In the

Supreme Court of the United States

ANDERSON BROS. FORD AND FORD MOTOR CREDIT COMPANY,	)	
Petitioners,	)	
v.	)	No. 80-84
OLGA VALENCIA AND MIGUEL GONZALEZ	)	
Respondents.	)	

Washington, D.C.
March 23, 1981

Pages 1 through 46

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Washington, D.C.,

Monday, March 23, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 o'clock a.m.

APPEARANCES:

AARON J. KRAMER, Esq., 7200 Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606; on behalf of the Petitioners

ALAN A. ALOP, Esq., Legal Assistance Foundation of Chicago, 1661 South Blue Island Avenue, Chicago, Illinois 60608; on behalf of the Respondents.

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 will hear arguments first this morning in Anderson Bros. v. Valencia.

Mr. Kramer, you may proceed whenever you are ready.

ORAL ARGUMENT OF AARON J. KRAMER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KRAMER: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court:

This case is here on certiorari from the Seventh Circuit Court of Appeals, and it poses two broad issues. The first of which is whether the entire credit industry, whose stock in trade is security interests failed to recognize and disclose a security interest required to be disclosed under the Truth-in-Lending Act.

Secondly, this case poses the question of whether even if such a hard to imagine mistake occurred, the ends of justice are served by applying any such decision retroactively to any case other than the one at bar.

QUESTION: Will these issues all disappear under the new statute that was passed last year?

MR. KRAMER: They will, Your Honor, but not with respect to contracts that were written with respect to the former statute, the present statute, which are now --

QUESTION: Cases like yours?

MR. KRAMER: That's right, Your Honor.

QUESTION: And what is the volume of those contracts, have you any idea?

MR. KRAMER: Well there are -- this contract that is before the Court is the paradigm of the industries contract. It has --

QUESTION: Well are we talking about millions of contracts?

MR. KRAMER: We are talking about millions of contracts, Your Honor. This is the industries' form --

QUESTION: How many cases are pending?

MR. KRAMER: There are -- we have no number as to the precise number of cases which have raised this issue. There have been, however, 27 decisions of various circuit and district courts on this issue in 15 different cases that have already reached the courts. Certainly whatever the decision of this Court is on this issue will be the landmark case in this area. And depending on what this Court holds --

QUESTION: Well landmark, except for the new statute.

MR. KRAMER: Except for the new statute, Your Honor.

QUESTION: Which will remove the problem for the future?

MR. KRAMER: Except for those millions of outstanding contracts which presently exist.

QUESTION: Well, as I understand it, under the

statute there's a fixed recovery, is there not, $1000 or something?

MR. KRAMER: Well Your Honor, for certain violations --

QUESTION: For this one.

MR. KRAMER: For this one it is twice the amount -- penalty in -- twice the amount of the finance charge, up to $1,000 per contract where the Truth-in-Lending Act is violated. And what the Court has before it now is the industries' form --

QUESTION: What you're suggesting is that affirmance here would encourage lawsuits to recover that penalty, is that right?

MR. KRAMER: I am most certainly saying that, Your Honor. As well, an affirmance here would put defaulting debtors in the position of having, even those that are -- have a contract that was entered into more than a year prior to the statute of limitations would have --

QUESTION: Is there any limitation of jurisdiction of the federal courts for such suits?

MR. KRAMER: No there is not, Your Honor. These actions may be brought in either the federal courts or the state courts. But most jurisdictions have state laws which provide that even time barred counter-claims for contracts entered into for more than a year prior to the date on which

the action was filed can be brought as counter-claims and are revived. So that any defaulting creditor, rather, any defaulting debtor who is sued by a creditor to collect a deficiency judgment on an amount owed on a car who may have entered into his contract four or five years ago could bring a $1000 plus attorneys fees counter-claim, or action for recoupment under most jurisdictions and that would be greater, in most cases, than the deficiencies in these cases.

Now the Respondents in this case estimate that Ford Motor Credit Company alone repossesses 10,000 cars per year. The industry of course, repossesses and has to bring deficiency actions in a far greater number of cases. The fact that this is the industries' form contract presents a very great problem for the industry.

The facts of this particular case are that the Respondents purchase and financed the purchase of a used car in 1977 from Anderson Bros. Ford. Almost immediately they were disenchanted with their purchase because of mechanical difficulties and sought to rescind the transaction after unsuccessfully pursuing certain state consumer complaint remedies. Those were unsuccessful, but they -- the Respondents did file this Truth-in-Lending action, alleging five separate truth-in-lending violations in this form.

In an opinion rendered on October 31, 1978, the

trial court dismissed entirely those truth-in-lending allegations. In particular, it dismissed the allegation as to the claim that the assignment on the back of the contract which was an assignment of physical damage in unearned insurance premiums by the debtor to the creditor was a security interest, that was the allegation, and that was one of the five allegations which was entirely dismissed by the trial court. As to this particular allegation that the assignment was a security interest that should have been not disclosed on the back but on the front of the contract under the Truth-in-Lending Act, but the District Court looked at the normal meaning of the term security interest in the Act, and looked at the usual and customary meaning of those words as used in the contract, and found that there was no security interest here in the assignment of unearned physical damage insurance premiums, appearing on the back of the contract. And therefore, no requirement that that appear on the front of the contract.

Now, developments occurred in the Fifth Circuit where the Fifth Circuit rendered an opinion contrary to that which we called to the attention of the District Court and he reversed his position, eventually that reversal against finding the violation of the Truth-in-Lending Act as to this assignment clause was affirmed by the Seventh Circuit.

There are four uncontrovertible elements which

stand as walls that surround the issues in this case, and we respectfully submit that the Court's decision will be made somewhere within the confines of those four walls. They are: the true nature of the interest, the assignment interest that is before this Court; the purpose of the Act and the specific legislative history of adoption of the Act's security interest provision; the promulgation by the Federal Reserve Board staff in 1981, of -- Federal Reserve Board Proposed Official Interpretation 173, which is precisely in point on this issue.

QUESTION: Now is that interpretation of the Truth-in-Lending Act, or is it of the new statute --

MR. KRAMER: That is of the present Truth-in-Lending Act, Your Honor.

QUESTION: Only? It has nothing to do with the simplification act?

MR. KRAMER: Only. It has nothing directly to do with the simplification act, that is right.

QUESTION: That's not too clear, I think. In chronology, it followed the adoption of the simplification act, didn't it?

MR. KRAMER: It did -- in -- follow, and indeed, the Federal Reserve Board had the benefit of the intensive Congressional hearings on the simplification act that led to adoption of the simplification act. And it adopted, after

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there were these 27 separate decisions and 15 cases raising this issue, the Federal Reserve Board also had the benefit of those conflicting decisions, all before it held in its proposed -- and it has not yet been adopted and it was not finalized --

QUESTION: Now what was the gist of 173?

MR. KRAMER: The gist of 173, Your Honor, was that consumers are not aided by the disclosure of the assignment clause of the physical damage insurance -- the insurance premiums on the back of the contract -- they would not be aided by putting that on the front of the contract to carry out the purpose --

QUESTION: But it wasn't explicit, was it, that the assignment was not a security interest?

MR. KRAMER: They held that although -- a technical reading, as had been accomplished in certain courts in certain Circuit Courts could support that decision that that would -- that such an incidental interest was not intended by the Act, and that the purposes of the Act are better served by not disclosing that provision as a security interest on the front.

QUESTION: Yes, but yes or no -- did they interpret a bulletin to say that the assignment was not a security interest for purposes of the statute?

MR. KRAMER: For purposes of the statute they said

it should not be disclosed as a security interest, yes, Your Honor.

QUESTION: Mr. Kramer, I have some difficulty with the various levels of regulations and the weight we should give them. The 1970 regulation, which doesn't seem to be mentioned in the 1981 promulgation, simply, at the end, says in the event of the customers default, your client would have the right to cancel the policy and apply any premium refund to the unpaid balance of the loan. Under the circumstances, we think it would be appropriate to disclose the loan company's ownership of the policy as a type of interest under 12 C.F.R. Section so-and-so. I had some trouble with that, originally, because it didn't seem to me to state flatly it must be disclosed, the words it is appropriate to disclose it simply said may be in an excess of caution -- but I was also troubled by the fact that the 1981 promulgation, the new regulation which goes in exactly the opposite direction, didn't seem to refer to the 1970 regulation.

MR. KRAMER: Your Honor, I don't believe that they were exactly the same. The 1970 unofficial interpretation issued by the Board staff does certainly use the word appropriate. However, it involved a different kind of insurance than physical damage insurance on a vehicle, where the vehicle is the real security interest in the transaction. And the

only security interest which appears in the 1970 unofficial interpretation by the Board was the lender's security interest in the insurance itself, which he was financing; it is not at all the same as the transaction where the unearned insurance premiums on physical damage insurance are entirely incidental to the real security interest in the transaction as we have here, which is the financed vehicle, which is clearly disclosed on the front of the contract and it's disclosure would be clouded if there were such an incidental interest taken off of the back of the industries' form contract and put on the front, to confuse the issue of what security interest the consumer was giving up in the transaction.

QUESTION: When you say they were different kinds of insurance, the 1970 letter referred to life insurance?

MR. KRAMER: Accidental death and dismemberment policy where there was a single lifetime premium, Your Honor, and the only thing that the creditor was taking in that case was a security interest in the unearned premiums. There was no other security interest in that transaction.

QUESTION: And the 1981 regulation would apply to unearned premiums on physical damage -- insurance.

MR. KRAMER: Physical damage insurance on a vehicle which is exactly what we have here.

QUESTION: Why hasn't the '81 proposal been

finalized? There just isn't time, or is it --

MR. KRAMER: No, Your Honor, it's very clear that it is out of deference for this Court's authority. Clearly, the Federal Reserve Board under the Court's opinion in Milhollin had the authority to clear up this matter once and for all, and tell the credit community which is only looking for direction in such matters, and will follow that direction from a central authority -- which Your Honors found in Milhollin was the Federal Reserve Board clearly, and its power was to enforce, apply and interpret the Act and the regulation. That -- what the Board has referred to as a deferral of final action, and not a withdrawal at all, came only after this Court granted certiorari in this case.

And in light of the fact that the 172 prior official staff interpretations of the Federal Reserve Board have been adopted without any substantive change, as we indicated in Appendix B to our reply brief, is a factor that the Court ought to consider, because these things were not promulgated as trial balloons, as counsel for the Respondents has argued, but rather as seriously well considered and thoroughly thought-through determinations by the Federal Reserve Board as to interpreting the Act that governs the framework of, in determining commerce and credit in the United States.

Indeed, although 173 is only a proposed agency

interpretation, the Courts have held applying this Court's Skidmore v. Swift decision, that even a proposed agency interpretation is entitled to such persuasive weight as is evidenced from such things as the thoroughness of its consideration and the validity of its reasoning.

Petitioners submit --

QUESTION: I suppose that's true only with respect to agencies which are not empowered to, in effect, kind of fill in the blanks or make definitions and that sort of thing? Skidmore v. Swift dealt with an agency which was not expressly authorized by Congress to interpret the Act --

MR. KRAMER: Yes, Your Honor, but the Federal Reserve Board, of course, is empowered to interpret the Act, just as the Securities and Exchange Commission is empowered to interpret the Securities laws. And this Court's opinion in 1975, the Court held that even though the -- in the Forman case, the securities law of 1934 refers to any stock -- the Securities and Exchange Commission had the power to interpret that to exclude stock in a cooperative housing project as not being a security, even though the express words of the language of the statute that the agency was empowered to interpret did use the term any stock, the Respondents in this case, make an argument to the effect that the strict words of the statute should be followed in this case, or the strict words of the regulation, which indeed are not in point

as to this type of assignment of an interest in unearned premiums, but the Respondent's literal interpretation cuts the heart of the purpose and intent of the Act out of it, does not look at the purpose of the Act, which is to permit informed, comparison credit shopping as this Court held in the Milhollin decision. And the Board's determination, after having thoroughly considered, in proposing 173, the 27 decisions in the conflicting district and circuit court cases on this matter, who had -- the Board had, at the time they proposed 173, the benefit of intensive Congressional hearings on the simplification act, and its own ongoing revision of Regulation Z before it proposed 173, so that it is the position of the Petitioners given those factors which support the validity of the reasoning of 173, and the determination of the Federal Reserve Board particularly backed against the fact that none of the prior official staff interpretations of the Board which were proposed were changed in any way before they became final.

QUESTION: Is it clear that if -- that there was something on the back of this contract?

MR. KRAMER: Well, it is clear, Your Honor, that a contract was included with the appendix.

QUESTION: There was a -- there was a disclosure on the back?

MR. KRAMER: There is no question, no question.

QUESTION: And if that disclosure had been put on the front, would that -- is it agreed that it would have been adequate?

MR. KRAMER: Well Your Honor, there is a problem with respect to that, because the Courts have held, including our Seventh Circuit, has held that there is a violation of the Truth-in-Lending Act if you overdisclose and claim a security interest where you do not have one. For example --

QUESTION: Well, I know. But in this particular case if the disclosure on the back had been put on the front would the Seventh Circuit have come out the way it did?

MR. KRAMER: I don't think the Seventh Circuit would have come out the way it did, Your Honor. I think --

QUESTION: It would have -- there would have been no problem then, I suppose?

MR. KRAMER: That's right. The point of the Petitioners is that the Seventh Circuit was wrong in its decision. And indeed, in reading its decision and in reading the very reluctant, two concurring opinions, from Judges Cudahy and Swygert, it is clear that the Seventh Circuit felt it was being dragged along by what it was being required to do in providing a very liberal and very technical construction of the Truth-in-Lending Act. And I would point out to --

QUESTION: What's the source of -- what was the source of the Seventh Circuit's decision that the disclosure

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had to be on the front, rather than the back?

MR. KRAMER: Your Honor, the Seventh Circuit more or less looked at the Fifth Circuit's decision, and --

QUESTION: Well what did the Fifth Circuit rely on, the statute or the regulation?

MR. KRAMER: The Fifth Circuit relied on the philosophy that if it was important enough to claim in the contract it was important enough to put on the front. And that's the rationale of the Fifth Circuit's --

QUESTION: Did they say it violated the statute?

MR. KRAMER: And they said it violated the statute.

QUESTION: And, wholly aside from Regulation Z?

MR. KRAMER: They said, the cases that have so held have held that it's a violation of the statute and the regulation. However, that rationale would put everything that was on the back of the contract on the front of the contract, Your Honor. It would not, as the Board has noted in 173, promote proper -- the purposes of the act or proper comparison credit shopping --

QUESTION: Well what if -- what is your position if it hadn't been disclosed at all?

MR. KRAMER: If it hadn't been disclosed at all, even on the back, Your Honor, then the creditor would not have that right to unearned physical damage insurance premiums. It would not be -- part of the contract.

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QUESTION: Why --

MR. KRAMER: It would not then be part of the contract if you couldn't claim it. Putting it on the back makes it part of the contract; the issue in this case is whether it was required under the Truth-in-Lending Act to be disclosed on the front as a security interest, along with the vehicle which was the real security interest in this transaction.

QUESTION: Mr. Kramer, just to be sure I'm right, --

MR. KRAMER: Yes, Your Honor.

QUESTION: -- it's this language, is it, that appears on the back: "buyer hereby assigns to seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums."

MR. KRAMER: That's correct, Your Honor.

QUESTION: And did you answer my brother White that if that had appeared on the front it would have -- it would not have been adequate?

MR. KRAMER: It would have satisfied the Seventh Circuit, Your Honor, but I would point out two important factors with respect to that. The first of which is, 173 was not available to the Seventh Circuit when it wrote its decision. If Your Honor looks at footnote 24, I believe it is, in the Seventh Circuit's decision, it is obvious, and that footnote states, "it may be critical to the credit industry

that there is not an official staff interpretation of the Federal Reserve Board on this question, but there is not."

QUESTION: There still isn't.

MR. KRAMER: And -- and there still isn't, Your Honor. Except, but for -- but for this Court's grant of certiorari, it --

QUESTION: One-seventy-three would be operative.

MR. KRAMER: It would be operative, it would be operative. And as I --

QUESTION: But I still don't -- without regard to what the Seventh Circuit might have held, what would be your view whether had what I read you appeared on the front, would that have satisfied any disclosure requirement -- do you suggest?

MR. KRAMER: Your Honor, it would not have satisfied a requirement of the statute or the regulation, because neither the regulation nor the statute require it, and all that must be on the front is what is required of it, and as I've indicated --

QUESTION: I see.

MR. KRAMER: -- one of the problems faced by creditors in this field is that if they put on the front of such a contract something which is -- the state --

QUESTION: Yes, but if this -- if we were to say that this is a security interest -- not assignment --

MR. KRAMER: Yes.

QUESTION: -- then, I gather, under the statute and regulation, irrespective of 173 would have had to have appeared on the front, would it?

MR. KRAMER: If Your Honors so state, that's correct. Indeed, if Your Honors were to so hold --

QUESTION: Well I thought your suggestion was, and 173's suggestion was that even if this is a security interest, it isn't the kind that needs to appear on the front?

MR. KRAMER: It is the -- 173 does not state, categorically, that this is not a security interest. But what 173 says is that this incidental interest --

QUESTION: Even if it is, it needn't appear on the front?

MR. KRAMER: It's not the type of interest that need appear on the front, or --

QUESTION: Isn't it awfully hard for you to suggest that this isn't a security interest, if you have the right to -- you agree that if it weren't either on the front or the back you wouldn't have it?

MR. KRAMER: I would agree, Your Honor, that if it weren't on the back we wouldn't have the right. I don't agree that it is a security interest, it does not have the elements that a security interest classically has.

QUESTION: But 173 is to the effect that even if it

is it needn't be on the front?

MR. KRAMER: To the effect, Your Honor, that the -- it doesn't use those exact words, it says this incidental interest need not be shown on the front, it would not aid the purposes of the Act, in fact, it would retard the purposes of the Act if it were shown on the front. It would confuse,-- in the Milhollin case -- I had the opportunity to read the argument that was made before the Court in that case. And in that case, the argument was made that simply by adding two words to the front of the same contract there could be compliance with the Truth-in-Lending Act. Respondents in this case allege that by adding five words to the front of this contract there could be compliance with the Act--

QUESTION: Mr. Kramer, may I be sure about this?

MR.KRAMER: Yes, Mr. Justice?

QUESTION: The reason, if it has to appear on the front, is because the statute says security interests must be disclosed on the front and if this is a security interest that provision of the statute then requires its appearance on the front.

MR. KRAMER: Exactly. And this is our position and the Federal Reserve Board's proposed position is not such a required Truth-in-Lending security interest required under the Act to appear on the front.

QUESTION: Mr. Kramer, I think a moment ago you

referred to footnote 24 in the Seventh Circuit opinion, District opinion -- as I see it now, the last footnote in the opinion is footnote 21?

MR. KRAMER: It is 21, Your Honor, that I'm referring to.

QUESTION: Could you give me the statutory citation, what section in the statute that says that the disclosure must be on the front?

MR. KRAMER: Your Honor the statute says that the -- I think you will find that the pertinent provisions in our petition for the writ, of both Regulation Z and --

QUESTION: Yes?

MR. KRAMER: -- and of the statute itself --

QUESTION: All right. So what does it --

MR. KRAMER: Regulation Z would be 12 C.F.R. --

QUESTION: What page of the petition?

MR. KRAMER: We've listed these in the front, Your Honor -- on page -- pages 1 and 2. I would point out --

QUESTION: Well I still want to know where are the words that say a disclosure must be on the front?

MR. KRAMER: The requirement, Your Honor, would be with reference to disclosure statements under the Truth-in-Lending Act. The regulation and the statute uses the term disclosure statement, and for purposes of the Act the front of the contract that's in Court now is the

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disclosure statement. A disclosure statement may be given as a separate document on -- and not as the front of a contract -- but in this case, the front of the contract is the disclosure statement.

QUESTION: So if you said -- if you had just provided that the entire contract should be the disclosure statement, then what about that?

MR. KRAMER: That would not be permissible under the provisions which require that the disclosure statement be on one sheet of paper and I believe, on the front, exclusively.

In conclusion, we have argued in our brief and pointed out to the Court in our brief that the adoption of the original Truth-in-Lending Act, the Act that this case comes under, and its security interest provisions, came from the floor of Congress with the idea of preventing not -- and not affecting the type of interest which is before the Court now, but what was referred to on the floor of Congress by Congressman Cahill and Senator Proxmire, as a vicious second mortgage racket that involved the taking of second mortgages on purchasers homes and borrowers homes, unwittingly given by such borrowers -- that's what the security interest provision of the Act was adopted -- to put in -- that's how it came up from the floor of Congress.

The incidental interest which is before the Court

at this time, there is no relationship whatsoever to what Congress had in mind when it originally adopted the Act, under the Truth-in-Lending Simplification Act, Chairman Volcker has said in the letter that is attached to our reply brief as an appendix, that this issue disappears under the new Act. And it's very clear that this disclosure is not required under the new Act.

In conclusion, I would cite to the Court, --

QUESTION: Mr. Kramer, under the new Act will you still have to make the disclosure that you did make in this case?

MR. KRAMER: No, Your Honor, we will not have to make any disclosure with respect to incidental interests, such as --

QUESTION: I'm talking about the security interest in the automobile?

MR. KRAMER: In the automobile, we will, Your Honor.

QUESTION: But that's the one you did make in the contract?

MR. KRAMER: That's the one we did make, and --

QUESTION: That was not a second mortgage?

MR. KRAMER: And that was not a second mortgage.

QUESTION: So that the security interest requirement is not limited to second mortgages?

MR. KRAMER: It is limited -- Congress' intent

is limited to significant interests in property, and in knowledge on the part of buyers --

QUESTION: But significant interest in property or interest in significant property?

MR. KRAMER: Both, Your Honor.

QUESTION: Because your point is -- there's a significant interest in the property, but your point is, it's not -- the property is not significant, as I understand it?

MR. KRAMER: That's right. That's right.

QUESTION: That insurance is rather a sort of -- a fringe --

MR. KRAMER: That's correct. As Judge Cudahy said, and he was joined in by Judge Swygert in his concurring opinion, that to require the disclosure of this particular assignment on the face of the contract would merely add virtually inconsequential information; lengthening, complicating and trivializing this disclosure for no apparent reason.

QUESTION: But you said earlier, I think you were interrupted, that only five words would have to be added to this phrase.

MR. KRAMER: That's Respondent's contention, and this Court rejected the contention in Milhollin with only two words having to be added to that contract, because it

was not within the intent of Congress.

QUESTION: Well, that may be, but just as a matter of whether it's true or not, is it not true that by just adding the words "and insurance policies", or something like that, you would have an adequate disclosure?

MR. KRAMER: It could be done, Your Honor. It is done on a new form of Ford Credit Contract, however, that form of contract gives up significant interest that is taken under this broader form. For the reasons that we've stated in our briefs and that I've had a chance to reach in argument today, we ask that the Court reverse on the merits or at the minimum, because of the problems created with respect to this form contract, make any decision on this issue affirming prospective only.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Alop.

ORAL ARGUMENT OF ALAN A. ALOP, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. ALOP: Mr. Chief Justice --

MR. CHIEF JUSTICE BURGER: Mr. Alop, forgive me, before you start, but where is it -- that the requirement that it appear on the face -- where is that in the statute?

MR. ALOP: That's in Regulation Z, Your Honor, at 12 C.F.R. Section 226.8(a).

QUESTION: Now here's Regulation Z at page 2 of

the petition -- what's the language in Regulation Z that says the front?

MR. ALOP: The language in 226.8(a)(1) is that all of the disclosures shall be made together on either the note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature. Where the customer signs on the front side of the page and only on the front side of the page, all disclosures must be --

QUESTION: What are you reading from?

MR. ALOP: I'm not reading from the brief, Your Honor. The Regulation Z quotation does not appear in either of the briefs.

QUESTION: Where do we find it?

MR. ALOP: Twelve, Code of Federal Regulations --

QUESTION: Isn't that the crux of this case?

QUESTION: No, well, there's no controversy about it, is there?

MR. ALOP: The other side has not disputed this. The Petitioners have never claimed that it could be adequately disclosed on the reverse side of the contract.

QUESTION: Yes, but it wouldn't -- it would only be because of the regulation?

MR. ALOP: That's correct, Your Honor. That's at 12 C.F.R. --

QUESTION: If there weren't any provision like that, no Court has construed the statute to require that.

MR. ALOP: That's correct. The question in this case, whether a creditor's claim to returned insurance premiums has to be disclosed as a Truth-in-Lending Act security interest is disposed of by the fact that both the Act and Regulation Z require the disclosure of any security interest.

The use of the broad language "any security interest" reflects an unmistakable intention of Congress that every security interest retained by a creditor in the course of a credit transaction be disclosed. This Court, in the cases of Shea v. Vialpando and Harrison v. PPG Industries has indicated that the use of the term "any" precludes limited or narrowed statutory construction. The broad language in the statute, "any security interest", would also controvert -- Ford Credit's suggestion, that only essential security interests need be disclosed.

QUESTION: Well now, the Proposed Official Staff Interpretation 173, which as I understand it has not yet become effective, does say that this kind of interest need not be -- need not appear on the face of the statement. And if it says that, doesn't it necessarily also say that it's not a security interest, if the statute, as you tell us unequivocally requires that any security interests do

appear?

MR. ALOP: I would not dispute that, Your Honor. The proposed FC-0173 does leave one with the implication that it is not a security interest.

QUESTION: Where does the relevant text to that regulation appear?

MR. ALOP: Of 0173?

QUESTION: Yes.

MR. ALOP: I believe it's in the -- page 33 of the addendum -- no, 54 of the addendum.

QUESTION: Addendum to what, Mr. Alop?

MR. ALOP: To the Petitionters' brief. It's addendum number 54.

QUESTION: What color?

MR. ALOP: It's a blue brief.

QUESTION: Well, let me ask you, you read 228.8(a) is that it, a moment ago?

MR. ALOP: That's correct.

QUESTION: And that's the source of the requirement for the disclosure being on the front?

MR. ALOP: That's correct.

QUESTION: Now, what if in that regulation it had said except security interests in the unearned premium?

MR. ALOP: If that --

QUESTION: And then those may be on the back?

Suppose that that regulation said that?

MR. ALOP: Then we would not have this lawsuit before the Court today, Your Honor.

QUESTION: Well why isn't that -- if 173 is adopted, why isn't that in effect an amendment of -- it just adds an exception to 228(a).

MR. ALOP: The point is that FC-0173 is an unadopted, mere proposal of the Federal Reserve Board that was issued with the caveat that it may be withdrawn or that it may be altered after public comment was scrutinized.

Moreover, the Federal Reserve Board has twice in writing specifically precluded any reliance on FC-0173 and it has deferred any final action on FC-0173 as a result of this Court's granting of certiorari in this case.

QUESTION: Do you concede that if the Federal Reserve Board goes ahead and adopts the resolution, it will be a valid regulation?

MR. ALOP: If the Federal Reserve Board adopted FC-0173 because it uses the test of incidentalness which is at variance with the plain language of the Truth-in-Lending Act and Regulation Z, and because it is also at variance with longstanding Federal Reserve Board Regulations, or rather, the interpretation in Public Information Letter 377, it would still be entitled to little deference under the traditional test of Skidmore v. Swift & Co.

QUESTION: But Regulation Z is, itself, a promulgation of the Federal Reserve Board, is it not?

MR. ALOP: That's correct, Your Honor.

QUESTION: Well, to say then that it's contrary to Regulation Z, when the Regulation Z is in effect superseded in part by this new regulation, is rather hard for me to follow.

MR. ALOP: I also said that it is at variance with the language of the Act, which requires --

QUESTION: That was not hard to follow. But do you really place much reliance on the fact that the new regulation is at variance with the old regulation?

MR. ALOP: I place a reliance on the fact that Regulation Z defines security interest to encompass any interest in property which secures payment and that this proposal uses the test of incidentalness which ignores the concept in Regulation Z that any interest in property constitutes a security interest.

QUESTION: Well what if this proposal had been promulgated right after passage of the Act? Because the Act doesn't contain, as I understand it, any definition of the phrase "security interest".

MR. ALOP: The Act does not, Your Honor; it is Regulation Z --

QUESTION: And what if 0173 had been promulgated,

immediately after passage of the Act, saying security interests means any -- does not include an incidental security.

MR. ALOP: Had that been the case, I believe there would have been a contradiction between the Regulation Z definition --

QUESTION: Well, there would have been no Regulation Z. Regulation Z, itself, would have, under my hypothesis would have included the present provisions of 0173.

MR. ALOP: Given that hypothesis -- that Section 226.2(gg) that is the security interest definition of Regulation Z would not exist, then of course FC-0173, if it was final action, would control. But given --

QUESTION: It would control, because the statute -- while it does require that a description of any security interests be stated, it doesn't define what a security interest is, does it?

MR. ALOP: No, Your Honor.

QUESTION: And it doesn't require that it be on the face?

MR. ALOP: The statute does not, Your Honor, it is Regulation Z which requires --

QUESTION: That it be on the face.

QUESTION: And if Regulation Z had come out saying that some security interests have to be on the face and it's

enough to put some of them on the back, you wouldn't be here?

MR. ALOP: That's correct. I would note that the Federal Reserve Board has issued a series of rulings which have required disclosure of a wide range of security interests, security interests which do not fit into Ford Credit's characterization of essential security interests. The Federal Reserve Board, in their rulings set out at page 9 of our brief, have required disclosure of security interests in bank accounts, credit union accounts, and after acquired property. The test is not whether the security interest is essential, but whether -- but merely that any security interest be required to be disclosed. The Regulation Z definition, as I indicated, is any interest in property which secures payment or performance of an obligation and thus a two-pronged test is set up by Regulation Z and every Court which has applied that test to the issue in this case has concluded that a creditor's claim to returned insurance premiums is a security interest under the Truth-in-Lending Act.

Although the first test, the first prong of the Regulation Z definition, is any interest in property, Ford Credit attempts to downplay the significance of the interest in property it has retained in this case. It argues that this is an incidental interest and therefore need not be

disclosed. However, a creditor's claim to returned insurance premiums is significant: to Ford Credit, it has meant more than 10 million dollars by virtue of that provision over the last 10 years by our estimate, an estimate Ford Credit has not disputed.

QUESTION: When you say term insurance premiums, you're not talking about the life insurance premiums that -- they were talking about in 1970, are you?

MR. ALOP: This case involves physical damage insurance premiums, Your Honor.

QUESTION: Just what exactly is the property interest; you know, described in --

MR. ALOP: Well in this case, for example, it involved the physical damage insurance premium that exceeded $200. Given a cancellation of that insurance upon the default of the consumer, Ford Credit would have been entitled to that $215 by virtue of its clause. And in this case, it meant $215 to the consumer.

QUESTION: And why would Ford -- why would the insurance company have cancelled?

MR. ALOP: What happens is, is on default of the consumer the -- by virtue of the contractual assignment clause, Ford Credit is entitled to -- upon default, the insurance is cancelled because there's no longer any need for the continuation of physical damage insurance since the

car has been repossessed, at that moment, Ford Credit is entitled to all returned insurance premiums that would exist at that time.

QUESTION: Mr. Alop, do you think the buyer reasonably would have expected to get the premium in that situation?

MR. ALOP: Well, consumers will have no means of having any opportunity to know that they are entitled to these funds unless the matter is meaningfully disclosed to them.

QUESTION: Well they really would not be entitled to the funds if they are in default on the loan, would they?

MR. ALOP: They are entitled to -- without any clause, of course, those funds would go directly to the consumer, if Ford Credit --

QUESTION: Well who holds the policy?

MR. ALOP: The policy is -- the insurance company issues a policy directly to the consumer and without --

QUESTION: Doesn't there have to be a copy to the dealer or the finance company?

MR. ALOP: I do not know.

QUESTION: I mean, how does the finance company know that the car is being insured, that it's a contractual obligation to get insurance?

MR. ALOP: The contract requires the consumer to

give proof of insurance to the dealer.

QUESTION: That's some kind of written document, I assume?

MR. ALOP: That's correct.

QUESTION: And then, if there's a default, isn't it fairly clear that whatever money comes back will be paid over to the dealer? I mean, wouldn't the -- how could one not expect that to happen?

MR. ALOP: The money of course, for example, in this case, the consumer purchased the insurance from an independent insurance company and ordinarily, the consumer would tend to think that that money would come back to the consumer, given default or given a cancellation of the insurance policy. But by virtue of Ford Credit's --

QUESTION: Even though he was in default on his loan he would think that?

MR. ALOP: There would be no reason for the money to go from the insurance company to the dealer, to Ford Credit, absent the clause in the --

QUESTION: Oh, I understand that, but wouldn't the buyer of the car realize that that's why he's carrying the insurance, to protect the -- his ability to pay off the debt?

MR. ALOP: No, the insurance protects the automobile from collision.

QUESTION: Right.

MR. ALOP: This is collision insurance.

QUESTION: Right.

MR. ALOP: And I don't think that consumers have an idea that this insurance is securing the debt, they are not -- certainly not disclosed, that's not disclosed to them, by virtue of the contract, in the present case.

QUESTION: You really think there's a significant potential for misleading the buyers in this situation?

MR. ALOP: It's not so much as an intentional misleading --

QUESTION: I don't mean intentional, potential for, do you think the buyers are really apt to be misled in this situation?

MR. ALOP: The buyer is not given an opportunity --

QUESTION: It seems rather unlikely to me.

MR. ALOP: Under the contract in this case, the buyer really is not given a meaningful opportunity to know that this sum of insurance --

QUESTION: He's told he's got to buy insurance to cover this risk and he assumes he can default on the loan, and get the rebate on the premium and put it in his pocket, is what you're saying?

MR. ALOP: I'm saying that --

QUESTION: It seems very unlikely to me.

MR. ALOP: -- that the consumer does not know that

these refunds will be going to Ford Credit rather than to be coming back to the consumer, absent the meaningful disclosure on the front side of the contract.

I was referring to the significance of the interest to the creditor. It's -- Ford Credit has recovered substantial funds by virtue of this security interest over the last 10 years and this is an attractive --

QUESTION: But aren't those recoveries all against a larger, unpaid debt that they weren't able to collect? I mean, isn't that always when they get the money on these refunds?

MR. ALOP: There are --

QUESTION: They don't make any profit on it.

MR. ALOP: There are occasionally surpluses, in which the secured property, the automobile, for example, will -- the value of that will exceed the outstanding debt.

QUESTION: But then the buyer gets the surplus?

MR. ALOP: The buyer is supposed to get that surplus, the buyer will have no means of knowing that this money is coming to the buyer unless it is disclosed.

QUESTION: No, but isn't it a fact that the 100 million or whatever the big sum of money is that Ford has collected is a reduction of losses it otherwise would have suffered?

MR. ALOP: It is applied to outstanding debts,

that's correct.

QUESTION: They haven't made any money by -- on this --

MR. ALOP: They have recovered this money by virtue of that.

With regard to --

QUESTION: And also, it's also clear that the buyers would never have had a legal right to retain any of that -- or, I mean, any equitable right to any of that money, because they would have been indebted to Ford for an amount greater than the amount that's in dispute in every one of these cases.

MR. ALOP: Well, this money would, if there is no deficiency, if there was a surplus, of course, it would go directly to the consumer -- even, however, if this Court deemed that the interest in this case to be incidental, it would still be sufficient to meet the test of Regulation Z's definition of security interest, which merely requires any interest in property.

The second prong of the Regulation Z test is an interest in property which secures payment or performance of an obligation. The interest Ford Credit has retained in returned insurance premiums secures payment of this obligation because Paragraph 17 of Ford Credit's contract specifically authorizes Ford Credit to recover returned insurance

premiums and to apply them towards the outstanding debt. Thus, Ford Credit's interest in this returned insurance premium secures the payment of the obligation and both prongs of the Regulation Z test for security interest are met.

Contrary to the assertion of Ford Credit which was made today, the interest it retains in secured premiums would, if properly disclosed to consumers, be understood by consumers --

QUESTION: Incidentally, Mr. Alop, may I ask how much actually is involved here?

MR. ALOP: The total amount of the premium in this case was $215.

QUESTION: Oh, and the return would be about what?

MR. ALOP: The return would of course depend at the time -- on the timing of the cancellation of the insurance.

QUESTION: Do we know here when it was?

MR. ALOP: No we do not, Your Honor.

Ford Credit also has argued that --

QUESTION: May I ask one other question as a matter of history, is it true that before this statute was passed it was customary for the finance companies to buy the insurance themselves, and then they would buy the policy and make the purchaser pay the premiums?

MR. ALOP: The record doesn't reflect that, Your Honor, but I believe it is customary for both mechanisms to exist. Dealers oftentimes do sell this insurance, in other cases, consumer --

QUESTION: And there's the provision in the contract here that permits the buyer to buy it elsewhere if he wants to. I mean, it used to be in the home mortgage business that the real estate brokers would make the money on the insurance. I guess it's probably true in this industry as well, although I don't know. And so, is this just sort of one of those things that grew out of the fact that the buyer was given an option to buy his own insurance and therefore, the security interest was created in that policy? Whereas, if the older practice had been followed, the dealer would have just owned the policy himself.

MR. ALOP: Well, in both situations of course, the dealer retains the security interest in returned insurance premiums. Under both. I don't think the historical analysis there would explain anything.

Ford Credit argued that this information would create an information overload. Certainly when the matter is disclosed, as it is in the present contract, buried on the reverse side and clothed in the language of an assignment clause, in one sentence which is 58 words long, it is confusing. However, the Third Circuit Court of Appeals in

the Gennuso decision indicated that a creditor's security interest in returned insurance premiums could be meaningfully disclosed to consumers in a matter of a few words and also importantly, intelligibly and meaningfully. And we would note that Ford Credit's new contract which it has adopted subsequent to the decision below, does disclose this information to consumers on the front side of the contract --

QUESTION: Well the decision below told it it had to?

MR. ALOP: That's correct, Your Honor.

QUESTION: That's no-- not very surprising.

MR. ALOP: My point is however, that they have, they are now disclosing this information concisely in a matter of five words on the front side of the contract; that's hardly creating an information overload that they refer to.

I would also note that Ford Credit's reliance on the Truth-in-Lending Simplification and Reform Act is misplaced. That Act is not effective until 1982, and -- it is not retroactive, it is not made applicable to pending litigation or is it applicable -- or made retroactively applicable, thus by it's own terms, the Simplification Act is not relevant to this case and by virtue of 11 United States Code Section 109, Ford Credit's liability for violations of the existing Truth-in-Lending Act is not extinguished by virtue of the enactment of the Simplification Act.

QUESTION: What does that statute provide, 1 U.S. Code Section 109?

MR. ALOP: Section 1 U. S. Code Section 109 merely indicates that a repeal of the statute or an amendment to that statute does not extinguish liability that may have --

QUESTION: Previously arisen under the statute?

MR. ALOP: That's correct.

QUESTION: But this isn't an amendment -- or, you're talking about the Simplification Act, not the proposed regulations?

MR. ALOP: I'm referring to the Simplification Act.

QUESTION: And does the Simplification Act in terms -- have some provision that would bear on this question if it were in effect now?

MR. ALOP: The point is, Your Honor, the Simplification Act does not bear on these proceedings because it is entirely prospective in --

QUESTION: No, I say, if it were in effect now.

MR. ALOP: If it were in effect --

QUESTION: Would it have a bearing on --

MR. ALOP: It would, Your Honor, because I believe it does change the law regarding the disclosure of security interests. There's no question of that. The point is that Ford Credit argues that we should look to the Simplification

Act because it allegedly interprets the Truth-in-Lending Act, and we would note that there is nothing in the language of the Simplification Act or the Committee Reports which underlie the simplification Act, that interprets or construes the present Truth-in-Lending Act which governs this transaction. The only thing Ford Credit has relied on, since there is nothing in the language of the Act or in the Committee Reports that underlie it, the only thing Ford Credit has relied on is a statement, an isolated statement of one senator -- Senator Garn, to the effect, arguing that -- excuse me, that the language -- but Senator Garn, we would note, was not a member of the body that enacted the Truth-in-Lending Act, the Congress that enacted the Truth-in-Lending Act, and Senator Garn's statement is not reflected in the Committee Report; instead, it was inserted in the Congressional Record after the Committee Report was issued and it's not reflected in the Committee Report.

QUESTION: And his statement was to the effect that the new provisions of the Simplification Act were simply clarifying?

MR. ALOP: That's correct. However this Court in the past, has given little if any, weight to the post-passage remarks of legislators regarding the meaning of previously enacted legislation, particularly where the legislator was not a member of the enacting body.

Ford Credit has argued that the application of the decision in this case should be made prospective only, with regard -- except as with regard to the Respondents in this case. However, by placing the argument in this posture, by conceding that the Respondent should recover, regardless of the application of the decision as given, Ford Credit has destroyed any adversarial relationship between the parties on this issue. That is, Ford Credit has presented no case or controversy to this Court on the issue of the application this decision is to be given. Ford Credit on the issue of non-retroactivity, presents no case or controversy in that it seeks no relief that will affect the Respondents in any way, it seeks no alteration in the judgment below, and as a consequence, in essence it seeks an advisory opinion that will affect other litigation, pending litigation in which the Respondents have no interest.

QUESTION: The Court announced a decision this morning with which I am sure you haven't yet had time to familiarize yourself -- Kirchberg v. Feenstra, which might have some bearing on this aspect of the case.

MR. ALOP: As it is our opinion that the Court need not reach the issue of prospective application, we will stand on our briefs with regard to the Chevron analysis. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything

further, Mr. Kramer? You have one minute left.

MR. KRAMER: One minute left, Your Honor?

MR. CHIEF JUSTICE BURGER: One.

MR. KRAMER: Thank you.

ORAL REBUTTAL ARGUMENT OF AARON J. KRAMER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. KRAMER: The purpose of the clause that we've been discussing today is not to gain access to incidental -- unearned security interests, but rather to keep the real security interests in these transactions not only for Ford Credit but for the industry insured -- and that is, to maintain insurance on the financed vehicles themselves which are the real security interests in the transaction. We do not only rely upon Senator Garn who is a member of the committee that adopted the Simplification Act, but also the Federal Reserve Board that held that the Simplification Act clarifies this issue as intended by the original Act.

Finally, with respect to this matter, creditors are only looking for clear direction from the Federal Reserve Board which has stated that clear direction in 173, and but for this Court's grant of certiorari that would be the law today. Respondent should not be permitted to embrace the Federal Reserve Board's decision while at the same time ignoring 173. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:58 o'clock a.m. the case in the above matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-84

ANDERSON BROS. FORD AND FORD MOTOR CREDIT COMPANY,

v.

OLGA VALENCIA AND MIGUEL GONZALEZ

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Bill J. Wilson

William J. Wilson

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