proceedings
not prohibited 572
8.4.2.4 The *Rooker-Feldman* Doctrine 573
8.4.2.5 The Bankruptcy Automatic Stay As an Alternative 576
8.5 Actual Damages 576
8.5.1 Importance of Actual Damages. 576
8.5.2 Legislative History 577
8.5.3 The Detrimental Reliance Standard 577
8.5.3.1 Development of the Detrimental Reliance Standard. 577
8.5.3.2 What Must Be Shown to Establish Detrimental Reliance? 579
8.5.3.2.1 Courts' varying statements of the test 579
8.5.3.2.2 Another creditor would have granted credit on more
favorable terms 579
8.5.3.2.3 Consumer would have foregone the credit 580
8.5.3.2.4 Damages are measured as the harm caused by the
reliance. 581
8.5.3.2.5 A special case: actual damage in cases involving hidden
payments 582
8.5.3.2.6 Benefit of the bargain damages. 583
8.5.4 Alternate Standards for Determining Actual Damages 584
8.5.4.1 Overview 584
8.5.4.2 Why the Detrimental Reliance Standard Is Wrong. 585
8.5.4.2.1 Liberal construction of actual damages provision. 585

Contents

8.5.4.2.2	Detrimental reliance is at odds with TILA’s remedial purposes	585
8.5.4.3	Correction of Error As a Standard for Actual Damages	587
8.5.4.4	Enforcement Agency Restitution Power As Standard for Actual Damages	587
8.5.4.5	Enforcing Erroneous Disclosure As Contract Term; Refusing to Enforce Improperly Disclosed Contract Terms	588
8.5.4.6	Avoidance or Reformation of Contract Due to Mistake	589
8.5.4.7	Reliance upon Fair Dealing by Creditor	590
8.5.5	Actual Damages in Class Actions	591
8.5.5.1	Presumption of Reliance	591
8.5.5.2	Bifurcation of Reliance Issues	591
8.5.5.3	Award of Actual Damages As Part of Statutory Damage Award	591
8.5.6	Components of Actual Damage Awards	592
8.5.6.1	Consequential Damages; Emotional Distress	592
8.5.6.2	Prejudgment Interest.	593
8.5.6.3	Multiple Actual Damage Awards	593
8.5.6.4	Relation Between Usurious Interest and Actual Damages.	593
8.6	Statutory Damages	594
8.6.1	General: Availability, Purpose, and Character	594
8.6.2	Calculating TIL Statutory Damages	595
8.6.2.1	General Calculation Rules	595
8.6.2.2	Minimum and Maximum Awards	596
8.6.2.3	What Is the Finance Charge That Should Be Doubled?	596
8.6.2.3.1	General rules	596
8.6.2.3.2	Open-end credit	597
8.6.3	Multiple TIL Statutory Damages	598
8.6.3.1	General	598
8.6.3.2	Refinancings	599
8.6.4	Recovering Both TIL Statutory Damages and State Law Damages.	600
8.6.5	Violations Giving Rise to Statutory Damages	601
8.6.5.1	Overview	601
8.6.5.2	The Specific “Disclosure” Violations: What Is a Penalty Violation and What Is Not	601
8.6.5.3	Statutory Damages for Other Violations of Part B (Credit Transactions).	603
8.6.5.3.1	General.	603
8.6.5.3.2	Statutory damages for unclear or inconspicuous disclosure	605
8.6.5.3.3	Statutory damages for disclosures not properly segregated.	605
8.6.5.3.4	Statutory damages for untimely disclosures	606
8.6.5.3.5	Statutory damages for unsolicited credit cards; unauthorized use requirements	608
8.6.5.4	Statutory Damages for Part D (Fair Credit Billing) Violations.	608
8.6.5.5	Statutory Damages for HOEPA Violations	608
8.6.5.6	Statutory Damages for Inaccurate Disclosures	608
8.6.5.7	Statutory Damages for Regulation Z Disclosures with No Statutory Parallel	609
8.6.5.7.1	Overview	609
8.6.5.7.2	Variable rate transaction disclosures	611
8.6.5.8	Statutory Damages and Rescission	612
8.6.5.9	No Statutory Damages for Part C (Advertising and Oral Disclosures)	613
8.6.6	Statutory Damages Under State Disclosure Laws.	613

Truth in Lending

8.7 Remedies for Violations of the Federal Rebate Statute	614
8.8 TIL Class Actions	614
8.8.1 Background	614
8.8.2 Certifying the TIL Class Action	616
8.8.2.1 General	616
8.8.2.2 Numerosity	616
8.8.2.3 Commonality	617
8.8.2.4 Typicality	618
8.8.2.5 Adequacy of Representation	618
8.8.2.5.1 General	618
8.8.2.5.2 Named plaintiff's recovery may be less in class than in individual action	619
8.8.2.5.3 Named plaintiff may be in default on credit contract	620
8.8.2.5.4 Cost of notifying the class	621
8.8.2.6 Class Actions for Injunctive or Declaratory Relief	621
8.8.2.7 TIL Damage Class Actions Under Rule 23(b)(3)	621
8.8.2.7.1 Common questions must predominate	621
8.8.2.7.2 Superiority	624
8.8.3 TIL Class Action Monetary Damages	625
8.8.3.1 General	625
8.8.3.2 Factors Determining Size of Statutory Damages	626
8.8.3.3 Determining the Creditor's Net Worth	627
8.8.3.4 Statutory Damages in a Series of TIL Class Actions	627
8.8.3.5 Who Determines the Size of the Award—Court or Jury	628
8.9 Attorney Fees	629
8.9.1 General	629
8.9.2 Situations Where Attorney Fees Are Awarded	630
8.9.2.1 Where the Consumer Successfully Concludes an Action	630
8.9.2.2 Attorney Fees in Connection with Recoupment Claims	632
8.9.2.3 Attorney Fees for Appeals and for Attorney Fee Petitions	632
8.9.2.4 Attorney Fees in Rescission Cases and Against Assignees	633
8.9.2.5 Attorney Fees Where the Claim Is Settled	633
8.9.2.5.1 Right to attorney fee award	633
8.9.2.5.2 Tactical and ethical factors in negotiating a settlement containing attorney fees	636
8.9.2.6 Fees for Work in Bankruptcy Court	638
8.9.2.7 Fees After Acceptance of Rule 68 Offer of Judgment	638
8.9.3 Who Is Entitled to a Fee Award?	639
8.9.3.1 The Attorney or the Client?	639
8.9.3.1.1 Award usually goes to the client	639
8.9.3.1.2 As against third parties, award goes to attorney	639
8.9.3.2 Fees for Legal Services Attorneys	640
8.9.3.3 Individuals Appearing Pro Se	641
8.9.3.4 No TIL Attorney Fees for Prevailing Creditors	641
8.9.4 Calculating the Attorney Fee Award	642
8.9.4.1 The General Approach; Determining the "Lodestar"	642
8.9.4.2 Determining the Allowable Hours	643
8.9.4.2.1 Excessive or duplicative time	643
8.9.4.2.2 Distinguishing work on various claims and activities	645
8.9.4.2.3 Paralegal and law student time; travel time	646
8.9.4.3 Establishing the Hourly Rate	647
8.9.4.4 Adjustments to the Lodestar	649
8.9.4.4.1 General	649
8.9.4.4.2 Upward adjustments	649
8.9.4.4.3 Downward adjustments	650

Contents

8.9.4.5 Costs and Expert Fees	651
8.9.5 Fee Applications.	652
8.9.6 Appeals of Attorney Fee Awards.	654
8.9.7 Interim Fees.	655
8.9.8 Apportionment of Award Among Defendants	655
8.10 Right to Jury Trial.	655
8.10.1 Practical Significance.	655
8.10.2 Constitutional and Statutory Requirements	656
8.11 Government Enforcement	657
8.11.1 An Overview of Federal Agency Enforcement.	657
8.11.2 Where the Creditor Has Filed for Bankruptcy	658

Chapter 9

High-Rate Home Equity Loan Protections

9.1 Overview.	659
9.1.1 Introduction.	659
9.1.2 Background and Legislative History	660
9.1.3 Major Regulatory Action Since HOEPA's Effective Date.	662
9.1.4 Preemption	665
9.1.5 Other Strategies for Litigating Problem Home Equity Loans	666
9.2 Coverage	666
9.2.1 General.	666
9.2.2 Consumer Credit Transactions Secured by the Consumer's Principal Dwelling	667
9.2.3 Expanded Definition of Creditor	667
9.2.4 Exempt Transactions	668
9.2.4.1 Purchase and Construction Credit.	668
9.2.4.2 Reverse Mortgages.	668
9.2.4.3 Open-End Credit	669
9.2.4.4 Board Authority to Exempt Other Mortgage Transactions.	670
9.2.5 The Annual Percentage Rate Trigger	670
9.2.5.1 The Trigger Spreads.	670
9.2.5.2 The Relevant Date	671
9.2.5.3 "Comparable Maturities" Defined	671
9.2.5.4 Finding the Relevant Rate and Calculating the APR Trigger.	671
9.2.5.5 APR Accuracy and Tolerances.	672
9.2.5.6 APR Calculations in Foreclosure Rescue Scams	672
9.2.6 The Points and Fees Trigger.	673
9.2.6.1 General	673
9.2.6.2 Calculating the Total Loan Amount	674
9.2.6.3 Calculating the Points and Fees	675
9.2.6.3.1 Four-part definition.	675
9.2.6.3.2 All items included in the finance charge	675
9.2.6.3.3 Broker fees	677
9.2.6.3.4 Special issue: yield spread premiums.	678
9.2.6.3.5 Other closing costs as points and fees	683
9.2.6.3.6 Credit insurance premiums and debt cancellation charges	685
9.2.6.3.7 Crunching the numbers: a review	686
9.2.6.3.8 Points and fee trigger calculations in foreclosure rescue scams	688
9.3 Disclosure Requirements	689
9.3.1 Required Disclosures.	689
9.3.2 Conspicuous Type Size	689
9.3.3 Number of Copies; Multiple Borrowers	690

Truth in Lending

9.3.4	Content of Disclosures, Redisclosures, and Tolerances	690
9.3.5	Additional Inconsistent Information	691
9.3.6	Timing of Disclosures	693
9.3.7	Delivery of Notice; Presumption of Delivery	693
9.3.8	Modification or Waiver of the HOEPA Notice	694
9.3.9	Electronic Disclosures	694
9.3.10	Consequences of Failure to Disclose	696
9.4	Limitations on Contract Terms	696
9.4.1	Introduction	696
9.4.2	Limitations on Prepayment Penalties	696
9.4.3	Prohibition of Interest Rate Increases on Default	698
9.4.4	Limitation on Balloon Payments	698
9.4.5	Prohibition of Negative Amortization	699
9.4.6	Limitation on Prepaid Payments	700
9.4.7	Limitations on Due-on-Demand Clauses	700
9.4.8	Chart of Prohibited Provisions	701
9.4.9	Remedies for Including a Prohibited Term	701
9.5	Prohibited Acts or Practices	701
9.5.1	Introduction	701
9.5.2	Extending Credit Without Regard to Ability to Pay	702
9.5.3	Special Requirements for Payments to Home Improvement Contractors	705
9.5.4	Notice to Assignee	705
9.5.5	Early Refinancings	705
9.5.6	Structuring the Loan as Open-End to Evade HOEPA	707
9.5.7	Chart of Prohibited Acts or Practices	708
9.5.8	FRB's Power to Prohibit Unfair Trade Practices	708
9.5.9	Remedies for Engaging in a Prohibited Act or Practice	708
9.6	Remedies	709
9.6.1	Civil Liability and Enhanced Damages	709
9.6.1.1	General	709
9.6.1.2	Material Violation Standard for Enhanced Damages	710
9.6.1.3	Requirement That Finance Charges and Fees Be Paid	710
9.6.1.4	Statutory Damages for Multiple Violations and for Multiple Obligors	711
9.6.2	Rescission	711
9.6.3	Pleading Requirements	712
9.6.4	Attorney General Enforcement	712
9.7	Extension of Assignee Liability	712
9.7.1	Overview	712
9.7.2	Scope of Extended Liability	713
9.7.3	Limitation on Assignee Liability and the Assignee's Burden of Proof to Invoke It	715
9.7.4	Interplay Between the Various Assignee Provisions in § 1641	717
9.7.5	Limits on Damages	717
9.7.5.1	The Monetary Cap and Offset	717
9.7.5.2	Damages Roadmap	718
9.7.5.3	Using the Roadmap to Calculate Assignee Damages	719

Chapter 10

Consumer Leasing Act

10.1	Introduction	721
10.1.1	Summary of Consumer Leasing Act Requirements	721
10.1.2	Structure of the Act	721
10.1.3	Sources of Consumer Leasing Act Law	721
10.2	Scope	722

Contents

10.2.1	Lease Must Exceed Four Months; Rent-to-Own and Other Terminable Leases Do Not Exceed Four Months	722
10.2.2	Lease Must Be For Less Than \$25,000	722
10.2.2.1	General	722
10.2.2.2	Treatment of Down Payments, Trade-Ins, Other Payments Made at Lease Signing	722
10.2.2.3	Taxes and Other Third Party Payments	723
10.2.2.4	Lease Extensions, Purchase Option, and Residual Value	723
10.2.3	Distinguishing Leases from Credit Sales	723
10.2.4	Consumer Must Be Natural Person Leasing Property for Consumer Purposes	724
10.2.5	CLA Applies to Lessors, Arrangers of Leases, Certain Assignees	725
10.2.6	Real Property Leases Are Not Covered	726
10.2.7	Other Exempt Property	726
10.3	Lease Disclosures	726
10.3.1	General	726
10.3.1.1	Federal Requirements	726
10.3.1.2	State Disclosure Statutes	727
10.3.2	When and How Disclosures Are Made	728
10.3.2.1	Timing for Consumer Receipt of Disclosures—213.3(a)(3)	728
10.3.2.2	Type of Document Containing the Disclosures—213.3(a)(1)	728
10.3.2.3	Disclosures Not Made in English—213.3(a)(4)	728
10.3.2.4	Electronic Disclosures	729
10.3.2.4.1	Introduction	729
10.3.2.4.2	Electronic disclosures under the E-Sign Act	729
10.3.2.4.3	Regulation M interim rule on electronic disclosures	729
10.3.2.5	Disclosure of Multiple Leased Items	730
10.3.2.6	Whether Renegotiations, Extensions, or Assumptions Require New Disclosures—213.5	730
10.3.2.7	Should Disclosures Include Outstanding Lease or Credit Balances?	731
10.3.2.8	Should Disclosures Include Insurance, Other Incidental Services, Other Products Obtained in Conjunction with the Lease?	731
10.3.3	Who Makes and Receives Disclosures; Identification of the Parties—213.3(a), (c)	731
10.3.4	Format of Disclosures	731
10.3.4.1	Segregated Disclosures—213.3(a)(2)	731
10.3.4.2	Form of Non-Segregated Disclosures—213.3(b)	732
10.3.5	Excusable Errors in Disclosure: Unknown Information; Effect of Subsequent Occurrence; Minor Variations	733
10.3.5.1	General	733
10.3.5.2	Unknown Information and Estimates—213.3(d)	733
10.3.5.3	Subsequent Occurrences—213.3(e)	733
10.3.5.4	Minor Variations—213.3(f)	733
10.3.6	Specific Required Disclosures	733
10.3.6.1	Description of Property—213.4(a)	733
10.3.6.2	Amount Due at Lease Signing or Delivery—213.4(b)	734
10.3.6.2.1	Itemization of amounts to be paid	734
10.3.6.2.2	Itemization of how the consumer pays the amounts due at lease signing	734
10.3.6.2.3	Disclosure of trade-in's positive or negative equity	735
10.3.6.2.4	Disclosure of rebates	735
10.3.6.2.5	Practice tips	735
10.3.6.3	Payment Schedule and Total Amount of Periodic Payments—213.4(c)	736

Truth in Lending

10.3.6.4	Other Charges—213.4(d)	736
10.3.6.4.1	General	736
10.3.6.4.2	Lessor’s failure to pay consumer for interest on security deposit	736
10.3.6.5	Total of Payments—213.4(e)	737
10.3.6.6	Payment Calculation, Including Capitalized Cost, Rent, and Residual Value—213.4(f)	737
10.3.6.6.1	General	737
10.3.6.6.2	Gross capitalized cost and the agreed-upon value of the vehicle	738
10.3.6.6.3	Itemization of the gross capitalized cost	738
10.3.6.6.4	Capitalized cost reduction	739
10.3.6.6.5	Adjusted capitalized cost	739
10.3.6.6.6	Residual value	739
10.3.6.6.7	Depreciation and any amortized amounts	739
10.3.6.6.8	Rent charges	740
10.3.6.6.9	The total of base periodic payments	740
10.3.6.6.10	The number of payments in the lease term	741
10.3.6.6.11	The base periodic payment	741
10.3.6.6.12	The itemization of the periodic payment	741
10.3.6.6.13	The total periodic payment	741
10.3.6.7	Early Termination and Default Charges—213.4(g)	741
10.3.6.7.1	General	741
10.3.6.7.2	The formula must be completely and fully disclosed	742
10.3.6.7.3	Lessors need not define a generally accepted method they use to compute unamortized cost	743
10.3.6.7.4	Is an overly complex formula a disclosure violation?	744
10.3.6.7.5	Lessor must disclose both early termination and default charges and grounds	745
10.3.6.7.6	Failure to apply in practice the formula disclosed in the lease	745
10.3.6.8	Party Responsible for Maintenance; Excess Wear and Use—213.4(h)	746
10.3.6.9	Purchase Option—213.4(i)	747
10.3.6.9.1	Disclosure whether there is a purchase option	747
10.3.6.9.2	Disclosure of the purchase option price	747
10.3.6.9.3	Use of guidebooks to determine purchase option price	748
10.3.6.9.4	Disclosure of taxes, fees, and other charges related to purchase option	748
10.3.6.10	Statement Referencing Nonsegregated Disclosures—213.4(j)	748
10.3.6.11	Liability for Difference Between Residual and Realized Value—213.4(k)	748
10.3.6.12	Right to an Appraisal—213.4(l)	749
10.3.6.13	Special Open-End Lease Disclosures—213.4(m)	749
10.3.6.14	Official Fees and Taxes—213.4(n)	750
10.3.6.15	Insurance—213.4(o)	750
10.3.6.16	Identification of Express Warranties—213.4(p)	751
10.3.6.16.1	General	751
10.3.6.16.2	Insufficient to mention manufacturer warranties without confirming their existence	751
10.3.6.16.3	Disclaimers of warranties	752
10.3.6.16.4	When has the lessor or manufacturer made express warranties that would then need to be disclosed?	752
10.3.6.16.5	Need warranties on components be disclosed?	752
10.3.6.17	Penalties and Other Charges for Delinquency—213.4(q)	752

Contents

10.3.6.18 Security Interest—213.4(r)	753
10.3.6.19 Limits on Rate Information—213.4(s)	753
10.3.6.20 Special Disclosures for Non-Motor Vehicle Open-End Leases— 213.4(t)	753
10.4 Required Advertising Disclosures	754
10.4.1 Private Remedies for Advertising Violations	754
10.4.2 What Is an Advertisement?	754
10.4.3 Advertising Requirements	754
10.4.3.1 Advertising of Terms That Require Additional Disclosure	754
10.4.3.2 Alternative Disclosures for Merchandise Tags	755
10.4.3.3 Alternative Disclosures for Television or Radio Advertising	755
10.4.3.4 Multi-Page Advertisements and Catalogs	756
10.4.3.5 Bait-and-Switch Advertising	756
10.4.4 Government Enforcement Actions	756
10.5 Substantive Regulation of Early Termination Charges	756
10.5.1 CLA Standards for Early Termination Charges	756
10.5.2 Other Legal Standards As to Size of Early Termination Charges	757
10.5.2.1 UCC Article 2A	757
10.5.2.2 State Leasing Statutes	757
10.5.2.3 Unconscionability	758
10.5.2.4 Common Law Contract Principles	758
10.5.3 Understanding How Lessors Compute Consumers’ Default and Early Termination Liability	758
10.5.3.1 Introduction	758
10.5.3.2 Understanding the Method Disclosed in the Lease	759
10.5.3.2.1 Reading the formula	759
10.5.3.2.2 Lessor’s core damage, expressed as difference between actual and paid-in depreciation	759
10.5.3.2.3 The adjusted lease balance method	760
10.5.3.2.4 Calculations based on remaining lease payments and the residual value	760
10.5.3.2.5 Two formulas produce the same results	761
10.5.3.3 Actual Liability Computations Often Deviate from Method Required by the Lease	761
10.5.3.4 Identifying the Method Actually Used to Compute Early Termination Liability	762
10.5.3.5 Consumer Remedies When Early Termination Computation Not Performed As Specified in the Lease	762
10.5.4 Excessive Residual Values and Inadequate Realized Values	763
10.5.4.1 General	763
10.5.4.2 Realized Value Must Exceed the Residual Value	763
10.5.4.3 Lessor Arguments That Consumer Bears Risk of Low Realized Value at Early Termination	764
10.5.4.4 Inflated Residual Values	764
10.5.4.5 Manufacturer “Supported” Residual Values	765
10.5.4.6 Rationale to Use Sale Price to Determine Realized Value	766
10.5.4.7 Does Regulation M Condone Use of a Realized Value?	766
10.5.4.8 Method of Determining Realized Value	767
10.5.4.9 The Realized Value and Double Counting of Excess Use and Wear Charges	768
10.5.4.10 Selling Expenses Should Not Be Charged to the Lessee	768
10.5.4.11 When Formula Fails to Provide Credit for Realized Value	768
10.5.5 Other Limitations on Early Termination Charges	768
10.5.5.1 Extra Penalties	768

Truth in Lending

10.5.5.2	Failure to Credit the Security Deposit or Interest on Security Deposits	769
10.5.5.3	Taxes Not Paid to Taxing Authority	770
10.5.5.4	Manipulation of the Adjusted Capitalized Cost	770
10.5.5.4.1	Implications of including charges in the adjusted capitalized cost instead of rent	770
10.5.5.4.2	Fictitious agreed-upon value of the vehicle at lease inception	770
10.5.5.4.3	Acquisition costs, reserves, and other components of the adjusted capitalized cost	771
10.5.5.5	Failure to Fully Apply Rebate to Rent Charges	771
10.5.5.6	Rebate of Third Party Charges	772
10.5.5.7	Limits on Consumer Liability After Vehicle Loss	772
10.5.5.8	Limits on Early Termination Charges for Servicemembers	772
10.6	Liability at Expiration of Open-End Leases	773
10.7	Consumer Leasing Act Remedies	773
10.7.1	When Remedies Are Triggered	773
10.7.1.1	Disclosure Violations	773
10.7.1.2	Violations Related to Unreasonable Early Termination Penalties	774
10.7.1.2.1	Disclosure of an unreasonable early termination charge is a <i>disclosure</i> violation	774
10.7.1.2.2	CLA's language indicates remedies are triggered for mere inclusion of unreasonable early termination formula	774
10.7.1.2.3	Seventh Circuit requires early termination as precondition to challenging reasonableness of charge	775
10.7.1.2.4	Other courts require consumer to independently establish injury	775
10.7.1.3	Advertising Violations	775
10.7.2	Remedies Provided	776
10.7.2.1	General	776
10.7.2.2	Multiple Statutory Damages Involving Multiple Lessees	776
10.7.2.3	Multiple Statutory Damages for Multiple Violations or Against Multiple Lessors	777
10.7.3	Class Action Certification, Settlement, and Impact on Individual Actions	777
10.7.3.1	Suitability of Class Actions to Litigate CLA Claims	777
10.7.3.2	The Class Definition	778
10.7.3.3	Class Action Settlements	778
10.7.4	Statute of Limitations; Recoupment Claims	778
10.7.4.1	General	778
10.7.4.2	Recoupment Claims	779
10.7.5	Jurisdiction	780
10.7.6	CLA Statutory Defenses	780
10.7.6.1	CLA Adopts TIL Statutory Defenses	780
10.7.6.2	Assignee Liability	780
10.7.6.3	Correction Defense	781
10.7.6.4	Bona Fide Error Defense	781
10.7.6.5	Good Faith Conformity with FRB Rulings and Official Interpretations	782

Appendix A

The Truth in Lending Act

A.1	TILA Cross References to Title 15 of the United States Code	783
A.2	The Truth in Lending Act	784
A.3	Adjustable Rate Mortgages Caps	821

Contents

Appendix B	Regulation Z	823
Appendix C	Official Staff Commentary on Regulation Z	879
Appendix D	Sample TIL Rescission Notice	
	D.1 Sample TIL Rescission Notice	979
	D.2 Sample TIL Rescission Notice in Foreclosure Rescue Scam Case	980
Appendix E	Sample Pleadings	
	E.1 Introduction	983
	E.2 Sample Complaints	983
	E.2.1 Sample TIL Complaint for Money Damages	983
	E.2.2 Sample Complaint for TIL Rescission	985
	E.2.3 Sample Complaint for HOEPA Rescission and Damages	988
	E.2.4 Sample Fair Credit Billing Act Complaint	991
	E.2.5 Sample Consumer Leasing Act Complaint	992
	E.3 TRO Motions	998
	E.3.1 Sample State Court Petition for an Injunction to Stop Foreclosure Proceedings, Memorandum, Motion to Waive Bond, and Accompanying Orders	998
	E.3.1.1 Introduction	998
	E.3.1.2 Petition for Injunction to Stay Foreclosure Proceeding	998
	E.3.1.3 Memorandum in Support of Petition	999
	E.3.1.4 Affidavit of Homeowner	1002
	E.3.1.5 Ex Parte Injunction to Stay Foreclosure	1002
	E.3.1.6 Motion to Dispense with Bond or Security Requirement	1003
	E.3.1.7 Order Waiving Bond	1003
	E.3.2 Sample Federal Court Motion for Temporary Restraining Order with Brief, Supporting Papers, and Order	1003
	E.3.2.1 Introduction	1003
	E.3.2.2 Motion for Temporary Restraining Order	1004
	E.3.2.3 Plaintiff's Affidavit in Support of Motion for Temporary Restraining Order	1004
	E.3.2.4 Attorney Statement in Support of Motion for Temporary Restraining Order	1005
	E.3.2.5 Brief in Support of Motion for Temporary Restraining Order	1005
	E.3.2.6 Temporary Restraining Order	1007
Appendix F	Sample Discovery	
	F.1 Introduction	1009
	F.2 Sample First Set of Interrogatories	1009
	F.3 Sample First Request for Production of Documents	1013
	F.4 Sample Fair Credit Billing Act Interrogatories	1017
	F.5 Sample Fair Credit Billing Act Request for Production of Documents	1018
	F.6 Sample Consumer Leasing Act Interrogatories	1018
	F.7 Sample Consumer Leasing Act Request for Production of Documents	1019
Appendix G	Sample Jury Instructions on TIL Issues	
	G.1 General TIL Instructions	1023

	<i>Truth in Lending</i>	
	G.2 TIL Disclosure Instructions	1024
	G.3 TIL Finance Charge Instructions	1024
	G.4 HOEPA Instructions	1025
Appendix H	HOEPA Points and Fees Worksheet	1027
Appendix I	Consumer Leasing Act	
	I.1 Consumer Leasing Act	1031
	I.1.1 Consumer Leasing Act Cross References to Title 15 of the United States Code	1031
	I.1.2 The Consumer Leasing Act.	1031
	I.2 Regulation M	1034
	I.3 Official Staff Commentary	1045
	Index	1055
	Quick Reference to Consumer Credit and Sales Legal Practice Series . .	1113
	About the Companion CD-Rom	1135