In the

Supreme Court of the United States

LEILA MOURNING,	)	
Petitioner,	)	
v.	)	No. 71-829
FAMILY PUBLICATIONS SERVICE, INC.,	)	
Respondent.	)	

Washington, D. C.
November 9, 1972

Pages 1 thru 78

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LEILA MOURNING,

Petitioner,

v.

No. 71-829

FAMILY PUBLICATIONS SERVICE, INC.,

Respondent.

Washington, D. C.,

Thursday, November 9, 1972.

The above-entitled matter came on for argument at 10:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ERIC SCHNAPPER, ESQ., 10 Columbus Circle, Suite 2030, New York, New York, 10019; for the Petitioner.

A. RAYMOND RANDOLPH, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the United States as amicus curiae.

ROBERT S. RIFKIND, ESQ., One Chase Manhattan Plaza, New York, New York 10005; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 71-829, Mourning against Family Publications.

Mr. Schnapper, you may proceed whenever you're ready.

ORAL ARGUMENT OF ERIC SCHNAPPER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court:

This is the first case to reach this Court arising out of one of the most important federal statutes for the protection of consumers, the Truth in Lending Act of 1968. That statute was enacted to inform consumers about the cost of credit and about the other terms of credit transactions. Congress was particularly concerned to aid consumers like the plaintiff in this case, a 75-year-old widow living on a government pension of $82.50 a month, who can ill afford high finance charges or excessive financial commitments.

Defendant admits that it failed to make several disclosures required by the regulations of the Federal Reserve Board, but claims that those regulations are invalid.

The facts of the case are as follows: On August 19, 1969, following a telephone solicitation, Mrs. Mourning entered into a contract with the defendant, Family Publications Service, for the purchase of four magazines. The contract is set out on pages 6 and 7 of the printed Appendix.

Under the terms of the contract, Mrs. Mourning was to receive Life, Holiday, Ladies Home Journal, and Travel & Camera for a period of five years.

QUESTION: Now, if you could tell me, counsel -- of course I'm not sure if I've spelled it out accurately: what would be the price of each of these if you just subscribed by mail in the ordinary course?

MR. SCHNAPPER: There's nothing in the record to indicate what the price would have been.

QUESTION: Don't you think that's relevant to the case?

MR. SCHNAPPER: Under the terms of the regulation, the statute, it's not. Whether or not she was given a good price is ultimately something that she, under our economics, assume, ought to have been able to determine for herself. One of the problems that arises out of the failure of the defendant to disclose the total price of the goods was that even if she had been aware of the terms offered by the publishers directly, she had no way of making that comparison directly.

QUESTION: Well, if it's an inflated price on a package deal, in order to conceal the carrying charge, isn't that pretty important?

MR. SCHNAPPER: Well, absent the regulations, it would be necessary to inquire about the general practices of the defendant, as to whether or not it was inflating its prices. The whole purpose of the regulation was to make that very detailed and complicated factual inquiry unnecessary, both to avoid deterring private action such as this one and to make sure that the statute itself was administerable.

Otherwise, the Federal Reserve Board and the other enforcement agencies would be in the business of trying to compare the prices for other magazines or bicycles or television sets with the prices charged in contracts like this for all the consumer contracts that were signed every day in the country.

QUESTION: In the classical usury case, isn't it ordinarily an important factor of evidence to show that a particular automobile had a listed case, a cash price, and a time price: and that's the way you prove your concealed usury.

MR. SCHNAPPER: That -- that --

QUESTION: But you say that under these regulations, that that becomes irrelevant, and now --

MR. SCHNAPPER: That's correct. Under the regulations, that problem is not one that has to be dealt with by the Board or by plaintiff seeking to prove that the information should have been disclosed.

Mrs. Mourning paid $3.95 down, and agreed to pay

$3.95 a year (sic) for two and a half years. The contract did not disclose the cost of the magazines was $122.45, nor did it disclose that the amount due after the down payment was $118.50.

In addition, the contract did not disclose what has been, really, for the first time in this Court by the defendant, that if Mrs. Mourning had paid cash for the magazines, she might well have paid less to the defendant itself.

All of this information, withheld from Mrs. Mourning by the defendant, is required to be disclosed to consumers in credit transactions covered by the Truth in Lending Act.

Mrs. Mourning refused to make any payments under the contract after the initial down payment.

On December 16th, 1969, defendant sent Mrs. Mourning the first of at least eight dunning letters, all of which are set out on pages 14 to 21 of the printed Appendix. The first letter stated that FPS had had Mrs. Mourning's subscriptions entered for the entire five-year period, and her contract could not be cancelled.

On December 28th of that year, FPS sent Mrs. Mourning a second letter, stating that FPS had paid for the magazines in advance and that Mrs. Mourning had incurred an obligation to repay FPS.

The letter also stated: "This is a credit account, and as such must be repaid by you on a monthly basis, much the same as if you had purchased any other type of monthly -- any other type of merchandise on a monthly budget plan."

On April 23rd, 1970, Mrs. Mourning brought this action in the District Court for the Southern District of Florida, suing to enforce the Truth in Lending Act. Federal jurisdiction to enforce the statute is expressly conferred upon the district courts by Section 1640 of the statute.

Mrs. Mourning, in her amended complaint, alleged that the contract with FPS was a credit transaction covered by the Truth in Lending Act, and that the disclosures required by the Act had not been made.

Plaintiff sought statutory damage of $100 plus legal fees and costs.

FPS, in its answer, asserted three defenses relevant here: FPS urged, first, that none of the disclosure provisions of the Act apply to this transaction, because the contract did not involve a finance charge; as a second defense, FPS asserted that the Act did not apply to the contract because FPS had not extended credit to Mrs. Mourning.

Finally, FPS maintained that even if the contract were covered by the Act, neither Mrs. Mourning nor any other consumer could enforce the statute because FPS had not imposed a finance charge under this type of contract.

FPS concedes, however, that it did not make the disclosures which plaintiff claims are legally required.

On October 30th, 1970, the district court granted Mrs. Mourning's motion for summary judgment. That court ruled that the transaction was subject to the Truth in Lending disclosure requirements, because the purchase price was payable in more than four installments.

The district court upheld and applied the four-installment rule, promulgated by the Federal Reserve Board, which requires that disclosures be made to consumers in any transaction involving more than four installments, without regard to whether or not a finance charge is proven to have been imposed.

The district court also held that the instant contract involved the extension of credit by FPS to Mrs. Mourning.

Judgment was entered on behalf of the plaintiff in the amount of $100 plus costs and attorney fees.

The Court of Appeals reversed on appeal and ordered the complaint dismissed.

In an opinion by Judge Coleman, the Court of Appeals agreed that the four-installment rule required FPS to make the disclosures withheld in this case. But the Court of Appeals held that that rule was invalid, because it was not within the Federal Reserve Board's power to promulgate regulations under the Act.

The Court of Appeals also held that the four-installment rule was unconstitutional because it constituted a conclusive presumption that all transactions with more than four installments involved a hidden finance charge.

The Court of Appeals did not rule on the two additional defenses raised by FPS in the district court.

A writ of certiorari was sought in this Court to review the decision of the Fifth Circuit, invalidating the four-installment rule.

FPS did not urge in the proceedings below that the four-installment rule was unconstitutional, and expressly does not rely on that ground before this Court.

FPS does argue, however, that the four-installment regulation exceeded the Board's rulemaking authority under the Truth in Lending Act.

The statute involved was enacted in 1968, with the express purpose of giving to consumers a meaningful disclosure of credit terms, so that the consumer would be able to compare more readily the various credit terms available to him, and to avoid the uninformed use of credit.

The statute arose out of seven years of hearings and committee findings that consumers were generally unaware of the terms of their loans, contracts, and other credit transactions.

The legislative history revealed that creditors generally withheld vital information, and that the value of what was disclosed was often impaired by widely disparate terminology and accounting methods.

In addition to the expressly stated purpose quoted, and contained in Section 1601 of the Act, Section 1604 of the statute specifically authorized the Federal Reserve Board to promulgate whatever regulations it might deem necessary or proper to effectuate the purposes of the statute.

In addition to delegating this general regulatory responsibility to the Board, Congress also enacted a number of specific provisions requiring several disclosures under various circumstances. These disclosures include purchase price of goods, the amount to be paid after the down payment, the finance charge involved, and the annual interest rate of finance charge, expressed as a percentage.

The statute and regulations also require that standardized terminology be used to facilitate comparison of various contracts.

Some of the problems as to how the purpose of meaningful disclosure would be achieved were dealt with in detail by Congress in the substantive provisions; other problems were left untreated, for resolution by the Board itself.

Congress provided the enforcement of the statute and regulations would be left primarily to private parties suing, such as Mrs. Mourning.

And also mandated enforcement of the statute and regulations by various federal agencies.

The fourt-installment rule, whose validity is at issue, is contained in 12 CFR, Section 226.2(k), and is set out on page 4 of petitioner's brief.

The effect of the rule is to require that disclosures be made to consumers in any credit transactions payable in more than four installments, regardless of whether the creditor admits to imposing a finance charge in that transaction or others.

In the instant case, the four-installment rule would have required a minimum that FPS disclose to Mrs. Mourning the total price of the magazines and the amount which she still owed FPS after he initial down payment.

QUESTION: The total was a hundred and twenty-two --

MR. SCHNAPPER: $122.45.

Whether the Federal Reserve Board's four-installment rule is valid turns upon whether it was within the Board's express authority to promulgate regulations as set out in the Truth in Lending Act itself.

The authority of the Board is defined in Section 1604 of the statute, reproduced on pages 3 and 4 of petitioner's brief.

That section provides: "The Board shall prescribe regulations to carry out the purposes of this subchapter.

These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments or exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith."

The four-installment rule is necessary, first, to prevent evasion of the substantive requirement contained in Section 1638 of the Act that creditors disclose to consumers the finance charge and annual interest rate imposed in any credit transaction.

In the normal credit sale with which we're familiar, the merchant imposes one charge for the purpose of goods for cash, and imposes an additional separate charge for the privilege of paying for the goods over an extended period of time.

Congress was particularly concerned, however, that the amount of this finance charge might be hidden in the price of the goods themselves. The Board concluded that such a danger was very real. Their concern was, for example, that instead of charging $100 for a television set, and $20 for the privilege of paying for it over two years, a merchant would charg $120 for the television set and inform the consumer that the credit was free.

Such a merchant would naturally assert that the annual interest rate involved was zero. This would not merely leave consumers uninformed, but would create a false illusion that the merchant's credit was significantly less expensive than the credit of lenders such as banks, which have no prices in which they can bury their finance charges.

The congressional hearings indicated that baring finance charges and prices was a problem even before the statute was enacted, and a report to Congress by the Federal Trade Commission indicated that this practice of hiding finance charges and prices was particularly common in urban ghettoes.

Rather than permit retailers to thus render the Truth in Lending Act requirement of disclosure of finance changes a dead letter, the Federal Reserve Board promulgated the four-installment rule. The key effect of this rule is to require a creditor who may claim he imposes no finance charges to nonetheless disclose at the very least the total price of the goods involved in any transaction payable in more than four installments.

The Board apparently reasoned, as had supporters of the statute while it was being considered by the Congress, that if consumers were at least told the total price of an item, they could compare that price with other prices and determine if a merchant were charging more than the normal amount. In this case, for example, if Mrs. Mourning had been told that the total price of the magazines was $122.45, she --

QUESTION: Well, in light of that, I'm even more puzzled by why the record does not contain the figures on the publisher's subscription price for each of these magazines, which you say is irrelevant under the regulations.

MR. SCHNAPPER: That's correct.

I believe that the Board concluded --

QUESTION: But you just emphasized that a merchant having a hundred-dollar price tag on something and $120 time price was the kind of an evil the statute was trying to get at.

MR. SCHNAPPER: The regulation is designed not merely to facilitate or encourage that kind of case-by-case inquiry, as to whether there was a hidden finance charge. The congressional hearings indicated that Congress felt that it was --

QUESTION: Yes, I understand the thrust of the legislation all right, but when you get away from the legislation and get down to a specific case under it, then I should think this factor would be of some interest.

MR. SCHNAPPER: If the statute stood alone, an inquiry would be necessary as to whether or not this particular creditor regularly extended credit for which a finance charge was required. That would be the case because Section 1602 of the Act, defining "creditor", limits the substantive provisions of the Act to creditors who extend credit for which a finance charge is regularly imposed.

However, --

QUESTION: Would the regulation apply to a lease of real estate, where you reserve a total amount of rent for a period of time, like two years, payable in installments over the two years -- it's certainly beyond four months.

MR. SCHNAPPER: Only under one circumstance, the statute provides --

QUESTION: Well, why not under all circumstances?

MR. SCHNAPPER: Because --

QUESTION: Literally, the regulation reads right on it, doesn't it?

MR. SCHNAPPER: No, the regulation requires there be an extension of credit. Now, the statute provides that certain leases will be treated as credit sales, namely, leases which provide that at the end of the lease the goods or --

QUESTION: So you think maybe we have the wrong issue up here? Is that it?

The only issue here is the validity of the regulation?

MR. SCHNAPPER: That's correct.

QUESTION: Not that there was credit involved?

MR. SCHNAPPER: Well, that's an issue that's been raised in addition, but the problem you raise is --

QUESTION: Is that issue here? Whether there's credit involved.

MR. SCHNAPPER: That issue is here.

It is our position that --

QUESTION: Did you bring it here, or did somebody else?

MR. SCHNAPPER: The defendant brought it here.

QUESTION: On a cross-petition, or what?

MR. SCHNAPPER: No, they've offered it as an alternative ground for affirming the Court of Appeals.

QUESTION: I see.

MR. SCHNAPPER: It is our position that if the -- if this Court rules that the four-installment rule is invalid, and feels that their argument merits detailed consideration, that the case should be remanded to the Fifth Circuit, because the Fifth Circuit didn't reach the question of whether credit was present in this particular case.

QUESTION: But the facts are all stipulated, aren't there, there's really nothing for a fact-finder, with respect to whether or not this is an extension of credit?

MR. SCHNAPPER: That's essentially correct. There are some conflicts between the answer and the evidence as presented by the plaintiff, but there was no substantive evidence presented by the defendant, for example, to show that the defendant hadn't in fact prepaid the publishers, to some extent, for these magazines.

QUESTION: Yes.

MR. SCHNAPPER: And other facts which, as we've set forth in our reply brief, are relevant to a clear showing that credit was extended in this case.

But to get back very briefly to the question that you raised, a normal lease, for example, for an apartment would not be covered by the statute because at the end of the lease the apartment would revert to the owner of the building involved.

QUESTION: There wouldn't be any credit involved.

MR. SCHNAPPER: There wouldn't be any --

QUESTION: You're just paying monthly for what you get, I guess.

MR. SCHNAPPER: That's correct. But, more importantly the statute distinguishes those kinds of leases from a lease in which at the end of the -- at the end of the lease period, the property goes over to the tenant or to the person who is renting the material. If, for example, you rent a television for ten dollars a week, and at the end of two years you can buy it for a nickel, that's treated as a sale under the Act.

QUESTION: Well, would that -- but not as an extension of credit, particularly.

MR. SCHNAPPER: That would be a separate question to be resolved. But in the case of the television set, of course, it would be clear that the purported tenant or lessee of the goods in fact had possession from the beginning.

In this case, as the evidence shows, the facts are not such as I think you may have in mind, a problem where the goods are only delivered after they're paid for. The contract, in fact, involved three parties: Mrs. Mourning, who bought the goods; the Family Publication Service; and the publishers, which was a different, we don't know exactly how many publishers there are involved.

Now, the letter, the dunning letters which were sent to Mrs. Mourning show that, first, there were these additional parties and FPS was not in fact the seller or publisher of the magazines.

Secondly, that as soon as the -- roughly, right after the contract was signed, FPS turned around and contracted with the publishers in advance to deliver all the magazines to Mrs. Mourning over the requisite period.

Third, FPS stated in these letters, and the evidence wasn't contradicted below, that it had prepaid to some extent the cost of the magainzes, and they told Mrs. Mourning on several occasions that she owed them money because they couldn't get a refund from the publishers.

So that it's not a normal, it's not the simple case of a person selling a television set. We, in fact, have three parties. But, as FPS stated in one of the letters involved, it acted really as a financier of this whole operation.

QUESTION: She made an additional -- a down payment of, what, $3.95, didn't she?

MR. SCHNAPPER: Yes.

QUESTION: So, to that extent, she was the creditor, wasn't she?

MR. SCHNAPPER: Well, the --

QUESTION: At least to that extent. I mean, then, that the whole deal was that she should be the one who extended the credit, she paid in advance of getting anything, and she would always -- under the contract, she would have always paid more than she got.

MR. SCHNAPPER: But she would always, she would --

QUESTION: Both under the statute and by ordinary economic, in dictionary definitional terms, she was the one who was the creditor, wasn't she?

MR. SCHNAPPER: Well, we believe not, because under the realities of the transaction, while she paid for magazines before she got them, she paid for them after FPS had paid out money to the publishers, so that she had a debt to FPS to cover the money that they had laid out. And that --

QUESTION: So she couldn't have gotten the magazines from the publisher except by paying the full subscription price in advance?

MR. SCHNAPPER: That's also correct. That's the normal practice in the industry.

QUESTION : And the middle man furnished the money to her and loaned it -- and you say loaned it to her, really?

MR. SCHNAPPER: Well, I think our economic analysis of it would be essentially that they put up the money for her to buy the subscription and she paid them back.

Now, the record doesn't indicate --

QUESTION: With the finance charge, you think?

MR. SCHNAPPER: What?

QUESTION: With the finance charge, you think?

MR. SCHNAPPER: Well, we think --

QUESTION: It doesn't make any difference.

MR. SCHNAPPER: We say it doesn't make any difference under the regulation.

QUESTION: Right.

MR. SCHNAPPER: That's correct.

The four-installment rule is also necessary to prevent evasion of the other disclosure requirements of the statute. In addition to requiring disclosure of finance charges, the statute requires the disclosure of a host of other credit terms: the amount financed, the price of the goods, the time and number of payments.

If, however, a creditor asserts in his contract that he does not impose a finance charge, a serious question arises under the face of the statute, as to whether or not the creditor need disclose anything to consumers, or whether, by having first hidden his finance charge, in evading the requirement that that be disclosed, he can then turn around and evade all the other requirements of the statute and claim a complete exemption.

The four-installment rule precludes this type of circumvention as well. The regulation provides that the usual disclosures must be made in any transaction involving finance charges, but also in any transaction in which more than four installments are involved.

The rule thus not only prevents circumvention of the Act in this way, but it effectuates the expressly stated purpose of the Act to provide consumers with credit terms of their transactions.

Congress expressly delegated to the Federal Reserve Board the responsibility for deciding when there was a danger of evasion and for fashioning a remedy to be evolved to deal with that danger.

The Board's expertise in understanding the statute goes back to many years before its actual enactment, because the Board was intimately involved in the process of drafting the statute, through the congressional hearings.

After the draft regulations were proposed, and more than 1200 comments considered, and subsequent to consideration of them, the Federal Reserve Board promulgated the four-installment rule in its present form.

That rule has remained in effect, despite three years of experience, reflecting the Board's judgment that it is operative and effectuates the purposes for which it was designed.

The judgment and expertise of an agency such as the Federal Reserve Board, intimately involved with the framing of the statute and charged with the responsibility of setting its machinery in motion, and of making the parts work efficiently and smoothly while they are yet new and untried, is entitled to great deference.

At issue in this case is not an ancillary regulation of minor significance, but a rule which the Federal Reserve Board has found vital to preventing wholesale evasion of the Act. If the Federal Reserve Board's four-installment rule is invalidated, large numbers of creditors currently baring their finance charges will be able to refuse to disclose both their prices and all the other credit terms of their transactions.

The Board has further projected that the number of creditors thus hiding their finance charges will increase, as a result of the promulgation of the statute, and that the effect of the statute will thus be to decrease rather than increase the amount of information which consumers get.

The legislative history of the statute indicates that the burden of this decrease in disclosure will fall particularly heavily upon the poor.

In sharp contrast to these consequences, creditors such as Family Publication Service will suffer no serious inconvenience if they're required to make disclosures and comply with the four-installment rule.

FPS, as most retailers, uses a printed form contract, with standardized terms therein. Inversely, all of the missing information and all of the missing standardized terminology in this case could have been included on that form when it was printed.

The only interest which FPS could have had in withholding the absent information from Mrs. Mourning was to lure her into making an uninformed decision, to sign a contract at issue. And it was precisely to prevent this kind of uninformed purchases that the Truth in Lending Act was enacted by Congress in the first place.

QUESTION: Mr. Schnapper, let me try to straighten myself out. I understand your position on the irrelevancy of proof of the existence of a finance charge. Am I correct on the facts that if this contract had been carried out from the start, according to its terms, Mrs. Mourning would always be ahead in the sense that she, at any point, would have paid more than she had received in return for that payment?

Because her payments were over 30 months, and the subscription was over 60; am I correct in that?

MR. SCHNAPPER: That's correct.

QUESTION: Is it possible to say, then, that FPS would have the use of that money throughout this period?

MR. SCHNAPPER: Apparently not. The letters sent to Mrs. Mourning indicated that FPS had in fact paid for the magazines to some extent in advance; one letter suggested they had fully invested in her contract, which suggests that they had paid for the thing completely.

The letters indicate at the very least that they had prepaid the publishers to some extent from their own funds, and that she owed them money to repay them, and the word "repay" is used in the letters, for expenditures they had already made.

Now, if, for example, she had dealt with a bank and borrowed $122 and paid it to the magazine company, it would still be the case that she was receiving magazines only after she had put out money to the bank.

But the fact of the matter is that that would clearly be a credit transaction, because the lender involved would have parted with value, not to her but to the magazine company, prior to receiving it back from her.

QUESTION: Well, what I'm trying to suggest is to ask whether there is a finance charge in FPS's use of her money. And I take it you say there isn't?

MR. SCHNAPPER: Well, it may be that in this case there is a finance charge. The argument that I would suggest wouldn't turn upon the fact that she was -- that they were using her money, but rather the fact that she was using theirs, hat essentially she was getting a subscription purchased for her by FPS, with FPS's money, and then being allowed to repay FPS for that advanced payment over a period of two and a half years.

QUESTION: Now, lastly, am I correct in my impression that there is some pending 1972 legislation on this subject?

MR. SCHNAPPER: Congress has adjourned; that particular bill died in committee.

QUESTION: What would that bill have done? I didn't find it mentioned in either brief, and I -- do you know what that would have permitted?

MR. SCHNAPPER: My understanding is that that particular statute would have put that -- that particular amendment to the statute would have put into the statute a rule substantially equivalent to the four-installment rule that's been promulgated by the Board.

QUESTION: Well, does the existence of that proposed legislation weaken your argument in any way?

MR. SCHNAPPER: No. A similar case arose under Jones v. Alfred Mayer Company several years ago in this Court, where not only had a Fair Housing Act been proposed in

Congress, but actually passed.

In that particular case, the Court was called upon to decide whether something similar to Fair Housing had been imposed by a statute almost a century old. The Court proceeded to reach that question, even though, as a practical matter, that particular problem had been resolved, that social problem had been resolved by Congress in other statutes.

In this case, of course, we have nothing here but the hope that someone will get up and propose that this particular statute will be passed by both Houses, and signed by the President. That particular Congress, though it was elected two days ago, hasn't even met yet. It would be utter speculation at this point to guess when it would happen.

QUESTION: Not an uncommon situation, where remedial legislation is in to eliminate the issue that is under litigation.

MR. SCHNAPPER: I think not. I think that reflects Congress is concerned with the fact that if the regulation is invalidated, the whole statute is threatened, and the whole statutory schema may be --

QUESTION: Let me get clear now on whether there was an extension of credit or not. As between your client and the intermediary, the other party, wasn't it found as a fact, in the district court, that there was an extension of credit as between those two parties, regardless of what the situation might be looked at as between Mrs. Mourning and the publisher?

MR. SCHNAPPER: That's correct. And the --

QUESTION: And the Court of Appeals did not disturb that finding?

MR. SCHNAPPER: It didn't reach it, one way or the other.

QUESTION: Well, it didn't disturb it.

MR. SCHNAPPER: That's true, too.

QUESTION: So that they reached the ultimate question of validity.

MR. SCHNAPPER: That's correct.

QUESTION: And left that factual finding undisturbed.

MR. SCHNAPPER: Yes.

QUESTION: Well, I think you were more accurate the first time. They didn't reach it. They didn't --

MR. SCHNAPPER: Well, I wasn't going to push my luck on that.

QUESTION: Right.

QUESTION: But there it is. The factual finding is still --

MR. SCHNAPPER: Yes, that's correct. It could only be to term it clearly erroneous, and it seems to me that there's adequate evidence to support it.

QUESTION: As I understand, you suggest that the analysis should be that if John Smith wants to subscribe to Life Magazine, and borrows $25 from a bank and prepays, to get a five-year subscription to Life Magazine, he's a debtor and the bank is a creditor, vis-a-vis that $25, even though he may be a creditor and the publisher of Life Magazine a debtor, vis-a-vis his prepayment of a five-year subscription?

MR. SCHNAPPER: Yes. That's essentially our analysis situation.

QUESTION: Assume that -- I think a related question, as soon as Mrs. Mourning signed that contract, she was a debtor to the extent of $118.50, wasn't she?

She had made a promise to pay $118.50 --

MR. SCHNAPPER: Yes, she had made that promise --

QUESTION: -- to someone else.

MR. SCHNAPPER: -- as soon as the --

QUESTION: So that made her a debtor --

MR. SCHNAPPER: Yes.

QUESTION: -- and the Family Publications a creditor certainly, did it not?

MR. SCHNAPPER: Yes, and that was reinforced by the economic circumstances, which followed it, the payment of money to the publisher.

QUESTION: Well, this is an exchange -- this is a typical, classical contract situation of one promise exchanged for another. Each one to be partially performed in the future.

MR. SCHNAPPER: Yes.

They tell me my time is up.

MR. CHIEF JUSTICE BURGER: Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,

FOR THE UNITED STATES AS AMICUS CURIAE

MR. RANDOLPH: Mr. Chief Justice, and may it please the Court:

First I'd like to answer Mr. Justice Blackmun's question about the pending legislation.

That is pointed out on page 6 of the government's brief in Footnote 8. What happened to the legislation was that it passed the Senate. The legislation essentially enacted as an amendment to the Act, the four-installment rule that's in issue in this case; the legislation did pass the Senate, but it was not reported out of the House Banking and Currency Committee in time before Congress adjourned. So the legislation has essentially died for this term.

The other question I'd like to address myself to: at the beginning is Mr. Chief Justice Burger's question with regard to evidence in the case as to what the publishers' charge for these magazine subscriptions would have been.

I take it that question is directed to determining whether in fact there's a buried finance charge in this transaction.

The proper comparison, Mr. Chief Justice, I would submit, would be not what the publishers charge but what Family Publications would have charged a cash customer, a person that was willing to pay the entire amount on line when they contracted for the magazines, as opposed to what they charge someone who would defer the payment over a longer period of time, such as Mrs. Mourning.

QUESTION: Well, might not both factors be an element?

MR. RANDOLPH: Well, it might be, but I think that if you can show, if one can show that a cash customer pays less than a time customer, there's direct legislative history to show that's considered as just simply another way of saying "We're charging you for something more, paying over time", which essentially is the finance charge.

In the district court an affidavit was submitted by the vice president of Family Publications Service. That affidavit read as follows: -- it's not in the Appendix. It said: There is no discount for paying it once and no charge for paying over 24 or 30 months. However, now, for the first time --

QUESTION: Is that because they're not in the business of selling things for cash but only for the purpose of --

MR. RANDOLPH: Well, that's what that affidavit would lead one to believe. However, in this Court for the first time, we find, on page 3 of Family Publications Service brief, in the second footnote, the admission that contrary to representations made below, cash customers do in fact get a discount.

The statement is made that cash customers only represent one percent of Family Publications' total customers; but that's not the relevant figure.

I've inquired as to exactly what this discount is, apparently that's not known. I've inquired as to exactly what percentage of cash customers get a discount, and that's not known.

QUESTION: Is that affidavit in our files now?

MR. RANDOLPH: Yes, it is, Mr. Chief Justice.

QUESTION: Does that really bear on the issue before us?

MR. RANDOLPH: Well, I think I can bring to light how that does bear on the issue, and I think it confirms Congress's judgment and the Board's judgment that whenever a credit is extended for any appreciable length of time, that the costs are incurred by the creditor;as an economic fact, he must incur costs. And those costs are contained as some component of its selling price, regardless of whether he differentiates it out to the consumer or not.

QUESTION: Well, I thought that the -- that that may go to the motivation of the Board in the rational --

MR. RANDOLPH: Yes, and I'd like to --

QUESTION: -- to the rationality of the Board. But I thought that whether in any particular case there was a hidden finance charge didn't have anything to do with the issue, that this was a general regulation.

MR. RANDOLPH: This regulation applies, regardless --

QUESTION: And that even if there were no hidden or finance charge here of any kind, unless --

MR. RANDOLPH: I would maintain --

QUESTION: -- the regulation is applicable, it required the disclosure of certain information. Isn't that right?

MR. RANDOLPH: That's right. But what I'm about to propose, Mr. Justice Stewart, is that theoretically a transaction without a finance charge as some component of the selling price is possible.

QUESTION: Yes.

MR. RANDOLPH: Practically, it wouldn't exist.

QUESTION: It's not very likely.

MR. RANDOLPH: No.

QUESTION: But you think what you're saying is very relevant to the validity of the regulation under the statute?

MR. RANDOLPH: That's right. Because, let me first of all say that the provisions of the Act upon creditors, those who regularly extend finance charges, now, they're the people that have to disclose under the Act. There would be no problem at all in applying this provision if every creditor simply said, My finance charge is this; my selling price is this. No difficulty.

But there are some creditors that have never, perhaps never differentiated the cost of credit from the selling price of the goods. The apparent reason being that they sold primarily all their goods on credit, and there would be no reason for them, without a disclosure requirement, to differentiate it. They would say, My price is $120, payable in ten monthly installments, for one year -- 12 months, or ten monthly installments over a period of time. And that would be all they tell the consumer.

The question is: What is going to be done about those transactions?

Well, the assumption throughout the congressional hearings, in seven years of congressional hearings is that whenever a creditor said or a retailer said there's no charge for credit, that simply meant that somewhere in that selling price a component of the selling price was the cost of credit to the retailer.

Now, this assumption is based on a very simple economic fact. Whenever the seller extends credit for any appreciable length of time he incurs costs. Now, we maintain that this case is no exception.

FPS sent letters to Mrs. Mourning. That cost them money they would not have had to incur if they operated on a cash business. They took legal action against those who defaulted. As a matter of fact, on page 19, FPS tells Mrs. Mourning they don't want to do that to her because it's very expensive. That's another cost that they would not have icurred if they operated on a cash basis.

They ran collection offices in Florida for people who were late in their payments. This is revealed on page 25 and 27 of the Appendix.

And FPS itself told Mrs. Mourning that it paid for this merchandise before it received payment from Mrs. Mourning.

We don't know whether FPS ran credit checks or had a bad-debt reserve or anything of that sort, or whether it had to borrow money to pay for these magazine subscriptions. But we do know that in every transaction for any appreciable length of time, costs of credit are going to be incurred, that would not be incurred if they ran a cash business.

The problem that faced the Federal Reserve Board is what to do about this. Their solution is the four-installment rule.

Now, before the ink was even dry on this bill, the Federal Reserve Board began the task of setting the Act in motion. As my co-counsel has explained, the Federal Reserve Board was involved in this legislation from the very beginning.

It testified many times before Congress. It took an active part in the consideration of the legislation.

Congress, in fact, delayed the effective date of the Act for one year in order to allow the Board time to set up regulations to implement it. Or, in the words of the House report, on page 19, to formulate, quote, subsequent regulations so necessary for effective enforcement of the Act.

What did the Board do? The first thing it did was it set up a task force drawn from the staffs of various Federal Reserve banks around the country and from its own staff. It drew upon retail credit experts to look at these problems. It drew upon vice presidents of various Federal Reserve banks. The actuary of the Treasury was drawn in.

It set up an advisory panel of twenty members, representing retailer, lender, and consumer groups from every section of the country and headed by the Dean of the Berkeley School of Business.

And after they studied this problem, as I said, their solution was the four-installment rule, but the Board didn't stop there.

On page 19 of our brief, in Footnote 22, there's an explanation of what the four-installment rule is all about and why the Board did it. This is testimony from Vice Chairman of the Federal Reserve Board Robertson. It's before the regulations took effect, and he's testifying before the very committee of Congress that enacted the Truth in Lending Act, and explaining exactly what the Board did before the regulations take effect.

In that testimony, what I've just described is, as far as the promulgating process is concerned, is confirmed.

The other thing the Board did was undertake a massive campaign to inform creditors of exactly what their obligations would be and what the Board called Z day, which is when Regulation Z took effect, in July of 1969. It distributed a million and a half of these pamphlets, which describe in detail exactly every creditor's obligation. They were distributed to every known person or firm extending consumer credit in the country. The Board also ran seminars in the Federal Reserver Bank and other informational services.

QUESTION: If you're right in your position, exactly what would have had to have been disclosed here? I can't find that; I saw it in reading the briefs, but I can't --

MR. RANDOLPH: Yes.

QUESTION: The total price and the -- what was it?

MR. RANDOLPH: Let me run down what was --

QUESTION: All right.

MR. RANDOLPH: Let's take the usual case, and this is one where there's no finance charge differentiated in the cost of the price.

QUESTION: Right.

MR. RANDOLPH: And the four-installment rule was watched. They would have had to say the down payment. Now, the FPS contract is set out on pages 6 and 7 of the Appendix. It will be helpful to follow that.

They did that. They said "Pay only $3.95 down." The next thing they would have to have done -- to do, is to give the number, amount, and due dates of the payments. Now we think they substantially complied with that. They said "$3.95 each month for 30 months".

Of course, if the Truth in Lending Act doesn't apply, the next contract FPS writes could say $3.95 a month for two and a half years. There'd be nothing to prevent them from doing that. But they did that in this case.

The next thing they would have had to tell Mrs. Mourning is the total payments. They did not disclose this.

QUESTION: That is, 31 times 3.95.

MR. RANDOLPH: No, it would be 30 times 3.95.

QUESTION: Well, no, the total is the down payment of 3.95 plus 30 more times 3.95.

MR. RANDOLPH: But payments she would have to make after the salesman walked out the door.

QUESTION: All right. They would have had to do that multiplication, 30 times 3.95.

MR. RANDOLPH: Yes.

It's interesting, I think, Mr. Justice, that on page 17 is the first time the Family Publications did that multiplication for Mrs. Mourning. You'll notice they say, "The time is here NOW! We cannot wait any longer for your payment. We give you 48 hours to forward the entire balance of $118.50."

They had the courtesy to multiply it for her there.

The next thing is the cash price. Now, this is interesting. FPS never discloses, there is no indication of what their cash price is here. But now we know, as I stated earlier in my argument, that there was a cash price, but we don't know how much it was, and neither did Mrs. Mourning.

QUESTION: We now know that it was lower?

MR. RANDOLPH: It was lower. We know that. I think that I might digress here for a moment.

This is one of the main points of the four-installment rule, too, in addition to preventing circumvention and evasion. It gives creditors an easy rule to follow, in no charge for credit transactions. They know that they don't have to await a consumer's action against them to prove exactly, and calculate what their finance charge was, if the consumer could ever prove that. But it gives them a clear rule to follow. And it may be that FPS never thought they charged the finance charge. I remember during the hearings that Sears, Roebuck Company came in before Senator Douglas, who was the principal sponsor, claiming "We charge no finance charges." It took Senator Douglas five pages of testimony and a computer to prove to them they in fact did; after which they admitted it.

So it's not all a purpose for evasion, it's misunderstanding, too.

Okay. So we don't know the finance charge.

The next thing is the amount financed, which would be the cash price minus the down payment. Of course we don't know this, either, because we don't know what, in fact, the cash price is now.

And the final thing would be the deferred payment price which would be everything, the finance charge, the cash price, the down payment, and all additional charges. In this case it would come to $122.45.

None of this was told to Mrs. Mourning. Throughout this litigation --

QUESTION: Except that it's 31 times 3.95, is that it?

MR. RANDOLPH: That's right.

QUESTION: Just fourth-grade arithmetic. They would have had to put it in.

MR. RANDOLPH: Well, I think one of the major points of the Truth in Lending Act is that if you were a mathematician you might be able to get all the information by taking certain figures, juggling them around, that a creditor is required to disclose under the Act.

Two things. Everyone is not a mathematician. And, second, in the pressure of a sale, when the seller is emphasizing the merchandise, the amount each month, you can afford this; people may not be able to conduct themselves so that they would sit down with a pencil and realize their obligations.

Throughout this litigation, I think it's interesting that FPS has never said why don't they want to tell their customers this. I mean, it's not going to cost them very much money. This is a standard form contract. They could run them off by the thousands at very little expense by putting in a few more lines describing what I said.

It may be that they don't want their salesmen to go to people and say, How would you like to buy some magazines for $122.45? Particularly to a woman --

QUESTION: Isn't that in the legislative history, between the lines as well as on the surface, that this is an effort to protect people from their own folly, to a degree?

MR. RANDOLPH: That's exactly right, Mr. Chief Justice.

QUESTION: Their own inadvertence.

MR. RANDOLPH: To give them information, and if they want to make mistakes, at least they'll have the information before them to do that.

QUESTION: Now, these requirements you specify, where, in which part of the legislation are they? I can't find them here.

MR. RANDOLPH: I'm sorry; I'm not clear about what requirements?

QUESTION: Well, the ones you just, in going down this contract, on pages 6 and 7.

MR. RANDOLPH: Yes.

QUESTION: You said what they would have been required to add.

MR. RANDOLPH: Yes. Section 1638 of the Act, and the regulation is Section 226.8.

QUESTION: Is that in these papers somewhere?

MR. RANDOLPH: Page 13a of the Appendix, I've been told by my colleague.

QUESTION: What page is that? The one you've just mentioned.

MR. RANDOLPH: Of Appendix to Petitioner's -- or to Respondent's brief, page 13a. Well, that just gives the general rule under 226.8. All the detailed disclosures that I've described are set forth after that in the section.

QUESTION: Mr. Randolph, as I understand the court below, they said that Congress couldn't adopt this regulation?

MR. RANDOLPH: Yes. I'd like to say a word about that. They said that this is a conclusive presumption, therefore it's a violation of the due process clause.

We think that reasoning is faulty, for the reasons we've explained in our brief. We think that characterizing this rule as a conclusive presumption aids analysis not at all.

The entire Truth in Lending Act is a conclusive presumption, because what it is is presumes that regardless of who the consumer is, he needs this information, regardless of whether he's William McChesney Martin buying furniture or John Kenneth Galbraith, the creditor still has to disclose.

What we do think is the signicant and important thing is is the regulation reasonable with respect to the object sought to be achieved.

The reasons I have just stated and the reasons my co-counsel stated, I think confirm that it is a reasonable and --

QUESTION: And you say that the court below just said the Act was unconstitutional?

MR. RANDOLPH: Yes, they said that not even Congress -- so this legislation that's pending would be declared unconstitutional by this panel of the Fifth Circuit if it were ever passed.

I would like to --

QUESTION: But your adversary, he doesn't rely on that reasoning of the Court of Appeals at all.

MR. RANDOLPH: But if the Court were to rule in our favor, we would suggest that they would have to overturn that particular aspect of the Fifth Circuit's judgment, and I would just like, in response to Mr. Justice Marshall's question, I would just like to add one more thing.

One of the important things under the due process clause is a question of benefit/burden analysis, and what are the benefits? And I've talked at length about the benefits of this four-installment rule. What are the burdens?

The burdens are virtually minimal on the creditor, particularly in this situation wheter they have a standard form contract, and it means just setting a few more lines.

For all those reasons, we think the judgment of the Court of Appeals should be reversed.

QUESTION: Mr. Randolph --

QUESTION: With that approach, it would be to abandon the old idea to "let the buyer beware" and substitute the proposition that the "buyer must know".

MR. RANDOLPH: That's exactly --

QUESTION: Is that about what it is?

MR. RANDOLPH: That is the philosophy. Mr. Chief Justice, you may not be realizing it, but you're paraphrasing Section 1601 of the Act, which says, "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."

In other words, we want people operating with their eyes open in these transactions.

It doesn't protect people from making mistakes.

One thing that hasn't been mentioned is that Mrs. Mourning is still liable -- would be technically still liable on this contract, even regardless of her civil recovery in this suit.

In that sense, the civil penalty section is really kind of compensatory. What it gives her is $100, although she's still obligated on the contract.

That's --

QUESTION: Mr. Randolph.

MR. RANDOLPH: Yes?

QUESTION: Did you finish your answer to the Chief Justice?

MR. RANDOLPH: Yes, I have.

QUESTION: Let's assume a case in which a merchant, for reasons satisfactory to himself, were foolish enough to have precisely the same price on a cash basis as for a deferred sale of, say, four, five, or six months.

MR. RANDOLPH: Yes.

QUESTION: And that he could prove that so that in fact there would be no finance charge. Do I understand --

MR. RANDOLPH: No, I would not agree with that, that it followed that there would be no finance charge.

What I would say is --

QUESTION: Well, let me put it this way, and then you can come back to that point. Assuming the testimony were to the effect that this merchant, for reasons satisfactory to himself, intended to charge nothing for the deferred installment, that he ran a ma-and-pa store, he didn't want to be confused with computations of that kind. Do you think the Act requires a finance charge before it is applicable?

MR. RANDOLPH: Well, that question -- may I back up to the question that I was about to --

QUESTION: Yes, indeed.

MR. RANDOLPH: -- or the statement I was about to make.

I think that just because the cash price is the same as the installment price, it does not follow that there is no finance charge hidden in the installment price. What it may mean is that there is a finance -- that both cash customers and installment customers are paying for the cost of credit.

That's a very typical situation in low-income neighborhoods, where, for example, the creditor does very little cash business, and can afford to do that.

Now, as to the question whether, in fact, you had a situation where there was no cost of credit, and nothing in the price of the goods, I think that the Act would cover that situation.

But what it would require the consumer to do is -- in every situation there's a cost of credit, regardless of whether the seller says "I'm charging you for this" or not. Part of his cost of doing business is in the selling price, and so, even if he extends cred-t and says "I'm not going to charge you anything", what he is in fact doing is taking a lower profit. I mean that's another way of characterizing it.

If he wanted, if a consumer wanted to cover a person like that, what he'd had to do is bring an action with a team of accountants and break down the fellow's bookkeeping practices and show exactly what percentage the cost of credit was in his operating expenses which went into the selling price. So --

QUESTION: I take it,you think the Act does require a finance charge?

MR. RANDOLPH: Yes, but not one that has to be calculated. And the Board's -- what the Board's rule does is to dispense with that because they base their rule on the economic fact that any time you have credit extended over four installments there's going to be a finance charge involved.

QUESTION: In my case --

MR. RANDOLPH: Congress assumed the same thing, incidentally, on page -- I'm sorry to interrupt you -- on page 13 of our brief -- I believe it's 13.

No. On page 15 of our brief, footnote 13, I think we have about 20 references to where this situation was mentioned during hearings. Every time it was mentioned, the Congressman or whoever the expert was who was testifying said, Well, that just means that the cost of credit is absorbed in the selling price. It's just another way of --

QUESTION: And the seller himself might not realize it?

MR. RANDOLPH: He might not realize it, no.

QUESTION: Their position is the same.--

MR. RANDOLPH: Sears, Roebuck didn't.

QUESTION: Mr. Randolph, --

MR. RANDOLPH: Sorry.

QUESTION: -- if there were two stores, side by side, selling the identical commodity at the identical price, and one charged more for deferred purchase and the other decided he didn't want to charge any more for the deferred purchase, as you say he's willing to take a lower profit, perhaps, --

MR. RANDOLPH: Yes.

QUESTION: -- it's your position that the Act applies and that there is a finance charge, even though the man doesn't intend to make it?

MR. RANDOLPH: Without the four-installment rule. With the four-installment rule, of course, it would depend on whether he --

QUESTION: Well, the four-installment rule obviously covers it.

MR. RANDOLPH: That covers it.

QUESTION: What I'm addressing is whether or not the Act would cover a situation like that.

MR. RANDOLPH: My position -- and I've discussed this situation with the Federal Reserve Board, and the position is that in that type of situation the only way that creditor would be covered is if the consumer could come in to show, regardless of the fact that he's charging, making a lower profit, that, nevertheless, part of his selling price, one component of that selling price is cost of credit. It's just part of the cost of doing business, which is always in the selling price. And when you get beyond that, then you get a profit.

I might add that during the hearings, on page 15 of our brief, in footnote 14, we mentioned a statement by Senator Proxmire, which says, "I see, then what you are saying is that at Foyes you don't pay a carrying charge of any kind. ... Obviously what Foyes is doing is burying the charge in the cost of the merchandise."

Counsel for FPS has stated that a few seconds later

Senator Proxmire said, "Oh, apparently you're not charging a finance charge for this merchandise" or that Foyes wasn't.

I would direct the Court's attention -- I'm not sure where that is in their brief -- to the testimony that preceded Senator Proxmire's statement, because what he was told was that Foyes went out of business with respect to this merchandise. His reply was, "Oh, they weren't charging a finance charge." I think there was a touch of sarcasm in that response.

QUESTION: Mr. Randolph, are you saying, then, that as a matter of law there's a statutory finance charge every time the sale is not for cash?

MR. RANDOLPH: No, not as a matter of law. This is why the Board made the rule four installments. In the legislative history there is, in both the House and Senate Reports, the statement that the reason Congress required or said finance charge with respect to creditors was that they didn't want to cover 30, 60, 90-day accounts or trade accounts, because they consider them essentially cash transactions.

And what the Board did -- the Board did consider a more-then-three-installment rule.

QUESTION: But if your analysis is correct, that every time you don't sell for cash there are hidden costs, whether you admit it or not, or whether you know of them or not, why wouldn't the same be true for a two-installment sale?

MR. RANDOLPH: Well, I think it would. What I'm saying is that it was Congress's judgment that these -- the smaller transactions, over a smaller period of time were essentially cash transactions, meaning that there may be finance charges involved, but it's a de minimis situation, every one has always treated these as rather cash transactions, and we don't want to upset that type of business activity because the benefit to the consumer would be minimal; whereas, what we're really aiming at are the longer-term installments.

QUESTION: You mean Congress's judgment or the Board's judgment.

MR. RANDOLPH: That's Congress's judgment. I can -- on page -- if I can find it -- yes, at the top of page 20 of our brief. "This requirement would not apply to transactions which are not commonly thought of as credit transactions, including trade credit, open-account credit, 30-, 60-, 90-day credit, etc., for which a charge is not made."

This is the legislative history the Board looked at and said, "Well, we have to have a rule that covers transactions beyond this, because the reason Congress put finance charge in there is because they didn't want these transactions covered."

I might add that the Board, as my colleague stated, was involved in this legislation from the very beginning, constantly testifying before Congress both before and after the Act became effective. And this legislation that we've been talking about that passed the Senate, was at the Board's urging. I think we filed with the Court the report that the Board files with Congress every year, which is an annual report, and they suggested that Congress put this legislation in, despite the fact that this case was in the Supreme Court. That's how critical the Board thinks the four-installment rule is.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Rifkind, we have extended the time of your friends, and,to accommodate that, your time will be enlarged ten minutes, if you need it.

ORAL ARGUMENT OF ROBERT S. RIFKIND, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. RIFKIND: Thank you very much.

Mr. Chief Justice; and may it please the Court:

The Truth in Lending Act is an important, elaborate, very complex piece of social legislation designed and intended to cover an enormous, absolutely enormous, array of consumer credit transactions.

In light of the complexities involved, the Congress gave the Federal Reserve Board very broad powers, to implement the purposes of the Act, to construe it, to interpret it, to adopt regulations in order to facilitate compliance and so forth.

The four-installment rule is not an interpretation of the Act. It is not a construction of the Act. It doesn't come under all those rubrics like Udall v. Tallman, of a contemporaneous interpretation. The four-installment rule is an amendment to the Act. It rewrites the Act. It rewrites the very definitions of the Act and the operative provisions of the Act.

And, I submit, that because it brings within the scope of the civil and criminal penalties of the Act, both of which can be quite staggering, it is invalid, because it is inconsistent with the explicit language and intention of Congress.

Now, I'd like to begin by calling the Court's attention to the specific statutory provisions on which we rely.

The portions I'm relying on are set forth at the Appendix to our blue brief, starting at page 1a. First, Congress declared its purpose. They said: "The informed use of credit results from an awareness of the cost thereof by consumers." It is the purpose of the Act to disclose that cost.

I can't emphasize too strongly that what the Act deals with from beginning to end is the cost of credit, not the business costs of the businessman who may bury his charges or unbury them, but the cost to the consumer.

QUESTION: What you mean is the price.

MR. RIFKIND: The price; the cost --

QUESTION: The cost is to the extender of the credit and the price is to the extendee of the credit.

MR. RIFKIND: The price -- the price of credit, I think that's a fair statement. Which, for the purposes of this Act is called the finance charge.

QUESTION: Right.

MR. RIFKIND: A bundle word.

Now, they go on in the definitions to define the term "creditor" as that term is used in the Act.

The term "creditor", it says in 1602(f), "refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, ... The provisions of this subchapter apply to any such creditor, irrespective of his status."

So, at the very outset, Congress is saying, as I understand it: there are creditors who impose finance charges and there are creditors who don't impose finance charges. We're talking about the ones who do.

The next critical section -- well, I should add at that point that the rewriting of the Act begins at that point. The Federal Reserve Board's definition of "creditor" omits the phrase, "for which the payment of a finance charge is required".

That's in Regulation 226.2(m) at page 10a of our brief.

The next section, the next critically operative section --

QUESTION: Mr. Rifkind, --

MR. RIFKIND: Yes, sir.

QUESTION: -- you mean a finance charge which is identified as such or a finance charge which is determined to be present as a matter of economic reality?

MR. RIFKIND: We submit that the Act does not distinguish between identified and unidentified finance charges, hidden or patent finance charges; it says "finance charges imposed by a creditor must in all circumstances be disclosed." Without question.

Now, I add the proposition, that Congress did not share the Solicitor General's view or the Federal Reserve Board's view, that every creditor impose a finance charge in some ambient economic sense.

First of all, there's no law guarantees that you're going to stay in business, as Foyes discovered. People do not always recover their costs from their customers.

But there is a more simple situation. A patient comes to a doctor, has a major operation, and the doctor says, "Well, my fee for removing your appendix is $2,000. I know you can't pay me for it now; pay me $100 a week for the next 20 weeks."

Now, no one in his right mind, I think, supposes that that doctor is imposing a finance charge. But the Federal Reserve Board says he is subject to the four-installment rule.

The doctor, of course, has a cost of business, he has to pay his telephone operator, his nurse, buy a stethoscope, and do whatever doctors do.

QUESTION: But you think it would not be relevant if it could be demonstrated, in an attack on that transaction, that in fact all other patients who paid cash or within 90 days were charged $1,000?

MR. RIFKIND: Oh, I quite agree. If it is shown that the normal price of this doctor or his contemporaries for an appectomy is a thousand dollars, but he charged two thousand dollars for letting a patient pay for it over two years, I think you'd prove a finance charge just as simply as that. And I -- if the Board wants to regulate that, I have no problem with that all. I think the Act regulates it, and requires the doctor to disclose under those circumstances.

All I'm saying there are in fact, in practical experiences, we all know situations in which the fee, the charge, the cost imposed on the customer does not in fact vary with deferment of payments.

And at least --

QUESTION: But as a matter of economic reality, however, it does. I mean, two thousand dollars over twenty weeks is less money than two thousand dollars cash in hand. Everybody that's ever studied elementary economics knows that.

MR. RIFKIND: That is, that the seller experiences a cost.

QUESTION: That's right.

MR. RIFKIND: Which he may or may not pass on.

QUESTION: Which he may or may not even realize.

MR. RIFKIND: Which he may not realize, and he may or may not impose on his customers.

QUESTION: I mean just as there are naive buyers, there are naive sellers, too.

MR. RIFKIND: That is true.

Now, I turn to Section 1631(a) of the Act, which is at page 6a of our Appendix in the blue brief, and this is the General Disclosure requirement. It says that "Each creditor" — we have already defined "creditor" to mean creditors who regularly impose finance charges; each such creditor, in accordance with regulations prescribed by the Board, "shall disclose to each person to whom credit is extended and upon whom a finance charge is or may be imposed, the information required under this part."

So, not only do you start with a class of creditors who impose finance charges, you go on to those transactions in which they in fact impose them, as Congress wrote it.

Now, I'd like to say a word about "may be" there. There has been some temptation, I think, in the briefs for the government and petitioner, to suppose that "may be" means "maybe"; perhaps it's there, perhaps it isn't. It clearly doesn't mean that.

The word "may" is defined in the Act, it's not carried forward into the code except in a footnote; "may" is definied as an act that is authorized or permitted. In other words, af the contract says you may defer your payments and if you do so, after the first thirty days the interest rate will be five percent. That's a situation in which interest, a finance charge may be imposed, pursuant to the agreement, pursuant to some condition subsequent.

But it doesn't mean "might be" or -- we can't tell whether it's there or not; it doesn't mean "maybe".

Contrary to the government's -- contrary to the petitioner's suggestion, at pages 12 and 13 of its brief, the Act does not impose the disclosure requirements on all credit transactions, even of those who regularly impose finance charges; but only in those transactions in which a finance charge is imposed.

Now, the legislative history behind Section 1631 sheds some light at this point. The Senate and House Reports, the Senate Report is quoted at page 17 and 18 of our brief, say that this language in 1631, the language "upon whom a finance charge may be imposed" is intended to make clear that disclosure need only be made to persons upon whom a finance charge is or may be imposed.

Thus the disclosure requirement would not apply to transactions which are not commonly thought of as credit transactions, including trade credit, open-account credit, 30-, 60-, or 90-day credit, et cetera, for which a charge is not made.

Now, Congress didn't have to say that,it didn't have to go out of its way to say that. It was perfectly simple to omit all this language. But it has reiterated now three times that what it's talking about is the imposition of the cost of credit.

Finally, -- well, -- and ultimately the Act sets forth the disclosures to be made, and those are contained in two sections, 1637, which sets forth the disclosures for open-end credit, charge accounts and that sort of thing. That is not in our brief. The disclosures required there include the conditions under which the finance charge may be imposed, the method of determining the balance upon which a finance charge will be imposed, the method of determining the amount of the finance charge, and such like.

In 1638, which is the section applicable, if any is applicable here, they talk about the cash price and so on, going on to the total amount to be financed, the amount of the finance charge, the finance charge expressed as an annual percentage rate, and so on.

QUESTION: Well, I thought this case turned not on that section but on the regulation.

MR. RIFKIND: I'm trying to show, Mr. Justice White, that the regulation is inconsistent with the manifests --

QUESTION: Well, you are, then, going to talk some time about what kind of authority the Board has to adopt rules and regulations?

MR. RIFKIND: Yes, sir. Yes, indeed.

QUESTION: And if the regulation is valid, it is 1638 -- it is the information required by 1638 that would be applicable to this transaction?

MR. RIFKIND: That is right.

QUESTION: Yes.

MR. RIFKIND: I might say, in that connection, that 1638 demonstrates the quandry created by imposing, by validating the four-installment rule, because, if the four-installment rule applies and you're required to make the disclosures called for by 1638, you're called upon to make a disclosure of your finance charge. And the annual percentage rate. And you're supposed to do it precisely.

No one has given us any clue as to how, if their economic theory, not shared by Congress, is correct, how we are supposed to ascertain it. What we have been told is that the Federal Reserve Board doesn't know how to ascertain it, and that the whole committee of Congress who composed these regulations didn't know how to do it.

But we must, in hundreds of thousands of transactions each year, do it at peril of liability of a hundred dollars to every customer, and a criminal liability.

Now, it is true the Federal Reserve Board has suggested, not by regulation but rather informally, and it's in the Solicitor General's brief, they said, Well, maybe you don't have to disclose the finance charge and the percentage rate, after all, if it's hard to do.

How that waiver of the requirements of the Act furthers the purposes of the Act as having brought within the ambit of the Act a large class of people who everyone thought didn't have finance charges, and then say, Well, you don't have to disclose your finance charges after all. How that furthers the purpose of disclosure of credit terms, I don't really see. But whether or not the statement by the Board that you don't have to make those disclosures would bind Mrs. Mourning in her suit or any of the other people who have brought suit, or, indeed, would bind any grand jury that wanted to begin criminal proceedings under this Act, I don't know.

QUESTION: Well, I thought, Mr. Rifkind, that it was not, at least, clear, belatedly, that had it been an entire cash transaction it would have been a lower amount of total cash.

MR. RIFKIND: No, sir.

QUESTION: Isn't that right? I thought that was in the briefs, that --

MR. RIFKIND: Let me say this.

QUESTION: -- Family Publications Service would have done it. and (7), subsection (7) of 1638(a) -- subsection (6), I mean, says that the finance charge may be designated as a time-price differential.

So, to that extent, it would not be impossible or an unrealistic requirement, would it?

MR. RIFKIND: If we had a time-price differential, that is correct.

QUESTION: Well, then, --

MR. RIFKIND: I will get to that in just a second.

QUESTION: -- if I misunderstood that. Yes.

MR. RIFKIND: Just to finish with the Act, and I have just one last section to call your attention to, the Act, the section under which this suit actually arises, 1640, finally wraps it all up by saying that if you violate it, if you fail to make the disclosures, the liability imposed is twice the amount of the finance charge in connection with the transaction.

The Congress apparently thought that the finance charge was there and that it was sufficiently ascertainable to be used as a convenient measuring rod for the, really, penalty; it's not a compensatory -- it isn't damages, it's a penalty.

QUESTION: Well, it isn't a very big penalty under these circumstances, is it?

MR. RIFKIND: If you multiply it by 250,000 customers, it is a staggering penalty.

QUESTION: Well, such as what amount? Have you suggested the amount in your brief, other than saying it was a staggering amount?

MR. RIFKIND: Well, they say that they're entitled to the minimum amount of $100 per person; and 250,000 customers as year, that's $25 million.

QUESTION: Congress certainly was capable of making that calculation, was it not?

MR. RIFKIND: Yes.

QUESTION: It's something like treble damages in --

MR. RIFKIND: As far as Congress is --

QUESTION: -- patent and other cases, isn't it?

MR. RIFKIND: Where Congress left us, though, the Act clearly didn't apply.

Let me go now to what you were raising, Mr. Justice Stewart. Our footnote concerning our discovery, quite late in the day, I concede -- as a matter of fact, after the selling operations that Family had closed down, that in some few instances there was indication that some customers who paid cash did not pay the full price.

I thought candor required me to call that to the Court's attention. I think it is also totally irrelevant.

The complaint in this action, indeed, the second amended complaint does not allege that there was a finance charge. The case was presented in the district court on the plaintiff's motion for summary judgment on the proposition that it didn't make any difference whether there was a finance charge or not, and the plaintiff had no interest in proving it, because she relied entirely on Regulation Z.

The district court didn't find that there was a finance charge; the Court of Appeals didn't find that there was a finance charge, and I don't think, at this stage in the game, the plaintiff can now rely on the proposition that maybe there was a finance charge there. That isn't the case that's presented.

I will say that if there were a finance charge in the transaction, Regulation Z is wholly irrelevant. We're clearly responsible to disclose it, and liable.

QUESTION: Is it also clear that there was an extension of credit?

MR. RIFKIND: To me it is perfectly clear that there was not.

QUESTION: What did the district court say? Anything?

MR. RIFKIND: The district court said that the letters written after the contract, the dunning letters written to Mrs. Mourning evidenced that it was credit, that the non-cancellable provisions of the contract, the statement that the contract was non-cancellable made it a credit transaction, and -- there was one other ground -- that the -- well, I think those are exemplary of the grounds he went on.

He certainly did not rely on the proposition that FPS, Family Publications Service, had incurred costs and paid money to publishers, which there is nothing in the record to support except these dunning letters.

QUESTION: Did the district court say that the defendant has extended consumer credit within the meaning of the Truth in Lending Act?

MR. RIFKIND: Yes, he did.

QUESTION: Is that a finding, or not?

MR. RIFKIND: I think that's a conclusion of law.

QUESTION: Well, he decided, he concluded -- whatever you want to call it -- anyway.

MR. RIFKIND: Yes, sir.

QUESTION: And that was tried out on --

MR. RIFKIND: There was no trial.

QUESTION: I know, but it was on affidavits, wasn't it?

MR. RIFKIND: There were affidavits.

QUESTION: So there were matters besides the pleadings taken into account?

MR. RIFKIND: Only the dunning letters that have been described to you.

QUESTION: Well, the answer is yes, then?

MR. RIFKIND: Yes.

QUESTION: And so there were -- and the court did enter summary judgment?

MR. RIFKIND: That is correct.

QUESTION: And in the course of that, he said that?

MR. RIFKIND: Yes.

QUESTION: Now, did the Court of Appeals do anything about that?

MR. RIFKIND: The Court of Appeals did not reach the question. As all the parties here agree.

QUESTION: So what should -- are you suggesting that we should decide the case on the basis that there wasn't a credit transaction?

MR. RIFKIND: I think that, since the only document that is relevant is a document that all of the parties, I think, conceded is an unambiguous contract. That is, that is what tells you whether it's a credit transaction as a matter of law or not. That this Court could readily proceed to determine that this was not a credit transaction.

QUESTION: Because the regulation certainly doesn't make it irrelevant as to whether there was a credit transaction.

MR. RIFKIND: Well, --

QUESTION: It does with respect to the finance charge.

MR. RIFKIND: It does, and I must say, as I read some of the opinions that have been issued by the Federal Reserve Board, they seem to be reading out the credit requirement of the Act as well.

QUESTION: The regulation doesn't seem to.

MR. RIFKIND: Not the regulation, it's more the regulation as applied, that leads to reading it out. Because wha they keep saying that they're interested in is disclosing the sum total of installment payments. And they have gone after getting the statement of the sum of installment payments to be disclosed.

But installment agreements -- not all installment agreements -- are credit agreements. That's perfectly fundamental. And I think the Federal Reserve Board has lost track of that.

An example was given in one of the hearings.

QUESTION: But maybe not in this case.

MR. RIFKIND: I think they have lost track of it in this case, too. I should say that the government below declined to take a position on whether there was credit here. And expressed no opinion at all in its amicus participation in the Fifth Circuit.

Perhaps that was why the Fifth Circuit never reached the question.

I'm not quite clear on what position they take on the credit question here.

It seems to me quite clear, if you look at the opinions, the opinion letters that the Board has issued, that they are reading out, diminishing the requirement of credit in these installment contracts. Now, that's the underlying rationale of what they're trying to do here. They keep telling us, You don't have to disclose the finance charge; that would be too hard. But what you have to disclose is the sum total of installment payments.

QUESTION: Was there an objection to deciding the case on summary judgment?

MR. RIFKIND: No, there were cross-motions for summary judgment.

QUESTION: Well, wasn't one of the relevant questions in the case whether or not there was a credit transaction?

MR. RIFKIND: Yes, sir.

QUESTION: But you say that was a legal, really a legal question on which you couldn't find any more facts other than the contract?

MR. RIFKIND: Yes.

QUESTION: And the letters, maybe.

MR. RIFKIND: That's right. It seems to me that the contract, on its face, is really the answer to whether or not it is. And that's what the district judge thought, too. He said the acceleration clause,-- which is the third ground I had forgotten before -- the non-cancellable provision, and perhaps also the dunning letters, came together to support that conclusion.

QUESTION: Well, wouldn't it have been rather relevant on that question to know what the arrangements were between Family Publications and the publishers?

MR. RIFKIND: No, I don't -- I don't think so.

QUESTION: Well, let us assume for the moment that they actually had paid the publishers a sum of money, on behalf of the customer.

MR. RIFKIND: I would think that when I go to buy a car on time from a General Motors dealer, it really, whether my relationship with him is a credit relationship, doesn't depend upon whether he has already bought the car from General Motors and has been holding it, or he plans to buy it in the future from General Motors. It seems to me the question is, is he extending me credit, not what he's doing with his money, and how he raises his money.

QUESTION: Well, it certainly -- I mean, otherwise you would think, as Mr. Justice Stewart or someone else brought out, it might be that the buyer was extending credit to the publisher, paying in advance for a service.

MR. RIFKIND: The buyer is extending credit to the publisher; that is exactly what is happening here.

QUESTION: Well, not if the intermediary, Family Publications, has already paid the publisher. That's why I say the fact -- that that might be a very relevant fact.

MR. RIFKIND: The district court didn't --

QUESTION: But if it was a failure in that regard about the facts, you say it must be on the plaintiff's side and not yours?

MR. RIFKIND: Well, our answer to the complaint did say: at no point during the life of the contract has defendant, FPS, paid money to a third person or supplied goods or services to the customer for which reimbursement is expected from the customer in the future.

The fact of the matter is that we paid the magazine publishers after we received payment from the customer. Now, that is not clearly established in the record. The district court thought it was irrelevant and not necessary to its conclusion, and I think the grounds on which the district court relied are legal error.

QUESTION: Assuming that I buy everything you say up to the point of the fact that one she misses one payment she's in trouble. For example, if you only paid three dollars a month for three one-dollar books, that might not be credit. But if the contract provides that you must do that for three years, and failure to make one installment accelerates; isn't that an entirely different ballgame?

MR. RIFKIND: Well, Mr. Justice Marshall, one of the reasons for the acceleration clause is precisely that we did not care to become creditors. We wanted to be paid in advance.

QUESTION: All of it.

MR. RIFKIND: We were willing to be paid at sort of double the rate --

QUESTION: Well, when the --

MR. RIFKIND: But if it fell into default we wanted the whole amount, because we didn't want to be sending magazines to people who had not paid us.

QUESTION: So that when they paid the whole amount, would there be a credit relationship then?

MR. RIFKIND: Yes, we would be substantially in Mrs. Mourning's debt. She would have paid us $122, and we would have sent her three years of magazines.

QUESTION: Well, isn't that in the original contract?

MR. RIFKIND: That is in the original contract. It says --

QUESTION: Well, why isn't that a contract of credit?

Since it's in the contract.

MR. RIFKIND: Well, if it's credit running from Mrs. Mourning to us, the Act doesn't apply because it only applies to -- it only applies the other way around.

QUESTION: I didn't agree to that. That was you --

MR. RIFKIND: Yes. The answer is that it applies only to consumer credit.

QUESTION: Mr. Rifkind, earlier, in your colloquy with Mr. Justice White, I thought I heard you say that on the record as it now stands the Court was in a position -- this Court was in a position to reach a determination that there was no credit transaction; that was it, essentially?

MR. RIFKIND: Yes.

QUESTION: On this record, could we reach the contrary determination?

MR. RIFKIND: I think that on this record it ought at least to be remanded to the Fifth Circuit to consider the question. It seems to me there is a difference between affirming the Fifth Circuit on another ground that it didn't reach and reversing it, on a ground that it didn't consider.

QUESTION: Even if it's a pure question of law, that would be the --

MR. RIFKIND: I think it would be more conformable to the normal practice of the Court, in those circumstances, to remand it to the Fifth Circuit. And maybe, in the last analysis, you have to remand it to the district court for an evidentiary examination of the question.

If I'm right that you can answer the question on the face of the contract, it seems to me it can be answered here as well as in any other court.

QUESTION: But isn't it rather strange for the Court to figure that it must -- that it must invalidate the regulation unless it assumes that the fact that triggers the regulation isn't present in the case?

MR. RIFKIND: Oh, but I could see the Court saying that it ought to have reached the credit argument first. I think it was thrown off that normal course --

QUESTION: Well, that was really -- was that a major -- in major litigation before the Court of Appeals?

MR. RIFKIND: It certainly was. It was argued at length. I think the thing that may have deterred them from deciding it is that the Justice Department came in and said we must have a ruling on the validity of Regulation Z. We expressed no opinion on the credit question.

QUESTION: Then they got it.

MR. RIFKIND: Just to pursue the credit question once more. In the legislative hearings, I think the Chairman of the Federal Trade Commission was asked in the Senate committee: Suppose I hire my neighbor's son to come in each Saturday and mow my lawn, and suppose I agree to pay him a dollar each Saturday after he's done it. Is that a credit transaction?

And after a lot of legal talk, the answer was no. There was no finance charge and there was no credit, as I understand it.

That seems to me a perfectly normal, healthy example of an installment arrangement in which both sides are contractually obligated to continue rendering performance over a substantial period of time, but not a credit transaction, because --

QUESTION: Where is the enforcibility of this lawn mowing operation, as compared with the enforcibility here?

MR. RIFKIND: Well, I suppose that the shrewd youngster would say, "Now, Mr. Jones, before I agree to mow your lawn and forego mowing other people's lawns this summer, I want you to write me a promise that you will pay me a dollar every week. I don't want you moving off to the seashore and leaving me without a lawn to mow."

QUESTION: How long ago is that that somebody mowed a lawn for a dollar?

[Laughter.]

MR. RIFKIND: I confess I don't have a lawn, Mr. Justice Marshall.

The analogy to our case is: I go to my newsstand and say to the -- maybe I'm on safer ground here -- and say to my news dealer: "I'd like to get the Manchester Guardian every Friday." He says, "I'm sorry; I'll only get it for you if you'll promise -- promise -- to come in and pay me every Friday." I say "Sure"; he does it.

Now, we're bound, we may be bound for a year, two years, whatever deal I make with him, but neither of us is extending credit to the other.

Now, if he was a canny newsdealer, as FPS was, and said: "Look, how do I know you're going to come in. You pay me on Monday and I'll have the Manchester Guardian here for you on Friday." A fortiori, no credit has been extended to the consumer, to me. Quite the contrary, I have extended credit to the newsdealer.

And that is exactly what happens in the FPS transaction.

QUESTION: Well, that's certainly true on a prepaid subscription to the publisher himself, but this was a tripartite arrangement, and it's been suggested that payment was made by your client to the publisher, and your client thereby became a creditor of Mrs. Mourning.

MR. RIFKIND: There is nothing on the face of the contract which suggests that it is a tripartite --

QUESTION: Well, you're not the publisher of the magazines, your client.

MR. RIFKIND: No. That is correct. But neither is the department store the manufacturer of most of the things I buy at the department store.

QUESTION: But most of them have a regular stock and make delivery, don't they?

MR. RIFKIND: They do, but --

QUESTION: FPS has nothing except probably a general understanding that when, as, and if they send in a subscription with some money, on some terms, the contract will then occur.

MR. RIFKIND: I think the key thing, though, is that if the magazine doesn't get delivered, it's perfectly clear that FPS is liable, not the magazine publisher. This is not a subscription with the magainze publisher, it is a subscription in which all the rights flow from FPS to the customer.

And, indeed, serious problems have arisen where, for example, the Saturday Evening Post or Look Magazine, closes down. It is a PDS, as it's called, paid during service magazine sales organization that may well be left holding the bag, unable to perform a contract which it undertook to perform.

There is nothing, except for the fact that it says that delivery will come from the publisher's office.

QUESTION: Well, I suppose your client either makes money from the finance charge or gets a discount from the magazine. You're not in business for nothing, are you?

MR. RIFKIND: No, we're not a philanthropy.

QUESTION: So you're making money off of one end or the other, either in your purchases or in your sales.

MR. RIFKIND: Certainly. We charge customers more than we are charged by the magazine publisher. That's exactly right.

QUESTION: But you're an independent organization,--

MR. RIFKIND: Absolutely.

QUESTION: -- not part of the merchanising arrangement of the magazine itself.

MR. RIFKIND: That is right.

QUESTION: And you're not an agent; you're not an agent?

MR. RIFKIND: We're not an agent. It happens that FPS is a wholly owned subsidiary of Time, Inc., but it deals in the magazines of other publishers, as well as those of Time.

QUESTION: Mr. Rifkind, you suggested earlier that there is no privity of contract between the -- Mrs. Mourning and the magazine; but if, promptly, as was contemplated, after the making of this contract FPS did contract with the magazines, would Mrs. Mourning be possibly a third-party beneficiary who could enforce that contract?

MR. RIFKIND: Well, I think it would be difficult, as a practical matter, because --

QUESTION: Difficult, but --

MR. RIFKIND: Well, --

QUESTION: -- I'm speaking just in pure legal terms.

MR. RIFKIND: Yes. I think not, because, in fact, the arrangements with the magazine publisher are sort of in bulk, not just, as I understand it, for Mrs. Mourning but for some substantial group, whatever came in that week; and I don't know whether she has a pro rata interest in that, maybe as a member of a class she does.

I think, though, to go back to the Manchester Guardian for a minute, my newsdealer didn't have it in stock either, he had to order it some place. But that didn't make him my creditor.

Similarly here, the fact that FPS doesn't have the magazine or the newspaper in stock doesn't make FPS a bank, in a relationship between Mrs. Mourning and Holiday.

I also think that -- I also urge that the Court may feel that it has to reach the credit issue in all events here because, assuming that the government's thesis that somehow there's always a finance charge buried in credit transactions, assuming that has any validity, the four-installment rule even under that theory could not logically or rationally extend to non-credit situations.

And if that's what they mean, they mean really to all installment contract situations where there is no necessary or logical implicit finance charge, then it seems to me the rule has to be overbroad by all tests.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rifkind.

I think all of your time is consumed on the other side.

The case is submitted.

[Whereupon, at 11:41 o'clock, a.m., the case in the above-entitled matter was submitted.]