Florida State University Law Review

Volume 1 | Issue 1 Article 7

1973

Bissette v. Colonial Mortgage Corp., 340 F. Supp. 1191 (D.D.C. 1972)

Follow this and additional works at: http://ir.law.fsu.edu/lr

 Part of the Consumer Protection Law Commons

Recommended Citation

Bissette v. Colonial Mortgage Corp., 340 F. Supp. 1191 (D.D.C. 1972), 1 Fla. St. U. L. Rev. 164 (2014) .
http://ir.law.fsu.edu/lr/vol1/iss1/7

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

residence requirements[25] condition or penalize free movement by placing the new resident in a state at a disadvantage in comparison with the long-time resident. The right-to-travel standard which has emerged from *Shapiro* and *Dunn* would now seem to make use of these devices for any purpose highly suspect.[26]

Consumer Protection— TRUTH IN LENDING — DISCLOSURE AT REAL ESTATE CLOSING IS NOT TIMELY AND FRUSTRATES THE PURPOSE OF THE FEDERAL TRUTH IN LENDING ACT.—*Bissette v. Colonial Mortgage Corp.*, 340 F. Supp. 1191 (D.D.C. 1972).

The Calvin Bissettes entered into an agreement with a builder-developer for the purchase of a one-family home, the agreement con-

---

25. Waiting periods applicable to new arrivals in a state may not in terms be "durational" residence requirements. They may rather purport to distinguish residents from nonresidents, creating an irrebuttable presumption of nonresidence so far as entitlement to some particular benefit is concerned. The Court has thus far dealt only with durational residence requirements and has been careful to emphasize that fact. In *Dunn*, for example, the Court stated that "[n]othing said today is meant to cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements." 405 U.S. at 342 n.13. The question arises whether a state can distinguish residents from nonresidents in terms of presence within the state for a period of time without in effect creating a durational residence requirement that would then be subject to testing by the compelling state interest standard. Certainly states which have a less burdensome test of bona fide residence—like Tennessee's "intention to stay indefinitely in a place" coupled with "some objective indication consistent with that intent"— will experience logical difficulty in explaining why a resident-nonresident classification in terms of time within the state is anything other than a durational residence requirement by another name.

26. Out-of-state tuition differentials represent one of the most widely used and economically significant forms of durational residence requirement. *See generally* Note, *The Constitutionality of Nonresident Tuition*, 55 MINN. L. REV. 1139 (1971). Attacks on tuition differentials have generally been unsuccessful. *See, e.g.*, Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd per curiam*, 401 U.S. 985 (1971); Kirk v. Board of Regents, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (Cal. 1st Dist. Ct. App. 1969), *appeal dismissed*, 396 U.S. 554 (1970); Bryan v. Regents, 188 Cal. 559, 205 Pac. 107 (1922); Commentary, 24 ALA. L. REV. 147 (1971); *But see* Kline v. Vlandis, 346 F. Supp. 526 (D. Conn. 1972). In the *Starns* case, the Court in a memorandum opinion affirmed a district court's application of the traditional "rational relation" equal protection test to uphold a Minnesota statute which created "an irrebuttable presumption that any person who has not continuously resided in Minnesota for one year immediately before his entrance to the University is a nonresident for tuition purposes." 326 F. Supp. at 237. *Shapiro* was distinguished by the district court in two respects: the court found no significant evidence that the claimants' right to travel had actually been deterred, and *Shapiro* was said to involve immediate and pressing needs relating to the preservation of life and health. *Id.* at 237-38. But the *Starns* affirmance came before *Dunn*. Given the Court's rejection in *Dunn* of an actual deterrence requirement and its careful elaboration of the right to travel as an independent basis necessitating application of the compelling state interest test, it seems improbable that the *Starns* rationale will be adequate to dispose of this issue should it again come before the Court.

tingent upon financing. The Bissettes then applied for a mortgage loan with Colonial Mortgage Corporation. On November 23, 1970, they were notified by Colonial that their loan application had received FHA approval. After executing a pre-possession agreement[1] with the builder-developer, the Bissettes moved into their new home on December 2, 1970. The disclosures required by the Truth in Lending Act, as implemented by Federal Reserve Board Regulation Z,[2] were not made by the mortgagee until closing, three weeks later. Mr. and Mrs. Bissette subsequently instituted a class action seeking a declaration that the mortgage company's actions were in violation of the Act. Damages were also sought.[3] The District Court for the District of Columbia, in a case of first impression, held that disclosure at real estate closing was not timely and frustrated the purpose of the Act.

The Act requires that disclosure in certain mortgage transactions be made "before the credit is extended."[4] Regulation Z specifies that disclosure be made "before the transaction is consummated."[5] Consummation occurs "at the time a contractual relationship is created between a creditor and a customer irrespective of the time of per-

---

1. A pre-possession agreement is one between a vendor and vendee allowing the latter to take possession prior to closing. For a discussion of these agreements see M. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY 351-59 (2d ed. 1963).

2. 82 Stat. 146 (1968), 15 U.S.C. §§ 1601-65 (1970) [hereinafter referred to as the Act]. Pursuant to § 1604, the Federal Reserve Board has implemented the Act by promulgating Fed. Res. Bd. Reg. Z, 12 C.F.R. §§ 226.1-.1002 (1972) [hereinafter referred to as Regulation Z]. Items required to be disclosed are set out in detail on the standard form for real property loans supplied by the Federal Reserve Board. The principal data required are the prepaid finance charge, the finance charge expressed in dollars, charges excludable from the finance charge, and the finance charge expressed as an annual percentage rate. *See generally* Aldridge, *Truth-in-Lending in Real Estate Transactions*, 48 N.C.L. REV. 427 (1970).

3. 82 Stat. 157 (1968), 15 U.S.C. § 1640(a) (1970) provides that any creditor who fails to make required disclosures is liable to the borrower

> in an amount equal to the sum of (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1000; and (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

4. 82 Stat. 156 (1968), 15 U.S.C. § 1639(b) (1970). This provision is made applicable, *inter alia*, to all real property transactions in which there is an offer or extension of consumer credit by a creditor to a natural person for personal consumer use and in which a security interest "is or will be retained or acquired." Fed. Res. Bd. Reg. Z, 12 C.F.R. § 226.2(k), (x) (1972). For a thorough discussion of the application of the Act to real property transactions, see Aldridge, *supra* note 2, at 428-32.

5. 12 C.F.R. § 226.8(a) (1972). One commentator has expressed the view that "before the transaction is consumated" is not synonymous with "before the credit is extended." Aldridge, *supra* note 2 at 442-43.

formance of either party."[6] Read literally, the Act and Regulation Z seem only to require that disclosure be made at any time before the credit relationship is created by contract. The *Bissette* court rejected the literal interpretation in favor of one that it thought achieved the purpose disclosure requirements were intended to serve.

The Bissettes argued that a contract was "consummated" when Colonial informed them of FHA loan approval, and that subsequent disclosures failed to satisfy the Act's directives. Alternatively, they urged that even if there was no enforceable contract prior to closing, "disclosure at closing is too late to be 'meaningful' under the Act."[7]

Colonial advanced four arguments in support of its assertion that disclosure at closing was timely. First, it contended that the phrase "before the credit is extended" means *any time* before it is extended, and that no credit had been extended prior to the closing. The court responded that "[s]uch an interpretation is in direct conflict with the essential purpose of this legislation."[8] That reading would permit creditors to make disclosure too late for the borrower to make effective use of the information. Secondly, Colonial urged that the language of the Act permitting disclosure "in the note or other evidence of indebtedness to be signed by the obligor"[9] authorizes disclosure when the debtor executes the loan document. But the court interpreted this language to specify only the manner and not the time at which disclosure should be made. Thirdly, the mortgagee contended that disclosure prior to closing is impossible because all the requisite information would not be available. In reply, the court cited the section of Regulation Z[10] allowing the creditor to estimate unknown amounts and items that must be disclosed and observed that "most of the information disclosed by defendant on closing day was ascertainable well in advance of that time."[11] Finally, it was argued that the words "before the credit is extended" are ambiguous and do not lend themselves to a rule specifying the time of disclosure.

The court held for the Bissettes[12] on the strength of their alterna-

6. Fed. Res. Bd. Reg. Z, 12 C.F.R. § 226.2(cc) (1972). The actual date of consummation is fixed by those provisions of state contract law that determine when a "contractual relationship is created." *Id.* In an opinion letter dated June 19, 1969, Frederic Solomon, Director of the Federal Reserve Board, stated: "[T]he date of consummation is fixed by State law, that is, the State law of contracts would determine when that 'contractual relationship' arose." 4 CCH CONSUMER CREDIT GUIDE ¶ 30,070 (1970).

7. 340 F. Supp. at 1192.

8. *Id.* at 1193.

9. 82 Stat. 156 (1968), 15 U.S.C. § 1639(b) (1970).

10. 12 C.F.R. § 226.6(f) (1972).

11. 340 F. Supp. at 1194.

12. The court granted plaintiffs' motion for summary judgment but withheld assessment of damages pending determination of the propriety of the class. *Id.*

tive argument. Declining to establish a time-of-disclosure rule, the court said "[a]ll that is required and all this Court concludes is that Truth in Lending disclosures made only at closing frustrate the Congressional intent and basic purpose of the Act, and as such, constitute a violation thereof."[13]

The purpose of the Act is "to assure a meaningful disclosure of credit terms."[14] Requiring early disclosure of borrowing costs provides the consumer information with which to select rationally the lender offering the most favorable rates.[15] It is supposed that this revelation will partly "avoid the uninformed use of credit," and that it will promote credit rate comparisons.[16] The Act was further designed to insure that "economic stabilization [will] be enhanced and . . . [that] competition among the various financial institutions . . . [will] be strengthened . . . ."[17]

The *Bissette* court concluded that disclosure at closing frustrates "comparison shopping."[18] This conclusion was reached even though consummation had evidently not occurred (although the court did not resolve this question). "Comparison shopping" requires that information be supplied early in credit negotiations while the borrower is relatively uncommitted. Although the purchaser may not be legally bound by the time he comes to the real estate closing, he may be too committed to the transaction, and he may have made incidental expenditures in anticipation of purchase. In *Bissette,* for example,

---

13. *Id.*

14. 82 Stat. 146 (1968), U.S.C. § 1601 (1970). *See also* Fed. Res. Bd. Reg. Z, 12 C.F.R. § 226.1 (a) (2) (1972); S. REP. No. 392, 90th Cong., 1st Sess. 1 (1967); Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270, 276 (S.D.N.Y. 1971).

15. *But see* Jensen, *Effect of Federal Truth in Lending Act and Regulation Z on Real Estate,* 4 REAL PROPERTY PROBLEMS AND TRUST J. 11, 28 (1969) (In his conclusion, the author says the Act "will not materially change the information presently obtained by borrowers in a first mortgage transaction.").

16. *See* 82 Stat. 146 (1968), 15 U.S.C. § 1601 (1970).

17. *Id.* The statement is evidently founded upon the tenet of conventional economic theory that informed buyers will patronize sellers who offer the most attractive price (or interest rate), thereby "shaking out" the inefficient and overpriced firms. *Cf.* Alfred, *Fair Market Value Concept,* 14 W. RES. L. REV. 173, 175 (1963); Knauss, *A Reappraisal of the Role of Disclosure,* 62 MICH. L. REV. 607, 610 (1964). Writing on the disclosure obligations imposed on issuers of securities, Knauss states: "The less information available, the less the market price will be representative of . . . true value . . . ." *But see* Shafton, *Truth-in-Lending,* 23 BUS. LAW. 511 (1968) (discussing the Act's ill effects on the mortgage finance industry); Note, *Truth in Lending: The Impossible Dream,* 22 CASE W. RES. L. REV. 89, 108 (1970) (examining the flaws in the argument that Truth in Lending will enhance economic stability).

18. 340 F. Supp. at 1194. The court said: "[Borrowers] merely want a clear indication of the cost . . . [of the loan], so they can decide for themselves whether the charges are reasonable and have the opportunity, if they wish, to compare that cost with other available credit arrangements."

the plaintiffs had already moved into the home. They were hardly objective or uncommitted shoppers on the day of closing.

Disclosure consistent with the purpose of the Act could be made—and the *Bissette* decision complied with—in at least two ways. First, the lender could obtain a firm commitment[19] from the prospective borrower before closing but after loan approval. Since the commitment would apparently be a "consummation"[20] under Regulation Z, disclosure would be required prior to its execution. To assure that disclosure upon the execution of a firm commitment does not meet with the same fate as disclosure at closing, the lender could make disclosure as soon as the loan is approved, simultaneously offering to the borrower the terms of the firm commitment. One of the terms could be that acceptance of the commitment must be made within ten days but no sooner than three days after the offering. In this way, the loan would be approved and full disclosure made before actual execution of the commitment.

Secondly, disclosure could be made immediately upon the filing of a loan application or soon thereafter.[21] This procedure would be in full accord with the spirit of the Act and would allow the consumer to shop for mortgage rates much as he is now able to shop for goods.

Both proposals require the creditor to use the provision of Regulation Z[22] permitting estimation of items disclosed. This provision directs the lender first to make a reasonable effort to ascertain the unknown data. If the information cannot be determined, an estimate can be made provided it "is clearly identified as such, is reasonable,

19. A firm commitment is an agreement in which a lender promises to provide a mortgage loan on specified terms subject to certain conditions. The borrower may pay a fixed fee to the lender should the borrower decide not to accept, or he may promise to reimburse him for the cost of processing the loan application up to the date on which the borrower rejects the loan. *See generally* PRACTICING LAW INSTITUTE, REAL ESTATE FINANCING: BUSINESS AND LEGAL CONSIDERATIONS 112-35 (J. McCord ed. 1970).

20. In an opinion letter dated Aug. 27, 1969, Frederic Solomon, Director of the Federal Reserve Board, stated: "[C]onsummation would occur at the time the lender issued its permanent loan commitment to the purchasing customer and the purchasing customer accepted such commitment." 4 CCH CONSUMER CREDIT GUIDE ¶ 30,147 (1970).

21. This time for disclosure has been recommended to bankers. *See* Frank, *Preparation of Bank Forms for Regulation Z*, 87 BANK L.J. 307, 323 (1970).

22. Fed. Res. Bd. Reg. Z, 12 C.F.R. § 226.6(f) (1972). The estimation provision may create an inequity between competing lenders. The span of time between execution of the loan and closing may differ among borrowers, but it is an item that must be estimated and disclosed. Since the borrower will be required to pay interest over this period, the estimation could have considerable impact on the borrower's decision of where to do business. The candid lender is at a disadvantage against an unduly conservative competitor whose estimate of time-to-closing is less than forthright. Accordingly, the Federal Reserve Board could eliminate this problem by providing for a standard estimate of time-to-closing.

is based on the best information available to the creditor, and is not used for the purpose of circumventing or evading the disclosure requirements . . . ."[23] As the *Bissette* court said, "[p]laintiffs do not seek, nor does the Act require, full and complete disclosure of each and every detail of the entire credit transaction."[24] All that is required is a forthright indication of the cost of borrowing, allowing the consumer to decide for himself if the rate is reasonable and the best available.

Criminal Law — SEARCH WARRANT — HEROIN SEIZED IN BACKYARD INCIDENT TO ARREST OF DEFENDANT IN HIS APARTMENT HELD ADMISSIBLE IN EVIDENCE.—*Fixel v. State,* 256 So. 2d 27 (Fla. 3d Dist. Ct. App. 1971), *cert. denied,* 262 So. 2d 443 (Fla. 1972).

During a surveillance of defendant Robert Fixel's apartment and backyard, an officer of the Key West police saw a number of persons—later characterized by the appeal court as "known pushers"—enter defendant's apartment. Another officer observed that several times defendant went to a pile of debris in his backyard, removed something from a black zipper bag, and took it into his apartment. A warrant to search the apartment was secured. One officer then went to the front door and arrested Fixel while another picked up the bag from the debris pile in the fenced-in backyard. The bag was found to contain heroin. The police were unable to find any narcotics in the apartment itself. The heroin seized in the backyard was admitted at trial, and defendant was convicted of possession of heroin. On appeal, the district court affirmed the conviction, stating that "Coolidge v. New Hampshire . . . does not require a reversal in this case inasmuch as that opinion recognizes that not every seizure of evidence which is not supported by a warrant is unconstitutional."[1] The Florida Supreme Court denied certiorari.[2]

The *Fixel* decision arguably misconstrues the import of *Coolidge v. New Hampshire.*[3] The law has long recognized that not all searches and seizures need be authorized by a warrant. The significance of *Coolidge* was not in its recognition of this principle but rather in its discussion of the situations in which the warrant requirement

---

23. *Id.*
24. 340 F. Supp. at 1194.

1. 256 So. 2d at 28.
2. 262 So. 2d 443 (Fla. 1972).
3. 403 U.S. 443 (1971).