NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NV-05-1235-MaMoS
CHRIS M. LUCAS,	Bk. No. 02-21124-BAM
Debtor.	Adv. No. 03-01148-BAM
KATHLEEN LEAVITT, Chapter 13 Trustee,	Ref. No. 05-15
Appellant,	
v.	**M E M O R A N D U M**[1]
CASH N ADVANCE, INC.,	
Appellee.	

Argued and Submitted on May 18, 2006
at Las Vegas, Nevada

Filed - October 23, 2006

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding.

Before: Marlar, Montali and Smith, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

INTRODUCTION

Postpetition, the debtor voluntarily repaid a $165 "payday" loan. The bankruptcy trustee then filed a proof of claim for the creditor and an adversary proceeding, as a counterclaim, alleging that the lender had violated disclosure requirements under federal and state consumer protection laws. In addition to seeking disallowance of the claim, as paid, the trustee sought statutory and actual damages and attorney's fees under these statutes.[2]

Following a trial, the bankruptcy court disallowed the claim and ruled that the creditor did not violate the federal Truth in Lending Act ("TILA"). It therefore denied the trustee's request for damages and attorney's fees.

In this appeal, the trustee contends that the bankruptcy court erred in its analysis and failed to rule on her state law claims. We conclude that there was no error, and AFFIRM.

FACTS

Chris Lucas ("Debtor") filed a chapter 13[3] petition on September 30, 2002. At the time, Debtor owed $165 to Cash N

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[2] Trustee had the right to recover the payment as a postpetition transfer of estate funds, and therefore, the resolution of an objection to the claim was appropriate. See § 549(a) (avoidance of postpetition transfers); 11 U.S.C. §§ 541 and 1306 (property of chapter 13 estate additionally includes all property or earnings acquired postpetition).

[3] Unless otherwise indicated, all section, chapter, and code references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as promulgated before its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). Rule references are to the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P."), Rules 1001-9036.

Advance ("CNA") for a payday loan. On October 6, 2002, Debtor voluntarily repaid the loan in full.

The Payday Loan

On July 6, 2002, CNA loaned Debtor $140 for two weeks, with interest of $25 for the 14-day period. The loan was memorialized on a form which included the "Disclosures Under Federal Reserve Regulation Z," containing the "Annual Percentage Rate," "Finance Charge," "Amount Financed," "Total of Payments," "Effective Date," "Today's Date," and new "Due Date."

This loan was then "rolled over" several times, meaning that Debtor would come in, on or around the deadline, pay $25 in interest, and obtain an extension. Each time, he would execute another loan form of the same type. The "amount financed" was always the same, as long as he was current in interest payments and had made no payments toward the principal, which he had not. The transaction history was as follows:

Date	Effective Date	Due Date	Annual Percentage Rate	Finance Charge	Amount Financed	Total of Payments
7/6/02	7/6/02	7/20/02	465.561%	$25 (pd 7/20)	$140	$165
7/20/02	7/20/02	8/3/02	465.561%	$25 (pd 8/3)	$140	$165
8/3/02	8/3/02	8/17/02	465.561%	$25 (pd 8/16)	$140	$165
8/16/02	8/17/02	8/31/02	465.561%	$25 (pd 9/3)	$140	$165
9/3/02	8/31/02	9/17/02	383.403%	$25 (pd 9/20)	$140	$165
9/20/02	9/17/02	10/4/02	383.403%	$25	$140	$165

10/6/02 LOAN PAID IN FULL ($165 = $140 plus $25)						

Procedural History

In May 2003, the chapter 13 trustee ("Trustee") filed a proof of claim in CNA's name for $165. Trustee then filed a complaint and objection to the claim,[4] alleging that, in the September 3, 2002 loan document, CNA had miscalculated the finance charge and disclosed the wrong amount. Trustee asserted that these were violations of TILA, 15 U.S.C. §§ 1601 et seq., and its implementing regulations, 12 C.F.R. §§ 226.1 et seq. ("Regulation Z"), and state customer loan regulations, Nevada Revised Statutes ("NRS") § 604.164.3.[5] Trustee sought actual damages and statutory damages under TILA, and attorney's fees and costs under both TILA and NRS § 604.164.3. By law, Trustee could recover no more than

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[4] Rule 3007 provides that "[i]f an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding." Rule 7001(1) provides that a proceeding to recover money is an "adversary proceeding."

[5] Trustee also alleged a "timing" failure, i.e., that CNA failed to provide the required disclosures prior to consummation of the transaction, pursuant to 15 U.S.C. § 1638(b)(1) and Regulation Z, 12 C.F.R. § 226.17(b). This issue was not addressed in bankruptcy court, nor has it been raised and argued in this appeal. (Notwithstanding that Trustee's Opening Brief lists § 1638(b) in the Table of Statutes, no mention of the section is to be found on the given pages.) Therefore, Trustee has waived review of this alleged violation. Laboa v. Calderon, 224 F.3d 972, 981 n.6 (9th Cir. 2000) (issues not specifically and distinctly argued in the appellant's opening brief are waived on appeal).

$50 in statutory damages (twice the amount of any finance charge).[6] See 15 U.S.C. § 1640(a)(2).

CNA answered Trustee's complaint and a trial was set. The main issue of contention was whether the September 3, 2002 transaction was a rollover of the original July 6, 2002 loan or whether it should be classified as a refinanced loan.

The parties stipulated that 383.403% was the correct percentage for a 17-day loan from August 31 to September 17, 2002, because the same loan would have merely been extended for three extra days without an added finance charge or fee. However, if the loan's effective date was actually September 3, 2002, then it would have been considered a new loan entered into three days after the due date of the previous loan, causing the finance charge to have been miscalculated for the 14-day period from September 3-17, 2002. As a new loan, the disclosed annual percentage rate should have been 465.561%. (But either way, the finance charge would be the same: $25.)

The specific alleged violations, relevant to this appeal, were succinctly described as:

> 1) Failing to properly disclose the "finance charge" in violation of 15 U.S.C. § 1638(a)(3) and Regulation Z, 12 C.F.R. § 226.18(d).
>
> 2) Improperly calculating the annual percentage rate ("APR"), in violation of 15 U.S.C. § 1606 and Regulation Z, 12 C.F.R. § 226.22. Defendant also misstated the disclosed annual percentage rate in violation of 15 U.S.C. § 1638(a)(4) and Regulation Z, 12 C.F.R. § 226.18(c).

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[6] We seriously question the value to the estate of such a "cottage industry" of fighting TILA offenses when the administrative expenses outweigh any recovery.

3) Improperly calculating the total payments, in violation of 15 U.S.C. § 1638(a)(5) and Regulation Z, 12 C.F.R. § 226.18(h).

4) Violating Nevada state law by making a loan without the "[d]isclosures required for a similar transaction by the federal Truth in Lending Act." NRS § 604.164.3 (2003).

See Compl. 4-5, June 17, 2003.

Trial went forward on April 21, 2005. Debtor testified that he had "rolled over" the July 6, 2002 loan several times. In regards to the September 3, 2002 transaction, Debtor stated that he had called CNA before the due date of August 31, 2002 to say that he would be coming in to make a payment "three days late":

Q. Exhibit D shows a due date of the 31st, and so you came in three days late to pay that off.

A. Yes. But I called them before then and told them I would be in three days late.

Q. Okay. So you came in three days late, and you rolled it over again.

A. Correct.

Tr. of Proceedings 20:17-23, Apr. 21, 2005.

The developer of the software that was used to calculate the APR was also called as a witness. He testified that the computer made the proper calculation based on the "effective date" of August 31, 2002 and the "due date" of September 17, 2002. He further testified that August 31st was the effective date rather than September 3rd because it was a "rollover" loan:

Q. Now, it has an effective date of 8/31/02, and then the due date of 9/17.

A. Correct.

Q. And then your computer software would calculate the APR based upon what?

A. The effective date and the due date.

. . . .

Q. But the reason that your software calculates it from the effective date is because it's a rollover?

A. Exactly. If he --

Q. And he's still --

A. If he would have received $140 on that date, it would have been different because he would have got -- the effective date would have been the same date that he came in.

Q. Right. Okay. But the [sic] 8/31 because he still has the cash in his pocket from the prior loan —

A. Exactly.

Q. — he still has your money.

A. Yes.

Q. And that's why it's calculated from 8/31.

A. Exactly.

Id. at 29:13-25, 30:1-2.

The Bankruptcy Court's Decision

The bankruptcy court entered its memorandum decision on May 18, 2005. It found that Debtor called CNA on August 31, 2002, the loan's due date, to say that he would be late, and then Debtor went in three days later, on September 3, 2002, and renewed the same $140 loan for another 14 days, paying the $25 interest, which he owed for the preceding period, and agreed to pay another $25 interest for the new period. CNA, in effect, gave Debtor three days interest free. The bankruptcy court reasoned that CNA should not be penalized simply because it had included those three

interest-free days in the interest rate calculation for the new rollover. It concluded therefore that the annual percentage rate on the rollover was correctly disclosed. Even if it was improperly disclosed, the error was in Debtor's favor, and Debtor suffered no financial damage.

On January 6, 2006, the bankruptcy court entered a second memorandum decision in which it disallowed the $165 proof of claim based on Debtor's testimony that he had paid off the loan in full on October 6, 2002. The court's judgment was also entered on that day, and it incorporated both memorandum decisions. This appeal followed.[7]

ISSUES

1. Whether the September 3, 2002 loan transaction was merely an extension of the July 6, 2002 original loan or a new loan or refinancing.

2. Whether Trustee pleaded and proved a claim for damages and attorney's fees under Nevada law.

STANDARD OF REVIEW

The panel reviews the bankruptcy court's conclusions of law, including its interpretation of federal and state law, de novo.

[7] The notice of appeal was filed prematurely on May 27, 2005, in response to the court's memorandum. It is treated as timely filed after entry of the judgment. See Fed. R. Bankr. P. 8002(a).

White v. City of Santee (In re White), 186 B.R. 700, 703 (9th Cir. BAP 1995); Tex. Comptroller of Pub. Accounts v. Megafoods Stores, Inc. (In re Megafoods Stores, Inc.), 163 F.3d 1063, 1067 (9th Cir. 1998).

When a contractual obligation is created is a matter of state law. Jackson v. Grant, 890 F.2d 118, 120 (9th Cir. 1989). Under Nevada law, extrinsic evidence of the parties' intent is properly admitted to interpret the terms of an ambiguous contract. Stratosphere Litig. L.L.C. v. Grand Casinos, Inc., 298 F.3d 1137, 1144 (9th Cir. 2002) (citing Farmers Ins. Exch. v. Young, 832 P.2d 376, 379 n.3 (Nev. 1992)). Thus, we review the bankruptcy court's factual findings under the clearly erroneous standard. See Hubbard v. Fid. Fed. Bank, 91 F.3d 75, 78 (9th Cir. 1996) (as amended) (remanding intent issue to trier of fact); Yarnall v. Four Aces Emporium, Inc. (In re Boganski), 322 B.R. 422, 426 (9th Cir. BAP 2005) (panel reviews finding of fact for clear error). "A factual finding is clearly erroneous if, after reviewing the record, we have a firm and definite conviction that a mistake has been committed." Id.

DISCUSSION

A. Statutory Damages: TILA and Regulation Z

1. Background of Truth-in-Lending

TILA was enacted in 1968 as Title I (Consumer Credit Cost Disclosure) of the federal Consumer Credit Protection Act, and has

been amended substantively several times. TILA's stated purpose is:

> to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601(a).

TILA applies to payday loans, which are classified as "closed-end" credit, "a type of loan that requires a single payment or succession of payments (also known as a[n] 'installment' loan)." Thomas A. Wilson, The Availability of Statutory Damages Under TILA to Remedy the Sharp Practice of Payday Lenders, 7 N.C. BANKING INST. 339, 344 (Apr. 2003); see also Brown v. Payday Check Advance, Inc., 202 F.3d 987, 991 (7th Cir. 2000) (payday loans fall under 15 U.S.C. § 1638, "which addresses all consumer loans other than open-end credit plans"), cert. denied, 531 U.S. 820 (2000); 12 C.F.R. § 226.2(a)(10) (defining "closed-end credit" transactions).

Under the authority of TILA, the Federal Reserve Board ("Board") promulgated Regulation Z, 12 C.F.R. §§ 226.1 et seq. & Supp. I (Official Staff Interpretations), which is the implementing regulation for TILA. TILA and Regulation Z are liberally construed in favor of the consumer, and must "'be absolutely complied with and strictly enforced.'" Jackson, 890 F.2d at 120 (quoting Mars v. Spartanburg Chrysler Plymouth, Inc., 713 F.2d 65, 67 (4th Cir. 1983)). They require a seller/creditor to make certain disclosures to protect the consumer.

TILA provides remedies to consumers in the form of statutory and actual damages, even for technical or minor violations of TILA. Jackson, 890 F.2d at 120; 15 U.S.C. § 1640 (civil liability). A plaintiff may recover statutory damages whether or not actual damages are proven. So. Discount Co. of Ga. v. Whitley (In re Whitley), 772 F.2d 815, 817 (11th Cir. 1985) (holding that statutory damages must be imposed regardless of the trial court's belief that no actual damages resulted); Walters v. First State Bank, 134 F. Supp. 2d 778, 782 (W.D. Va. 2001) (stating that the plaintiff was entitled to "actual damages, if any, and statutory damages"). If the creditor is liable for damages, then attorney's fees and costs are also awardable to the plaintiff under 15 U.S.C. § 1640(a)(3).[8] A defense to damages, however, is an unintentional, bona fide error. See 15 U.S.C. § 1640(c).[9]

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[8] "[I]n the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title," § 1640(a)(3) provides for "the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1640(a)(3).

[9] Section 1640(c) provides:

> (c) Unintentional violations; bona fide errors
>
> A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

15 U.S.C. § 1640(c).

2. Alleged Violations

Here, Trustee alleged that CNA: (1) improperly calculated the APR;[10] (2) failed to properly disclose the "finance charge";[11] (3) misstated the disclosed annual percentage rate;[12] and (4) improperly calculated the total payments.[13] See APPENDIX, herein, for details of these statutes and regulations.

For simplification, both parties agree that the TILA disclosures, as made, would be correct if the September 3, 2002, loan transaction was merely a rolled-over loan or extension. Therefore, the fundamental issue is whether the September 3, 2002 loan transaction was a renewal of the July 6, 2002 original loan or a new loan transaction or refinancing.

a. Substance of Transaction

We keep in mind that TILA focuses on the substance, not the form of credit-extending transactions. Turner v. E-Z Check Cashing of Cookeville, Tn., Inc., 35 F. Supp. 2d 1042, 1047 (M.D. Tenn. 1999). In substance, a "payday loan" is

> a short-term loan that is to be repaid on the borrower's next payday. The transaction is handled with a minimum of

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[10] An alleged violation of 15 U.S.C. § 1606(c) and Regulation Z, 12 C.F.R. § 226.22.

[11] An alleged violation of 15 U.S.C. § 1638(a)(3) and Regulation Z, 12 C.F.R. § 226.18(d).

[12] An alleged violation of 15 U.S.C. § 1638(a)(4) and Regulation Z, 12 C.F.R. § 226.18(c).

[13] An alleged violation of 15 U.S.C. § 1638(a)(5) and Regulation Z, 12 C.F.R. § 226.18(h).

> paperwork; the loan agreement is a single sheet of paper, and the borrower receives cash within minutes of applying. The rate of interest is high (in the range of 500% annually), and the lender typically requires the borrower to write a check that can be submitted for payment after the borrower's next scheduled payday.

Smith v. Check-N-Go of Ill., Inc., 200 F.3d 511, 513 (7th Cir. 1999).

CNA allows its customers to put off repayment in exchange for payment of the finance charge for the loan period, and it then executes a new disclosure form for an additional payday period.

TILA requires only that "[f]or each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items . . . ." 15 U.S.C. § 1638(a) (emphasis added). "The basic working principle of Regulation Z is that a refinancing is a new transaction that requires all new disclosures to the consumer." 1 CONSUMER CREDIT LAW MANUAL § 1.06[1] (Matthew Bender & Co. 2004). A "refinancing" is defined in Regulation Z as follows:

> **§ 226.20 Subsequent disclosure requirements.**
>
> (a) Refinancings. A refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer. The new finance charge shall include any unearned portion of the old finance charge that is not credited to the existing obligation. The following shall not be treated as a refinancing:
>
> (1) A renewal of a single payment obligation with no change in the original terms.

12 C.F.R. § 226.20 (a)(1).

The Official Staff Interpretation to § 226.20(a)(1) states:

> Changes in the terms of an existing obligation, such as the deferral of individual installments, will

> not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation.

12 C.F.R. Pt. 226, Supp. I.

Therefore, the Board defines a refinancing as a new transaction requiring a complete new set of disclosures.

b. Trustee's Arguments

Trustee contends that the September 3, 2002 transaction was a "refinancing" because a new loan document and contract was executed.

While we did not find any case law construing a rollover payday loan and Regulation Z, 12 C.F.R. § 226.20, cases with analogous facts are instructive. In Jackson v. Am. Loan Co., 202 F.3d 911 (7th Cir. 2000), the plaintiff took out a payday loan from a company that allowed her to delay repayment in exchange for an "extension fee." She sued the company for failing to describe the fee as a "finance charge." The Seventh Circuit ruled that deferring repayment until another payday did not "cancel" the old loan and note, or substitute a new one. Thus, the transaction was an extension and not a refinancing, so it mattered not what the fee was called because TILA did not apply. Id. at 913.

Jackson relied on the Ninth Circuit's Bone v. Hibernia Bank, 493 F.2d 135, 140-41 (9th Cir. 1974), which held that a bank's use of the "Rule of 78's" for computing finance charge rebates did not constitute a prepayment penalty charge that was required to be disclosed under TILA. The Ninth Circuit reasoned:

> [O]nce disclosed, if the annual percentage rate is "rendered inaccurate as the result of any act, occurrence,

> or agreement subsequent to the delivery of the required disclosures . . .[,]" it is not a violation of the Act. 15 U.S.C. § 1634 (1970). Otherwise, subsequent events such as late payment charges, Christmas deferrals or prepayment of the obligation, would each require a recomputation of the annual percentage rate. This result would be entirely unwieldy and impractical.

Id. at 140-41.

In contrast, the satisfaction and replacement of the old obligation by the new obligation defines "refinancing." See Hubbard, 91 F.3d at 79 n.8 (construing the definition of refinancing in Regulation Z, 12 C.F.R. § 226.20 and its Official Staff Interpretation).

Trustee maintains that a new note was missing in Jackson and that fact distinguishes it from our case.[14] We disagree. Here CNA used only one type of form for both the initial loan and subsequent extensions. This form was necessarily used because it contained the new effective date and due date and any changes in

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[14] Trustee has filed a Motion to Supplement the Excerpts of Record with CNA's motion to dismiss the adversary proceeding and its reply, which were filed in November, 2003. CNA had argued that the matter was subject to binding arbitration, pursuant to the arbitration clause in the September 3, 2002 loan form. It lost that argument, and the bankruptcy court issued a published opinion, Lucas v. Cash N Advance, Inc. (In re Lucas), 312 B.R. 407, 412 (Bankr. D. Nev. 2004), in which it held that the arbitration clause was an invalid contract of adhesion. Trustee now seeks to have CNA judicially estopped from arguing that September 3, 2002 loan agreement was not a separate contract.

We hereby DENY the Motion to Supplement. Neither these pleadings nor this argument was before the bankruptcy court in the present proceeding. See Ryther v. Lumber Prods., Inc. (In re Ryther), 799 F.2d 1412, 1414 (9th Cir. 1986) (not reaching issues raised for the first time on appeal). Moreover, the doctrine of judicial estoppel only estops a party where "the court relied on, or 'accepted,' the party's previous inconsistent position." See Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 783 (9th Cir. 2001). The bankruptcy court, in the prior proceeding, ruled that the arbitration clause was invalid, but it did not address the discrete issue of whether the transaction was a refinancing or a loan extension.

the APR and finance charge disclosures. However, the initial $140 loan had not been paid, canceled, replaced or satisfied, and Debtor still had the $140 "in his pocket." "The key terms are 'satisfaction' and 'replacement' and both terms must be met absolutely." 1 CONSUMER CREDIT LAW MANUAL, supra, § 1.06. The substance of the September 3, 2002 transaction was clearly a deferral of principal by acceptance of a check for the interest to date. These facts are analogous to the extension fee in Jackson.

The Sixth Circuit also cited Bone in holding that a lender did not need to make new disclosures when it merely offered the borrower payment deferrals, known as "payment holidays," on a car loan in exchange for an extension fee payment. Begala v. PNC Bank, Ohio, Nat'l Ass'n, 163 F.3d 948, 951 (6th Cir. 1998), cert. denied, 528 U.S. 868 (1999). Other courts have followed the same reasoning. See Sheppard v. GMAC Mortgage Corp. (In re Sheppard), 299 B.R. 753, 764 (Bankr. E.D. Pa. 2003) (mortgage loan modification to cure arrears was not refinancing); Caddell v. CitiMortgage, Inc., 2006 WL 625970 (D. Kan. 2006) (loan prepayments which skewed interest rates and rendered their disclosures inaccurate did not violate TILA).

Trustee also argues that the new loan agreement was a "novation" and thus a new contract under Nevada law.

> A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid . . . . If all four elements exist, a novation occurred . . . . Additionally, the intent of all parties to cause a novation must be clear . . . . However, consent to novation may be implied from the circumstances of the transaction and by the subsequent conduct of the parties. . . .

> Novation is a question of law only when the agreement and consent of the parties are unequivocal. . . . Whether a novation occurred is a question of fact if the evidence is such that reasonable persons can draw more than one conclusion. . . .

United Fire Ins. Co. v. McClelland, 780 P.2d 193, 195-96 (Nev. 1989) (citations omitted).

Here, the new loan agreement was not an unequivocal novation because Debtor testified that it was his intent to simply renew the initial $140 loan for an additional two weeks, as he had already done on several occasions. CNA's witness also testified that it was a "rollover" with an effective date of August 31, 2002. Debtor telephoned CNA to say that he would be coming into the CNA office three days after the August 31, 2002 due date. He did so, but only paid the $25 interest charge. The new loan form showed the APR for a 17-day term rather than a new 14-day loan. However, the finance charge for the 17-day term was the same as for an additional 14-day term ($25) because CNA effectively forgave the three days' interest. The September 3, 2002 transaction was merely an extension, and not a replacement of, the original $140 loan.

Trustee further argues that CNA admitted that the renewals were in reality cancellations of the prior loans in its answer to the propounded interrogatories. Specifically, Interrogatory No. 13 asked: "If any part of the consideration for the instant transaction was the cancellation of a prior extension of credit, state the date and transaction number . . ." etc. In response, CNA listed the chronology of extensions from July 6, 2002 until the final payment on October 6, 2002.

We disagree that this response proves a novation or refinancing. Rather, it ambiguously refers to a "prior extension of credit." In fact, there were several prior extensions.[15]

c. Our Decision

The bankruptcy court held that CNA's renewals were subject to TILA's disclosure requirements, but that the disclosures were accurate and, therefore, it had not violated the statute. We affirm on different grounds and agree with CNA that new disclosures were not required by TILA for this extension of a payday loan.[16]

Alternatively, we hold that CNA proved a bona fide clerical error in its disclosure of the incorrect APR for the 14-day period. Compare Boganski, where the BAP found that CNA admitted

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[15] Since we conclude that the September 3rd loan was not a refinancing, and therefore, not subject to TILA, we do not need to address Trustee's argument concerning the consummation date and whether the APR was supposed to be determined and disclosed as of August 31st or September 3rd. Nor do we need to address CNA's argument that the telephone call created an oral contract effective on August 31st.

[16] This conclusion might appear to conflict with a BAP decision, In re Boganski. This Nevada case had similar facts. The debtor had obtained a $500 payday loan for two weeks, and requested the term to be extended one month. A new form consumer loan agreement was printed on which CNA handwrote adjusted amounts for the finance charge and total of payments, but overlooked an erroneously computer-calculated APR. After the debtor filed a chapter 13 bankruptcy petition, the same trustee and trustee's attorney filed a proof of claim and an adversary proceeding alleging multiple violations of TILA. 322 B.R. at 424-25.

At trial, as well as on appeal, the only issue was whether the lender had a bona fide error defense under § 1640(c). Id. at 425. The BAP apparently presumed that TILA disclosures were required for the extension of credit, yet it did not directly address that issue, as we do today. Therefore, Boganski is not controlling as to whether such an extension was a refinancing.

to a manual mistake and failed to correct it by recalculating the numbers electronically. 322 B.R. at 427. Here, CNA did not make a calculation mistake, but to the extent the actual finance charge was assessed from September 3rd instead of August 31st, such clerical error gave CNA no advantage and was de minimis.

B. Alleged State Law Violations

The bankruptcy court did not address Trustee's state law claim and Trustee contends that she was entitled to an award of her attorney's fees under Nevada's consumer protection laws. 15 U.S.C. § 1610 provides that TILA does not preempt consistent state consumer protection laws.

Trustee's complaint alleged that Appellee had violated NRS § 604.164.3, which lists the requirements for a written loan agreement as including "Disclosures required for a similar transaction by the federal Truth in Lending Act."[17] Apparently, at the time of the violation, this chapter did not contain a civil action remedy, and Trustee did not cite to one.[18]

For the first time in this appeal, Trustee cites NRS § 41.600, which provides that if a victim of consumer fraud prevails in any one of several enumerated actions, "the court shall award him: (a) Any damages that he has sustained; and (b)

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[17] These laws were repealed and renumbered, effective July 1, 2005. The new NRS § 604A.410(2)(g) similarly provides that the written loan agreement must include: "(g) Any other disclosures required under the Truth in Lending Act and Regulation Z or under any other applicable federal or state statute or regulation."

[18] The 2005 law contains a new section, NRS § 604A.930 entitled "Civil action," which provides that a customer may bring a civil action if a person violates the disclosure provisions of NRS § 604A.410 (formerly NRS § 604.164).

His costs in the action and reasonable attorney's fees." NRS § 41.600(1), (3) (emphasis added). One "consumer fraud" action enumerated in NRS § 41.600 is that brought by a victim of a "deceptive trade practice as defined in" NRS § 598.0923. NRS § 598.0923(3) defines a "deceptive trade practice" as being a violation of "a state or federal statute or regulation relating to the sale or lease of goods or services."

CNA contends that Trustee's independent state law claims were dependent upon the alleged TILA violations. We agree that Trustee conceded that the only issue was whether CNA had violated TILA or the state statute which incorporated TILA requirements. Her recovery under state law was expressly tied to whether she prevailed on the federal claim. Therefore, we conclude that Trustee's separate state law claims have been rendered moot.[19]

CONCLUSION

The bankruptcy court did not err in its findings and conclusions that the September 3, 2002 loan was an extension or renewal and not a refinancing. CNA was not obliged to disclose the new terms, and, to the extent it did so erroneously, such error was not a violation of TILA. Trustee's state law claims based on the TILA violation are moot. The bankruptcy court's order is therefore **AFFIRMED.**

[19] Also mooted is Trustee's alternative theory, on appeal, that she was entitled to attorney's fees as a "private attorney general" to facilitate enforcement of TILA.

APPENDIX

Disclosure Violations: Statutes and Regulations

Section 1606 provides, in pertinent part:

> **§ 1606. Determination of annual percentage rate**
>
> . . . .
>
> (c) Allowable tolerances for purposes of compliance with disclosure requirements
>
> The disclosure of an annual percentage rate is accurate for the purpose of this subchapter if the rate disclosed is within a tolerance not greater than one-eighth of 1 per centum more or less than the actual rate or rounded to the nearest one-fourth of 1 per centum. The Board may allow a greater tolerance to simplify compliance where irregular payments are involved.

15 U.S.C.A. § 1606(c).

Section § 1638(a) provides, in pertinent part:

> § **1638. Transactions other than under an open end credit plan**
>
> (a) Required disclosures by creditor
>
> For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:
>
> . . . .
>
> (3) The "finance charge", not itemized, using that term.
>
> (4) The finance charge expressed as an "annual percentage rate", using that term. This shall not be required if the amount financed does not exceed $75 and the finance charge does not exceed $5, or if the amount financed exceeds $75 and the finance charge does not exceed $7.50.
>
> (5) The sum of the amount financed and the finance charge, which shall be termed the "total of payments".

15 U.S.C.A. § 1638 (a)(3), (4), (5).

Regulation Z provides, in pertinent part:

> **§ 226.18 Content of disclosures.**
>
> For each transaction, the creditor shall disclose the following information as applicable:
>
> . . . .
>
> (c) Itemization of amount financed.
>
> (1) A separate written itemization of the amount financed, including: []
>
> (I) The amount of any proceeds distributed directly to the consumer.
>
> (ii) The amount credited to the consumer's account with the creditor.
>
> (iii) Any amounts paid to other persons by the creditor on the consumer's behalf. The creditor shall identify those persons. []
>
> (iv) The prepaid finance charge.
>
> (2) The creditor need not comply with paragraph (c)(1) of this section if the creditor provides a statement that the consumer has the right to receive a written itemization of the amount financed, together with a space for the consumer to indicate whether it is desired, and the consumer does not request it.
>
> (d) Finance charge. The finance charge, using that term, and a brief description such as "the dollar amount the credit will cost you."
>
> . . . .
>
> (2) Other credit. In any other transaction, the amount disclosed as the finance charge shall be treated as accurate if, in a transaction involving an amount financed of $1,000 or less, it is not more than $5 above or below the amount required to be disclosed; or, in a transaction involving an amount financed of more than $1,000, it is not more than $10 above or below the amount required to be disclosed.
>
> . . . .

(h) Total of payments. The total of payments, using that term, and a descriptive explanation such as "the amount you will have paid when you have made all scheduled payments." [FN]

[FN] In any transaction involving a single payment, the creditor need not disclose the total of payments.

12 C.F.R. § 226.18 (c), (d), (h) (footnotes omitted).

§ 226.22 Determination of annual percentage rate.

(a) Accuracy of annual percentage rate.

(1) The annual percentage rate is a measure of the cost of credit, expressed as a yearly rate, that relates the amount and timing of value received by the consumer to the amount and timing of payments made. The annual percentage rate shall be determined in accordance with either the actuarial method or the United States Rule method. Explanations, equations and instructions for determining the annual percentage rate in accordance with the actuarial method are set forth in Appendix J to this regulation. [FN]

[FN] An error in disclosure of the annual percentage rate or finance charge shall not, in itself, be considered a violation of this regulation if: (1) The error resulted from a corresponding error in a calculation tool used in good faith by the creditor; and (2) upon discovery of the error, the creditor promptly discontinues use of that calculation tool for disclosure purposes and notifies the Board in writing of the error in the calculation tool.

(2) As a general rule, the annual percentage rate shall be considered accurate if it is not more than 1/8 of 1 percentage point above or below the annual percentage rate determined in accordance with paragraph (a)(1) of this section.

12 C.F.R. § 226.22 (1), (2).