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CREDIT LIFE AND DISABILITY INSURANCE DISCLOSURES UNDER TRUTH-IN-LENDING: THE TRIUMPH OF FORM OVER SUBSTANCE

JOHN M. SHEFFEY*

I. INTRODUCTION

It is rare for a consumer to buy an automobile, finance a major home appliance or borrow money from a bank or finance company and not also be solicited and encouraged to buy credit life and disability insurance.1 It is almost as unusual for a consumer to decline the insurance.2 Recognizing the importance of credit life and disability insurance in consumer credit transactions, Congress mandated uniform disclosure of the terms of consumer credit transactions in the Truth-in-Lending Act (the Act),3 which provides:

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1. Credit life insurance is insurance on the life of the debtor which provides, in the event of the debtor's death, that the insurer will pay to the creditor the scheduled, unpaid balance of the obligation. AMERICAN COUNCIL OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK 1979 34 (1979); L. DAVIDS, DICTIONARY OF INSURANCE 74 (1970). Credit disability insurance, also known as credit accident and health insurance, provides that if the insured debtor becomes disabled within the meaning of the policy the insurer will meet the installment payments due so long as the insured remains disabled. See, e.g., ARK. STAT. ANN. § 66-3804(2) (1966); CAL. INS. CODE § 779.2(2) (1972); Act of July 15, 1959, Ins. Code § 155.52, ILL. REV. STAT. ch. 73, § 767.52(b) (1975); MICHIGAN COMP. LAWS ANN. § 550.603(2) (1967). Each type of coverage is issued in connection with individual consumer credit transactions, and the seller or lender typically provides for or arranges for the insurance as well as the credit.

Other types of insurance may also be sold in connection with the credit transaction, the premiums for which may also be included in the finance charge and annual percentage rate. See, e.g., 15 U.S.C. § 1605(c) (1976); 12 C.F.R. § 226.4(a)(6) (1979), (insurance on property); Federal Reserve Board Letter no. 1286, excerpts published in TRUTH-IN-LENDING, SPECIAL RELEASES—CORRESPONDENCE, APRIL 1969 TO OCTOBER 1978 91 (CCH 1979) [hereinafter cited as FRB Letter 1286] with regard to “non-credit” life or disability insurance (insurance not made payable to the creditor). See also Cody v. Community Loan Corp., 606 F.2d 499 (5th Cir. 1979) (cancer insurance in connection with loans). Discussion of these other forms of insurance is beyond the scope of this article, and all references herein to “insurance” and “credit insurance” are solely to credit life and credit disability insurance.

2. Apparently it is not unusual for creditors to have “penetration” rates (the percentage of credit transactions in which the borrower also takes out insurance) “approaching 100%.” BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT TO CONGRESS ON TRUTH-IN-LENDING FOR THE YEAR 1976 34 (1977) [hereinafter cited as 1976 FRB REPORT TO CONGRESS]; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT TO CONGRESS ON TRUTH-IN-LENDING FOR THE YEAR 1974 12 (1975) [hereinafter cited as 1974 FRB REPORT TO CONGRESS]. See Paer, Truth-In-Lending: Protection for the Consumer or for the Creditor? 24 EMORY L.J. 357, 373-75 (1975).


In 1968, the year of enactment of the legislation, the total number of credit life insureds...
Charges or premiums for credit life, accident, or health insurance written in connection with any consumer credit transaction shall be included in the finance charges unless

(1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and

(2) in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof.4

A similar, although not verbatim, provision is found in the Federal Reserve Board’s Regulation Z under the Act.5 While it is not entirely certain whether these two provisions have identical meanings,6 for present purposes it is sufficient to understand that both

under both group and individual policies was 74,851,000 and the total amount of such insurance in force was $68,357,000,000. AMERICAN COUNCIL OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK 1978 33 (1978). The volume of credit life insurance has grown steadily since then, and in 1978 the total number of credit life insureds was 83,725,000. These individuals were insured for a total amount of $183,081,000,000. AMERICAN COUNCIL OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK 1979 34 (1979). These figures do not include credit disability coverage.


5. The Federal Reserve Board was given broad power to issue regulations to carry out the purposes of the Act. 15 U.S.C. § 1604 (1976); Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 365 (1973). The regulation of the Federal Reserve Board, commonly known as “Regulation Z,” with regard to credit life and disability insurance states in pertinent part:

(a) General rule. Except as otherwise provided in this section, the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party, including any of the following types of charges:

(5) Charges or premiums for credit life, accident, health, or loss of income insurance, written in connection with any credit transaction unless

(i) The insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and

(ii) Any customer desiring such insurance coverage gives specific dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance.


6. See In re USLIFE Credit Corp., 91 F.T.C. 984, 1019 n.2, modified on other grounds, 92 F.T.C. 353 (1978), vacated, 599 F.2d 1387 (5th Cir. 1979). While the language of the two provisions differs in several respects, perhaps the most significant difference is in their treat-
provide, at a minimum, that the cost to the consumer of an insurance component in the loan transaction need not be disclosed as part of the finance charge if three conditions are satisfied: (1) the consumer is not required to purchase the insurance; (2) the lack of a purchase requirement is clearly disclosed to the consumer in writing; and (3) the consumer, after receiving written disclosure of the cost, gives affirmative written indication of his desire to purchase the insurance.

The specific problem which Congress addressed by generally requiring that the insurance premium be included in the finance charge was the lender's ability to "bury" additional finance charges in the premium. To illustrate how the lender might do this, it is first necessary to understand that the lender makes a considerable profit from the sale of credit life and disability insurance. This profit may come in the form of an insurance commission if the creditor is properly licensed as an insurance agent, or it may come in the form of an experience refund under a group insurance policy. The creditor by himself or with other creditors may even acquire or form an insurance company to reinsure the credit insurance written on his own customers, thereby realizing the

ment of the requirement of insurance by the lender. Regulation Z states that the premium for insurance may be excluded from the finance charge if the insurance is "not required by the creditor." 12 C.F.R. § 226.4(a)(5)(i) (1979). The statute provides for exclusion of the premiums from the finance charge if the insurance is "not a factor in the approval by the creditor of the extension of credit." 15 U.S.C. § 1605(b)(1) (1976). The statutory provision is the broader of the two. If the insurance is required by the lender then it must be a factor in the approval of the loan. There could certainly be situations, however, where the insurance is not required but is still a factor. For example, if the lender requires either insurance on the life of the debtor or the cosignature of the borrower's spouse, the insurance would not be required but it would be a factor in the approval of the loan. Thus, Regulation Z might permit the exclusion of the insurance premium from the finance charge under this situation while the Act would not.


8. An experience refund, also referred to as a "dividend" or "retrospective rate credit," provides a refund of a portion of the premium to the policyholder (the creditor in the case of a group policy) in the event insured losses do not exceed a certain level. CONSUMER CREDIT LIFE AND DISABILITY INSURANCE 29-30 (C. Hubbard ed. 1973) [hereinafter cited as Hubbard]. In many states the maximum compensation that the insurance company can pay to a creditor, whether in the form of commission or experience refunds, is limited by so-called "caps" on compensation to a certain percentage of the premium. See, e.g., IND. ADMIN. CODE § 1-14-3 (35%); OHIO ADMIN. CODE § 3901-1-15(B)(1) (32 1/2 %). See also Ark. Ins. Dept., Rule & Reg. 12, § 14.1 (35%); Miss. Ins. Dept. Reg. No. L A&H 69-1 (50%); Nebr. Ins. Dept. Rule 30, § 4 (33 3/4 %); Nev. Ins. Dept. Reg. LH 2, § 7 (40%); Okla. Ins. Dept. Rule 69-8, § 6 (40% —as amended by Rule 70-5); Tenn. Ins. Dept. Rule 24, § VI (H) (40%); Tex. Ins. Dept. Board Order 26263, § 15 (35%).
underwriting income. But no matter how the funds work their way back, the creditor stands to make a significant profit from the sale of credit insurance. The creditor has none of the usual acquisition costs associated with insurance, because potential insureds need not be sought out. They are already attracted to the creditor by the prospect of borrowing money or financing a purchase. Furthermore, the creditor’s salesmen need not be paid considerably more to solicit the insurance because they are already being compensated to perform their other functions in connection with the extension of credit. There is, of course, some bookkeeping expense involved in remitting premiums to the insurer, but this cost is minor and can be handled by the creditor’s present staff. Expenses will no doubt increase considerably if the creditor acquires or forms its own reinsurance company, but the creditor’s income should also increase substantially with the addition of underwriting income.

Of course, where the creditor has additional profit from the credit insurance transaction, he can afford to extract a smaller

9. Hubbard, supra note 8 at 27, 30. This type of insurer, known as a “captive” insurer, usually only reinsures rather than writes the coverage directly because of the lack of a license to write insurance in the state, and/or the lack of sufficient surplus to policy holders.

10. According to one source, the creditor’s profit from the sale of credit insurance can be so substantial that it even exceeds the profit from charging interest for loaning the funds. Consumer Credit Protection Act: Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 90th Cong., 1st Sess. 408-09 (1967) (supplementary statement of Father Robert J. McEwen, S.J.).

11. See generally Hubbard, supra note 8, at 31. The fact that the creditor makes such a profit from the insurance without a corresponding increase in expenses may be significant in determining whether a portion of the true finance charge is being concealed in the insurance premium. Because the creditor puts forth no significant additional effort or expense to earn profit on the insurance part of the transaction, the insurance charge resembles investigation fees and other service charges paid by the borrower when the creditor provides no investigation or other services in return. With respect to the latter types of charges, when the creditor does nothing to earn and the borrower receives nothing extra for the additional amounts being paid, the only logical conclusion is that the additional charges are in reality a part of the true cost of credit. Cobb v. Puckett, (Tenn. Ct. App.) printed in Consumer Credit Protection Act: Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 90th Cong., 1st Sess. 971 (1967). Similarly, if a portion of the insurance premium goes to the creditor for little or no additional work, and the borrower, therefore, receives nothing in return, then is not that portion of the premium also just another part of the cost of the credit?

Of course, it is not necessary to prove in fact that a portion of the cost of credit is being concealed in this manner to justify the inclusion of the insurance premium in the finance charge. See Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973) (disclosure requirements of Regulation Z for transactions involving more than four installments were valid despite the fact that some sales with more than four installments may not involve credit).
finance charge. Consumers thus may be attracted by a lower finance charge and annual percentage rate without realizing that, because of the insurance charge, they are actually paying more for this credit than for a loan with a higher annual percentage rate but without insurance. The artificially low finance charge consequently defeats the overall objective of the legislation: consistent and uniform disclosure of credit terms facilitating the informed use of credit and comparison shopping for credit terms. The most effective way to avoid hidden finance charges is to require that the insurance premium be included in the finance charge in all instances so that all portions of the cost of credit, even the part possibly hidden in the insurance premium, are disclosed as part of the finance charge. However, since Truth-in-Lending does not require that all credit life and disability premiums be included in the finance charge, an opportunity to evade its purpose is apparent on the face of the Act. To effectively conceal a portion of the cost of credit in the insurance premium, the creditor need only be assured as a practical certainty that the consumer will buy the insurance. Otherwise, consumers could obtain credit by paying only the portion of the finance charge which is revealed. The creditor might lose the chance to collect the portion of the finance charge hidden in the insurance premium. This reasoning appears to underlie Congress' limited exclusion from the finance charge of only those premiums for voluntary or optional insurance. Application of the statutory and regulatory provisions regarding credit insurance is relatively easy in most situations. If the lender's disclosure statement provides, "CREDIT LIFE AND DISABILITY INSURANCE is not required to obtain this loan," the disclosure is sufficient, and the creditor need not supplement the writing with redundant oral disclosures or explanations; however, if the disclosure recites that insurance is not required but the borrower is able to prove otherwise, the premium must be included in the finance charge. The premium's inclusion is also indicated if the borrower does not evince his desire for the insurance by a sepa-

rate signature. Conversely, inclusion of the premium in the finance charge when the insurance is truly optional, is not a violation of statutory and regulatory credit provisions.

A closer question exists when the creditor appears to have done all that is literally mandated by the insurance disclosure provisions of Truth-in-Lending and Regulation Z, but so obscures the disclosures or distracts the consumer’s attention that the consumer is unaware of what he has signed or is led to believe that despite the disclosure to the contrary, the purchase of the insurance is a prerequisite to obtaining the loan. For example, assume that a creditor who extends credit without regard to whether the debtor is insured, clearly and conspicuously discloses in writing to the consumer that insurance is not required and, before such insurance is issued but after the cost thereof has been disclosed, receives from the consumer a separately signed and dated affirmative written indication of the consumer’s desire for the insurance. Having


18. Robinson v. Central Loan & Fin. Corp., 609 F.2d 170, 174-75 (5th Cir. 1980) (court interpreted Regulation Z to permit inclusion in the finance charge of premiums for optional insurance even though the statute and regulation are silent).

19. See, e.g., In re USLIFE Credit Corp., 91 F.T.C. 984, 985-86, modified on other grounds, 92 F.T.C. 353 (1978), vacated, 599 F.2d 1387 (5th Cir. 1979).

20. The required insurance disclosures are usually set apart from the other disclosures and contract terms under a caption such as “insurance” or “insurance authorization.” Two sample insurance disclosures suggested by the Federal Reserve Board are set forth below:

Insurance Agreement

The purchase of insurance coverage is voluntary and not required for credit. ___ (Type of Ins.) insurance coverage is available at a cost of $_______ for the term of credit.

I desire insurance coverage
Signed__________ Date_____

I do not desire insurance coverage
Signed__________ Date_____


INSURANCE

PROPERTY INSURANCE, if written in connection with this loan, may be obtained by borrower through any person of his choice. If borrower desires property insurance to be obtained through the creditor, the cost will be $_______ for the term of the credit.

CREDIT LIFE AND DISABILITY INSURANCE is not required to obtain this loan. No charge is made for credit insurance and no credit insurance is provided unless the borrower signs the appropriate statement below:

(a) The cost for Credit Life Insurance alone will be $_______ for the
accomplished all of this, the creditor would appear to be in literal compliance with the Act and Regulation Z\textsuperscript{21} and to be entitled to include the insurance premium in the amount financed rather than in the finance charge. But, if that same creditor distracts the consumer's attention from the disclosures, or completes the disclosure form and contract in advance with the cost of insurance already included in the amount financed and in the scheduled payments, or communicates by oral statement or innuendo that, in fact, insurance will be required to obtain the loan,\textsuperscript{22} should the result be different? Should literal and technical compliance with the insurance disclosure requirements of Truth-in-Lending be sufficient to justify exclusion of the insurance premium from the finance charge? Or should such exclusion be allowed only when the creditor does nothing to negate the disclosures given? This is the central issue to which this article is addressed.

II. THE PRINCIPAL CASES

Several decisions have directly considered this question. In the term of the credit.

(b) The cost for Credit Life and Disability Insurance will be $\underline{\hspace{20mm}}$ for the term of the credit.

<table>
<thead>
<tr>
<th>I desire Credit Life and Disability Insurance.</th>
<th>I desire Credit</th>
<th>I DO NOT want Credit Life Insurance only.</th>
<th>Life or Disability Insurance.</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Date) (Signature)</td>
<td>(Date) (Signature)</td>
<td>(Date) (Signature)</td>
<td>(Date) (Signature)</td>
</tr>
</tbody>
</table>

Id. at 399. It is interesting to note that although no apparent statutory or regulatory requirement exists, both of these samples suggest that the consumer should separately sign if he declines to purchase the insurance.

Although the Federal Reserve Board has traditionally disclaimed any representation that its sample forms are in compliance with the Act, recent amendments to the Act require the Federal Reserve Board to publish model disclosure forms for common transactions. It is further provided in those same amendments that a creditor using any such model forms shall be deemed in compliance with the disclosure requirements. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-842, § 605, 48 U.S.L.W. 125 (Apr. 22, 1980) (to be codified in 15 U.S.C. § 1604(b)).


22. For ease of reference, all of these practices, and perhaps others, can be lumped together under the generic description of "negating" the insurance disclosure, see, In re US-LIFE Credit Corp., 91 F.T.C. 984, 1010-13, modified on other grounds, 92 F.T.C. 353 (1978), vacated, 599 F.2d 1387 (5th Cir. 1979), because the impact of each, if successful, is to render the disclosure ineffective. The consumer's attention is either distracted so that he is unaware of the disclosure or, being aware of the written disclosure, is convinced that he must purchase the insurance anyway. In either instance, the disclosure has been effectively negated.
first, *Fisher v. Beneficial Finance Co.*,28 the plaintiff-borrower alleged that an otherwise clear and conspicuous insurance disclosure was negated by the context in which it was given.24 The plaintiff contended that by including the cost of the insurance in the disclosure form when it was first presented to her, the lender had implied that the insurance was required. Therefore, plaintiff alleged, the lender's failure to include the insurance premium in the finance charge violated Truth-in-Lending.26 Although the court denied plaintiff's motion for summary judgment, it noted that the plaintiff was not precluded by this holding from attempting to prove at trial that "by its conduct" the defendant-lender actually had required the insurance.26 The court seemed to recognize the possibility that creditors would be required to include premiums for credit life and disability insurance in the finance charge if by their actions they negated otherwise adequate disclosures.

Whatever comfort the opinion in *Fisher* might have given consumers was soon dashed by a series of decisions from courts within the Fifth Circuit. The first of these was *Stanley v. R. S. Evans Motors, Inc.*,27 in which the credit purchaser of a used car challenged the inclusion of premiums for credit life and disability insurance in the amount financed rather than in the finance charge. The plaintiff had at first signed an "order" for the automobile which set forth the various credit terms, including premiums for credit life and disability insurance. This order, which apparently was not a binding commitment, contained none of the required insurance disclosures.28 After the loan to purchase the auto was approved by the finance company, the plaintiff signed a purchase contract. The contract included credit life and disability insurance

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24. *Id.* at 899. The plaintiff also alleged that the insurance disclosure itself was inadequate but the court found it acceptable on its face. *Id.*
25. *Id.* at 899-900. It is not entirely clear from the opinion in what manner the cost was disclosed on the disclosure statement as first presented to the plaintiff. The defendant must have done something more than simply include the cost in the insurance disclosure, because inclusion of the cost is required. 15 U.S.C. § 1605(b)(2) (1976); 12 C.F.R. § 226.4(a)(5)(ii) (1979). Presumably the disclosure statement also set forth the total amount financed and the monthly payment amount with the insurance premiums already included. *See, e.g., In re USLIFE Credit Corp.*, 91 F.T.C. 984, modified on other grounds, 92 F.T.C. 353 (1978), vacated, 599 F.2d 1387 (5th Cir. 1979).
28. *Id.* at 860. The court held that because the purchase of the car was not consummated by the order but only by the contract, the fact that the insurance disclosures did not appear on the order was insignificant. *Id.* at 861.
in the amount financed, rather than in the finance charge, and for the first time disclosed that the insurance was not a factor in the approval of credit. Plaintiff alleged that in this sequence of events he had “no meaningful alternative” to the purchase of the insurance and therefore that the insurance was, “in effect,” required. Although the substance of the plaintiff’s argument was not specifically detailed in the opinion, it seems to have been that by including the insurance charges in the original order, without any disclosure and perhaps without even asking first whether plaintiff desired the insurance, the impression was created that the insurance was required. This impression was probably strengthened by inclusion of those same charges in the contract. Presumably the plaintiff argued that this impression could not be overcome by the contrary disclosure which appeared in the contract.29

The court had little difficulty disposing of plaintiff’s argument. It found that the formal requirements of the Truth-in-Lending Act and Regulation Z which permit exclusion of the premiums from the finance charge were met; i.e., the insurance was not required, the necessary disclosures were made, and the plaintiff had dated and separately signed the insurance notice in the contract.30 The court concluded:

Although plaintiff may not have fully understood the terms of the Contract, this cannot be attributed to the defendant’s failure to comply. Plaintiff has charged defendant with violating the requirements of a statute and regulation; there is, however, nothing that the law requires which defendant did not do. Under these circumstances, liability does not attach.31

The next in this series of decisions was Mims v. Dixie Finance Corp.32 Plaintiff contended that the disclosure that insurance was

29. Because the disclosures were included in the contract and shown to the plaintiff prior to the contract being signed, the court found that there was sufficient compliance with the disclosure requirements. Id.
30. Id. This decision has been criticized on the ground that it recognized only the mechanical disclosure provision but not the substantive aspect of the Act’s provision regarding credit insurance; that is, for ignoring the rule that the insurance must not be a factor in the extension of credit. Landers, supra note 7, at 122 n.172. Although the result reached by the court is subject to criticism, it is not for this reason. The court specifically referred to, and apparently accepted, the creditor’s testimony that neither it nor the finance company “required” credit life insurance either as a general policy or in this transaction specifically. 394 F. Supp. at 861. Thus, the court recognized both statutory prerequisites to excluding the premium from the finance charge.
31. Id.
not required was false (i.e., that the defendant did require insurance) and, therefore, that the premium should have been included in the finance charge. As proof of her allegations, the plaintiff stated that she had applied for a loan and, on returning to the defendant's office the following day, "was presented with the entire contract, including the insurance authorization, filled out." The defendant did not ask the plaintiff whether she wanted the insurance and the plaintiff did not request the insurance.\(^{33}\) Although the insurance authorization complied in form with the requirements of Regulation Z by disclosing that insurance was not required, plaintiff contended that by presenting her with a completed contract providing for the purchase of insurance, the defendant had created the impression that the insurance was required. Thus, despite disclosure to the contrary, plaintiff had assumed that insurance was required.\(^{34}\) Although it was somewhat sympathetic to her dilemma, the court was unpersuaded by plaintiff's argument. The importance of credit insurance to lenders was recognized, the lender's effectiveness in selling the insurance was noted, and the natural reluctance of the borrower to displease the lender by refusing the insurance was discussed.\(^{35}\) Nevertheless, it was concluded that plaintiff's mere assumptions were insufficient to prove that the insurance was in fact required. Furthermore, the defendant was under no obligation to assure communication of its disclosure through oral as well as written means.\(^{36}\) The opinion concluded by stating a prima facie "rule" for determining that the borrower has overcome a written disclosure that insurance is not required:

\[\text{[A]}\text{ plaintiff must prove that the creditor specifically and unequivocally informed her that insurance is required in order to contradict the recital to the contrary. . . . Thus, if plaintiff proves that she told the creditor that she did not want the insurance and the creditor told her that no loan would be made with-}\]

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33. Id. at 631.

34. Id. It is not clear from the special master's recommendation whether the plaintiff read the insurance disclosures. See id.

35. Id. The court admitted that this permits a hard sell for the insurance by the creditor "such as plaintiff described." Id. In fact, the plaintiff described no hard sell at all but rather a situation where the insurance was sold with absolutely no sales effort. In any event, implicit in the special master's conclusion is the implication that the creditor has now been allowed to accomplish indirectly what it is prohibited from accomplishing directly by requiring the insurance (the borrower's involuntary purchase of the insurance).

36. Id.
out insurance, plaintiff has met her burden.37

By this statement, the court modified the following earlier formulation of the rule: “[T]he debtor is estopped [from contending that insurance was required if the insurance authorization recites that it was not] unless she can show fraud or other duress.” According to the modified version, though, even an equivocal statement would apparently not be sufficient proof that insurance had been required. For example, if the lender’s employee, in response to a question from the borrower, states “I doubt the boss will approve this loan without insurance,” or “I don’t think you will get this loan approved anywhere in town without insurance,” the reasonable implication is that insurance is required. Because neither of these examples is a specific or unequivocal statement that the insurance is required, however, according to a literal reading of the Mims rule, they would not be enough to override the contrary disclosure.

Another roadblock for the borrower was constructed in Anthony v. Community Loan & Investment Corp.38 The plaintiff had purchased credit insurance in connection with a loan even though she had neither requested nor desired the insurance. The agreement contained the necessary disclosures but all of the documents were completed in advance to include the insurance purchase; the plaintiff had simply signed when told to do so.39 The court found these facts insufficient to require inclusion of the insurance premium in the finance charge for two reasons. First, the facts did not bring into question whether the insurance was required.40 Like Mims, this decision emphasized whether the insurance was required rather than its voluntary purchase by the borrower. Second, by application of Georgia’s parol evidence rule the court barred the submission of any “extraneous oral evidence” to contradict the disclosure except in the event of illiteracy, fraud, or duress.41 The court

37. Id. (citations omitted).
38. 559 F.2d 1363, 1369 (5th Cir. 1977).
39. Id. at 1369-70. It is unclear from the court’s opinion whether the plaintiff saw the insurance disclosure provision or realized that insurance was included in the agreement.
40. Id. at 1370.
41. Id. at 1369. In other words, where the plaintiff can show illiteracy, fraud, or duress, parol evidence may be admitted to show that the defendant gave the plaintiff the impression that the insurance was required. Although this opinion has been described as a “model of clarity,” R. Clontz, Truth-in-Lending Manual ¶ 2.04[4][d][ii] (4th ed. Supp. 1979), it is not clear how this decision should be applied. If by “illiteracy” the court intends to require that the disclosures must be made in the primary language of the consumer, this seems to have broken new ground. See County Trust Co. v. Mora, 383 N.Y.S.2d 468 (County Ct.
reasoned that application of the parol evidence rule in Truth-in-Lending cases such as this would encourage borrowers to read and utilize the disclosures and hence would promote the purpose of Truth-in-Lending.\footnote{42} Apparently the court felt that a victory by the borrower in the face of disclosures on the documents would encourage other consumers to ignore the disclosure documents and to rely instead on subsequent litigation for protection.\footnote{43}

The last in this series of decisions was \textit{In re USLIFE Credit Corp.}\footnote{44} Unlike the earlier cases brought by individual consumers, this case was an enforcement action by the Federal Trade Commission (the FTC).\footnote{45} In the administrative proceedings, the FTC found that although the lender had an official policy that insurance was not required, it had routinely engaged in a number of practices which effectively precluded the customer's exercise of a free choice to accept or decline the insurance. The lender quoted repayment terms which included insurance and it prepared completed loan documents with insurance charges included, all before the bor-

\footnote{42. \textit{559 F.2d at 1370.}}
\footnote{43. The \textit{Anthony} decision was followed in \textit{Williams v. Blazer Financial Servs., Inc.}, \textit{598 F.2d 1371} (5th Cir. 1979), and \textit{Lamar v. American Fin. Sys., Inc.}, \textit{577 F.2d 953} (5th Cir. 1978).}
\footnote{44. \textit{91 F.T.C. 984, modified on other grounds, 92 F.T.C. 353} (1978), \textit{vacated, 599 F.2d 1387} (5th Cir. 1979).}
\footnote{45. The action was brought by the FTC under its general power to enforce the provisions of Truth-in-Lending. \textit{15 U.S.C. § 1607(c)} (1976). This action is not the only one brought by the FTC concerning the voluntariness of the insurance election. \textit{See, e.g., In re Peacock Buick, Inc.}, \textit{86 F.T.C. 1532} (1975), \textit{appeal denied, 553 F.2d 97} (4th Cir. 1977); \textit{In re Gulf South Corp.}, \textit{39 Fed. Reg. 2084} (1974); \textit{In re Am. Thrift & Fin. Plan, Inc.}, \textit{38 Fed. Reg. 30868} (1973). Apparently the FTC has been continuously concerned with whether the sale of credit life and disability insurance has been truly voluntary. \textit{See, e.g., Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth-in-Lending for the Year 1979} 5 (1980); \textit{Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth-in-Lending for the Year 1977} 10 (1978).}
\footnote{One of the prime causes of the FTC's concern is the very high penetration rates achieved by many creditors. \textit{Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth-in-Lending for the Year 1976} 34 (1977). \textit{See note 2 supra.} High penetration rates suggest the possibility that those creditors are somehow concealing the legal effect of the disclosure, \textit{i.e.}, that the insurance is optional and that the option is a right of the borrower. 1976 \textit{FRB Report to Congress, supra note 2, at 34. A survey conducted by the College of Business Administration of Ohio University, however, indicates that only 20\% of the consumers questioned thought they were required to buy credit life insurance, and only 14\% thought they were required to buy credit disability insurance. Hubbard, \textit{supra} note 8, at 73-76. Although those conducting the survey concluded that consumers generally do have a real choice concerning the insurance, \textit{id. at 275-76,} these percentages are intolerably high if they reflect misunderstanding created by the creditors.}
rower received any disclosure that insurance was optional and before the borrower indicated any desire for the insurance. Moreover, the lender informed customers about the insurance charge without telling them insurance was voluntary, and it indicated by "X's" or check marks that borrowers should sign for insurance. All of these practices, but most particularly the inclusion of insurance charges in completed loan papers before consideration of the insurance option by the borrower and before the disclosures were made, were found by the FTC to violate the Act despite the fact that the documents as ultimately signed contained the required disclosures.46

In the opinion of the FTC the Act required more than pro forma compliance with the disclosure requirement.47 Even when technical compliance has been achieved, it is essential to ask: has the lender undermined the borrower's insurance election by practices that obscure or defeat the borrower's free opportunity to exercise choice in the purchase of insurance?48 In answering this question, the FTC found that each of the USLIFE Credit Corp. practices had at least confused borrowers concerning their rights to refuse insurance, and perhaps had even misled borrowers to believe that insurance was required.49 The FTC concluded that the language and purpose of the Act required greater attention to preserving the borrower's free choice.50 By phrasing the issue as one of meaningful consumer choice, the FTC did what the prior judicial decisions had refused to do: it placed more importance on the voluntariness of the borrower's insurance decision than on a paper record demonstrating technical compliance with the required disclosures.51

On appeal, the Fifth Circuit Court of Appeals vacated the FTC order, finding that the FTC has "missed the point" of Anthony. The FTC had distinguished Anthony on the ground that it involved the application of a local parol evidence rule. The Fifth Circuit ascribed broader meaning to Anthony, stating that Anthony stood for the proposition that the parol evidence rule was not in conflict with the disclosure statute because it did not preclude evi-

46. 91 F.T.C. at 1023-31.
47. Id. at 1020.
48. Id. at 1019-20.
49. Id. at 1030-31.
50. Id. at 1029-31.
51. The FTC expressly refused to follow Stanley v. R.S. Evans Motors, Inc. and Mims v. Dixie Fin. Corp., 91 F.T.C. at 1021, n.10. Anthony was distinguished on the ground that the parol evidence rule should not apply to an FTC administrative enforcement proceeding. 92 F.T.C. at 357.
dence of a material fact.\textsuperscript{52} The decision in \textit{Anthony} was actually founded on two separate reasons. First, that the parol evidence rule barred any evidence of negation of the insurance disclosure because such evidence would vary the terms of the contract. The court noted in \textit{Anthony} that the parol evidence rule would also further the purpose of the Act by encouraging the consumers to read and use the written disclosures rather than relying on oral representations.\textsuperscript{58} As a separate and independent basis for its decision, the \textit{Anthony} court held that summary judgment against the consumer was appropriate because the consumer’s allegations of negation did not create an issue of material fact. The court suggested that the only material fact involved was whether the insurance was “required.”\textsuperscript{5} Although the court offered both of these reasons for its decision, its decision on the parol evidence rule was entirely independent of its decision on the materiality of the excluded evidence. Therefore, in \textit{USLIFE}, the court misconstrued the holding of \textit{Anthony}. The court said of \textit{Anthony}: “The [parol evidence] rule was not in conflict with the statute because the testimony it barred was not testimony of a material fact.”\textsuperscript{55} As so construed, however, the holding in \textit{Anthony} concerning the parol evidence rule is a very limited one. The parol evidence rule can only exclude evidence consistently with the purpose of Truth-in-Lending under this reading of \textit{Anthony}, if that evidence is not material. Stated conversely, once evidence of negation is considered material, then the evidence would not be excluded under the parol evidence rule because to do so would be inconsistent with the statute. Viewed in this manner, the parol evidence rule becomes significant only after the issue of materiality of negation has been decided. Thus the rule cannot preclude consideration of that primary issue. In effect, the Fifth Circuit said that the standard of materiality would be the same for either a private damage action or an administrative enforcement proceeding. Therefore, the holding in \textit{Anthony} that the parol negation of the otherwise appropriate disclosure is not material applied to the FTC as well. Eliminating any doubt as to its meaning, the Fifth Circuit reiterated that in the absence of illiteracy, fraud, or duress, “literal, technical compliance with the regulation is all that is required.”\textsuperscript{56} The court stated flatly

\textsuperscript{52} 599 F.2d at 1389-90.  
\textsuperscript{53} 559 F.2d at 1369-70.  
\textsuperscript{54} Id. at 1370.  
\textsuperscript{55} 599 F.2d at 1390.  
\textsuperscript{56} Id.
that Truth-in-Lending *does not* require that consumers be afforded a free and knowing choice concerning the insurance option.\textsuperscript{57}

Considering these several decisions,\textsuperscript{58} a general rule emerges: so long as the lender would make the loan without the insurance, the loan documents clearly disclose the cost of the insurance and recite that the insurance is not required, and the borrower separately signs and dates the insurance authorization, the premium may be excluded from the finance charge. The only exception is when the borrower can show illiteracy, fraud, or duress.

Unfortunately, proof of either fraud or duress is extremely difficult. Apparently the only fraud sufficient to protect the borrower is when the lender in actuality requires insurance but states in its disclosure that it does not. According to *Mims*, such fraud can be proven only by a specific and unequivocal admission of the fraud by the lender.\textsuperscript{59} As for duress, the borrower's burden is equally difficult, since the relevant decisions provide no real guidance as to what factors constitute duress. Certainly, the necessary duress must be something more than subtle tactics by the lender which distract borrowers so that they do not realize they are purchasing insurance. They must also go beyond the tactics which convince borrowers that they must purchase the insurance in order to secure the loan. Since the burden of proof in such instances will be difficult, if not impossible, for borrowers to meet, the effect of these decisions is to elevate form over substance. At the same time, the decisions reflect a considerable degree of indifference as to the factors influencing consumers in the consummation of credit transactions.

III. CRITICISM OF PRINCIPAL CASES

The mechanical approach to compliance with Truth-in-Lending and the formalistic reasoning of the several decisions which support it are vulnerable to criticism from several fronts. Perhaps the most obvious deficiency in the technical approach is the court's complete disregard of the rules of liberal construction long accorded to remedial statutes such as the Truth-in-Lending Act and Regulation Z. Courts which have addressed the question of statu-

\begin{footnotes}
\item[57] Id.
\item[58] For ease of reference, the decisions in *Stanley, Mims, Anthony* and *USLIFE* will be collectively referred to as the "principal cases."
\item[59] 426 F. Supp. at 631.
\end{footnotes}
tory construction have universally held that Truth-in-Lending must be liberally construed to effect its purpose. Courts have not hesitated to deduce therefrom that the statute and regulation should be construed in favor of the consumer whose protection was intended. At the very least, narrow and technical constructions are to be avoided because they tend to frustrate the purpose of the Act. The principal decisions promulgating the technical approach did not even attempt to reconcile their holdings with these general precepts of statutory construction. The courts did no more than pay passing lip service to the expressed purpose of Truth-in-Lending to promote the "informed use of credit" by assuring a "meaningful disclosure of credit terms." The result of these decisions is that lenders are required to make certain disclosures concerning insurance but are then given license to obscure the disclosures so that they are of no use to the consumer. This type of disclosure can hardly be considered meaningful under any standard since the resulting use of credit is misinformed. In fact, the contempt for the established rules of construction shown by the decisions reviewed above is well exemplified by the conclusion in USLIFE that the Act can be satisfied by mere technical compliance with its literal terms, despite lack of consumer knowledge or consent.

This is not to advocate, of course, that all cases of doubt concerning the meaning of a particular provision of Truth-in-Lending or Regulation Z must blindly be resolved in favor of consumers just because the Act was enacted for their protection. Certainly Truth-in-Lending should not be interpreted or enforced to simply harass or oppress lenders or to find hidden meanings which serve as traps for the unwary lender but do not provide any real benefit to


64. 599 F.2d at 1390.

consumers other than windfalls for their lawyers. A "do justice" type of interpretation, which seeks the right and best solution of the problem without regard to what the Act and Regulation Z say, should also be avoided.

Another legitimate criticism of the principal decisions is their consistent failure to discuss or distinguish other authorities which support a different conclusion. Indeed, a reading of the preceding cases creates the impression that there are no inconsistent judicial or regulatory decisions and that their holdings are universally accepted. But a number of authorities suggest or conclude that negation of the disclosure also negates the voluntariness of the insurance purchase, the result being that the insurance is in effect required by the lender even though the literal disclosures are in compliance.

The first of these contrary authorities is the primary sponsor of Truth-in-Lending in the House of Representatives, Leonor K. Sullivan. Representative Sullivan stated during debate that the premiums for credit life insurance would be included in the finance charge "if the consumer does not have a free opportunity to decide whether he wants the coverage." The Congresswoman's concern was shared in several later decisions which, although the courts were not called upon to consider the precise question at hand, put


By requiring lenders to cease obscuring the consumer's freedom of choice resulting from their mandated disclosures, no lenders would be harassed or oppressed nor would they be forced into a trap for the unwary. A requirement of candor seems clearly to be mandated by the purpose expressed in 15 U.S.C. § 1601 (1976). Prohibiting negation would also provide a real benefit to consumers. Finally the suggested canon of construction is not of the simplistic "do justice" type because it is firmly tied to the purpose of Truth-in-Lending.

The construction in the principal cases may, however, have been given some unintended support by the recent amendments to the Act. Those amendments provide that a creditor who uses a model disclosure form adopted by the Federal Reserve Board "shall be deemed to be in compliance with the disclosure provisions of this title with respect to other than numerical disclosures." Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 605, 48 U.S.C.W. 125 (to be codified at 15 U.S.C. § 1604(b)).

the insurance requirements in their proper perspective. In *Hall v. Sheraton Galleries* the court noted that "unless the customer is given a meaningful choice, in the case of life insurance, whether or not to take it, [the premium] must be included in the finance charge and reflected in the annual percentage rate." Subsequently, in *FTC v. Jorgensen*, the same concern for the voluntariness of the borrower's decision was expressed. *Jorgensen* involved an action to enforce an FTC subpoena seeking testimony and the production of the records concerning the lender's credit insurance sales practices. Enforcing the subpoena, the court stated:

Respondents contend that their loan contract forms clearly meet the terms of Regulation Z and that no more may be required of them. According to respondents, any FTC inquiry seeking to explore company practices in regard to the utilization of the form would impose a requirement beyond the scope of Regulation Z. Respondents contend that this would permit the FTC to create "ad hoc regulations," something which is assertedly beyond the FTC's powers. The argument of respondents is not persuasive. Regulation Z would be meaningless indeed if its requirements could be met in form and ignored or overridden in practice. An inquiry into actual practice is therefore appropriate.

A more ringing denunciation of literal and technical compliance is hard to imagine. Yet the *USLIFE* court ignored *Jorgensen* and demanded nothing more than literal and technical compliance.

A similar conclusion to that in *Jorgensen* was reached in *In re Branch*. The court considered whether a finance company's claim against the bankrupt debtor included any illegal amounts. In connection with a series of loans to the bankrupt, the finance company had charged premiums for credit life insurance under the provisions of a state loan law which allowed the lender to provide, but not to require, credit life insurance. The issue was whether or not

70. *Id.* at 88,337.
72. *Id.* at 88,105 (footnote omitted). In the same vein is *In re Dickson*, 432 F. Supp. 752 (W.D.N.C. 1977), which said of the question whether the insurance was not required: "This, of course, is not conclusively established by the statement on the disclosure that it was not required, though this is some evidence of that fact. . . ." *Id.* at 759.
74. *Id.* at 968.
the insurance was required by the lender and consequently illegal. The borrower had signed an "insurance authorization" stating that "the purchase of insurance is entirely voluntary and has not been made compulsory by the lender." 75 Despite this provision, the referee in bankruptcy found for the borrower who had testified about the insurance: "To tell you the truth I didn't know anything about it." 76 In fact the borrower had signed the authorization in rapid succession with all the other documents prepared by the lender, without any knowledge of what he was signing. On these facts the referee concluded that the insurance was issued without the debtor's consent, and was thus in violation of the statute. 77 The issue of whether the insurance was required was resolved by asking whether the purchase was voluntary and not by looking solely to the contrary recital in the loan documents. Whether or not the referee was correct in his conclusion on the facts, his emphasis on the voluntariness of the purchase contrasts sharply with the approach taken in USLIFE and the decisions which preceded it.

Authority contradictory to the principal cases is not limited to judicial declarations. The staff of the Federal Reserve Board 78 has on numerous occasions stated that the consumer's free choice, rather than the lender's technical compliance, is the determining factor as to whether the premiums must be included in the finance charge. The Board's staff took this position as early as 1970 when asked to comment upon whether the requirement of disclosing the cost of the insurance could be met by a cross-reference to the cost appearing in the sum-step disclosures instead of by a separate disclosure in the insurance authorization. 79 The Board's staff responded that the congressional intent to exclude insurance from the finance charge only when its purchase was strictly voluntary was best served by separate disclosure and that preparing all documents with the insurance included effectively precluded the customer's free exercise of choice, without which the premiums would

75. Id. The similarity between this provision and the standard Truth-in-Lending disclosure that the insurance is not required by the lender is obvious.
76. Id.
77. Id.
The sentiment expressed by the Board's staff in 1977 when commenting upon an earlier declaration that certain disclosures would be sufficient "affirmative written indication" under section 226.4(a)(5) of Regulation Z:80

Staff did not and does not mean to suggest that, because a customer gives a proper "specifically dated and separately signed affirmative written indication" of his or her desire for such insurance, there may be no further inquiry as to whether the customer's election to obtain the insurance was truly voluntary and not required by the creditor. Whether a customer desired such insurance is a question of fact, which can only be answered by reference to all of the circumstances of a particular transaction. Inquiry into those circumstances is, of course, not foreclosed by the presence of a customer's signature on an insurance authorization.81


The staff of the Federal Reserve Board reiterated its concern regarding the voluntariness of the consumer's insurance purchase the following year:

That a creditor may characterize an insurance policy as optional is not dispositive of whether the insurance premium may be excluded from the finance charge. Because of the economic incentive for selling the insurance, the creditor and its employees should make every effort to make clear to a customer that the insurance is not a condition of the credit extension. The question may well turn on whether the customer understands that the insurance is voluntary and still elects to purchase it. In making this determination, a fact finder might look at how the information (price, coverage, and voluntary nature) was disclosed to the customer. For example, a disclosure such as the one required in § 226.4(a)(5), signed and dated by the customer, may bear more weight than an oral disclosure. While the customer's signature on a document would be some evidence of voluntariness, of course, it would not conclusively establish that the insurance was not required. Any number of collateral acts or practices by a creditor could negate the apparently affirmative nature of the customer's election to purchase the insurance.
The opposition of the staff of the Federal Reserve Board to the policy that literal, technical compliance alone will satisfy the Act's requirements is beyond question: "Congressional concern over the voluntary purchase of credit life . . . is the genesis of [the insurance disclosure] provision." The policy of the Board's staff is exactly contrary to the results of Stanley, Mims, Anthony, and US-LIFE. Furthermore, it is well settled that the Federal Reserve Board interpretations and staff opinions are entitled to some judicial deference. Yet the staff position is never mentioned, much

Routine inclusion of the insurance premium in the preparation of the credit documents, on the other hand, might be evidence that the creditor had created the impression that the insurance was a condition of the extension of credit. Further, a suggestion that if insurance is not desired new documents would have to be prepared, and disbursement of the loan proceeds delayed, might be viewed as a form of coercion.

FRB Letter 1286, supra note 1.

83. Federal Reserve Board Letter no. 624, August 9, 1972, excerpts published in TRUTH-IN-LENDING, SPECIAL RELEASES-CORRESPONDENCE, APRIL 1969 TO OCTOBER 1978 ¶ 30,873 (CCH 1979). In addition, the staff has spoken of compliance with the insurance requirements of Truth-in-Lending when the purchase of insurance is "strictly voluntary." FRB Official Inter. FC-0043, supra note 17.

84. The United States Supreme Court recently reaffirmed that interpretations of Truth-in-Lending by the Federal Reserve Board and its staff are entitled to great respect:

The Court has often repeated the general proposition that considerable respect is due "the interpretation given [a] statute by the officers or agency charged with its administration." Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978), quoting Udall v. Tallman, 380 U.S. 1, 16 (1965); see, e.g., Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961). An agency's construction of its own regulations has been regarded as especially due that respect. See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945). This traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in "setting [the statutory] . . . machinery in motion. . . ." Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933). As we emphasized in Mourning v. Family Publications Service, 411 U.S. 356 (1973), Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed the Truth in Lending Act. The Act is best construed by those who gave it substance in promulgating regulations thereunder.

Ford Motor Credit Co. v. Milhollin, 100 S. Ct. 790, 797 (1980) (citations omitted) (footnote omitted). The Court went on to recognize "administrative rulemaking and interpretation [by the Federal Reserve Board] under TILA as authoritative" in order to promote uniformity of interpretation of this complex legislative scheme. Id. at 798. The Court concluded: "Thus, while not abdicating their ultimate judicial responsibility to determine the law, . . . judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational." Id. (citation omitted).

While the Supreme Court was considering the weight to be afforded official staff interpretations, even unofficial interpretations, though less authoritative than official interpretations, are nevertheless "entitled to weight when they concern the construction of a Board regulation or interpretation and are not in conflict with the Truth in Lending Act, a regulation, or
less accorded any weight, by the courts in the principal cases treated in this article.

The disregard of the Federal Reserve Board's staff interpretation is particularly distressing in *Anthony*. In an earlier part of the opinion dealing with a security interest taken in the same transaction, the court expressly recognizes that at least Federal Reserve Board official staff interpretations are entitled to great weight. Then, upon discussing the credit insurance aspects of its decision, not only does the court refuse to even cite the contrary Board interpretations, it proceeds to quote from an FTC informal staff opinion. Reliance on an interpretation by the FTC is misplaced because the only power of the FTC is to enforce the Act, not to issue interpretive regulations. The latter authority is vested exclusively in the Federal Reserve Board. Thus, an FTC staff letter is entitled to no special deference whatsoever in construing Truth-in-Lending.

The courts' refusal to adhere to established rules of construction or to consider the contrary position expressed by these other authorities motivates concern regarding the resulting subversion of legislative intent. The congressional purpose is not simply the general purpose of meaningful disclosure to promote the informed use of an interpretation." General Electric Credit Corp. v. Smail, 584 S.W.2d 690, 695 (Tex. 1979). See *Gantt v. Commonwealth Loan Co.*, 573 F.2d 520, 523 (8th Cir. 1978); *Pollock v. General Fin. Corp.*, 552 F.2d 1142, 1144 (5th Cir. 1977), *cert. denied*, 434 U.S. 891 (1977); *Philbeck v. Timmers Chevrolet, Inc.*, 499 F.2d 971, 976-77 (5th Cir. 1974); *Hensley v. Granning & Treece Loans, Inc.*, 378 F. Supp. 841, 844 (D. Or. 1974).

Of course, before these extrinsic aids to construction need be consulted, it must be determined that a clear expression of meaning is not to be found in either the statute or regulation. See *Ford Motor Credit Co. v. Milhollin*, 100 S. Ct. 790, 796-98 (1980). The absence of such clarity is the source of the problem presently being addressed. Regulation Z states that the premium must be included in the finance charge if the insurance is required. But what is meant by "required?" Very different interpretations will follow, depending on whether "required" means that the credit would not be extended without insurance, or that the insurance must be voluntarily selected by the consumer. While the first of these interpretations may at first appear more reasonable, the regulation is also reasonably susceptible to the second. The regulation and the statute both speak of the consumer's desire for the insurance in the same section in which they provide that the insurance must not be required and must not be a factor if the premiums are to be excluded from the finance charge. 15 U.S.C. § 1605(b) (1976); 12 C.F.R. § 226.4(a)(5) (1979). It is therefore not at all unreasonable to interpret "required" to take into account whether the insurance is desired by the consumer. Because the regulation is thus susceptible to either interpretation, reference to the construction by the Federal Reserve Board is entirely appropriate.

85. 559 F.2d at 1367.
87. 559 F.2d at 1369.
of credit. As indicated at the outset, congressional concern with credit insurance focuses on the potential for burying a portion of the real cost of credit in the insurance premium. While that problem might be effectively controlled by requiring that all insurance premiums be included in the disclosed finance charge, Congress ultimately decided to mandate such inclusion only when the insurance is "required." The obvious reasoning behind mandating inclusion of the insurance premium in these cases is that the lender will only bury a portion of the cost of credit in the premium when he is sure that the borrower will buy the insurance. Viewed in this light, it is unimportant what methods the lenders use to make borrowers purchase insurance. The significant fact is whether the borrowers buy the insurance because of real or imagined coercion. In either case, the lenders will be confident that enough borrowers will buy the insurance to risk losing the profit included in the premium in the rare event that the insurance is not purchased. Accordingly, the key to the statutory scheme is the actual voluntariness of the consumer's decision concerning the insurance.

The decisions in the principal cases, however, completely ignore the voluntariness of the consumer's insurance election. They hold that the only relevant factors in determining compliance with this part of Truth-in-Lending are the form of the disclosures and whether the insurance is "required." If these conditions are met, these courts are unconcerned with whatever else lenders might have done to make borrowers believe that they must purchase the insurance. These decisions, therefore, permit the lender to accomplish exactly what Congress intended to prohibit, exclusion of the insurance premium from the finance charge when the buyer's elec-

89. See notes 7-12 and accompanying text supra.
90. Senator Proxmire, the primary sponsor of the Act in the Senate following the reelection defeat of Senator Paul Douglas, apparently preferred this treatment. He argued for inclusion of the credit life insurance premiums in the finance charge whenever incident to the extension of credit. 113 Cong. Rec. 2045 (1967). In the Act as originally passed by the Senate, these insurance premiums were not required to be included in the finance charge so long as they were separately itemized and described. The Conference Committee, however, adopted the House version of the insurance provisions, which are presently found in the Act. Conf. Rep. No. 1397, 90th Cong., 2d Sess. 25 (1968) reprinted in [1968] U.S. Code Cong. & Ad. News 2021, 2022-23; 114 Cong. Rec. 14387 (1968) (remarks of Rep. Sullivan).
91. See note 6 supra concerning the difference in meaning, if any, between the statutory and regulatory provisions.
92. This is not to say that every lender who negates the insurance disclosure does so with devious intent. The intent of individual lenders is, however, irrelevant for the purpose of construing and enforcing the congressional purpose behind the insurance disclosure requirement. The crucial factor is the possibility for abuse.
tion of the insurance is involuntary.\textsuperscript{93}

Not only do the decisions in the principal cases frustrate the specific congressional purpose, they also undermine one of the basic tenets upon which the entire structure of Truth-in-Lending is founded—to provide useful disclosures to consumers. The Act is designed to promote "meaningful disclosure"\textsuperscript{94} and to ensure that specific credit terms are disclosed "clearly and conspicuously."\textsuperscript{95} Although creditors may provide information to consumers in addition to the disclosures specifically required, such other information cannot be "stated, utilized, or placed so as to mislead or confuse the customer or lessee or contradict, obscure, or detract attention from the information required . . . to be disclosed."\textsuperscript{96}

It might be said that some of the practices apparently legitimized by the principal cases would be in direct violation of this section of Regulation Z,\textsuperscript{97} but not all practices which have the effect of negating insurance disclosures involve providing additional information or explanations.\textsuperscript{98} It is obvious from this section of Regulation Z that lenders might accomplish the same result by effective sales techniques. If the lender makes the required disclosures, does nothing to negate those disclosures, but nevertheless persuades a high percentage of consumers to purchase the insurance, the Act would not be violated and yet the lender would have the ability to bury in and recoup from the insurance premium a portion of the cost of credit. In that situation, the borrower's decision would be totally voluntary and it would be within each individual borrower's power to pay no more than the finance charge disclosed by disclaiming the insurance.

In any event, the potential for such persuasive sales techniques is an additional reason to insure that borrowers realize they need not purchase the insurance if they do not want it. See \textit{USLIFE}, 91 F.T.C. at 1027.

\textsuperscript{93} Lenders might accomplish the same result by effective sales techniques. If the lender makes the required disclosures, does nothing to negate those disclosures, but nevertheless persuades a high percentage of consumers to purchase the insurance, the Act would not be violated and yet the lender would have the ability to bury in and recoup from the insurance premium a portion of the cost of credit. In that situation, the borrower's decision would be totally voluntary and it would be within each individual borrower's power to pay no more than the finance charge disclosed by disclaiming the insurance.


\textsuperscript{96} 12 C.F.R. § 226.6(c) (1979).

\textsuperscript{97} For example, if the lender told the consumer, "I don't think you will get this loan anywhere in town without insurance," the Act would not be violated according to \textit{Mims} because it is not a specific and unequivocal statement. Such a statement would not be a violation according to \textit{Anthony} and \textit{USLIFE} so long as required disclosures were made. Nevertheless, this clearly constitutes additional information which may contradict or distract from those disclosures or may mislead or confuse the customer and, therefore, may violate § 226.6(c) of Regulation Z. Similarly, if the lender reviews the completed loan papers with the borrower and in the course of that review communicates any information or explanation which contradicts, obscures, or distracts from the insurance disclosures, this section may be violated once more. See \textit{USLIFE}, 91 F.T.C. at 1028.

\textsuperscript{98} For example, by placing an "X" next to the signature line in the insurance authorization form, or by completing the loan papers with the insurance included before the borrower has indicated any desire therefor, the lender arguably does not provide the borrower with any additional information or explanation and thus the activity would be outside the scope of § 226.6(c). Furthermore, to the extent that this section requires proof of intent by the lender to mislead or confuse, the consumer would be saddled with a difficult burden. See \textit{Gennuso v. Commercial Bank & Trust Co.}, 425 F. Supp. 461, 472 (W.D. Pa. 1976), rev'd, 566 F.2d 437, 443 (3d Cir. 1977). Therefore, this section of Regulation Z could not be effectively
tion Z, however, that disclosure of credit terms must be comprehensible to consumers, so that they can comparison shop for credit terms and make informed decisions concerning the use of credit. Yet the decisions in the principal cases countenance actions which render the insurance disclosures meaningless; actions which certainly confuse customers and distract their attention from the disclosures provided.

The concentration in the principal cases on the form rather than the substance or effect of the insurance disclosures produces absurd results. Assume a borrower who desires the insurance, reads and comprehends the written disclosure, but does not separately sign the insurance authorization. Or perhaps he receives the necessary disclosures orally but not in writing. In either event his purchase of the insurance is truly voluntary but the lender is nevertheless in violation of the Act for noncompliance with the disclosure requirements. On the other hand, consider a consumer who receives all the written disclosures specifically required by the Act and who separately signs and dates the insurance authorization. If that consumer buys the insurance only because the lender has created the impression that the insurance is required, despite the disclosure to the contrary, no violation of the Act has occurred. These two examples suggest that the legislative objective of a voluntary insurance purchase is irrelevant for determining compliance with the Act. The form of the disclosure and the consumer's separate signature have become the only factors relevant in that determination. The result of the second example, mandated by the decisions of the principal cases, truly loses sight of the intent of Congress.

Given that the decisions of the principal cases have subverted utilized as a basis for prohibiting all types of negation of the insurance disclosures, but all types of negation nevertheless violate the spirit of this provision.


100. The result in the first example suggests that the form of disclosure mandated by Congress must be adhered to even when the specific legislative purpose is attained. Since adherence to form, so long as it is not negated, is a significant means of conveying the voluntariness of the insurance election, this is an acceptable result. The point to be made is that form alone should not be determinative.
the legislative purpose, it is important to consider whether this result may have a serious adverse impact on consumers. If the Act and Regulation Z already provide ineffective protection for consumers in reaching their decision whether to purchase credit insurance, any further dilution of that protection by the principal cases could well be insignificant. 101 In view of the widespread criticism of the overall effectiveness of Truth-in-Lending, this is more than an idle inquiry. 102

Truth-in-Lending is, of course, only a disclosure statute. It does not regulate the substance of credit transactions. 103 Therefore, the Act will be successful in achieving its overall purpose of promoting comparison of credit terms and informed use of credit only if the required disclosures are read, understood and used by credit consumers. 104 The general consensus among commentators is that Truth-in-Lending has not been successful in this sense. Although some feel that the Act and Regulation Z have succeeded in increasing the level of realistic awareness among consumers of the annual percentage rates they are paying for the use of credit, 105 and though at least one commentator feels that disclosure for disclosure's sake may be a virtue, 106 the general consensus is that con-

101. The question of the legality of the lender's actions remains unaffected by this consideration. Even if the protection provided consumers by Truth-in-Lending is wholly ineffective, that is not a license to the lender to ignore it.


103. Boyd, The Federal Consumer Protection Act—A Consumer Perspective, 45 NOTRE DAME LAW. 171, 174 (1970). It has been said that with respect to provisions concerning credit life and disability insurance the Act has a substantive element. Landers, supra note 7, at 122. The Act regulates not only what is disclosed regarding insurance, but also whether the insurance is required. This substantive component, however, is not a substantive regulation of the credit terms. The Act does not mandate whether the insurance may or may not be required; it only varies the disclosure requirements (whether the insurance must be disclosed as part of the finance charge) based upon whether the insurance is required. See 15 U.S.C. § 1605 (1976); 12 C.F.R. § 226.4 (1979).

104. See FTC Informal Staff Opinion, December 9, 1969, excerpts published in TRUTH-IN-LENDING, SPECIAL RELEASES—CORRESPONDENCE, APRIL 1969 TO OCTOBER 1978 ¶ 30,309 (CCH 1979) [hereinafter cited as FTC Staff Opinion].

105. 1978 FRB REPORT TO CONGRESS, supra note 101, at 3-4; Garwood, supra note 101, at 27-28. But see Davis, Protecting Consumers From Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts, 63 VA. L. REV. 841, 842 (1977); Whitford, The Functions of Disclosure Regulation in Consumer Transactions, 1973 WIS. L. REV. 400, 414 (1973), both of which conclude that whatever increased awareness has occurred, it is less than enough to qualify as success.

106. Whitford, supra note 105 at 404. The author suggests that even if consumer behavior is unaffected by Truth-in-Lending disclosure, a benefit would nevertheless be realized to
sumer behavior has not been affected by Truth-in-Lending. Critics conclude that Truth-in-Lending requires disclosure of excessive information which is too detailed, complex, and technical to be assimilated and used by consumers. The picture painted is of consumers presented with such a complex and long disclosure statement that they are discouraged from trying to comprehend it. Other critics question whether even comprehensible disclosures are of use to consumers who, by the time they first receive the disclosures, have already decided to make the purchase or take the loan and are unlikely at that point to forego the credit merely because they do not like the credit terms disclosed.

While the criticisms of the combined disclosure requirements of Truth-in-Lending may be valid, it does not necessarily follow that the credit insurance disclosures are as ineffective as the other disclosures. Granted, the insurance disclosure provides a greater quantity of information and is more detailed than many of the other disclosures. Nevertheless, the consumer’s attention may be drawn to this disclosure more than the others due to the requirement of a separate signature. More important, unlike the other

the extent that the disclosure imparts more honesty into the transaction.

107. Whitford, supra note 105, at 417-20. Cf. Boyd, supra note 102, at 175-77 (noting that despite the possible trivial effect on consumer behavior, the Act may still provide some benefits for the consumer).


109. The required disclosures must be given to the consumer before the transaction is consummated. 15 U.S.C. § 1639(b) (1976); 12 C.F.R. § 226.8(a) (1979). This requirement may be satisfied by delivery of the disclosures only momentarily before the consumer executes the loan papers. Bissette v. Colonial Mortgage Corp., 477 F.2d 1245, 1246-48 (D.C. Cir. 1973).

110. In that situation, the consumer is susceptible to a “conflict-resolving” suggestion from the creditor. For example, the lender may say that the objectionable credit term is not important but only required by law. Whitford, supra note 105, at 426. Of course, if this scenario is common, the Truth-in-Lending disclosures have failed in their essential purpose.

111. Boyd, supra note 103, at 175-76; Whitford, supra note 105, at 417-20. But see S. REP. No. 95-720 95th Cong., 2d Sess. (1978), in which the Committee referred to the Federal Reserve Board’s statistics to the effect that those creditors charging higher interest have suffered a substantial reduction in their share of the market. See also Hubbard, supra note 8, at 275-76.

112. One critic has even suggested that in order to make the disclosures simpler and more comprehensible to consumers the insurance authorization should be deleted entirely because of its relative complexity and detail. Davis, supra note 105, at 862-66. He feels the “potential utility [of the insurance authorization] seemed too small to justify the added information load.” Id. at 863. While the result might be that the consumer’s understanding of all the disclosures is enhanced and he may even understand more clearly that insurance is
credit terms disclosed, consumers who object to inclusion of insurance need not forego their objection in order to make the purchase or secure the loan.\textsuperscript{113}

It would be naive to assume that most or even many consumers make a conscious decision concerning the desirability and price of the insurance, and, on the basis of their conclusions, inform the creditor whether to include or exclude the insurance from the transaction. This possibility is even more remote when consumers must make their decisions quickly and in the presence of lenders.\textsuperscript{114} As demonstrated above, however, the consumer was intended to have a real choice. At least some consumers will be motivated by the fact that the transaction without insurance will obviously cost less than if insurance is included.\textsuperscript{116} Lenders should not be permitted to continue to negate the disclosures and thus preclude a choice by those consumers, as few in number as they may be, who might want to exercise it.

\textsuperscript{113} Credit terms in consumer credit transactions are normally not negotiable, or at least are not presented by the creditor or perceived by the consumer as being negotiable.
\textsuperscript{114} When the loan papers are to be executed the consumer might feel real or imagined pressure from the lender to consummate the transaction quickly, and the lender might also, if he has not done so earlier, make a sales pitch concerning the desirability of the credit insurance. In that environment it is indeed difficult for the consumer to consider his options and decide whether the credit terms are acceptable. Even if the consumer realizes that insurance is included and decides he does not want it, changes are the loan papers which he is being asked to sign already include the purchase of insurance. Rejection of the insurance, therefore, would necessitate preparation of a completely new set of documents. Few consumers are sufficiently aggressive to demand such extra effort by the lender. Landers, supra note 7, at 120. Many consumers might even fear that such a request would so alienate the lender that he would then refuse to extend the credit. See Mims v. Dixie Fin. Corp., 426 F. Supp. 627 (N.D. Ga. 1976). \textit{But see} Hubbard, supra note 8, at 275-76 (Hubbard seems to suggest that consumers should no longer be so intimidated since, if denied credit, they can visit a variety of other lending institutions). Thus the preparation of the documents with the insurance included can be a very effective method of guaranteeing that the consumer will purchase the insurance. This practice, however, is unobjectionable under the principal cases. \textit{See, e.g., USLIFE Credit Corp. v. FTC, 599 F.2d 1387} (5th Cir. 1979).

\textsuperscript{115} Credit consumers are traditionally assumed to be more concerned with the size of the down payment and the amount of each monthly payment than with the total price or total cost of credit. To any consumer who falls within that characterization the additional cost of the insurance, even if it is considerable, is insignificant because it does not raise his down payment nor appreciably raise the amount of his monthly payment. Recent studies have indicated, however, that consumers are more sensitive to interest rates and the total cost of the credit than previously believed. Hubbard, supra note 8, at 118; 1978 FRB \textit{Report to Congress}, supra note 101, at 5. Therefore a significant percentage of consumers may be concerned with the total amount the insurance adds to the cost of the transaction and may elect to forego the insurance as an economy measure.
IV. Suggestions for Overcoming Principal Cases

If it is true that the decisions in the principal cases sanction activities by lenders which frustrate congressional purpose, the only remaining issue is whether and how that unfortunate result might be changed. One author, in phrasing that issue, seems to suggest that the consumer protection intended by Congress in relation to credit insurance cannot be achieved except by prohibiting creditors from offering the insurance coverage or by supplying consumers with lawyers or paralegals.\(^\text{116}\) Despite the pessimism implicit in this suggestion, some less drastic possibilities exist for giving effect to the congressional purpose. One of the most obvious is for consumers to continue to bring suits challenging creditor practices which negate the insurance disclosures. It may still be possible to persuade courts outside the Fifth Circuit that the intent of the Act and not the form of compliance is of paramount importance.\(^\text{117}\)

An equally obvious method to avoid the results in the principal cases is to amend the Act. Several amendments for that very purpose have been suggested. One would require that all credit insurance premiums be included in the finance charge regardless of whether the insurance is required by the lender.\(^\text{118}\) Such an amendment, however, would diminish rather than enhance protection of consumers because the lender's incentive to make the insurance optional, exclusion of the premium from the finance charge, would be eliminated.\(^\text{119}\) Another suggested amendment would require

\(^\text{116}\) D. Rice, Consumer Transactions 74 (Supp. 1978).
\(^\text{117}\) The question appears to be decided in the Fifth Circuit Court of Appeals by the principal cases, and further challenges within that circuit would be fruitless. The absence of a definitive judicial statement on this issue in any other circuit, however, leaves open the possibility of contrary results in other circuits.
\(^\text{118}\) 1974 FRB Report to Congress, supra note 2, at 12. Paer, supra note 2, at 375.
that solicitation for the insurance be delayed until sometime after consummation of the credit transaction. While this would remove any misconception the consumer might have about the insurance being required to secure the credit, it would also result in a period of time during which the consumer has no insurance coverage. Still another proposed amendment would require that every credit insurance policy give the insured consumer an opportunity to cancel the policy within a certain number of days after the credit transaction was consummated and receive a return of all premiums paid. This approach, however, places the insurer in an unfair position. Not only will the insurer have afforded the protection for a period of time for which it must return the premium, but only those consumer-insureds who suffered no covered loss following consummation of the credit transaction will cancel. Certainly those who suffered loss will not jeopardize their claim by retroactively cancelling their insurance. As an ultimate result, credit insurers would likely raise premium rates for all consumers under this scheme.

Each of these reforms deserves consideration. The most effective amendment, though, would specify that any creditor who practices


120. 1974 FRB REPORT TO CONGRESS, supra note 2, at 12.

121. Some consumers desire to purchase the insurance in order to protect themselves or their estates from large credit obligations in the event of their disability or death. For example, Mr. Ralph Clontz, the author of a considerable work on Truth-in-Lending, states that he always takes out the insurance in connection with consumer loans because "he prefers to bequeath a paid-for automobile, rather than an obligation on which payments must be continued." 1 R. CLONTZ, TRUTH-IN-LENDING MANUAL ¶ 2.04(4)(e) (4th ed. 1976). This suggested amendment would make the insurance unavailable to Mr. Clontz and consumers like him until sometime after the transaction is consummated, thereby leaving them uncovered during a time in which they are exposed to the loss against which they wish to insure.

122. 1976 FRB REPORT TO CONGRESS, supra note 2, at 17, 34. At least one state already requires such a cancellation option. Wis. STAT. § 424.203(4) (1974). The Wisconsin statute permits cancellation "within 10 days from the date the indebtedness is incurred." Id. It should be noted that even if it is not specifically required by statute, giving the consumer such a cancellation option may be evidence that the insurance purchase was voluntary. FRB Letter 1286, supra note 1. But see In re USLIFE Credit Corp., 91 F.T.C. at 1029 n.21.
thwarting the consumer's free choice would be required to include the premium in the finance charge. Ideally, it would set forth a nonexclusive list of several of the objectionable creditor practices, such as including insurance in the completed loan documents or placing an "X" next to the space for separate signature before the consumer has given any affirmative indication of his desire for the insurance. Neither this nor any of the other suggested amendments has been included in any recent reform proposals.123

The results in the principal cases might also be avoided by modification of Regulation Z. Certainly the Federal Reserve Board has authority to make the necessary changes in Regulation Z even without any further amendment to the statute,124 and these changes would have the force and effect of law.125 Alternatively, the Federal Reserve Board could issue an official interpretation without amendment of the regulation. Although an official interpretation does not have the effect of law,126 it would nevertheless be entitled to great deference.127 However the Board might choose to act, the substance of the amendment or of the interpretation could resemble any of the suggested statutory reforms discussed above.128


124. Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 365-66, 373 (1973). Regarding the authority of the Federal Reserve Board to adopt regulations under Truth-in-Lending, the Court noted in a passage particularly appropriate to the present considerations:

In addition to granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to "carry out the purposes" of the Act, Congress specifically provided, as noted earlier, that the regulations may define classifications and exceptions to insure compliance with the Act. . . . The Board was thereby empowered to define such classifications as were reasonably necessary to insure that the objectives of the Act were fulfilled, no matter what adroit or unscrupulous practices were employed by those extending credit to consumers.

Id. at 365-66 (footnote omitted) (citation omitted).

125. General Electric Credit Corp. v. Smail, 584 S.W.2d 690, 695 (Tex. 1979) (quoting K. Davis, Administrative Law Treatise § 5.03-3 (Supp. 1976)).

126. Official interpretations do not have the effect of law because they are not subject to the procedural review requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1976). General Electric Credit Corp. v. Smail, 584 S.W.2d 690 (Tex. 1979).

127. 584 S.W.2d at 695. See note 84 supra.

128. This would not be the first time that the Board acted in response to a judicial decision construing Truth-in-Lending which it felt was erroneous. In 1975 the court in Ives v. W.T. Grant Co., 522 F.2d 749, 760-61 (2d Cir. 1975), held that a single element finance
A last resort, if both Congress and the Federal Reserve Board refuse to act, is for the Federal Trade Commission to take independent action under the Federal Trade Commission Act. Although the FTC clearly has no rulemaking authority under Truth-in-Lending, it is vested with general enforcement responsibilities of that Act. In order to facilitate FTC enforcement, any Truth-in-Lending violation is also deemed a violation of the Federal Trade Commission Act. It was pursuant to this enforcement capability that the FTC proceeded against USLIFE Credit Corporation. This is not, however, the full extent of FTC authority in the area of credit practices. Under its enabling statute, the FTC is "empowered and directed to prevent . . . unfair methods of competition in or affecting commerce." The FTC has long taken the position that certain credit practices by lenders, particularly misrepresentation and devious credit sales practices, are violations of this provision and are therefore vulnerable to FTC challenge, regardless of whether they are also a violation of Truth-in-Lending. In fact, the administrative law judge who found in favor of USLIFE in connection with the alleged Truth-in-Lending violations conceded that the same facts may be sufficient to establish a separate violation of the Federal Trade Commission Act. But because the FTC

charge must be itemized. Shortly thereafter the Board issued an interpretation for the purpose of changing the result reached in Ives. See Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth-in-Lending for the Year 1975 13 (1976).

132. See USLIFE, 91 F.T.C. at 986-87.
(a) Declaration of unlawfulness; power to prohibit unfair practices
(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 U.S.C. 1301 et seq.], and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(a)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.
134. See FTC Staff Opinion, supra note 104.
counsel disclaimed any reliance on such a theory and proceeded solely on the basis of alleged violations of Truth-in-Lending, the administrative law judge refused to consider that issue.\textsuperscript{138}

The ability of the FTC to prevent certain credit practices was confirmed by the court in 

\textit{Tashof v. FTC}.\textsuperscript{136} In 

\textit{Tashof} the FTC brought an enforcement proceeding under section 5 of the Federal Trade Commission Act alleging, among other things, that a low-income retailer had failed to inform customers fully and adequately of the credit terms of their purchases, including the dollar amount of the credit charge and the annual percentage rate.\textsuperscript{137} Although the Truth-in-Lending Act was not applicable to the alleged practices since they occurred prior to its enactment, the respondent nevertheless took the position that the Act evidenced the FTC's lack of any independent authority in connection with credit practices. This argument was flatly rejected by both the FTC\textsuperscript{138} and the circuit court on appeal. As indicated by the court:

The argument is without merit. The [Truth-in-Lending] Act establishes minimum standards of disclosure which the Commission may enforce without proving unfairness and deception on a case by case basis. It was not intended to cure a previous deficiency in Commission power to deal with individual cases, and to shape its remedies to the facts of these cases.\textsuperscript{139}

\begin{itemize}
  \item \textsuperscript{135} 91 F.T.C. at 1015-16.
  \item \textsuperscript{136} 437 F.2d 707, 714-15 (D.C. Cir. 1970).
  \item \textsuperscript{137} Id. at 711.
  \item \textsuperscript{138} In its opinion, the FTC held:
    \begin{quote}
      The Commission has jurisdiction under Section 5 over unfair or deceptive acts and practices in commerce, and no exception is made in the Federal Trade Commission Act or any other Act of Congress for acts and practices involving credit. Indeed the Commission has been actively enforcing Section 5 in the field of credit transactions for decades.
    \end{quote}

\textit{In re Tashof}, 74 F.T.C. 1361, 1399 (1968) (footnote omitted), aff'd, 437 F.2d 707 (D.C. Cir. 1970). Later in its opinion, the FTC added:

The Consumer Credit Protection Act does not, of course, in any way pre-empt the Commission's jurisdiction over deceptive acts and practices in commerce, even if such acts may involve credit practices. There is no suggestion in the law or in the legislative debates which preceded its enactment that it was designed to pre-empt the Commission's jurisdiction. The purpose of that law is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit" (§ 103). Our jurisdiction, on the other hand, stems from unfairness and deception and has traditionally extended to credit practices as well as all other types of sales and promotion practices which are unfair or deceptive.

\textit{Id.} at 1414.

\item \textsuperscript{139} 437 F.2d at 714 (footnote omitted).\end{itemize}
According to this decision, the FTC may proceed against offensive credit practices in either of two ways. First, it may proceed under Truth-in-Lending alleging violations of the specific provisions of the Act or Regulation Z. In the alternative, the FTC may proceed under the Federal Trade Commission Act alleging that the challenged practices are unfair or deceptive.\(^\text{140}\) Such an action is not dependent on finding a violation of either the Truth-in-Lending Act or Regulation Z and is completely independent of that statutory scheme.\(^\text{141}\)

The FTC’s authority under the Federal Trade Commission Act was utilized to challenge the negation of credit insurance disclosures in *In re Peacock Buick, Inc.*\(^\text{142}\) The complaint alleged various violations of section 5 of the Federal Trade Commission Act including misrepresentation by the car dealer that area banks would not accept applications for credit without credit insurance, and completion of the contracts with insurance charges included without the customer’s prior approval.\(^\text{143}\) No violations of the Truth-in-Lending Act were charged. The FTC found that despite a written disclosure on the loan papers that credit insurance was not required, these actions constitute a deception and therefore violate the Federal Trade Commission Act.\(^\text{144}\)

Further proceedings under this theory are not precluded by, nor inconsistent with, the decisions in the principal cases. Those decisions consider only whether the challenged creditor practices violated Truth-in-Lending. No violation was found on the ground that technical compliance is all that is required. Whether the challenged practices were unfair or deceptive was not considered since, according to the courts, such factors are irrelevant in determining compliance with Truth-in-Lending. In determining compliance with section 5 of the Federal Trade Commission Act, however, the sole consideration is whether the practices are unfair or deceptive.\(^\text{145}\) Consequently, further action by the FTC under its own en-

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140. See *id.* at 714-15.
141. *Id.* The exercise of such an independent jurisdiction to challenge credit practices, to the extent that it results in any disclosures in addition to those already mandated by Truth-in-Lending, is vulnerable to the criticism that it will simply cause further confusion to the consumer. See *Brandel & De Long, supra* note 108, at 970. When used to eliminate practices which negate credit insurance disclosures, however, the result should be to clarify the disclosures rather than confuse the consumer.
143. See *id.* at 1534, 1558-60.
144. *Id.* at 1558.
145. See note 132 *supra.*
The FTC might even issue an appropriate trade regulation rule under the power granted it by the Federal Trade Commission Act.\textsuperscript{148} Because the FTC's rulemaking authority is limited to proscribing "unfair or deceptive acts or practices," such a rule could not deal with violations of Truth-in-Lending and thus would avoid a direct conflict with the decisions in the principal cases.\textsuperscript{149}

V. Conclusion

The frustration of congressional purpose resulting from the decisions in the principal cases is reason enough to urge corrective action to restore free choice to the consumer's credit insurance purchase. The need for such corrective action is heightened by the current economic climate. The recent ills of double digit inflation and economic recession resulted in the restriction of the availability of consumer credit.\textsuperscript{150} The impact of such restriction on credit insurance transactions could be a double-edged sword. Creditors might seek alternative sources of income to compensate for profits

\textsuperscript{146} Federal Trade Commission Act § 5(b); 15 U.S.C. § 45(b) (1976). Because some of the negation practices are already subject to an existing cease and desist order, see In re Peacock Buick, Inc., 86 F.T.C. 1532 (1975), appeal denied, 553 F.2d 97 (4th Cir. 1977), the FTC also has the power to seek a civil penalty against any lender engaging in the practices found unfair and deceptive in that case. 15 U.S.C. § 45(m)(1)(B) (1976). The FTC probably would not take this course because a lender is liable only if it engaged in the proscribed practice "with actual knowledge that such act or practice is unfair or deceptive."\textsuperscript{147} Id. at § 45(m)(1)(B)(2). In view of the decisions in the principal cases sanctioning the same practices, it is unlikely that lenders could be proved to have such actual knowledge.

\textsuperscript{147} Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988-89 (D.C. Cir. 1973). Although one court reached the opposite result when an individual sought recovery under the Federal Trade Commission Act with regard to practices which had previously been found to be unfair and deceptive by the FTC, see Guernsey v. Rich Plan, 408 F. Supp. 582, 586-89 (N.D. Ind. 1976), it does not appear that even this limited private cause of action has survived. Bott v. Holiday Universal, Inc., [1976] 5 TRADE REG. REP. (CCH) 60,973 (D.D.C. 1976). See generally 9 CONN. L. REV. 294 (1977) and authorities cited therein.


\textsuperscript{149} The FTC has issued or proposed several rules concerning unfair or deceptive credit practices. See, e.g., Preservation of Consumers' Claims and Defenses, (1979) 5 Cons. Cred. Guide (CCH) ¶ 10,181-84; Proposed Trade Regulation Rule on Credit Practices, id. at ¶ 10,471.

\textsuperscript{150} N.Y. Times, Mar. 15, 1980, at 1, col. 1.
lost by a decline in the volume of credit transactions. The return from the sale of credit insurance was a readily available source of replacement income. At the same time, credit consumers, faced with a shrinking market and increasing difficulty in obtaining credit, were even more vulnerable to creditor pressure to purchase the insurance. Conversely, although restrictions on credit have been removed, the continuing current slowing of the economy makes consumers all the more dependent on credit, equally increasing their vulnerability to creditor pressure. Consequently, the protection of the consumer's free choice in the credit insurance transaction is now more than ever in need of reinforcement and restoration.