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A REVIEW OF SIGNIFICANT LEGISLATION AND CASE LAW CONCERNING CONSUMER CREDIT

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Part I of this article, which appears in the Spring 1974 Issue of this Journal,[1] covers the principal disclosure requirements of the Truth-in-Lending (TIL) and Fair Credit Reporting Acts, Regulation Z, the significant cases which interpret that legislation and the regulations issued for its implementation.

This portion of the article covers the Texas Consumer Credit Code with emphasis upon its disclosure requirements.

PART II

In 1967, the Texas Legislature completed its study of consumer credit and declared a need for comprehensive legislation to clearly define interest and usury, to classify and regulate loans and lenders, to regulate credit sales and services, and to place limitations on charges imposed in connection with such sales and services.[2] In that year, it passed the Texas Consumer Credit Code.

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1. Smyer, *A Review of Significant Legislation and Case Law Concerning Consumer Credit*, 6 ST. MARY'S L.J. 37 (1974).

2. D. HOLMAN, CONSUMER CREDIT LAW IN TEXAS 11-15 (1970). The general purpose of the Consumer Credit Code is contained in the declaration of legislative intent. *Declaration of Legislative Intent*, 15 TEX. REV. CIV. STAT. ANN. 1 (1971). Governor John Connally commented that the enactment of the credit code provided adequate safeguards for the public. D. HOLMAN, CONSUMER CREDIT LAW IN TEXAS 13-14 (1970). However, there are those who have commented that the Code, "despite its lofty rhetoric, abandons to the whims of the industry the consumer it purports to protect." Comment, *Consumer Credit Regulation in Texas—The Case for the Consumer*, 49 TEXAS L. REV. 1011 (1971). A rejoinder to this is an article by Professor S. Hugh High. High, *Consumer Credit Regulation in Texas—A Rejoinder by an Economist*, 50 TEXAS L. REV. 463 (1972). *See also* CONSUMER CREDIT CODE LENDING OFFICERS GUIDE (1967); CONSUMER CREDIT CODE LENDING OFFICERS GUIDE, PART II (1967); Illig, *Meshing Truth-*

Generally, the Credit Code regulates maximum rates which may be charged as interest and prescribes the disclosures concerning the costs of credit which must be made concerning consumer credit transactions. Chapter One of the Credit Code consists of a restatement of the usury laws of this state prior to the enactment of the Code.[3] As a general rule, those laws allowed recovery of a maximum of 10 percent simple interest on a loan. The Code contains separate chapters pertaining to regulated loans,[4] installment loans,[5] secondary mortgage

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In-Lending With the Consumer Credit Code, 33 TEX. B.J. 87 (1970); Shoecraft, *Digest of Texas Consumer Code,* 31 TEX. B.J. 105 (1968); Comment, *Home Improvement Frauds and The Texas Consumer Credit Code,* 47 TEXAS L. REV. 463 (1969).

3. TEX. REV. CIV. STAT. ANN. art. 5069-1.01-1.06 (1967). Chapter 2 of the Code contains general definitions, creates the office of a consumer credit commissioner and specifies the general powers of that office. TEX. REV. CIV. STAT. ANN. art. 5069-2.01-2.03 (1967). The Code specifically provides that credit unions shall not contract for or receive interest in excess of 12 percent per annum. TEX. REV. CIV. STAT. ANN. art. 5069-2.05 (1967). Protective provisions against usury were included in Section 11, Article XVI of the Texas Constitution. The section established 8 percent per annum as the legal rate of interest but permitted parties to contract for a maximum interest rate of 12 percent per annum. In 1891, the legal rate was reduced to 6 percent per annum and the rate permitted by contract was reduced to 10 percent per annum. In 1960, Section 11, Article XVI of the Texas Constitution was amended authorizing the Texas Legislature to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest. The amendment also provided that in the absence of legislation fixing maximum rates of interest, all contractual interest rates which exceed 10 percent per annum and all contracts where no rate of interest was agreed upon which exceed 6 percent per annum "shall be deemed usurious." TEX. CONST. art. XVI, § 11 and interpretative commentary thereto.

Corporations may pay interest up to a rate of 1.5 percent per month on obligations in which the principal amount exceeds $5,000.00. TEX. REV. CIV. STAT. ANN. art. 13.09 (1967). Texas courts have recognized that the "time price differential" of a credit sale is not usury and that a creditor may charge a "cash price" and a "credit price," which may be considerably higher than the cash price, in a sale of merchandise on credit.

> [N]o loan of money is involved, a purchaser buys an automobile from a regular automobile dealer for a credit price known to the purchaser to be higher than the cash price, and signs a note and chattel mortgage for the unpaid balance, such transaction is an actual sale of the automobile on time or credit selling price, mutually agreed upon by the parties, and such note and mortgage thus given for the balance, providing for interest, only in the case of default, at the highest legal rate, is not usurious. A seller may demand one price for cash and another and greater price upon credit, and it would not be usury.

Rattan v. Commercial Credit Co., 131 S.W. 399, 400 (Tex. Civ. App.—Dallas 1939, no writ); *see* Lusk v. G.M.A.C., 395 S.W.2d 847 (Tex. Civ. App.—Tyler 1965, no writ); Bradford v. Mack, 359 S.W.2d 936 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.); National Bond & Inv. Co. v. Atkinson, 254 S.W.2d 885 (Tex. Civ. App.—Amarillo 1952, writ dism'd); Gifford v. State, 229 S.W.2d 949 (Tex. Civ. App.—El Paso 1950, no writ); Associates Inv. Co. v. Baker, 221 S.W.2d 363 (Tex. Civ. App.—Austin 1949, writ dism'd); Fisher v. Hoover, 21 S.W. 930 (Tex. Civ. App. 1893, no writ).

Validity of the time price doctrine has recently been recognized in Hernandez v. United States Fin. Co., 441 S.W.2d 859, 861-62 (Tex. Civ. App.—Waco 1969, writ dism'd); *see* Avant v. Gulf Coast Inv. Corp., 457 S.W.2d 134 (Tex. Civ. App.—Dallas 1970, no writ).

4. TEX. REV. CIV. STAT. ANN. art. 5069-3.01-3.21 (Supp. 1974).

5. TEX. REV. CIV. STAT. ANN. art. 5069-4.01-4.04 (1971).

loans,[6] retail sale of goods,[7] installment sales of motor vehicles,[8] loans for insurance premiums[9] and pawn broker fees.[10] Each allows an interest rate in excess of 10 percent per annum provided that the lender complies with the requirements of the respective chapters of the Code.

These chapters allow creditors to charge additional interest in the event of default.[11] Premiums for credit life, health and accident insurance as well as hazard insurance, as additional security for each loan or consumer credit transaction, may also be charged.[12] However, the interest or time price differential which may be charged is limited to the rate designated therein and cannot be collected more than once on the same installment. Furthermore, deferment charges are strictly regulated and all loans and credit obligations may be prepaid at any time. If a loan is prepaid, the Code requires the creditor to refund or credit the consumer with the refund on the loan, calculated pursuant to a refund formula specified in the respective chapter of the Code.[13] The Consumer Code also requires that various written disclosures be made by the creditor to the consumer concerning each consumer credit transaction.[14] Unlike the TIL, which does not attempt to regulate interest rates at all, a significant part of the Credit Code is directed to interest rate regulation. The rates specified in the various chapters of the Code, except Chapter One, exceed what would otherwise be classified as usurious rates of interest in this state. At the time the Credit Code was enacted, Governor Connally commented that

> [t]he rates of charge authorized . . . are no higher than rates currently being charged for consumer credit in our state and, on a national comparison, are for the most part substantially below the rates charged for such credit in other states . . . .[15]

One group of consumer advocates, however, have classified the rates as "generous to all classes of creditors."[16] Thus, the broad policy

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6. TEX. REV. CIV. STAT. ANN. art. 5069-5.01-5.05 (1971).
7. TEX. REV. CIV. STAT. ANN. art. 5069-6.01-6.09 (1971).
8. TEX. REV. CIV. STAT. ANN. art. 5069-7.01-7.10 (1971).
9. TEX. REV. CIV. STAT. ANN. art. 5069-12.01-12.19 (Supp. 1974).
10. TEX. REV. CIV. STAT. ANN. art. 5069-51.01-51.17 (Supp. 1974).
11. TEX. REV. CIV. STAT. ANN. art. 5069-3.15(5), 4.01(5), 5.02(3), 6.02(11), 7.03(6) (1971); TEX. BUS. & COMM. CODE ANN. art. 12.17 (Supp. 1974).
12. TEX. REV. CIV. STAT. ANN. art. 5069-3.18(1), 4.02(1), 5.03(1), 6.04(1), 7.06(1) (1971).
13. TEX. BUS. & COMM. CODE ANN. art. 12.16 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 5069-3.15(6), 4.02(6), 5.02(4), 6.02(10), 7.04 (1971).
14. These disclosure requirements will be summarized at pp. 553-55 *infra*.
15. D. HOLMAN, CONSUMER CREDIT LAW IN TEXAS 13-14 (1970).
16. Comment, *Consumer Credit Regulation in Texas—The Case for the Consumer*, 49 TEXAS L. REV. 1011, 1026 (1971).

question is whether the legislature should attempt to regulate the money-lending industry by the imposition of maximum loan rates, or whether it should not regulate, and allow the competition of the market to determine the maximum rates for credit.[17]

Those who oppose rate-making action of the legislature contend that the high credit risks involved and the cost of extending credit on small loans will prohibit a legitimate lender from making small loans if the "legal ceilings on interest rates" are too low. They contend that low interest rate ceilings result in a denial of loans to low income groups who then must turn to "loan shark" lenders for their source of borrowed funds. Those opposed to rate regulation assert that the money market should be permitted to be conducted in response to supply and demand in a freely operating credit market, free from any regulated rate imposed by the legislature.[18]

Consumer advocates, on the other hand, argue that the high-risk borrowers who most need credit are rejected by legitimate and licensed creditors. In their struggle to obtain immediate funds these high-risk borrowers often turn to unregulated sources for money.[19] One group of consumer advocates states that this procedure forces

> the poorest segment of society to pay dearly for its marginal participation in a credit economy. If the poverty cycle is to be broken in Texas, less costly—both economically and socially—sources of cash credit must be provided. '[T]he current ridiculously high rates on Texas small-small loans result in grave damage to an important segment of society and make virtually impossible for the poorest debtor to break out of poverty.'[20]

By enacting the Consumer Credit Code the Texas Legislature has chosen to establish maximum rates of interest to be charged for consumer credit and has, therefore, assumed a recurring obligation to continually evaluate the rates specified in the Code to insure that these rates do not have a detrimental effect on the availability of consumer credit.

Although the problems of interest rate regulation are too complex to be properly treated here, a review of the Credit Code's disclosure requirements and the resulting problems should provide a strong back-

17. B. CLARK & J. FONESCA, HANDLING CONSUMER CREDIT CASES § 33 (1972).

18. *E.g.*, THE CONSUMER FINANCE INDUSTRY: ITS COSTS AND REGULATION 137-62 (J. Chapman & R. Shay ed. 1967); High, *Consumer Credit Regulation in Texas—A Rejoinder by an Economist*, 50 TEXAS L. REV. 463, 473 (1972).

19. *E.g.*, Comment, *Consumer Credit Regulation in Texas—The Case for the Consumer*, 49 TEXAS L. REV. 1011, 1034 (1971).

20. *Id.* at 1034-35, *quoting* Fritz, *Would the Consumer Credit Code Help the Consumer?*, 25 BUS. LAW. 511, 512 (1970).

ground from which studies of that, and other consumer credit problems, can be approached.

DISCLOSURE REQUIREMENTS

The Consumer Credit Code requires that certain designated disclosures be made to the consumer in each consumer credit transaction. The disclosures required by Chapter Three (Regulated Loans), Chapter Four (Installment Loans) and Chapter Five (Secondary Mortgage Loans) are essentially the same, generally requiring that the following disclosures be made about the respective consumer credit transaction:

(1) the names and addresses of the borrower and of the creditor;

(2) the date and the amount of the cash advance, the maturity date, and the agreed schedule of payments or a description of such payments;

(3) the nature of the security, if any;

(4) the fees for filing, recording, or releasing any security authorized by the respective chapter of the Code;

(5) the charges for default or deferment authorized by the respective chapter of the Code;

(6) the types of insurance, if any, provided in connection with the loan, and the premiums for such insurance;

(7) the amount, in dollars and cents, of interest charges contracted for at the time the loan is made, or the percentage that the interest charges bear to the total amount of the loan expressed as the nominal rate on the average outstanding unpaid balance of the principal amount of the loan;

(8) the total amount, in dollars and cents, of all the charges included in the amount of the loan.[21]

In addition, the total amount of all charges included in the amount of the loan must be disclosed to the borrower.[22] These disclosures may be made on the face of the note or loan contract or may be recited in a separate written statement which must be delivered to the consumer at the time the transaction is consummated.[23]

Chapters Six (Retail Installment Sales) and Chapter Seven (Motor Vehicle Installment Sales) require that the following information be disclosed to the consumer:

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21. TEX. REV. CIV. STAT. ANN. art. 5069-3.19, 4.03, 5.04 (1971).
22. TEX. REV. CIV. STAT. ANN. art. 5069-3.19(h), 4.03(h), 5.04(h) (1971).
23. TEX. REV. CIV. STAT. ANN. art. 5069-3.19, 4.03, 5.04 (1971).

(1) the cash sale price of the goods, services or motor vehicle;

(2) the amount of the buyer's down payment, specifying the amounts paid in money and allowed for goods traded in;

(3) the difference between items (1) and (2);

(4) the aggregate amount, if any, included for insurance, if a separate identified charge is made therefor, specifying the type or types of insurance and the term or terms of coverage;

(5) the aggregate amount of official fees;

(6) the principal balance, which is the sum of items (3), (4) and (5);

(7) the amount of the time price differential;

(8) the amount of the time balance owed by the buyer to the seller, which is the sum of items (6) and (7); and

(9) the number of installments, the amount of each installment and the due date or period thereof.[24]

Because these chapters require that certain disclosures be given in a more conspicuous manner,[25] they are distinguishable from other chapters of the Code. Conspicuously printed notices[26] must inform the consumer of the steps he should take before signing the contract in order to protect his legal rights. Chapter Six also requires that the creditor furnish the debtor with a monthly statement of his revolving charge account.[27] Both chapters require that the buyer be given written notice of an assignment or negotiation of the contract.[28]

Home solicitations are also covered in the Credit Code.[29] The distinguishing characteristics of this chapter are that (1) the creditor must furnish a contract in the language as that principally used in the oral sales presentation and (2) the consumer is given an option to cancel the transaction within 3 business days from the date of the transaction.[30]

All premium finance agreements must also be in writing and on forms approved by the Consumer Credit Commissioner.[31] As in Chapters Six and Seven, Chapter 12 disclosures must be clear, conspicuous

24. TEX. REV. CIV. STAT. ANN. art. 5069-6.02(5), 7.02(6) (1971).
25. TEX. REV. CIV. STAT. ANN. art. 5069-6.02(2), 7.02(2) (1971).
26. *Id.* These sections set out in full a suggested notice.
27. TEX. REV. CIV. STAT. ANN. art. 5069-6.03(2) (1971).
28. TEX. REV. CIV. STAT. ANN. art. 5069-6.07, 7.08 (1971).
29. *See generally* TEX. REV. CIV. STAT. ANN. art. 5069-13.01-13.06 (Supp. 1974).
30. TEX. REV. CIV. STAT. ANN. art. 5069-13.02(b) (Supp. 1974).
31. TEX. REV. CIV. STAT. ANN. art. 5069-12.11 (Supp. 1974).

and meaningful.[32] Pawn tickets must also disclose, in detail, the credit costs of the transaction. Important aspects of the chapter regulating premium rates and pawn tickets are that the terms "annual percentage rate" and "finance charge" are to be printed more conspicuously than other terminology included in the chapter.[33] In this regard, they parallel the disclosure requirements of the TIL and Regulation Z.

Credit Disclosure Problems

Although the Credit Code has been a part of the law of this state for approximately 7 years, only one reported opinion has dealt with the construction of any of the Code's credit disclosure requirements. That case, *McDonald v. Savoy*,[34] was decided by San Antonio Court of Civil Appeals in 1973. In this case the motor vehicle contract required the plaintiff to insure the motor vehicle against loss or damage. The contract contained blanks which, if properly filled in, would disclose the kind of coverage and term of the required insurance. None of the blanks, however, were filled in. The plaintiff, who had purchased an automobile from defendant, sued for statutory penalties alleging defendant's failure to make the following disclosures:

(1) The kind, coverage, term of the required property insurance required by defendant together with the premiums for such insurance;

(2) Failing to include the cost of the insurance in the finance charge; and

(3) Failing to make conspicuous disclosure of the security interest to be retained by the defendant.

The court conceded without deciding that it would be unreasonable to require disclosure of the cost of the insurance when it was not procured "from or through" the creditor. But even where the insurance is not procured "from or through" the creditor, he is under an obligation to disclose whether insurance is required; and if so, he must also disclose the kind, coverage and term of the insurance required.[35] In reaching this decision the court noted that the purpose of the Code was to provide the consumer with information which would permit him to realize the true cost of his purchase.[36] Because the facts

32. Tex. Rev. Civ. Stat. Ann. art. 5069-12.11(4) (Supp. 1974).
33. *Id.*
34. No. 15134 (Tex. Civ. App.—San Antonio, filed Oct. 17, 1973).
35. *Id.*
36. *Id.*

in *Savoy* established that the plaintiff did procure insurance "through" the creditor, the court concluded that the creditor had failed to make proper disclosures concerning the insurance.[37]

The affirmance of the plaintiff's second allegation was based upon the defendant's violation of Section 1605(c) of the TIL. That section requires an insurance premium written in connection with a credit transaction to be included in the finance charge

> unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of insurance if obtained from or through the creditor, and stating the person to whom the credit is extended may choose the person through which the insurance is to be obtained.[38]

The court concluded that the defendant's failure to furnish the plaintiff with the written statement and his failure to include the insurance premium as a part of the finance charge violated the TIL and the pertinent provisions of Regulation Z.[39]

The plaintiff's final allegation was upheld after an examination of the pertinent parts of the TIL and Regulation Z. The court stated that any security interest to be retained by the creditor must be sufficiently described to the debtor. In aid of its determination, the court referred to a ruling of the Federal Reserve Board requiring that a notice be placed on the instrument, warning the consumer to check both sides of the writing as well as to affix his signature on each side of the pages.[40] In *Savoy* neither requirement was met. Although a statement on the front page of the credit document notified the consumer that the creditor was reserving a security interest in the vehicle, and a further description of the security interest was placed on the reverse side of the instrument, this disclosure did not qualify as "conspicuous" as required by the statute and regulations. The contract was therefore held violative of the provisions and the plaintiff's contention was upheld.[41]

The opinion in *Savoy* illustrates the court's strict interpretation and application of the pertinent provisions of the Texas Consumer Credit Code and the TIL and is but one of several cases throughout the nation which have tended to apply a strict construction of consumer credit dis-

37. *Id.*
38. 15 U.S.C. § 1605(c) (1970).
39. No. 15134 (Tex. Civ. App.—San Antonio, filed Oct. 17, 1973).
40. *Id.*
41. *Id.*

closure statutes.[42] This approach creates problems concerning the scope of disclosure where the federal and state disclosure statutes vary in their respective disclosure requirements.

For example, Sub-sections 226.7(b) and 226.8(c) of Regulation Z require the use of certain specific terms such as "previous balance," "payment," "cash price," and "cash down payment," in disclosing the credit costs and other information required to be disclosed to the consumer in a periodic statement or a credit sale. Articles 3.15(4), 4.01 (4) and 6.02(5) of the Credit Code require the disclosure of the same kind of credit cost information but not in the exact terms required by Regulation Z. However, Sub-section 226.6(b) of Regulation Z specifies that if state disclosures are inconsistent with federal disclosures, these disclosures may be printed on the same disclosure form if they are printed below a conspicuous demarcation line accompanied by a statement that the disclosures are inconsistent with the federal disclosure requirements. These additional disclosures only restate what has already been disclosed concerning the credit costs of the consumer transaction. They made the credit disclosures more detailed, and may confuse the consumer more than they assist him in understanding what the actual costs of the credit are. The "technical disclosure" approach of the *Savoy* case sanctions this disclosure process.

A consumer credit transaction conducted in a foreign language further typifies the difficulty presented by the doctrine of technical disclosure. In most instances key disclosures such as "finance charge" and "annual percentage rate" do not have a meaningful literal translation in the foreign language. For example, the Consumer Credit Commission has intentionally used language employing terms found in neither the Credit Code nor in the TIL in order to more clearly express these concepts in Spanish.[43] The reasoning is that the resulting inconvenience is outweighed by the long term benefits to all concerned. The use of the Spanish language form, which does not use the literal translation of the terms required in the TIL or the Credit Code, highlights the practicality of using terminology which is meaningful to the consumer—whatever their ethnic background or educational level.

The purpose of credit disclosure legislation is to require disclosures which serve to advise the consumer of the cost of credit in a credit

42. *E.g.*, Palmer v. Wilson, 359 F. Supp. 1099 (N.D. Cal. 1973); Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971).

43. Letter from Sam Kelly (Consumer Credit Commission of Texas) to Regulated Loan Licensees, December 11, 1973.

transaction.[44] Emphasis should therefore be placed on the meaningful disclosure of the cost of the credit to the consumer which could be attained by:

(1) the preparation and use of standardized forms which emphasize meaningful disclosure of the costs of credit; and

(2) an effective educational program designed to educate the consumer concerning the cost of a credit transaction.

The preparation of nationally standardized forms would require Congress to authorize the Federal Reserve Board to prepare all printed forms to be used by creditors in consumer credit transactions and give the creditors the option to use the forms.[45] The standardized forms would be published in a print format similar to that of the 1040 forms distributed by the Internal Revenue Service and would standardize the various credit cost disclosures required by federal and state statutes. The state credit commissioner or the federal agency given the responsibility to supervise state credit disclosure information could be authorized to report any unusual or inconsistent credit disclosure statements to the federal agency to be included in the forms to be used in that state. The major advantage of this type of form would be printed in a format in which the key credit cost disclosures would be located at the same place on each of the forms. This would standardize the location and disclosure of all terms dealing with credit cost and would, therefore, eliminate any confusion resulting from inconsistent provisions in forms prepared by different sources. The consumer would be able to more readily identify the pertinent credit disclosures than he would if the disclosures were made on forms prepared by the various creditors. Use of the forms would also limit the risk and exposure of creditors to excessive damages resulting from improper disclosures in prepared forms.

Another aspect of the credit cost disclosure problem suggests that certain classes of consumers are unable to understand the credit cost disclosures required by federal and state legislation. A study conducted in 1972 by the National Commission on Consumer Finance discovered that a "relatively impoverished 'high risk' market" existed in which the awareness of the cost of consumer credit was poor.[46] The study con-

44. *See Declaration of Legislative Intent,* 15 TEX. REV. CIV. STAT. ANN. 1 (1971).

45. The use of the federal forms could be promoted by exposing the creditor to damages if his forms did not properly disclose.

46. Annual Report to Congress on Truth in Lending for the Year 1972, Special Issue No. 216, Pt. II CCH CONSUMER CREDIT GUIDE 175-77 (January 16, 1973).

cluded that during the 15 months since the effective date of the TIL, cost awareness had not reached many of the consumers in the "high risk" market. The Commission concluded that "until these consumers become more affluent, rate disclosure will not add significantly to their economic well being."[47] Consumer education on a recurring basis is obviously needed.

The National Commission on Consmer Finance stressed the need for educating the consumer about all aspects of consumer credit in its initial report on consumer credit. Part of that report states that

> [e]ducation in the use of consumer credit can be preventive or remedial. Preventive education, preparing consumers for ventures in the marketplace, obviously is to be preferred to remedial education, pointing out to consumers what they should have done. . . .
>
> The consumer who needs to know more about the financing of purchases needs to know much more about the economics of life in general. The place to begin to learn is at home or in school rather than in the trial-and-error arena of the marketplace. . . .
>
> Disclosure legislation is only as effective as the informed use consumers make of the disclosures. . . . Consumer education should start at the primary school level and continue through adulthood. It should be designed to aid buyers in making market choices which are right for them. . . . Consumer education at all academic levels should be made more meaningful for consumers, and particularly for consumers in lower socio-economic strata—those who can be presumed to need it most.[48]

In 1973 the Texas Legislature amended the Texas Educational Code to authorize academic credits to be awarded to high school students who take courses in consumer credit.[49] In the future, emphasis should be placed on consumer education programs conducted in schools and through the news media and not on credit transaction forms, as the primary means in which to advise and educate the consumer about the costs of credit.

The adoption and use of standardized credit cost disclosure forms and the maintenance of an effective educational program can assist greatly in achieving the aims of federal and state consumer credit legislation.

47. *Id.* at 176-77.
48. *Id.* at 193-200.
49. Tex. Laws 1973, ch. 337, at 763 (codified at TEX. EDUC. CODE ANN. § 21.119 (Supp. 1974).

REMEDIES AVAILABLE TO THE CONSUMER

The penalties imposed for violation of the Credit Code are significant. If interest is charged or received which is greater than the amount authorized by Chapter One, the creditor shall forfeit to the obligor not only twice the amount of interest contracted for, charged or received, but also reasonable attorneys fees fixed by the court.[50] If interest is charged or received which is in excess of double the amount of interest allowed by the Credit Code, the creditor shall forfeit as an additional penalty, "all principal as well as interest and all other charges and shall pay reasonable attorney fees set by the court."[51] The statute provides for a 4-year statute of limitations for the prosecution of any usury claim.[52]

Chapter Eight of the Code specifies the remedies available for victims of violation of any of the provisions of the Code concerning specialized loans or retail installment sales.[53] The penalty for violating any of those chapters is forfeiture to the consumer of twice the amount of interest or time price differential and default and deferment charges contracted for, charged or received, and reasonable attorney's fees fixed by the court. If the creditor violates the provisions of these chapters by charging or receiving interest or a time differential or other charges which are in the aggregate in excess of double the total amount of interest, time price differential and other charges authorized, the creditor shall forfeit to the consumer an additional penalty of all principal or principal balance as well as all other charges and shall pay reasonable attorney's fees actually incurred by the consumer.[54]

The consumer also has important rescission remedies, authorized by the Code in retail installment sales, motor vehicle installment sales, and home solicitation sales. A consumer involved in one of these transactions who has not received delivery of the goods contracted for or who has not been furnished the services contracted for, has the right to rescind the contract and to recover either a refund of all payments made or a trade-in allowance if the buyer has not received a copy of the retail installment contract.[55]

The Code provides for a 4-year statute of limitations "from the date of loan, retail installment transaction or two years from the date

50. TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (1971).
51. *Id.*
52. *Id.*
53. TEX. REV. CIV. STAT. ANN. art. 5069-8.01-8.05 (1971).
54. TEX. REV. CIV. STAT. ANN. art. 5069-8.02 (1971).
55. TEX. REV. CIV. STAT. ANN. art. 5069-6.02(3), 7.02(4) (1971).

of the final entry made thereof, whichever is later."[56] A violation of the terms of an injunction results in the payment of a penalty of not more than $1,000 per violation to the state as an additional civil penalty.[57]

DEFENSES AVAILABLE TO CREDITORS

The Code specifically provides that "there shall be no penalty for a violation which results from an accidental or bona fide error."[58] But neither of these terms is defined, and there is only one reported case which interprets them within the context of the Code provisions. In that case, *Savoy*, the court of civil appeals construed the "bona fide error defense" as a proviso which need not be negated by a plaintiff.

The plaintiff had filed a motion for summary judgment and defendant contended that its plea of a bona fide error raised a fact issue which should defeat the motion for summary judgment. The court stated that plaintiff was under no obligation to establish the nonexistence of a material fact issue relating to the defense of bona fide error. The mere pleading of the defense was not sufficient to raise a fact issue, and judgment was rendered for plaintiff.[59] This construction of the defense of bona fide error suggests that both bona fide error and accident will be strictly construed against the creditor and will be recognized only if unusual circumstances exist which might justify their use.

The Code recognizes that the consumer's right either of action or of defense arising out of a retail installment transaction may be cut off by negotiation of the retail installment contract to a third party if the third party acquires the contract in good faith.[60] The rights of the consumer, however, shall not be terminated by negotiation of the contract unless the assignee or holder gives notice of the negotiations of the contract to the consumer.[61]

PROJECTED TRENDS IN CONSUMER CREDIT REGULATION

Since 1969, Congress has continued to amend the Consumer Credit Protection Act. Amendments are presently pending which

56. TEX. REV. CIV. STAT. ANN. art. 5069-8.04 (1971).
57. TEX. REV. CIV. STAT. ANN. art. 5069-8.05 (1971).
58. TEX. REV. CIV. STAT. ANN. art. 5069-8.01 (1971).
59. No. 15134 (Tex. Civ. App.—San Antonio, filed Oct. 17, 1973).
60. TEX. REV. CIV. STAT. ANN. art. 5069-6.07; 7.08(4) (1971).
61. Commercial Credit Corp. v. Williams, 474 S.W.2d 751, 752 (Tex. Civ. App.—Eastland 1971, no writ).

would incorporate most of the recommendations made in recent years by the Board of Governors of the Federal Reserve System regarding amendments to the TIL.[62] These proposed amendments are contained in Senate Bill 2101.[63] Title One of that legislation is termed "The Fair Credit Billing Act" which is designed to help consumers resolve credit billing disputes in a fair and timely manner and to prohibit certain other practices arising out of the use of credit cards or revolving charge accounts.[64] Significant changes include the imposition of the statute's disclosure requirements on credit advertising of transactions with more than four installments,[65] passage of an agricultural credit exemption where the credit transaction exceeds $25,000,[66] and the extension of the rescission rights to liens which arise by operation of state law.[67] The amendment provides, however, that the consumer's right of rescission expires 3 years after the date the transaction was consummated, notwithstanding any failure by a creditor to comply with the TIL.[68] The amendment also allows as a defense a creditor's good faith reliance on the Board's interpretation of any rule or regulation issued by it pursuant to Regulation Z.[69] The amendment would also restrict recovery by a consumer to a singular collection of damages even though several violations of the act occurred in one transaction.[70] The legislation would amend the civil liability section of the TIL to allow class actions in which each member of the class could recover damages in an amount not more than the lesser of $100,000 or 1 percent of the creditor's net worth. These limitations would not apply to the amount of actual damages which could be proved in the class action suit.[71]

62. Annual Report to Congress on Truth in Lending for the Year 1973, Special Issue No. 271, Pt. II CCH CONSUMER CREDIT GUIDE 16 (January 16, 1974); Annual Report to Congress on Truth in Lending for the Year 1972, Special Issue No. 216, Pt. II CCH CONSMUER CREDIT GUIDE 13-16 (January 16, 1973); Annual Report to Congress for the Year 1971, Supplement to Issue No. 161 CCH CONSUMER CREDIT GUIDE 18-19 (January 19, 1972).

63. S. 2101, 93rd Cong., 1st Sess. §§ 101-302 (1973).

64. *Id.* § 106.

65. *Id.* § 201.

66. *Id.* § 202.

67. *Id.* § 204.

68. *Id.* § 205.

69. *Id.* § 206.

70. *Id.* § 207.

71. *Id.* § 208. The Bill also (1) requires that a full statement of closing costs to be incurred by the consumer be disclosed by the creditor; *id.* § 209; (2) amends that part of the TIL dealing with credit cards to eliminate business credit cards from the act and revises the provisions for fraudulent use of credit cards; *id.* §§ 210, 214; (3) requires identification of the credit transaction; *id.* § 211; (4) provides for revision of the liability of assignees; *id.* § 213; (5) amends the grace period for consumers; *id.* § 215; and

Both the TIL and the Consumer Credit Code have been in effect for more than 5 years. During that period considerable planning has been conducted throughout the nation to prepare and implement additional consumer credit legislation. Examples of this legislation, in addition to the TIL and the Credit Code, are the Uniform Commercial Code, the Uniform Consumer Credit Code and the National Consumer Act.[72] Although the Uniform Commercial Code cannot be classified as providing the consumer with protection in excess of the TIL, it does recognize certain protective concepts such as the unenforceability of an unconscionable contract.[73] Unconscionability is extremely important in consumer credit, where such a transaction typically involves a contract of adhesion in which, as a practical matter, the creditor is in a position to dictate the terms of the contract.[74]

The Uniform Consumer Credit Code was initially drafted in 1968 and has been accepted by only a few states.[75] It is, however, the first attempt to codify the consumer credit subject in an integrated and comprehensive manner.[76] The National Consumer Act, a model act for consumer protection, was prepared by the National Consumer Law Center at Boston College Law School and was first published in January 1970. It is the most comprehensive of all legislation which has been proposed in the consumer protection area and has been described as "the most pro-consumer of all the statutes."[77] This consumer legislation, much of which is still in a draft stage, attempts to cover and regulate such topics as deceptive trade practices, disreputable collection tactics by collection agencies, various credit card abuses, various credit bureau abuses, and other related problems concerning the consumer sector of our economy. It is doubtful that all or any major part of these consumer-oriented acts will be adopted by the majority of state legislatures or by Congress. They will, however, pinpoint the policies used and provide a fruitful source of background for various statutes which will undoubtedly be passed at the state and national level concerning the entire gambit of consumer activities.

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(6) provides for equal credit opportunity and prohibits any discrimination based on sex or marital status; *id.* §§ 301-303.

72. B. Clark & J. Fonseca, Handling Consumer Credit Cases §§ 4, 44 (1972); § 4 (Supp. 1973).

73. Tex. Bus. & Comm. Code Ann. § 2.302 (1966).

74. Annot., 18 A.L.R.3d 1305, 1307 (1968).

75. 1 C.C.H. Consumer Credit Guide ¶ 5002, ¶ 5005 (1971). As of February 1974 only seven states (Colorado, Idaho, Indiana, Kansas, Oklahoma, Utah and Wyoming) had adopted the Uniform Consumer Credit Code. *Id.* at ¶ 4770 (1974).

76. B. Clark & J. Fonseca, Handling Consumer Credit Cases § 4, at 11 (1972).

77. *Id.* § 4, at 12.

CONCLUSION

Consumer credit transactions have multiplied at a rapid rate since the end of World War II. This growth and expansion has created considerable confusion concerning the type of credit available, as well as its resulting costs and obligations. Congress, principally through the Consumer Credit Protection Act (TIL and Fair Credit Reporting Acts), and the Texas Legislature, through the Consumer Credit Code, have attempted to clarify some of the confusion by specifying what information the creditor should disclose to the consumer about the costs of credit. Although considerable progress has been made in legislating for more accurate and complete credit disclosures, critical comments have concluded either that the consumer credit disclosure legislation is of marginal value or that it does not provide the consumer with adequate relief.

Three basic problems continue to exist. The first involves the ability of the consumer to understand and favorably react to the credit cost disclosures. One aspect of this problem is the consumer's personal disregard for the significance of the credit cost disclosure. It has been postulated by certain authorities, and supported by surveys, that many consumers are more interested in the convenience of credit availability at one source than of "shopping" for credit at more reasonable sources.[78] Another observation is that many consumers are more concerned about their ability to pay the "monthly payments" of the consumer transaction than they are about the overall cost of the credit.[79] These factors suggest that since some consumers are not vitally concerned about the cost of credit, it is doubtful if any disclosures concerning the cost of credit or any amount of continued education concerning the cost of consumer credit will assist them. Conversely, certain classes of consumers are *unable* to understand and to react favorably to the credit cost disclosures required by federal and state legislation. Continued consumer education concerning the cost, scope, and obligations of consumer credit can and will assist many of these consumers. This is especially true if the federal and state governments continue to monitor and direct educational programs concerning consumer credit.

A second principal problem is that of compliance by the creditor with all disclosure requirements, both federal and state. The objective of these disclosure statutes is consumer enlightenment; but a point of

78. *Id.* § 43, at 151.
79. *Id.* § 43, at 152.

diminishing returns is reached when the requirements for "complete disclosure" result in lengthy forms containing complex explanations of various credit plans which consumers cannot understand. One authority has classified this development as "complete disclosure vs. customer confusion"[80] and concludes that "the Board must search for that point at which increased disclosure begins to decrease consumer enlightenment."[81] One solution would be for Congress to authorize the Federal Reserve Board, in conjunction with the respective state agency, to prepare all printed forms to be used by creditors in consumer credit transactions and give the creditors the option to use the forms.[82] This proposal would standardize and insure consistent content of the credit disclosure language required by federal and state law.

The third problem involves the interest rate which a creditor may charge for credit.[83] Since the TIL makes no attempt to regulate maximum charges for credit this is a problem which must be solved by the respective states. Basically this problem involves the costs and risks of doing business for the credit lender who is in the business of making loans in small amounts. Credit lenders have experienced that the costs and risks of making and servicing small loans are much greater than those of making larger loans since little or no profit can be made on a small consumer loan transaction if the state regulated rates for consumer credit are too low. For example, the historic explanation for

80. Garwood, *Truth In Lending—A Regulator's View*, 29 BUS. LAW. 193, 198 (1973).

81. *Id.* at 199.

82. At least one authority rejects the use of "universal printed forms" as being "impractical." 1 R. CLONTZ, TRUTH IN LENDING MANUAL ¶ 2-09(1) (1973). G.L. Garwood states:

> The Board could have prescribed very general requirements for the disclosure of the information required by the Act, hoping that creditors would make disclosure as completely and clearly as necessary in order to meet the goals of truth in lending. On the other hand, the Board could have restrained creditor activity by the imposition of a standard form of disclosure for universal use throughout the country. In fact, it did neither, but attempted to strike a balance between freedom and restraint by establishing type size, terminology, and conspicuousness requirements, while trusting to creditors' general good judgment in the overall design of their forms.

Garwood, *Truth In Lending—A Regulator's View*, 29 BUS. LAW. 193, 197 (1973). It is submitted, however, that the freedom of form drafting which Mr. Garwood advocates is useless if the creditor, by exercising such freedom, subjects himself to the extensive or annihilating damages authorized by the disclosure statutes in the event of his error.

83. *See generally* THE CONSUMER FINANCE INDUSTRY ITS COSTS AND REGULATION 137-62 (J. Chapman & R. Shay ed. 1967); B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES §§ 33-37 (1972); D. TYREE, THE SMALL LOAN INDUSTRY IN TEXAS 105-111, 122, 128-29 (1960); H. High, *Consumer Credit Regulation In Texas—A Rejoinder By an Economist*, 50 TEXAS L. REV. 463, 473 (1972); Comment, *Consumer Credit Regulation in Texas—The Case for the Consumer*, 49 TEXAS L. REV. 1011, 1083 (1971).

"loan shark" activity is the fixing of state usury rates too low to allow sufficient profit to a lender of small amounts. As a result, many lenders attempting to comply with state laws were unable to do so and withdrew from that sector of the money market. Disreputable lenders have filled the vacuum which was thus created—all to the disadvantage of the consumer. After small loan laws were passed in many of the states, the approach was to establish a rather high interest rate for small loans and allow competition among state licensed and regulated lenders to keep the rates at a reasonable level. Texas has followed this approach, but consumer advocates continue to urge a constant vigil to reduce the maximum rates for consumer credit. Because there is no immediate solution, it appears that the Texas Legislature will be confronted with the problem of interest rate regulation for the foreseeable future. This problem does not appear to lend itself to an immediate solution, especially for the consumer.

Regardless of whether solutions can be found for these and related problems, consumer credit disclosure legislation will occupy a prominent role in the economic activities of this nation and state for the foreseeable future. In the recent words of the United States Supreme Court, this kind of legislation reflects a transition in legislative policy "from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose."[84]

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84. Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 377 (1973). Perhaps the creditor in his attempt to comply with these disclosure requirements should be mindful of the advice contained in the last verse of the poem entitled "The Present Crisis" which was written by the American poet James Russell Lowell. That verse reads:

New occasions teach new duties; Time makes ancient good uncouth;
They must upward still, and onward, who would keep abreast of Truth:
Lo, before us gleam her camp-fires! we ourselves must Pilgrims be,
Launch our Mayflower, and steer boldly through the desperate winter sea,
Nor attempt the Future's portal with the Past's Blood-rusted key.

OND HUNDRED AND ONE FAMOUS POEMS 37 (1958).