

OCT 23 2006

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No.	NV-05-1235-MaMoS
	)		
CHRIS M. LUCAS,	)	Bk. No.	02-21124-BAM
	)		
Debtor.	)	Adv. No.	03-01148-BAM
	)		
_____	)	Ref. No.	05-15
KATHLEEN LEAVITT, Chapter 13	)		
Trustee,	)		
	)		
Appellant,	)		
	)		
v.	)	<b><u>MEMORANDUM</u></b> <sup>1</sup>	
	)		
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: Marljar, Montali and Smith, Bankruptcy Judges.

\_\_\_\_\_  
<sup>1</sup> 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.



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

3  
4 **The Payday Loan**

5  
6 On July 6, 2002, CNA loaned Debtor \$140 for two weeks, with  
7 interest of \$25 for the 14-day period. The loan was memorialized  
8 on a form which included the "Disclosures Under Federal Reserve  
9 Regulation Z," containing the "Annual Percentage Rate," "Finance  
10 Charge," "Amount Financed," "Total of Payments," "Effective Date,"  
11 "Today's Date," and new "Due Date."

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

19

20 <b>Date</b>	<b>Effective Date</b>	<b>Due Date</b>	<b>Annual Percentage Rate</b>	<b>Finance Charge</b>	<b>Amount Financed</b>	<b>Total of Payments</b>
21 7/6/02	7/6/02	7/20/02	465.561%	\$25 (pd 7/20)	\$140	\$165
22 7/20/02	7/20/02	8/3/02	465.561%	\$25 (pd 8/3)	\$140	\$165
23 8/3/02	8/3/02	8/17/02	465.561%	\$25 (pd 8/16)	\$140	\$165
24 8/16/02	8/17/02	8/31/02	465.561%	\$25 (pd 9/3)	\$140	\$165
25 9/3/02	8/31/02	9/17/02	383.403%	\$25 (pd 9/20)	\$140	\$165
26 9/20/02	9/17/02	10/4/02	383.403%	\$25	\$140	\$165

27  
28

1	10/6/02					
2	LOAN					
3	PAID IN					
4	FULL					
5	(\$165 =					
	\$140					
	plus					
	\$25)					

6 **Procedural History**

7

8 In May 2003, the chapter 13 trustee ("Trustee") filed a proof  
9 of claim in CNA's name for \$165. Trustee then filed a complaint  
10 and objection to the claim,<sup>4</sup> alleging that, in the September 3,  
11 2002 loan document, CNA had miscalculated the finance charge and  
12 disclosed the wrong amount. Trustee asserted that these were  
13 violations of TILA, 15 U.S.C. §§ 1601 et seq., and its  
14 implementing regulations, 12 C.F.R. §§ 226.1 et seq. ("Regulation  
15 Z"), and state customer loan regulations, Nevada Revised Statutes  
16 ("NRS") § 604.164.3.<sup>5</sup> Trustee sought actual damages and statutory  
17 damages under TILA, and attorney's fees and costs under both TILA  
18 and NRS § 604.164.3. By law, Trustee could recover no more than

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19

20 <sup>4</sup> Rule 3007 provides that "[i]f an objection to a claim is  
21 joined with a demand for relief of the kind specified in Rule  
22 7001, it becomes an adversary proceeding." Rule 7001(1) provides  
that a proceeding to recover money is an "adversary proceeding."

23 <sup>5</sup> Trustee also alleged a "timing" failure, *i.e.*, that CNA  
24 failed to provide the required disclosures prior to consummation  
of the transaction, pursuant to 15 U.S.C. § 1638(b)(1) and  
25 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  
26 appeal. (Notwithstanding that Trustee's Opening Brief lists §  
1638(b) in the Table of Statutes, no mention of the section is to  
27 be found on the given pages.) Therefore, Trustee has waived  
review of this alleged violation. *Laboa v. Calderon*, 224 F.3d  
28 972, 981 n.6 (9th Cir. 2000) (issues not specifically and  
distinctly argued in the appellant's opening brief are waived on  
appeal).

1 \$50 in statutory damages (twice the amount of any finance  
2 charge).<sup>6</sup> See 15 U.S.C. § 1640(a)(2).

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

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

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

- 20 1) Failing to properly disclose the "finance  
21 charge" in violation of 15 U.S.C. § 1638(a)(3)  
and Regulation Z, 12 C.F.R. § 226.18(d).
- 22 2) Improperly calculating the annual percentage  
23 rate ("APR"), in violation of 15 U.S.C.  
24 § 1606 and Regulation Z, 12 C.F.R. § 226.22.  
25 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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27 <sup>6</sup> We seriously question the value to the estate of such a  
28 "cottage industry" of fighting TILA offenses when the  
administrative expenses outweigh any recovery.

- 1           3) Improperly calculating the total payments, in  
2 violation of 15 U.S.C. § 1638(a)(5) and  
3 Regulation Z, 12 C.F.R. § 226.18(h).  
4           4) Violating Nevada state law by making a loan  
5 without the "[d]isclosures required for a  
6 similar transaction by the federal Truth in  
7 Lending Act." NRS § 604.164.3 (2003).

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

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

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

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

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

20           A. Correct.

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

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

28           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?

1 A. The effective date and the due date.

2 . . . .

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

5 A. Exactly. If he --

6 Q. And he's still --

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

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

11 A. Exactly.

12 Q. -- he still has your money.

13 A. Yes.

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

15 A. Exactly.

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

17

18 **The Bankruptcy Court's Decision**

19

20 The bankruptcy court entered its memorandum decision on May  
21 18, 2005. It found that Debtor called CNA on August 31, 2002, the  
22 loan's due date, to say that he would be late, and then Debtor  
23 went in three days later, on September 3, 2002, and renewed the  
24 same \$140 loan for another 14 days, paying the \$25 interest, which  
25 he owed for the preceding period, and agreed to pay another \$25  
26 interest for the new period. CNA, in effect, gave Debtor three  
27 days interest free. The bankruptcy court reasoned that CNA should  
28 not be penalized simply because it had included those three

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

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

### 12 13 ISSUES

- 14
- 15 1. Whether the September 3, 2002 loan transaction was  
16 merely an extension of the July 6, 2002 original loan or  
17 a new loan or refinancing.
  - 18
  - 19 2. Whether Trustee pleaded and proved a claim for damages  
20 and attorney's fees under Nevada law.
  - 21

### 22 STANDARD OF REVIEW

23

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

26 \_\_\_\_\_

27 <sup>7</sup> The notice of appeal was filed prematurely on May 27,  
28 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).

1 White v. City of Santee (In re White), 186 B.R. 700, 703 (9th Cir.  
2 BAP 1995); Tex. Comptroller of Pub. Accounts v. Megafoods Stores,  
3 Inc. (In re Megafoods Stores, Inc.), 163 F.3d 1063, 1067 (9th Cir.  
4 1998).

5 When a contractual obligation is created is a matter of state  
6 law. Jackson v. Grant, 890 F.2d 118, 120 (9th Cir. 1989). Under  
7 Nevada law, extrinsic evidence of the parties' intent is properly  
8 admitted to interpret the terms of an ambiguous contract.  
9 Stratosphere Litig. L.L.C. v. Grand Casinos, Inc., 298 F.3d 1137,  
10 1144 (9th Cir. 2002) (citing Farmers Ins. Exch. v. Young, 832 P.2d  
11 376, 379 n.3 (Nev. 1992)). Thus, we review the bankruptcy court's  
12 factual findings under the clearly erroneous standard. See  
13 Hubbard v. Fid. Fed. Bank, 91 F.3d 75, 78 (9th Cir. 1996) (as  
14 amended) (remanding intent issue to trier of fact); Yarnall v.  
15 Four Aces Emporium, Inc. (In re Boganski), 322 B.R. 422, 426 (9th  
16 Cir. BAP 2005) (panel reviews finding of fact for clear error).  
17 "A factual finding is clearly erroneous if, after reviewing the  
18 record, we have a firm and definite conviction that a mistake has  
19 been committed." Id.

## 20 21 DISCUSSION

### 22 23 A. Statutory Damages: TILA and Regulation Z

#### 24 25 1. Background of Truth-in-Lending

26  
27 TILA was enacted in 1968 as Title I (Consumer Credit Cost  
28 Disclosure) of the federal Consumer Credit Protection Act, and has

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

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

9 15 U.S.C. § 1601(a).

10 TILA applies to payday loans, which are classified as  
11 "closed-end" credit, "a type of loan that requires a single  
12 payment or succession of payments (also known as a[n]  
13 'installment' loan)." Thomas A. Wilson, The Availability of  
14 Statutory Damages Under TILA to Remedy the Sharp Practice of  
15 Payday Lenders, 7 N.C. BANKING INST. 339, 344 (Apr. 2003); see also  
16 Brown v. Payday Check Advance, Inc., 202 F.3d 987, 991 (7th Cir.  
17 2000) (payday loans fall under 15 U.S.C. § 1638, "which addresses  
18 all consumer loans other than open-end credit plans"), cert.  
19 denied, 531 U.S. 820 (2000); 12 C.F.R. § 226.2(a)(10) (defining  
20 "closed-end credit" transactions).

21 Under the authority of TILA, the Federal Reserve Board  
22 ("Board") promulgated Regulation Z, 12 C.F.R. §§ 226.1 et seq. &  
23 Supp. I (Official Staff Interpretations), which is the  
24 implementing regulation for TILA. TILA and Regulation Z are  
25 liberally construed in favor of the consumer, and must "be  
26 absolutely complied with and strictly enforced.'" Jackson, 890  
27 F.2d at 120 (quoting Mars v. Spartanburg Chrysler Plymouth, Inc.,  
28 713 F.2d 65, 67 (4th Cir. 1983)). They require a seller/creditor  
to make certain disclosures to protect the consumer.

1 TILA provides remedies to consumers in the form of statutory  
2 and actual damages, even for technical or minor violations of  
3 TILA. Jackson, 890 F.2d at 120; 15 U.S.C. § 1640 (civil  
4 liability). A plaintiff may recover statutory damages whether or  
5 not actual damages are proven. So. Discount Co. of Ga. v. Whitley  
6 (In re Whitley), 772 F.2d 815, 817 (11th Cir. 1985) (holding that  
7 statutory damages must be imposed regardless of the trial court's  
8 belief that no actual damages resulted); Walters v. First State  
9 Bank, 134 F. Supp. 2d 778, 782 (W.D. Va. 2001) (stating that the  
10 plaintiff was entitled to "actual damages, if any, and statutory  
11 damages"). If the creditor is liable for damages, then attorney's  
12 fees and costs are also awardable to the plaintiff under  
13 15 U.S.C. § 1640(a)(3).<sup>8</sup> A defense to damages, however, is an  
14 unintentional, bona fide error. See 15 U.S.C. § 1640(c).<sup>9</sup>

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16 <sup>8</sup> "[I]n the case of any successful action to enforce the  
17 foregoing liability or in any action in which a person is  
18 determined to have a right of rescission under section 1635 of  
19 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).

20 <sup>9</sup> Section 1640(c) provides:

21 (c) Unintentional violations; bona fide errors

22 A creditor or assignee may not be held liable in any  
23 action brought under this section or section 1635 of  
24 this title for a violation of this subchapter if the  
25 creditor or assignee shows by a preponderance of  
26 evidence that the violation was not intentional and  
27 resulted from a bona fide error notwithstanding the  
28 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).

1 **2. Alleged Violations**

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

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

14  
15 **a. Substance of Transaction**

16  
17 We keep in mind that TILA focuses on the substance, not the  
18 form of credit-extending transactions. Turner v. E-Z Check  
19 Cashing of Cookeville, Tn., Inc., 35 F. Supp. 2d 1042, 1047 (M.D.  
20 Tenn. 1999). In substance, a "payday loan" is

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

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23 <sup>10</sup> An alleged violation of 15 U.S.C. § 1606(c) and Regulation  
24 Z, 12 C.F.R. § 226.22.

25 <sup>11</sup> An alleged violation of 15 U.S.C. § 1638(a)(3) and  
26 Regulation Z, 12 C.F.R. § 226.18(d).

27 <sup>12</sup> An alleged violation of 15 U.S.C. § 1638(a)(4) and  
28 Regulation Z, 12 C.F.R. § 226.18(c).

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

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

7 Smith v. Check-N-Go of Ill., Inc., 200 F.3d 511, 513 (7th Cir.  
8 1999).

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

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

20 **§ 226.20 Subsequent disclosure requirements.**

21 (a) Refinancings. A refinancing occurs when an existing  
22 obligation that was subject to this subpart is  
23 satisfied and replaced by a new obligation undertaken  
24 by the same consumer. A refinancing is a new  
25 transaction requiring new disclosures to the  
26 consumer. The new finance charge shall include any  
27 unearned portion of the old finance charge that is  
28 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

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

3 12 C.F.R. Pt. 226, Supp. I.

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

6  
7 **b. Trustee's Arguments**

8  
9 Trustee contends that the September 3, 2002 transaction was a  
10 "refinancing" because a new loan document and contract was  
11 executed.

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

23 Jackson relied on the Ninth Circuit's Bone v. Hibernia Bank,  
24 493 F.2d 135, 140-41 (9th Cir. 1974), which held that a bank's use  
25 of the "Rule of 78's" for computing finance charge rebates did not  
26 constitute a prepayment penalty charge that was required to be  
27 disclosed under TILA. The Ninth Circuit reasoned:

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

1 or agreement subsequent to the delivery of the required  
2 disclosures . . .[,]" it is not a violation of the Act.  
3 15 U.S.C. § 1634 (1970). Otherwise, subsequent events  
4 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.

5 Id. at 140-41.

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

11 Trustee maintains that a new note was missing in Jackson and  
12 that fact distinguishes it from our case.<sup>14</sup> We disagree. Here CNA  
13 used only one type of form for both the initial loan and  
14 subsequent extensions. This form was necessarily used because it  
15 contained the new effective date and due date and any changes in  
16

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17  
18 <sup>14</sup> Trustee has filed a Motion to Supplement the Excerpts of  
19 Record with CNA's motion to dismiss the adversary proceeding and  
20 its reply, which were filed in November, 2003. CNA had argued  
21 that the matter was subject to binding arbitration, pursuant to  
22 the arbitration clause in the September 3, 2002 loan form. It  
23 lost that argument, and the bankruptcy court issued a published  
24 opinion, Lucas v. Cash N Advance, Inc. (In re Lucas), 312 B.R.  
25 407, 412 (Bankr. D. Nev. 2004), in which it held that the  
26 arbitration clause was an invalid contract of adhesion. Trustee  
27 now seeks to have CNA judicially estopped from arguing that  
28 September 3, 2002 loan agreement was not a separate contract.

23 We hereby DENY the Motion to Supplement. Neither these  
24 pleadings nor this argument was before the bankruptcy court in the  
25 present proceeding. See Ryther v. Lumber Prods., Inc. (In re  
26 Ryther), 799 F.2d 1412, 1414 (9th Cir. 1986) (not reaching issues  
27 raised for the first time on appeal). Moreover, the doctrine of  
28 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.

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

9 The Sixth Circuit also cited Bone in holding that a lender  
10 did not need to make new disclosures when it merely offered the  
11 borrower payment deferrals, known as "payment holidays," on a car  
12 loan in exchange for an extension fee payment. Begala v. PNC  
13 Bank, Ohio, Nat'l Ass'n, 163 F.3d 948, 951 (6th Cir. 1998), cert.  
14 denied, 528 U.S. 868 (1999). Other courts have followed the same  
15 reasoning. See Sheppard v. GMAC Mortgage Corp. (In re Sheppard),  
16 299 B.R. 753, 764 (Bankr. E.D. Pa. 2003) (mortgage loan  
17 modification to cure arrears was not refinancing); Caddell v.  
18 CitiMortgage, Inc., 2006 WL 625970 (D. Kan. 2006) (loan  
19 prepayments which skewed interest rates and rendered their  
20 disclosures inaccurate did not violate TILA).

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

23 A novation consists of four elements: (1) there must  
24 be an existing valid contract; (2) all parties must agree  
25 to a new contract; (3) the new contract must extinguish  
26 the old contract; and (4) the new contract must be valid  
27 . . . . If all four elements exist, a novation occurred  
28 . . . . 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.  
. . . .

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

4           United Fire Ins. Co. v. McClelland, 780 P.2d 193, 195-96 (Nev.  
5           1989) (citations omitted).

6           Here, the new loan agreement was not an unequivocal novation  
7           because Debtor testified that it was his intent to simply renew  
8           the initial \$140 loan for an additional two weeks, as he had  
9           already done on several occasions. CNA's witness also testified  
10          that it was a "rollover" with an effective date of August 31,  
11          2002. Debtor telephoned CNA to say that he would be coming into  
12          the CNA office three days after the August 31, 2002 due date. He  
13          did so, but only paid the \$25 interest charge. The new loan form  
14          showed the APR for a 17-day term rather than a new 14-day loan.  
15          However, the finance charge for the 17-day term was the same as  
16          for an additional 14-day term (\$25) because CNA effectively  
17          forgave the three days' interest. The September 3, 2002  
18          transaction was merely an extension, and not a replacement of, the  
19          original \$140 loan.

20          Trustee further argues that CNA admitted that the renewals  
21          were in reality cancellations of the prior loans in its answer to  
22          the propounded interrogatories. Specifically, Interrogatory No.  
23          13 asked: "If any part of the consideration for the instant  
24          transaction was the cancellation of a prior extension of credit,  
25          state the date and transaction number . . ." etc. In response,  
26          CNA listed the chronology of extensions from July 6, 2002 until  
27          the final payment on October 6, 2002.

28

1 We disagree that this response proves a novation or  
2 refinancing. Rather, it ambiguously refers to a "prior extension  
3 of credit." In fact, there were several prior extensions.<sup>15</sup>  
4

5 **c. Our Decision**  
6

7 The bankruptcy court held that CNA's renewals were subject to  
8 TILA's disclosure requirements, but that the disclosures were  
9 accurate and, therefore, it had not violated the statute. We  
10 affirm on different grounds and agree with CNA that new  
11 disclosures were not required by TILA for this extension of a  
12 payday loan.<sup>16</sup>

13 Alternatively, we hold that CNA proved a bona fide clerical  
14 error in its disclosure of the incorrect APR for the 14-day  
15 period. Compare Boganski, where the BAP found that CNA admitted  
16

---

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

24 <sup>16</sup> This conclusion might appear to conflict with a BAP  
25 decision, In re Boganski. This Nevada case had similar facts.  
26 The debtor had obtained a \$500 payday loan for two weeks, and  
27 requested the term to be extended one month. A new form consumer  
28 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.

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

### 6 7 **B. Alleged State Law Violations**

8  
9 The bankruptcy court did not address Trustee's state law  
10 claim and Trustee contends that she was entitled to an award of  
11 her attorney's fees under Nevada's consumer protection laws. 15  
12 U.S.C. § 1610 provides that TILA does not preempt consistent state  
13 consumer protection laws.

14 Trustee's complaint alleged that Appellee had violated NRS  
15 § 604.164.3, which lists the requirements for a written loan  
16 agreement as including "Disclosures required for a similar  
17 transaction by the federal Truth in Lending Act."<sup>17</sup> Apparently, at  
18 the time of the violation, this chapter did not contain a civil  
19 action remedy, and Trustee did not cite to one.<sup>18</sup>

20 For the first time in this appeal, Trustee cites NRS  
21 § 41.600, which provides that if a victim of consumer fraud  
22 prevails in any one of several enumerated actions, "the court  
23 shall award him: (a) Any damages that he has sustained; and (b)

---

24  
25 <sup>17</sup> These laws were repealed and renumbered, effective July 1,  
26 2005. The new NRS § 604A.410(2)(g) similarly provides that the  
27 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."

28 <sup>18</sup> 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).

1 His costs in the action and reasonable attorney's fees." NRS  
2 § 41.600(1), (3) (emphasis added). One "consumer fraud" action  
3 enumerated in NRS § 41.600 is that brought by a victim of a  
4 "deceptive trade practice as defined in" NRS § 598.0923. NRS  
5 § 598.0923(3) defines a "deceptive trade practice" as being a  
6 violation of "a state or federal statute or regulation relating to  
7 the sale or lease of goods or services."

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

15  
16 **CONCLUSION**  
17

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

25  
26  
27  
28 

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<sup>19</sup> 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.

1 **APPENDIX**

2  
3 **Disclosure Violations: Statutes and Regulations**

4  
5 **Section 1606 provides, in pertinent part:**

6 **§ 1606. Determination of annual percentage rate**

7 . . . . .

8 (c) Allowable tolerances for purposes of compliance with  
9 disclosure requirements

10 The disclosure of an annual percentage rate is  
11 accurate for the purpose of this subchapter if the  
12 rate disclosed is within a tolerance not greater than  
13 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.

14 15 U.S.C.A. § 1606(c).

15  
16 **Section § 1638(a) provides, in pertinent part:**

17 **§ 1638. Transactions other than under an open end credit plan**

18 (a) Required disclosures by creditor

19 For each consumer credit transaction other than under  
20 an open end credit plan, the creditor shall disclose  
21 each of the following items, to the extent  
applicable:

22 . . . . .

23 (3) The "finance charge", not itemized, using  
that term.

24 (4) The finance charge expressed as an "annual  
25 percentage rate", using that term. This  
26 shall not be required if the amount  
27 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.

28 (5) The sum of the amount financed and the  
finance charge, which shall be termed the  
"total of payments".

1 15 U.S.C.A. § 1638 (a) (3), (4), (5).

2

3 **Regulation Z provides, in pertinent part:**

4 **§ 226.18 Content of disclosures.**

5 For each transaction, the creditor shall disclose the following  
6 information as applicable:

7 . . . . .

8 (c) Itemization of amount financed.

9 (1) A separate written itemization of the amount  
10 financed, including: []

11 (I) The amount of any proceeds distributed  
12 directly to the consumer.

13 (ii) The amount credited to the consumer's  
14 account with the creditor.

15 (iii) Any amounts paid to other persons by the  
16 creditor on the consumer's behalf. The  
17 creditor shall identify those persons. []

18 (iv) The prepaid finance charge.

19 (2) The creditor need not comply with paragraph  
20 (c) (1) of this section if the creditor provides  
21 a statement that the consumer has the right to  
22 receive a written itemization of the amount  
23 financed, together with a space for the consumer  
24 to indicate whether it is desired, and the  
25 consumer does not request it.

26 (d) Finance charge. The finance charge, using that term,  
27 and a brief description such as "the dollar amount  
28 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.

. . . . .

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

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

8 12 C.F.R. § 226.18 (c), (d), (h) (footnotes omitted).

9 **§ 226.22 Determination of annual percentage rate.**

10 (a) Accuracy of annual percentage rate.

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

22 [FN] An error in disclosure of the annual  
23 percentage rate or finance charge shall not, in  
24 itself, be considered a violation of this  
25 regulation if: (1) The error resulted from a  
26 corresponding error in a calculation tool used  
27 in good faith by the creditor; and (2) upon  
28 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).