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SIGNIFICANT RECENT DEVELOPMENTS IN FEDERAL
CONSUMER CREDIT LEGISLATION
AND CASE LAW

JOE P. SMYER* AND P. KEITH O'GORMAN**

During the two year period from October, 1974 to October, 1976, considerable amending legislation was passed by the United States Congress that expanded existing federal consumer credit legislation. During this period, the Real Estate Settlement Procedures Act, the Fair Credit Billing Act, the Equal Credit Opportunity Act, and the Mortgage Disclosure Act were passed by Congress to provide additional protection to the consumer in consumer credit transactions. During the same period, the federal court of appeals rendered several decisions construing this consumer credit legislation.

An examination of this new legislation and these cases, with particular emphasis on those decisions of the Court of Appeals for the Fifth Circuit, will assist in an understanding of their effects and the legal requirements they impose on parties to consumer credit transactions.

RECENT AMENDMENTS TO THE
CONSUMER CREDIT PROTECTION ACT

Recent Amendments to Federal Truth-In-Lending Act

During the spring and summer of 1974 the United States Congress worked on various amendments to the Federal Truth-in-Lending Act (TIL), a majority of which became effective on October 28, 1974.²

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1. For the purpose of this article "consumer credit" may be generally defined as credit which is extended to natural persons for personal, family, or household purposes. For a detailed analysis of both federal and Texas legislation and case law concerning consumer credit prior to 1974, see Smyer, A Review of Significant Legislation and Case Law Concerning Consumer Credit (pts. 1 & 2), 6 ST. MARY'S L.J. 37, 549 (1974).
One of the most important TIL amendments is the authorization of class actions for alleged violations of the Act.\(^4\) Previously, the TIL did not specifically authorize class action suits for any alleged violation of the Act.\(^5\) The civil liability section of the Act was amended in October 1974 to allow class action suits and to allow a court to determine the amount that each class member would receive in the event a class action is successfully litigated. While no minimum recovery is applicable to each member of the class, the total recovery in such action may not be more than the lesser of five hundred thousand dollars or one percent of the net worth of the creditor.\(^6\) To determine the amount of damages to be awarded a class, the amendment authorizes the court to consider “the frequency, and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor’s failure of compliance was intentional.”\(^7\)

The civil liability section was also amended to allow a successful litigant recovery of any actual damages sustained by him as a result of the creditor’s failure to make disclosures required by the statute. Recovery of actual damages is in addition to the statutory damages previously authorized by the statute.\(^8\)

A statutory defense in consumer credit litigation was also added by amendment to the TIL. Good faith compliance with any rule, regulation, or interpretation of the Federal Reserve Board may be asserted as a defense by a creditor involved in litigation.\(^9\) In addition, where multiple failures to disclose are shown, the amendment limits liability to a single recovery unless the failure is a continuing one after recovery has been granted.\(^10\)

A time limit on the right of rescission in transactions involving liens (other than first liens) in consumer real estate transactions is now statutorily imposed.\(^11\) A consumer’s right of rescission shall expire three years after the date of the transaction’s consummation or upon the sale of the property, whichever occurs first.\(^12\) The right of rescission ex-

\(^5\) Id. § 1640(a) (1970) (amended 1974).
\(^6\) Id. § 1640(a)(2)(B) (Supp. V 1975) (amended in 1976, increasing maximum recovery from $100,000 to $500,000).
\(^7\) Id. § 1640(a).
\(^8\) Id. § 1640(a).
\(^9\) Id. § 1640(f).
\(^10\) Id. § 1640(g).
\(^11\) Id. § 1635(e), (f).
\(^12\) Id. § 1635(f).
pries regardless of whether disclosures required by the Act have been delivered to the consumer. A creditor must also disclose any security interest that may arise by operation of state law.

FAIR CREDIT BILLING ACT

The 1974 amendments to the TIL also contain the Fair Credit Billing Act, the primary purpose of which is to protect consumers against inaccurate and unfair credit billing and credit card practices. The Act extends the definition of the term “creditor” to include credit card issuers. Creditors are required to notify credit card holders periodically of their rights concerning billing errors which may appear in the cardholders’ accounts.

The Act also defines “billing error” and provides for a procedure to correct alleged billing errors which might appear in the periodic statements of the cardholders’ accounts. Additionally, the Act provides for a time framework in which a creditor must resolve any notice of an alleged billing error. For example, if a creditor, within sixty days after having transmitted an obligor’s statement to the obligor, receives a written notice from the obligor that sufficiently identifies an alleged billing error, the creditor must send a written acknowledgment thereof to the obligor not later than thirty days after the receipt of the notice, unless the alleged error has been resolved.

13. Id. § 1635(f).
14. Id. § 1635(a). Another significant amendment provides for the exemption of certain credit transactions primarily for agricultural purposes where the amount financed exceeds $25,000. Id. § 1603(5). Specific disclosure is required in advertisements where a finance charge is not imposed but a consumer is allowed to repay the cost in more than four installments. Id. § 1665(a). Also, a civil action for violation of the TIL may be brought against an assignee of the original credit transaction where the violation is apparent on the face of the assigned instrument unless the assignment is involuntary. Id. § 1614. Additional regulations concerning business credit cards and the fraudulent use of credit cards are set out at Id. § 1644.
18. Id. § 1637(a)(8). The prescribed form of the notice is set out in 12 C.F.R. § 226.7(a)(9) (1976).
19. 15 U.S.C. § 1666(a), (b) (Supp. V 1975). Billing errors are defined to include reflections on statements of credit extension either not made or not in the amount stated; requests for clarifying the credit extension and appropriate evidence of such transaction; situations where goods and services were not accepted or not delivered per agreement; failure to indicate payments made or credits due on the account; computation or other clerical errors; and any other error specified by Board regulations. Id. § 1666(b).
20. Id. § 1666(a). Within two billing cycles after receipt of the notice and prior
In the event an obligor has filed a written notice of an alleged billing error, a creditor may not restrict or close the account pending the creditor’s examination of the alleged billing error. Further, a creditor is prohibited from threatening to report to any person an obligor’s failure to pay the amount involved in an alleged billing error until the creditor has complied with the required billing error review procedures.

A significant part of the Act allows the cardholder to raise certain of those defenses against the card issuer that the cardholder already had against the seller. As a result, the card issuer is made subject to all claims (other than tort claims) and defenses arising out of any transaction in which the credit card is used as a method of payment or an extension of credit if (1) the obligor has made a good faith attempt to obtain satisfactory resolution of a disagreement or problem relative to the transaction from the person honoring the credit cards; (2) the amount of the initial transaction exceeds $50.00; and (3) the place where the initial transaction occurred was in the same State as the mailing address previously provided by the card holder or was within one hundred miles from such address.

The amount of claims or defenses asserted against the card issuer is limited to the amount of credit outstanding with respect to the transaction at the time the cardholder first notifies the issuer of such claim or defense. This provision of the Act actually constitutes a modified repeal of the holder in due course doctrine where creditor transactions are involved.

Cash discounts to credit cardholders of up to five percent of the merchandise price may no longer be prohibited by credit card issuers. Additionally, setoffs of an obligor’s credit card account against his

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21. Id. § 1666(d).
22. Id. § 1666(a). The obligor is allowed a minimum of 10 days to make payment as provided in the credit agreement. Id. The creditor must promptly credit payments received from an obligor, and promptly account for any excess payments. Id. §§ 1666c, 1666d.
23. Id. § 1666i.
24. Id. § 1666i(a).
25. Id. § 1666i(b).
26. Id. § 1666f. Nor may merchants participating in a credit card plan be required to purchase tie-in services. Id. § 1666g.
checking or savings account is prohibited unless the cardholder previously agreed in writing to allow the setoff.\textsuperscript{27}

**Consumer Leasing Act of 1976**

The Consumer Leasing Act of 1976 was passed as another amendment to the Federal Truth-in-Lending Act to become effective March 23, 1977.\textsuperscript{28} Prior to its enactment, many sellers were leasing automobiles and other goods for consumer use without adequate cost disclosures. The purpose of the legislation, therefore, was to provide guidelines whereby consumers would receive meaningful disclosures concerning lease terms.\textsuperscript{29}

In effectuating the Act's disclosure guidelines, the Federal Reserve Board has proposed amendments to Regulation Z to become effective on March 23, 1977.\textsuperscript{30} The pertinent provisions of Regulation Z will require the lease to disclose a brief description of the leased property, the total amount to be paid by the lessee, with all charges individually itemized, and a statement identifying any express warranties available to the lessee.\textsuperscript{31}

\textsuperscript{27} Id. § 1666(a)(1).
\textsuperscript{29} Id. § 1667(1). The term does not include leases for agriculture, business, or commercial purposes. Id. § 1667(1).
\textsuperscript{31} Id. The regulation provides for the following disclosures:

1. The total amount of any payment, . . . . advance payment, . . . . or any trade-in allowance, . . . . to be paid by the lessee at consummation of the lease.
2. The number, amount and due date or periods of payments scheduled under the lease and the total amount of such periodic payments.
3. The total amount paid . . . . for official fees, registration, certificate of title, license fees or taxes.
4. The total amount of all other charges, individually itemized.
5. A brief identification of insurance in connection with the lease.
6. A statement identifying any express warranties or guarantees available to the lessee made by the lessor or manufacturer with respect to the leased property.
7. An identification of the party responsible for maintaining or servicing the leased property together with a brief description of the responsibility.
8. A description of any security interest, other than a security deposit . . . . and a clear identification of the property to which the security interest relates.
9. The amount or method of determining the amount of any penalty or other charge for delinquency, default or late payments.
10. A statement of whether or not the lessee has the option to purchase the
In addition to these proposed amendments, the Federal Reserve Board will apparently propose sample disclosure forms for use with leases of personal property, which will help assure compliance with the regulations.\textsuperscript{32}

\textbf{EQUAL CREDIT OPPORTUNITY ACT}

In addition to the amendments to the Truth-in-Lending Act cited above, the Consumer Credit Protection Act was amended to include the Equal Credit Opportunity Act (ECOA). The principal purpose of the ECOA is to make it unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2)
because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under the Consumer Protection Act.83

The ECOA specifically prohibits discrimination against any credit applicant on the basis of sex, marital status, or any other prohibited basis as provided therein and specifies the federal agencies who are charged with the enforcement of the Act.84 Section 1691e of the ECOA specifies the penalties which a creditor must pay to a successful aggrieved credit applicant for the creditor's failure to comply with any of the provisions of the Act or the regulations which are implemented to enforce it.85 An applicant who brings a suit in an individual capacity and is awarded judgment may recover any actual damages sustained by the applicant and punitive damages in an amount not greater than ten thousand dollars, as determined by the court.86 If a judgment is awarded to an applicant in a class action suit, the applicant may recover any actual damages sustained, and the court may impose punitive damages in an amount not to exceed the lesser of five hundred thousand dollars or one percent of the net worth of the creditor.87

The ECOA, however, excuses the creditor for any act or omission committed in good faith and in conformity with any Federal Reserve Board rule, regulation, or interpretation.88 Regulation B, as amended March 23, 1977, divides credit into consumer credit, incidental credit, business credit, securities credit, governmental credit, and public utilities credit.89 Incidental credit, business credit, securities credit, governmental credit, and public utilities credit are exempted from certain of the procedural provisions of the regulation.40 The regulation does not exempt, however, such credit from the basic prohibition of the ECOA against discrimination in credit transactions.41

36. Id. § 1691e(a), (b).
37. Id. § 1691e(b). A successful litigant is also entitled to court costs and reasonable attorneys' fees as determined by the court. Id. § 1691e(d).
38. Id. § 1691e(e). This section also requires an action to be brought within two years from the date of the occurrence of the violation. Id. § 1691e(e).
40. Id. § 202.3.
41. Id. § 202.3.
Regulation B consists of thirteen sections which, among other things, define the scope and definitions of the regulation and specify the information which shall and shall not be requested in credit applications. The regulation also designates how credit information shall be furnished to consumer reporting agencies and other credit information recipients.\(^42\) The provisions of Regulation B also prohibit a creditor from discriminating against an applicant on a prohibited basis.\(^43\) Creditors may not refuse, on the prohibited basis provided in Regulation B, to grant separate accounts to creditworthy applicants, nor may they discount the income (including part-time income) of an applicant or an applicant’s spouse on any prohibited basis specified in the regulation.\(^44\) Creditors may no longer request information concerning birth control practices or child bearing capability, nor may they consider any aggregate statistics or assumptions relating to the likelihood of any group of persons bearing or rearing children.\(^45\) Regulation B further prohibits the aggregation or combination of separate accounts of spouses for purposes of determining finance charges or loan ceilings permissible under the laws of Texas or of the United States.\(^46\)

In describing marital status, Regulation B requires that credit application forms contain only the terms “married,” “unmarried,” or “separated.”\(^47\) If the application form requests that an applicant designate

\(^42\) Id. § 202.10. Limitations are also imposed on requests for the signature of a spouse or other person concerning a credit transaction. Id. § 202.7.

\(^43\) Id. § 202.4 and § 202.3(2).

\(^44\) Id. § 202.5. Additionally, creditors cannot prohibit an applicant from using a birth-given name and surname, or a birth-given first name and a combined surname. Id. § 202.7(h).

\(^45\) Id. § 202.5(d).

\(^46\) Id. § 202.11(c). In addition, Regulation B requires that a creditor shall: consider alimony, child support, or maintenance payments as income where an applicant chooses to disclose that income, to the extent that such payments are likely to be consistently made; notify the applicant of any adverse action taken upon the credit application and furnish each applicant the reasons for the denial of credit or the termination of the account. Id. §§ 202.6(b)(5), 9. Included in the section is a suggested form a creditor may use for the statement of its reasons for denial or termination of credit. Id. § 202.9(b)(2). As of March 23, 1977, each creditor is to retain as to each credit applicant, in original form or copy thereof, any application form and the documents designated in § 202.12 for a period ending 25 months after the date the creditor gives the applicant notice of its action on an application, or after the date the creditor adversely changes the terms or conditions of credit for an account. In the event any creditor is notified it is under investigation for violation of Regulation B by the appropriate investigatory agency, or if it has been served with notice of an action filed against it, the creditor shall retain the information required in subsections (1) and (2) of 202.12(b) until final disposition of the matter or as ordered by the agency or court. Id. § 202.12.

\(^47\) Id. § 202.5(d). “Marital status” is defined as “the state of being unmarried,
a title, such as Mr., Mrs., Ms., or Miss, the application form shall state conspicuously that the designation of such title is optional. Except for this designation of title, if used in an application form the remainder of the application form shall otherwise use only terms that are neutral as to sex.48

The revised version of Regulation B injects a new concept into the evaluation of credit applications. This method of evaluating creditworthiness of the applicant has been called an “effects test” concept and is referred to in footnote seven of the regulation:

The legislative history of the Act indicates that the Congress intended an “effects test” concept, as outlined in the employment field by the Supreme Court in the cases of Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), to be applicable to a creditor's determination of creditworthiness.49

The regulation does not specify the details in which such a test can be specifically applied in determining an applicant's creditworthiness.50

Revised Regulation B specifically defines the adverse action of a creditor in regard to a credit application which triggers the requirement by that creditor to give to the applicant a notice of the creditor's adverse action on the application.51 The revised regulation also contains model credit application forms, which, if used by the creditor, shall be deemed to be in compliance with the pertinent provisions of the regulation. These model application forms are designated as Appendix B to Regulation B.

**REAL ESTATE SETTLEMENT PROCEDURES ACT**

The Real Estate Settlement Procedures Act52 (RESPA) was passed to ensure that consumers are provided with more information on the nature and costs of the settlement process involved in real estate transactions. The Act also seeks to protect consumers from unnecessarily high settlement charges caused by certain abusive practices that have

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48. Id. § 202.6(d)(3).
49. Id. § 202.6(a)n.7.
50. Id. § 202.6(a).
51. Id. §§ 202.2(c), 202.9.
developed in some areas of the country. RESPA requires that more effective advance disclosures of settlement costs be made to the consumer and the seller during the settlement process for residential real estate transactions. Kickbacks or referral fees that unnecessarily increase certain settlement services are eliminated by the Act. Further, the amounts consumers are required to place in escrow accounts established to ensure payment of real estate taxes and insurance were reduced. RESPA additionally provides for initial reform and modernization of local record keeping of land title information.

Any lender making a federally related mortgage loan is required to disclose to the consumer, the seller, and to the appropriate federal agency proposing to ensure or guarantee the loan a written itemized disclosure of each charge arising in connection with the settlement. The lender must disclose the settlement costs on a standard form prepared by the Secretary of Housing and Urban Development. The form conspicuously and clearly itemizes all charges imposed upon the consumer and the seller in connection with the settlement. Lenders must also distribute special information booklets concerning the costs of real estate settlement services to each person submitting an application to borrow money for the purchase of residential real estate.

In prohibiting kickbacks and fees other than for services actually performed in a transaction, the Act provides for criminal penalties, including a fine up to a maximum of ten thousand dollars or one year imprisonment or both for any person accepting or giving any unearned fee. In addition to the imposition of the criminal penalty, RESPA

54. Id. § 2601(b)(1). RESPA applies to a residential real estate transaction involving a federally related mortgage loan which is secured by residential real estate (including condominiums and cooperatives) designed principally for the occupancy of from one to four families. 12 U.S.C.A. § 2602(1)(A) (Pamp. Supp. I 1976).
55. 12 U.S.C. § 2601(b)(2), (3) (Supp. V 1975). A seller of property covered by the Act also cannot require as a condition of sale that a consumer purchase title insurance covering the property from a particular title company. Id. § 2608(a). A seller who violates this provision shall be liable to the consumer in an amount equal to three times all charges made for such title insurance. Id. § 2608(b).
56. Id. § 2601(b)(4).
58. Id. The standard form should also disclose all of the settlement costs and services "including, but not limited to title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the handling of the processing, and closing or settlement..." 12 U.S.C. § 2602(3) (Supp. V 1975).
60. Id. § 2607.
provides for recovery of civil penalties amounting to treble damages, plus court costs and reasonable attorneys' fees.61

In an action to recover damages pursuant to RESPA's provisions, suit may be brought in any district court of the United States or any other court of competent jurisdiction.62 Such an action, however, must be brought within one year from the date the violation occurred.63 RESPA specifically provides, however, that none of its provisions affect the validity or enforceability of any sale, contract for sale, or any mortgage or lien perfected on property involved in a real estate transaction.64

THE HOME MORTGAGE DISCLOSURE ACT OF 1976

The Home Mortgage Disclosure Act65 requires certain depository institutions to publicly disclose information concerning residential and home improvement loans which those institutions make in certain geographical areas.66 Disclosure of this information is designed to enable citizens and public officials to determine whether the depository institutions are fulfilling their obligations in serving the housing needs of the communities and neighborhoods in which they are located.67

The Office of Management and Budget is required by this Act to define standard metropolitan statistical areas in urban zones throughout the United States.68 Each depository institution which, as of its last full fiscal year, has total assets of ten million dollars and which has a home or a branch office located in a standard metropolitan statistical area must disclose the number and total dollar amount of loans that were originated or purchased by the institution during the preceding fiscal year. The number and dollar amount of home improvement loans made by a depository institution covered by the Act must also be designated.69 This information must be retained and made available to the

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61. Id. § 2607.
63. Id. § 2615.
64. Id. § 2615.
66. "Depository institutions" are defined as "any commercial bank, savings bank, savings and loan association, building and loan association or homestead association . . . or credit union which makes federally related mortgage loans." Id. § 2802(2).
67. Id. § 2801.
68. Id. § 2803.
69. Id. § 2803(a)(2). Depositories must designate the number and dollar amount of each loan which is secured by property located outside of the standard metropolitan statistical area. In addition, the number and dollar amount of loans which are insured by federal agencies and the number and dollar amount of mortgage loans made to mort-
public for a period of five years after the close of the first year during which the information is required.\textsuperscript{70}

**SIGNIFICANT RECENT CASE REVISIONS BY THE FIFTH CIRCUIT**

An analysis of the decisions of the United States Court of Appeals for the Fifth Circuit is indicative of the emergence of consumer credit law in the United States. Although the Truth-in-Lending Act became effective in 1969, the Fifth Circuit did not decide its first consumer credit case until September 1971. The Fifth Circuit decided only two consumer cases in 1972 and one in 1973. The pendulum then began to swing in earnest with four consumer credit decisions in 1974 and three in 1975. The Fifth Circuit wrote fifteen consumer credit decisions in 1976, and each advance sheet further evinces the river of consumer litigation that began as a trickle five short years ago.

The Fifth Circuit decisions reflect the increasing trend toward consumer protection. The initial consumer credit decision by the Fifth Circuit was *Mourning v. Family Publications Service, Inc.*\textsuperscript{71} The Fifth Circuit began its analysis of consumer credit law on the side of the creditor by holding unconstitutional the Federal Reserve Board's Regulation Z, which applied TIL disclosure requirements to finance charge-free consumer loans payable in more than four installments.\textsuperscript{72} The court held in *Mourning* that in order for the Truth-in-Lending Act to apply there must be three elements—a creditor, a consumer credit transaction, and a finance charge.\textsuperscript{73} The Fifth Circuit held the Truth-in-Lending Act was penal and thus must be strictly construed.\textsuperscript{74} By controlling loans which had no finance charge, Regulation Z constituted an administrative enlargement of the law and was therefore unconstitutional.\textsuperscript{75}

The United States Supreme Court, however, reversed the Fifth Circuit's narrow creditor-oriented approach to Truth-in-Lending.

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\textsuperscript{70} Gators who did not intend to reside in the property securing the mortgage loan must be disclosed. *Id.* § 2803(a)(2).

\textsuperscript{71} *Id.* § 2803(c). The data must be first gathered for the fiscal year beginning with the last fiscal year of the institution which immediately preceded the effective date of the Act. *Id.* § 2803(a)(2).

\textsuperscript{72} 449 F.2d 235 (5th Cir. 1971), rev'd, 411 U.S. 356 (1973).

\textsuperscript{73} *Id.* at 242-43.

\textsuperscript{74} *Id.* at 240.

\textsuperscript{75} *Id.* at 241.
Writing for the majority, Chief Justice Burger observed that Congress created a broad structure for the Truth-in-Lending Act and entrusted the Federal Reserve Board with the duty of implementing and monitoring the Act's operation. The court held Regulation Z was within the authority granted the Federal Reserve Board by Congress.

While Mourning was pending in the Supreme Court, the Fifth Circuit decided two more consumer credit cases. In the first case, Wilson v. Retail Credit Co., the court held the Fair Credit Reporting Act was not retroactive and therefore did not apply to statements made prior to its enactment. The second decision, was the first of two opinions in a landmark case involving the right of rescission. Initially, the trial court decided that either the exemption for state-regulated transactions, or a lack of jurisdiction compelled dismissal. The Fifth Circuit disagreed and held the Federal Reserve Board was the only power that could grant state-regulated exemptions and therefore the exemption argument was inapplicable. The Fifth Circuit decided the district court had jurisdiction under 28 U.S.C. § 1337 and remanded the case for a determination on its merits.

On remand, the trial court allowed the plaintiff to rescind her home improvement contract with the defendant- creditor but awarded judgment to the defendant for the balance owing on the contract. The Fifth Circuit affirmed the contract’s rescission, but reversed the award to the defendant for the balance owing on the contract. The plaintiff had timely exercised her right of rescission by giving the contractor notice of rescission prior to three days after delivery of the statutorily prescribed disclosures. Since the contractor did not respond to the plaintiff’s rescission notice, the court held the plaintiff fulfilled her rescission obligations by the mere offer to return the goods. The plaintiff, therefore, had no obligation to the defendant for further payments and was.

77. Id. at 371.
78. 457 F.2d 1406 (5th Cir. 1972).
79. Id. at 1407.
80. 465 F.2d 1227 (5th Cir. 1972).
82. Sosa v. Fite, 465 F.2d 1227, 1228-29 (5th Cir. 1972).
83. Id. at 1229.
84. Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974).
entitled to full restitution of all amounts previously paid to the contractor and a release of the judgment lien.\textsuperscript{86}

In 1973 the Fifth Circuit reviewed the application of Truth-in-Lending to open end credit in \textit{Thomas v. Myers-Dickson Furniture Co.}\textsuperscript{87} The court held that open end credit accounts must comply with existing disclosure requirements regardless of the age of the accounts.\textsuperscript{88} Minimum damages for each violative periodic statement were awarded by the court's holding that each statement was a separate violation.\textsuperscript{89}

In \textit{Bussey v. Georgia Bankamerica}\textsuperscript{90} a special master, the trial court, and the Fifth Circuit panel unanimously agreed that a credit card issuer had made the necessary statutorily-required disclosures.\textsuperscript{91} Repeating the established purpose of the Truth-in-Lending Act of meaningful disclosure, the court held the use of "periodic finance charge," "cash advance finance charge," and "total finance charge" as disclosure terms complied with the required disclosure terms "finance charge" and "periodic rate" used in the Act.\textsuperscript{92} In addition, the court extended its common sense approach by holding that the use of an arithmetic disclosure sequence was meaningful.\textsuperscript{93}

Bankamerica used different color backgrounds to emphasize not only the finance charge and the annual percentage rate, but also the itemized portions of the finance charge. Although the itemized portions were included, the court held Bankamerica still complied with its duty to conspicuously disclose the finance charge.\textsuperscript{94}

After the \textit{Sosa} decision, the Fifth Circuit, in \textit{Philbeck v. Timmers Chevrolet, Inc.}\textsuperscript{95} addressed the use of credit life insurance in an automobile installment loan contract. \textit{Timmers} clearly disclosed that the purchase of credit life insurance was optional and that the existence of credit life insurance was not a factor in the extension of credit.\textsuperscript{96}

\textsuperscript{87} 479 F.2d 740 (5th Cir. 1973).
\textsuperscript{88} \textit{Id.} at 745.
\textsuperscript{89} \textit{Id.} at 747.
\textsuperscript{90} 516 F.2d 452 (5th Cir. 1975).
\textsuperscript{91} \textit{Id.} at 456.
\textsuperscript{92} \textit{Id.} at 456-57.
\textsuperscript{93} \textit{Id.} at 456-57.
\textsuperscript{94} \textit{Id.} at 457. \textit{But see} Zeltzer v. Carte Blanche Corp., 514 F.2d 1156, 1163 (3d Cir. 1975).
\textsuperscript{95} 499 F.2d 971 (5th Cir. 1974).
\textsuperscript{96} \textit{Id.} at 978-81. The court also noted that the TIL was designed to ensure meaningful disclosure of credit provisions so that consumers can intelligently choose credit plans.
Since the term of the insurance was the same as the contract's term, disclosure of the insurance's term was unnecessary, and therefore, Timmers did not have to include the cost of credit life insurance as part of the finance charge.\footnote{97. \textit{Id.} at 981; accord, \textit{Doggett v. Ritter Fin. Co.}, 528 F.2d 860, 863 (4th Cir. 1975).}

The Fifth Circuit began 1975 with another case concerning a home improvement contract, \textit{Sellers v. Wollman}.\footnote{98. 510 F.2d 119 (5th Cir. 1975).} Since the \textit{Sellers} trial court did not make findings of fact or conclusions of law, the Fifth Circuit held it could not review the merits of the case.\footnote{99. \textit{Id.} at 121-22.} Remanding the case, the court observed that contrary to the holding of \textit{Bostwick v. Cohen},\footnote{100. 319 F. Supp. 875, 878 (N.D. Ohio 1970).} a court may allow both the remedy of rescission and a recovery of damages.\footnote{101. \textit{Sellers v. Wollman}, 510 F.2d 119, 123 (5th Cir. 1975). \textit{See also} \textit{White v. Arlen Realty & Dev. Corp.}, 540 F.2d 645, 648 (4th Cir. 1975); 15 U.S.C.A. §§ 1635, 1640 (Supp. 1976).} In addition, the court observed that the award of attorneys' fees was not dependent upon the plaintiff's obligation to pay a fee.\footnote{102. \textit{Sellers v. Wollman}, 510 F.2d 119, 123 (5th Cir. 1975); \textit{see Martin v. Body}, 533 S.W.2d 461, 465 (Tex. Civ. App.—Corpus Christi 1976, no writ) (reasonableness of attorneys' fees must be shown).}

\textit{Burton v. G.A.C. Finance Co.}\footnote{103. 525 F.2d 961 (5th Cir. 1976).} was the first consumer credit case for the Fifth Circuit in 1976. The court vacated and remanded the trial court's decision for the creditor because of procedural mistakes which made the trial court's \textit{in camera} decision improper.\footnote{104. \textit{Id.} at 963-64.} The court adopted a narrow construction approach contrary to the common sense approach of \textit{Bussey}.\footnote{105. \textit{Id.} at 964-65 (dicta).} The finance company's contract stated: "\textit{[T]he cost of such insurance(s) may be obtained by borrower through any person of his choice, however, the lender reserves the right to refuse, for reasonable cause, to accept an insurer offered by the customer.}"\footnote{106. \textit{Id.} at 964.} The court held this disclosure did not advise the customer of his right to purchase the insurance from the person of his choice.\footnote{107. \textit{Id.} at 964-65.} In so observing, the Fifth Circuit created an internal contradiction as to whether a creditor must comply explicitly and precisely with the Truth-in-Lending Act or whether a meaningful, substantial compliance is sufficient.

Ten days later, the court faced its first attempt at a consumer class action in *Pennino v. Morris Kirschman & Co.* Mr. Pennino, a retail charge account customer of Kirschman, alleged the retailer had violated the Truth-in-Lending Act in its periodic statements to customers. The court followed the same strict interpretation approach as *Burton* and held that technical violations of the TIL were sufficient to invoke the Act's penalty provisions. The court strictly interpreted the bona fide error defense as being inapplicable unless the error was made in reliance on a "rule, regulation or interpretation" of the Federal Reserve Board. The retailer had additionally violated the Truth-in-Lending Act in a number of ways, such as the failure to use the term "new balance," the failure to clearly disclose the "billing date," and an inadequate disclosure of the security interest granted in purchased merchandise. Upon finding these violations, the court directed the trial court to consider the question of a class action. The court stressed that the retailer must make clear, meaningful disclosures so the consumer does not have to assume, surmise, or guess as to his credit status.

Six days later, a consumer again prevailed in *Williams v. United Credit Plan, Inc.*, the third such decision in a little over two weeks. Williams sued both the lender and contractor for rescission of a home improvement contract and for damages. The Fifth Circuit reversed a trial court's dismissal for failure to state a claim, stating that the plaintiff's failure to specify the alleged violations of the Truth-in-Lending Act was insufficient cause for dismissal. Parties should instead use other procedural devices, such as a motion for more definite statement, in order to narrow the issues. An allegation of a loan execution,

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108. 526 F.2d 367 (5th Cir. 1976).
109. *Id.* at 370. See *also* Hinkle v. Rock Springs Nat'l Bank, 538 F.2d 295, 297 (10th Cir. 1976).
110. *Pennino v. Morris Kirschman & Co.*, 526 F.2d 367, 370 n.3 (5th Cir. 1976). Federal Reserve Board regulations provide a defense where failure to comply results from a mechanical, electrical, or clerical error made in good faith. 12 C.F.R. § 202.11 (a) (1976). Here, the defendant removed the finance charge from the plaintiff's account with the simple explanation that it had been made "through inadvertence." 526 F.2d at 370 n.5.
112. *Id.* at 372.
113. *Id.* at 372.
114. 526 F.2d 713 (5th Cir. 1976).
the parties’ identity, and the subcontractor’s threat to take legal action against the borrower were sufficient to state a cause of action.117

Two days later, the consumers extended their winning streak in *Jones v. Community Loan & Inv. Corp.*118 *Jones* involved the question of whether statutory loan fees imposed pursuant to Georgia law were required to be disclosed as “prepaid finance charges.” Since loan fees were fully earned at the loan’s execution, Regulation Z required their disclosure as “prepaid.”119

After the Fifth Circuit’s decision, the Federal Reserve Board advised the defendants that the interpretative regulation120 was intended to effect a contrary result. The Fifth Circuit granted the defendants’ petitions for rehearing and reviewed their holding.

The *Jones* case was a consolidated appeal of three similar cases, two of which were distinguished upon rehearing. Affirming its first opinion, the court held that the loans in two cases were made prior to the Federal Reserve Board’s regulation and therefore the regulation was immaterial and the fees should have been disclosed.121

The third loan was made after the regulation’s amendment. The Fifth Circuit examined the Federal Reserve Board’s position and found that the loan fee must always be part of the “finance charge.”122 The court observed that the Federal Reserve Board’s limitation on the concept of “prepaid finance charge” would render meaningless the requirement of disclosure of such charges.123 In addition, the court expressed its view that the Federal Reserve Board’s interpretation was meaningless and contrary to the statutory scheme.124 The Fifth Circuit, however, recognized the statutory exemption from liability where the lender acted in reliance on the Federal Reserve Board’s regulation.125 The court limited its analysis to the regulation itself by holding that staff letters issued prior to all three loans could not affect the merits of a section 1640(f) defense.126 As a result of its holding,

117. Id. at 714.
118. 526 F.2d 642 (5th Cir. 1976).
119. Id. at 643. It is interesting to note that all of the consumer victories came as a result of the Fifth Circuit’s overturning trial court, creditor-oriented decisions.
120. 12 C.F.R. § 226.819 (1976).
122. Id. at 1231.
123. Id. at 1231.
124. Id. at 1232.
the court remanded the third case to determine if the lender had in fact acted in reliance on the Federal Reserve Board Regulation.\textsuperscript{127} By its reversal of the regulation, the court eliminated the possibility of using a section 1640(f) defense for any loan made after its decision which failed to disclose the loan fees as "prepaid."

The Fifth Circuit's dismissal of Federal Reserve Board staff letters as "not rules, regulations, or interpretations" and therefore immaterial for purposes of a section 1640(f) defense severely limits the value of the staff letters.\textsuperscript{128} The effect of this interpretation is to place on the lender the burden of obtaining official Board interpretations before commencing a course of action.

In \textit{Weaver v. General Finance Corp.},\textsuperscript{129} a per curiam opinion, the court held a creditor's contract violated TIL when it stated the amount financed would be reduced by the amount of the insurance charges.\textsuperscript{130} The Fifth Circuit agreed with the trial court that the provision was misleading to the consumer and confused the real identity of the amount financed, including the insurance charges not contained in the finance charge.\textsuperscript{131}

Consumer victories continued with \textit{Pollock v. General Finance Corp.}.\textsuperscript{132} Implementing the strict interpretation approach, the Fifth Circuit held a creditor must disclose the amount of cash given a debtor, individually itemized charges, and the total of the two in an installment cash loan.\textsuperscript{133} Although Pollock could have determined these figures by applying simple arithmetic to the disclosed figures, the court held the contract in question violated the Truth-in-Lending Act.\textsuperscript{134} The lender's security interest disclosure was also insufficient because it failed to explain the ten day limitation of subsection 9-204(2) of the Uniform Commercial Code.\textsuperscript{135} A third violation was committed where the lender used conditional language in one document regarding a security

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\textsuperscript{127} \textit{Id.} at 1232. \\
\textsuperscript{128} \textit{Id.} at 1232. \\
\textsuperscript{129} 528 F.2d 589 (5th Cir. 1976). \\
\textsuperscript{130} \textit{Id.} at 590. \\
\textsuperscript{131} \textit{Id.} at 590. \\
\textsuperscript{132} 535 F.2d 295 (5th Cir. 1976). \\
\textsuperscript{133} \textit{Id.} at 298. \\
\textsuperscript{134} \textit{Id.} at 299. \\
\textsuperscript{135} \textit{Id.} at 299. \\
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\textsuperscript{134} U.C.C. § 2-204(2) provides:
No security interest attaches under an after-acquired property clause to consumer goods other than accessions ... when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value.
interest in after-acquired property and mandatory language in another disclosure.\textsuperscript{138}

The next consumer credit case, \textit{Turner v. Firestone Tire \& Rubber Co.},\textsuperscript{137} created a conflict with the previous opinion in \textit{Thomas v. Myers-Dickson Furniture Co.}\textsuperscript{138} In \textit{Turner} the court found that Firestone's periodic statements violated the Truth-in-Lending Act by failing to disclose the cost of credit life insurance and by failing to include the cost in the finance charge on each statement.\textsuperscript{139} The court refused to accept the bona fide error defense because Firestone failed to provide factual evidence that the omission was a factual mistake and more importantly, that Firestone had made the mistake despite established "procedures reasonably adopted to avoid such error."\textsuperscript{140}

\textit{Turner} was a Pyrrhic victory for the consumer because his recovery was limited to the minimum statutory award of one hundred dollars. The court expressly held that a subsequent amendment of the Consumer Credit Protection Act legislatively reversed the Fifth Circuit's holding in \textit{Thomas}.\textsuperscript{141} As a result, the consumer could recover only once on his account even though the creditor sent numerous periodic statements, each of which violated the Truth-in-Lending Act.\textsuperscript{142}

The Fifth Circuit returned to the examination of installment automobile loans in \textit{Grant v. Imperial Motors}.\textsuperscript{143} Emphasizing again its strict analysis approach, the court expressly stated that the imposition of statutory penalties was not discretionary regardless of the technicality of the violation.\textsuperscript{144} The court held that one of the defendant car dealers violated the law when it failed to itemize and disclose the license, title, and registration fees chargeable in the transaction even though the violation was miniscule in its scope and amount.\textsuperscript{145}

The \textit{Grant} court also held that the failure to fill in a blank with the figure zero was not a per se violation since the figure was surplusage.\textsuperscript{146} In addition, the creditor need not disclose the right of acceleration since

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  \item \textsuperscript{136} Pollack v. General Fin. Corp., 535 F.2d 295, 300 (5th Cir. 1976).
  \item \textsuperscript{137} 537 F.2d 1296 (5th Cir. 1976).
  \item \textsuperscript{138} 479 F.2d 740 (5th Cir. 1973). See text accompanying notes 87-89 \textit{supra}.
  \item \textsuperscript{139} Turner v. Firestone Tire \& Rubber Co., 537 F.2d 1296, 1297-98 (5th Cir. 1976).
  \item \textsuperscript{140} Id. at 1298.
  \item \textsuperscript{141} Id. at 1298-99; see 15 U.S.C.A. § 1640(g) (Supp. 1976).
  \item \textsuperscript{142} Turner v. Firestone Tire \& Rubber Co., 537 F.2d 1296, 1299 (5th Cir. 1976).
  \item \textsuperscript{143} 539 F.2d 506 (5th Cir. 1976).
  \item \textsuperscript{144} Id. at 510.
  \item \textsuperscript{145} Id. at 510; accord, Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976).
  \item \textsuperscript{146} Grant v. Imperial Motors, 539 F.2d 506, 510 (5th Cir. 1976).
\end{itemize}
it was not a "default, delinquency or similar charge." Further, no disclosure was necessary to explain the "sum-of-digits" method in using that term to disclose the manner of figuring prepayment of a loan.

The *Grant* court approved the defendants' disclosure of a security interest which stated that "[h]older retains a security title to and a security interest in property until total of payments and any other indebtedness now or hereafter due or owing by Buyer to Holder, however and whenever incurred, is paid." In *Meyers v. Clearview Dodge*, a case factually similar to *Grant*, the Fifth Circuit uniquely analyzed the seller-assignee relationship. Judge Lynne, a District Judge sitting by designation, wrote the Fifth Circuit's opinion in both *Grant* and *Meyers*. In *Meyers* Judge Lynne observed that since the automobile dealer did not finance sales itself, but prearranged assignment of its buyers' contracts, the assignee-creditor was a "creditor" under the Truth-in-Lending Act and could not invoke the limited protection of a "subsequent assignee." Judge Lynne added that the two defendants were jointly responsible for making disclosures, but they were jointly and severally liable for only one statutory penalty. The court also held the creditor's assignment of proceeds to a reserve account for the seller's benefit did not constitute a "finders fee" required to be disclosed.

In *Martin v. Commercial Securities Co.*, the Fifth Circuit rejected several lower court decisions and a Federal Reserve Board Staff Opinion Letter and held failure to disclose an acceleration clause and rebate policy in an installment credit transaction was not actionable.

*Murray v. Amoco Oil Co.* involved a consumer's suit against Amoco alleging a violation of the Consumer Credit Protection Act for

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147. *Id.* at 508.
148. *Id.* at 509.
149. *Id.* at 508.
150. 539 F.2d 511 (5th Cir. 1976).
151. *Id.* at 514-15.
152. *Id.* at 515, 520-21.
153. *Id.* at 516-17.
154. 539 F.2d 521 (5th Cir. 1976).
155. *Id.* at 528-29; accord, *Meyers v. Clearview Dodge Sales*, Inc., 539 F.2d 511, 519 (5th Cir. 1976); *Grant v. Imperial Motors*, 539 F.2d 506 (5th Cir. 1976). These holdings were reasserted in three per curiam opinions: *McDaniel v. Fulton Nat'l Bank*, 543 F.2d 568 (5th Cir. 1976); *Whittlesey v. Ford Motor Credit Co.*, 542 F.2d 245, 246 (5th Cir. 1976); *Smith v. Avco Fin. Servs., Inc.*, 542 F.2d 242, 243 (5th Cir. 1976).
156. 539 F.2d 1385 (5th Cir. 1976).
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failure to send the consumer periodic statements regarding his open end credit account. Mr. Murray also alleged that Amoco had libeled him by referring his account to a collection agency. In an appeal from the district court’s dismissal of the complaint, the Fifth Circuit reversed that court’s decision. Taking a narrow view of the record, the Fifth Circuit limited its holding by saying that the dismissal was premature because the allegations stated on the face of Murray’s complaint must be taken as true. Amoco argued that under the implementing regulation they were relieved of the duty to send periodic statements because delinquency collection procedures had commenced. The court held Amoco’s position to be premature and one which should be developed during the subsequent trial. The court avoided a decision on the libel claim saying that the record was insufficient to allow a review of the claim on the merits, but instructed the district court to determine the propriety of exercising pendent jurisdiction over the libel claim.

The disclosure problems of consolidation or renewal loans were the subject of the Fifth Circuit’s decision in McGowan v. Credit Center, Inc. The court held that allocation of loan proceeds to pay prior debts was not part of the finance charge nor the cost of the loan at issue. Therefore, the amount of the prior loans and the amount of the retired debt were not required disclosures. Nevertheless, since the loan occurred prior to an amendatory interpretative regulation on prepaid finance charges, the lender’s failure to include a broker’s fee as part of the prepaid finance charge rendered the lender liable under the Truth-in-Lending Act.

CONCLUSION

While the future is always uncertain, the Fifth Circuit’s consumer credit decisions evince certain trends. The number of consumer credit decisions is increasing, indicating a growing awareness of consumer credit law. The concentration of activity in Louisiana and Georgia continues to identify these two states as the center of Truth-in-

157. Id. at 1387.
159. Murray v. Amoco Oil Co., 539 F.2d 1385, 1387 (5th Cir. 1976).
160. Id. at 1388.
161. 546 F.2d 73 (5th Cir. 1977).
162. Id. at 76.
163. Id. at 76-77.
Lending activity in the Fifth Circuit. The most significant trend is the increasing orientation of the Fifth Circuit in favor of the consumer. All of these trends may continue, but regardless of their viability, consumer credit law has come of age in the Fifth Circuit.

The legislation summarized in this article is only a part of the body of consumer law which has been passed recently by the United States Congress. The trend toward legislative consumer protection is expanding at such a rapid rate that Congress has empowered the Federal Trade Commission, and various other administrative agencies, with unprecedented authority to dictate by administrative decree various rules and regulations which bind the commercial community as well as creditors and sellers who deal directly with the consumer.\textsuperscript{164} Although some of the reforms pronounced in these administrative regulations and rulings have been necessary to provide adequate protection to the consumer in an expanding economy, the administrative agencies must learn to assert their new found rule-making power with caution and responsibility lest they regulate this area of our private enterprise system to such a degree that the benefits achieved by the recent consumer reform are totally lost.