

NO. 77708-0

SUPREME COURT  
OF THE STATE OF WASHINGTON

Court of Appeals No. 22764-2-III  
Court of Appeals No. 23239-5-III

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CASHMERE VALLEY BANK, a Washington corporation

Respondent

v.

TERRY B. BRENDER

Petitioner

FILED  
BY C. J. HENNING  
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SUPPLEMENTAL BRIEF OF PETITIONER  
TERRY B. BRENDER

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
I. ASSIGNMENTS OF ERROR.....	1
II. STATEMENT OF CASE .....	1
III. ARGUMENT .....	2
A. <u>Quantitative Test undermines the Federal Truth in Lending Act’s purpose and rules of construction</u> .....	2
B. <u>All Circumstances Test appropriately places burden of compliance with Federal Truth-in-Lending Act on Lenders</u> .....	2
C. <u>Original Purpose Test squares with consumers’ expectations</u> .....	3
D. <u>“Sophisticated Borrower Test” complies with the Federal Truth-in-Lending Act’s purpose and rules of construction</u> .....	4
E. <u>A lender who fails to comply with the Federal Truth-in-Lending Act must pay the costs, including attorney’s fees, incurred by the consumer</u> .....	4
IV. CONCLUSION.....	6

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page(s)</b>
<u>Cashmere Valley Bank v. Brender</u> , 128 Wn.App. 497, 116 P.3d 421 (Div. 3, 2005).....	10
<u>Conrad v. Smith</u> , 42 Wn.App. 559, 563, 712 P.2d 866 (Div. 3, 1986) .....	5
<u>Evy v. Reb Realty, Inc.</u> , 495 F.2d 646 (9 <sup>th</sup> Cir. 1974); .....	2
<u>Fairley v. Turan-Foley Imports, Inc.</u> , 65 F.3d 475, 482 (5 <sup>th</sup> Cir. 1995) .....	2
<u>Federal Land Bank of Jackson v. Kennedy</u> , 662 F.Supp. 787, 790 (N.D. Miss. 1987).....	3
<u>GAC Finance Corporation of Spokane v. Burgess</u> , 16 Wn.App. 758, 760, 558 P.2d 1386 (Div. 3, 1977) .....	2
<u>Gardener &amp; North Roofing &amp; Siding Corp. v. Board of Governors of the Fed. Res. Sys.</u> , 150 U.S. App. D.C. 329, 464, F.2d 838 (1972) .....	2
<u>McGovern v. Smith</u> , 59 Wn.App 721, 732, 801 P.2d 250 (Div. I), 1991 .....	7
<u>N.C. Freed Co. v. Board of Governors of the Fed. Res. Sys.</u> , 473 F.2d 1210 (2 <sup>nd</sup> Cir. N), Cert. Denied 414 U.S. 827, 94 S.Ct. 48, 38 L.Ed.2d 61 (1973); .....	2
<u>Stillman v. First National Bank of North Idaho</u> , 117 Idaho 642, 791 P.2d 23 (Idaho, 1990).....	3
<u>Thorns v. Sundance Properties</u> , 726 F.2d 1417, 1419 (9 <sup>th</sup> Cir. 1984) .....	5
<u>Tower v. Moss</u> , 625 F.2d 1161, 1166-67 (5 <sup>th</sup> Cir. 1980)....	5

## TABLE OF AUTHORITIES (CONTINUED)

<b>Cases:</b>	<b>Page(s)</b>
---------------	----------------

<u>Toy Nat. Bank of Sioux City v. McGarr</u> , 286 N.W.2d 376 (Iowa, 1979) .....	3, 6
---	------

### **Statutes:**

15 U.S.C. §1601(a) .....	1
15 U.S.C. §1602(h) .....	2
15 U.S.C. §1640(a) .....	9
15 U.S.C. §1640(a)(3) .....	9

## **I. ASSIGNMENT OF ERROR**

The trial court erred in granting Cashmere Valley Bank's ("CVB") motion for summary judgment and denying Terry Brender's ("Mr. Brender") motion for summary judgment on the issue of whether the federal Truth-in-Lending Act ("TILA") applies to the facts of this case. The Court of Appeals erred in affirming the trial court's decisions.

## **II. STATEMENT OF THE CASE**

Mr. Brender's statement of the case is set forth in his Petition for Review filed with this Court, and in his briefs in Division III of the Court of Appeals, Case Nos. 22764-2-III and 23239-5-III, which statements are incorporated herein by this reference.

## **III. ARGUMENT**

The purpose of the federal Truth-in-Lending Act ("TILA") is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. §1601(a). "In order to better

effectuate the purpose, the courts have held [TILA] act [Federal Regulation Z] are to be liberally construed and the requirements contained therein are to be strictly enforced.” GAC Finance Corporation of Spokane v. Burgess, 16 Wn.App. 758, 760, 558 P.2d 1386 (Div. 3, 1977), citing Evy v. Reb Realty, Inc., 495 F.2d 646 (9<sup>th</sup> Cir. 1974); N.C. Freed Co. v. Board of Governors of the Fed. Res. Sys., 473 F.2d 1210 (2<sup>nd</sup> Cir. N), Cert. Denied 414 U.S. 827, 94 S.Ct. 48, 38 L.Ed.2d 61 (1973); Gardener & North Roofing & Siding Corp. v. Board of Governors of the Fed. Res. Sys., 150 U.S. App. D.C. 329, 464, F.2d 838 (1972). In other words, “TILA is to be enforced strictly against creditors and construed liberally in favor of consumers.” Fairley v. Turan-Foley Imports, Inc., 65 F.3d 475, 482 (5<sup>th</sup> Cir. 1995). TILA applies to all loans made primarily for personal, family, or household purposes. 15 U.S.C. §1602(h).

With TILA’s purpose and rules of construction in mind, and based on undisputed facts, this court may find, as a matter of law, that the loan received by Mr. Brender in 1993 was primarily for personal, family, or household purposes. This result is reached under an application of each of the four below-analyzed tests.

**A. The Quantitative Test undermines TILA's purpose and rules of construction.**

The Quantitative Test uses a strict formulaic approach in determining whether lenders must comply with TILA requirements. See Stillman v. First National Bank of North Idaho, 117 Idaho 642, 791 P.2d 23 (Idaho, 1990). The Stillman court stated this easy to apply formula thusly:

Where more than half the money loaned is for an exempt purpose, such as to fund a business, the disclosure requirements are deemed not to apply.

Id., at 644, 791 P.2d 23, citing Federal Land Bank of Jackson v. Kennedy, 662 F.Supp. 787, 790 (N.D. Miss. 1987). However, the Stillman court went on to say that “the only workable approach, in light of the scheme established by Congress, is to characterize a loan according to the purpose stated by the borrower at the outset of the transaction, and to maintain this characterization throughout the life of the loan.” Stillman, 117 Idaho at 645, 791 P.2d 23, (emphasis added), citing Toy Nat'l Bank of Sioux City v. McGarr, 286 N.W.2d 376, 378 (Iowa 1979).

This formulaic approach does not further the purpose of TILA. It is lender-friendly. A borrower who seeks a loan for consumer purposes reasonably expects that the laws regarding

consumer transactions apply to the loan transaction. A bank that lends money to a consumer should not be exempt from laws regarding consumer transactions merely because it simultaneously consolidates the consumer's previous debt. A bank lending to a consumer certainly should not be exempt from providing TILA-required plain-language disclosures merely because it requires the consumer to allow the bank to improve its position on existing debt from that of an unsecured creditor to that of a secured creditor. That is exactly the type of situation for which a consumer would need plain-language disclosures.

Here, Mr. Brender went into CVB in 1993 to borrow \$150,000 to settle his divorce. (CP 272-274) CVB took advantage of Mr. Brender's need for money to settle his divorce, seeing an opportunity to improve its position on funds previously lent to Mr. Brender from that of an unsecured creditor to that of a secured creditor. (CP 380-482) The remaining amount of the 1993 loan merely "restructur[ed] [CVB's] present debt put[ing] the bank in a fully secured and amortizing position." (CP 65) Thus, the only funds issued pursuant to the 1993 loan was approximately \$150,000 for the settlement of Mr. Brender's divorce.

Therefore, even under the lender-friendly quantitative test,

all or nearly all of the 1993 loan was for personal, family or household purposes. Certainly, Mr. Brender reasonably believed that the 1993 loan was for the purpose of settling his divorce, and only agreed to restructure his existing debt with CVB so that it would lend him the money he needed in order to settle his divorce. Construing these matters liberally in favor of the consumer and strictly against the creditor, TILA applies to the 1993 loan.

**B. The All Circumstances Test appropriately places the burden of compliance with TILA requirements on lenders.**

In Washington, TILA applicability has been determined using the following standard:

Whether a loan is for personal or business purposes appears to be a factual question to be answered only after evaluating the circumstances surrounding a transaction.

Conrad v. Smith, 42 Wn.App. 559, 563, 712 P.2d 866 (Div. 3, 1986), citing Thorns v. Sundance Properties, 726 F.2d 1417, 1419 (9<sup>th</sup> Cir. 1984); Tower v. Moss, 625 F.2d 1161, 1166-67 (5<sup>th</sup> Cir. 1980).

A lender should be required to evaluate the circumstances surrounding the transaction to determine whether a consumer should reasonably expect laws regarding consumer transactions to

apply to a specific loan situation. In other words, consumers should be protected when they reasonably expect to be. The ease or difficulty to a lender of determining whether or not TILA applies is a secondary consideration compared to the consideration of the reasonable expectations of consumers. Lenders can avoid any uncertainty by erring on the side of caution -- issuing TILA-required plain-language disclosures to a borrower when there is any question as to whether the transaction is consumer in nature.

Had CVB considered all the circumstances surrounding the 1993 loan, it would have realized that Mr. Brender's reasonable expectation was that the loan was for settling his divorce, a consumer purpose. CVB could have easily given Mr. Brender plain-language disclosures informing him of the specifics regarding the 1993 loan.

**C. The Original Purpose Test squares with consumer's expectations**

The Original Purpose Test "characterize[s] a loan transaction by the use to which the proceeds are originally placed and maintain[s] the same characterization throughout the life of the loan." Toy Nat'l Bank of Sioux City v. McGarr, 286 N.W. 2d 376, 378 (Iowa) 1979. Washington courts "do not accept the proposition

that a business purpose certificate signed in connection with one loan will control the nature of subsequent loans used to refinance or repay the prior loan.” McGovern v. Smith, 59 Wn.App 721, 732, 801 P.2d 250 (Div. I), 1991.

Here, the only funds issued by CVB pursuant to the 1993 loan were for consumer purposes - \$150,000 to settle Mr. Brender’s divorce. CVB has admitted that it knew that Mr. Brender’s sole purpose in seeking the 1993 loan was to settle his divorce. (CP 396)

Having not received any plain language disclosures as to what exactly was happening with the 1993 loan, Mr. Brender signed a business purpose certificate as part of the 1993 loan and the 1996 loan. However, Mr. Brender did not sign such a business purpose certificate as part of the 2001 refinance loan. Therefore, the business purpose certificates signed as part of the 1993 loan and the 1996 loan do not control the purpose for which the 2001 loan was obtained. Since the original purpose for taking out additional funds in 1993 was to settle his divorce, TILA applies to this situation under the Original Purpose Test.

**D. The “Sophisticated Borrower Test” complies with TILA’s purpose and rules of construction**

Mr. Brender offers an additional test for the court’s consideration. This new proposed test requires lenders to consider the sophistication of borrowers in determining whether TILA-required plain-language disclosures should be given in hybrid loan situations. One of the reasons that TILA requires lenders to provide plain-language disclosures is that consumer borrowers are generally less financially sophisticated than commercial borrowers. However, if a borrower is both a consumer borrower and a commercial borrower, a lender should bear the burden of evaluation such a borrower’s sophistication.

For example, if the president of a large, successful, privately-owned company borrows money for both her business and for consumer purposes, the lender could reasonably expect such a borrower to be fairly financially sophisticated. In such a situation, the lender would not be required to issue TILA-required plain-language disclosures to such a borrower. Compare that borrower with the borrower who is the only employee of a business he just started out of his garage. When this borrower comes to the bank to borrow for both business and consumer purposes, a lender could

not reasonably expect this borrower to be particularly financially sophisticated. As such, a borrower should be required to issue plain-language disclosures to such a borrower.

This test furthers the purpose of TILA by providing easy-to-understand disclosures to hybrid loan borrowers that need such disclosures. This test likewise appropriately construes TILA protections liberally in favor of consumers, while requiring lenders to strictly comply with TILA requirements.

Mr. Brender is self-employed, and the only employee of his mill business. He has no financing department or accountants reviewing his business loan documents. As such, he is not a particularly financially sophisticated borrower. Mr. Brender would have greatly benefited from plain-language disclosures explaining that, among other things, CVB was receiving a security interest in his property.

**E. A lender who fails to comply with TILA must pay the costs, including attorney's fees, incurred by the consumer.**

A consumer is authorized to bring a private cause of action for a lender's failure to comply with TILA requirements. 15 U.S.C. §1640(a). Where the consumer prevails in such a private cause of action, the lender must pay the consumer's "costs of the action,

together with a reasonable attorney's fee as determined by the court." 15 U.S.C. §1640(a)(3).

In determining that TILA applies to the 1993 loan, Mr. Brender requests that the court grant him the costs of the action, including a reasonable attorney's fees as determined by the court.

## **VI. CONCLUSION**

Mr. Brender reasonably expected that laws regarding consumer transactions applied to the 1993 loan because he sought the loan for consumer purposes. Any test that this court adopts should recognize such a reasonable expectation. Therefore, Mr. Brender respectfully requests that this court reverse the Court of Appeals decision in Cashmere Valley Bank v. Brender, 128 Wn.App. 497, 116 P.3d 421 (Div. 3, 2005).

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June, 2006.

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