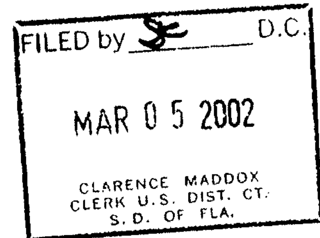
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA



LORETTA FABRICANT, on behalf of herself and all others similarly situated,

Plaintiffs,

Case No. 98-1281-CIV-MORENO
(formerly 98-1281-CIV-NESBITT)

vs.

SEARS ROEBUCK, et al.,
Defendants.
_______________________________/

ORDER ON MOTIONS FOR SUMMARY JUDGMENT ON COUNTS I & II OF PLAINTIFF'S COMPLAINT

This cause comes before the Court upon those portions of the parties' motions for summary judgment that relate to Counts I and II of Plaintiff's Complaint.

The Court concludes that Sears violated the Truth-in-Lending Act as a matter of law because it failed to clearly disclose that the purchase of insurance was not a factor in the decision to extend credit, failed to separately disclose the cost of property insurance, and failed to inform applicants that they could purchase property insurance from someone other than Sears. However, Sears did not violate TILA by virtue of its failure to separately disclose the costs of credit life, disability, and unemployment insurance. Because Sears has not demonstrated good faith compliance with a Federal Reserve Board rule, regulation, or interpretation, it is not exempt from liability and Plaintiffs are entitled to summary judgment as to liability on Counts I and II.

Because Fabricant testified that she did not read disclosures on the back of her insurance application form, Sears is entitled to summary judgment on Fabricant's individual claims for actual

damages insofar as they relate to those specific disclosures. However, because Sears has not demonstrated that Fabricant will be unable to demonstrate that she relied on Sears' other misleading disclosures and omissions, Sears is not entitled to summary judgment as to Fabricant's claims for actual damages in their entirety.

BACKGROUND

This case concerns the Defendants Sears Roebuck & Co.'s and Sears National Bank's (collectively "Sears") practice of marketing a package of "credit life, credit disability, credit unemployment and credit property insurance" called Sears Credit Protection Plan ("SCPP") in connection with the Sears Credit Card.

I. PROCEDURAL BACKGROUND

Counts I & II of Plaintiff's Second Amended Complaint alleges that Defendants Sears violated the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* Count I alleges that Defendants violated § 1601 by selling the SCPP package of credit life, disability, property and unemployment insurance without giving consumers the option of purchasing credit life insurance alone and without "clearly disclos[ing] in writing" (1) the separate costs of SCPP credit life, disability and unemployment insurance, and (2) that purchase of SCPP was "not a factor" in the approval of the extension of credit. In Count II, Plaintiff alleges that Defendants violated § 1605(c) of TILA, which requires creditors (1) to furnish "a clear and specific statement in writing ... setting forth the cost of the

insurance" and (2) to inform consumers that they "may choose the person through which the insurance is to be obtained."

The Court certified the case as a class action with respect to the Truth in Lending violations alleged in Counts I and II ("TILA class"). The Court defined the TILA class as consisting of all Sears accountholders purchasing SCPP insurance sold by Defendants (1) who signed up for SCPP insurance by in-store application from June 5, 1997 through October 1998, and (2) who have not received benefits in excess of premiums paid, and (3) whose accounts are not in default by the close of the opt-out period. The case proceeds as a class to resolve statutory damages pursuant to 15 U.S.C. § 1640(a)(2)(B), for declaratory judgment and to resolve issues of liability for actual damages pursuant to 15 U.S.C. § 1640(a)(1).

II. FACTUAL BACKGROUND

Plaintiffs consist of a nationwide class of Sears credit card holders who purchased SCPP insurance. Order of June 29, 2001 (D.E.# 420). SCPP is a package of group credit insurance that includes credit life, credit disability, credit unemployment and property insurance for purchases made with the Sears Credit Card. Def. Fact ¶ 2; Pl. Fact ¶ D.[1] The insurance package covers cardholders' minimum monthly payment if they are unable to pay due to "involuntary unemploy[ment]" or "can't work due to total

[1] The Court will utilize the following abbreviations: Def. = Defendants'; Pl. = Plaintiffs'; Fact = Statement of Undisputed Facts; Compl. = Plaintiffs' Second Amended Complaint; Ex. = Exhibit attached to Motion for Summary Judgment; Dep. = Deposition.

disability," pays off the entire account balance if the cardholder or cardholder's spouse passes away, and "covers items" purchased on the Sears Credit Card that are "accidently damaged destroyed or stolen." Pl. Ex. D; see also Def. Fact ¶ 4.

The SCPP insurance is sold in connection with the Sears Credit Card and is offered to new and existing Sears Card accountholders. Def. Fact ¶ 2; Pl. Fact ¶ C. The insurance is sold only as a package of insurance and the individual insurance is not available separately. Def. Fact ¶10; Pl. Fact ¶ D. The price of the insurance is likewise disclosed only as a package and the cost of the individual policies is not disclosed. Def. Fact ¶ 11; Pl. Fact ¶ D; Def. Ex. 3.

SCPP is a group coverage arrangement using policies issued by Defendants Allstate Insurance Company and Allstate Life Insurance Company. Def. Fact ¶ 5; Pl. Fact ¶ C. Defendant Sears, in turn, sold the SCPP through its sales associates. Def. Fact ¶ 6. Sears sold SCPP to Sears customers at the time of and as part of the application for a Sears credit card using a standardized form, entitled "your Sears Card application." Pl. Fact ¶ B; Def. Fact ¶ 7; see Def. Ex. 3 (hereinafter "Sears Card Application").

The Sears Card Application consists of 6 parts. Def. Ex. 3. Part 1, entitled "tell us about yourself," requests personal information about the applicant (e.g. name, address, social security number). Part 2, entitled "about your income," requests information about the applicant's employer, occupation and income.

Part 3, entitled "about your credit references," requests information about the applicant's other credit and banking accounts. Part 4, entitled "authorized buyers" needs to be completed "if [the applicant] want[s] additional buyers on [the] account." Part 5, entitled "Sears card special options," is divided into three parts (or options). Applicants are afforded the following "options:" (1) "choosing your payment date," (2) the "Sears Credit Protection Plan Enrollment," and (3) providing "Co-Applicant" personal information. Finally, Part 6, entitled "required signatures," requires the applicant's and co-applicant's signature and the date.

The portion of Part 5 entitled "Sears Credit Protection Plan Enrollment" contains three parts. First, the application makes the following disclosures:

> I want to help protect my account by enrolling in the optional Sears Credit Protection Plan. I have read and agree to the terms and conditions on the back of this application, and authorize the insurance charges to be billed to my account each month they become due (subject to approval). **CA residents only: If you sign, you will be contacted by phone or mail to enroll you in this coverage.**

Id. (emphasis in original). Second, the application requests the applicant's birth date - and, in fact, this is the only place on the application where the applicant's date of birth is requested. Finally, just below the space to provide the birth date, the application requests a signature.

The back of the Sears Card application contains two boxes. Box 1 is entitled "**IMPORTANT SEARS CREDIT TERMS.**" Box 2 contains two headings: at the top, "**SEARS CREDIT PROTECTION PLAN (SCPP)**" and in the middle, "**General Limitations and Exclusions.**" Under the

first heading in Box 2, there are four lines explaining in simple terms SCPP's benefits, followed by the following statement of maximum benefits:

The plan can pay your Sears Card bill when you can't.

- SCPP pays your minimum monthly payment if you are involuntarily unemployed or can't work due to total disability.
- SCPP pays off your entire account balance if you or your spouse passes away.
- SCPP also covers items bought on your Sears Card that are accidentally damaged, destroyed or stolen.

For unemployment, disability and life coverages, benefits are based on your account balance on the date of loss. The maximum benefit is $10,000 ($500 monthly) paid after a 30-day waiting period and applied back to the date of loss. In VA there is no maximum benefit.

Id. The "**General Limitations and Exclusions**" section comprises the remaining three-quarters of the box. About halfway through this portion of the box, the following "disclosure" is made:

SCPP costs 85¢ per $100 monthly outstanding balance (in DE, GA, NM 90¢; WY 89¢; IL, IN 86¢; AR 84¢; UT 83¢; TX 82¢; OK 81¢; AL, WV 80¢; DC, FL, OR 79¢; OH 78¢; CT, NJ 77¢; MD, ND, NH, RI, WI 75¢; NC 69¢; ME 67¢; NE 66¢; AK, CO, HI, SD 65¢; MO 64¢; NV 63¢; NY 61¢; MN 57¢; PA 51¢; VA)

Id. (ten footnotes omitted). The separate cost of unemployment, life, disability and property insurance is disclosed only for purchasers in the states of Texas, Virginia and Oregon. Id. Nothing on the application form, front or back (at least that the Court can find), discloses either that the consumer has the option of purchasing property insurance through another source or the individual cost of property insurance – except in Texas, Virginia and Oregon (and Colorado where this insurance is unavailable).

STANDARD OF REVIEW

Summary judgment should be granted if the record shows that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. Rule 56(c). The movant bears the initial burden of informing the Court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of

material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In response to a properly supported motion for summary judgment, "the adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts which show a genuine issue for trial." Fed. R. Civ. P. Rule 56(e). If the non-moving party fails to "make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," then the Court must enter summary judgment for the moving party. Celotex, 477 U.S. at 323. The Court is not to resolve factual issues, but may only determine whether factual issues exist. The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

TRUTH IN LENDING ACT

The Truth in Lending Act (TILA) was enacted to promote "the informed use and awareness of the cost of credit by consumers." Rodash v. AIB Mortgage Co., 16 F.3d 1142, 1144 (11th Cir. 1994). TILA changed the philosophy in the extension of credit from "let the buyer beware" to "make the seller disclose." Mourning v. Family Publications Servs., Inc., 411 U.S. 356, 376 (1973). To further this goal, courts must "liberally construe the language [of the statute] in favor of the consumer." Rodash, 16 F.3d at 1144; McGowan v. King, 569 F.2d 845, 848 (5th Cir. 1978).

TILA is a remedial statute that imposes strict liability on

creditors who fail to make the required disclosures. Rodash, 16 F.3d at 1144-45; Grant v. Imperial Motors, 539 F.2d 506, 509-10 (5th Cir. 1976) (finding that once the court finds a violation no matter how minuscule or technical, it has no discretion to impose liability). Liability is determined by an objective standard, irrespective of a particular plaintiff's subjective circumstances or understanding. Charles v. Knauss Co., 572 F.2d 544, 546 (5th Cir. 1978) (explaining there is "no requirement that the plaintiff himself be deceived in order to sue in the public interest").

The Eleventh Circuit has explained that the issue whether disclosure is required by TILA is one of pure law. Jones v. Bill Heard Chevrolet-Geo, Inc., 212 F.3d 1356, 1361 (11th Cir. 2000); see Green v. Levis Motors, Inc., 179 F.3d 286, 293 (5th Cir. 1999).

I. COUNT I: LIFE, ACCIDENT AND HEALTH INSURANCE SOLD IN VIOLATION OF 15 U.S.C. § 1605(b)

Section 1605(b) provides that charges or premiums for credit life, accident or health insurance written any consumer credit transaction must be included in the finance charge, unless (1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor in the extension of credit and this fact is clearly disclosed in writing; and (2) the person to whom credit is extended must give specific affirmative written indication of his desire to obtain the insurance after written disclosure of the cost of the insurance. 15 U.S.C. § 1605(b) (emphasis added). Plaintiff alleges that Defendants violated both requirements of §

1605(b).

A. DISCLOSURE REQUIREMENTS REGARDING APPROVAL BY THE CREDITOR IN THE EXTENSION OF CREDIT

The essence of the Plaintiffs' allegation is that Sears never clearly disclosed that the purchase of credit insurance would not be a factor in Sears' decision to extend credit. It is undisputed that nothing on the application states or suggests that the purchase of credit insurance will not be a factor in the decision to extend credit or will not help the applicant obtain credit. Rather, Sears maintains that it was not required to make such a disclosure as Regulation Z, 12 C.F.R. § 226.4(d)(1)(i), has interpreted the statute to be satisfied if the creditor discloses that insurance is "not required."

In a statutory construction case, the beginning point is always the language of the statute. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). Only if the "statute is silent or ambiguous with respect to the specific issue" may the Court then resolve whether the agency interpretation is based on a permissible construction of the statute. Id. (emphasis added).

The first question in this case is whether the language of the statute addresses the specific issue here: What is required for the

charges or premiums to be excluded from the finance charge? Section 1605(b) sets forth four specific requirements: (1) insurance coverage of the debtor is not a factor in the decision to extend credit; (2) the creditor clearly discloses in writing that insurance coverage is not a factor in the decision to extend credit; (3) the cost is disclosed in writing prior to purchase; and (4) the applicant must give specific affirmative written indication of her desire to purchase insurance.

1. DISCLOSURE THAT INSURANCE COVERAGE IS NOT A FACTOR IN THE DECISION TO EXTEND CREDIT

The first issue to resolve is what the creditor is required to disclose in order to comply with § 1605(b)'s requirement that the purchase of insurance is "not a factor" in the decision to extend credit. Statutory interpretation requires starting from the premise that the statutory language is precise and that Congress said what it meant. United States v. LaBonte, 520 U.S. 751, 757 (1997). When words are not defined in the statute, they are given their ordinary meaning. In re Griffith, 206 F.3d 1389, 1393 (11th Cir. 2000). The ordinary meaning of terms often requires turning to the dictionary definitions. CBS, Inc. v. Primetime Joint Venture, 245 F.3d 1217, 1223 (11th Cir. 2001). "A factor" is defined as "any circumstance or influence which brings about or contributes to a result," Black's Law Dictionary 532 (5th ed. 1990), or "one that actively contributes to an accomplishment, result or process." American Heritage Dictionary of the English

Language 485 (2d College. Ed. 1982). Thus, the plain meaning of the statute requires a creditor to clearly disclose that the purchase of credit insurance does not influence, bring about or contribute to the decision to extend credit.

Congress' intent is clear, at least as to what must be "clearly disclosed." The plain language of the statute requires that the creditor's disclosure must clearly convey that obtaining insurance will not be "a factor" in the decision to extend credit. Nothing could make the intent of Congress on this matter any clearer. As to what must be disclosed, the plain language of the statute controls and this court need not look any further than the plain language of the statute. See CBS, 245 F.3d at 1224 ("The 'plain' in 'plain meaning' requires that [the Court] look to the actual language used in a statute, not to the circumstances that give rise to that language.")[2]

The Court notes that in London v. Chase Manhattan Bank, 150 F. Supp. 2d 1314 (S.D. Fla. Mar. 30, 2001), the Court determined that

[2] Contrary to the assertion by Defendants, this conclusion does not require a creditor to "parrot" the statutory language. Numerous disclosures could convey this meaning, for example: "Your decision to purchase credit insurance will not influence our decision to extend you credit" or "We will not consider whether you chose to purchase insurance in our decision to extend you credit" or "Your decision to purchase this SCPP is entirely voluntary and will not in any way affect our decision to approve your credit application" or even somewhat persuasive "We offer this insurance entirely for your protection and at your option. Your decision to purchase insurance is entirely unrelated to our decision whether to approve your credit application" or very bluntly "Your decision to decline to purchase this insurance will not contribute to our decision to approve or reject your credit application."

Congress did <u>not</u> "dictate the precise language that a creditor must employ in connection with an extension of credit in order to be relieved of the obligation of including the cost of insurance in the finance charge." <u>Id.</u> at 1322. The problem with this analysis is that "neither Regulation Z nor the Commentary indicates clearly how to make proper insurance disclosures (to keep the premium out of the finance charge) in open-end credit." Ralph Rohner & Fred Miller, <u>Truth in Lending</u> ¶ 3.04[2][b][iii], at 157 (2000). Thus, to the extent that the statute is ambiguous on this point, the Board has not resolved the ambiguity.

Even so, the <u>London</u> court determined that "meaningful disclosure" required that the creditor disclose that it would "not consider" in the credit approval process whether a consumer signed up for insurance coverage. <u>Id.</u> at 1324-26. This amounts, as Defendants observe, to the conclusion that Congress mandated the language that must be conveyed by a creditor. <u>See</u> <u>id.</u>; <u>see</u> Def. Sears' Response to Pl.'s Notice of Supplemental Authority (D.E. #407), at 3. In other words, the <u>London</u> court ultimately determined that the plain language of § 1605(b) controlled.

The thrust of Sears' argument is not that the disclosure satisfied the statutory requirement; rather, Sears claims that if this Court adheres to the statute rather than the regulation, then a "myriad [of] cases" were wrongly decided because they upheld disclosures complying with Regulation Z. This "myriad" consists of

four cases in this Circuit - two cited by Defendants and two found by this Court - involving credit insurance disclosures. See Williams v. Blazer Fin. Servs., Inc., 598 F.2d 1371 (5th Cir. 1979); Anthony v. Community Loan & Invest. Corp., 559 F.2d 1363 (5th Cir. 1977); English v. MCC Financial Servs., 403 F. Supp. 679 (M.D. Ga. 1975); Stanley v. R.S. Evans Motors, 394 F. Supp. 859 (M.D. Fla. 1975). None of these cases considered whether Regulation Z is a permissible interpretation of § 1605(b).

It is clear that none of these cases addressed whether Regulation Z was a permissible interpretation of § 1605(b).[3] In Williams, the creditor disclosed that the credit insurance was "not required to obtain this loan. Such insurance will only be procured for the term of the loan if Customer(s) requests Creditor to obtain such insurance by signing below." Williams, 598 F.2d at 1373. Immediately below this statement, the debtor was provided

[3] Sears cites additional cases in support of its proposition. While these cases state that the creditor must disclose that the insurance is "not required" or "optional," none of these additional cases involved a question of the sufficiency of the disclosure. E.g. Jones v. Fitch, 665 F.2d 586, 591-92 (5th Cir. 1982) (deciding whether the signature requirement was sufficient); Robinson v. Central Loan and Finance Corp., 609 F.2d 170, 174 (5th Cir. 1980) (finding that a creditor may choose to include optional insurance premiums in the finance charge even though they could have been excluded, but not at all addressing the necessary disclosure requirements); Burton v. G.A.C. Finance Co., 525 F.2d 961, 963 (5th Cir. 1976) (vacating and remanding, not affirming, on procedural grounds the district court's decision and noting that the reversal did mean the substance of the district court opinion was in error). Indeed, Sears' repeated assertion that these additional cases held that a disclosure that the insurance was optional satisfies Regulation Z is incorrect. In each of these cases, the statements cited by Sears are unarguably dicta.

with three options: (1) credit life and disability insurance; (2) credit life insurance only; (3) no insurance. Id. at 1374. Plaintiff signed and dated the option requesting credit life and disability insurance in which the dollar amount of the premiums was disclosed for that plaintiff was specifically and clearly set forth. Id. The Williams court concluded only that these specific disclosures satisfied Regulation Z,[4] 12 C.F.R. § 226.4(a)(5). Id. at 1374. Nothing in Williams suggests that a lesser disclosure, which undeniably exists in the present case,[5] would suffice, nor does Williams address whether Regulation Z is a permissible construction of § 1605(b).

Neither Anthony v. Community Loan & Inv. Corp., 559 F.2d 1363 (5th Cir. 1977) nor English v. MCC Financial Servs., Inc., 403 F. Supp. 679 (M.D. Ga. 1975) involved the substance of the disclosures. Anthony, 559 F.2d at 1369-70 (concluding that alleged oral statements contradicting the written disclosures - similar to those in Williams - did not create a material issue of fact); English, 403 F. Supp. at 683 (concluding that there was no

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[4] The Williams court's conclusion that these disclosures satisfied Regulation Z and no liability was imposed does not necessarily lead to the conclusion that they satisfied § 1605(b). As addressed infra, TILA's safe harbor provision, 15 U.S.C. § 1640(f), prevents imposition of liability when they conform to Regulation Z. Williams is simply silent on which of these possible bases supported its conclusion.

[5] The specificity, clarity and sufficiency of the information contained in the disclosure made in Williams starkly contrasts with the characteristics of the disclosure made in this case.

requirement as to placement so long as the disclosures were plainly disclosed and a meaningful disclosure made). Thus, neither case provides any guidance or impact on the analysis here.

Finally, Stanley did concern the substance of the disclosures regarding the purchase of credit insurance. See 394 F. Supp. at 860-61. Part of the disclosures at issue in Stanley explained: "NOTICE TO BUYER - (A) You are not required to obtain the [credit insurance] for which a charge is indicated hereon and such is not a factor in the Seller's approval of this credit." Id. (emphasis added). The creditor in Stanley expressed the language of Regulation Z, but also, and for these purposes more importantly, conveyed the meaning (as well as the actual language) of § 1605(b). The Stanley court then concluded that "all the legal requirements of [TILA] disclosure were met by defendant." Id. at 861. Thus, the only authority in this Circuit directly on point involved disclosures in accord with the language of § 1605(b).

Neither a "longstanding administrative construction of the statute" nor case-law relying on that interpretation requires deference when the interpretation is "contrary to [the plain] language" of the statute. Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) (rejecting a longstanding interpretation of a statute where the plain language of the statute contradicted the administrative interpretation); see Dobbs v. Costle, 559 F.2d 946, 948 (5th Cir. 1977) (affirming district court's decision "to give effect to the statute rather than the regulation" despite the

longstanding administrative construction of the statute). Thus, the mere fact that prior decisions have assumed that Regulation Z sets forth the appropriate standard does not compel the conclusion that Regulation Z permissibly interprets § 1605(b).

Even if the statute is construed as ambiguous, as to "the precise language that a creditor must employ in connection with an extension of credit [to exclude] the cost of credit insurance in the finance charge," London v. Chase Manhattan Bank, No. 99-1298-CIV, 150 F. Supp. 1314, 1322 (S.D. Fla. 2001), the agency's interpretation must still be based on a permissible construction of the statute. Chevron, 467 U.S. at 843. While the agency's interpretation need not be the only permissible interpretation, it may not be contrary to Congressional intent. Id. at 843 n.9 & n.11; see also Jones v. Bill Heard Chevrolet, 212 F.3d 1356, 1363 (11th Cir. 2000) (rejecting an interpretation of Regulation Z that would abrogate the statutory language of TILA), rev'd on other grounds Turner v. Beneficial Corp., 242 F.3d 1023 (11th Cir. 2001) (en banc).

When verbal ambiguity exists in a statute, deference is permitted when the agency chooses "between accepted alternative meanings." MCI Telecommunications v. AT&T, 512 U.S. 218, 227-29 (1994) (emphasis added). The administrative agency, however, is not permitted to change the meaning of the statute. Id. at 229. In particular, the agency is not permitted to take a "narrow[er] view of a statute that uses expansive language." Volkswagenwerk

Aktiengellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 273 (1968); see Neuberger v. Commissioner of Internal Revenue, 311 U.S. 83, 88-89 (1940) (explaining that it is "beyond question that an agency cannot narrow the scope of a statute").

In this case, the statute provides that the creditor must disclose that insurance coverage is "not a factor in" approving the extension of credit. Regulation Z provides that the creditor must disclose that insurance coverage is "not required by" the creditor. A "factor" is defined as "any circumstance or influence which brings about or contributes to a result." Black's Law Dictionary, supra at 532. Required means either "demanded as essential" or "demanded as appropriate." National Railroad Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417-19 (1992) (quoting American Heritage Dictionary of the English Language 1105 (2d ed. 1981)). The statute requires that the creditor disclose that the applicant's decision to purchase insurance coverage will not bring about or contribute to the creditor's decision to extend credit. In contrast, Regulation Z provides the creditor need only disclose that insurance coverage is not "demanded."

Regulation Z imposes a far more limited disclosure than § 1605(b). While "not required" merely conveys that insurance coverage is not demanded, as either essential or appropriate, the applicant's decision to purchase insurance may be considered and may factor into the creditor's decision to approve the applicant for credit. Another "Special Option" on the Sears Application

provides a perfect example of the difference between the statute and the regulation. In Section 5, immediately below the box for SCPP enrollment, is the box to exercise the "option" of a "Co-Applicant." Nothing requires that the applicant have a co-applicant; however, the text below the co-applicant box clearly indicates that, if this option is exercised, the co-applicant's information will be considered as a factor in the decision to extend credit. See Def. Ex. 3, Section 5, n.3. To the extent that the regulation changes, and in fact reduces, the amount of information to be disclosed, Regulation Z impermissibly alters the disclosure requirements set forth in § 1605(b).

Further, the Court, as the final arbiter of statutory construction, must reject administrative constructions that are inconsistent with the statutory mandate or frustrate the policy that Congress sought to implement. FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981). The purpose of § 1605(b) is to assure that an accurate finance charge is disclosed as the cost of insurance is a "true cost of credit." Robinson v. Central Loan & Finance Corp., 609 F.2d 170, 175 (5th Cir. 1980). Inclusion of the premiums in the finance charges assures that the purchaser is aware of the true cost of credit. Id. Making consumers aware of the cost of credit, enables consumers to evaluate and readily compare competing credit offers. See 15 U.S.C. § 1601(a). By requiring a disclosure that insurance will not be a factor in the decision to extend credit, TILA assures that

consumers are not pressured into purchasing insurance only to increase their chances of obtaining credit - particularly where such an impression is untrue -- and assures that the decision to purchase insurance is truly voluntary. See National Consumer Law Center, Truth in Lending § 3.9.4.1, at 128 (4th ed. 1999). Where the insurance is not truly voluntary, either because it is a factor in the extension of credit or the applicant is not informed it is not a factor, then the premium must be included in the finance charge. 15 U.S.C. § 1605(b). A regulation allowing a lesser disclosure undermines the ability of consumers to engage in the informed use of credit and to protect themselves from inaccurate and unfair credit card practices. See 15 U.S.C. § 1601(a). Accordingly, to the extent that Regulation Z permits creditors to disclosure less than the statute requires, Regulation Z frustrates the underlying policy of TILA.

When a regulation conflicts with a statute, the simple rule laid down by Chief Justice Marshall controls: "That which is not supreme must yield to that which is supreme." Dobbs, 559 F.2d at 948 (quoting Brown v. Maryland, 12 Wheat 419, 448 (1827)). To the extent that Regulation Z alters the creditor's disclosure obligation to inform consumers that the purchase of insurance is "not a factor" in the decision to extend credit, the statutory requirement must control. Defendants have made no argument that they have complied with § 1605(b), except to the extent that their disclosures complied with Regulation Z. For the same reasons that

"not required" is an impermissible interpretation of § 1605(b), Defendants' disclosure that SCPP was a "special option" or "optional" does not satisfy § 1605(b) because it does not convey that it is "not a factor" in the decision to extend credit. Accordingly, Defendants' disclosure violated § 1605(b) as a matter of law.

2. CLEARLY DISCLOSED

Plaintiff also claims that Defendant's disclosures in Section 5 that the insurance was a "special option" and "optional" did not satisfy the requirement to "clearly disclose[]" that the insurance was "not required." 15 U.S.C. § 1605(b)(1); 12 C.F.R. § 226.4 (d)(1)(i). The Eleventh Circuit has explained that the disclosures required "by Regulation Z are to be made clearly, conspicuously and, in a meaningful sequence." Besaw v. General Finance Corp., 693 F.2d 1032, 1034 (11th Cir. 1982); see Smith v. Chapman, 614 F.2d 968, 971 (5th Cir. 1980) (requiring "a meaningful disclosure of credit terms" that are "clearly and conspicuously disclosed"); see also 12 C.F.R. § 226.5(a)(1) (requiring that creditor disclosures shall be made "clearly and conspicuously in writing").[6] Sufficiency of TILA disclosures are evaluated "from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve

[6] Section 226.5(a)(1)'s "clearly and conspicuously" standard applies to open-end credit disclosures governed by Subpart B of Part 226 of Regulation Z. Id. Subpart B includes regulations for "credit card application and solicitation disclosures." 12 C.F.R. § 226.5(b)(3). The clearly and conspicuously standard applies to applications and solicitations, and therefore applies to the SCPP package sold via the Sears Card Applications.

Board member, federal judge or English professor." Lifanda v. Elmhurst Dodge, Inc., 237 F.3d 803, 806 (7th Cir. 2001); see Edmondson v. Allen-Russell Ford, Inc., 577 F.2d 291, 296 (5th Cir. 1978) (explaining that the adequacy of TILA disclosures must be assessed the adequacy of disclosure by the audience for which disclosure was intended, namely ordinary lay persons engaged in consumer credit transactions). Thus, assuming that "not required by the creditor" sufficiently discloses that insurance is "not a factor," the disclosures must still clearly convey to the ordinary consumer the decision to purchase insurance is entirely voluntary.

TILA is designed to make the terms in credit contracts comprehensible. Williams v. Blazer Financial Servs., 598 F.2d 1371, 1374 (5th Cir. 1979). The language of the disclosures are clear only if they convey an unambiguous meaning to an ordinary consumer. See Lifanda, 237 F.3d at 806; accord Edmonson, 577 F.2d at 296. There is no dispute here that the word "optional" means "not required;" however, the mere fact that Defendants included the word "optional" does not mean they clearly disclosed to the ordinary consumer that the purchase of insurance was voluntary.

As the Supreme Court has made clear, the word "required" has alternative meanings. National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 417-419 (1992). The word "required" may mean "necessary or indispensable," but another reasonable interpretation is "useful or appropriate." Id. at 418. Likewise, "not required" or "optional" may mean either "not necessary" to

obtain credit or "not useful" to obtain credit. The disclosure could reasonably be interpreted by the ordinary consumer to mean only that purchasing insurance is neither necessary nor indispensable, but fail to convey that the decision to purchase insurance will not be useful or appropriate in the creditor's decision to extend credit.

Moreover, the phrase "optional Sears Credit Protection Plan" is even more ambiguous than a disclosure that the insurance is "not required by the creditor" in the approval of credit. Compare Def. Ex. 3 with 12 C.F.R. § 226.4(d)(1)(i). Optional only conveys that something is "left to choice." American Heritage Dictionary of the English Language 873 (2nd College Ed. 1982). As the American Heritage Dictionary explains choice "implies broadly the freedom of choosing from a set of persons or things." Id. at 268-69. One may have an option or choice to select from one of many things, but be required to choose one of them. For example, immediately above the SCPP Enrollment box in another special option of Section 5, applicants are permitted to "choose [their] payment date." Def. Ex. 3. While cardholders have an option of when to make payment, they are certainly required to have a payment date and to make payments. The use of the word optional here may reasonably convey only that the consumer has a choice of providers, but that such insurance is nonetheless required as appropriate.[7] Different

[7] Indeed, Defendants themselves argue that the word optional conveys a choice of providers. See infra at II.B.

reasonable interpretations of the meaning of the disclosures requires the conclusion that Defendants failed to make clear disclosures. Accordingly, summary judgment on this issue will be granted in favor of Plaintiffs and against Defendants.

B. DISCLOSURE REGARDING THE COST OF CREDIT INSURANCE

Plaintiff also alleges in Count I that Defendants violated § 1605(b)(2) by failing to disclose the individual costs of the credit life, disability and unemployment insurance.[8] There is no dispute that Defendants disclosed the cost of the SCPP <u>package</u> as "79¢" "per $100 monthly outstanding balance," but did not disclose the <u>individual</u> costs of the credit life, credit disability and credit unemployment insurance separately. There is no dispute that SCPP is available only as a package. The only question is whether § 1605(b) and/or Regulation Z, 12 C.F.R. § 226.4(d)(1)(ii), require the disclosure of the individual cost of life, disability and accident insurance respectively when available only as a package.

Section 1605(b)(2) requires in relevant part that the premiums for credit life, accident, or health insurance shall be included in the finance charge unless written disclosure of the cost of the insurance is provided beforehand. Similarly, Regulation Z provides that premiums for voluntary credit life, accident, health or loss-of-income insurance may be excluded from the finance charge if the

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[8] Plaintiffs also allege under Count II that the bundling of life, accident and unemployment insurance with property insurance violated TILA. As Plaintiff's accede for purposes of this case, this alleged violation is more appropriately construed under § 1605(c) and the Court will address that claim there.

premium for the initial term of insurance is disclosed. 12 C.F.R. 226.4(d)(1)(ii). The premium may be disclosed on a unit-cost basis in open-end credit transactions. Id. Nothing in the statute requires that disclosure of the individual costs of each specific insurance.

No case has been cited on whether itemization of the cost of insurance must be made when the insurance is sold only as a package. When the creditor offers a choice of credit life insurance or accident and health insurance or a combination of life, accident or health insurance, the creditor must state the cost as to each insurance coverage, as well as the cost of the combined package. Rohner & Miller, Law of Truth in Lending ¶ 3.04[2][b][i], at 155. In contrast, when a package is the only option, there is no need to provide a cost breakdown of the insurance included in the package. See id. Accordingly, the only authority[9] on this issue suggests that no individual cost disclosure is required under § 1605(b).

When credit life and disability is available for sale only as package, the underlying principles of TILA also do not suggest disclosure of the component parts as well as the total cost. Disclosure of the cost of the package informs the consumer of the

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[9] In Doggett v. Ritter Finance Co, 528 F.2d 860 (4th Cir. 1975), the court concluded that the finance company had "no option of disclosure by stating the combined cost" as one item when the insurance is sold individually. Id. at 863. Moreover, the Doggett court relied on a then-existing regulation that required itemization of all costs. See id.

cost of credit if she chooses to purchase the insurance package. Disclosure of the individual portions, as well as the total package, would do nothing to advise the consumer of the cost of credit to comparison shop when the insurance is not available for purchase individually. Section 1605(b) does not require that a creditor must disclose the underlying costs of life and disability insurance when sold together as a package. Accordingly, Defendants did not violate § 1605(b)(2) as a matter of law by failing to disclose the individual costs of credit life, disability and unemployment insurance that were sold only as a package.

C. GOOD FAITH COMPLIANCE WITH REGULATION Z AS TO COUNT I

TILA exempts creditors from liability for "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation of the [Federal Reserve] Board." 15 U.S.C. § 1640(f). The purpose of this provision is "to relieve the creditor of the burden of choosing 'between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act.'" Ford Motor Co. v. Milhollin, 444 U.S. 555, 567 (1980) (quoting in part S. Rep. No. 93-278, 93rd Cong., 1st Sess. 13 (1973)).

To avail themselves of § 1640(f)'s protections, Defendants must point to a regulation or administration interpretation on which it relied. Hamilton v. Southern Discount Co., 656 F.2d 150, 152 (5th Cir. Unit B 1981). Section 1640(f) does not protect Defendants' reliance on judicial decisions. Id. To the extent

that Defendants relied on cases to conclude that optional satisfied Regulation Z and/or 15 U.S.C. § 1605(b), such reliance is irrelevant.

Defendants must point to specific regulations or interpretations that support its position. Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1287 (7th Cir. 1980); Lopez v. Olor, 176 F.R.D. 35, 43 (D. Conn. 1997). Defendants may not rest on a conclusory allegation that they acted in conformity with Board interpretations. Valencia, 617 F.2d at 1287. Here, Defendants state only that "Sears relied on Regulation Z, 12 C.F.R. § 224" without any further elucidation as to the nature of their reliance. This does not satisfy the requirement of § 1640(f).

Finally, § 1640(f) does not protect a creditor who fails to conform with a regulation through an honest, good faith mistake. Hendley v. Cameron-Brown, 840 F.2d 825, 834 (11th Cir. 1988). In other words, a creditor's mistaken interpretation, even if honest, reasonable and in good faith, is not protected. Id. Here, even if Defendants mistakenly believed that the use of a single adjective "optional" to describe the SCPP would constitute a clear disclosure that insurance was "not required by the creditor," this erroneous interpretation does not conform with § 226.4. Accordingly, nothing in § 226.4 shields Defendants from liability on Count I.

II. COUNT II: PROPERTY INSURANCE SOLD IN VIOLATION OF 15 U.S.C. § 1605(c)

Section 1605(c) requires that charges or premiums for property

insurance must be included in the finance charge, <u>unless</u> the creditor provides a <u>clear and specific</u> statement in writing that (1) sets forth the cost of the insurance if obtained from or through the creditor, and (2) states that the credit applicant may choose from whom to obtain the insurance. 15 U.S.C. § 1605(c). Plaintiff alleges that Defendants improperly excluded the premiums because they failed both (1) to set forth the cost of the insurance and (2) to inform applicants that they could purchase property insurance from someone other than Defendants.

A. CLEAR AND SPECIFIC STATEMENT SETTING FORTH THE COST OF PROPERTY INSURANCE

There is no dispute that Defendants did not disclose the cost of property insurance separately from the aggregate cost of the insurance package. The only dispute is whether TILA requires a separate disclosure of the cost of property insurance.

TILA treats life, accident or health insurance differently than property insurance. While § 1605(b) governs life, accident and health insurance premiums, § 1605(c) deals exclusively with property damage and liability insurance. The disclosures and prerequisites for excluding property insurance premiums from the finance charge differ from those provisions relating to life, accident or health insurance. Section 1605 requires that the creditor must furnish "a clear and specific statement in writing ... setting forth the cost of the [property and liability] insurance." 15 U.S.C. § 1605(c). Similarly, Regulation Z requires

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that "the premium for the [property or liability] insurance shall be disclosed." 12 C.F.R. § 226.4.

The simple requirement is that TILA requires disclosure of the property and liability premiums. Both § 1605(c) and Regulation Z require that the cost of property insurance must be disclosed. Neither clearly state whether disclosure of the cost of a package of insurance satisfactorily discloses the premium for property insurance. The language of Regulation Z suggests that "the premium [for property] insurance must be disclosed" means separately.

Interpreting the language of a statute requires not merely examining the provision in isolation, but consideration of its placement and purpose in the overall statutory scheme. Holloway v. United States, 526 U.S. 1, 6 (1999); United States v. McLemore, 28 F.3d 1160, 1162 (11th Cir. 1994). In doing so, a court must interpret a statute to give effect to each of its provisions and avoid an interpretation that renders parts or words in the statute inoperative or superfluous. United States v. Brame, 997 F.2d 1426, 1428 (11th Cir. 1993). Here, the statutory scheme of § 1605 establishes requirements for life, accident and health insurance premiums separate and apart from those for property damage and liability premiums. While there is some similarity between the provisions of § 1605(b) and § 1605(c), the language, structure and overall placement within the statute suggest that the requirements are indeed separate and distinct. The language contained within § 1605(c) provides that the creditor must disclose the cost of the

property insurance. The separate disclosure requirements for property insurance suggest the cost should be disclosed separately from other forms of insurance, otherwise, there would be no reason to enact separate statutory subparts.

Further, every available authority suggests that the cost of property insurance should be disclosed separately from the cost of life, accident and disability insurance. Hall v. Sheraton Galleries of Atlanta, 5 Consumer Credit Guide (CCH) ¶ 98,737, at 88335 (N.D. Ga. 1974) (concluding that property insurance may not be sold as a package with life insurance); see Stanley v. R.S. Evans Motors of Jacksonville, Inc., 394 F. Supp. 859, 860 (M.D. Fla. 1975) (distinguishing Hall and finding no violation because the purchase of life and/or accident and health insurance was not tied to the purchase of property insurance); see also Federal Reserve Board Staff Letter, No. 843 [1974-77 Transfer Binder - Correspondence] ¶ 31,165 (Sept. 19, 1974) (opining that while creditor need not disclose components of credit life and disability insurance, must distinguish between costs for credit life and property insurance).[10] Even the treatise, Truth in Lending, co-authored by Defendants' expert, Ralph Rohner, and published by the Business Law Section of the American Bar Association, provides

[10] Defendants attempt to discredit this Federal Reserve Board letter from the Chief of the Truth in Lending Section as no longer valid; however, this letter is cited in the 2000 edition of the treatise by Defendants' expert Rohner for precisely this point. See Rohner & Miller, supra, ¶ 3.4[2][b], at 355 n.306. It is cited as persuasive authority here and establishes the longstanding and undisputed nature of this point of view.

support for this point of view. <u>See</u> Rohner & Miller, <u>supra</u>, ¶ 3.4[2][b], at 355 n.306 (explaining "because of the different disclosures, creditors do not, <u>and legally cannot</u>, combine consumer credit [life, accident and disability] and property insurance").[11] Accordingly, this longstanding and undisputed authority persuades the Court that the property insurance premiums should be disclosed separately from life, accident and disability premiums.

Moreover, the policy consideration of allowing consumers to comparison shop for insurance - i.e. to compare the price of the insurance offered by the creditor with those offered by others -- supports a separate disclosure of the cost of property insurance.

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[11] In his deposition, Rohner attempted to distance himself from this point of view. <u>E.g.</u> Rohner Dep. at 106, 108. Rohner's opinion on this subject simply conflicts, not only with his past opinion, but with his present opinion. On one hand, he agrees to "stand by that footnote." <u>Id.</u> at 147. On the other hand, he asserts without authority or convincing explanation that in his opinion, the footnote in his text applies only to required property insurance - though he acknowledges the text and the authority on which the text and footnote relies addresses <u>optional</u> credit property insurance and neither the Act nor the Regulation "really have changed." <u>Id.</u> at 141-49. The most that can be said about Rohner's opinion about the applicability of his treatise to the disclosures in the instant case is that he has no opinion:

> Q: But you understand [the footnote] to mean that it says that Sears can't do what it did in this case?
>
> A: I'd have to ... sit down and think about it some more as to exactly what [the footnote] meant or why it was written that way.

<u>Id.</u> at 149. The only explanation offered for his current interpretation of his text is "to the extent that it's read to say that Sears can't do what it currently did in this case, [he] disagree[s] with it." <u>Id.</u> This ipse dixit of Defendants' retained expert is of no assistance or persuasive value.

See generally 15 U.S.C. § 1601(a). All credit insurance nominally protects the consumer, though really protects the creditor by insuring the loan will be repaid, Bailey v. Defenbaugh & Co., 513 F. Supp. 232, 243 (N.D. Miss. 1981); the special nature of credit property insurance heightens the necessity of the policy of disclosure to allow comparison shopping. National Consumer Law Center, supra § 3.9.4.6.1, at 142; Consumers Union & Center for Economic Justice, Credit Insurance: The $2 Billion A Year Rip-Off 29-33 (March 1999) (attached to Plaintiff's Renewed Motion for Class Certification).

Credit property insurance pays to repair or replace personal property serving as collateral if the property is lost or damaged. Consumers Union, supra at 29. Unlike other forms of credit insurance which insure against the borrower's ability to pay, property insurance insures against damage or loss to the collateral. Id. Rather than make payments to the lender, credit property insurance attempts to restore the property serving as collateral. Id. at 31. While credit property insurance only pays benefits if certain property is stolen, damaged or destroyed, the premiums are based upon the total outstanding monthly balance. Id. at 31. The premiums are assessed on items such as food, meals, airline tickets and entertainment purchases, although these items are not covered by the insurance.[12] Id. These factors contribute

[12] Theoretically, a credit card holder could use a credit card exclusively for purchases of non-covered items and thereby pay premiums on property insurance that effectively covers

to the high cost (and high profit margins) for credit property insurance when compared to insurance not sold in credit transactions, particularly considering that many borrowers have already non-credit property insurance providing the same coverage. Id. at 32, 33-34, 49; National Consumer Law Center, supra § 3.9.4.6.1, at 142. Accordingly, disclosure of the specific cost of property insurance enables consumers to avoid overpaying for duplicate insurance and/or comparison shop for lower cost, higher benefit property insurance coverage.

Based on the structure of the statute, every available authority (including Defendants' own expert) and the policy considerations underlying separate requirements for property insurance and the overall purpose of TILA, the Court concludes that § 1605 requires creditors to either (1) disclose the specific cost of property insurance prior to sale, whether the property insurance is sold as part of a package, or (2) include the premium in the finance charge.[13] There is no dispute that such a disclosure was

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nothing.

[13] There is no need to decide here whether property insurance may be sold as a package with other types of insurance. The provision governing insurance concerns disclosure: if the creditor chooses to package property insurance with other types of insurance, the cost of the property insurance must be disclosed in addition to the total package cost. While no case has held that disclosing both the individual cost and the package cost violates TILA, Sears contends that such a disclosure "has the capacity to mislead or confuse a potential borrower." Def. Reply Brief at 24 (quoting Weaver v. General Finance Corp., 528 F.2d 589, 590 (5th Cir. 1976)). Only one case has addressed disclosure of the separate costs of individual insurance versus the total cost of an insurance package. See Doggett v. Ritter

not made -- much less that it was "clear and specific" -- except for those consumers who purchased in Texas, Virginia and Oregon,[14] as well as Colorado where this property insurance is not available. Accordingly, Defendants violated § 1605(c) as a matter of law by failing to provide a clear and specific statement in writing setting forth the cost of the insurance (except for SCPP sold to consumers in Colorado, Oregon, Texas and Virginia).

B. CLEAR AND SPECIFIC STATEMENT DISCLOSING THAT THE BORROWER MAY CHOOSE FROM WHOM TO PURCHASE PROPERTY INSURANCE

Plaintiff also alleges that Defendants violated the second requirement of § 1605(c) by failing to advise the class that they could purchase property insurance from someone other than Sears. In response, Defendants contend that the magic word "optional" conveys that the consumer is free to purchase property insurance from anyone.

The second prerequisite of § 1605 for exclusion of the premium from the finance charge mandates that the creditor furnish a "clear and specific statement" that the borrower may choose the provider from whom to obtain property insurance. 15 U.S.C. § 1605(c); see Regulation Z, 12 C.F.R. § 226.4(d)(2)(i) (requiring disclosure of

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Finance Co., 528 F.2d 860 (4th Cir. 1975). In Doggett, the Fourth Circuit concluded that separately stated insurance premiums for insurance not totaled on the disclosure statement were not misleading when "addition of the two [premiums] was not difficult." Id. at 863. No authority suggests that disclosing both the total and individual costs would be misleading.

[14] The fact that Defendants made separate disclosures for certain states undermines any argument that they would be unable to provide such a cost breakdown.

the fact that "insurance coverage may be obtained from a person of the consumer's choice"). Even when the term and cost of the insurance is clearly disclosed, the lender must still disclose that the insurance may be obtained from a provider selected by the consumer. In re Wright, 133 B.R. 704, 709 (E.D. Pa. 1991) (concluding that only failing to meet the second condition still clearly violated § 1605(c) by excluding the premium in the finance charge). Thus, even assuming the cost was clearly disclosed, Defendants must have made a clear and specific disclosure advising the class that they could purchase the property insurance from another provider.

The former Fifth Circuit provided guidance as to what constitutes a clear and specific statement in this context. Burton v. G.A.C. Finance Co., 525 F.2d 961 (5th Cir. 1976). In Burton, the loan documentation disclosed as follows:

> Where insurance against loss of or damage to property is written in connection with this loan, the cost of such insurance(s) may be obtained by borrower through any person of his choice, however, the lender reserves the right to refuse for reasonable cause to accept an insurer offered by the customer.

Id. at 963. The Fifth Circuit determined that "at best ... this statement was unclear" because it only advised that he could discover the cost of the insurance from a person of his choice, not that he had the right to purchase insurance from a provider of his choice. Id. Thus, the Burton court advises that the disclosure is clear only if it advises he consumer of her right to purchase insurance from someone other than the creditor.

Defendants argue that a <u>one-word</u> disclosure, the word "optional," sufficiently informs consumers that the insurance may be purchased from the provider of their choice. Defendants' own arguments belie this contention. With respect to the § 1605(b) disclosures, Defendants maintain that "optional" conveys the voluntary nature of the transaction - that they may freely choose this insurance or not. Here, Defendants maintain that "optional" conveys choice of the provider of that insurance. Without a question, choice is inherent in the meaning of the word optional, but the real question is choice of what? At best, this statement is unclear:[15] The single word "optional" may disclose EITHER that (1) consumers are not required to purchase credit insurance,[16] but if they choose to do so, they must purchase from the creditor OR that (2) consumers may choose from whom they obtain credit insurance, but they must have credit property insurance. The use

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[15] Although Defendants' cite to the understanding of the word "optional" by the class representative, Loretta Fabricant, her understanding is of no consequence as these disclosures are evaluated by an objective standard. <u>Smith v. Chapman</u>, 614 F.2d 968, 971-72 (5th Cir. 1980). It is simply unnecessary for the plaintiff to show that she was actually deceived in order for there to be a violation. <u>McGowan v. King</u>, 569 F.2d 845, 849 (5th Cir. 1978).

[16] Defendants, particularly Defendants' expert, attempt to draw a distinction between "optional" and "required" property insurance. Unlike credit life, accident or health insurance, however, the exclusion of property insurance from the finance charge under § 1605(c) does not depend on whether is "not required" or "not a factor in the approval ... of the extension of credit." As the disclosures do not hinge on the voluntary nature of the insurance, an argument resting on such a distinction is unpersuasive.

of the one word "optional" is simply ambiguous as to the nature of the choice. Accordingly, Sears failed to provide a clear statement about the consumer's choice of property insurance providers.

Section 1605(c) does not merely require that the statement be clear; the statute also requires that the statement be "specific." 15 U.S.C. § 1605(c). Even accepting Defendants' argument that the inherent nature of choice in optional is sufficiently clear, the statement must also be "specific." The ordinary definition of specific is "precisely formulated or restricted; definite; explicit; of an exact or particular nature ... precise; tending to specify." Black's Law Dictionary 1254 (5th ed. 1990). To be specific, the disclosure must definitely, explicitly and precisely specify the nature of the choice -- namely that the consumer has a choice of property insurance providers. E.g. Dixon v. S&S Loan Service of Waycross, Inc., 754 F. Supp. 1567, 1571 (S.D. Ga. 1990) (finding disclosure "You may furnish this required insurance through anyone you choose, or you may provide it through an existing policy" to be sufficiently clear). Defendants' use of a single word is hardly specific: it does not mention choice of provider nor does it mention property insurance. Accordingly, Defendants Sears failed to provide a clear specific statement in writing that the credit applicant had a choice of insurance providers.

C. GOOD FAITH COMPLIANCE WITH REGULATION Z AS TO COUNT II

TILA exempts creditors from liability for "any act done or

omitted in good faith in conformity with any rule, regulation, or interpretation of the [Federal Reserve] Board." 15 U.S.C. § 1640(f). The purpose of this provision is "to relieve the creditor of the burden of choosing 'between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act.'" Ford Motor Co. v. Milhollin, 444 U.S. 555, 567 (1980) (quoting in part S. Rep. No. 93-278, 93rd Cong., 1st Sess. 13 (1973)).

Defendants must point to specific regulations or interpretations that support its position. Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1287 (7th Cir. 1980). Defendants may not rest on a conclusory allegation that they acted in conformity with Board interpretations. Id. at 1287. Again, Defendants state only that "Sears relied on Regulation Z, 12 C.F.R. § 224" without any further elucidation as to the nature of their reliance. This does not satisfy the requirement of § 1640(f).

Section 1640(f) does not protect a creditor who fails to conform with a regulation through an honest, good faith mistake. Hendley v. Cameron-Brown, 840 F.2d 825, 834 (11th Cir. 1988). In other words, a creditor's mistaken interpretation, even if honest, reasonable and in good faith, is not protected. Id. Here, Defendants failed to disclose the cost of the property insurance they sold. Nothing in § 226.4 suggests that the cost may not be disclosed if it is included as a package. In fact, every available authority suggests that the cost of property insurance must be

stated separately from that of life and disability insurance. Similarly, the regulation upon which Defendants rely requires disclosure that "the insurance coverage may be obtained from a person of the consumer's choice." 12 C.F.R. § 226.4(d)(2)(i). A single ambiguous adjective indicating "choice" does not indicate reliance on or conformity with § 226.4. Accordingly, § 1640(f) does not shield Defendants from liability on Count II.

III. CLASS REPRESENTATIVE FABRICANT'S CLAIM FOR ACTUAL DAMAGES

Defendants seek summary judgment on Plaintiff Fabricant's individual claim for actual damages. In Turner v. Beneficial, 242 F.3d 1023 (11th Cir. 2001), the en banc Eleventh Circuit held that reliance is a necessary element for actual damages. Id. at 1027. The Turner court, however, did not explain what is necessary to prove damages based on detrimental reliance. See id. Defendants suggest that reliance in TILA requires a plaintiff to show that (1) she read the deficient disclosure and (2) she was prevented from obtaining better credit terms elsewhere. Def. Brief in Support of Def. Motion for Summary Judgment 24-25 (quoting Adiel v. Chase Fed. Sav. & Loan Ass'n, 630 F. Supp. 131, 133 (S.D. Fla. 1986)).

A necessary ingredient of reliance is that a plaintiff has knowledge of, or at least read, the representation on which she relied.[17] Plaintiff Fabricant has testified that she "certainly did

[17] Defendants cite Groth v. Rohr-Ville Motors, Inc., 1997 WL 630189 (N.D. Ill. 1997) for the proposition that a plaintiff must have also "understood the charges being disclosed." Id. at *4. Such a requirement is unnecessary in a case in which the main contention is misleading or insufficient disclosures. The entire

not read the back [of the application]." Fabricant Dep. at 183; Id. at 122 (testifying she "never turned over [the form]"). No evidence has been presented whether she read the front of the form. Count I concerns only disclosures on the front of the form. Count II involves disclosures made both on the front (the less than "clear and specific statement that consumers have a choice as to their insurance provider) and on the back (disclosures as to cost). Accordingly, summary judgment on actual damages with respect to Plaintiff Fabricant's claim must be denied at this time for Count I and granted in favor of Defendants for Count II as to disclosures made on the back of the form.

As to the second element, Defendants claim that no evidence has been presented that Plaintiffs would have obtained better credit terms. The real question is what must Plaintiffs show to prove that they were harmed by relying on Defendants misleading disclosures or omissions.

"Reliance is a *causa sine qua non*, a type of but for requirement:" had the borrower known the truth, she would not have acted. Currie v. Cayman Resources Corp., 835 F.2d 780, 785 (11th Cir. 1988). Outside the context of federal securities fraud cases,[18] courts have held that reliance or "but for" causation is

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theory is that consumers did not or would not understand the disclosures - that the disclosures were unclear.

[18] In the securities fraud context, a plaintiff must show that the defendant's fraudulent conduct not only caused plaintiff to enter the transaction, but also the loss in the value of the stock. Id.

sufficient to demonstrate proximate cause of a loss resulting from a misrepresentation. Robert L. Dunn, Recovery of Damages for Fraud § 1.2, at 10-11 (1995); e.g. Greycas, Inc. v. Proud, 826 F.2d 1560, 1565 (7th Cir. 1987) (finding "no serious doubt about the existence of a causal relationship between the misrepresentation and [the issuance of] the loan" when loan transaction would not have occurred but for the misrepresentation). The central allegations here concern insufficient disclosures as to the voluntary nature of the insurance and as to consumers' ability to purchase the insurance from other providers. When the central contention is that "but for" the misrepresentations, or as here the omissions, the transaction would never have occurred, a plaintiff properly demonstrates reliance.

The Restatement likewise recognizes that in certain situations a plaintiff may be "left with something acquired under the transaction which, because of the matter misrepresented, [s]he does not want and cannot use." Restatement (Second) Torts § 549 comment g (1977). This is true "[a]lthough the thing which the plaintiff has received under the transaction with the defendant may have substantial value and may even be sold to others, it may, because of the matter represented, be entirely useless to the plaintiff for [her] own purposes." Id. at § 549 comment j. The proper remedy in such a case is restore plaintiff to her original position. Id.

In this case, a plaintiff may properly demonstrate reliance in at least one of several ways: (1) by showing that she would not

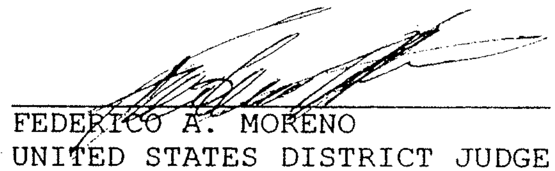
have purchased the insurance at all if the Defendants had disclosed that the purchase of insurance was not a factor in the decision to extend credit or (2) by showing that she had existing property insurance coverage and if Defendants had disclosed that she had a choice of providers, she would not have purchased the duplicate property insurance coverage or (3) by showing that she would have obtained cheaper or better property insurance if the Defendants had disclosed that she had a choice of insurance providers or (4) would have obtained cheaper insurance or no insurance at all if Defendants had disclosed the separate cost of property insurance. A plaintiff who testifies that she would not have purchased insurance had the proper disclosures been made is entitled to the difference between what she paid in premiums and what she received in benefits.[19] For a plaintiff who testifies that she would have purchased insurance elsewhere, she is entitled to a difference between what she actually paid and what she would have paid for comparable insurance coverage.

This case has been certified as a class action to resolve only liability as to actual damages. With respect to actual damages, this case proceeds essentially on a bifurcated basis. The proper time for any Plaintiff to establish proof of actual damages will be after this Court resolves all questions of liability. Defendants here have not demonstrated that either Plaintiff Fabricant or other

[19] Those purchasers who received benefits in excess of premiums are not members of the class.

relate to disclosures on the back of the insurance application form that Fabricant concedes she did not read, but Sears is not entitled to summary judgment as to Fabricant's claims for actual damages in their entirety because it has not demonstrated that she will be unable to prove that she relied on Sears' other misleading disclosures and omissions.

DONE and ORDERED, in Chambers, Miami, Florida, this 5th day of March, 2002.



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UNITED STATES DISTRICT JUDGE

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