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A Review of Significant Legislation and Case Law Concerning Consumer Credit.

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A REVIEW OF SIGNIFICANT LEGISLATION AND CASE LAW CONCERNING CONSUMER CREDIT

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This article shall consist of two parts. Part I constitutes a review of the significant federal legislation and case law concerning consumer credit. Part II of this article will be published in the Fall Issue of this Journal and shall consist of a review of the significant Texas legislation and case law concerning consumer credit, a general comparison of federal and Texas legislation dealing with consumer credit, future trends in consumer credit regulation and concluding remarks concerning the problems involved in consumer credit disclosure requirements.

Between 1945 and 1973, consumer credit[1] in the United States increased $24.1 billion to $551.4 billion.[2] By 1973 it had surpassed the public debt by $90 billion and was approximately 55 percent of the national income and approximately 42 percent of the Gross National Product.[3] As of January 1, 1974, the population of the United States had reached 210,740,000,[4] a figure which results in approximately $2,600 of consumer credit for each man, woman and child in the United States. These figures suggest that the era of the consumer credit transaction has not only arrived but it is in full swing in this nation's economy.

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1. Consumer credit may be generally defined as credit which is extended to natural persons for personal, private residential, household, family and other related personal expenditures. Normally, it is divided into installment credit and non-installment credit. The four principal classes of consumer installment credit consist of automobile loans, consumer goods loans, home repair and modernization loans and personal loans. Generally non-installment credit is divided into three classes, namely single-payment loans, charge accounts and service credit. J. CHAPMAN & R. SHAY, THE CONSUMER FINANCE INDUSTRY: ITS COSTS AND REGULATIONS 1 (1967).

2. 59 FED. RESERVE BULL. A49, A54 (Dec. 1973). In 1945 the mortgage debt on residential property (not including multi-family structures of five or more units) amounted to approximately $18.4 billion; the balance of the consumer credit in 1945 amounted to approximately $5.7 billion. 57 FED. RESERVE BULL. A54, A56 (Aug. 1971). During the latter part of 1973 the mortgage debt on residential property (excluding multi-family structures of five or more units) amounted to approximately $376.6 billion. The balance of the consumer credit in the latter part of 1973 amounted to an excess of $174.8 billion. 59 FED. RESERVE BULL. A49, A54 (Dec. 1973).

3. 59 FED. RESERVE BULL. A42, A49, A54, A68 (Dec. 1973).

4. San Antonio Light, Jan. 27, 1974, at 8-A, col. 4.

Consumer credit has assisted in this nation's transition from an agrarian to an industrial economy and has stimulated the passage of statutes which allow lending charges which exceed the rates of the states' usury laws. Consumer credit has become an important stimulant to the growth of our mass-producing and mass-distributing economy, providing for the purchase of many durable consumer goods such as automobiles, home furnishings and other items by enabling consumers, who receive their income principally from wages and salaries, to spend, for designated periods, more than their monthly incomes.[5]

Generally, consumer credit has consisted of consumer loans and retail installment sales. Historically, consumer loans have been available to those persons who were willing to pay extra amounts, such as interest, "charges" or "fees," for the principal amount borrowed. The expenses for making this kind of credit available were high and, as a result, the "charges" and "fees" exceeded the limits of the usury laws of the states. Banks and other legitimate lending organizations could not effectively compete with these lending practices and this segment of the lending industry, commonly referred to as "loan shark" operations, went largely unregulated. The consumers who fell prey to the "loan shark" were usually poor, uneducated persons who did not have sufficient collateral to negotiate loans from legitimate lenders, but who were in need of an immediate source of revenue. In an early effort to regulate and eliminate these "loan shark" activities, the Uniform Small Loan Law, sponsored by the Russell Sage Foundation, was drafted in 1916.[6] Various versions of this statute have been adopted in many of the states of this nation.[7] Generally, these small loan laws authorized maximum interest rates as high as 42 percent per annum for the first $100 dollars of principal and 24 percent per annum for

5. "Credit in its various forms is one of the most essential and vital elements of our economy. It can be truly said that credit affects every citizen every day." Declaration of Legislative Intent, Texas Consumer Credit Code, Tex. Laws 1967, ch. 274, § 1(2), at 608. *See* J. CHAPMAN & R. SHAY, THE CONSUMER FINANCE INDUSTRY: ITS COST AND REGULATION 137-162 (1967); R. COLE, CONSUMER COMMERCIAL CREDIT MANAGEMENT 3-165 (3d ed. 1968); B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION ch. VI (1965); C. PHELPS, THE ROLE OF THE SALES FINANCE COMPANIES IN THE AMERICAN ECONOMY, 9-84 (1957); D. TYREE, THE SMALL-LOAN INDUSTRY IN TEXAS 1-52 (1960); 12 ENCYCLOPEDIA BRITANNICA 319-22 (1973); 15 ENCYCLOPEDIA BRITANNICA 708-10 (1973).

6. I. MICHELMAN, CONSUMER FINANCE: A CASE HISTORY IN AMERICAN BUSINESS 136-50 (1966); *see* Annot., 14 A.L.R.3d 330 (1967).

7. I. MICHELMAN, CONSUMER FINANCE: A CASE HISTORY IN AMERICAN BUSINESS 136-50 (1966). *See also* Report of the Nat'l Comm'n on Consumer Finance, Consumer Credit in the United States, Special Issue No. 215 CCH CONSUMER CREDIT GUIDE (January 15, 1973).

the next $200 of principal. The apparent justification for these rates is that they allowed legitimate credit lenders to compete in this sector of consumer lending. The small loan legislation was intended to defeat the "loan sharks" and to recompence the legitimate lender for the fixed costs which were higher for small loans than loans for larger amounts. These small loan laws normally required that the lender be licensed and regulated by a state agency which has the power to examine the lender's records and operations periodically.[8]

Regulation of retail installment sales developed after the passage of the small loan laws. Most laws which regulated retail installment sales required the disclosure of various items concerning the retail transaction such as the cash price, down payment, fees, unpaid principal balance, total credit charge and time balance. The regulatory legislation also recognized the right of the retailer to charge two separate prices for an item: the cash price or a higher credit price, if the item was purchased "on time" or credit. This differential in prices is referred to as "time price differential" and has been construed in most state jurisdictions as not violative of their usury laws.[9]

The availability of credit has not been without its problems for the consumer. A serious problem posed by easy credit was the various ways in which creditors stated the cost of the credit. For example, a consumer might be charged "1½ percent carrying charge" at a department store; "8 percent simple interest per annum" or "$7 per $100 per year " at his bank; or "7½ percent add-on" by an appliance dealer. Also, if he were purchasing a residence, he might be required to pay "7 percent discount" for the loan. Each of these rates produces different amounts of interest for the cost of the consumer's credit.[10] The problem of requiring the expression of credit costs in a standardized format and other related problems have received considerable attention by both Congress and the Texas Legislature during the past few years.

8. *See, e.g.*, J. CHAPMAN & R. SHAY, THE CONSUMER FINANCE INDUSTRY: ITS COSTS AND REGULATION 11-14 (1967); B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 2, at 4-5 (1972); I. MICHELMAN, CONSUMER FINANCE: A CASE HISTORY IN AMERICAN BUSINESS 106-135 (1966); W. MORS, CONSUMER CREDIT FINANCE CHARGES 9-19 (1965); D. TYREE, THE SMALL-LOAN INDUSTRY IN TEXAS 3-11 (1960); Annot., 14 A.L.R.3d 330, 333-36 (1967); 12 ENCYCLOPEDIA BRITANNICA 319-22 (1973).

9. *See, e.g.*, B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 3, at 6-9 (1972); D. HOLMAN, CONSUMER CREDIT LAW IN TEXAS 6-7 (1970); W. MORS, CONSUMER CREDIT FINANCE CHARGES 19-24 (1965); Annot., 14 A.L.R.3d 330, 333-34 (1967).

10. B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 38, at 137-39 (1972); W. MORS, CONSUMER CREDIT FINANCE CHANGES 8-9, 24-27 (1965).

Within the past decade, specific legislation[11] concerning consumer credit has been passed by Congress and the Texas Legislature in an attempt to afford the consumer some degree of protection from the consequences of debt. In 1968, congress passed the Consumer Credit Protection Act,[12] which had been pending for several years. Two years later, Congress enlarged the Consumer Credit Protection Act by adding the Fair Credit Reporting Act.[13] Since 1972, an office of consumer affairs has been added as a part of the Executive Branch of the federal government and numerous bills concerning consumer related activities have been introduced in Congress.[14] Meanwhile, the Texas Legislature had passed the Texas Business and Commerce Code[15] and the Texas Consumer Credit Code[16] in an attempt to cope with the commercial and consumer credit problems of this state.

In 1973, certain revisions were made to the Business and Commerce Code and the Consumer Credit Code for the specific benefit of consumers. A revised Deceptive Trade Practices-Consumer Protection Act was added to the Business and Commerce Code[17] with the Consumer Credit Code expanded to include new legislation concerning the regulation of debt collections,[18] financing of insurance premiums,[19] home solicitation transactions[20] and pawn broker activities.[21] Legis-

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11. The late President Lyndon B. Johnson wrote:

> We obtained most of the laws we sought. They are on the books for the protection of the American Consumer, and all of us are consumers. . . . *[W]ith those laws a whole new era of concern was ushered in, and consumerism became a permanent part of the American way of life and the American political scene.*

L. JOHNSON, THE VANTAGE POINT 341 (1971) (emphasis added).

12. Act of May 29, 1968, Pub. L. No. 90-321, 82 Stat. 146 (codified at 15 U.S.C. § 1601 (1970)).

13. Act of October 26, 1970, Pub. L. No. 91-508, Title VI, 84 Stat. 1127 (codified at 15 U.S.C. § 1681 (1970)).

14. Upshaw, *Banking in the Consumer Protection Age*, 5 U.C.C.L.J. 232 (1973).

15. Tex. Laws 1967, ch. 785, at 2343 (codified at TEX. BUS. & COMM. CODE ANN. §§ 1.101-35.40 (1968)).

16. Tex. Laws 1967, ch. 274, at 608 (codified at TEX. REV. CIV. STAT. ANN. art. 5069—1.01 to—50.06 (1971)).

17. Tex. Laws 1973, ch. 143, at 322 (codified at TEX. BUS. & COMM. CODE ANN. §§ 17.41-17.63 (Supp. 1974)). For an analysis of the new act, see Comment, *Caveat Vendor: The Texas Deceptive Trade Practices and Consumer Protection Act*, 25 BAYLOR L. REV. 425 (1973); Shaw, *Recent Consumer Legislation in Texas*, 37 TEX. B.J. 141 (1974).

18. Tex. Laws 1973, ch. 547, at 1513 (codified at TEX. REV. CIV. STAT. ANN. art. 5069—11.01 to—11.11 (Supp. 1974)).

19. Tex. Laws 1973, ch. 86, at 176 (codified at TEX. REV. CIV. STAT. ANN. art. 5069—12.01 to—12.19 (Supp. 1974)).

20. Tex. Laws 1973, ch. 246, at 574 (codified at TEX. REV. CIV. STAT. ANN. art. 5069—13.01 to—13.06 (Supp. 1974)).

21. Tex. Laws 1973, ch. 894, at 2757 (codified at TEX. REV. CIV. STAT. ANN. art. 5069—51.01 to—51.19 (Supp. 1974)).

lation was also passed to further delineate the legal relations of landlords and tenants;[22] to amend section 5 of article 1995, which will limit venue concerning consumer transactions falling within the scope of that section;[23] and to amend Chapter 21 of the Texas Education Code to provide for an optional unit of study in consumer education in the public schools of Texas.[24]

The following pages will analyze this federal and state consumer legislation with a view as to what must be disclosed, who must make the disclosures, and to whom the disclosures must be made. The remedies available to the consumer for disclosure violations, as well as the defenses available to the creditor, will also be discussed along with consideration and evaluation of some of the problems created by consumer credit disclosure requirements.

PART I

PRINCIPAL FEDERAL CONSUMER CREDIT LEGISLATION

One of the objectives in creating the Federal Trade Commission (FTC) in 1914 was to curtail unfair competition in commercial transactions.[25] In 1938 Congress expanded the FTC's authority to regulate "unfair or deceptive acts or practices in commerce."[26] This grant of power, although limited to only interstate commerce, allowed the FTC to begin the federal policing of unwarranted consumer practices on a nation-wide basis. Although the FTC has issued industry guide and trade regulation rules, as well as cease and desist orders against deceptive or unfair consumer trade practices in interstate commerce, critics of the FTC's power contend that the FTC cannot effectively regulate consumer credit because consumer credit is primarily a local, intrastate activity and therefore outside of the jurisdiction of the FTC.[27]

22. Tex. Laws 1973, chs. 441 & 433, at 1226 & 1182 (codified at TEX. REV. CIV. STAT. ANN. arts. 5236b, 5236e (Supp. 1974)).

23. Tex. Laws 1973, ch. 213, at 489 (codified at TEX. REV. CIV. STAT. ANN. art. 1995, § 5 (Supp. 1974)).

24. Tex. Laws 1973, ch. 337, at 763 (codified at TEX. EDUC. CODE ANN. § 21.119 (Supp. 1974)).

25. Act of September 29, 1914, ch. 311, § 5, 38 Stat. 717, 719.

26. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111.

27. *E.g.*, D. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES, §§ 60-62, at 211-220 (1972); Upshaw, *Banking in the Consumer Protection Age*, 5 U.C.C.L.J. 232, 232-239 (1973). The FTC has promulgated certain rules and regulations which have had some effect on consumer credit. For example, in 1951 it issued a list of unfair trade practices in financing automobiles, retail installment sales and financing of motor vehicles. 16 C.F.R. § 197 (1972). In 1959 the FTC promulgated its guides against bait advertising. 16 C.F.R. § 238 (1972). In 1965 it published its guides

Thus, the principal federal protection for the consumer has come from the Consumer Credit Protection Act, which includes the Truth-In-Lending Act (TIL) and the Fair Credit Reporting Act, passed by Congress to give the consumer some protection from the unauthorized disclosure of credit costs and credit information.

FEDERAL RESERVE BOARD REGULATIONS

Although credit disclosure requirements are provided for generally in the TIL and the Fair Credit Reporting Act, Congress charged the Board of Governors of the Federal Reserve System (Board) with the obligation to prescribe necessary regulations to effectuate the purposes of the Consumer Credit Protection Act. The Board's source of authority stems from several provisions within the Act; section 1604 states:

> The Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Additionally, section 1632 provides:

> Regulations of the Board need not require that disclosures pursuant to this chapter be made in the order set forth in this chapter, and may permit the use of terminology different from that employed in this chapter if it conveys substantially the same meaning.

Pursuant to this obligation, the Board promulgated Regulation Z.[28] Various provisions of Regulation Z have been challenged on the general grounds that the provisions were not interpretive rules but were legislative rules which were not promulgated in accordance with the due process requirements of the Administrative Procedure Act[29] or that they represent the Board's usurpation of legislative authority from Congress.[30] However, these attacks on the Board's authority to regu-

against debt collection deception. 16 C.F.R. § 237 (1972). In 1966 the FTC issued its guides relating to retail credit transactions and in 1968 it issued an economic report on installment credit and retail sales practices of the District of Columbia retailers, which was an important background study concerning the consumer credit in a specific locality. D. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 61, at 217 (1972).

28. 12 C.F.R. § 226 (1972).

29. 5 U.S.C. § 551 (1970).

30. *See* Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973); N.C. Freed Co. v. Board of Gov. of Fed. Reserve Sys., 473 F.2d 1210 (2d Cir.), *cert. de-*

late have not been successful. *Mourning v. Family Publications Service, Inc.*,[31] *Gardner & North Roofing & Siding Corp. v. Board of Governors of the Federal Reserve System*,[32] and *Richardson v. Time Premium Co.*[33] are examples of the cases which have upheld the authority of the Board to issue regulations effecting the purposes of the Act.

The *Mourning* case involved a magazine subscription contract which did not specify a finance charge but did permit the payment of the subscription in more than four installments. The suit challenged the validity of that part of Regulation Z, section 226.2(k), which applies the Act to a consumer credit transaction where a finance charge has not been disclosed but the indebtedness is to be paid in more than four installments. The Board had previously concluded that, without inserting the four installment rule in the regulations, some creditors might attempt to bury a finance charge in the cash price and would thereby circumvent the congressional intent of the Act. The trial court held that the transaction violated Regulation Z and granted summary judgment for the plaintiff. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the trial court and held that the Board had exceeded its statutory authority and that the regulation created a conclusive presumption (that credt payments made in more than four installments included a finance charge) which gave rise to a violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.[34] The Supreme Court reversed, stating that the four installment rule did not violate the Fifth Amendment but was a valid exercise of the Board's broad power granted by Congress.[35] The concluding part of the Court's majority opinion reveals what at least five members of that Court believe the scope of the TIL to be:

> The Truth-in-Lending Act reflects a transition in congressional policy from a philosophy of let-the-buyer-beware to one of let-

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nied, — U.S. — (1973); Gardner & N. Roofing & Siding Corp. v. Board of Gov. of Fed. Reserve Sys., 464 F.2d 838 (D.C. Cir. 1972); Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S.D. Fla. 1972); Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1972); Garza v. Chicago Health Clubs, Inc., 329 F. Supp. 936 (N.D. Ill. 1971); Belton v. Columbus Fin. & Thrift Co., 195 S.E.2d 195 (1972).

31. 411 U.S. 356 (1973).

32. 464 F.2d 838 (D.C. Cir. 1972).

33. [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,272, at 89,239 (S.D. Fla. February 4, 1971).

34. Mourning v. Family Publications Serv., Inc., 449 F.2d 235, 241-42 (5th Cir. 1971), *rev'd*, 411 U.S. 356 (1973).

35. Mourning v. Family Publications Serv., Inc., 411 U.S. 356, —, 93 S. Ct. 1652, 1664-65, 36 L. Ed. 2d 318, 344 (1973).

the-seller-disclose. By erecting a barrier between the seller and the prospective purchaser in the form of hard facts, Congress expressly sought "to . . . avoid the uninformed use of credit." 15 U.S.C. § 1601. Some may claim that it is a relatively easy matter to calculate the total payments to which petitioner was committed by her contract with respondent; but at the time of sale, such computations are often not encouraged by the solicitor or performed by the purchaser. Congress has determined that such purchasers are in need of protection; the Four Installment Rule serves to insure that the protective disclosure mechanism chosen by Congress will not be circumvented.

That the approach taken may reflect what respondent views as an undue paternalistic concern for the consumer is beside the point. *The statutory scheme is within the power granted to Congress under the Commerce Clause. It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner.*[36]

The parts of Regulation Z, 12 C.F.R. §§ 226.9(a) and 226.2(z), concerning a security interest which arises by operation of law, have also been challenged. Section 226.9(a) affords the customer the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction or the date of delivery of the required disclosures, whichever is later, where "a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer." Section 226.2(z) defines the term "security interest" to include liens created by operation of law, such as mechanic's, materialman's, artisan's and other similar liens. The regulations require a creditor in this type of transaction to notify a customer of his right to rescind when there is a probability that a lien on the consumer's house will arise by operation of law even though a security instument or indenture has not been executed on the property. In *Gardner & North Roofing & Siding Corp.*, plaintiffs, who were engaged in the business of renovating dwelling houses, brought an action for a declaratory judgment challenging the validity of Sections 226.9(a) and 226.2(z) of Regulation Z. The Court of Appeals for the District of Columbia stated that the TIL must be broadly construed to effectuate its purpose and concluded that the "challenged regulation is entirely consistent with the legislative purpose and is a reasonable and proper device

36. *Id.* at —, 93 S. Ct. at 1664-65, 36 L. Ed. 2d at 344 (emphasis added).

for carrying it out."[37]

Judicial interpretation of the TIL has also endorsed the Board's authority to require the use of the specific disclosure terminology contained in Part 12, Section 226.8 of the *Code of Federal Regulations.* In *Richardson v. Time Premium Co.*,[38] a federal district court sanctioned the congressional authority under which Regulation Z was issued and upheld the Board's authority to require the specific disclosures in the exact terms required by the respective section of the regulation.[39]

The *Mourning, Gardner* and *Richardson* cases illustrate court interpretations of the wide latitude and discretion that the Board possesses in promulgating and enforcing Regulation Z. In view of these decisions, it is doubtful that a litigant can successfully challenge the validity of the principal provisions of Regulation Z on the grounds that the Board exceeded its authority in promulgating them.

TRUTH-IN-LENDING ACT

Scope of the Act

The Truth-in-Lending Act (TIL), which was enacted in 1968 as Title I of the Consumer Credit Protection Act, is the landmark legislation on the subject of consumer credit.[40] As declared by Congress, the purpose of TIL is to:

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37. Gardner & N. Roofing & Siding Corp. v. Board of Gov. of the Fed. Reserve Sys., 464 F.2d 838, 842 (D.C. Cir. 1972).

38. [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,272, at 89,239 (S.D. Fla. February 4, 1971).

39. *Id.* at 89,240.

40. Act of May 29, 1968, Pub. L. No. 90-321, Title I, 82 Stat. 146 (codified at 15 U.S.C. § 1601 (1970)). Titles II, III, IV, V and VI of the Consumer Credit Protection Act deal with extortionate credit transactions, wage garnishments, the establishment of a national commission on consumer finance, various general provisions and consumer credit reporting requirements, respectively. Perhaps the most detailed statement and evaluation of the TIL disclosure requirements are contained in two volumes by Ralph C. Clontz, Jr. entitled *Truth-in-Lending Manual* (3d ed. 1973).

Also see U.S. CODE CONG. & AD. NEWS 1962-2030 (1968) for the legislative history of the Consumer Credit Protection Act. Interesting background information which led Senator Douglas to prepare and submit one of the first Truth-in-Lending bills in Congress can be found in P. DOUGLAS, IN OUR TIME 94-122 (1967).

The TIL requires that the provisions of the Act be implemented by regulations prepared by the Board of Governors of the Federal Reserve Board with an appropriate regulatory agency enforcing the disclosure requirements under the Act. These various regulatory agencies include the Board of Governors of the Federal Reserve System, Comptroller of the Currency, Board of Directors of the Federal Deposit Insurance Corporation, Director of the Bureau of Federal Credit Unions, the Interstate Commerce Commission, the Civil Aeronautic Board, and the Secretary of Agriculture, with the Federal Trade Commission having the responsibility for overall enforcement. 15 U.S.C. § 1607 (1970).

> 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.[41]

Basically, TIL is a disclosure act. It does not attempt to regulate the credit industry and it does not specify or regulate interest rates to be charged in consumer credit transactions. The various rates of interest and other credit charges are regulated by state law.[42]

The Act requires a creditor to disclose to the consumer the cost of the credit being extended so that the consumer can compare the costs of credit and engage in comparative shopping for credit terms. In attempting to translate credit costs into numerical figures such as the *finance charge* and rates of interest into a single common denominator called the *annual percentage rate*, credit shopping is assisted by requiring a "price tag" on the cost of credit for the purpose of making the comparison of credit costs as easy as the comparison of cash prices of goods and services. The consumer's bewilderment and confusion is lessened by allowing him to compare annual percentage rates of competing creditors, and thereby obtain the cheapest credit available.[43]

Various types of transactions are included in or excluded from the Act's coverage. TIL covers installment credit transactions and generally applies to creditors who regularly extend or arrange for the extension of credit (1) to a natural person; (2) where the loan does not exceed $25,000 (except real estate transactions); (3) for a personal, family, household or agricultural purpose; (4) for which a finance fee is charged *or* (5) where the finance charge is not disclosed but thc credit obligation, agreed to by the consumer in the contract, is repayable in more than four installments.[44]

Transactions which are specifically exempted from the Act are (1) credit transactions for business or commercial (except agricultural) purposes, or credit transactions with governmental agencies or business organizations; (2) transactions with a duly licensed stock broker or dealer; (3) credit transactions (other than real estate transactions) in which the total amount to be financed exceeds $25,000 and (4)

41. 15 U.S.C. § 1601 (1970).

42. 15 U.S.C. § 1610 (1970); P. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 38, at 139-40 (1972); Wachtel v. West, 476 F.2d 1062 (6th Cir.), *cert. denied*, — U.S. — (1973).

43. 15 U.S.C. §§ 1605, 1606 (1970); Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973); Wachtel v. West, 476 F.2d 1062, 1063-64 (6th Cir.), *cert. denied*, — U.S. — (1973); U.S. CODE CONG. & AD. NEWS 1962-67 (1968).

44. 12 C.F.R. §§ 226.1(a), 226.2(k), 226.3(c) (1972).

transactions under public utilities tariffs. In general, the Act applies to all consumer credit transactions involving real estate and other consumer credit transactions, including commercial agricultural transactions which do not exceed the principal amount of $25,000.[45]

Despite the clear enumerations of included and excluded transactions, determination of the Act's applicability in certain instances has raised some difficult questions. For example, courts have been confronted with the question of whether the Act applies to a mixed consumer-business loan. In *Sapenter v. Dreyco, Inc.*,[46] plaintiffs owned a 6-unit apartment building which was encumbered with three mortgages. To avoid foreclosure on the apartment building, plaintiffs executed a mortgage on other real estate which was being used as their residence. Thereafter, plaintiffs sought to set aside the mortgage on their residence because of the defendant mortgagee's alleged failure to satisfy the TIL disclosure requirements. The federal district court looked to the purpose of the subsequent loan to determine whether TIL was applicable and found that the loan was not "primarily for personal, family, household or agricultural purposes" within the meaning of 15 U.S.C. § 1602(h). The TIL was inapplicable because the loan was for a business purpose—the extension of a past due obligation which plaintiffs had incurred on rental property purchased and owned as an investment. The purpose for the extension of credit, not the property on which the security interest is retained, was deemed the major consideration in determining whether a transaction is exempt from the Act.[47] In *Brill v. Newport National Bank*,[48] plaintiffs negotiated a loan and, as collateral, executed a mortgage on their apartment house, containing five apartment units. Plaintiffs used some of the loan proceeds to pay off other loans which they had negotiated previously. Part of the loan proceeds were also applied to refinance the 5-unit apartment complex. Plaintiffs sued the mortgagee for alleged TIL violations, contending that the apartment complex was bought primarily for use as a summer home and not for investment purposes. The defendant countered with the argument that the proceeds of the loan were used primarily to refinance the apartment complex, which was used for a commercial and not a personal purpose. As in *Sapen-*

45. 15 U.S.C. § 1603 (1970); 12 C.F.R. § 226.3 (1972).
46. 326 F. Supp. 871 (E.D. La.), *aff'd*, 450 F.2d (5th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972).
47. *Id.* at 874.
48. [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,057, at 88,857 (S.D.N.Y. February 20, 1973).

ter, the court looked to the purpose of the loan in its determination of the applicability of the Act.[49] Finding that the loan was primarily for business purposes, the court concluded that TIL disclosure requirements were not applicable to the transaction.[50] *Sapenter* and *Brill* suggest that courts will look to the *principal purpose* for the loans, and not specific property classifications, to determine whether a mixed consumer-business loan is within or excluded from the coverage of the Act.

Of those transactions brought within the Act there have been formulated three classes: (1) open end credit transactions, which include revolving charge and credit card accounts; (2) sales not under open end credit (sometimes referred to as closed end credit), which includes installment contracts; and (3) consumer loans not under open end credit.[51] In consumer transactions of these three types, the cost of credit must be expressed in numerical figures as the *finance charge* and in percentage figures as the *annual percentage rate.* The disclosures specified by the Act must be made in a meaningful sequence, in the prescribed manner and terminology (1) in certain advertisements, (2) when the transaction is consummated, and (3) at the time billing statements concerning the transaction are forwarded to the consumer.[52]

The Act defines a creditor simply as a person who arranges for the extension of credit.[53] If more than one creditor is involved in a consumer credit transaction, each creditor must be clearly identified and each must make the required disclosures.[54] However, the creditors may make the required disclosures on a joint disclosure statement which clearly identifies each creditor.[55] If there is more than one consumer involved in the transaction and the transaction does not involve a right to rescind, the disclosures need be furnished to only one of the consumers, however, if the transaction is rescindable, disclosures

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49. *Id.* at 88, 858.

50. The court here was considering the applicability of 12 C.F.R. § 226.302 (1972) which provides that credit extended to an owner of a dwelling containing more than four family housing units for the purpose of acquiring, financing, refinancing, improving or maintaining that dwelling is an extension of credit for business or commercial purposes. The court in *Brill*, however, determined that the loan in question was for business purposes without having to rely on § 226.302. Brill v. Newport Nat'l Bank, [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,057, at 88,857 (S.D.N.Y. February 20, 1973).

51. 15 U.S.C. §§ 1637-39 (1970).

52. 15 U.S.C. §§ 1631-32, 1636-39, 1663-64 (1970).

53. 15 U.S.C. § 1602(f) (1970); 12 C.F.R. § 226.2(m) (1972).

54. 12 C.F.R. § 226.6(d) (1972).

55. *Id.* § 226.6(d).

must also be furnished to an endorser, co-maker, guarantor or similar party.[56]

Disclosure Requirements and Required Terminology

The Act's disclosure requirements may be divided into two types: general and special disclosure requirements.[57] The general disclosure requirements apply to all consumer credit transactions covered by the Act and may be summarized as follows:

(1) all disclosures must be made in a clear, conspicuous manner, in the prescribed terminology, and in a meaningful sequence;

(2) all numerical amounts and percentages designated in credit advertising or in the disclosure statements are required to be stated in figures and must be printed in not less than the equivalent of ten point type, .075-inch computer type, or elite size typewriter numerals, or be legibly handwritten;

(3) state law disclosure requirements, which are inconsistent with federal law disclosure requirements, are required to be disclosed on a separate paper apart from the federal law disclosure requirements or on the same statement below a conspicuous demarcation line and identified by a conspicuous heading indicating that such statements are inconsistent with the disclosure requirements of the federal statute; and

(4) the terms *finance charge* and *annual percentage rate* must be designated in a conspicuous manner on the various disclosure statements.[58]

The special disclosure requirements depend on the type of transaction involved (*i.e.*, open end credit plan, closed end plan) and the existence of various elements within each which will be discussed subsequently. In discussing these special disclosure requirements, the author feels compelled to expose the reader to extensive quotations from the pertinent regulations due to their complexity and specificity; characteristics that have become critical because of the courts' insistence upon strict compliance with the statutory language.

The key disclosures required by the act are the finance charge and the annual percentage rate. The finance charge represents the total cost of the credit or, as stated in the terms of the statute, the "sum of

56. *Id.* § 226.6(e). Regulation Z also requires the creditor to preserve evidence of compliance with the disclosure requirements for at least 2 years after the date each disclosure is required to be made. 12 C.F.R. § 226.6(i) (1972).

57. 15 U.S.C. §§ 1631, 1636-39 (1970).

58. 15 U.S.C. § 1631 (1970); 12 C.F.R. § 226.6 (1972).

all charges . . . imposed directly or indirectly by the creditor as an incident to the extension of credit"[59] and is to be presented as a numerical figure printed in the equivalent of 10 point type.[60] The finance charge not only includes the interest or time differential charged in the credit transaction, but also includes points, discounts, service or carrying charges, loan fees, insurance premiums and any other costs for the credit.[61] Charges in connection with any extension of credit secured by an interest in real property, which ordinarily are itemized and disclosed as part of the finance charge, need not be included in the computation of the finance charge if such charges are disclosed to the consumer during the consummation of the credit transaction.[62] These charges may include (1) fees or premiums for title examination, title insurance, or similar purposes, (2) fees for preparation of a deed, settlement statement, or other documents, (3) escrows for future payments of taxes and insurance, (4) fees for notarizing deeds and other documents, (5) appraisal fees and (6) fees for credit reports.[63]

59. 15 U.S.C. § 1605(a) (1970); 12 C.F.R. § 226.4(a) (1972). If the amount of a figure, required to be disclosed, is unknown at the time the disclosure must be made, and the creditor has made a reasonable effort to ascertain the information to be disclosed, the creditor may use an estimated amount or an approximation of the information provided that the estimate or approximation is clearly identified as such and is based upon the best information available to the creditor and is not being used for the purpose of circumventing or evading the disclosure requirements of the Act or regulation Z. 12 C.F.R. § 226.6(f) (1972).

60. 12 C.F.R. § 226.6(a) (1972).

61. 15 U.S.C. § 1605(a) (1970); 12 C.F.R. § 226.4(a) (1972); *see, e.g.*, Grubb v. Oliver Enterprises, Inc., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,094, at 89,931 (N.D. Ga. November 3, 1972); Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo. 1971); Roberts v. Allied Fin. Co., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,040, at 88, 841-42 (Ga. Ct. App. April 3, 1973) (summary of opinion); Thrift Funds, Inc. v. Jones, 259 So. 2d 487 (La. Ct. App. 1971), *modified*, 274 So. 2d 150 (La. 1973).

Obligations which are payable on demand are considered to have a maturity of 6 months for the purpose of computing the amount of the finance charge and the annual percentage rate; however, where such obligation is alternatively payable upon a stated maturity, that date shall be used for the purpose of making the computation. 12 C.F.R. § 226.4(g) (1972).

An overstatement of the cost of credit in the finance charge does not constitute a violation of the Act if that disclosure is made with no intention by the creditor to avoid the disclosure requirements. 12 C.F.R. § 226.6(h) (1972).

62. 15 U.S.C. § 1605(d) (1970); 12 C.F.R. § 226.4(b) (1972).

63. 15 U.S.C. § 1605(e) (1970); 12 C.F.R. § 226.4(e) (1972); *see, e.g.*, Kroll v. Cities Serv. Oil Co., 352 F. Supp. 357 (N.D. Ill. 1972); Kenny v. Landis Fin. Group, Inc., 349 F. Supp. 939 (N.D. Iowa 1972); Continental Oil Co. v. Burns, 317 F. Supp. 194 (D. Del. 1970). Other charges have also been classified as not being a part of the finance charge. Overdraft charges imposed by a bank for paying checks which create or increase an overdraft in a checking account is not considered as a finance charge unless the parties have agreed otherwise. 12 C.F.R. § 226.4(d) (1972). Late payments, delinquency, default and reinstatement charges, if unanticipated, are not part of a finance charge. 12 C.F.R. § 226.4(c) (1972).

The annual percentage rate represents the relative cost of the credit and must also be expressed in numerical percentage terms in the equivalent of 10 point type.[64] The computation of the annual percentage rate depends on the type of credit transaction which is involved—open end or other than open end. If the transaction involves open end credit, the annual percentage rate is computed by dividing the finance charge by the unpaid balance to which it applies and then multiplying that number by the number of payment periods used by the creditor during the year. The result will be expressed in a numerical figure as a specific percentage.[65] If the credit is other than open end, however, the creditor may compute the annual percentage rate by the actuarial method (where payments are first applied to interest due and then the remainder is applied to reduce the principal indebtedness) or the creditor may use the U.S. Rule Method, the compilation of which is specified by the Federal Reserve Board.[66] Whichever method is used, the annual percentage rate must be accurate to within ¼ of one percent.[67]

The problems of whether and how to disclose the cost of insurance premiums illustrate the general confusion resulting from the finance charge disclosure requirements. The TIL and Regulation Z require that any credit life, accident or health insurance premiums, which are written in connection with any consumer credit transaction, shall be included in the finance charge unless (1) the creditor discloses in writing to the consumer that the insurance coverage is not required *and* (2) the consumer gives the creditor a written notice, separately signed and specifically stating that the consumer desires the insurance coverage after written disclosure has been made of the cost of the insurance requested.[68]

In *Thomas v. Myers-Dickson Furniture Co.*,[69] the creditor did not obtain a signed statement from the consumer regarding the consumer's desire for optional insurance coverage. The court held that, even when the insurance offered by the creditor is optional, the premiums must be included in the finance charge, as stated in the disclosure statement and the monthly billing statement, unless the creditor informs the con-

64. 15 U.S.C. § 1606(a) (1970); 12 C.F.R. § 226.5(a) (1972).
65. 15 U.S.C. § 1606(a)(2) (1970); 12 C.F.R. §§ 226.5(a), 226.7(a)(4) (1972).
66. 15 U.S.C. § 1606(a)(1) (1970); 12 C.F.R. § 226.5(b) (1972).
67. 15 U.S.C. § 1606(c) (1970); 12 C.F.R. § 226.5(a), (b)(1) (1972).
68. 15 U.S.C. § 1605(b) (1970); 12 C.F.R. § 226.4(a)(5) (1972).
69. [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,056, at 88,855 (N.D. Ga. August 22, 1972), *aff'd*, 479 F.2d 740 (5th Cir. 1973).

sumer that the insurance is optional and the creditor obtains a signed statement from the consumer indicating that the insurance coverage is desired.[70]

The cost of premiums on property hazard insurance obtained from the creditor is also required to be included in the finance charge, unless the creditor has disclosed to the consumer in writing the cost of the insurance, *and* has given the consumer a written statement informing the consumer that he may choose the party from which he desires to buy the insurance.[71] *McDonald v. Wesley Savoy*[72] reveals the consequences of improper compliance with this part of the TIL and Regulation Z. The plaintiff-consumer in that case purchased an automobile on credit from defendant under a motor vehicle contract which contained a provision stating that insurance against loss of or damage to the purchased vehicle was required by the seller and that the purchaser could obtain such insurance from the person of his choice or from the seller. The form contained blanks which, if completed, would have disclosed the kind, coverage and term of the required insurance, together with the premiums for such insurance if it was purchased from the creditor. The San Antonio Court of Civil Appeals held that the creditor, in addition to other disclosure violations of the TIL and the Texas Consumer Credit Code, had violated the pertinent parts of the TIL and Regulation Z by failing to complete the written statement concerning credit insurance.[73]

Principal Disclosures Required in an Open End Credit Plan or Account

The TIL defines an open end credit plan as a plan "prescribing the terms of credit transactions which may be made thereunder from time to time and under the terms of which a finance charge may be computed on the outstanding unpaid balance from time to time thereunder."[74] More simply, it is a credit account in which the consumer has the privilege of paying the account balance in full or in installments such as department store revolving charge account or a bank credit card account. Prior to initiating an open end account, the credit must make certain disclosures regarding the computation of finance charges and the manner in which the indebtedness can be repaid. These disclosures are found in Part 12, Section 226.7(a) of the *Code of Federal Regulations* and consist of the following:

70. *Id.* at 88,856.
71. 15 U.S.C. § 1605(c) (1970); 12 C.F.R. § 226.4(a) (1972).
72. No. 15134 (Tex. Civ. App.—San Antonio, filed Oct. 17, 1973).
73. *Id.* at 5-6.
74. 15 U.S.C. § 1602(i) (1970); 12 C.F.R. § 226.2(r) (1972).

(1) The conditions under which a finance charge[75] may be imposed, including an explanation of the time period, if any, within which any credit extended may be paid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge may be imposed.

(3) The method of determining the amount of the finance charge, including the method of determining any minimum, fixed, check service, transaction, activity, or similar charge, which may be imposed as a finance charge.

(4) Where one or more periodic rates[76] may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) If the creditor so elects, the Comparative Index[77] of Credit Cost in accordance with § 226.11.

(6) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(7) The conditions under which the creditor may retain or acquire any security interest[78] in any property to secure the payment of any credit extended on the account, and a description . . . of the interest or interests which may be so retained or acquired.

(8) The minimum periodic payment required.

The Act also requires[79] that a creditor of an open end consumer credit plan, at the end of each billing cycle,[80] transmit to the consumer

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75. Defined in Regulation Z as "the cost of credit determined in accordance with § 226.4." 12 C.F.R. § 226.2(q) (1972).

76. Defined in 38 Fed. Reg. 18457 (1973) as "a percentage rate of finance charge which is or may be imposed by a creditor against a balance for a period."

77. The term "comparative index of credit cost" has been defined as

> the relative measure of the cost or credit under an open end credit account, computed in accordance with § 226.11, and is the expression of the "average effective annual percentage rate of return" and the "projected rate of return" which appear in section 127(a)(5) of the Act.

12 C.F.R. § 226.2(j) (1972).

78. The terms "security interest" and "security"

> mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation.

12 C.F.R. § 226.2(z) (1972).

79. 12 C.F.R. § 226.7(b) (1972), *as amended*, 37 Fed. Reg. 24338 (1972).

80. The term "billing cycle" has been defined as

a statement setting forth each of the following items to the extent applicable:

(1) The outstanding balance in the account at the beginning of the billing cycle, using the term "previous balance."

(2) The amount and date of each extension of credit or the date such extension of credit is debited to the account during the billing cycle and, unless previously furnished, a brief identification of any goods or services purchased or other extension of credit.[81]

(3) The amounts credited to the account during the billing cycle for payments, using the term "payments," and for other credits including returns, rebates of finance charges, and adjustments, using the term "credits," and unless previously furnished, a brief identification of each of the terms included in such other credits.

(4) The amount of any finance charge, using the term "finance charge," debited to the account during the billing cycle, itemized and identified to show the amounts, if any, due to the application of periodic rates and the amount of any other charge included in the finance charge, such as a minimum, fixed, check service, transaction, activity, or similar charge, using appropriate descriptive terminology.

(5) Each periodic rate, using the term "periodic rate" (or "rates"), that may be used to compute the finance charge (whether or not applied during the billing cycle), the range of balances to which it is applicable, and the corresponding annual percentage rate determined by multiplying the periodic rate by the number of periods in a year. The words "corresponding annual percentage rate," "corresponding nominal annual percentage rate," "nominal annual percentage rate" or "annual percentage rate" (or "rates") may be used to describe the corresponding annual percentage rate. The requirements of § 226.6(a) of this Part with respect to disclosing the term "annual percentage rate" more conspicuously than other required terminology shall not be applicable to the disclosure made under this sub-paragraph, although such term (or words incorporating such term) may, at the creditor's option, be shown as conspicuously as the terminology required under subparagraph 6 of this paragraph. Where a minimum charge may be applicable to the account, the amount of such minimum charge shall be disclosed.

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the time interval between regular periodic billing statement dates. Such intervals may be considered equal intervals of time unless a billing date varies more than 4 days from the regular date.
12 C.F.R. § 226.2(g) (1972); Krainin v. Klein Dep't Stores, Inc., 345 F. Supp. 1345 (S.D.N.Y. 1972).

81. *See* Taylor v. R.H. Macy & Co., 481 F.2d 178, 180 (9th Cir.), *cert. denied*, — U.S. — (1973).

(6) When a finance charge is imposed during the billing cycle, the annual percentage rate or rates determined under § 226.5(a) using the term "annual percentage rate" (or "rates").

(7) If the creditor so elects, the Comparative Index of Credit Cost in accordance with § 226.11.

(8) The balance on which the finance charge was computed, and a statement of how that balance was determined. If any balance is determined without first deducting all credits during the billing cycle, that fact and the amount of such credits shall also be disclosed.

(9) The closing date of the billing cycle and the outstanding balance in the account on that date, using the term "new balance" accompanied by the statement of the date by which, or the period, if any, within which payment must be made to avoid additional finance charges.

The creditor must make these disclosures on the face of the periodic statement except that, at the creditor's option, the itemization of the amount and date of each extension of credit, the itemization of the amount of the "credits" disclosed and amount of any finance charge required to be disclosed may be made on the reverse side of the periodic statement or on a separate accompanying statement. The totals of these amounts, however, must be disclosed on the face of the periodic statement.[82] Also, if a creditor exercises the option to place some of the disclosures on the reverse side of the periodic statement or on a separate statement, one of the following notices must be included on the face of the periodic statement:

NOTICE: See reverse side for important information or NOTICE: See accompanying statement(s) for important information or

NOTICE: See reverse side and accompanying statement(s) for inportant information . . . .[83]

An analysis of some of the required disclosures for an open end account is contained in Judge Frankel's opinion in *Ratner v. Chemical Bank New York Trust Co.*[84] A principal issue in that case was whether the Master Charge Card agreement made a proper disclosure of the nominal annual percentage rate.[85] The court determined that

82. 12 C.F.R. § 226.7(c) (1972).

83. *Id.* § 226.7(c)(3).

84. 329 F. Supp. 270 (S.D.N.Y. 1971).

85. The bank credit card is a somewhat novel and new addition to the extension of open end consumer credit. It is novel in that it consists of a three-party relationship; the issuing bank, who lends the credit for the transaction; the merchant, who sells the consumer items on the reputation of the credit card; and, the consumer or customer

the Act's purpose is to put the consumer in possession of the pertinent information before he actually becomes obligated to pay a finance charge so that he may know and intelligently compare his options. The consumer is to have, prospectively, not only the monthly rate (periodic rate), but also the annual rate so he can compare it with rates of other lenders.[86] Other courts have also concluded that the disclosures required by the statute are mandatory and must be disclosed in a logical and informative sequence.[87]

Principal Disclosures Required in Consumer Credit Transactions not under an Open Credit Plan.

1. *In General.* The disclosure required for open end accounts differ to a considerable degree from the disclosures required for a closed end transaction, the latter requiring a more detailed disclosure. This degree of disclosure can be critical as was illustrated in *Maes v. Motivation For Tomorrow, Inc.*,[88] where the court was confronted with the problem of distinguishing between an open end and a closed end transaction. The court suggested that the determination be made on a case-by-case approach, with emphasis placed on the intent of the parties and whether the particular account is to be used as a revolving account or whether the transaction will be included with the specific purchases.[89]

A creditor is required to make the following disclosures in connection with each consumer credit transaction—whether it be a sale or a loan—not under an open end credit plan:

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of the merchant, who is the card holder and ultimately responsible for paying the bank for the consumer item purchased from the merchant. B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES §§ 45, 46 (1972); B. CLARK & A. SQUILLANTE, THE LAW OF BANK DEPOSITS, COLLECTIONS AND CREDIT CARDS 185-87, 189-90, 191-93 (1970); Davenport, *Bank Credit Cards and The Uniform Commercial Code*, 85 BANKING L.J. 941, 961-73 (1968). Space does not permit an examination of the novel legal relationships created by this kind of credit. The Act, however, does regulate the issuance of credit cards and the liability of the credit card holder. In 1970, TIL was amended to restrict the issuance of credit cards unless they were in response to an application for the same. Furthermore, the credit card holder's liability was limited to "not in excess of $50" on the condition that the card holder notify the card issuer of the loss or unauthorized use of the credit card. 15 U.S.C. §§ 1642-43 (1970); 12 C.F.R. § 226.13(b), (c) (1972).

86. Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270, 276 (S.D.N.Y. 1971).

87. *E.g.*, Evans v. Household Fin. Corp., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,007, at 88,779 (S.D. Iowa March 29, 1973); Willis v. American Nat'l Stores, 350 F. Supp. 173 (N.D. Ga. 1972).

88. 356 F. Supp. 47 (N.D. Cal. 1973).

89. *Id.* at 50-51.

(1) The date on which the finance charge begins to accrue if different from the date of the transaction.

(2) The finance charge expressed as an annual percentage rate, using the term "annual percentage rate," except in the case of a finance charge

(i) Which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(ii) Which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide an extension of credit into two or more transactions to avoid the disclosure of an annual percentage rate, nor may any other percentage rate be disclosed if none is stated in reliance upon subdivisions (i) or (ii) of this subparagraph.

(3) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness and, except in the case of a loan secured by a first lien or equivalent security interest on a dwelling made to finance the purchase of that dwelling and except in the case of a sale of a dwelling, the sum of such payments using the term, "total of payments." If any payment is more than twice the amount of an otherwise regularly scheduled equal payment, the creditor shall identify the amount of such payment by the term "balloon payment" and shall state the conditions, if any, under which that payment may be refinanced if not paid when due.

(4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.

(5) A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after-acquired property will be subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification set

forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

(6) A description of any penalty charge that may be imposed by the creditor or his assignee for prepayment of the principal of the obligation (such as a real estate mortgage) with an explanation of the method of computation of such penalty and the conditions under which it may be imposed.

(7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.[90]

2. *Sales Not Under an Open End Credit Plan.* Installment sales of automobiles, large appliances and household furniture are illustrations of sales not under an open end credit plan. In addition to those disclosures required by section 226.8(b), just quoted above, if the transaction involves a credit sale, Regulation Z also requires the following disclosures:

(1) The cash price of the property or service purchased, using the term "cash price."

(2) The amount of the downpayment itemized, as applicable, as downpayment in money, using the term "cash downpayment," downpayment in property, using the term "trade-in" and the sum, using the term "total downpayment."

(3) The difference between the amounts described in subparagraphs (1) and (2) of this paragraph, using the term "unpaid balance of cash price."

(4) All other charges, individually itemized, which are included in the amount financed but which are not part of the finance charge.

(5) The sum of the amounts determined under subparagraphs (3) and (4) of this paragraph, using the term "unpaid balance."

(6) Any amounts required to be deducted under paragraph (e) of this section using, as applicable, the terms "prepaid finance charge" and "required deposit balance," and, if both are applicable, the total of such items using the term "total prepaid finance charge and required deposit balance."

90. 38 Fed. Reg. 19814 (1973); Evans v. Household Fin. Corp., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,007, at 88,779 (S.D. Iowa March 29, 1973).

(7) The difference between the amounts determined under subparagraphs (5) and (6) of this paragraph, using the term "amount financed."

(8) Except in the case of a sale of a dwelling:

(i) The total amount of the finance charge, with description of each amount included, using the term "finance charge," and

(ii) The sum of the amounts determined under subparagraphs (1), (4), and (8)(i) of this paragraph, using the term "deferred payment price."[91]

3. *Loans not Under an Open End Credit Plan.* A creditor who negotiates a consumer loan must disclose, in addition to the disclosures required in Section 226.8(b) of Regulation Z, each of the following items to the extent applicable:

(1) The amount of credit, excluding items set forth in paragraph (e) of this section, which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, using the term "amount financed."

(2) Any amount referred to in paragraph (e) of this section required to be excluded from the amount in subparagraph (1) of this paragraph, using, as applicable, the terms "prepaid finance charge" and "required deposit balance," and, if both are applicable, the total of such items using the term, "total prepaid finance charge and required deposit balance."

(3) Except in the case of a loan secured by a first lien or equivalent security interest on a dwelling and made to finance the purchase of that dwelling, the total amount of the finance charge, with description of each amount included, using the term "finance charge."[92]

All of the disclosures concerning closed end credit that have been set out must be made "before the transaction is consummated."[93] The disclosures may be made on the note or other instrument evidencing the obligation "on the same side of the page and above or adjacent to the place for the customer's signature . . . ."[94] The creditor also has the option of making the disclosure on "[o]ne side of a separate statement which identifies the transaction."[95]

In the event the transaction is a refinancing or consolidation of a prior loan, the refinancing and consolidation is treated as a new trans-

91. 12 C.F.R. § 226.8(c) (1972).
92. *Id.* § 226.8(d).
93. *Id.* § 226.8(a).
94. *Id.* § 226.8(a)(1).
95. *Id.* § 226.8(a)(2).

action for disclosure purposes. This necessitates compliance with all disclosure requirements again and any unearned portion of the finance charge not credited to the existing obligation must be added to the new finance charge and must not be included in the new amount financed.[96] If a loan is assumed by another consumer, the creditor must make the required disclosures to the party assuming the loan, if the third party has assumed the obligation in writing.[97]

Consumer Real Estate Transaction Disclosures

The Act applies to all consumer real estate transactions which are arranged for by a creditor, regardless of the amount involved. In addition to the normal disclosures required for consumer loans not under an open end credit plan, consumer real estate loans involve some unique disclosures. Since a consumer has the right to rescind certain consumer real estate loans, the creditor is required to give the consumer two copies of a notice concerning the consumer's right of cancellation.[98] The notice must be printed in letters of 12-point bold type on one side of a statement that identifies the transaction and must be in the following language:

Notice to customer required by Federal law:

You have entered into a transaction on ________ (date) which may result in a lien, mortgage, or other security interest on your home.

96. *Id.* § 226.8(j).

97. Reyes v. Carver Fed. Sav. & Loan Ass'n, 344 N.Y.S.2d 501 (1973).

98. 15 U.S.C. § 1635(a) (1970); 12 C.F.R. § 226.9(a), (b) (1972); *see* Wachtel v. West, 476 F.2d 1062, 1064 (6th Cir.), *cert. denied,* — U.S. — (1973); N.C. Freed Co. v. Board of Gov. of the Fed. Reserve Sys., 473 F.2d 1210, 1216 (2d Cir.), *cert. denied,* — U.S. — (1973); Gardner & N. Roofing & Siding Corp. v. Board of Gov. of the Fed. Reserve Sys., 464 F.2d 838 (D.C. Cir. 1972); Garza v. Chicago Health Clubs, Inc., 329 F. Supp. 936, 938 (N.D. Ill. 1971); Sapenter v. Dreyco, Inc., 326 F. Supp. 871, 874 (E.D. La.), *aff'd,* 450 F.2d 941 (5th Cir. 1971), *cert. denied,* 406 U.S. 920 (1972); Bostwick v. Cohen, 319 F. Supp. 875 (N.D. Ohio 1970); Young v. Tri-City Remodeling Enterprises, Inc., 335 N.Y.S.2d 308 (Albany City Ct. 1972).

A consumer may waive his right to rescind a consumer credit transaction in certain limited situations which are specified in 12 C.F.R. § 226.9(e) (1972). If joint owners are involved, the right to receive disclosures and notice of the right of rescission, the right to rescind, and the need to sign a waiver of such right, apply only to those joint owners who are parties to the transaction. 12 C.F.R. § 226.9(f) (1972).

A creditor may waive his lien rights but such waiver, in itself, does not determine whether or not the transaction is rescindable. The transaction is rescindable until *all* security interests are effectively waived, and the waiver by the creditor cannot affect the lien rights of subcontractors or other persons, who under state law, may perfect a lien on the real property involved in the consumer credit transaction. 12 C.F.R. § 226.901 (1972); 2 R. CLONTZ, TRUTH-IN-LENDING MANUAL D-50 (1973).

You have a legal right under Federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying __________ (name of creditor) at __________ (address of creditor's place of business) by mail or telegram sent not later than ______ (date). You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction.

________ (date) ________________ customer's signature[99]

In connection with real estate loans, the proper time for making the disclosures required by Regulation Z has presented a problem to the courts. In *Bissette v. Colonial Mortgage Corp.*,[100] the federal district court held that TIL disclosures made only at the time of the closing of the loan were made too late, and, if permitted, would violate the intent and basic purpose of the act. The standard set by the trial court would have required the disclosures should be made far enough in advance of the closing date to allow the consumer to comparatively shop for credit.[101] On appeal, however, the trial court was reversed and the case remanded, the appellate court determining that the creditor can wait until the closing of the loan to make the required disclosures, if the closing of the loan is the inception of the contractual relationship between the parties.[102]

A subsequent case, *Stavrides v. Mellow National Bank & Trust Co.*,[103] also held that the disclosures can be made to the consumer just before the credit is extended.[104] The conclusion that, in a con-

99. 12 C.F.R. § 226.9(b) (1972).
100. 340 F. Supp. 1191 (D.D.C. 1972), *rev'd*, 477 F.2d 1245 (D.C. Cir. 1973).
101. *Id.* at 1192.
102. Bissette v. Colonial Mortgage Corp., 477 F.2d 1245, 1248 (D.C. Cir. 1973).
103. 353 F. Supp. 1072 (W.D. Pa. 1973).
104. *Id.* at 1179.

sumer real estate transaction, the disclosures may be made to the consumer at any time prior to the closing of the loan appears to be the rule supported by current case law until Regulation Z is modified to provide for earlier credit disclosures in this type of transaction so as to allow the consumer to comparison shop for credit.

Advertising Disclosure Requirements

The Act also prescribes disclosure requirements for consumer credit advertising:[105] the objective being the prevention of bait advertising. Advertising of an amount of credit or the representation that an amount of credit can be arranged is restricted or prohibited unless the creditor customarily arranges credit payments or installments for such a period and in the amount advertised.[106] Advertising specific down payments is also proscribed, unless the creditor usually and customarily arranges for payments in that amount.[107]

The restrictions concerning open end credit advertising are much more strict than those concerning closed end credit advertising. Regulation Z authorizes the advertisement of the annual percentage rate in a closed-end transaction, but it prohibits the inclusion of the annual percentage rate in an open end credit advertisement, unless certain other specific disclosures are made therein.[108] In the event any specified credit terms[109] are disclosed in open end credit advertising, the following items must also be disclosed in the advertisement:

> (1) An explanation of the time period, if any, within which any credit extended may be paid without incurring a finance charge.
>
> (2) The method of determining the balance upon which a finance charge may be imposed.
>
> (3) The method of determining the amount of the finance charge, including the determination of any minimum, fixed, check service, transaction, activity, or similar charge, which may be imposed as a finance charge.
>
> (4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances

105. 15 U.S.C. §§ 1663-64 (1970); 12 C.F.R. § 226.10 (1972); *see* Jordan v. Montgomery Ward & Co., 442 F.2d 78, 81 (8th Cir.), *cert. denied*, 404 U.S. 870 (1971); Garza v. Chicago Health Clubs, Inc., 329 F. Supp. 936, 941 (N.D. Ill. 1971).

106. 12 C.F.R. § 226.10(a)(1) (1972); B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 42 (1972).

107. 12 C.F.R. § 226.10(a)(2) (1972).

108. *Compare* 12 C.F.R. § 226.10(d) (1972), *with* 12 C.F.R. § 226.10(c) (1972).

109. These include any of the terms of open end credit which are required to be disclosed in the transaction by the statute.

to which it is applicable, and the corresponding annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(6) The minimum periodic payment required.[110]

If the advertising involves credit other than open end and discloses (a) the amount of down payment required or that no down payment is required, or (b) the amount of any installment payment, or (c) the dollar amount of any finance charge, or (d) the number of installments or the period of payment, or (e) that there is no charge for credit, then the following items must be disclosed: (1) the cash price or the amount loaned; (2) the amount of the down payment required or that no down payment is required; (3) the number, amount, and due dates or period of payments scheduled to repay the indebtedness; (4) the amount the finance charge expressed as an annual percentage rate; and (5) except in the case of the sale of a dwelling or a loan secured by a first lien on a dwelling to purchase that dwelling, the deferred payment price or the sum of the payments.[111]

These requirements make consumer advertising quite restrictive and various proposals have been made to restructure the advertising provisions so that advertising could be conducted without the extensive disclosures required by the Act and Regulation Z.[112]

Remedies Available to the Consumer

A violation of the TIL does not void the consumer transaction[113] except in certain consumer real estate transactions where the consumer is given a right of rescission.[114] A violation does, however, entitle the successful consumer litigant to recover damages upon the mere proof that a violation occurred.[115] Actual damages or reliance by the consumer need not be proved.

110. 12 C.F.R. § 226.10(c) (1972).

111. *Id.* § 226.10(d).

112. Garwood, *Truth In Lending—A Regulator's View*, 29 BUS. LAW 193, 200 (1973). For a general analysis of the TIL requirements concerning credit advertising, see Bartlett, *Truth In Advertising—The Whole Truth*, 89 BANKING L.J. 998 (1972). For a current status report covering TIL credit advertising requirements, see Garwood, *A New Look at Credit Advertising Under Regulation Z*, 91 BANKING L.J. 48 (1974).

113. John Deere Indus. Equip. Co. v. Delphia, 511 P.2d 386 (Ore. 1973).

114. 15 U.S.C. § 1635(a) (1970); 12 C.F.R. § 226.9(a) (1972); Wachtel v. West, 476 F.2d 1062, 1065 (6th Cir.), *cert. denied*, — U.S. — (1973).

115. Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270, 280 (S.D.N.Y. 1971); *Annot.*, 11 A.L.R. Fed. 815 (1972).

The civil liabilities section of the Act authorizes a successful consumer litigant to recover damages in an amount equal to the sum of twice the amount of the finance charge, but not less than $100 or greater than $1000. The consumer is also authorized to recover the court costs together with reasonable attorneys' fees, as determined by the court.[116] Regardless of the amount in controversy, the suit for recovery of damages may be brought in a United States District Court or any other court of competent jurisdiction provided, however, the suit must be brought within one year from the date of the violation.[117]

1. *Class Actions.* Considerable litigation has arisen in which the statutory remedy, which guarantees a minimum amount of damages regardless of the actual injuries sustained by a consumer, has been asserted in class actions pursuant to Rule 23 of the *Federal Rules of Civil Procedure.*[118] Only a very few of the cases attempting class actions, however, have been certified as proper class actions.[119] The few courts which have allowed class actions in TIL cases have allowed them on the grounds that the class action is a necessary device to force creditor compliance with the Act's disclosure requirements. This rationale

116. 15 U.S.C. § 1640(a) (1970).

117. *Id.* § 1640(e) (1970). Courts have concluded that the TIL is remedial in nature and must be construed in a liberal fashion. N.C. Freed Co. v. Board of Gov. of the Fed. Reserve Sys., 473 F.2d 1210, 1214 (2d Cir.), *cert. denied,* — U.S. — (1973); Bostwick v. Cohen, 319 F. Supp. 875, 877 (N.D. Ohio 1970).

118. *See* Statute Note, 5 ST. MARY'S L.J. 417 (1973).

119. Class actions have been permitted in the following reported cases: Beard v. King Appliance Co., 4 CCH CONSUMER CREDIT GUIDE ¶ 98,912, at 88,594 (E.D. Va. November 27, 1973) (summary of opinion); Kristiansen v. John Mullins & Sons, Inc., 59 F.R.D. 99 (E.D.N.Y. 1973); Eovaldi v. First Nat'l Bank, 47 F.R.D. 545 (N.D. Ill. 1972); Settle v. Mallicott Auto Sales, Inc., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,089, at 88,918 (D. Ore. August 18, 1972) (summary of opinion); Smith v. International Magazine Serv., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,249, at 89,220 (N.D.W. VA. October 29, 1971) (summary of opinion); Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971); Berkman v. Westinghouse Elec. Corp., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,270, at 89,236 (N.D. Ill. December 3, 1971); Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo. 1971); Richardson v. Time Premium Co., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,272, at 89,273 (S.D. Fla. September 14, 1971); Douglas v. Beneficial Fin. Co., 334 F. Supp. 1166 (D. Alas. 1971), *rev'd on other grounds,* 469 F.2d 453 (9th Cir. 1972); Martin & Alexander v. Family Publications Serv., Inc., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,267, at 89,235 (D. Vt. June 30, 1970) (summary of opinion).

The *Kristiansen* and *Eovaldi* cases were only conditional grants of a class action in each case pending further discovery and development. Although the *Katz* judgment was affirmed by a panel of the United States Court of Appeals for the Third Circuit, that court subsequently withdrew its opinion affirming the class action and in an en banc opinion reversed and remanded the case. Katz v. Carte Blanche Corp., Civil No. 72-1054 (3d Cir., filed Mar. 15, 1974).

is explained in *Kristiansen v. Mullins & Sons, Inc.*,[120] which allowed a class action:

> [T]here is implicit in the purpose and language of the Act an intent to protect small claimants from excessive credit charges. The fact that the Act provides a minimal recovery of $100, a maximum of $1000, and a reasonable attorney's fee, if successful, is not enough, in our opinion, to indicate an intent to prohibit class actions since the amount of the recovery does not provide a sufficient incentive to induce the prosecution of individual suits. Moreover, the computation of credit charges in an instalment contract is not easily understood by the ordinary consumer, and its complexity tends to discourage individual suits and suggests that his protection may best be accomplished by the class action technique.[121]

Most of the cases which have been filed as class actions, however, have been denied class action certifications.[122] The landmark case involving this issue was *Ratner v. Chemical Bank New York Trust Co.*[123] The questions presented in *Ratner* were whether the failure to disclose

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120. 59 F.R.D. 99 (E.D.N.Y. 1973).

121. *Id.* at 103-104 (citations omitted).

122. Class actions have not been allowed in the following cases: Katz v. Carte Blanche Corp., Civil No. 72-1054 (3d Cir., filed Mar. 15, 1974), *rev'g* 53 F.R.D. 539 (W.D. Pa. 1971); LaMar v. H. & B. Novelty & Loan Co., No. 72-1485 (9th Cir., filed Dec. 7, 1973), *rev'g* 55 F.R.D. 22 (D. Ore. 1972); Gonzales v. C.D. Stampley Enterprises, Inc., Civil No. SA-72-CA-382 (W.D. Tex., filed Aug. 8, 1973); Pennino v. Morris Kirschman & Co., Civil No. 72-1339 (E.D. La., filed Apr. 27, 1973); Linn v. Target Stores, Inc., 654 ANTITRUST & TRADE REGULATION REP. B-2 (D. Minn. December 4, 1973); Platt v. B.P. Oil Corp., 4 CCH CONSUMER CREDIT GUIDE ¶ 98,934, at 88,634 (S.D.N.Y. November 1, 1973) (summary of opinion); Richmond v. Railey's Appliance Centers, Inc., 4 CCH CONSUMER CREDIT GUIDE ¶ 98,928, at 88,631 (E.D. Va. June 6, 1973); Hollis v. Gilbert Tucker, Civil No. 72-735-K (D.C. Md., filed Mar. 27, 1973); Roth v. Community Nat'l Bank, Civil No. C-72-1031 (N.D. Ohio, filed Mar. 19, 1973); Lindig v. City Nat'l Bank, CA 72-79 (S.D. Ohio, filed Mar. 14, 1972); Berkman v. Sinclair Oil Corp., CA-69-C-2055 and 69-C-2320 (consolidated) (N.D. Ill., filed Mar. 8, 1973); Wilcox v. Commerce Bank, 474 F.2d 336 (10th Cir. 1973); Hunter v. Gross Bros. Furniture, Inc., Civil No. C-71-2443 RHS (N.D. Cal., filed Dec. 20, 1972); Greer v. Sears, Roebuck & Co., Civil No. 72-80 CH (S.D.W. Va., filed July 3, 1972), Grubb v. Oliver Enterprises, [Transfer Binder 1969-1973] CCH CONSUMER CREDIT GUIDE ¶ 99,094, at 88,931 (N.D. Ga. November 3, 1972); Rodriguez v. Family Publications Serv. Inc., 57 F.R.D. 189 (C.D. Cal. 1972); Goldman v. First Nat'l Bank, 56 F.R.D. 587 (N.D. Ill. 1972); Garza v. Chicago Health Clubs, Inc., 56 F.R.D. 548 (N.D. Ill. 1972); Shields v. Valley Nat'l Bank, 56 F.R.D. 448 (D. Ariz. 1972); Shields v. First Nat'l Bank, 56 F.R.D. 442 (D. Ariz. 1972); Kriger v. European Health Spa, Inc., 56 F.R.D. 104 (E.D. Wis. 1972); Kroll v. Cities Serv. Oil Co., 352 F. Supp. 357 (N.D. Ill. 1972); Kenney v. Landis Financial Group, Inc., 349 F. Supp. 939 (N.D. Iowa 1972); Gerlach v. Allstate Ins. Co., 338 F. Supp. 642 (S.D. Fla. 1972); Wilcox v. Commerce Bank, 55 F.R.D. 134 (D. Kan. 1972); Rogers v. Coburn Fin. Corp., 54 F.R.D. 417 (N.D. Ga. 1972); Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972); Buford v. American Fin. Co., 333 F. Supp. 1243 (N.D. Ga. 1971).

123. 54 F.R.D. 412 (S.D.N.Y. 1972).

a nominal interest rate on a credit card account constituted a violation of the Act and also whether the suit would be certified as a proper class action. Judge Frankel, an authority on the class action concept, denied plaintiffs' request for designating the case as a class action. In doing so, he stated:

> [T]he incentive of class-action benefits is unnecessary in view of the Act's provisions for a $100 minimum recovery and payment of costs and a reasonable fee for counsel; and . . . the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act.[124]

Subsequently, in *Shields v. First National Bank*[125] a federal district court denied a class action in a TIL case and made the following statement concerning the applicability of a class action in this type of litigation:

> Traditionally, the purpose of a class action is to give incentive to litigate claims that would otherwise not be litigated because they are too small as to make it impractical to bring individual suits . . . .
>
> The Truth in Lending Act, however, is drafted so that the incentive offered by a class action is not necessary to enforce the provisions of the Act. First, 15 U.S.C. § 1640 (e) [*sic*] provides that an individual plaintiff will recover a minimum of $100 plus attorneys fees and costs. The Act contemplated that the damages involved in the violations of the Act would often be under $100 and that the attorney's fee should not be measured as a percentage of the total judgment. Thus by inserting 15 U.S.C. § 1640 (e) [*sic*] into the Act, Congress removed one of the principal reasons why a class action would be superior to individual suits, i.e., each individual member of the proposed class has an adequate remedy by means other than a class action.[126]

Thus far, the overwhelming majority of cases concerning alleged TIL

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124. *Id.* at 416.

125. 56 F.R.D. 442 (D. Ariz. 1972).

126. *Id.* at 445-46. The courts have also been extremely cautious in considering the applicability of a class action in a TIL case in which the attorney representing the plaintiffs is also a member of the class represented. Shields v. Valley Nat'l Bank, 56 F.R.D. 448, 451 (D. Ariz. 1971); Wilcox v. Commercial Bank, 55 F.R.D. 134 (D. Kan. 1972), *aff'd*, 474 F.2d 336 (10th Cir. 1973). Under these circumstances, the class action is usually rejected because the attorney cannot adequately represent the other members of the class as required by Federal Rule of Civil Procedure 23(a)(4). Shields v. Valley Nat'l Bank, 56 F.R.D. 448, 449 (D. Ariz. 1971); Kriger v. European Health Spa, Inc., 56 F.R.D. 104 (E.D. Wis. 1972).

disclosure violations have disallowed class actions and all indications are that the trend will continue. The applicability of the class action doctrine to the remedies provided by the TIL, however, has not been completely resolved. The Federal Reserve Board has recommended to Congress that the remedy section of the TIL be amended "to delete any minimum recovery per class member and provide a ceiling on class action recovery—namely a maximum of $50,000 or one percent of the net worth of the creditor, whichever is greater."[127] Accordingly, in the last session of Congress, the Senate recommended amending the remedy section of the Act. The Senate's proposed amendment recognizes the applicability of a class action and provides:

> In the case of a class action, such amount as the Court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $100,000 or one percent of the net worth of the creditor . . . .[128]

As of February 1974, the Senate Bill had not been passed into law.

2. *Real Estate Transactions.* Another remedy afforded the consumer is the right of rescission in certain real estate transactions. More specifically, a consumer is authorized to rescind a credit transaction in which a security interest is or will be retained or acquired in any real property used or expected to be used as his principal residence in the event the creditor fails to make the required disclosures to the consumer concerning the credit transaction. This right of rescission may be exercised until midnight of the third business day following (1) the consummation of the transaction, or (2) the delivery of the disclosures required by TIL and Regulation Z, or (3) the creditor's delivery of the rescission notice, whichever is later.[129]

If the consumer exercises his right to rescind pursuant to the statute, the consumer is not liable for finance charges or any other charges on

127. Annual Report to Congress on Truth in Lending for the Year 1973, Special Issue No. 271, Pt. II CCH CONSUMER CREDIT GUIDE 9-11 (January 16, 1974).

128. S. REP. NO. 2101, 93d Cong., 1st Sess. 208 (1973). *See also* Garwood, *Class Action Limits and Case Trends In Truth-In-Lending*, 89 BANKING L.J. 803 (1972). Mr. Garwood, chief of the Truth-In-Lending Section of the Division of Supervision and Regulation of the Federal Reserve Board, suggests that the *qui tam* approach is the "most intriguing of the solutions proposed" to the question of requiring TIL compliance by creditors. Under this approach a private citizen would be permitted to recover a certain sum for bringing suit against a non-complying creditor and the balance of damages would be awarded to the federal government. *Id.* at 807-808. This same theory of allowing a *qui tam* action is also asserted in Fischer, *From Ratner to Qui Tam: Truth-In-Lending Class Action Developments*, 24 HASTINGS L.J. 813, 844-45 (1973).

129. 15 U.S.C. § 1635(a) (1970); 12 C.F.R. § 226.9(a) (1972); Wachtel v. West, 476 F.2d 1062 (6th Cir.), *cert. denied*, — U.S. — (1973).

the transaction and any security interest which may have been acquired against his property becomes void.[130] In the event of the consumer's rescission, the creditor must, within 10 days after receipt of the notice of rescission, return all the consumer's money or property given as a downpayment and take any action necessary to reflect the termination of the security interest which had been created.[131] This right of rescission is not subject to the regular one year statute of limitations which controls the other remedies and it is not available to a consumer where the creation of a security interest amounts to a purchase money lien on the real estate.[132] Furthermore, the rescission rights authorized by Section 1635(a) of the TIL are not available if the security interest in the residence was perfected as a part of a business or commercial purpose instead of a regular consumer transaction.[133]

A consumer cannot rescind the transaction and also recover damages authorized by the Act. In *Bostwick v. Cohen*[134] the federal district court concluded that Congress had not intended to depart from the traditional election of remedies. The court reasoned that, when the consumer elected to rescind, such action constituted an abandonment of the affirmance of the transaction for purposes of seeking money damages.[135] Thus, the liabilities section of the statute was viewed by the court as remedial rather than punitive in nature.

In certain instances, subsequent assignees of the original creditor may become liable to the consumer if the Act is violated. A consumer may sue the assignee of the original creditor where a real estate security interest is involved and the assignee is in a continuing business relationship with the original creditor either at the time the credit was extended or at the time of the assignment. The assignee can defeat his suit, however, by showing either that the assignment was involuntary or that he had no reasonable grounds to believe that the original cred-

130. 15 U.S.C. § 1635(b) (1970); 12 C.F.R. § 226.9(d) (1972).

131. 15 U.S.C. § 1635(b) (1970); 12 C.F.R. § 226.9(d) (1972). In certain restricted cases the consumer may waive his right of rescission. 15 U.S.C. § 1635(d) (1970); 12 C.F.R. § 226.9(e) (1972). However, a consumer's right to rescind the credit transaction does not extend to the transactions designated in 12 C.F.R. § 226.9(g) (1972).

132. 15 U.S.C. § 1635(a), (e) (1970); 12 C.F.R. § 226.9(a), (g) (1972); Wachtel v. West, 476 F.2d 1062 (6th Cir.), *cert. denied*, — U.S. — (1973).

133. Brill v. Newport Nat'l Bank, [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,057, at 88,857 (S.D.N.Y. February 20, 1973); Sapenter v. Dreyco, Inc., 326 F. Supp. 871 (E.D. La.), *aff'd*, 450 F.2d 941 (5th Cir. 1971), *cert. denied*, 406 U.S. 920 (1972).

134. 319 F. Supp. 875 (N.D. Ohio 1970).

135. *Id.* at 878. *Contra*, Palmer v. Wilson, 359 F. Supp. 1099, 1104 (N.D. Cal. 1973).

itor was engaged in violations of the Act and that he maintained procedures reasonably adapted to apprise himself of the existence of such violations.[136]

Defenses Available to a Creditor

A creditor will not be liable for violating any of the Act's disclosure requirements, if the creditor notifies the consumer of the violation and makes the necessary adjustments so that the consumer will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed. The creditor, however, must notify the consumer of the violation within 15 days after discovering the violation and prior to the institution of a suit against the creditor or receipt of written notice of the violation from the consumer.[137] The Act also relieves a creditor of liability if the creditor shows that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid the error.[138]

The courts have limited the applicability of the "unintentional violation" or "bona fide error" defense. This defense has been construed to exempt only clerical errors, which result despite reasonable safety precautions, and where the acts of the defendant are intentional, but result from a mistaken notion as to the applicability of the law, the creditor is not exempt from liability.[139] Due to the very narrow applicability of the defenses, a creditor will seldom have any defense to a violation of the Act. Furthermore, late disclosures cannot be made retroactive to the time they should have been made and will not consti-

136. 15 U.S.C. § 1640(d) (1970).

137. *Id.* § 1640(b).

138. *Id.* § 1640(c).

139. Stefanski v. Mainway Budget Plan, Inc., 456 F.2d 211 (5th Cir. 1972); Kristiansen v. John Mullins & Sons, Inc., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,055, at 88,853 (E.D.N.Y. March 14, 1973) (summary of opinion); Owens v. Modern Loan Co., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,099, at 88,941 (W.D. Ky. November 6, 1972); Kenney v. Landis Fin. Group, Inc., 349 F. Supp. 939, 947 (N.D. Iowa 1972); Richardson v. Time Premium Co., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,272, at 89,237 (S.D. Fla. September 14, 1971); Douglas v. Beneficial Fin. Co., 334 F. Supp. 1166, 1178 (D. Alas. 1971), *rev'd on other grounds*, 469 F.2d 453 (9th Cir. 1972); Buford v. American Fin. Co., 333 F. Supp. 1243, 1247-48 (N.D. Ga. 1971); Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270, 281 (S.D.N.Y. 1971); Roberts v. Allied Fin. Co., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 99,040, at 88,841 (Ga. Ct. App. April 3, 1973) (summary of opinion); Thrift Funds, Inc. v. Jones, 274 So. 2d 150 (La. 1973); Pitkin Furniture Co. v. Jackson, 344 N.Y.S.2d 464 (Civ. Ct. 1972).

tute an acceptable defense to a disclosure violation.[140] In view of the general nonavailability of the creditor's defenses, the creditor should certainly attempt to comply with all the disclosure requirements of the Act, in the manner required by TIL and Regulation Z.[141]

THE FAIR CREDIT REPORTING ACT

Scope of the Act

Prior to the passage of The Fair Credit Reporting Act[142] in 1970, Congress conducted an extensive study of commercial credit reporting activities. This study revealed that consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers and that an elaborate system had been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers. The study also revealed that in many instances inaccurate credit records and reports were being maintained and distributed by credit reporting agencies. Congress concluded that there was a need to insure that consumer reporting agencies were exercising their responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy. As a result of the study, Congress passed the Fair Credit Reporting Act and stated its purpose to be

> to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.[143]

The basic purpose of the Act has been advanced by regulating the preparation and use of credit reports concerning a consumer and giving that consumer, when his request for credit has been rejected because of an adverse credit report or adverse information, the opportunity to correct any inaccurate or misleading information in his credit file.[144]

140. Pitkin Furniture co. v. Jackson, 344 N.Y.S.2d 464, 466-67 (Civ. Ct. 1972).

141. The TIL is silent as to the creditor's right to a jury trial, however, Warren v. G.A.C. Fin. Corp., [1969-1973 Transfer Binder] CCH CONSUMER CREDIT GUIDE ¶ 98,968, at 88,710 (N.D. Ga. July 18, 1973) determined "there is no Seventh Amendment right to a jury in a private action for violations of the [TIL] Act." *Id.* at 88,710.

142. Act of Oct. 26, 1970, Pub. L. No. 91-508, Title VI, 84 Stat. 1127 (codified at 15 U.S.C. § 1681 (1970)).

143. 15 U.S.C. § 1681(b) (1970).

144. 15 U.S.C. § 1681i (1970); Upshaw, *Banking in the Consumer Protection Age*, 5 U.C.C.L.J. 232, 266-73 (1973); Weinstein, *Federal Fair Credit Reporting Act—*

The provisions of the Act establish disclosure requirements which are directed primarily at "users of consumer reports" and "consumer reporting agencies," who regularly engage in preparing, evaluating and distributing consumer credit information to third parties for a fee.[145] Additionally, consumer reporting agencies and users of credit information acquired from consumer reports are required to adopt procedures which will limit the permissible uses of consumer reports, prohibit the reporting of obsolete information and notify the consumer of certain steps taken in processing his application for credit.[146]

Requirements of the Act

When credit for personal, family, or household purposes, or when employment is denied or the charge for such credit is increased because of information contained in a consuuer report from a consumer reporting agency, the credit report user must notify the consumer of the name and address of the consumer reporting agency making the report.[147] If the information is "obtained from a person other than a consumer reporting agency," the Act requires the user of the information to notify the consumer in writing that the consumer has been re-

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Compliance By Lenders and Other Users of Consumer Credit Information, 89 BANKING L.J. 410 (1972). For a general background information concerning the act, see B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES §§ 52-55 (1972).

145. 15 U.S.C. §§ 1681c, 1681d (1970). At this point several definitions should be provided in discussing the scope of the act. The term "consumer reporting agency" is defined in 15 U.S.C. § 1681a(f) (1970) as

> any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

The term "consumer report" is defined in 15 U.S.C. § 1681a(d) (1970) as

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681m of this title.

146. 15 U.S.C. §§ 1681b, 1681c, 1681d, 1681g, 1681m (1970).

147. *Id.* § 1681m(a).

jected for credit and to advise the consumer that he has 60 days from the date of such notice to request the user to disclose the nature of the information to the consumer.[148]

The Act defines "investigative consumer report" as a consumer report which contains information on a consumer's character, general reputation, personal characteristics, or mode of living, which is obtained from neighbors, friends, or associates of the consumer.[149] In the event a user desires to procure an investigative consumer report on any consumer, the Act requires that the user inform the consumer that such a report has been requested. This notice must be mailed to the consumer not later than 3 days after the date on which the report was requested.[150] Upon written request by the consumer, within a reasonable period of time after receipt of such notice, the user shall make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure must be mailed to the consumer not later than 5 days after the date on which the request for such disclosure was received.[151]

Upon a request from a consumer, the consumer reporting agency must clearly and accurately disclose the following information:

> (1) nature and substance of all information except medical information in its files concerning the consumer;
> (2) all sources of information on which it compiled its information about the consumer (except sources for investigative consumer report and used for no other purpose);
> (3) the recipients of any consumer report requested for employment purposes within the preceding two years or for any other purpose within the preceding six months.[152]

The consumer reporting agency is required to make these disclosures only upon reasonable notice and during normal business hours. These disclosures may be made to a consumer in person or by tele-

148. *Id.* § 1681m(b).

149. The term "investigative consumer report" is defined in 15 U.S.C. § 1681a(e) (1970) as

> a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

150. 15 U.S.C. § 1681d(a)(1) (1970).

151. *Id.* § 1681d(b).

152. *Id.* § 1681g(a).

phone if the consumer, with proper identification, has made a previous written request for such information.[153]

If the consumer disputes information in his file, the Act requires the consumer reporting agency to reinvestigate the information within a reasonable time and record the current status of information. Inaccurate information and information which cannot be verified must be deleted from the agency's files.[154] If the reinvestigation does not resolve the dispute, the consumer may file a brief statement (limited to 100 words) which the reporting agency shall include in all future consumer reports prepared by the agency concerning that consumer.[155]

In its efforts to limit the use of consumer reports and protect the privacy of the consumer, the Act requires that such reports be furnished only in response to the following:

(1) an order of court; or

(2) written instructions from the consumer to whom it relates; or

(3) to a person or organization which the consumer reporting agency has reason to believe

   a. intends to use the information in connection with a credit transaction or employment involving the consumer, or

   b. intends to use the information for insurance underwriting involving the consumer, or

   c. intends to use the information in connection with the issuance of a license or other benefit granted by the governmental agency required by law to consider an applicant's financial status, or

   d. has a legitimate business need for the information due to a business transaction with the consumer.[156]

The Act prohibits a consumer reporting agency from including any of the following information, concerning the consumer, in a consumer report:

(1) Bankruptcies antedating the report by more than 14 years;

(2) Suits and judgments antedating the report either by more than 7 years or until the applicable statute of limitations has

153. *Id.* § 1681h(a), (b).

154. *Id.* § 1681i(a).

155. *Id.* § 1681i(b). The consumer's 100 word statement shall be included by the consumer reporting agency in any subsequent report concerning that consumer. If the agency deletes information from the consumer's file as a result of a review of the information at the request of the consumer, the agency must notify the parties who have received reports from the agency that the information has been deleted from the consumer's file. 15 U.S.C. § 1681i(c), (d) (1970).

156. 15 U.S.C. § 1681b (1970).

expired, whichever period is longer;[157]

(3) Paid tax liens antedating the report by more than 7 years;

(4) Accounts placed for collection antedating the report by more than 7 years;

(5) Records of arrest, indictment, or conviction of any crime which, from date of disposition, release, or parole, antedate the report by more than 7 years;

(6) Any other adverse information antedating the report by more than 7 years.[158]

These limitations on reporting, however, are not applicable to any consumer credit report to be used in connection with (1) a consumer credit transaction involving the principal amount of $50,000 or more; (2) the underwriting of life insurance involving a face amount of $50,000 or more; or (3) employment of an individual at an annual salary which equals, or which may reasonably be expected to equal, $20,000 or more.[159]

Furthermore, the Act contains several loopholes which somewhat limit its effectiveness. For example, a credit reporting agency is not required to physically deliver its file to a consumer who has properly identified himself. All that the Act requires is for the agency to disclose the "nature and substance" of the file's contents to the consumer. Another shortcoming is the failure of the Act to specify that the credit information gathered by the credit reporting agency must be relevant to the consumer's credit worthiness. Also, the Act fails to require a credit reporting agency to correct erroneous or misleading information about a consumer until the consumer notifies the agency that the information is erroneous, thus placing the burden on the consumer to discover any errors in the agency's file.[160] An additional limitation of the Act is its nonapplicability to credit reports used by a credit report user to evaluate an application for business credit as well as consumer credit.[161] As a result of these and other deficiencies of the Act, vari-

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157. Accordingly, suits and judgments can be used for 10 years in consumer reports in Texas. TEX. REV. CIV. STAT. ANN. art. 5449 (1958).

158. 15 U.S.C. § 1681c(a) (1970).

159. *Id.* § 1681c(b).

160. B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 53.5, at 58-62 (Supp. 1973). For an interesting account of the inroads being made upon the consumer's right to privacy by the use of the computer and related electronic equipment, see Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEXAS L. REV. 837, 865 (1971). For a revealing article containing shortcomings of credit reporting, see Carper, *The Reputation Merchants*, 3 MONEY 26 (1974).

161. *See* Sizemore v. Bambi Leasing Corp., 360 F. Supp. 252 (N.D. Ga. 1973).

ous authorities have suggested that Congress consider amending the Act to provide for stiffer regulation of the credit reporting industry.[162]

Remedies Available to the Consumer

The Act allows the consumer to recover punitive damages, actual damages, and the cost of litigation together with reasonable attorney's fees for any willful violation of the Act by a consumer reporting agency or credit report user.[163] For negligent non-compliance with the Act, the consumer may recover actual damages plus costs of the action and reasonable attorney's fees.[164] Suits for violations may be brought in any United States District Court, without regard to the amount in controversy, or in any other court of competent jurisdiction. The statute of limitations on such actions is 2 years from the date of the violation or, in the case of willful misrepresentation, within 2 years after discovery of the violation by the consumer.[165]

Defenses Available to a Consumer Credit Reporting Agency or a Credit Report User

The Act does not specifically provide credit reporting agencies or credit report users with any defenses for alleged violations, however, the civil liability sections of the Act do make a distinction between willful non-compliance and negligent non-compliance.[166] Furthermore, civil liability is imposed only if the violation is willful or negligent. Therefore, probably the best defense available would be to assert that the violations which caused the alleged injury were neither willful nor negligent and hence did not constitute actionable violations of the Act. This defense should be especially effective if the defendant can show that its records-keeping procedures were in strict accordance with the Act.

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162. B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 53.5 (Supp. 1973).
163. 15 U.S.C. § 1681n (1970).
164. *Id.* § 1681*o*.
165. *Id.* § 1681p.
166. *Compare* 15 U.S.C. § 1681n (1970), *with* 15 U.S.C. § 1681*o* (1970).