WHEN OVER-THE-LIMIT IS OVER THE TOP: ADDRESSING THE ADVERSE IMPACT OF UNCONSCIONABLE CONSUMER-CREDIT PRACTICES ON THE ELDERLY

Donna S. Harkness

Predatory lending practices in the credit card industry have created retirement instability for today's elderly population. Many elderly individuals find themselves facing mounting debt, lawsuits, and foreclosure because of the eradication of state usury laws as a limit on interest rates, late fees, and other penalty charges. Existing laws, which focus on disclosure of credit terms to consumers, have done little to address or ameliorate the problems facing the elderly, who are more vulnerable to the negative effects of unconscionable consumer-credit practices. While many feel that the problem lies in the improvident extension of credit, evidence suggests that much of the profit gained by the credit card industry lies in extending credit to people more likely to default, such as the elderly. Professor Harkness advocates for the revision of the federal Truth in Lending Act to add substantive protections that would prohibit the charging of excessive late fees, require creditors to take affirmative steps to mitigate damages, and prohibit assessment of over-the-limit fees when debtors have not actually requested issuance of additional credit. These revisions would help eliminate the financial incentives encouraging credit card companies to profit from the default and financial ruin of the elderly.

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In 2001, when Ms. L. was eighty-seven years old, she responded to a phone solicitation for a credit card with a $300 credit limit.[1] Ms. L. was living with her adult daughter, and both were authorized to use the card. It was their intention to have it available for gasoline purchases and incidentals. At the time she applied for the card, Ms. L. was receiving Social Security retirement benefits in the amount of $832.00 per month. She had been working as an in-home cook for a well-to-do family and had continued working until she had a stroke and was forced to retire. For cash advances, the interest rate on the card was 19.80% APR; however, the promotional introductory interest rate for purchases was 0.00%.[2] This benefit was somewhat offset by the fact that Ms. L. was assessed a $39.00 annual membership fee in order to possess the card.

Her first month's statement showed a $62.00 cash advance, a $5.00 cash-advance fee, a gas purchase of $12.00, and $39.00 for the membership fee, resulting in a total balance of $118.10. Four months later, Ms. L.'s total charges on the card for items that were of benefit to her (as opposed to the fees and interest charges) equaled $265.02, still below her credit limit of $300. Unfortunately, the total balance on the card, which included these fees and other charges, equaled $321.12, which was over the credit limit. To make matters worse, Ms. L. had made only one $15.00 payment on the account during the first three-month period. That payment had been received late by the credit card company and was insufficient to meet the required minimum payment of $30.00. She was therefore assessed a past-due fee of $25.00 for that month. For virtually every month thereafter for the next two years, Ms. L. was assessed not only a past-due fee in the amount of $25.00, but an over-the-limit fee in the amount of $25.00 as well. The credit card company finally defaulted the account in April 2003. Ms.

1. The facts of Ms. L.'s case are patterned after those recounted by an actual elderly client represented by a student attorney while enrolled in the Elder Law Clinic at the University of Memphis under the direct supervision of Professor Harkness.

2. This interest rate for purchases later jumped to a much higher variable rate when the credit card company exercised its option to terminate the 0.00% APR promotional rate after Ms. L. failed to pay the minimum payment by its due date in the previous two months. The variable rate started at 24.40% APR and then ranged from a high of 25.90% to a low of 20.65% APR. The variable rate of 19.80% APR on cash advances floated down to a low of 18.30% one month prior to the aforementioned default, but thereafter conformed to the default rates charged for purchases.

L. was sued three years later by a collection agency seeking $2,445.69, not including court costs and service-of-process fees.

Between the time she had opened the account in January 2001 and when it was finally closed by the credit card company in April 2003, Ms. L. had been assessed $309.13 in finance charges, $525.00 in past-due fees, $550.00 in over-the-limit fees, $117.00 for three years worth of membership fees, and a $5.00 cash-advance fee. Charges for cash and actual purchases for her benefit came to a grand total of $277.02, all of which was incurred between January and April of 2001. After April 2001, she had no more credit available on the card. Ms. L. did continue to try to pay off the account, and her payments totaled $474.75. The last payment occurred in November 2002, when she tendered $50.00 that was totally eradicated by the past-due fee of $25.00 and the over-the-limit fee of $25.00 assessed for the same month.

Ms. L.'s story illustrates how in the modern world of consumer credit, even a consumer who pays back all that he or she has originally charged, plus an amount that would equal a 70% return if calculated as simple interest, can still wind up owing over eight times the amount that was originally charged. More sadly still, the assessment of this veritable mountain of fees and interest is apparently nothing unusual and, as will be discussed below, is well within the legal parameters of what is considered to be a standard consumer-credit contract.

The ubiquitous onslaught of credit card offers that floods everyone's mailbox presents a special hazard to the elderly.[3] Although it is admittedly the case that anyone who is living on a limited income, either due to unemployment, lack of marketable job skills or education, or as a consequence of suffering from disability, is vulnerable to the allure of such offers,[4] the elderly represent an especially vulnerable population for several reasons. First, the generation that is currently aged sixty-five to eighty-four was either born or came of age during World War II. This generation is known for individuals that are both trusting and trustworthy; they value promises and consider one's

3. SENATE COMM. ON BANKING, HOUSING & URBAN AFFAIRS, EXAMINING THE BILLING, MARKETING, AND DISCLOSURE PRACTICES OF THE CREDIT CARD INDUSTRY AND THEIR IMPACT ON CONSUMERS 3 (2007), http://www.banking.senate.gov/_files/warren.pdf [hereinafter WARREN TESTIMONY] (statement of Professor Elizabeth Warren, Leo Gottlieb Prof. of Law, Harvard Law School).

4. Teri Rebecca Daniel, *Improvident Extension of Credit as an Extension of Unconscionability*: Discover Bank v. Owens *and a Debtor's Rights Against Credit Card Companies*, 54 CLEV. ST. L. REV. 435, 436 (2006).

word to be one's bond.[5] They believe that the receipt of an offer of credit reflects the lender's faith in their ability to qualify and repay the amount extended, and are either not critical or, due to dementia or other illness, are not mindful of the draconian measures taken by credit card companies should they fail to repay the account in a timely fashion.[6] They may even be unable to read or comprehend the terms contained in the fine print relating to what happens when and if the account goes into default. Secondly, this age cohort may be confined to their homes by issues that limit their mobility, a fact that also limits their ability to shop around for better credit terms than those they have received in the mail.[7] Thirdly, if they are retired and living on a fixed income, their financial needs may well exhaust and overwhelm the income at their disposal.[8] An offer of seemingly easy credit may prove to be an irresistible temptation to help make ends meet. Fourth, this generation tends to be loath to leave any obligation they have incurred unmet.[9] As a consequence, they respond to the appeals and threats of collection agents and continue to tender payments in a vain attempt to satisfy delinquent accounts.[10] The account balances steadily increase despite made payments because the payments are either late or not enough to meet the minimum payment, with the result that late fees, over-the-limit fees, and additional interest charges are assessed.[11] Finally, the elderly, even those of limited income, are likely to be homeowners and either own their homes outright or have an extensive equity interest in them.[12] Because of these factors, the laws re-

5. Pamela Paxton, *Trust in Decline?*, CONTEXTS, Winter 2005, at 1, 2.

6. Daniel, *supra* note 4, at 436.

7. Shelby A. D. Moore & Jeanette Schaeffer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 518–20 (2004).

8. Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 167–68 (2007).

9. *See* Aleksandra Todorova, *Debt Management Tips for Seniors*, KEYBANK, 2007, https://www.key.com/html/sm-debt-management.html.

10. *See generally id.* (discussing the psychological toll not paying debt has on seniors).

11. *See* Loonin & Renuart, *supra* note 8, at 184.

12. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2005, at 460–67 tbl.7-15 (2006), *available at* http://www.census.gov/prod/2006pubs/h150-05.pdf; WAN HE ET AL., U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 65+ IN THE UNITED STATES: 2005, at 110–12 (2005), *available at* http://www.census.gov/prod/2006pubs/p23-209.pdf; U.S. Census Bureau, Occupancy Characteristics, http://factfinder.census.gov (select "Housing Physical Characteristics" hyperlink; then select "General Housing Characteristics and Counts: Occupancy Characteristics"; then select "2005" hyperlink) (last visited Mar. 20, 2008).

lating to extension of consumer credit to the elderly should be revised to reflect the greater vulnerability of this population and to provide less incentive for those that are in business to exploit this vulnerability for profit.

Part I of this Article discusses the existing law governing consumer-credit transactions with a focus on the Truth in Lending Act. The inadequacies of this Act in relation to seniors are examined in Part II. Finally, in Part III, three revisions to the Truth in Lending Act are proposed that give greater protection to seniors in their consumer-credit transactions.

I. Existing Law Governing Consumer-Credit Transactions

The extension of open-ended consumer credit through revolving charge accounts, credit cards, and overdraft checking accounts is primarily regulated at the federal level by the Truth in Lending Act (TILA).[13] TILA incorporates the provisions of the Fair Credit and Charge Card Disclosure Act of 1988[14] and the Fair Credit Billing Act of 1974.[15] For purposes of TILA, a consumer is defined as a "natural person" who is engaging in a credit transaction wherein the funds, services, or goods that are to be acquired as a result of the transaction will primarily be used for "personal, family, or household purposes."[16] An open-ended credit plan is defined as an arrangement wherein the creditor "reasonably contemplates" unspecified or multiple numbers of repeated credit transactions, assesses a finance charge on a recurring basis on any outstanding credit balance, then reextends credit to the consumer as the outstanding balance is paid down to within the credit limit extended by the creditor.[17]

Ms. L. is a natural person, her credit card transactions involved items for personal use, and she was involved in an open-ended credit plan, therefore her situation is governed by TILA. The statute's protections, however, are directed toward disclosures that must be made concerning the annual percentage rate of interest,[18] finance charges,[19]

13. Truth in Lending Act of 1968, 15 U.S.C. § 1601 (2000).
14. *Id.* § 1637(c).
15. *Id.* §§ 1666–1666j.
16. *Id.* § 1602(h).
17. *Id.* § 1602(i); 12 C.F.R. § 226.2(a)(20) (2007).
18. 15 U.S.C. § 1606(a)(2); 12 C.F.R. § 226.5a(b).
19. 15 U.S.C. § 1605(a); 12 C.F.R. § 226.5a(b).

fees for card membership, transaction fees, grace periods, interest computation, and billing disclosures.[20] If fees will be charged for things such as cash advances, tendering of late payments, or accessing credit in excess of the credit limit, these fees must be disclosed along with the other required disclosures in materials provided to the consumer by the creditor "before opening any account" involving an open-ended consumer plan.[21] Therefore, these disclosures are generally included in materials provided to consumers as part of either the offer of a credit card or the original application for the credit card.[22] Once the credit card is actually issued, the creditor must provide the consumer with "periodic" statements disclosing the account's previous balance as of the last statement, listing any transactions which have occurred, applying any credits, indicating the periodic rates that are applicable and the balances to which the given periodic rates are applied, the amount of the finance charge, annual percentage rate, any other charges, closing date of billing cycle, any grace period, and the address for providing notice of billing errors.[23] This last disclosure is particularly important, as the Fair Credit Billing Act provisions of TILA establish settlement procedures for any billing disputes that may arise.[24]

The consumer is not to be held liable for any unauthorized charges in excess of fifty dollars,[25] and the consumer is entitled to question, among other things, the amount charged, the date on which charges are incurred, whether the services or goods for which charges have been assessed were authorized, errors in computation, failure to post applicable credits, and payments.[26] However, in order to benefit from the law's protections, the consumer must write to the creditor at the address provided for billing inquiries or disputes, and do so within sixty days of the date that the statement containing the error was mailed to the consumer.[27]

20. 15 U.S.C. § 1637(c)(1)(A)–(B); 12 C.F.R. § 226.5(a)(5).
21. 15 U.S.C. § 1637(a); 12 C.F.R. § 226.5a(b).
22. 12 C.F.R. § 226.5a(e) (2007).
23. 15 U.S.C. § 1637(b) (2000).
24. *Id.* §§ 1666–1666j.
25. 12 C.F.R. § 226.12(b) (2007).
26. 15 U.S.C. § 1666(b) (2005).
27. *Id.* § 1666(a)(1)–(3). This may seem to be a straightforward and simple requirement, but from the author's observations, the billing statements generated by most major credit card companies do not prominently disclose the fact that a writing is required in order to preserve a dispute. Instead, consumers are given a telephone number they may call in case of questions concerning the statement, as well

A. Statutory Protections Afforded to Consumers Under the Truth in Lending Act

Violations of TILA entitle the consumer to actual and statutory damages.[28] Actual damages are equal to the dollar amount the consumer has actually had to pay as a result of an incorrect disclosure.[29] For example, in the case of *DeMando v. Morris*,[30] the plaintiff did not recover any actual damages because the TILA violation of which she complained was corrected before it could result in her having to pay any additional amounts.[31] Because there had been a violation of the statute, however, the plaintiff was entitled to statutory damages. Because she was proceeding on behalf of a class, the statutory damages were equal to a maximum of $500,000 or 1% of the creditor's net worth, whichever is lower, payable to the class as a whole with no cap on the amount given to any member of the class.[32] For one suing as an individual, statutory damages are equal to "twice the amount of any finance charge in connection with the transaction" where an open-ended credit plan is involved.[33]

as an address to which they may write. It is only on the back of the billing statement, in small print, that the consumer is advised that a writing must be sent to the given address within the requisite period of time. One would assume that most normal consumers, particularly the elderly and disabled who might find writing to be a hardship, would opt to rely on the telephone.

Although admittedly anecdotal in nature, the author's own experience in calling about an erroneous charge on a credit card billing statement netted advice from the credit card company's representation to contact the original creditor and attempt to have them remove the charges. The author was never advised to also preserve her dispute by sending something in writing, although the representative did purport to be memorializing the information in some sort of report that would be transmitted to the original creditor. The author, of course, did send something in writing to the credit card company within the sixty-day period to preserve the dispute in addition to contacting the original creditor, but can only imagine that most consumers would not have followed up in writing in the absence of receiving any directive to do so, and thus might wind up waiving their dispute.

28. 15 U.S.C. § 1640(a)(1)–(4) (2000).

29. *See id.* § 1640(a)(1).

30. 206 F.3d 1300 (9th Cir. 2000).

31. *Id.* at 1303.

32. 15 U.S.C. § 1640(a)(2)(B); *see DeMando*, 206 F.3d at 1303.

33. 15 U.S.C. § 1640(a)(2)(A)(i). Thus, in a case where a defendant made an offer of judgment to an individual plaintiff in an amount in excess of twice the improperly disclosed finance charge, the court held that the plaintiff's refusal to respond to the offer effectively mooted his case as the offer gave him an amount in excess of what he would have been entitled to receive under TILA had he prevailed on all claims. Goodmann v. People's Bank, No. 05-4617, 2006 WL 3749585, at *3–4 (3d Cir. Dec. 21, 2006).

The finance charge is thus a central concept in understanding the protections afforded to consumers pursuant to TILA. The finance charge is the total of any and all costs that must be paid by the consumer, either directly or indirectly, which are assessed by the creditor, again either directly or indirectly, as a condition or consequence of the issuance of credit.[34] Given this definition, it would appear that both the late fees and the "over-the-credit-limit" fees charged to Ms. L. would qualify as finance charges. Both are charges paid by the consumer and imposed as a condition or consequence of the issuance of the credit; particularly the over-the-limit fee, which involves additional extension of credit beyond what the creditor originally intended to provide. As it turns out, however, regulations promulgated by the Federal Reserve Board to implement TILA have set out a number of exclusions from the application of the definition of a finance charge.[35]

In general, charges imposed for unanticipated late payments, exceeding credit limits, delinquency, or default on the part of the consumer are excluded from the definition of finance charge.[36] The justification for these exclusions appears to revolve around the fact that such charges function more as a penalty than as a charge for the use of the credit. In *Household Credit Services, Inc. v. Pfennig*,[37] the plaintiff, who had been assessed over-the-limit fees in the amount of twenty-nine dollars for each month that her balance exceeded her credit limit, sought to challenge the regulatory exclusion of over-the-limit fees from the definition of a finance charge.[38] Plaintiff's counsel argued that TILA set out the general definition of what constituted a finance charge, and that over-the-limit fees fell within the parameters of that definition as they were paid by the consumer and imposed directly by the creditor as a consequence of accessing credit over the existing credit limit.[39] Plaintiff's position was that the Federal Reserve Board's decision to exclude over-the-limit fees from the definition of what constituted a finance charge was not in accordance with the statute and thus exceeded its authority.[40]

34. *See* 15 U.S.C. § 1605(a).
35. *See* 12 C.F.R. pt. 226 (2007) (commonly referred to as "Regulation Z" or "Reg Z").
36. 12 C.F.R. § 226.4.
37. 541 U.S. 232 (2004).
38. *Id.* at 236.
39. *Id.*
40. *Id.*

The Court, however, did not agree, finding that because the statute did not specifically address the status of over-the-limit fees, the issue had been left to the discretion of the regulatory agency to determine what the appropriate status should be.[41] As a matter of administrative law, the agency's exercise of discretion would not be overturned unless it proved to be "arbitrary, capricious or manifestly contrary" to the terms of the statute.[42] This standard is one that affords great deference to administrative agencies; as the Court noted,

> Congress has authorized the Board to make "such classifications, differentiations, or other provisions and [to] provide for such adjustments and exceptions for any class of transactions as in the judgment of the Board are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith."[43]

The Court thus found the Board's actions in exempting over-the-limit fees from the TILA definition of a finance charge to be well within its regulatory authority.[44]

B. Development of Modern Credit Law

At best, TILA does not provide much in the way of substantive protection to consumers except where high-cost home-equity loans are involved.[45] If the required disclosures are properly made, the law does not prevent creditors from imposing egregiously unfair credit terms so long as consumers are willing to accept them. Thus, for substantive protection, consumers initially looked to state usury statutes, which limited the rate of interest that could be charged under credit agreements.[46] The utility of this protection was undercut, however, by the Supreme Court's application of the National Bank Act to the problem created for credit card companies by interstate variation in interest rate limits. *Marquette National Bank of Minneapolis v. First of Omaha*

41. *Id*. at 238.
42. *Id*. at 239 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)).
43. *Id*. at 244–45 (citing 15 U.S.C. § 1604(a) (2000)).
44. *Id*. at 245.
45. Home Ownership Equity Protection Act of 1994 (HOEPA), Pub. L. No. 103-325, 108 Stat. 2190 (codified at 15 U.S.C. §§ 1602, 1610, 1639, 1640) (2000) (providing for additional disclosure requirements and substantive protections for transactions involving high-cost home-equity loans encumbering the debtor's principal residence). The substantive protections include prohibition of prepayment penalties, balloon payments, and negative amortization. DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER CREDIT AND THE LAW § 9:08 (2006).
46. Daniel, *supra* note 4, at 449.

Service Corporation[47] involved the First National Bank of Omaha, which was chartered in the state of Nebraska, and Marquette National Bank, which was chartered in Minnesota.[48] At the time, under Nebraska law, banks could charge up to 18% per annum interest for amounts up to $999.99 and then 12% per annum on amounts of $1000.00 and over, while Minnesota banks could only charge 12% per annum interest no matter what the credit balance.[49] The competitive disadvantage created by this disparity for plaintiff Marquette National Bank led to the filing of a lawsuit to challenge First National Bank of Omaha's right to charge 18% on accounts that it had generated as a consequence of doing business in Minnesota.[50] First National Bank of Omaha invoked § 85 of the National Bank Act of 1864 for the proposition that it was entitled to charge interest up to the rate established in the state in which it was located, in this case Nebraska.[51]

The Supreme Court agreed and held that credit cards issued by national banks could rely on the interest rate limit applicable in the state in which the bank was located.[52] Thus, the proliferation of credit cards issued by national banks in the decades following the *Marquette* decision has been no accident, and neither has the relocation of such banking associations to states like South Dakota and Delaware that offer higher interest rate limits than other states.[53] The protection once afforded by usury limits thus became illusory as credit card companies increasingly devolved into entities that were entitled to legally impose the highest rates available on consumers, especially in the event of delinquency or default on the account.

The next issue to be decided was whether the same line of reasoning could be employed to allow credit card issuers to circumvent other state law protections, such as limits on late fees and over-the-limit charges. In *Smiley v. Citibank, N.A.,*[54] a California plaintiff challenged Citibank, her credit card issuer and a national bank located in

47. 439 U.S. 299 (1978).
48. *Id.* at 299.
49. *Id.* at 302.
50. *Id.* at 304.
51. 12 U.S.C. § 85 (2000) ("Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located.").
52. *Marquette Nat'l Bank*, 439 U.S. at 319.
53. Loonin & Renuart, *supra* note 8, at 183–84.
54. 517 U.S. 735 (1996).

South Dakota,[55] for its practice of charging late fees that were lawful in South Dakota but were in violation of California law.[56] Citibank raised § 85 of the National Bank Act in its defense, and during the pendency of the litigation, the Comptroller of the Currency proposed specific language in the regulations promulgated pursuant to the statute to incorporate "late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees" within the definition of "interest" for purposes of § 85.[57] The Court found that the agency's interpretation of the statute was still entitled to deference, despite the fact that the new revision to the regulation was being proposed one hundred years after the original enactment of § 85 in 1864 and was apparently being issued now in response to the plaintiff's lawsuit.[58] The Court therefore held that Citibank's assessment of late fees against its credit card customers in California and elsewhere was protected by § 85 of the National Bank Act, so long as the amount assessed was lawful in South Dakota, the state in which Citibank was located.[59] It should be noted that given the definition provided by the regulations, over-the-limit fees charged by Citibank would have been included as interest also, although imposition of such fees was not actually at issue in the case.

On the other hand, where the amount of fees charged rises to the level of that charged to Ms. L., the case of *Discover Bank v. Owens*[60] may give consumers some hope of redress. As stated above, Ms. L. was charged a grand total of $1075.00 in combined late fees and over-the-limit fees over a period of approximately two years, as well as $309.00 in interest and $117.00 in membership fees for the privilege of having accessed $277.02 worth of credit for purchases made for her benefit.[61] Ms. L. actually repaid this amount plus an additional $167.73, yielding a positive return on the credit card company's investment.[62] In *Owens*, the consumer, Ms. Owens, began in January 1996 with a balance owing on her credit card of $1,460.73.[63] Her credit

55. *Id.* at 737–38.
56. *Id.* at 738.
57. *Id.* at 739–40 (citing 12 C.F.R. § 7.4001(a)(2007)).
58. *Id.* at 740–41.
59. *Id.* at 746–47.
60. 822 N.E.2d 869 (Ohio 2004).
61. *See supra* notes 1–3 and accompanying text.
62. *See supra* notes 1–3 and accompanying text.
63. *Discover Bank*, 822 N.E.2d at 871.

limit at that time was $1900.00.[64] She was assessed a monthly fee for a product called CreditSafe Plus, a kind of credit insurance that would protect her credit rating by allowing her to take a payment holiday while simultaneously freezing her credit balance and eliminating further finance charges in the event that she were to become "unemployed, hospitalized, or disabled."[65] Because Owens was retired and on Social Security disability, two of the three conditions required for CreditSafe to be operative were already in existence and could not trigger the protection.[66] Apparently, the only time that the protection would be triggered in Owens's case would be in the event she became hospitalized.

Owens made a timely payment that was reflected on her January 1996 statement.[67] Over the next several months, through March 1997, Owens did not make any further purchases and made several payments, but many of them were late, which resulted in the assessment of late fees.[68] At the end of March 1997, Owens made one charge to the card in the form of a cash advance for $300.00, which raised her credit balance to $1,895.53.[69] Two months later in May, she made a payment, but it was less than the minimum amount due and thus triggered another late fee.[70] Although Ms. Owens made no further purchases, the additional finance charges and late fee increased her credit balance to $1962.82, or $62.82 over her credit limit resulting in an assessment of a $20.00 over-the-limit fee.[71]

Between May 1997 and May 2003, Ms. Owens continued to make payments, the grand total of which amounted to $3,492.00, but she was never again able to bring her credit balance below her credit limit.[72] She thus continued to be charged a monthly over-the-limit fee, which gradually increased from twenty to twenty-nine dollars.[73] The total amount in over-the-limit fees assessed against her over the course of the six-year period climbed to $1,518.00.[74] The credit card

64. *Id.*
65. *Id.*
66. *Id.* at 871–72.
67. *Id.* at 872.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*

company also continued to charge her for CreditSafe, bringing the total assessed for that to $369.52.[75] Despite the fact that Ms. Owens was receiving Social Security (which was supposed to be one of the conditions for receipt of coverage), the CreditSafe product did not relieve her of any liability or prevent her credit balance from increasing in any way.[76] By the time the creditor brought suit against her, the balance being sought had grown to $5,564.28, entirely composed of legal charges within the contract terms, all properly disclosed.[77]

Examining the application of the contract terms to Ms. Owens's situation caused the Ohio Supreme Court to conclude that the "operation of its terms as it applied to Owens was unconscionable."[78] The court found it interesting that Ms. Owens would have been better off had she totally defaulted and ceased paying under the contract back in 1997 when she was first assessed late fees and over-the-limit fees.[79] Had she adopted this approach, the account would have been closed, and Owens would have saved any additional membership fees, late fees and over-the-limit fees, as well as the accumulation of additional interest and finance charges that collected over the ensuing six years. Admittedly, this would have engendered immediate attempts to collect the nearly two thousand dollars that Owens already owed as of that time, but Owens might well have been able to pay that total as she did end up tendering payments equal to $3,492.00.[80] When the total of these payments were added to the amount being sought by Discover in the lawsuit, her total liability under the contract amounted to $9,056.28, or over four times what it would have been had the contract been declared in default at the time when it actually went into default and about seven times the account balance representing Owens's actual charges.[81]

In addition to the late and over-the-limit fees, the account balance was further inflated by the marketing to Owens of a credit-insurance product that was virtually useless to her. Judge Triozzi was moved to describe the situation as follows:

> How is it that the person who wants to do right ends up so worse off? It is plain to the court that the creditor also bears some re-

75. *Id.*
76. *See id.* at 871–72.
77. *Id.*
78. *Id.* at 874.
79. *Id.* at 872.
80. *Id.*
81. *Id.*

> sponsibility. Discover kept Owens's account open and active long after it was painfully obvious that she was never going to be able to make payments at the expected level. Under the law, an injured party has a duty to mitigate his damages and may not recover those damages that he could reasonably have avoided. A contract may be held unenforceable when a creditor leaves a debtor with little disposable income and presses a demand for judgment despite being aware of the debtor's dire financial straits. Even if plaintiff was technically within its rights in its handling of defendant's account, it was unreasonable and unjust for it to allow defendant's debt to continue to accumulate well after it had become clear that defendant would be unable to pay it. Unjust enrichment occurs when one retains money or benefits that, in justice and equity, belong to another. Because of its failure to even minimally pay attention to Owens's circumstances, and for allowing the debt to accumulate unchecked, the court finds that Discover would be unjustly enriched if this court were now to grant judgment in its favor.[82]

The court went on to find that the Discover credit card agreement was unconscionable as it had been applied to Owens, and that Owens had been the "victim of plaintiff's unreasonable, unconscionable, and unjust business practices."[83] Judgment was granted for Owens and Discover's claim was dismissed.

In Ms. L.'s case, a letter was sent to the opposing party outlining the unconscionability argument set out in the *Owens* case and explaining how it appeared to be directly applicable to the accumulation of fees and charges that had happened to Ms. L.[84] As a consequence, the opposing party decided to nonsuit the case against Ms. L. rather than take the matter to trial and confront the unconscionability argument, which the Tennessee judge might well have found to be persuasive.[85]

Favorable results for debtors are not typical, however. As at least one writer has noted the unconscionability doctrine tends to be

82. *Id*. at 873 (citations omitted).

83. *Id.* at 875.

84. *See infra* App. A.

85. A nonsuit is a voluntary dismissal of a lawsuit by a plaintiff at its costs. BLACK'S LAW DICTIONARY 1084 (8th ed. 2004). In General Sessions Court, where the lawsuit against Ms. L. was initiated, two such dismissals may be exercised without prejudice and the lawsuit may again be instituted, so long as it is done within the applicable statute of limitations. TENN. CODE ANN. § 16-15-707 (2000). A third nonsuit, however, will operate as an adjudication on the merits. *Id.* In cases where the statute of limitations has run as of the time the case is dismissed, there is a savings statute in Tennessee which allows the plaintiff another year in which to refile a nonsuited case. *Id.* § 28-3-109(a)(3). On the day that the case was scheduled to be heard in court (and the nonsuit instead announced), Ms. L. was, in fact, in the hospital suffering from a blood clot to her lung.

reserved for the harshest and severest terms and cannot be relied upon to protect vulnerable consumers who are victimized to a lesser extent.[86] As a consequence, under existing law, unless the accumulation of fees is so outrageous as to rise to the level of substantive unconscionability, the imposition of late fees and over-the-limit fees, as well as the escalation to the highest interest rates allowed by the state in which the credit card company is located, is perfectly legal so long as all such charges are properly disclosed.

II. Why Existing Law Is Inadequate

It has been said that "knowledge is power."[87] If the federal Truth in Lending Act mandates proper disclosures, then why is that not enough to empower elderly consumers to avoid financial exploitation? To understand this it may be helpful to examine how Ms. L. wound up in her situation despite the requirement of adequate disclosure. Like many senior citizens, her educational level is limited[88] and her eyesight is impaired, so she finds it very difficult to read even ordinary print type, let alone small print.[89] Her mobility is limited,[90] so she is somewhat isolated and, as a consequence, finds it enjoyable to receive phone calls from anyone, including telemarketers.[91] Ms. L was

86. Wayne R. Barnes, *Toward A Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 230, 273 (2007).

87. The Columbia World of Quotations, Francis Bacon Collection, http://www.bartleby.com/66/9/5109.html (last visited Mar. 20, 2008).

88. WAN HE ET AL., *supra* note 12, at 166 tbl.6-7. Of those aged sixty-five and over, 15.4% have less than a ninth-grade education. *Id.* For black Americans aged sixty-five and over, this percentage increases to 25.5%. *Id.*

89. *See id*. at 57. The probability of "visual impairment, including blindness, increases with age, and the use of vision-correcting devices, like prescription glasses, contact lenses, and magnifying glasses is common among older individuals." *Id.*

90. *See id*. at 59. Approximately 29% of the elderly suffer from some physical disability, with more than 20% of those aged sixty-five and over having "difficulty going outside the home." *Id*.

91. In this she is reminiscent of the case of one Richard Guthrie, a ninety-two-year-old Army veteran, who was tricked by a telemarketer into disclosing bank account information that enabled thieves to withdraw funds from his bank accounts depriving him of all his savings and leaving him destitute. *See* Charles Duhigg, *Bilking the Elderly*, *with a Corporate Assist*, N.Y. TIMES, May 20, 2007, at A1. The description provided of Mr. Guthrie is heartbreaking:

> As Mr. Guthrie sat home alone—surrounded by his Purple Heart medal, photos of eight children and mementos of a wife who was buried nine years earlier—the telephone rang day and night . . . . "I loved getting those calls," Mr. Guthrie said in an interview. "Since my wife

therefore not terribly critical about the information she was given over the phone concerning the credit card offer, and when she received the written information later, she was not inclined to read it. Furthermore, in order to have been eligible for representation through the University of Memphis Elder Law Clinic, her income had to be under 125% of the federal poverty guidelines.[92] Ms. L is no longer able to work because of her age and health, so her income is fixed. It was certainly within the realm of foreseeability that once she had a credit card in her possession, her temptation to charge would quickly outstrip her ability to repay—even if her charges remained within the very restricted $300 credit limit extended to her by the credit card company.

In testimony before the Senate Committee on Banking, Housing and Urban Affairs, Harvard Law Professor Elizabeth Warren notes

> passed away, I don't have many people to talk with. I didn't even know they were stealing from me until everything was gone."

Id. Although Mr. Guthrie was victimized by outright criminals and is thus distinguishable from Ms. L. in that the conduct leading to his loss is already illegal, his clear vulnerability would make him a perfect target for the aggressive, yet legal, sales tactics employed by legitimate credit card companies. *See generally* CreditLearningCenter, Why Are Credit Card Companies Coming Under Intense Fire?, http://www.creditlearningcenter.com/display.php?content_id=36 (last visited Mar. 20, 2008) (discussing predatory and questionable marketing practices of credit card companies).

In a variation of this sort of vulnerability, seniors feeling threatened and insecure about their ability to manage their own affairs may be manipulated by fraudulent telemarketing schemes that flatter seniors concerning their continued financial acumen and disparage seniors' adult children or others that may attempt to dissuade them from making the "investment" proposed by the telemarketer. *See* Sid Kirchheimer, *Scam Alert: Misplaced Trust*, AARP BULL., July–Aug. 2007, at 26, 26; *see also Old Scams—New Victims: Breaking the Cycle of Victimization: Hearing Before the S. Special Comm. on Aging,* 109th Cong. 19–21 (2005) [hereinafter *Old Scams Hearing*] (statement of Zane M. Hill, Acting Assistant Chief Inspector, United States Postal Inspection Service, Washington, D.C.). In one scheme, an eighty-three-year-old woman, perfectly competent but at odds with her children and convinced that the telemarketers were her "allies" against them, gave $200,000 to telemarketers in payment of "taxes and insurance" as an alleged prelude to collection of a nonexistent sweepstakes prize. Kirchheimer, *supra*, at 26. Suffice it to say, the National Consumer League's National Fraud Information Center has warned that credit card offers and the billing of consumers for optional services that they have not ordered are among the top ten telemarketing frauds of the past decade. *See* Press Release, Nat'l Fraud Info. Ctr., Money For Nothing: Top 10 Scams Released (Jan. 27, 1999), *available at* http://www.fraud.org/news/1999/jan99/012799.htm.

92. The University of Memphis Elder Law Clinic represents indigent elderly clients that are referred by Memphis Area Legal Services, a nonprofit, civil-legal-services provider that receives funding through the Legal Services Corporation located in Washington, D.C. Financial eligibility guidelines for clients receiving free legal assistance are established by federal regulations. *See* 45 C.F.R. § 1611.3 (2007).

that the normal economic incentives of the free market economy have gone awry and are no longer operative when it comes to the credit card industry.[93] Instead, the credit card industry's ability to prey on vulnerable consumers has led to what Professor Warren describes as "a two-tier business model" in which the credit card companies first "place as many credit cards in the hands of as many customers as possible."[94] As part of this effort, over six billion so-called pre-approved credit offers have been transmitted to consumers.[95] To the extent that these new credit card customers, whether young or old, pay their accounts in a timely fashion, the "card issuer can count on a stream of revenue—money from the merchants each time the customer used the credit card, annual fees from some of the customers, and a chance to sell enhancements, such as credit insurance and tax preparation assistance."[96]

Surprisingly, although regularly paying credit customers do yield a profit for the credit card industry, the most profitable accounts are those who, as Professor Warren puts it, "stumble and slide, who make payments and miss payments, and who end up paying default rates of interest and penalty fees."[97] In marketing to this second tier of credit card customers, the credit card companies stack the credit agreement with a plethora of charges and fees that explode in the consumer's face the minute the requisite trigger is tripped.[98] Hidden within the fine print are, *inter alia*, such contract terms as "universal default,[99] default rates of interest, late fees, over-[the-]limit fees, [and] fees for payment by telephone."[100] To make matters worse, the credit card company will heighten the likelihood of late payment or default

93. WARREN TESTIMONY, *supra* note 3, at 1.
94. *Id*. at 3.
95. *Id*.
96. *Id*. Use of the credit card company name may allow the telemarketers for these ancillary services to claim an "established business relationship" with the consumer for purposes of exempting themselves from the operation of the barriers created by the Do Not Call Registry, established pursuant to the Federal Trade Commission's Telemarketing Sales Rule. 16 C.F.R. § 310.2(n) (2007).
97. WARREN TESTIMONY, *supra* note 3, at 3.
98. *Id*.
99. The term "universal default" refers to a credit contract clause that allows the credit card issuer to raise the interest rate charged to the consumer on the credit card because of late payments tendered to other creditors or in the event that the consumer has incurred a debt load that the credit card issuer feels is excessive. Gerri Willis, *Avoid Credit Card Rate Hikes: Understand the Universal Default Interest Rate and How It Can Hit Your Wallet*, CNNMONEY.COM, Nov. 30, 2005, http://money.cnn.com/2005/11/30/pf/saving/willis_tips/index.htm.
100. WARREN TESTIMONY, *supra* note 3, at 3.

by such things as "repeated changes in the dates bills are due, changes in the locations to which bills should be mailed, making it hard to find the total amount due of the bill, moving bill reception centers to lengthen the time it takes a bill to arrive by mail, misleading customers about grace periods, and implementation of double cycle billing. . . ."[101] Even when properly disclosed in accordance with TILA, the proliferation of these terms, charges, and fees has made the complexity of credit card agreements overwhelming, particularly for those like Ms. L., who have difficulty seeing and hearing, and have a limited educational background.

Acknowledging the complexity of credit card terms and conditions, the Board of Governors of the Federal Reserve System (Board) advocates heightened disclosure requirements that are intended to alert vulnerable consumers to some of the above-described fees and charges presently embedded in most credit card agreements.[102] The Board has recommended ten changes, which are as follows: (1) clearer disclosure in initial advertisements of any increase in interest rates following the introductory period; (2) restriction of the use of the term "fixed rate" in advertising to those agreements where the interest rate is truly not subject to change; (3) easier to read presentation of interest rates and fees in "box disclosures"[103] accompanying introductory offers; (4) new summary table disclosure forms reiterating and summarizing the legal language contained in the standard boilerplate credit card agreement transmitted to clients; (5) highlighting any penalty rates and fees in both the box and summary table presentations, and inclusion of a reminder on every periodic billing statement of the possibility and amount of fees imposed for late payment; (6) forty-five (45) days advance notice to the consumer of the impending imposition of any penalty interest rate; (7) highlighting of the year-to-date total accumulation of fees, as well as a summation of all fees charged

101. *Id*.

102. *Improving Credit Card Consumer Protection: Recent Industry and Regulatory Initiatives: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 110th Cong. 13–14 (2007) [hereinafter *Credit Card Disclosures Hearing*] (testimony of Governor Fredric S. Mishkin, Board of Governors, Federal Reserve Board).

103. The term "box disclosures" refers to the presentation of credit terms in discrete, rectangular enclosures as required by Reg Z for closed-ended credit sales, installment sales, and mortgage loan transactions. Box disclosures are currently not required for open-ended credit, like that extended by credit card companies. 12 C.F.R. § 226, App. H (2007).

within a given billing period; (8) experimentation with the effectiveness of disclosing the effective APR on each periodic billing statement; (9) inclusion of a warning to consumers on each periodic statement of the costs inherent in tendering only the minimum payment each month and creation of incentives to creditors to provide on the periodic statement an estimated calculation of the time in which the debtors might pay off their credit card balance if they adhered to a plan of reasonable payments; and (10) better guidance to creditors of which charges must be disclosed and the proper methods of disclosure.[104]

As beneficial as these changes might be in theory, in practice disclosure and provision of information have not proven effective in preventing victimization of the most vulnerable populations.[105] Neurological research on the effects of aging on the cognitive system has indicated that older people have difficulty in processing new information, and as a result, they tend to focus on information that is presented in the simplest and most positive form.[106] In addition, older people retain less detail about the information they do process, meaning that information that is qualified is often recalled incorrectly.[107] For example, an older person presented with the statement "Most cold medicines cause the eye's (sic) pupils to dilate" and told that it was false on three separate occasions was more likely to believe that the statement was true than was an older person who had only been presented with the statement and told it was false once.[108] As a consequence, even public service ads aimed at older adults may inadvertently communicate the opposite message from what is intended.[109]

Finally, even if the consumer understands the disclosures, he or she may underestimate the temptation to run up charges on the card and fail to factor in unexpected expenses that lead to unintended inability to make required payments. Once an account delinquency has occurred, the consumer is caught in the trap, and there is virtually no way out. Although Professor Warren admits that a substantial number of credit card users, approximately 40%, are able to pay their accounts in full every month, another "23 million . . . are unable to make

104. *Credit Card Disclosures Hearing*, *supra* note 102, at 254–55.
105. Loonin & Renuart, *supra* note 8, at 197.
106. *Old Scams Hearing*, *supra* note 91, at 53 (statement of Professor Denise C. Park, Co-Director, National Institute on Aging, Roybal Center for Healthy Minds).
107. *Id.* at 55.
108. *Id.*
109. *Id.* at 56–57.

more than the minimum monthly payments on their cards."[110] An increasing number of elderly people are included in this group, including those who have been able to manage credit cards successfully for years.[111] As of 2001, the average credit card balance for persons aged sixty-five to sixty-nine was $5,844, an increase of over 200% from the average balance for this population in 1992.[112] The vast majority of American households possess at least one credit card; the estimated total of 1.5 billion credit cards in current use averages out to twelve cards per family unit.[113]

This increasing reliance on credit cards and consequent burgeoning burden of debt is attributable to diminishing income and increasing expenses experienced by middle-class retirees.[114] Approximately 70% of senior citizens report earning less than $50,000 a year.[115] For 20% of this group, credit card debt absorbs more than 40% of this limited income.[116] Senior citizens use credit cards to help pay for housing, medical care, utility bills, and property taxes.[117] To the extent that this increasing debt load results in foreclosure, repossession of consumer goods, collection litigation, and harassment by creditors, it leads to social instability in addition to individual hardship and calamity.

Does this mean that extension of credit to a person like Ms. L. is per se an improvident and unconscionable act?[118] As tempting as it may be to advocate such a position, to do so runs the risk of patronizing and discriminating against those who are elderly, disabled, and on a fixed income. Because the person does have the ability to make choices, it is possible that someone like Ms. L. could use a credit card for occasional emergency purchases and successfully manage to repay pursuant to the contract terms without incurring any late or over-the-limit fees. The deal will still, however, be a mixed one at best; while

110. WARREN TESTIMONY, *supra* note 3, at 5.
111. *See* Loonin & Renuart, *supra* note 8, at 168.
112. *Id*.
113. *Id*. at 184.
114. *Id*. at 170–71.
115. *Id*. at 168.
116. *Id*.
117. *Id*. at 171–73.
118. *See* Daniel, *supra* note 4, at 440–49. In her article, Daniel discusses the notion of improvident extension of credit, citing the work of Professor Vern Countryman, who tried for decades to advance the notion into law. *See* Vern Countryman, *Improvident Credit Extension: A New Legal Concept Aborning?*, 27 ME. L. REV. 1, 1–23 (1975).

the promotional interest rate on purchases was 0.00% APR, the default rate soared to a high of 25.90% APR, as did the 19.80% APR rate initially charged for cash advances.[119] In addition, Ms. L. was charged an annual membership fee of $39.00, which in itself comprised over 10% of the $300.00 credit limit, and a cash-advance fee of $5.00.[120] Still, Ms. L. could conceivably have avoided the default interest rates and the $25.00 late and over-the-limit fees had she managed to at least tender the minimum monthly payments in a timely fashion.

The answer does not seem to be the prohibition of an initial extension of what may appear to be improvident credit, as that may do more harm than good by depriving those on fixed and limited incomes from any access to credit at all. In addition, it should be noted that one would ordinarily assume a creditor would have as much, if not more, incentive to avoid improvident extensions of credit as would a borrower. The creditor is the one who presumably will not be repaid and will thus lose out on the deal. However, if the profit margins for credit card companies are any indication, creditors are apparently not disadvantaged by consumer defaults, a fact that Ms. L.'s situation seems to confirm.[121] Instead, credit card companies recover the amounts loaned plus enough interest and other fees and charges to more than compensate for initially extending credit.[122]

It has been postulated that the present consumer-credit crisis is no mere coincidence, but is rather the natural outgrowth of the interaction of both structural and cultural forces that have combined to heighten demand for credit at the same time creditors have become willing to foster overindebtedness with aggressive sales techniques.[123] Among the structural forces at work are the deregulation of the credit industry and the lack of options for those who experience adverse financial circumstances.[124] Cultural factors include aggressive marketing of consumer goods and services, and easy, high-cost credit.[125] The best and undoubtedly most effective approach to the problem would

119. *See supra* notes 1–3 and accompanying text.

120. *See supra* notes 1–3 and accompanying text.

121. *See* Andy Serwer, *Congress to Business: How May I Serve You?*, FORTUNE, Apr. 2005, at 47 (noting that the credit card industry saw profits rise from $12.9 billion in 1995 to $31.6 billion in 2004).

122. *See* WARREN TESTIMONY, *supra* note 3, at 3–4.

123. *See* Jean Braucher, *Theories of Overindebtedness: Interaction of Structure and Culture*, 7 THEORETICAL INQ. L. 323, 331–33, 341–43 (2006).

124. *See id*. at 330–33.

125. *See id*. at 334–38.

address both structure and culture. Unfortunately, given the confluence of these forces and the circumstances of fixed income and physical disability, which limit the ability of the elderly to manage or alter their circumstances (and even to benefit from programs of education), recommendations directed toward structure appear to be more advantageous than those directed toward culture.

Because there is apparently no incentive for credit card companies to limit access to credit, regardless of the credit history of the borrower, it may be of greater use to provide more substantive protections to prevent or limit the unconscionable, unfair, and exploitative application of credit terms to those least able to afford their burden. Limitation of such overreaching should not result in the imposition of any additional costs on consumers; as has been observed, to the extent that consumers like Ms. L. do represent poor credit risks, credit card companies are free to, and in fact do, impose credit limits and exact higher interest rates to compensate for the increased risk of loss that may accrue from the extension of credit to higher-risk borrowers.

III. How the Truth in Lending Act Should Be Revised to Provide Greater Protection to Elderly Consumers

It has been over ten years since passage of the Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 108 Stat. 2190 (1994), revised TILA to add substantive protections in response to the proliferation of high-cost home-equity loans causing widespread home equity loss to senior citizens. TILA should again be revised to add substantive protections to address the abuses currently rampant in the area of open-ended credit. Enforcement of these credit card contracts against senior citizens again poses a serious threat of deprivation to their hard-earned home equity, this time through court-enforced judgment liens obtained by credit card companies imposed against their homes. In the best of all possible worlds, these protections would extend to all consumers,[126] but because younger debtors

126. On May 15, 2007, Senator Carl Levin (D. Mich.) introduced S.B. 1395, entitled the "Stop Unfair Practices in Credit Cards Act," which would prohibit a number of abusive credit card practices, including, but not limited to, restriction of the repeated assessment of over-the-limit fees, retroactive interest charges, excessive interest rate increases, interest charges for payments made "on time," and fees charged for online or over-the-phone bill payments. *Sweeping Credit Card Reform Bill,* CONSUMER ACTION NEWS, Spring 2007, at 3, 3, *available at* http://www.consumer-action.org/downloads/english/CA_News_CC_07.pdf.

may be perceived as having incurred credit card debt irresponsibly, extension of such protection to other populations besides the elderly may not be politically feasible. To target those that are most vulnerable and most likely to be living on a fixed income, the protections afforded could be limited to apply only to those aged sixty or over at the time the credit card contract was sought to be enforced. For open-ended credit agreements involving the elderly, four revisions to TILA are recommended.

A. Prohibition of Excessive Late Fees

Pursuant to banking regulations promulgated by the Federal Reserve Board, known as the Credit Practices Rule, national bank credit card issuers are already prohibited from engaging in the practice known as "pyramiding of late fees."[127] Pyramiding of late fees occurs when the only basis for assessment of a late fee is the nonpayment of a previously assessed late fee or other delinquency charge.[128] For example, Ms. L.'s credit card billing statement for March 19 through April 18, 2001, shows a late payment of $15.00 received on March 19th and assessment of a late fee of $25.00 on March 20th.[129] The prior month's balance on her card equaled $295.15, and she charged an additional $15.00, also on March 20th. She was assessed a finance charge of $0.97 on her cash balance of $62.46; the APR for her purchases was still 0.0%. Her total new balance including the late fee equaled $321.12. If she had tendered $296.12 by the payment due date of May 18th, the credit card company could not thereafter assess her an additional late fee for the failure to pay the $25.00. Query as to whether the bank could attempt to circumvent the application of the regulation by allocating $25.00 of the payment to eradicate the late fee, which would then leave Ms. L. still owing a $25.00 balance on her purchases for purposes of assessing a late fee in the future? It should be noted that most credit card agreements include a provision that grants absolute discretion concerning allocation of payments to the creditor.[130] By analogy to the Federal Trade Commission's (FTC) interpretation of its

127. *See* 12 C.F.R. § 227.15(a) (2007).
128. *Id.*
129. *See supra* text accompanying notes 1–3.
130. *Credit Card Disclosures Hearing*, *supra* note 102, at 251.

late fee rule, such a practice would be prohibited.[131] Nevertheless, in any case where the balance is not paid off in full, the late fee charge is absorbed into the purchase balance and the allocation of the payment will reduce that balance without preserving the late fee as a separate charge. Thus, the situation where the late fees or delinquency charges will be identifiable as the only charges remaining on an account will be relatively rare and difficult to establish.

Of course, the imposition of a reasonable late fee as an occasional penalty to motivate timely payment is a legitimate business practice. It becomes abusive when late fees are set at an exorbitantly high level and/or when such fees are repeatedly imposed after it is clear the debtor has no prospect of being able to make a timely payment in a sufficient amount to avoid further imposition of the fees. In Ms. L.'s situation, for example, it was often the case that the late fees imposed were either equal to or even greater than the amount of the payment she was able to tender, resulting in her accruing additional debt load despite making payments.

For open-ended credit accounts involving elderly consumers, the amount of any given late fee should be capped at no more than a specified flat amount (such as $20.00) or 1% of the outstanding balance, whichever is less. In Ms. L.'s situation, such a restriction would have reduced her late fees dramatically, as recalculation of the first late fee imposed on her March 2001 billing statement will illustrate. Her balance from the previous month was $295.15; 1% of which is $2.95 as opposed to $25.00. Substituting this reduced late fee for that month would have given her a closing balance of $299.07, which would still have been under her credit limit of $300 as opposed to the actual balance of $321.12, which exceeded the credit limit and resulted in the imposition of an over-the-limit fee as well as a late fee on the next month's billing statement. Because substitution of reduced late

131. FEDERAL TRADE COMMISSION, THE CREDIT PRACTICES RULE 1–2 (1992), *available at* http://www.ftc.gov/bcp/conline/pubs/credit/crdtrul.pdf. By its terms, the FTC's Credit Practices Rule applies to entities that engage in "the business of lending money to consumers within the jurisdiction of the Federal Trade Commission." 16 C.F.R. § 444.1(a) (2007). The FTC's jurisdiction does not extend to banks or bank credit cards. *Id.* However, the language of the Federal Reserve Board's provision governing pyramiding of late fees is identical to that of the FTC's similar provision. *Compare* 12 C.F.R. § 227.15 (2007), *with* 16 C.F.R. § 444.4. Thus, one would assume that the Federal Reserve Board would find the FTC's interpretation of its Credit Practices Rule to be persuasive with respect to interpretation of the analogous Federal Reserve Board rule.

fees would have lowered the principal balance that Ms. L. owed every month, it would also have had the additional effect of lowering the total amount of interest Ms. L. was charged over the course of the two-year period.

Still, reduction of the amount of the late fee alone is not enough to eliminate unfairness or overreaching in situations where the debtor's limited income will simply not suffice to achieve payment. The law should additionally incorporate a maximum four-month limit on the assessment of late fees. If a consumer is not able to bring an account back to current status within a four-month period, that should bring the account to the attention of the creditor. The law should then require the creditor to act promptly to counsel the debtor and to determine if the implementation of remedial, mitigating steps[132] taken by the creditor and debtor jointly might enable the debtor to reinstate the account. If reinstatment is impossible, the account should immediately be declared in default with the creditor proceeding to collection. If the creditor proceeds to collection, further assessment of late fees will be prohibited and the creditor will be limited to collection of four months' worth of late fees at the capped rate established by law.

B. Requirement of Remedial Assessment and Mitigation of Damages

As suggested by Judge Triozzi in the *Owens* case,[133] a creditor has a duty to mitigate damages. TILA should be amended to require creditors to make a remedial assessment once an elderly debtor falls behind in making payments for a four-month period. The steps involved in the remedial assessment should include the notification of credit insurance cancellation rights, reduction of the interest rate, and a moratorium on membership fees.

1. CREDIT INSURANCE CANCELLATION RIGHTS

The creditor should examine the monthly charges on the debtor's credit card. If they include charges for credit life, credit disability, accident, or unemployment insurance, the creditor should provide the debtor with written notification that purchase of such insurance is voluntary, may be terminated at any time, and that the

132. *See infra* Part III.B.
133. Discover Bank v. Owens, 822 N.E.2d 869, 873 (Ohio 2004).

debtor may wish to consider whether such termination would be in his best interests if working toward reinstatement of the account is desired. For elderly debtors in particular, the utility of such products is often nominal at best as the matters being insured against, unemployment and disability, are often inapplicable or have already occurred.[134]

Such products are marketed through the credit card issuer, and although the protection they provide appears to be for the debtor's benefit, in practice the creditor receives the greatest benefit because the creditor is the party that receives payment under the policy if and when the event that triggers the coverage occurs.[135] In the case of a credit life policy, for example, the debtor's death will trigger coverage, which then results in payment of the account balance to the creditor. In the absence of such coverage, the debtor's estate would be liable for the account balance, and if the estate is insolvent, the creditor will then be the one that must ultimately bear the loss. Credit disability or unemployment insurance generally just makes the minimum payment every month.[136] It therefore does not reduce the credit balance for the debtor and operates to generate additional interest income for the creditor. Finally, the companies that provide such products are often subsidiaries or affiliates of the same national lenders that issue the credit cards.[137] The creditor may receive significant compensation from the insurer in the form of dividends and commissions,[138] while the addition of the insurance premiums to the principal balance on the card, and the interest charged on that, adds substantially to the creditor's profits as well. Advising the debtor of her right to eliminate

134. *See* Daniel, *supra* note 4, at 437 (discussing sale of CreditSafe product to debtor in *Owens*).

135. Frank Burt et al., Practicing Law Inst., *Recent Developments in Credit Insurance Litigation: An Update*, *in* CORPORATE LAW AND PRACTICE HANDBOOK SERIES 386–90 (2002). Interestingly, a 1994 study indicated that the typical purchaser of credit insurance tended to have less than a college education, be a renter, have less than $50,000 in other life insurance, and be more likely to be either a minority or elderly. *Id*. at 386–87.

136. Rebecca Lindsey, *Credit Card Protection Insurance—Should You Get It?*, CARDRATINGS.COM, Sept. 2004, *available at* http://www.cardratings.com/jan01new.html.

137. Burt et al., *supra* note 135, at 389–90.

138. *See* Fed. Deposit Ins. Corp. v. Gulf Life Ins. Co., 737 F.2d 1513, 1515 (11th Cir. 1984) (bank officer received 65% of premium as commission); United Fin. & Thrift Corp. v. Smith, 387 S.W.2d 752, 755 (Tex. Civ. App. 1965) *error ref. n.r.e*. (85% commission). *See generally* NAT'L CONSUMER LAW CTR., THE COST OF CREDIT: REGULATION AND LEGAL CHALLENGES § 8.2.2 (1995).

these charges appears to be a minimal protection that should be offered in the event of default.[139]

2. REDUCTION OF INTEREST RATE TO ORIGINAL CONTRACT LEVEL

If the debtor has been in default under the credit card agreement for four months, then the default APR rate has undoubtedly been activated and in place for at least two of those months. If an elderly debtor is to have any hope of reinstating his or her account, assessment of interest pursuant to the default rate must cease. Assessment of interest at the original contract level may still leave the debtor unable to make the necessary minimum payments. If that is the case, then the law should require the account to be declared in immediate default rather than allowing it to continue to accrue months or even years worth of excessive interest charges.

3. MORATORIUM ON MEMBERSHIP FEES

If the debtor has been in default in payments for a four-month period, federal law should bar further assessment of annual membership fees for use of the card unless and until the account has been brought current and the debtor's privileges for use of the card have been reinstated. In Ms. L.'s case, her credit card account had been seriously delinquent for over six months when the first of two further annual fees, both in the amount of $39.00, were assessed on her credit card account. When the next annual fee was assessed, she had been in delinquent status and unable to use the account for over a year. Two months after assessment of this final annual membership fee, the creditor officially declared Ms. L.'s account to be in default, accelerated the balance, and referred it for collection. She received no partial refund or rebate of the annual fee amount despite the ten months remaining on her annual cycle.

139. Any attempt at the federal level to actually prohibit further charges for credit insurance on defaulted or delinquent credit card accounts would run the risk of violating the McCarran-Ferguson Act. 15 U.S.C. §§ 1011–1015 (2000). McCarran-Ferguson prevents Congress from passing laws that would substantively regulate the "business of insurance," the regulation of which is to be left to the states. BURT ET AL. *supra* note 135, at 452–55.

C. Prohibition of Assessment of Over-the-Limit Fees Where No Additional Access to Credit Has Been Requested by the Debtor

The assessment of an over-the-limit fee should be associated with the actual extension of additional credit to the debtor for credit purchase of something of value to him. If the debtor does not request the extension of credit or if the debtor's credit balance exceeds the credit limit due to the accrual of late fees, over-the-limit fees, or other delinquency charges, then no over-the-limit fee should be assessed against the debtor. Using this standard in Ms. L.'s case, the over-the-limit fee would have been assessed only once, when she used the card one last time for $12.00 worth of gas and thus exceeded her credit limit with a purchase for her benefit. At every point after that, the account persisted in its over-the-limit posture simply because Ms. L. could not afford to make sufficient payments to bring it back under the limit given the monthly assessment of additional late and over-the-limit fees. This is the very practice that has led to a crisis of mounting debt for older Americans, whose limited and fixed incomes can least afford to bear these objectionable and unconscionable charges.[140]

IV. Conclusion

Older Americans are finding their hopes of peace, serenity, and economic stability in retirement undermined by predatory lending practices that now pervade the credit card industry as a result of the virtual eradication of state usury laws as a limiting force on interest rates, late fees, and other penalty charges. People like Ms. L., who have worked hard and paid their bills over an entire lifetime spent as productive citizens, are now finding themselves buried in debt and falling behind in their basic obligations. They face lawsuits, the threat of judgment liens, repossession of personal property, and foreclosure. At the same time, credit card companies are thriving and enjoying unprecedented profits, despite burgeoning default rates and the apparent crisis being experienced by elderly credit card debtors.

Existing law, which has focused on disclosure of credit terms to consumers, has done little to address or ameliorate the problems, particularly among the elderly, because vulnerable older Americans, of-

140. *See* Loonin & Renuart, *supra* note 8, at 169–71 (discussing the shrinking income of the elderly as a cause of the elder-debt boom).

ten either ill or undereducated, are unable to effectively comprehend and utilize such disclosure information. The routine experience of elderly credit card debtors mirrors that of the defendant in the *Owens* case and that of Ms. L. They are being sued for sums well in excess of the amounts originally charged, despite having made payments sufficient to have paid the original charges, albeit not in a timely fashion. Although it may be tempting to view the scenario as one involving the improvident extension of credit, in fact, the profits garnered by the credit card industry suggest that these extensions of credit have not been improvident at all, at least from the creditors' standpoint. Revision of the federal Truth in Lending Act to add substantive protections that would prohibit charging of excessive late fees, require creditors to take affirmative steps to mitigate damages, and prohibit assessment of over-the-limit fees where debtors have not actually requested issuance of additional credit, would be a first step in eliminating the financial incentives that have encouraged credit card companies to profit from the default and financial ruin of America's senior citizens.

Appendix A

May 15, 2007

Mr. F. W. Z., III
Attorney at Law
Large Creditor Law Firm & Associates
First Bank Building, Suite 8900
9583 Collection Row
Some Big City, Tennessee

RE: Bank Credit Card v. Ms. L., General Sessions Civil Warrant No. XXXXXX
Our File No. YYYYYY

Dear F,

This is just to confirm our brief discussion in court yesterday concerning the above referenced matter, which is now set for trial on Monday, July 23, 2007, at 10:00 a.m. Because Ms. L. is ninety-three years-old and in very poor health, she will be unable to be present in court on that day. However, this should not present a problem because the facts relating to the charges made by Ms. L. on the account are not at issue, and our case will simply consist of legal argument.

According to the statements Bank Credit provided, Ms. L. charged a total of $277.02 for items of benefit to her between the time the account was opened in January 2001 until April 2001. By that point, she had exceeded her $300 credit limit due to the interest and other fees charged, and from May 2001 forward, she made no other charges on the card. Her total payments, which were admittedly made sporadically, equaled $474.75. Between the time she opened the account until the time the account was finally closed by Bank Credit in April 2003, Ms. L. accrued $309.13 in finance charges, $117.00 in card-membership fees, past-due fees in the amount of $525.00 and over-the-limit fees in the amount of $550.00, as well as a miscellaneous $5.00 cash-advance fee, all of which totaled $1506.13.

For some inexplicable reason, Bank Credit is now seeking a judgment in the amount of $2445.69; even assuming that Ms. L. still owed the entire $277.02 (which she clearly does not, given her pay-

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ments equaling $474.75), the total would only be $1783.15 and not $2445.69. At any rate, Ms. L. paid $197.73 more than she originally charged within the first year, an amount equal to a simple annual interest rate of 71%. It would therefore appear that Bank Credit has already been adequately compensated for the credit that was actually extended to Ms. L.

To allow Bank Credit to obtain a judgment composed of finance charges and fees in an amount equal to almost nine times what was originally charged appears to be both excessive and unconscionable. In *Discover Bank v. Owens,* 822 N.E.2d 869 (Ohio 2004), an Ohio court held that such an accumulation of over-the-limit fees and finance charges was in fact unconscionable and would not be enforced. I am enclosing a copy of the case for your reference. Although an out-of-state case is obviously not binding here in Tennessee, our judge may choose to adopt the reasoning if he or she finds the case to be persuasive.

Thank you for your consideration of this information. If there are any questions or concerns, please feel free to call me.

Sincerely,
Donna S. Harkness, CELA
Associate Professor of
Clinical Law
Director, Elder Law Clinic

xc: Ms. L.