Acceleration Clauses in Georgia: Consumer Installment Contracts and the Federal Truth-in-Lending Act

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ACCELERATION CLAUSES IN GEORGIA:
CONSUMER INSTALLMENT CONTRACTS AND THE
FEDERAL TRUTH-IN-LENDING ACT

By JOHN M. HEWSON, III*

In 1968, Congress enacted the Truth-in-Lending Act1 expressly to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.”2 The Act is a disclosure act; it does not regulate the substantive terms of an extension of credit. Moreover, the Act and Regulation Z3 (the regulation promulgated by the Federal Reserve Board implementing the Act) do not require a disclosure of all the credit terms of any particular consumer transaction. They require the disclosure of certain specific credit terms as set forth in the Act and the Regulation.

The purpose of this article is to explore the question of whether an acceleration clause in a consumer installment contract is one of those specific credit terms required to be disclosed by the Act and Regulation.

I. GENERAL STATEMENT OF THE ISSUE

Section 128(a)(9) of the Act4 provides that the creditor must disclose “the default, delinquency, [and] other similar charges payable in the event of late payments.” To implement this section of the Act, the Federal Reserve Board promulgated section 226.8(b)(4) of Regulation Z,5 which provides that the creditor must disclose “[t]he amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.”

The first question that comes to one’s mind in reading the Act and Regulation is what is “a default, delinquency or similar charge payable in the event of late payments as these terms relate to consumer installment contracts?” To answer this question one must first understand the nature of a consumer installment contract. In recent years almost all consumer installment contracts have provided for a precomputed finance charge which is added to the principal at the inception of the contract. In the consumer financing industry this is known as an “added interest” loan. This is because the finance charge is computed on the original principal

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balance of the loan over the whole term of the loan. It is then added to the principal, and the resulting sum is divided by the number of installments to determine the periodic payment. Each installment is composed of a constant amount of principal and constant amount of interest.  

In such a financing arrangement the creditor will receive no income for the period of delay if the debtor is late in making a payment. To compensate the creditor for such delay, most states which allow added interest contracts have provided for a default or delinquency charge in the event of the late payment of any particular installment. The Consumer Credit Guide describes the term “delinquency charges” as follows:

Delinquency charges . . . are the compensation a creditor receives on a precomputed contract for the debtor's delay in making installment payments.

Because a precomputed contract is the only one prepared on the assumption that the debtor will make all payments when due, the creditor is left without any income for a period where payment is delayed. In lieu of accelerating the maturity of the entire obligation, the creditor may make an appropriate charge just for the delay on the particular installment.

These charges are usually a percentage of the late payment. An American Bar Foundation study of statutory regulation of consumer credit summarized such charges as follows:

Delinquency charges are specifically authorized in most states. Maximums imposed on late charges are similar, in many states, to maximum delinquency charges authorized under small loan laws. A lender may charge up to 4% or 5% of the amount of each installment in default for a minimum period of time, such as 10 days, subject to an over-all maximum of four or five dollars for any one installment during the entire time that such installment is in default. In some states, the lender is given an option of charging a late fee for each over-due installment in the manner described above, or of imposing a charge in the nature of interest on the aggregate amount in default for the period of default. In the latter case, the maximum delinquency charge authorized is quoted in terms of a specified per cent per month, such as 1%, of the amount in default or a specified per cent per year, such as 6%, of the amount in default. In most states, a

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6. By way of example, assume a borrower makes a note for $120.00 at a rate of six percent added interest for a period of two years. The finance charge is computed by taking six percent of the amount financed ($120 x .06 = $7.20). The finance charge is then added to the amount financed and the sum is divided by the number of payments (24) to determine the periodic installment ($5.60). Each installment consists of $5.00 principal and $.60 interest. This is to be contrasted to a simple interest loan where the interest is computed on the unpaid principal balance. In this type of loan the installments are for the same amount, but the amount of principal and interest making up each installment varies over the term of the loan. The early installments are composed of more interest and less principal, while the later installments are primarily principal.

7. 1 CCH CONSUMER CREDIT GUIDE, ¶¶4230, 4231 (1969).
limit is imposed on the aggregate amount of delinquency charges which may be made in connection with all defaults for any one loan. ⁸

All of the Georgia statutes providing for "added interest" loans follow this general scheme with the exception of the general usury statute, ⁹ which makes no provision for a default or delinquency charge. A default or delinquency charge is then an additional charge peculiar to consumer installment contracts which is due the lender when he accepts a late payment.

The other question which must be answered before our inquiry can proceed is, "what is an acceleration clause?" As we now know, a consumer installment contract is a loan agreement calling for specific periodic installments on a regularly scheduled basis. Each of these installments is in the nature of a separate contract. In fact, prior to the added interest statutes, the predecessor to installment contracts was a series of notes each with a separate maturity date. In the event of a default, the lender had to sue on each note as it came due, or he had to await the maturity of the final note and then sue on the notes collectively. Neither of these alternatives was adequate since the debtor might abscond, squander his assets, or depreciate the security before the maturity of the final note. To rectify

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⁹. GA. CODE ANN. §57-116 (Rev. 1971) is the general statute providing for "add on" interest. It does not make provision for a default or delinquency charge. However the Industrial Loan Act, GA. CODE ANN. §25-301 et seq. (Rev. 1971), The Retail Installment & Home Solicitation Sales Act, GA. CODE ANN. §96-901 et seq. (Rev. 1976), and the Motor Vehicle Sales Finance Act, GA. CODE ANN. §96-1001 et seq. (Rev. 1976) all provide for such a charge. The specific provisions of these Acts are reproduced below:

**Georgia Industrial Loan Act**, GA. CODE ANN. §25-315(d) (Rev. 1971):

Delinquent charges.—Charge and collect from the borrower a late or delinquent charge in amount equal to five cents for each $1 of any installment which is not paid within five days from the date such payment is due: Provided that this late or delinquent charge shall not be collected more than once for the same default.


Delinquency charges, attorneys' fees and court costs—A retail installment contract may provide for payment by the buyer of a delinquency charge on any installment which is not paid within 10 days from the date such payment is due. Such charge may not exceed five per cent of such installment or $5, whichever is less. A delinquent charge shall not be collected more than once for the same default. A retail installment contract or a revolving account may provide for the payment of reasonable attorney's fees if referred for collection to an attorney not a salaried employee of the retail seller and for the payment of court costs.

**Motor Vehicle Sales Finance Act**, GA. CODE ANN. §96-1003(g) (Rev. 1976):

The holder may, if the contract or refinancing agreement so provides, collect a delinquency charge on any installment which is not paid within 10 days from the date such payment is due. Such charge may not exceed five per cent of such installment, or $5, whichever is less. A delinquent charge shall not be collected more than once for the same default. In addition to such delinquency and collection charge, the contract may provide for the payment of reasonable attorney's fees where such contract is referred for collection to an attorney not a salaried employee of the holder of the contract, plus the court costs.
this situation, lenders began to include in their contracts a provision that allowed them to advance the maturity of all of the debtor's obligations in the event of a default in any one of them. This became known as an acceleration clause.

Because each installment of a consumer installment contract is treated as a separate contract, a prudent lender will include an acceleration clause in his contract, just as he included such a clause in each separate note in the series of notes. The typical acceleration clause provides as follows:

A default in the payment of the full amount of any installment hereon, at the option of the holder hereof, and without notice or demand, shall render the entire amount due hereon at once due and payable.  

With the inclusion of this provision in his contract, the lender may, upon default, advance the maturity of all amounts still outstanding on the contract at the time of the default.

With this background, we are now ready to answer the question, "Is an acceleration clause in a consumer installment contract a default, delinquency, or other similar charge payable in the event of late payment which must be disclosed under the provisions of section 226.8(b)(4) of Regulation Z?"

II. THE ISSUES AS DELINEATED BY THE JUDICIAL DECISIONS

First, let us turn to the cases and see how the courts have answered this question. The problem arises because Regulation Z requires all disclosures in a closed-end credit transaction to be on one side of a single piece of paper. All consumer installment contracts contain an acceleration clause, but until recently, none of them specifically disclosed it. In fact, in many cases the acceleration clause was on the back of the contract, while the Truth-in-Lending disclosures were on the front. Believing this to be a violation, numerous plaintiffs filed suit averring that the creditor had failed to properly disclose the acceleration clause as required by section 226.8(b)(4).

The first of these cases was Garza v. Chicago Health Clubs. In this case the court determined that the lender had accelerated the entire balance

10. An acceleration clause need not take any particular form. There are three possible results that can be reached depending upon the exact wording used in the contract and the particular state law applied to acceleration clauses:
   (1) Only the payment of the principal may be accelerated;
   (2) The payment of the principal and a portion of the unearned interest may be accelerated (this may occur where the creditor rebates the unearned interests on the sum-of-the-digits method rather than pro rata);
   (3) The payment of the principal and all the remaining interest may be accelerated.

of the loan "without providing for a partial refund of the finance charge. . . ." The court held that the lender had violated Regulation Z because the unearned portion of the finance charge, which was not refunded upon acceleration, was a charge within the purview of section 226.8(b)(4). We can better understand this holding by use of an example. Assume "X" borrows $60.00 from "Y" on January 1, 1976. The loan is for one year at 6 percent added interest. The payments are to be made monthly commencing on February 1. Each payment will be $5.30. The total of the payments is $63.60. If "X" defaults after making six payments, he will have paid $30.00 in principal and $1.80 in interest. "Y" now accelerates the total remaining balance of the loan. This would be $31.80. Of this amount, $30.00 is principal and $1.80 is interest. The problem is that the $1.80 in interest is unearned because "X" no longer has the right to use the money until the end of the contract.

In reaching its decision, the court in Garza exclusively fastened its attention on the word "charges" in the statute and regulation. It found that this term means a pecuniary burden or expense. The court reasoned that the unearned portion of the finance charge is an additional pecuniary expense accruing to the borrower after default and, therefore, a "charge" under section 226.8(b)(4). In our example, the $1.80 is the "charge". The court was correct in holding that the unearned interest is an additional pecuniary burden placed upon the borrower after default. What the court failed to consider is whether the statute and regulation require the disclosure of any charge accruing after default, or only those traditional default and delinquency charges discussed previously.

The Garza decision was followed by a number of decisions which misinterpreted its holding, thereby compounding the problem. The first of these was Johnson v. McCrackin-Sturman Ford, Inc. Here, the District Court completely ignored the question of whether or not the creditor was required to rebate the unearned interest upon acceleration. Citing Garza, the court held:

It seems to the Court that it [an acceleration clause] is exactly the type of disclosure that the Truth-in-Lending Act was intended to require in order to insure that consumers would have information concerning credit terms so that they could effectively choose between sources of financing to compare more readily the various credit terms available to them.

13. Id. at 959.
14. See footnote 6, supra for an explanation of added interest loans.
15. 347 F.Supp. at 959.
17. Id. at 155.
The clear implication of this holding is that acceleration is in and of itself a "charge" under section 226.8(b)(4), whether the borrower is subjected to any additional pecuniary burden or not. In following Garza, this court also failed to consider what charges are covered by the statute and regulation. In addition, it expanded the definition of charges to cover any additional burden placed on the borrower, whether of a pecuniary nature or not.

A plethora of district court cases followed Garza and Johnson. A majority of the courts returned to the original reasoning in Garza, holding that for there to be a violation, there must be some additional pecuniary burden imposed on the borrower. One district court stated the proposition this way:

[T]he court now concludes that if acceleration does not create an additional charge, and if the creditor does not assert the right to accelerate the note as to create a potential additional charge through the acceleration of unearned interest, there is no violation of the Truth-in-Lending Act.

However, this view was not universal. At least one district court specifically rejected the idea that a violation does not exist where the creditor is required to rebate the total unearned portion of the finance charge:

Secondly, the defendants maintain that an acceleration clause does not constitute a "charge" under §226.8(b)(4). This argument is grounded in a belief that §226.8(b)(4) requires disclosure only of "default, delinquency, or similar charges" which result in the increase of the consumer's total financial obligation and that since Louisiana law provides for a rebate of interest in the event of acceleration, the acceleration clause need not be disclosed. However, the Truth-in-Lending Act is remedial in nature and in order that its important goal of providing consumers with much needed credit information be furthered, we must construe its terms liberally. Thomas v. Myers-Dickson Furniture Company, 479 F.2d 740 (5th Cir. 1973). We agree with the decision in Garza v. Chicago Health Clubs, Inc., 347 F. Supp. 955 (N.D. Ill., 1972), that the word "charge" can mean any pecuniary burden, expense or obligation. The acceleration of the balance of the debt against one who is late with a payment certainly results in a considerable immediate pecuniary burden for one attempting to avoid foreclosure. The Truth-in-Lending Act was intended to require the disclosure of exactly this type of credit information. [Citations omitted.]


The court's position in Barrett is that Georgia law does not require a rebate of the unearned portion of the finance charge in event of acceleration and, therefore, there is a "charge" unless the contract itself requires a rebate. 395 F. Supp. at 911.


This split in authority has been cleared up, to some degree, by the decision of the Third Circuit Court of Appeals in Johnson v. McCrackin-Sturman Ford, Inc.\footnote{22}{527 F.2d 257 (3d Cir. 1975).} In the first paragraph of its opinion, the court stated the issue as follows:

This appeal presents a question of great importance to consumers and to persons and institutions extending consumer credit in the United States. We are called upon to determine whether the Truth-in-Lending Act and Regulation Z thereunder require a creditor to disclose an acceleration clause where state law provides that the creditor must rebate the unearned portion of the finance charge.\footnote{23}{Id. at 260.}

The court then went on to consider the question of whether there had to be an additional pecuniary charge before the disclosure requirements of section 226.8(b)(4) came into play. In determining that this was required, the court stated:

Thus, we conclude that the phrase "default, delinquency, and similar charges" in §128(a)(9) of the Truth-in-Lending Act mandates disclosures only of specific monetary sums, in addition to the amounts already due under the loan, that are imposed because of late payment of an installment or installments.\footnote{24}{Id. at 266.}

Thus, in the first case to come before an appellate court, the court held that there is no "charge" if all of the unearned portion of the finance charge is rebated upon acceleration. The court refused to decide the issue where the creditor is not required to rebate the total unearned finance charge.\footnote{25}{This issue was decided in Evans v. Household Fin. Corp., No. 72-46-D (S.D. Iowa, August 27, 1974), 4 CCH CONSUMER CREDIT GUIDE, ¶98,678 (1974). The court held that use of the Rule of 78's to calculate a rebate upon acceleration does not generate a section 226.8(b)(4) charge.}

It is interesting to note that the court in dictum did consider the creditors' argument that the terms "default, delinquency and other similar charges payable in the event of late payments," as used in the statute and regulation, refer only to traditional delinquency charges and not to all charges payable after default.\footnote{26}{527 F.2d at 264-66.} The court's opinion seems to lend some credence to this argument. One other appellate court has decided a case concerning the acceleration clause issue.\footnote{27}{Mirabel v. General Motors Acceptance Corp. and Ed. Murphy Buick-Opel, Inc., Nos. 75-1048, 75-1049, and 75-1050 (7th Cir. 1976).} The court held that only those charges automatically imposed are covered by section 226.8(b)(4). Since the creditor had an option to accelerate or not, the regulation did not apply.
To summarize, the great weight of authority is that for there to be a violation of section 226.8(b)(4) there must be some additional pecuniary burden placed upon the borrower because of default and acceleration of the unearned interest is such a burden. However, at least one district court has held that acceleration itself is enough of a burden to activate the disclosure requirements of section 226.8(b)(4), but this ruling rests on the district court decision in Johnson which has been reversed by the Third Circuit. None of the district courts have accepted the creditors' argument that section 226.8(b)(4) applies only to traditional delinquency charges and that acceleration is merely a creditor's remedy and not such a charge. The court of appeals, in Johnson, did recognize this argument in dictum, but specifically refused to rule on the case where all unearned interest is not required to be rebated.

III. Special Problems Created By The Georgia Law

The most prolific forum for Truth-in-Lending cases is the Northern District of Georgia. The acceleration clause issue has been no exception. Unfortunately, a peculiarity of Georgia law has played a major role in these cases, and in this author's opinion, has caused a distortion in some of the opinions. At the outset of this article I stated that the Truth-in-Lending Act is a disclosure act which does not control any of the substantive terms of an extension of credit. Nonetheless, the state law which does control the substantive terms can be the determining factor in finding a Truth-in-Lending violation. This has been true of the Georgia law as it related to acceleration.

To understand this, we must briefly review the history of acceleration clauses in Georgia. The first case, McCrary v. Woodward, grew out of the "series of notes" form of installment loan. Each note provided that if any of the notes was not paid at maturity, all of them should become due. None of the notes specifically provide for a rebate of any unearned interest in the event of acceleration after default. The Supreme Court of Georgia found that the arrangement was not usurious. The court held that

31. Id. at 794, 50 S.E. at 941.
In effect, the court read into the acceleration clause in the notes the provision that any unearned interest would be rebated to the date judgment was entered. This case was subsequently followed in *Lyle v. Mandeville Mills.*

In 1912, the legislature passed the first Georgia statute providing for "added interest" loans. In the case of *South Georgia Mercantile Co. v. Lance,* the Georgia Supreme Court, in construing this statute, held that in the event of default by the borrower, the creditor had the right under the acceleration provision in the contract "to sue for the principal of the loan, with interest thereon." The court noted that the creditor might have sued on each unpaid installment as it came due or waited for maturity of the last installment and sued for the entire amount due, but it was not obligated to do so. Under the contract, the creditor had the option to accelerate the maturity of the loan and proceed for the principal plus earned interest. The acceleration clause in this case did not specifically provide for a rebate of the unearned interest in the event of acceleration. As in *McCrary,* the court read this into the contract.

As the consumer credit industry became more sophisticated, the Georgia legislature authorized additional forms of consumer installment loans. Like the original "added interest" statute enacted in 1912, none of these acts specifically provide for acceleration in the event of default. Nor do any of the statutes give the lender any guidelines to follow in drafting an acceleration clause to be included in his contract.

The first case to be decided, dealing with acceleration clauses under these special consumer loan statutes, was *Lewis v. Term Plan, Inc.* In this case a lender, under the Georgia Industrial Loan Act, took a judgment against a borrower for the principal balance plus the unearned "added interest." The court held that a lender may include an acceleration clause in its contract, but it may not accelerate the unearned interest.

The statute does not deal with the effect of acceleration clauses and, as seen above, there may be a valid exercise of acceleration provisions where only the principal balance is sought, but to attempt to accelerate the payment of that part of the installments including unearned interest, even without the attempt to charge additional interest thereon from the date of acceleration, obviously gives a higher interest return on the use of the

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34. 143 Ga. 530, 85 S.E. 749 (1915).
35. Id. at 538, 85 S.E. at 752.
money than is authorized under the statute, and therefore nullifies the entire transaction. 38

A similar result was reached in Garrett v. G.A.C. Finance Corp. 39 where an Industrial Loan Act lender rebated the unearned interest using the sum-of-the-digits method and then sued on the note. Finally, the Georgia courts, in Lawrimore v. Sun Finance Co., 40 held that a lender may not include an acceleration clause in a contract under the Georgia Industrial Loan Act that authorizes the collection of unearned interest. Upon rehearing in Lawrimore, the lender called to the court's attention the apparent conflict between its decisions under the Industrial Loan Act and the prior Georgia cases. The court of appeals resolved this conflict by reference to the peculiar language of the Industrial Loan Act:

Appellee contends that the following controlling cases were overlooked by the court in rendering its decision, to-wit: McCrary v. Woodward, 122 Ga. 793 (50 S.E. 941), and Lyle v. Mandeville Mills, 68 Ga. App. 88 (22 S.E.2d 186). Neither of these cases was decided under a small Loan Act, which prohibited the "contracting for" usury as a result of which the contract would be void. The usurious interest was merely written off or only interest to date of judgment was allowed. While these cases dealt with acceleration clauses, they did not deal with acceleration clauses which were prohibited by the Act under which the loan was made. These cases are, therefore, neither applicable nor controlling. 41

From this brief review of the Industrial Loan Act cases it can be seen that a lender under that Act may not sue nor "contract for" unearned interest in the event of acceleration. The courts will not read the rebate requirement into a silent contract to save it from this prohibition.

In Cook v. First National Bank, 42 the Georgia Court of Appeals decided a case of first impression concerning rebates upon acceleration under the Georgia Motor Vehicle Sales Finance Act. The court held that the creditor must rebate pro rata in the event of acceleration after default and before judgment in a collection suit. This case is the counterpart to Garrett under the Industrial Loan Act. Here, the lender accelerated its loan rebating the unearned interest using the sum-of-the-digits method. It then sued for the principal balance plus earned interest and the remainder of the unearned interest. On appeal, the court of appeals, citing Garrett, found the contract was usurious. 43 Seemingly, the court did not consider the McCrary line of cases. Cook stands for the proposition that a lender under the Motor Vehicle Sales Finance Act may not take a judgment for unearned interest. The

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38. Id. at 509, 184 S.E.2d at 475.
41. 131 Ga. App. at 104-05, 205 S.E.2d at 115.
43. Id. at 588, 203 S.E.2d at 871.
opinion leaves open the question of whether or not the rebate requirement will be read into a silent contract prior to the time judgment is taken.

To summarize, a lender may not sue or "contract for" unearned interest in the event of acceleration after default in a contract under the Georgia Industrial Loan Act. The lender must rebate all of the unearned interest and may not use the sum-of-the-digits method in calculating the rebate. Under the Motor Vehicles Sales Finance Act, a lender must rebate all of the unearned interest upon acceleration. Unlike the Industrial Loan Act, a lender is not prohibited from "contracting for" unearned interest by way of acceleration, but he is prohibited from attempting to collect it. It was against this background that the Georgia Truth-in-Lending suits were decided.

As noted earlier in this article, the Georgia district court opinions have consistently held there is no "charge," and therefore no violation of section 226.8(b)(4), where the creditor is required to rebate the total unearned finance charge. The early decisions found for the creditor if he had, in fact, rebated the unearned interest on a pro rata basis before filing suit, or if he had not as yet filed a collection suit in the state courts at the time the Truth-in-Lending action was filed. This was consistent with the state court decisions in Lewis, Garrett, and Cook. Typical of these decisions was the December 18, 1974, order in McDaniel v. Fulton National Bank. In finding for the creditor the court stated:

While at first blush Garza and Johnson seem to support plaintiff's position, they are not controlling because of the difference between Georgia law and the law of the state involved in those cases. As was ably pointed out by the Special Master, in Georgia no additional amount is to be paid by the debtor in the event of default and ensuing acceleration. The debtor's balance due is adjusted by any unearned Finance Charge or unearned credit life insurance premium and the debtor is charged only for the actual earned portions thereof. In addition as Judge Norton stated in his recommendations:

Because, in Georgia [see Garrett v. G.A.C. Finance Corp., 129 Ga. App. 96, 198 S.E.2d 717 (1973)], the rebate upon acceleration is required to be computed under the consent ratio method rather than the direct ratio or actuarial method, if the annual percentage rate were computed over the term of the loan to date of prepayment (less than the full term), the annual percentage rate would be lower than disclosed at the outset of the transaction, the effect being an "acceleration bonus" rather than any default "charge."

In both Garza and Johnson the courts dealt with a situation where there would be no rebate of any interest. Thus, the interest to be paid upon acceleration that had not been earned could well be considered an addi-
tional charge. since this is not the situation in Georgia, these cases are not applicable to the situation sub judice.\textsuperscript{45}

This line of decisions ended with the opinion in \textit{Barrett v. Vernie Jones Ford, Inc.}\textsuperscript{46} On March 5, 1975, Chief Judge Edenfield entered his original order in this case. In it, he specifically rejected the prior Georgia district court decisions including \textit{McDaniel}.\textsuperscript{4} The court held that under Georgia law after \textit{Lawrimore}, an installment contract was usurious where it \textit{authorized} the collection of usurious interest by the acceleration of unearned finance charges.\textsuperscript{4} The court found that where the contract is silent as to the creditor's duty to rebate, there is no positive requirement that the unearned interest be rebated as stated in \textit{McDaniel}.\textsuperscript{4} The court recognized that such a contract under the Industrial Loan Act would be declared void, but in the court's view this would not avoid a Truth-in-Lending violation. The court reasoned that the violation occurred when the disclosures were given. If the contract authorized the collection of unearned interest, then there was a "charge" under section 226.8(b)(4).

The court is aware of no decisions holding that the fact that a note may ultimately be found to be usurious under the applicable state law insulates its maker from liability for any violations of the Truth-in-Lending Act which the note may contain. The purpose of the Truth-in-Lending Act is "to assure a meaningful disclosure of credit terms . . . available to him and avoid the uninformed use of credit." 15 U.S.C. §1601. It appears evident to the court that effectuation of this congressional purpose requires disclosure of all charges which the lender asserts a right to collect at the time credit is extended whether or not it is finally determined that he can utilize the enforcement mechanisms of the state courts to collect the charge. Equally clearly, the consumer has a need to be informed of all charges which may be assessed against him whether or not he could prevail in any eventual litigation attacking the validity of that charge.

The court thus concludes that, irrespective of how this acceleration clause might fare if an attempt was made to enforce it in the state courts, the Truth-in-Lending Act and its implementing regulation, 12 C.F.R. §226.8(b)(4), require that an acceleration clause be properly disclosed when, as here, by its terms it authorizes the creditor to demand immediate payment of future installments including unearned interests and finance charges upon default.\textsuperscript{50}

On motion for rehearing, the creditor brought to the court's attention the fact that the contract had been made under the Georgia Motor Vehicle Sales Finance Act and that the court's statement of the Georgia law related

\textsuperscript{45} \textit{Id.} at 423.
\textsuperscript{47} \textit{Id.} at 907.
\textsuperscript{48} \textit{Id.} at 908.
\textsuperscript{49} \textit{Id.} at 907.
\textsuperscript{50} \textit{Id.} at 908-99.
solely to transactions under the Georgia Industrial Loan Act. The court acknowledged this, but stated it was a distinction without a difference. In so holding, the court stated:

Under neither Act are acceleration clauses per se unenforceable and under neither Act will the Georgia court "read into" a silent acceleration clause a provision rebating all unearned interest.₃¹

The creditor maintained that it was required by law to rebate all unearned interest in the event of acceleration. It relied on McCrary and Cook. The court reviewed these holdings and determined that the Georgia courts would not require a rebate where the acceleration of the unearned interest would not create usury.₃² The court then stated its holding in the following terms:

Although for the reason set forth above the court cannot accept the statement of the Georgia law proposed by the defendants, even if the court had concluded that the defendants were correct in their reading of the Georgia law, that conclusion would not require any alteration of the court's judgment of March 5, 1975. The issue in this case is whether or not there has been a violation of the disclosure requirements under Truth-in-Lending and the resolution of that issue is not necessarily controlled by state law. The defendants' arguments are largely couched in terms of what would allegedly happen if and when the defendants chose to sue on their note in the Georgia state courts. There are two problems with this approach.

First, the court cannot simply assume that the defendants will not choose to attempt to enforce their note as written. If the defendants have no intention of utilizing a clause inserted in their note there would be no reason for that clause to be included in the note.

Second, the issue in a Truth in Lending case is not what charges the creditor would in fact assert in some hypothetical later state court proceeding, but what charges the creditor asserts a right to enforce at the time the credit transaction in question is entered into.₃₃

51. Id. at 909.
52. Id. at 910. In a footnote, the court set out the following example:

2. An illustrative example may make the distinction clear: A lends B $100 for one year at 4% interest, the entire sum of $104 to be paid in 12 equal installments. The note contains an acceleration clause identical to that found in the defendants' preprinted form. B makes six payments on time but defaults on the seventh. A accelerates the notes, sues for the outstanding balance, and being a resident of a sparsely settled area, promptly secures a judgment. In Truth in Lending terminology his earned interest is $2.00 ($100 x 4% per annum x ½ year. He has, however, collected $4.00 in interest and has collected a §226.8(b)(4) charge by virtue of the effective annual percentage rate increasing from 4% to 8%. He has not, however, run afoul of the Georgia usury laws because his annual percentage rate has never exceeded 8%.

Id.
53. Id. at 911.
After the entry of the order in Barrett, Judge Hill reversed this prior decision in McDaniel and issued a supplemental opinion accepting Chief Judge Edenfield’s reasoning in Barrett. At least three other judges in the Northern District of Georgia have now accepted the rationale of Barrett. This leaves a split in authority in the Georgia district courts which will come before the Fifth Circuit this spring.

This author feels that the morass in which the Georgia district courts now find themselves when they consider the acceleration clause issue is due to some unfortunate circumstances, and a misunderstanding by the federal courts of the Georgia precedents. The beginning point of this problem is the “contracting for” language contained in the Georgia Industrial Loan Act. This language is not found in any of the other Georgia statutes permitting “added interest” loans. Assuming the court’s decision in Lawrimore is correct, its reasoning should be limited to the Georgia Industrial Loan Act because it is based on language peculiar to that Act. It should not be extended to the other “added interest” statutes.

The next problem is the decision in the Cook case. The court, in holding usurious a judgment on a Motor Vehicle Sales Finance Act note for the remainder of the added interest (after a rebate using the sum-of-the-digits method), cited Garrett, an Industrial Loan Act case. This has caused no end of confusion. The court in Cook should have followed McCrary and required a rebate of all unearned interest to the date the judgment was entered. Georgia law requires the courts to construe a contract to make it conform to the law if possible. The court found that a creditor must rebate pro rata. All it needed to do was to read this requirement into the contract. This would not have conflicted with the Industrial Loan Act cases. As the court made clear on rehearing in Lawrimore, it was prohibited from reaching a similar result under the Industrial Loan Act because of the “contracting for” language in the statute.


55. At least two courts have agreed with Judge Hills’ original opinion in McDaniel. See Grant v. Imperial Motors, C.A. No. 3146 (S.D. Ga., Dec. 4, 1974); Barksdale v. Peoples Fin. Corp., 393 F. Supp. 112 (N.D. Ga., 1975). It should be noted that Barrett does not stand for the proposition that acceleration is per se a section 226.8(b)(4) “charge.” The court included the following footnote in its opinions:

8. Although this court must disagree with the result reached in McDaniel, the court is in agreement with the proposition recently advanced by Judge Henderson that if the acceleration clause by its own terms provides for a rebate of all unearned interest and the note properly discloses the method of rebate upon prepayment, then no separate (b) (4) disclosure is necessarily required. Barksdale v. Peoples Financial Corp. of Alpharetta, 393 F.Supp. 112 (N.D. Ga. 1975). 395 F.Supp. at 909.


57. 130 Ga. App. at 588, 203 S.E.2d at 871.

58. 131 Ga. App. at 104-05, 205 S.E.2d at 115.
The federal courts, in construing *Cook*, should not have fastened on the "authorizing" language in *Lawrimore* and applied it to Motor Vehicle Sales Finance Act contracts. It is true that the court in *Lawrimore* held that an instrument under the Georgia Industrial Loan Act authorizing the collection of unearned interest is void, but this ruling was specifically predicated on the "contracting for" language of the Industrial Loan Act. Even if the decision in *Cook* were correct that a lender under the Motor Vehicle Sales Finance Act cannot take a judgment for unearned interest, this does not automatically taint an acceleration clause in a Motor Vehicle Sales Finance Act contract. Under Georgia contract law, the law as it exists at the time and place of the making of the contract enters into and forms a part of it. At the time the creditor entered into the contract he was required to rebate pro rata. This requirement should have been read into his contract.

This has been made clear in the recent case of *Bell v. Loosier of Albany*.

In a full bench decision, the Georgia Court of Appeals held that the rebate requirement must be read into a silent contract under the Georgia Retail Installment & Home Sales Solicitation Act. The creditor filed suit without rebating the unearned interest. The acceleration clause in the contract was silent as to rebates. The debtor answered claiming the contract was usurious. The creditor amended its complaint to rebate the unearned interests and judgment was entered. The debtor appealed.

Speaking for the court, Judge Clark completely reviewed the history of acceleration clauses in Georgia, giving special attention to the Industrial Loan Act cases. He found these cases inapplicable because they were based on the "contracting for" language of that statute. Judge Clark correctly noted that none of the other added interest statutes contain this language. The court held:

An intention contrary to law should not be read into a contract by placing such a construction upon a provision therein, when the provision is just as susceptible of a construction that will show a lawful intention.

Since the required rebate had to be read into the silent acceleration clause, the contract did not per se violate the Act. The court held the creditor had a right to amend its suit. No judgment was entered for the unearned interest and, therefore, the Act had not been violated. This is consistent with the holding in *Cook*. The court of appeals reached a similar result in *Price v. Guardian Mortgage Corporation* under the Second Security Deed Act.

The Retail Installment & Home Sales Solicitation Act was enacted contemporaneously with the Motor Vehicle Sales Finance Act. The logical

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61. *Id.* at 53, __ S.E.2d at ___. [citation omitted].
inference to be drawn from Bell and Price is that Chief Judge Edenfield misinterpreted the Georgia law in Barrett. Seemingly, there is no violation of the added interest statutes other than the Industrial Loan Act, until the lender takes a judgment for the unearned interest.

But, what if a creditor did take a judgment or otherwise attempt to collect the unearned interest? Then, under Cook, his actions would be usurious and he would forfeit all interest due under the contract, including the unearned interest. Since the borrower would have no legal obligation for the unearned interest, how could it be "payable" within the terms of section 226.8(b)(4)? The court, in Barrett, erred in substituting the term "authorized," as used in Lawrimore, for the term "payable," used in the statute and regulation. The regulation provides for the disclosure of "default, delinquency and other similar charges payable in the event of late payments." Chief Judge Edenfield, in Barrett, incorrectly changed this to read "default, delinquency and other similar charges authorized in the event of late payments."

In any event, this author is convinced that any charge which results from acceleration is not a "default, delinquency or other similar charge payable in the event of late payments." The language of the statute and regulation refers to traditional delinquency charges. These charges are imposed where the lender allows a borrower to pay one or more installments after its due date in order to preserve the borrower's right to pay the remaining installments as originally scheduled. This is the opposite of acceleration where the maturity of the remaining installments is advanced to the date of acceleration. The courts have confused "default, delinquency and other similar charges payable in the event of late payments" (i.e., traditional delinquency charges) with charges assessed against the borrower "after default." Such charges might include repossession expenses, expenses for the sale of collateral, and court costs. Acceleration fits into the same logical category as such charges accruing "after default." Acceleration and delinquency charges are mutually exclusive.

IV. POTENTIAL SOLUTIONS

The present status of the law on the question of disclosure of an acceleration clause in a consumer installment contract is far from clear. What is clear is that most courts have agreed that there is no requirement to disclose an acceleration clause where the creditor is required to rebate the total unearned finance charge in event of acceleration. The Barrett case is in accord with this principle. The holding in Barrett stands for the proposition that Georgia law does not require such a rebate, and, therefore, to avoid a violation of section 226.8(b)(4), the creditor must (1) specifically

63. 12 C.F.R. §226.8(b)(4) (Rev. 1974) [emphasis added].
64. 395 F. Supp. at 909.
provide for such a rebate in his contract, or (2) make an adequate disclosure of his acceleration clause.

The second alternative is potentially dangerous. To the best of this author's knowledge, no case has been decided where the creditor properly disclosed his acceleration clause in accordance with Regulation Z. Therefore, the creditor who wishes to make this disclosure is left without any guidelines as to how to do so. The safer course is to make a general disclosure of the acceleration clause (just in case the Fifth Circuit sustains Meyers and to specifically provide in the contract for a pro rata rebate in the event of acceleration after default. This may be done in the following language.

A default in the payment of the full amount of any installment hereon, at the option of the holder hereof, and without notice or demand, shall render the entire amount then legally due hereon at once due and payable. In the event of acceleration as hereinbefore provided, the unearned portion of the FINANCE CHARGE will be rebated on a daily pro rata basis to the date of acceleration.

This language provides for a rebate to the date of acceleration. The creditor, in Barrett, argued that under the Motor Vehicle Sales Finance Act, it was entitled to interest to the date a judgment was entered. In those cases where the creditor determines he is legally entitled to interest to the date of the judgment, the language may be changed to so provide.

Another possible solution is for the legislature to adopt a statute similar to the one in Pennsylvania, which specifically requires the creditor to rebate unearned interest in the event of acceleration. The Pennsylvania statute provides as follows:

Whenever all of the time balance is liquidated prior to maturity by pre-payment, refinancing or termination by surrender or repossession and resale of the motor vehicle, the holder of the installment sale contract shall rebate to the buyer immediately the unearned portion of the finance charge. Rebate may be made in cash or credited to the amount due on the obligation of the buyer. 65

Considering the existing case authority in Georgia, it would be prudent for the Georgia legislature to amend this language to read as follows:

Whenever all of the time balance of any consumer loan providing for a precomputed finance charge is liquidated prior to maturity by acceleration of the maturity of the unpaid installments, the holder of the contract shall rebate to the buyer immediately the unearned portion of the finance charge on a daily pro rata basis to the date on acceleration. Rebate may be made in cash or credited

to the amount due on the obligation of the buyer. This section shall be considered a part of every consumer contract providing for a precomputed finance charge whether such contract by its own terms provides for such a rebate or not.

Until such time as the Georgia legislature enacts such a statute, Georgia lenders will have to either disclose their acceleration clauses or specifically provide in their contracts for a rebate of the unearned interest.

V. Conclusion

The issues discussed in this article will come before the Fifth Circuit Court of Appeals this spring in numerous pending appeals.66 The briefs of the parties and amicus curiae have effectively presented the issues and arguments for and against interpreting section 226.8(b)(4) of Regulation Z to require a disclosure of an acceleration clause in a consumer installment contract. Most of the cases before the court have arisen out of Georgia contracts and, therefore, involve the complex issues raised by the Georgia cases on acceleration. It is hoped that the court of appeals will disregard these peripheral issues and decide as a general proposition whether acceleration is one of those disclosures required by the Act and Regulation. In the meantime, Georgia creditors must eave their way through the maze of conflicting precedents to achieve compliance.