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Emergence of Consumer Credit Protection - Federal and Texas.

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EMERGENCE OF CONSUMER CREDIT PROTECTION— FEDERAL AND TEXAS

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Credit is now an established feature in the financial life of virtually every American, allowing consumers the opportunity to obtain not only luxuries but also the more necessary benefits of education, medical assistance, and support during financial misfortune. Increasing numbers of consumers are being captivated by the promises of deferred payment spending advanced by modern advertising.

Because of the need to protect consumers from unprincipled credit practices, Congress undertook seven years of hearings regarding such practices, culminating in the Consumer Credit Protection Act.[1] This comment is concerned with subchapter I of that Act, popularly known as the Truth-in-Lending Act, which deals with full disclosures of the terms and conditions of finance charges and the advertising used to promote credit.[2]

The need for disclosures in credit sales arose from the consumer's inability to penetrate the "jungle of confusing terms and incomprehensible concepts" found in credit agreements and their related advertising.[3] In many instances an individual did not know what rate he was paying for credit and was baffled by such terms as "add-on rates," "one percent carrying charges," and "five and one-half percent per annum." Often the purchaser was victimized by complicated credit transactions imposed upon him after he had been drawn into an establishment by misleading and deceptive "easy credit" advertisements. Congress has sought to eliminate these practices by requiring all rates to be presented as a single common denominator termed the annual percentage rate[4] (APR). This will accomplish the basic purpose of the legislation which is:

> [T]o assure to the consumer sufficient, clearly understandable and readily comparable information to enable him to measure various types of consumer credit proposals with one another and then decide, with reasonable accuracy, which offer is more suitable to his economic situation, or a better buy, or whether he should dip into his savings

1. 15 U.S.C. §§ 1601-1681t (1970 & Supp. V 1975).
2. *Id.* §§ 1601-1665 (1970).
3. H.R. Rep. No. 1040, 90th Cong., 2d Sess. 1990 (1968).
4. B. Clark & J. Fonseca, Handling Consumer Credit Cases § 38, at 137-38 (1972); *see* 12 C.F.R. § 226.1(2) (1976); H.R. Rep. No. 1040, 90th Cong., 2d Sess. 1974 (1968).

or make other arrangements to avoid using credit in a particular situation.[5]

Because advertising is the primary method of getting customers into a store, advertising standards were included in subchapter I to encourage "comparison shopping."[6]

The Effect of Federal Law on State Law

Both the federal government and the several states have become increasingly aware of the problems created by the growing number of credit purchases. Texas was slow to enact credit legislation, perhaps because for many years lending was almost exclusively the domain of banks whose borrowers were commercial enterprises.[7] Primarily as a result of the Depression's disastrous effect on commercial borrowing, bankers sought new sources of profits and entered into the consumer credit field, furnishing funds to middle and low income families.[8] Such a potential market brought with it the inevitable unscrupulous creditor and caused the Texas Bar Association in 1952 to call upon the legislature to establish laws and penalties to control credit transactions and to create a supervisory agency to enforce such legislation.[9] It was not until 1960 that the Texas Constitution was amended to allow the legislature to categorize loans, to classify and regulate lenders, to define interest, and to set maximum rates of interest.[10] This led to the Texas Regulatory Loan Act[11] which was, in turn, repealed in 1967 by the Texas Consumer Credit Act.[12]

The Federal Consumer Credit Protection Act does not preempt state law unless there is an inconsistency with federal law.[13] While questions have arisen concerning the effect of Truth-in-Lending on state law, the effect should be minimal since state laws are not preempted except where they differ on matters relating to form, content, terminology, and items of disclosure.[14] That Congress intended Truth-in-Lending as a base upon which state law would build is illustrated by the fact that the provisions of

5. H.R. REP. No. 1040, 90th Cong., 2d Sess. 1990 (1968); *see* 15 U.S.C. § 1601 (1970 & Supp. V 1975); 12 C.F.R. § 226.1 (1976).

6. 15 U.S.C. §§ 1661-1665 (1970 & Supp. V 1975); *see* 12 C.F.R. § 226.10 (1976).

7. D. HOLMAN, CONSUMER CREDIT LAW IN TEXAS 11 (1970).

8. *Id.*

9. *Id.* at 12.

10. TEX. CONST. art. XVI, § 11.

11. Tex. Laws 1963, ch. 205, at 550.

12. TEX. REV. CIV. STAT. ANN. arts. 5069-2.01 to -8.05 (1971 & Supp. 1976-1977).

13. The intention of Congress was to provide minimum requirements that would build on state law, not preempt it. H.R. REP. No. 1040, 90th Cong., 2d Sess. 1984-85 (1968); *see* Hodgson v. Cleveland Mun. Court, 326 F. Supp. 419, 437 (N.D. Ohio 1971); 15 U.S.C. § 1610(a), (b), (d) (1970 & Supp. V 1975); 12 C.F.R. § 226.6(b) (1976).

14. 12 C.F.R. § 226.6(b) (1976).

subchapter I are limited to credit cost disclosures.[15] Therefore, federal requirements do not affect state usury laws. Lenders may continue to offer credit at terms and interest rates permitted by state law as long as the required federal disclosures are made to the consumer before he enters into a contract.[16] It is also possible for a state to qualify for an exemption from the federal law.[17] Recently enacted amendments should qualify Texas for exemption status, thereby ensuring regulation of consumer credit as a state rather than a federal function.[18]

Federal Requirements for Credit Advertising

Subchapter I of the Consumer Credit Protection Act deals with both credit transactions and credit advertising. Credit transactions are regulated by requiring that specified person-to-person disclosures be made to consumers before they enter into contracts. These disclosures vary somewhat depending upon the nature of the installment agreement. Advertising is included in the disclosure section of the Truth-in-Lending Act because of its primary role in drawing consumers into the market place.[19] Allowing misrepresentations to be made through advertising would seriously limit the beneficial effects of the person-to-person disclosure requirements.[20]

This concern has been manifested in the attempt to limit "bait advertising" of credit terms.[21] In the absence of regulated credit advertising, an indi-

15. *See* Burgess v. Charlottesville Sav. & Loan Ass'n, 477 F.2d 40, 44 (4th Cir. 1973); H.R. Rep. No. 1040, 90th Cong., 2d Sess. 1982 (1968); Boyd, *The Federal Consumer Credit Protection Act—A Consumer Perspective*, 45 Notre Dame Law. 171, 174 (1970).

16. H.R. Rep. No. 1040, 90th Cong., 2d Sess. 1977 (1968). It is clear "that the annual percentage rate required to be disclosed under . . . the bill is not an interest rate within the meaning of the various State usury laws." *Id.* It is rather a composite of all charges incident to credit only one of which is interest. *Id.*

17. 15 U.S.C. § 1633 (1970) provides:

> The Board shall by regulation exempt from the requirements of this part any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those imposed under this part, and that there is adequate provision for enforcement.

As of 1972 five states had received Truth-in-Lending exemptions: Connecticut, Maine, Massachusetts, Oklahoma, and Wyoming. [1976] 1 Cons. Cred. Guide (CCH) ¶¶ 3680-3684 (1976). *See also* 12 C.F.R. § 226.12 (1976).

18. *See* Tex. Rev. Civ. Stat. Ann. art. 5069-14.01 to .28 (Supp. 1976-1977); D. Holman, Consumer Credit Law in Texas 17 (1970); *cf.* Sosa v. Fite, 465 F.2d 1227, 1229 (5th Cir. 1972) (exemption qualification a Board decision, not a judicial one. *See generally* Illig, *Consumer Credit: Meshing Truth-in-Lending with the Texas Code*, 33 Tex. B.J. 87 (1970).

19. "The public's exposure to advertising may [be] as high as 1500 ads a day for an average family." Note, *The FTC Ad Substantiation Program*, 61 Geo. L.J. 1427 (1973), *citing* R. Bauer & S. Greyser, Advertising in America: The Consumer View 173 (1968).

20. *See* Boyd, *The Federal Consumer Credit Protection Act—A Consumer Perspective*, 45 Notre Dame Law. 171, 186 (1970).

21. *Id.* at 186. The FTC has developed advertising guidelines to combat the "bait

vidual could be lured into a store advertising low credit terms, and under the influence of coercive sales pressure be enticed into accepting the mandatorily disclosed credit terms although they are harsher than those advertised. This vitiates the purpose of requiring disclosures to be made before the consumer signs the credit contract. Regulation of credit advertising requires *meaningful* disclosure of credit terms whenever credit is advertised so that consumers may shop for credit in much the same way they shop for goods. Upon full disclosure of credit terms the consumer is given the option to decide that a credit agreement includes exorbitant and excessive costs and would therefore be an undesirable means of purchase financing.

Two general rules have been established regarding the advertising of credit: (1) a creditor may not advertise terms for credit or installment amounts unless he usually and customarily does so for that period and in that amount, and (2) no advertisement may state that a specified down payment will be accepted in connection with credit unless the creditor will or customarily does accept such a down payment.[22]

Under the Act, the term "advertisement" assumes a broad range of forms and media including newspaper and magazine ads, leaflets, flyers, catalogs, commercial messages on radio, television, and public address systems, direct mail literature or other printed material, window displays, and price tags.[23] Neither phone conversations nor personal contact, however, appear to be included as advertising as defined by the Federal Reserve Board.[24]

Both the person-to-person disclosures and the advertising requirements of the Truth-in-Lending Act categorize credit transactions as either open end

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and switch" scheme. 16 C.F.R. § 238 (1976); *see* Tashof v. FTC, 437 F.2d 707, 709 (D.C. Cir. 1970).

22. 12 C.F.R. § 226.19(a) (1976); *see* 15 U.S.C.A. § 1667 (Pamp. Supp. II 1976). The Consumer Leasing Act of 1976 is a new amendment to the Truth-in-Lending Act regulating leasing of personal property. As with Truth-in-Lending, the advertising of specifics relating to payments or downpayments triggers disclosure of the other important items. *Id.* § 1667(c).

23. *Compare* 12 C.F.R. § 226.2(d) (1976), *with* 16 C.F.R. § 238 (1976) (advertising includes any form of public notice however disseminated or utilized). In Garza v. Chicago Health Clubs, Inc., 329 F. Supp. 936, 941 (N.D. Ill. 1971), the court held that Congress visualized the term "advertisement" to include only the traditional notice for selling of goods and services designed and generally circulated to attract public attention.

24. *See* Boyd, *The Federal Consumer Credit Protection Act—A Consumer Perspective*, 45 NOTRE DAME LAW. 171, 187 (1970), *citing* R. JOHNSON, R. JORDAN, & W. WARREN, MANUAL ON THE FEDERAL TRUTH-IN-LENDING LAW (1969). Additionally, telephone solicitations seem to be excluded from the term "advertisement." "Such 'personal contact' advertising has become increasingly common. Aside from the fact that the persistence of such uninvited callers is downright annoying, the potential for abuse inherent in such solicitation is great." 45 NOTRE DAME LAW. at 187. *Compare* 12 C.F.R. § 226.2(d) (1976), *with* 16 C.F.R. § 238.0 (1976). *But see* Lucas v. Park Chrysler Plymouth, Inc., 62 F.R.D. 399, 404 (N.D. Ill. 1974) (plaintiff's cause of action allowed where defendant offered *oral* credit terms, but failed to disclose Truth-in-Lending requirements).

or other than open end transactions.[25] An open end transaction, or revolving charge account, is defined as credit extended on an account where purchases or loans may be made from time to time by using a credit card, check, or whatever other device the plan provides.[26] The purchaser may pay the balance in full or through installments, in which case a finance charge may be computed periodically on the outstanding balance.[27] While payments are being made on the account, the debtor continues to make purchases and his credit is said to revolve.[28] The advertising disclosure requirements for an open end transaction include a requirement that if a creditor advertises any single credit term with particularity, he must include all other terms of the transaction with specificity.[29] No advertisement of open end credit may set forth any of the disclosures required in opening a new account, or any specifics about down payments, unless it sets forth clearly and conspicuously all of the following: (1) the conditions under which a finance charge may be imposed; (2) the method of determining the balance on which a finance charge may be imposed; (3) the method of determining the amount of the finance charge; (4) the conditions under which any other charge may be imposed and by what method it will be determined; (5) conditions under which a security interest may be acquired to secure payment; and (6) the minimum periodic payment required.[30] This precludes a creditor from advertising partial terms such as "10% down and easy monthly payments" or "nothing down, $10 a week for up to 42 weeks" without making all of the required disclosures.

Transactions other than open end have basically the same requirements as open end transactions in that if any single term is stated with specificity, other than the annual percentage rate or the cash price, all other terms must also be specified.[31] No advertisement may state any specifics as to down payment, installments, dollar amount or rate (other than the annual percentage rate) of the finance charge, the period of repayment, or absence of a credit charge unless it clearly sets out all of the disclosure terms. These terms include: (1) cash price; (2) down payment specifics; (3) repayment schedule; (4) annual percentage rate; and (5) except for first mortgages, the deferred payment price if the transaction is a sale or the total of payments

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25. *Compare* 15 U.S.C. §§ 1637, 1638 (1970), *with* 12 C.F.R. § 226.10(c), (d) (1976).
26. 12 C.F.R. § 226.2(x) (1976).
27. 15 U.S.C. § 1602(i) (1970); 12 C.F.R. § 226.2(x)(2), (3) (1976).
28. *See* D. HOLMAN, CONSUMER CREDIT LAW IN TEXAS 8 (1970).
29. 15 U.S.C. § 1663 (1970); *see* B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 42, at 150 (1972).
30. B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 42, at 150 (1972).
31. *See id.*

if the transaction is a loan.[32] Phrases such as "only $5 a month" or "24 months to pay" would require all of the above disclosures.

Two forms of advertising used by many retailers are catalogs and multi-page advertisements or "inserts" (commonly displayed in newspapers and magazines). To eliminate expense and needless repetition in these situations a single table or schedule of credit terms clearly and conspicuously referred to at any other point in the catalog where credit terms are advertised will eliminate the need for separate disclosures of each item advertised.[33] The table must contain all of the disclosures required by Truth-in-Lending, including a schedule of annual percentage rates for available financing plans. When the catalog contains minimum to maximum priced merchandise, the schedule of terms must include all amounts up to the commonly sold, highest priced property and services offered.[34] Should the goods exceed the value listed in the table, the creditor must state the method by which the finance charge is computed on the larger amounts and how the amount and number of payment periods is determined.[35]

Regulation Z also governs advertising of residential real estate which is financed through the Federal Housing Administration and compliance with all advertising disclosures is required.[36] In addition, if an advertisement states the amount of any scheduled repayment, it must also state the family size and income necessary to qualify for that amount.[37]

REMEDIES AND WEAKNESSES IN FEDERAL CREDIT ADVERTISING REGULATIONS

Federal administrative agencies are responsible for enforcing the advertising provisions of the Truth-in-Lending Act. Very few penalties are stipulated for noncompliance with the Act's requirements, and no liability extends to the owner of an advertising medium in which a violation of the Act occurs.[38] Criminal liability is imposed for any knowing and willful violations;[39] however, a great inequity may result due to the fact that the en-

32. 15 U.S.C. § 1664(d) (1970); 12 C.F.R. § 226.10(d) (1976).
33. 15 U.S.C. § 1661 (1970). *See also* 12 C.F.R. § 226.1002 (1976).
34. This table need not exceed $1,000 unless the creditor elects that it do so. 12 C.F.R. § 226.1002(b) (1976).
35. *Id.*
36. *Id.* § 226.10.
37. *Id.* § 226.10(e)(2). "The annual percentage rate exclusive of the assistance may be stated, but is not required." *Id.* § 226.10(e). The newest amendment to Regulation Z involves credit installments. Unless a finance charge is imposed, any advertisement extending credit repayable in more than four installments must state that the cost of credit is included in the cost of goods and services. *Id.* § 226.10(f).
38. 15 U.S.C. § 1665 (1970). "There is no liability under this part on the part of any owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated." *Id.*
39. *Id.* § 1611; 12 C.F.R. § 226.1(c) (1976).

forcement provisions do not provide for private civil relief. This was clearly illustrated in *Jordan v. Montgomery Ward & Co.*,[40] where the plaintiff purchased merchandise from defendant's winter sale catalog which contained the statement, "PRE-SEASON SPECIAL *no monthly payments till June.*"[41] Jordan later learned that the finance charges on his purchases began to accrue on the date of purchase rather than from the date on which payment was due. A class action suit on behalf of other purchasers similarly affected was then instituted against Montgomery Ward for publishing an advertisement that failed to conform to the Truth-in-Lending requirements. The Jordans conceded that a suit could not be maintained by persons who merely saw a noncomplying advertisement, but pointed out that persons who were induced by such an advertisement and did, in fact, make purchases should be allowed to maintain an action under chapter II of the Truth-in-Lending Act.[42] In denying the Jordans standing to sue, the court determined that no individual relief could issue for violations of the credit advertising provisions of the Act.[43] The court pointed out that the Federal Truth-in-Lending Act is divided into three parts: general provisions, credit transactions, and credit advertising.[44] While the chapter concerning credit transactions expressly provides for civil liability, the credit advertising chapter does not, and for this reason it was held that Congress did not intend that this remedy be applied to illegal advertising practices regardless of whether the consumer had in fact been injured.[45] The court's conclusion is partially borne out by an examination of the legislative history of the Act:

> The bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of the bill would attempt to seek civil penalties.[46]

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40. 442 F.2d 78, 81 (8th Cir.), *cert. denied*, 404 U.S. 870 (1971). *See also* Annot., 11 A.L.R. Fed. 815, 830 (1972).

41. Jordan v. Montgomery Ward & Co., 442 F.2d 78, 79 (8th Cir.), *cert. denied*, 404 U.S. 870 (1971).

42. *Id.* at 80.

43. *Id.* at 81-82; *cf.* Oldham v. Oldham, 337 F. Supp. 1039, 1040 (N.D. Iowa 1972) (civil relief denied with respect to violations of garnishment provisions of Consumer Credit Protection Act). *But see* Garza v. Chicago Health Clubs, Inc., 329 F. Supp. 936, 941 (N.D. Ill. 1971) (court has jurisdiction to enjoin fraudulent credit advertising upon request of injured private citizen). *See also* Annot., 11 A.L.R. Fed. 815, 830 (1972).

44. *See* 15 U.S.C. §§ 1601-1665 (1970 & Supp. V 1975).

45. Jordan v. Montgomery Ward & Co., 442 F.2d 78, 81 (8th Cir.), *cert. denied*, 404 U.S. 870 (1971). *See also* 15 U.S.C. § 1640 (1970 & Supp. V 1975). For failure to comply with credit transaction disclosures, liability is equal to twice the sum of the finance charge up to $1,000 plus attorneys' fees. *Id.* § 1640.

46. H.R. Rep. No. 1040, 90th Cong., 2d Sess. 1962, 1976 (1968). The section on penalties sets forth the civil penalties for failure to comply with the credit transaction portions of the Act, but expressly excludes civil relief for violations of the advertising requirements. *Id.* at 1987. *See also* 15 U.S.C. § 1640(a) (1970 & Supp. V 1975). The provisions for civil liability read in part "any creditor who fails to comply with any

Although a person who merely observes a deceptive advertisement should be denied recourse to a civil suit, there is no logical reason for denying relief to one who is damaged by entering into a contract as a result of reliance on the advertising. The *Jordan* case implies that the consumer's sole federal remedy at present is to file a complaint with the appropriate enforcement agency.[47] This handicap could be circumvented by an individual suing under an appropriate state statute providing civil liability for violations of state advertising requirements.[48]

Because the Jordans lacked standing, the court never addressed the issue of whether advertising "no payment till June" without stating that the interest charge begins from the date of the contract would be a violation of the Federal Truth-in-Lending Act. This question was considered in a Federal Reserve Board opinion.[49] The Board felt that neither the Consumer Credit Protection Act nor Regulation Z requires the specific disclosure of the date on which the finance charge begins to accrue; however, the statement "no payment till June" would require credit advertising disclosures.[50] This is in contrast to the phrase "you may defer your first monthly *installment* till February," which does not trigger any of the disclosures since it refers to installments in general when used in other than open end credit transactions.[51]

The situation in *Jordan* illustrates what may be another weakness in the Truth-in-Lending Act. Presently, subchapter I requires only that minimum

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requirement imposed under *this part* [credit transactions] . . . ." (emphasis added). *Id.* § 1640. There is no similar provision for civil liability in the credit advertising section. It has been suggested that civil liability is excluded because advertising is aimed at consumers in general and that no particular individual has standing to complain of a violation. *See* Boyd, *The Federal Consumer Credit Protection Act—A Consumer Perspective*, 45 NOTRE DAME LAW. 171, 187-88 (1970).

47. *See* Jordan v. Montgomery Ward & Co., 442 F.2d 78, 79 (8th Cir.), *cert. denied*, 404 U.S. 870 (1971). *Contra*, Garza v. Chicago Health Clubs, Inc., 329 F. Supp. 936, 941 (N.D. Ill. 1971) (court "assumed" it would have jurisdiction to enjoin fraudulent advertising upon request of injured private citizen).

48. *See* TEX. REV. CIV. STAT. ANN. arts. 5069-14.21 to .26 (Supp. 1976-1977); TEX. BUS. & COMM. CODE ANN. §§ 17.50, .51, .62 (Supp. 1976-1977).

49. Correspondence from G.L. Garwood, Adviser, Federal Reserve System, April 16, 1970, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,344. While Board opinions are not considered binding, they are helpful in determining how the Truth-in-Lending Act may be interpreted.

50. *Id.* Despite the fact that failure to state specifically when a finance charge will begin is not a violation of Regulation Z, the FTC has expressed concern over this practice. *Id.* Hopefully this practice will be included in the FTC's general regulatory power and be deemed an unfair or deceptive practice. *See* 15 U.S.C. § 45 (1970 & Supp. V 1975).

51. Correspondence from Frederic Solomon, Director, Federal Reserve System, Nov. 28, 1969, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,223. "[T]he phrase 'you may defer your first *payment* until February' " would require all disclosures to be stated as this phrase is held to imply that no downpayment is required. *Id.*

disclosures be made, but there are no prohibitions against unfair or deceptive credit practices and advertising.[52] The Truth-in-Lending Act does not require a statement of the date on which finance charges begin to accrue.[53] Despite this, the issue is presented as to whether advertising phrases such as "no payment till June" are deceptive in cases where interest actually begins to accrue at the time the contract is completed and the creditors fail to reveal this in their advertisements. Even if this practice were deceptive, no relief would be provided by the Truth-in-Lending Act. This deficiency is remedied in part by the fact that the FTC is the administrative agency that primarily enforces Truth-in-Lending provisions and the FTC does have the power to prohibit deceptive and unfair trade practices.[54] Although a failure to advertise that interest begins to accrue on the day the contract is executed does not violate disclosure requirements under section 226.10 of Regulation Z, it would seem that this practice is deceptive and may constitute a violation of the Federal Trade Commission Act.[55] To ensure adequate consumer protection the Truth-in-Lending Act could be enlarged in scope and purpose by incorporating provisions to combat both deceptive credit practices and deceptive credit advertising. This would provide the individual states with minimum guidelines which could be modified or expanded.

Another criticism of the Truth-in-Lending Act relates to the "all or nothing" requirement of the advertising provisions.[56] If a creditor chooses to disclose any important term with specificity, he must disclose all the important terms. While the argument may be made that the disclosures often confuse rather than enlighten,[57] the advantage gained by the consumer is that he is protected against false and misleading advertising. The problem with the degree of specificity required by the Truth-in-Lending Act is that a creditor may avoid the law by utilizing advertisements which are very vague. This is demon-

52. *See generally* 15 U.S.C. §§ 1601-1681t (1970 & Supp. V 1975).

53. *See* Correspondence from G.L. Garwood, April 16, 1970, [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,344.

54. *See* 15 U.S.C. § 45(a)(1) (1970 & Supp. V 1975) (unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce declared unlawful). *But see* 15 U.S.C. § 52 (1970 & Supp. V 1975), which deals with FTC prohibitions against false advertising. These prohibitions only involve inducements to purchase food, drugs, devices, or cosmetics. It is not clear whether the jurisdiction of the FTC is limited to the items specified. It could be argued that the broad prohibitions in § 45 regarding unfair or deceptive acts encompass advertising in general and credit advertising in particular.

55. In determining whether advertising is false, misleading, or deceptive it is the overall impression conveyed which is determinative. *See* Spiegel, Inc. v. FTC, 411 F.2d 481, 483 (7th Cir. 1969); Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942). *See also* B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 42, at 151 n.21 (1972). For examples of what constitutes false, misleading, or deceptive advertising or promotional practices see Annot., 65 A.L.R.2d 225 (1959).

56. Boyd, *The Federal Consumer Protection Act—A Consumer Perspective*, 45 NOTRE DAME LAW. 171, 186 (1970).

57. *Id.* at 186.

strated by the frequent use of terms such as "easy credit," "the cheapest credit in town," and "liberal terms." While these terms are outside Truth-in-Lending requirements, they may violate section 45 of the Federal Trade Commission Act.[58]

The FTC has established standards for using terms such as "easy credit," "liberal terms," "easy payment plan," and similar phrases by holding that these terms relate to credit worthiness as well as to the terms of sale and credit repayment.[59] These terms are held to mean that: (1) credit is extended without determining financial ability to pay or credit ratings, thus causing credit to be extended to persons whose ability to pay or credit rating is below normal standards; (2) prices charged for the goods do not exceed prices charged for similar goods sold by other retail establishments; (3) finance charges and annual percentage rates do not exceed those charged to persons who have acceptable credit worthiness; (4) downpayments and periods of repayment are the same as for persons who are determined to be credit worthy; and (5) debtors are dealt with fairly even when there is a delayed or missed payment.[60] This interpretation was established because such advertising is directed primarily to lower-income people who may be forced to purchase credit at high cost and should be protected.

CREDIT ADVERTISING IN TEXAS

In Texas there are two weapons which may be used to combat false or misleading advertising. The first is chapter 14 of the Texas Consumer Credit Act, which is designed to bring Texas into compliance with the federal disclosure requirements.[61] The Texas requirements are substantively the same as the federal, except that in Texas requirements for advertising of credit for other than open end transactions are not applicable to residential real estate.[62] While criminal liability is imposed for knowing and willful violations of credit disclosures, chapter 14 also has a subsection providing civil relief for violations of credit disclosures, but it is unclear whether this also applies to advertising disclosures.[63] "[A]ny creditor who fails in con-

58. 15 U.S.C. § 45 (1970 & Supp. V 1975). *See also* B. CLARK & J. FONSECA, HANDLING CONSUMER CREDIT CASES § 42, at 150 (1972).

59. [1969-1974 Transfer Binder] CONS. CRED. GUIDE (CCH) ¶ 30,251.

60. *Id. See also* Tashof v. FTC, 437 F.2d 707 (D.C. Cir. 1970).

61. TEX. REV. CIV. STAT. ANN. arts. 5069-14.01 to .28 (Supp. 1976-1977). The provisions of this chapter have added terms to the Texas Credit Code sufficiently related to the federal requirements to qualify for exemption from the Federal Truth-in-Lending Act. *See* Wallenstein & St. Claire, *Property, Annual Survey of Texas Law*, 30 Sw. L.J. 28, 48-49 (1976).

62. *Compare* 12 C.F.R. § 226.10 (d) (1976), *with* TEX. REV. CIV. STAT. ANN. art. 5069-14.24(b) (Supp. 1976-1977). "The provisions of this Article do not apply to advertisements of residential real estate except to the extent that the [Consumer Credit] Commission may by regulation require." *Id.*

63. TEX. REV. CIV. STAT. ANN. art. 5069-14.19 (Supp. 1976-1977).

nection with any *consumer-credit transaction* to disclose to any person" any required information may be liable.[64] No provision gives administrative agencies the exclusive right to prosecute violations of advertising requirements in Texas and it seems, therefore, that civil relief should be available.[65] Conversely, it might be argued that if advertising were intended to be included in the section dealing with civil remedies, this would constitute an inconsistency with federal provisions wherein the latter would prevail. This, however, overlooks the fact that the inconsistency standard is limited to disclosure requirements and a divergence of penalties is probably permissible.[66] Nevertheless, the better view would be to afford a civil remedy to an individual who has relied to his detriment on deceptive or false advertising.

Texas consumers have a second means of relief available in the Texas Deceptive Trade Practices—Consumer Protection Act[67] (DTPA). Section 17.12 of this Act deals with deceptive advertising and provides criminal liability for persons who knowingly misrepresent the cost or character of personal property, security, or service for the purpose of disposing of it through sale or inducing a person to contract with regard to it.[68] Additional provisions are made for soliciting in another's name without written permission.[69] As with the federal law, the media is exempt from liability except where the owner or employees of the advertising medium have knowledge of the unlawful act or have a direct interest in the sale or distribution of the unlawfully advertised goods or services.[70] If a seller is prosecuted for deceptive advertising, that seller may recover his damages against a third party who provided the advertisement or promotional material. To prevail, the vendor must have been a conduit of a third party and only received and disseminated the advertisement.[71]

The DTPA provisions concerning deceptive advertising only provide criminal liability for violations;[72] a consumer may, however, seek civil damages and obtain relief under section 17.46 of the DTPA.[73] While this section does not define what constitutes a delusory act, section 17.46 sets out a series of acts or conduct that would be considered false, misleading, or de-

64. *Id.* (emphasis added).
65. *But see id.* art. 5069-2.02 (1971), and art. 5069-14.06 (Supp. 1976-1977) (Consumer Credit Commissioner shall enforce certain chapters of the Consumer Credit Protection Act).
66. *See* 12 C.F.R. § 226.6(b)(1)(i) (1976); *accord*, Illig, *Consumer Credit: Meshing Truth-in-Lending with the Texas Code*, 33 TEX. B.J. 87, 89 (1970).
67. TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Supp. 1976-1977). *See also* Bourland v. State, 528 S.W.2d 350 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).
68. TEX. BUS. & COMM. CODE ANN. § 17.12(a), (d) (Supp. 1976-1977).
69. *Id.* § 17.12(b).
70. *Id.* § 17.49(a).
71. *Id.* § 17.55.
72. *Id.* § 17.12(d).
73. *Id.* §§ 17.46, .50(b).

ceptive practices.[74] Two subsections of 17.46 specifically relate to deceptive advertising. Subsection 9 prohibits advertising goods or services without intending to sell them as advertised.[75] This section is notably broad and appears applicable to any number of deceptive practices, including credit advertising, if the requisite intent can be shown. Subsection 10 provides that no creditor may advertise goods intending not to supply a reasonably expectable public demand unless the advertisement limits the quantity.[76] This section was included to provide a civil remedy for the once prevalent practice of "bait and switch."[77] Typically, customers were drawn into a store by advertisements of sale items which were stocked in very limited quantities. After being informed that these sale items were no longer in stock, the unwary purchaser was often persuaded to buy another item at a higher price.

Subsection 9 appears to encompass credit advertising when such could reasonably be considered deceptive or misleading. Since deceptive practices are not limited to the enumerated acts, recovery under the general provisions of section 17.46 should be allowed thereby providing civil relief in Texas for consumers who have relied on deceptive credit advertising.[78]

To encourage aggrieved individuals to file suit for deceptive practices, the penalties recoverable against violators are treble damages, court costs, and reasonable attorneys' fees.[79] Individuals with smaller monetary injuries or those who are poor credit risks will be more inclined to seek recourse against an unscrupulous advertiser where damages are trebled.

Assuming civil liability under section 14.19 of the Consumer Credit Act is held to include advertising, it is conceivable that an individual could receive a double recovery for an advertising violation. The DTPA provides that its remedies for deceptive practices are in addition to any other remedies or procedures provided for in any other law.[80] Thus an individual could recover under both the DTPA and the Consumer Credit Code.

CONCLUSION

Both Texas and federal legislative enactments reflect a growing movement to protect the consumer from deceptive practices. This legislation should be considered only a beginning, with the laws now in force being liberally construed to inhibit illegal practices.

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74. *Id.* § 17.46.
75. *Id.* § 17.46(b)(9).
76. *Id.* § 17.46(b)(10). *See generally* Annot., 50 A.L.R.3d 1008 (1973) (discussing bait and switch practices).
77. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(8) (Supp. 1976-1977). *See generally* 16 C.F.R. § 238.0 to .44 (1976) for FTC guidelines against bait advertising. *See also In re* Seekonk Freezer Meats, Inc., 82 F.T.C. 1025, 1033-44 (1973).
78. TEX. BUS. & COMM. CODE ANN. § 17.46(b)(9), (10) (Supp. 1976-1977).
79. *Id.* § 17.50(b)(1).
80. *Id.* § 17.43.

In pursuit of these objectives, an inequity at the federal level should be reexamined. Congress specifically provided that federal agencies enforce the credit disclosure requirements of the Truth-in-Lending Act. The purpose was to stop abusive practices aimed primarily at persons of modest income who are frequently unsophisticated and particularly vulnerable to the inducements and misrepresentations of unscrupulous creditors. These consumers lack both the means and the knowledge to seek proper redress for abuses. Additional provisions also furnished the credit advertising section of Truth-in-Lending with the protection of administrative enforcement; violations of the credit advertising section, however, may *only* be prosecuted by these agencies. In denying standing to individuals who have merely observed an illegal advertisement, the legislature has also denied recovery to consumers who have legitimate grievances. The disallowance of civil recourse for violations of the advertising provisions undermines what should be a fundamental policy consideration: provision for remedies that allow full recovery to consumers who have been induced by deceptive advertising into executing contracts. By rejecting the private attorney-general concept, strict agency enforcement may operate to limit consumer protection in the advertising field rather than aid the uninformed consumer.

Pursuit of judicial remedies and the imposition of substantial damages is the best deterrent to credit advertising abuses. Moreover, civil recovery for advertising violations would ensure the integrity of person-to-person disclosures. It is suggested that the federal law regarding civil liability be reconsidered to allow recovery by persons who have been enticed by illegal credit advertisements and acted in reliance thereon.