Public Law: Consumer Protection

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CONSUMER PROTECTION

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UNFAIR OR DECEPTIVE ACTS OR PRACTICES

The effectiveness of a consumer protection law usually can be prejudged accurately by its enforcement mechanism. Truth in Lending,
for example, which is considered to be an effective consumer protection enactment, is principally enforced by the private action.
The Louisiana Unfair Trade Practices and Consumer Protection Law,
and the FTC Act of 1914
on which it is modelled, rely primarily on administrative enforcement.
The Louisiana act relieves the chief enforcement agent—the attorney general—of the burden of proving irreparable injury or lack of adequate remedy at law when he seeks injunctive relief under section 1407 of the act. However, only the attorney general, acting in the interest of the public at large, may seek injunctive relief under the Louisiana act; the private litigant may not similarly proceed.

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5. The Louisiana act does provide for private enforcement in section 1409, but an aggrieved consumer faces a difficult problem of proof of an "ascertainable loss." Only if the acts or practices of the defendant are found to have been knowingly used, after defendant was put on notice by the director or the attorney general, may a court award noncompensatory treble damages under section 1409. The difficulty of proving actual damages is seen in Gerasta v. Hibernia Nat'l Bank, 411 F. Supp. 176 (E.D. La. 1975), and in Paris v. Model's Guild, 297 So. 2d 596 (La. App. 4th Cir. 1974); plaintiffs successfully proved actual damages in Moore v. Goodyear Tire & Rubber Co., 364 So. 2d 630 (La. App. 2d Cir. 1978), and in General Inv., Inc. v. Gaudet, 303 So. 2d 624 (La. App. 4th Cir. 1974). Cf. Gour v. Daray Motor Co., Inc., 373 So. 2d 571 (La. App. 3d Cir. 1979) (return of purchase price as actual damages).
LOUISIANA LAW REVIEW

Louisiana case, Guernsey v. Rich Plan of the Midwest, held that in certain narrow circumstances, a private litigant may bring an action for injunctive relief and compensatory damages under the FTC Act. The concurring opinion of Judge Lemmon in the fourth circuit's Reed v. Allison & Peronne decision implicitly suggests the adoption in Louisiana of the Guernsey approach to private actions for injunctive relief under the Louisiana act. A private action for injunctive relief could thus be premised upon a showing of the inadequacy of section 1409 of the act as an effective deterrent against deceptive practices, together with the inability of the attorney general of Louisiana, due to inadequate resources and manpower, to fulfill the role created by the act for that office, and hence to fulfill the purposes of the act.

Perhaps the sole difference between the scope of the Louisiana act and that of the FTC act is that the former refers to "trade or commerce" while the latter refers only to "commerce." The word "trade" is encountered in many regulatory settings, and the word has inspired much litigation over the years. A typical case involves the possible inclusion of the so-called "learned professions" within the meaning of "trade." The varying contexts within which the issue has arisen prevent reliable generalizations, but it can be said that the term "trade" is not typically thought to be synonymous with the term "learned profession." The Louisiana act deals with the problem by including "distribution of any services" as one facet of the definition of "trade." Yet, the clarity of the issue was not entirely established, since the Civil Code jurisprudence has not always considered the practice of medicine and other professional services as the distribution of services in the same sense as, for example, termite eradication. The Reed decision holds that the advertising of legal services involves a "trade or commerce" under the Louisiana act's definition of those terms.

Section 1411 of the Louisiana act empowers the attorney general

8. 376 So. 2d 1067 (La. App. 4th Cir. 1979).
10. See, e.g., Roy v. Mutual Rice Co. of La., 177 La. 883, 149 So. 508 (1933); Whitcomb v. Reid, 31 Miss. 567 (1856); Babcock v. Laidlaw, 113 N.J. Eq. 318, 166 A. 632 (1933).
12. Although the issue is not settled, Louisiana courts have generally regarded the relationship between the consumer and the provider of professional services as one from which only tort actions arise, reasoning that allegations of contractual obligations are simply belated attempts to "breathe life into dead causes of action in tort." Phelps v. Donaldson, 142 So. 2d 585, 587 (La. App. 3d Cir. 1962).
to serve an "investigative demand" upon any person believed to have information, documentary material, or physical evidence of relevance to an alleged or suspected violation of the act, "[w]hen the attorney general and director have evidence that a person has engaged in or is engaged in" any method, act or practice prohibited by the act. The person served with an investigative demand can be required to produce relevant material and physical evidence for examination. The attorney general's investigative demands upon a dance studio operator were set aside by the Supreme Court of Louisiana as lacking in allegations of material fact, in Humphreys v. State ex rel. Guste, the second recent decision of importance from the court concerning the consumer protection law. As a result of the Humphreys decision, an investigative demand may be upheld against a protective order only when it appears from specifically pleaded facts that the attorney general actually has evidence of an alleged violation of the act. Allegations in the form of general statements indicating that the state has information that a violation may have occurred are insufficient. The court has equated the investigative demand with the commencement of a civil action; hence, it must be "as specific and as factual as a petition in a civil suit, alleging, not the evidence, but the 'material facts' on which it is based" under article 891 of the Louisiana Code of Civil Procedure.

The court seems clearly and understandably worried about the potential of section 1411 as a staging area for a fishing expedition by the attorney general; but an examination of section 1411 just as clearly indicates that the statutory phrase—"has evidence that a person has engaged in or is engaged in" a deceptive act or practice—cannot mean that the attorney general must have sufficient evidence to warrant, for example, the filing of an injunction under section 1407. In the first place, section 1411 itself qualifies the meaning of the word "evidence" when it also requires that the attorney general "believe it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in or is engaging in any [deceptive] act or practice," and when the section speaks of "information, documentary material or physical
evidence relevant to the alleged or suspected violation." Second, the genesis of the investigation will usually be a complaint or series of complaints from the alleged violator's customers and competitors. To require the attorney general to set forth at the investigative stage "material facts," in a strict sense, would certainly hamper his enforcement abilities. That would be unfortunate, given that the clear tenor of section 1411 recognizes that the attorney general may be in a position only to allege, in effect, that he suspects a violation of the act may have occurred—the very procedure so obviously disliked by the supreme court.

Section 1412 of the act perhaps provides the key. Since the court pointed out that the investigative demand is not a subpoena, the decision presumably does not affect the power of the attorney general to issue an "investigative subpoena" for deposition testimony pursuant to section 1412. Section 1412, however, similarly requires that the attorney general "have evidence" of a violation of the act before issuing the investigative subpoena. The stated purpose of the subpoena is to reveal, identify, or explain material or evidence sought by an investigative demand. Section 1412 (again, presumably) is intended to aid the attorney general in meeting the "have evidence" requirement of section 1411.

CREDIT TRANSACTIONS

Truth in Lending

Consumer credit transactions typically involve precomputed finance charges, monthly installment payments, and an acceleration clause permitting the creditor to demand early payment of future installments. There are two principal forms of acceleration clauses. The typical form permits acceleration upon the occurrence of some default specifically set out in the agreement; the other form permits the creditor to accelerate at will when he deems himself insecure. Both forms are permitted in Louisiana; but good faith must attend the creditor's resort to his acceleration right, and the debtor must receive a rebate, or remission, of unearned precomputed in-

17. Id.
18. An acceleration clause is simply a stipulation "by which the time for payment of the debt is hastened or advanced because of breach of some condition" of the contract by the debtor. Black's Law Dictionary 26 (4th ed. 1951).
terest,\textsuperscript{22} computed by application of the "sum of the digits" method.\textsuperscript{23}

The Truth in Lending\textsuperscript{24} act contains no disclosure requirements specifically encompassing the acceleration clause, and throughout the decade of the 1970's courts did not agree as to the role the acceleration clause was intended to play in the federal scheme of disclosure of the true cost of credit. By the end of the decade the issue was completely entangled in a web of confusion,\textsuperscript{25} despite the existence of a Federal Reserve Board Staff Interpretation directly on point.\textsuperscript{26} The United States Supreme Court has now endorsed the view of the Federal Reserve Board. The decision in Ford Motor Credit Company v. Milhollin\textsuperscript{27} establishes the following rules for disclosure where the creditor has the right to accelerate:

1) the act of accelerating the indebtedness imposes, by itself, no monetary penalty or assessable charge on the debtor and consequently cannot be equated with a "default, delinquency, or similar charg[e]" under sections 1638(a)(9) or 1639(a)(7) of the act, or section 226.8(b)(4) of Regulation Z;\textsuperscript{28} 2) accelerated payment is, perhaps, an "involuntary"


\textsuperscript{25} Three principal views had evolved by the end of 1979. Some courts had held that an acceleration was not a "default charge" under 15 U.S.C. §§ 1638(a)(9) and 1639(a)(7) [12 C.F.R. § 226.8(b)(4) (1980)], and need not be disclosed at all. Other courts took the contrary view and required disclosure. Still other courts held that acceleration could result in a "charge" whenever state law or the terms of the contract permitted retention of unearned interest upon acceleration. The jurisprudential lineup is presented in Ford Motor Credit Co. v. Milhollin, 100 S. Ct. 790 (1980).


\textsuperscript{27} 100 S. Ct. 790 (1980).

\textsuperscript{28} 15 U.S.C. §§ 1638(a)(9), 1639(a)(7) (1976); 12 C.F.R. § 226.8(b)(4) (1980). The court viewed delinquency charges as the compensation a creditor receives on a pre-computed
prepayment of the obligation, and as such, the creditor is required by Regulation Z, § 226.8(b)(7)\textsuperscript{29} to identify the method that he will employ to compute any unearned portion of the finance charge;\textsuperscript{30} but so long as his acceleration-rebate method is the same (e.g., the sum of the digits) as his rebate policy for voluntary prepayment, no separate disclosure of the creditor's acceleration-rebate policy is required; 3) accelerated payment can result in a default charge to be disclosed under Regulation Z, § 226.8(b)(4),\textsuperscript{31} if the creditor retains unearned finance charges beyond that he would retain by rebating in accordance with the rebate policy he was required to disclose pursuant to section 226.8(b)(7).\textsuperscript{32}

The \textit{Milhollin} decision clarifies more than one confused disclosure area; the deference it lends to official interpretations of the Federal Reserve Board staff will serve to clarify other areas of the law. One such area involves those fees collected by a seller and paid to the state, such as license, title transfer, and registration fees, which are among the fees specified in Regulation Z, § 226.4(b)\textsuperscript{33} that are, if separately itemized and disclosed, not required to be in-

contract for the debtor's delay in making payments, holding, however, that acceleration, as a device by which the creditor avoids further delay in payment of the outstanding debt, results in no "charges payable in the event of late payments" under 15 U.S.C.A. §§ 1638(a)(9) and 1639(a)(7).


30. If state law does not require acceleration or prepayment rebates (and the creditor does not magnanimously make such rebates), or if the creditor does not intend to make rebates, state law notwithstanding, Regulation Z also requires the "no rebate" policy to be disclosed. 12 C.F.R. § 226.8(b)(7) (1980).


32. 12 C.F.R. § 226.8(b)(7) (1980). The court does not directly treat this aspect of Staff Interpretation No. F.C.-0054, but the opinion clearly sanctifies the entire Interpretation. A bit of murkiness still attends the situation where the creditor is required by state law to rebate unearned finance charges, but discloses to the consumer that no rebate will be made. If the creditor subsequently does what he disclosed he would do—make no rebate—the literal language of Interpretation F.C.-0054 indicates no violation of the requirements of section 226.8(b)(4), because the creditor has not retained any amount "beyond those which would have been rebated under the disclosed rebate provisions." Yet the \textit{Milhollin} opinion clearly suggests a contrary conclusion in its discussion of the right of acceleration per se: "In itself, acceleration entails no monetary penalty, although a creditor may independently impose such a penalty, for example, by failing to rebate unearned finance charges." 100 S. Ct. at 795 (emphasis added). However, the only penalty-disclosure provision of Regulation Z is section 226.8(b)(6), and the provision uses the term "penalty charge." So, presumably there is no need to disclose a penalty that results in no assessable charge. This is the view of the FRB, expressed in the context of the difference in yields between the "sum of the digits" method and the "actuarial" method: That difference does not constitute a penalty charge under section 226.8(b)(6) because there is no assessed charge. 12 C.F.R. § 226.818(b) (1980).

33. 12 C.F.R. § 226.4(b) (1980).
cluded in the finance charge. A North Carolina federal court decision has recently adopted the view of the Fifth Circuit Court of Appeals that the section 226.4(b) items may be disclosed as itemized components of the finance charge or separately disclosed as itemized "other charges" included in the amount financed but not part of the finance charges, but that they may not be disclosed as part of the cash price, with or without itemization. The court pointed out that the definition of "cash price" in Regulation Z states that the cash price shall not include "any . . . charges of the types described in § 226.4." Because Regulation Z also requires the creditor to clearly and meaningfully disclose the cash price, inclusion of the section 226.4(b) items in the cash price would arguably violate the act. The FRB staff does not agree, however. The staff believes that the purpose of the reference in the definition of cash price to the section 226.4 items was intended to prevent creditors from hiding finance charges in their cash price, and therefore the section 226.4(b) items must be excluded from the cash price disclosure only if they constitute "finance charges." Thus, the FRB staff would permit inclusion of such items in the cash price whenever the creditor is not required to include those items in the finance charge.

**Truth-in-Lending Simplification**

In view of the disclosure problems discussed above, only the uninitiated would exclaim the complexity of truth in lending. Congress intended a "meaningful" disclosure of credit terms to enable the relatively unsophisticated average consumer of credit to employ comparison shopping for his credit. To that end some nine disclosure-requirement sections were enacted, which, in fairness to

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34. 12 C.F.R. § 226.8(c)(8) & (d)(3) (1980).
35. 12 C.F.R. § 226.8(c)(4) (1980).
37. 12 C.F.R. § 226.2(n) (1980).
40. 12 C.F.R. § 226.2(n) (1980).
43. The sections of Title 15 of the United States Code are: 1605 ("Determination of finance charge"); 1606 ("Determination of annual percentage rate"); 1631 ("Disclosure requirements"); 1632 ("Form of disclosure; additional information"); 1635 ("Right of rescission as to certain transactions"); 1636 ("Periodic statements; contents"); 1637 ("Open end consumer credit plans"); 1638 ("Sales not under open end credit plans"); 1639 ("Consumer loans not under open end credit plans").
Congress, cannot be characterized as unduly complex, in view of the wide range of business activities and contractual terms covered by the law. But two provisions of the law, viewed as necessary to assure compliance, virtually guaranteed that the act would become complex and would be subjected to the constant pressure of criticism. First, section 1640 of the act\(^4\) unswervingly demands near perfection in compliance by large institutional creditors and small neighborhood creditors alike. Second, section 1604\(^5\) delegates to the Federal Reserve Board the power to prescribe regulations to carry out the purpose of the act, and those regulations "may contain such classifications, differentiations, or other provisions . . . as in the judgment of the Board are necessary or proper to effectuate the [act's] purposes . . . to prevent circumvention or evasion thereof, or to facilitate compliance therewith." Thus, where Congress provided eight specific disclosures for other than open-end loans,\(^6\) the FRB in Regulation Z requires those eight, plus seven more, for a total of fifteen specific disclosures;\(^7\) where Congress required the sale creditor to make ten specific disclosures,\(^8\) Regulation Z requires twenty;\(^9\) where Congress decreed that all disclosures be clear and conspicuous,\(^10\) Regulation Z adds that they also be "in meaningful sequence" and in prescribed terminology.\(^11\) Each additional disclosure requirement both promotes the purposes of the act and adds complexity that increases the creditor's exposure to the civil penalties of section 1640. The remedial nature of the act brought forth a liberal construction in the courts,\(^12\) adding to the problem.

Despite its complexity, there is solid evidence that the truth in lending law has begun to fulfill its purposes. In the FRB's Annual Report to Congress on Truth in Lending for the year 1977, the Board noted that there have been significant increases in consumer awareness of credit costs between 1969 and 1977.\(^13\) Yet, there also is evidence that disclosure statements that comply with the act and Regulation Z require too many disclosures which, whether or not in-

\(^{47}\) 12 C.F.R. §§ 226.8(b), (d) (1980).
\(^{49}\) 12 C.F.R. §§ 226.8(b), (c) (1980).
\(^{51}\) 12 C.F.R. § 226.6(a) (1980).


\(^{53}\) The following tables summarize those appended to the Annual Report.
herently confusing, tend to overwhelm and confuse the consumer. Such information overkill was doubtless the catalyst for the Truth-in-Lending Simplification and Reform Act\textsuperscript{55} signed into law on March 31, 1980, to be effective on April 1, 1982.

"Simplification" is clearly a better label for the act than "revision," and in no manner may the word "renovation" be used to describe the act; in that sense the simplification act will be disappointing to some. The act is, however, a step in the right direction. Agricultural credit extensions are removed from the scope of truth in lending, and sellers will no longer be required to itemize, as part of the finance charge, those fees such as sales taxes, license fees, and registration fees paid by cash as well as credit customers. More importantly, the disclosures required of sellers and lenders

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<tr>
<th>Types of credit:</th>
<th>Level of APR Awareness (percent)</th>
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<tr>
<td>Closed-end</td>
<td>14.5 54.6</td>
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<tr>
<td>Retail revolving</td>
<td>35.2 64.7</td>
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<tr>
<td>Bank credit cards</td>
<td>26.6 71.0</td>
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</tbody>
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<th>Categories:</th>
<th>Level of APR Awareness (percent)</th>
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<tr>
<td>New autos</td>
<td>17.5 70.5</td>
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<tr>
<td>Used autos</td>
<td>7.2 37.8</td>
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<tr>
<td>Home improvement</td>
<td>15.3 67.2</td>
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<tr>
<td>Personal loans</td>
<td>20.2 54.8</td>
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<tr>
<td>Appliances &amp; furniture</td>
<td>11.7 44.7</td>
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<tr>
<td>Consolidated</td>
<td>14.5 54.6</td>
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The Report also indicates that from 1969 to 1977 there have occurred dramatic increases in the awareness of the annual percentage rate at all levels of education, age, income, and race.

54. \textit{Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth in Lending, for the Year 1978 (1979).}

55. The act is Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, \_\_\_ Stat. \_\_. 
will be combined in one listing, to be disclosed only as applicable to the transaction in question. The most important aspect of the simplification act is its requirement that the FRB both promulgate model disclosure forms that comply with the law and provide a safe harbor for creditors using them, and prepare a new revision of Regulation Z by April 1, 1981. The real simplification of truth in lending will be accomplished through the proposed revision of Regulation Z, which the FRB has already published for public comment. Among the changes which the FRB proposes, beyond those of the simplification act itself, are: 1) incorporation into Regulation Z of the substance of many Board and FRB staff interpretations, and the clarification of various problem areas raised by court decisions; 2) encouragement of early disclosure through the use of streamlined closed-end credit disclosures that reflect representative transactions; 3) elimination of twelve of the twenty-four current closed-end disclosures for certain transactions; 4) elimination of many of the current "format" requirements for open-end credit; and 5) a conforming of the open-end credit disclosures to the requirements of the Electronic Fund Transfer provisions, wherever necessary and possible.

**Equal Credit Opportunity**

To be a successful competitor in the consumer credit market, creditors must discriminate; that is, they must strive to distinguish—and deny credit to—those consumers who are not creditworthy because they are unable or unwilling to repay the credit extended. To fail to do so increases the creditor's costs, thereby indirectly penalizing creditworthy consumers who must accept and repay credit at higher rates of interest. In short, society desires, and creditor self-interest demands, that creditors do discriminate by simply using sound business judgment. Of course, there also is another meaning of discrimination—to distinguish or pre-judge on a class or categorical basis in disregard of individual merit. This latter form of discrimination is not necessarily repugnant. Automobile insurers usually employ it when they impose higher insurance rates for families having driving-age sons than for families having driving-age daughters. The practice is defensible on the basis that, as a class, young male drivers have more accidents than young female drivers, and that it is not possible to accurately predict, on an individual basis, which youthful drivers will have accidents. Insurers could not, on the other hand, discriminate on the basis of eye,

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hair, or skin color. It is much the same story with creditors. Because credit has become so important to the consumer, the discrimination society demands of creditors must be rationally related to his business risks.

The Equal Credit Opportunity Act\(^5\) represents a Congressional attempt to force creditors to discriminate solely on the basis of two factors: the ability to repay and willingness to repay. The ability of an applicant to repay is demonstrated primarily by a consideration of such factors as the applicant's income (and other resources), his other indebtedness, his employment stability, and his preparedness for severe drains on his resources, such as medical expenses. The willingness of the applicant to repay is demonstrated primarily by his record of prior repayment to other creditors. By prohibiting discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or source of income,\(^6\) Congress in effect leaves only ability and willingness to repay as factors for consideration by creditors. Because marital status and age can, in some circumstances, also be related to one's ability to repay, the Equal Credit Opportunity Act and its implementing regulations (Regulation B) permit limited creditor inquiries in regard thereto.\(^7\)

The Equal Credit Opportunity Act cannot fairly be depicted as a response by Congress to blatant and widespread discrimination in credit-granting on the basis of the prohibited categories. It stretches credulity to assume that the officers and directors of a credit seller or financial institution would place themselves squarely in the crosshairs of a shareholder suit\(^8\) by intentionally turning away profitable credit extensions solely because of the applicant's race, sex, marital status, or any other prohibited bases. That creditors may, however, have employed various "shortcuts" that have the effect of discrimination on one or more of the prohibited bases is demonstrated in recent decisions. In Cherry v. Amoco Oil Company,\(^9\) for instance, Amoco cited, as one of the factors for denial of credit,\(^10\) its negative credit experience in the applicant's immediate geographical area. The area in question happened to be one heavily populated by blacks and readily identifiable by postal zip codes. Amoco could, no doubt, demonstrate that in its experience a disproportionate number

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10. Creditors are required by 15 U.S.C. § 1691(d) to provide a statement of specific reasons for denial of credit.
of defaults in repayment occurred in that area; but the Equal Credit Opportunity Act arguably was violated by Amoco's use of the neighborhood factor. Of interest in Cherry is the fact that the plaintiff was a white resident of a predominantly black area; she was held to have standing under the act to pursue her claim of racial discrimination.

The creditor's shortcut in Markham v. Colonial Mortgage Service Company Associates, Inc. was its refusal to aggregate the incomes of unmarried joint applicants, both of whom were willing to obligate themselves to repay. Because state law made no distinction meaningful to creditors between married and unmarried couples, a claim of discrimination under the Equal Credit Opportunity Act was stated, based on the creditor's admitted practice of aggregating the incomes of similarly situated, but married, joint applicants. Whether such a literal reading of 15 U.S.C. § 1691(a)(1) was intended by Congress remains to be tested, perhaps by a case involving unmarried homosexual joint applicants or polygamous applicants.

South Carolina Electric & Gas Company also has a shortcut regarding applications for utilities service: the company will not supply service to any applicant then indebted to it, or who, at the time of the application, is a member of the household of a former customer who is indebted to it, unless such indebtedness be paid. How should such a practice be applied to the application of a woman

65. The Northern District of Georgia held in the Cherry case that the plaintiff's allegation of racial discrimination stated a claim upon which relief may be granted under the act, 481 F. Supp. at 730, but ultimately found in favor of Amoco. 490 F. Supp. 1026 (N.D. Ga. 1980).
66. The issue was before the court on Amoco's motion to dismiss for lack of standing. The opinion stresses the language of 15 U.S.C. § 1691(a)(1), that it is "unlawful for any creditor to discriminate against any applicant . . . on the basis of race . . . ." 481 F. Supp. at 729 (emphasis added). The court also denied Amoco's motion for summary judgment, finding in the case disputed material facts, ultimately resolved against the plaintiff. 490 F. Supp. at 1026.
67. 605 F.2d 566 (D.C. Cir. 1979).
68. Applying a more favorable income aggregation rule to married couples than to unmarried couples is not, perhaps, the problem Congress sought to cure. Rather, discrimination against unmarried women applicants (e.g., applying less favorable standards to them than to similarly situated unmarried men) and married women applying for credit in their own names would seem to be the real problem. The facts of the Markham case do fall within the literal language of section 1691(a)(1), however.
69. South Carolina Electric did extend credit by permitting deferred payment. Under Regulation B, there is no requirement that there be a finance charge or a "more than four installments" agreement. Compare 12 C.F.R. § 202.2(j) & (l) (1980) with 12 C.F.R. § 226.2(q) & (s) (1980).
whose husband (in whose name the former account stood) no longer resided with her? The company's refusal to open a new account in her name unless the indebtedness in the husband's name was first paid was, in *Haynsworth v. South Carolina Electric & Gas Company,* held not violative of the act because, under state law, there was an implied obligation on her part to pay for past services consumed even though the account was not in her name. The case illustrates not only the important role state law may play in an equal credit opportunity case, but also the nature of unlawful discrimination. So long as South Carolina Electric applied the past indebtedness policy evenly, that is, refused new accounts without regard to the sex, marital status, age, etc., of the applicant, the discrimination was permissible. Thus, plaintiff's husband should likewise be denied a new account.71

Computerized processing of applications for, and issuance of, credit cards apparently enhances the likelihood of shortcuts in the granting of credit. In *Harbaugh v. Continental Illinois National Bank and Trust Company of Chicago,* for example, a credit card application by "Mrs. John P. Harbaugh" yielded issued cards in the name of "John P. Harbaugh," the applicant's husband. Had the applicant applied for the card in the name of "Helen D. Harbaugh," the issuer would risk violation of the act if it refused to judge the applicant on her own ability and willingness to repay; in fact, only in limited circumstances would the issuer be permitted to inquire as to her marital status, that status being, in general, unrelated to ability and willingness to repay. But was the refusal of the bank to issue a card in the name of "Mrs. John P. Harbaugh" an example of discrimination on the prohibited basis of sex? The seventh circuit says that it is not. In fact, since the creditor may not inquire as to the applicant's marital status, the bank could not have required the use of any such "courtesy titles" as "Mr.," "Mrs.," or "Ms." Nothing in the act requires a creditor to employ a voluntarily supplied courtesy title. Mrs. Harbaugh alternatively asserted that if it was the practice of the bank to use no courtesy titles, it at least should have realized that an application by a "Mrs. John P. Harbaugh" was

71. As fate so often provides, plaintiff's husband was in fact permitted to open a new account prior to payment of the existing indebtedness, apparently through inadvertence. *Id.* at 566.
72. 615 F. 2d 1169 (7th Cir. 1980).
74. Plaintiff reapplied for a credit card in the name of "Helen D. Harbaugh," but once again the reply of the bank's computer was in the form of cards issued in the name of plaintiff's husband.
an application by her for an account in her own name, and been under a duty to either advise her of the bank’s "no courtesy name" practice or to ascertain her given name. The court refused to find such a duty." An implicit part of the decision in the Harbaugh case is that the cards issued in the name of “John P. Harbaugh,” but applied for by “Mrs. John P. Harbaugh,” were in fact Mrs. Harbaugh’s cards (denuded of courtesy titles), not her husband’s cards. The decision drew a credible dissent.

The Cherry, Markham, Haynsworth, and Harbaugh cases involve no earthshaking points of law, but those cases do demonstrate the nature and scope of the ECOA. The Markham case aside, few creditors are likely to utilize—and less likely to admit that they utilize—factors directly relating to any of the prohibited categories. Amoco Oil Company may well discriminate on the basis of residential address; not likely will Amoco state, or even concede, that a given applicant was turned down because he was black, or Hispanic. There simply will not typically exist such a dual standard. The difficulty for the aggrieved applicant, then, is to make a prima facie case of unlawful discrimination. The Federal Reserve Board’s Regulation B, § 202.6(a), contains a footnote stating that “[t]he legislative history of the Act indicates that the Congress intended an ‘effects test’ concept . . . to be applicable to a creditor’s determination of creditworthiness,” citing the employment discrimination cases of Griggs v. Duke Power Company and Albermarle Paper Company v. Moody. The Cherry case provides an example of the operation of the “effects” test. Amoco utilized a computerized scoring system to make its creditworthiness determination, assigning to each of thirty-eight factors a weight, or rating, of 1 to 5. A high level of income might receive a rating of 5, a more modest income only a 2 or 3; certain occupations might receive higher ratings than others, and length of time on the job would be similarly rated. Amoco’s computer would then aggregate all thirty-eight ratings or scores and match the total against Amoco’s predetermined minimum acceptable total. Those applicants whose total scores fell short of the minimum would automatically be denied credit. One of Amoco’s thirty-eight factors is residence, and under the Amoco scoring system, most areas bearing a 303 zip code prefix were assigned a

75. Plaintiff admitted receiving federally required notices (from other creditors) advising her of her right to have credit histories reported in her own name. 12 C.F.R. § 202.10 (1980). The court believes that a creditor could not require an applicant to supply her given name, without risk of violation of the act. 615 F.2d at 1173-75.
76. 12 C.F.R. § 202.6(a) (1980).
77. 401 U.S. 424 (1971).
78. 422 U.S. 405 (1975).
low rating. Plaintiff's zip code area, 30310, received a rating of 1; had she resided in a zip code area assigned a weight of 3, 4, or 5, her aggregate score would have warranted the issuance to her of an Amoco credit card. In effect, an applicant residing in an unfavorably rated neighborhood must show more income, greater job stability, etc., to qualify under the scoring system than applicants residing in more favorably rated areas. Although residence has no particular relationship to willingness and ability to repay, it is not a prohibited basis of discrimination. Futhermore, no explicit dual standard existed—an applicant living within one of the unfavorably rated areas would receive the same treatment from Amoco's computer whatever be his age, sex, marital status, race, etc. An examination of the applicant's neighborhood might, however, reveal that it is populated predominantly by poor, black, female heads of households. Under the "effects" test, it might be concluded that the creditor's credit-worthiness determination policy has the effect—whether or not intended—of denying credit to a disproportionate number of black female heads of households or, put in other words, constitutes prima facie evidence of discrimination on the basis of marital status, race, and sex. Since such a pattern of discrimination could be violative of the act, the burden then would be on the creditor to demonstrate the validity of his requirements in terms of willingness and ability to repay.

The Cherry case, the first to apply the "effects" test in the ECOA setting, ultimately ruled that the plaintiff had failed to make out a prima facie case of discrimination, her proof showing only that Amoco's scoring system as a whole tended to reject a disproportionate number of applicants residing in black areas, not that the zip code criterion itself did so. The major hurdle confronting plaintiff was her inability to establish either an actual pool of Amoco applicants or one group acceptable as reasonably possessing that pool's characteristics. The court does concede that if, due to housing patterns, the zip code/race correlation is shown to be high, the zip code criterion could be considered as a mere substitute for a racial criterion; but it was shown that not all low-rated zip code areas were predominantly black. In fact, the aggregated population of all the low-rated areas was only 40% black. Thus, so long as the zip code criterion tended to equally penalize otherwise qualified whites and blacks residing in those areas, the criterion might be performing a disservice to Amoco shareholders, but would not be unlawfully discriminatory.

80. 490 F. Supp. at 1031.
The ECOA's civil liability provisions resemble those of the Truth in Lending Act: a failure to comply with any requirement of the act calls for an award of actual damages, sought individually or as a member of a class, but good faith conformity to an FRB rule, regulation, or interpretation thereof shields the creditor from liability. Unlike the Truth in Lending Act, there is no ECOA general provision forgiving creditors for unintentional violations resulting from bona fide errors. However, Regulation B does provide for a similar “inadvertent error” defense for failures to comply with the requirements pertaining to notice of, and statement of reasons for, adverse action. Regulation B defines “inadvertent error” as a mechanical, electronic, or clerical error that was not intentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. In Desselles v. J.C. Penney Company, the creditor had employed two persons to handle notification requirements with respect to adverse action taken by it on credit applications. The two employees fell behind in sending out the notifications, at the rate of about ten per day. Predictably, the company was unable to meet the notice requirements when it denied plaintiff's application. On the creditor's inadvertent-error-premised motion for summary judgment, the federal district court for the eastern district of Louisiana determined the defense to be inapplicable; the error causing the noncompliance was not a “clerical error,” but one of judgment in not realizing the need to reduce the backlog of notifications. Of course, had the court characterized the backlog problem as a “clerical error,” Penney would still have been required to show that at the time of the error, procedures reasonably adapted to avoid this very problem were being maintained.

Should a case like Desselles go to trial, a key issue will involve proof of notification under Regulation B, § 202.9. A writing addressed to the applicant and delivered, or mailed to the applicant's

83. 12 C.F.R. § 202.9(e) (1980).
84. 12 C.F.R. § 202.2(s) (1980).
85. No. 78-1495 (E.D. La. 1979).
86. Regulation B requires a “notification of action taken” within 30 days of adverse action. 12 C.F.R. § 202.9(a)(1) (1980). Penney apparently complied with that requirement, but Regulation B also requires either a “statement of reasons” for the action taken, within the “notification of action taken,” or a disclosure therein that the applicant is entitled to the statement within thirty days after receipt by the creditor of the applicant’s request therefor. Plaintiff made such a request by a letter to Penney dated August 11, 1977. Penney claimed compliance by its letter of October 14, 1977, but plaintiff denied receipt thereof.
87. See Mirabal v. General Motors Accept. Corp., 537 F.2d 871 (7th Cir. 1976).
88. See note 86, supra.
last known address, constitutes the giving of notice. Actual receipt by the applicant is not required. Presumably, a last known address refers to the address listed on the application, rather than to addresses listed in an external source such as a telephone directory.

Both the Truth in Lending Act and the ECOA provide for the recovery of punitive, as well as actual, damages. The Truth in Lending Act sets a ceiling of $1,000 on punitive damages and computes such damages by simply doubling the finance charge; the ECOA has a $10,000 ceiling on punitive damages. Both acts provide for class action status. The Truth in Lending Act sets out a list of factors to be considered by the court in making a class action award; the ECOA does likewise, but the factors there listed ostensibly apply equally to the determination of punitive damages in both individual and class actions. The federal court for the eastern district of Wisconsin has recently ruled otherwise. In Vander Missen v. Kellogg-Citizens National Bank the plaintiff believed that she had been denied credit in her own name, on the basis of her husband's unfavorable credit rating—a violation of the ECOA. In her individual action against the bank for punitive damages, she sought discovery by interrogatories as to the steps taken by the bank since the time of the alleged violation to assure that future applicants would not be discriminated against, and discovery by means of a newspaper advertisement for witnesses of the names of women who might have been subjected to similar treatment by the bank in the previous five years. The bank predictably blanched at such maneuvers; but plaintiff argued that such discovery was permitted by the list of factors to be considered by the court in awarding punitive damages, particularly "the frequency and persistence of failures of compliance by the creditor," "the number of persons adversely affected," and "the extent to which the creditor's failure of compliance was intentional." Had plaintiff pursued the case as representative for a class, she seemingly would be entitled to her proposed news-

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89. 12 C.F.R. § 202.9(f) (1980).
90. 15 U.S.C. § 1640(a)(2)(A)(i) (1976). Section 1640 does not use the label "punitive" when providing a minimum recovery of $100 and a maximum recovery of $1,000.
94. 15 U.S.C. § 1691e(b) (1976). The factors are: 1) the amount of any actual damages awarded under section 1691e(a); 2) the frequency and persistence of failures of compliance by the creditor; 3) the resources of the creditor; 4) the number of persons adversely affected; 5) the extent to which the creditor's failure of compliance was intentional; and 6) any other relevant factors.
95. 481 F. Supp. 742 (E.D. Wis. 1979).
96. See note 94, supra.
paper advertisement, and perhaps even answers to her interroga-
tories—although normally Federal Rule of Evidence 407 would pre-
vent discovery of subsequently taken measures which, if previously
adopted, would have made the violation less likely to occur. The
court, however, blocked both of plaintiff's discovery efforts, ruling
that the list of factors in section 1691e(b) was intended by Congress
as a protective shield for class action defendants, rather than as an
aid to an individual plaintiff's efforts to recover punitive damages.
Thus, the court refused, as irrelevant, any consideration of discrim-
ination against other women applicants, on the premise that, in ef-
fect, "the frequency and persistence of failures of compliance by the
creditor" factor can only mean, in an individual action, frequency
and persistence of failures of compliance by the creditor with
respect to this plaintiff alone. The court does concede that some of
the listed factors apply equally to individual actions as well as to
class actions, to wit, the amount of actual damages awarded, the
creditor's resources, and the extent to which the noncompliance was
intentional; but the court refused any consideration of the bank's
policies and procedures, other than those regarding plaintiff's ap-
lication, before or after the denial of credit, on the premise that only
those procedures—not whatever the bank had done concerning
other applicants—would be probative on the issue of the bank's in-
tent regarding its failure of compliance in plaintiff's case.

The Vander Missen case does serve the worthy purpose of im-
posing tight reins on the award of punitive damages in an individual
action under the ECOA: but of course, the decision may also en-
hance the attractiveness of class actions. Moreover, the "intent"
analysis of the case seems reasonable. But to limit the "frequency
and persistence" factor to failures of compliance with respect to the
individual applicant alone is an esoteric construction, not at all in
line with a traditionally liberal construction of a remedial statute or
with traditional notions of punitive damages.

The ECOA enables the agencies having responsibility for admin-
istrative enforcement of the Act to refer a compliance problem to
the Attorney General, who may then bring a civil action against one
or more creditors "for such relief as may be appropriate, including
injunctive relief." In addition to the injunction, the Attorney
General may, for example, seek relief in the form of a requirement
that the creditor reconsider previously denied credit applications,
utilizing reformed policies that comply with the law. It may be

97. 481 F. Supp. at 748.
argued that the Attorney General has implicit authority under the ECOA to seek actual or even punitive damages, as an ancillary aspect of his authority to enforce the act. The question was resolved against the Attorney General in *United States v. Beneficial Corp.*, thus limiting the Attorney General to noncompensatory, equitable relief.

**Debt Collection Practices**

Wrongful seizure by a creditor can constitute an unfair act or practice under the Louisiana Unfair Trade Practices and Consumer Protection Law, but recovery for a violation of that act would hinge upon proof of actual damages. If actual damages are awarded, the award must be accompanied by one of attorney's fees and costs. Wrongful seizure is also a tortious act, compensable as such. A debtor subjected to wrongful seizure of his property can recover not only special damages, but also general damages for humiliation or mental distress, as well as nominal damages. A prevailing party is, of course, not generally entitled to an award of attorney's fees unless provided under statutory authority or contractual stipulation. No statutory authority exists in Louisiana for an award of attorney's fees in instances of wrongful seizures under executory process, but such awards have been made for several years on the premise that attorney's fees are a recoverable item of damages where the plaintiff is forced to enjoin or dissolve the wrongful seizure under executory process in order to release his property.

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101. *Cf.* State v. General Motors Corp., 370 So. 2d 477 (La. 1979) (class action by state's attorney general for restitution under a deceptive practices statute).


104. LA. R.S. 51:1409(A) (Supp. 1972). The treble damages portion of section 1409(A) would not likely be applicable to the case of wrongful seizure, unless the creditor's policy is routinely to repossess in disregard of the legal process.


Until quite recently, the wrongful seizure/injunction exception to the "no attorney's fees" general rule had been germinating only in the fourth and second circuits; however, a series of decisions from the first and third circuits within the last forty months appears to have made the exception uniform in Louisiana. Those decisions are May Company, Inc. v. Heirs of Sumage,111 Mid-State Homes, Inc. v. Bice,112 General Motors Acceptance Corp. v. Meyers,113 Mid-State Homes, Inc. v. Lartigue,114 and Commercial Credit Corp. v. Nolan.115 The Meyers opinion presents a nice recounting of the evolution of the exception.

The lawyer may now reasonably wonder whether the exception applies to a non-injunctive action for tortious conversion premised on wrongful seizure, and indeed, whether the exception will ultimately swallow up the rule. The answer to the first query may be a negative one, and the theoretical basis of that negative answer may presage a negative answer to the second query as well. The second circuit, in which the exception is firmly entrenched, denied attorney's fees in a 1976 case in which the plaintiff sought, not injunctive relief and return of the property wrongfully seized by the creditor, but damages for the tortious conversion of the thing. The court ruled, in Lee v. Lewis,116 that the case was not sufficiently analogous to the circumstances of the cases awarding attorney's fees in wrongful seizure/injunction actions to warrant application of the exception.117 The Lee decision did not cite the 1950 decision of the Louisiana Supreme Court in Smith v. Atkins,118 which reached a similar result where recovery of damages was sought for the wrongful seizure of a building erected on a lot ultimately sold by defendant to another. The supreme court there stated that, when the attorney's fees are not incurred for the obtaining of the release of the property or dissolution of the writ, an award of attorney's fees cannot be made.119 The opinion suggests, in fact, that the award cannot be made unless the attorney's fees are incurred exclusively for the dissolution of the writ and/or release of the property.120

111. 347 So. 2d 916 (La. App. 3d Cir. 1977).
112. 361 So. 2d 275 (La. App. 1st Cir. 1978).
113. 377 So. 2d 1355 (La. App. 3d Cir. 1980).
114. 383 So. 2d 99 (La. App. 3d Cir. 1980).
115. 385 So. 2d 1246 (La. App. 3d Cir. 1980).
116. 399 So. 2d 513 (La. App. 2d Cir. 1976).
118. 218 La. 1, 48 So. 2d 101 (1950).
119. 218 La. at 7, 48 So. 2d at 103.
120. Id.
To draw a distinction between actions to obtain the return of a wrongfully seized thing and those that seek compensation for tortious loss of the thing risks Professor Dainow’s appellation: “tweedle-dum or tweedle-dee.” Since the supreme court, in applying the exception in injunction actions, has classified attorney’s fees as “damages,” perhaps it is time for the court to attempt to draw that distinction between injunctive and other actions, within the confines of Civil Code article 1934(2).

Louisiana has long been a leading jurisdiction in recognizing the right of a debtor in default to be free of unreasonable acts of the creditor in his debt collection activities. In at least three cases a debtor has recovered damages for intentional infliction of emotional distress or invasion of privacy upon a finding that the creditor’s act of contacting the debtor’s employer concerning a prejudgment debt was unreasonably coercive. In all three cases, however, the recovery was premised on a finding that the creditor made the contact with the intention of enlisting the employer’s influence and control over the debtor as a means of coercing the debtor to pay, through fear of discharge or other adverse effect on his employment. Where that intent is not demonstrated, contacts by creditors of the debtor’s employer are typically not actionable.

Actions in favor of the debtor can likewise arise when a creditor

123. In White v. Givens, 29 La. Ann. 571, 572 (1877), the court said, in a wrongful seizure/injunction case:
It is proper in estimating the damages occasioned by an unlawful invasion of the rights of a plaintiff to prove the loss, including the expense which he has incurred in preventing further wrong; and the reasonable fees of an attorney may be allowed as well as any other expense occasioned to the plaintiff by the unlawful act of the defendant.

contacts the debtor himself,\textsuperscript{127} his spouse,\textsuperscript{128} his neighbors,\textsuperscript{129} or other third parties\textsuperscript{130} having no legally recognized interest or right in the debtor's personal problems. The latest in the line of creditor contact cases, \textit{Ford Motor Credit Company v. Diffey},\textsuperscript{131} found the acts of the creditor, in periodically telephoning and personally contacting the debtor at her place of employment, not unreasonably coercive. Important to the decision in \textit{Diffey} was the choice by the creditor's agent of a reasonable time of day for the visits, and the fact that the plaintiff's co-employees were not made aware of the purpose of the agent's visit, nor was her employment jeopardized.

The tort action is not the only protection Louisiana affords to the debtor in default. Section 3562 of the Louisiana Consumer Credit Law\textsuperscript{132} prohibits contacts by any creditor\textsuperscript{133} regarding the debt to any person not living, residing, or present in the household of the debtor,\textsuperscript{134} unless the debtor (subsequent to the date the debt arises) consents thereto, or unless the purpose of the contact is to ascertain information as to the debtor's creditworthiness,\textsuperscript{135} his whereabouts,\textsuperscript{136} or his seizable property, or to make amicable demand and file suit on the debt. Nothing in the prohibitory provisions of section 3562 would change the outcome of the \textit{Diffey} case; however, a debtor has the right under section 3562 to give the creditor a specific written notice by registered or certified mail instructing him to cease further contacts with the debtor concerning the indebtedness. Once the notice is given, the creditor is limited to one non-threatening, mailed notice per month, and a maximum of four personal contacts having the purpose of settlement of the obligation.

\textsuperscript{127} Boudreaux v. Allstate Fin. Corp., 217 So. 2d 439 (La. App. 1st Cir. 1968).
\textsuperscript{128} See Everett v. Community Credit Co. of Scenic, Inc., 224 So. 2d 145 (La. App. 1st Cir. 1969); Davis v. Lindsay Furn. Co., 138 So. 439 (La. App. 1st Cir. 1931).
\textsuperscript{129} Boudreaux v. Allstate Fin. Corp., 217 So. 2d 439 (La. App. 1st Cir. 1968).
\textsuperscript{130} Tuyes v. Chambers, 144 La. 723, 81 So. 265 (1919). See Cunningham v. Securities Inv. Co. of St. Louis, 278 F.2d 600 (5th Cir. 1960).
\textsuperscript{131} 378 So. 2d 1032 (La. App. 2d Cir. 1979).
\textsuperscript{133} The protection of section 3562 is expressly not limited to a creditor in a "consumer credit transaction."
\textsuperscript{134} Exempted from the prohibition are contacts to other extenders of credit and to credit reporting agencies. La. R.S. 9:3562 (Supp. 1972 & 1974).
\textsuperscript{135} Section 3562, in effect, limits the "creditworthiness" contact to a situation in which there is a debt allegedly owed, but the creditor nevertheless is contemplating another extension of credit to the debtor. That situation seems somewhat unlikely. A creditor to whom no debt is already owed by the debtor is not constrained in the first instance by the opening paragraph of section 3562, so he has no need for the "creditworthiness" exception.
\textsuperscript{136} The "whereabouts" contact is permitted only when the creditor has reason to believe that the debtor has changed his employment or last known address. La. R.S. 9:3562(2)(b) (Supp. 1972 & 1974).
Had Mrs. Diffey employed the "cease and desist" notice of section 3562, one "dunning" telephone call to her from the defendant, at any location, would have violated the prohibition of the credit law; but the enforcement provisions of the credit law do not squarely apply to such a violation so as to provide a civil remedy. It has been suggested, however, that by analogy to the statutory negligence area, a violation of section 3562 constitutes fault under Civil Code article 2315.

In the event that the creditor's agent happened to fall within the definition of a "debt collector," the Diffey case would also be qualified by the recently-enacted Fair Debt Collection Practices Act. Under that enactment a debt collector may not communicate with a consumer-debtor at any unusual time or place, or at a time or place he should know is inconvenient to the consumer-debtor (with the hours of 8:00 a.m. to 9:00 p.m. being assumed to be the appropriate hours of convenience, in the absence of the debt collector's contrary knowledge), nor may the debt collector communicate with the consumer-debtor at the consumer's place of employment, if he knows or has reason to know that the employer prohibits the consumer from receiving such communication. The new act contains various other prohibitions against debt collectors, for violation of which the act provides a private action for damages.

A debt collector was recently introduced to the Fair Debt Collection Practices Act in Rutyna v. Collection Accounts Terminal, Inc., a federal district court case from Illinois which graphically illustrates the potential for consumer protection that the new act provides. Mrs. Rutyna, a sixty-year-old widow, had incurred an indebtedness for medical services assumed by her to have been paid in full by a combination of medicare and private medical insurance.
The debt collector sent her a letter stating, in reference to a portion of the indebtedness allegedly not paid:

You have shown that you are unwilling to work out a friendly settlement with us to clear the above debt.

Our field investigator has now been instructed to make an investigation in your neighborhood and to personally call on your employer.

The immediate payment of the full amount, or a personal visit to this office, will spare you this embarrassment.

The envelope containing the letter bore the full name of the debt collection company.

The debt collector's letter in Rutyna violated the Fair Debt Collection Practices Act in at least three regards. First, the "natural consequence" of the letter was to "harrass, oppress, or abuse" Mrs. Rutyna, in violation of section 1692d of the act, in that the tone of the letter was one of intimidation, intended as such. Second, the defendant's threat to contact Mrs. Rutyna's neighbors and employer constituted a false representation or threat as to the actions that defendant could legally take because the act itself would prohibit (with certain irrelevant exceptions) any communication by the defendant to her neighbors or her employer. Third, the return ad-

146. It was disputed whether prior telephonic contact between the parties had occurred. Id. at 981.
147. 15 U.S.C.A. § 1692d (1977). The section lists (nonexclusively) six specifically prohibited types of conduct, but the section is intended to prohibit any harassing, unfair, or deceptive collection practice.
149. 15 U.S.C.A. § 1692c(b) (1977). In Trans World Accounts, Inc. v. Federal Trade Comm'n, 594 F.2d 212 (9th Cir. 1979), a collector's letter advising the debtor that a failure to answer would result in an immediate lawsuit violated the act because, in fact, the collector was shown to have never filed a suit until several other steps had been tried, and such a suit could not, in any event, be said to be imminent. Cf. State v. O’Neill Investigations, Inc., 609 P.2d 520 (Alaska 1980) (threat to take legal action violated state deceptive practices law).

Whether the Trans World letter would constitute a tortious threat is an issue that apparently has not arisen in Louisiana. The Supreme Court of Louisiana did hold in 1902 that it is not duress, within the meaning of Civil Code articles 1850 through 1859, for a creditor to threaten a civil suit or "to declare [that] he intends to use the courts wherein to insist upon what he believes to be his legal rights." New Orleans & N.E.R. Co. v. Louisiana Constr. & Imp. Co., 109 La. 13, 23, 33 So. 51, 55 (1902). The 1902 decision, which cited for authority Morse v. Woodworth, 155 Mass. 233, 27 N.E. 1010 (1891), Snyder v. Braden, 58 Ind. 143 (1877), Buck v. Axt, 58 Ind. 512 (1882), and Civil Code article 1856, was reaffirmed in Storey v. Stanton, 182 La. 873, 162 So. 649 (1935), a consent case under articles 1850 through 1859. Of course, the Civil Code does declare, in the context of consent, that if the threats are only of doing that which the threatening party has a right to do, the consent of the other is not so impaired as to invalidate the contract. LA. CIV. CODE art. 1856. But important to the 1902 decision of
dress on the defendant's envelope violated section 1692f(8) in that it revealed to the world that the letter it enclosed was from a debt collection business.

The defendant in Rutyna sought to defend the return address violation on the basis that, due to its lack of awareness of the prohibition of section 1692f(8), the violation was "unintentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid" such an error. But the act does not immunize mistakes of law; it forgives the collector where he intended to prevent the conduct that violated the act, but failed despite the maintenance of procedures reasonably adapted to avoid the error.

Both the federal and the Louisiana law permit communications by a creditor or debt collector to a third person for the purpose of determining the debtor's whereabouts, but there are qualifications on the exception in both cases. The "whereabouts" exception in Louisiana is so written as to implicitly require good faith, while the federal provision is quite specific in its "location information"
exception. The collection tactics disclosed by Ford Motor Credit Company v. Sheehan would be violative of Louisiana and federal law. Ford Motor Credit Company was unable to locate Sheehan to remind him of an unpaid debt, but the company did know how to reach Mr. Sheehan's mother. An employee of FMCC telephoned Mother Sheehan, falsely identified herself as an employee of a hospital in San Francisco, falsely advised the mother that her son's children had been involved in a serious automobile accident, and falsely advised her that the hospital desired to contact Mr. Sheehan. Naturally, the information as to Mr. Sheehan's whereabouts was quickly obtained. Unfortunately, with the charade successfully pulled off, the FMCC employee did not confess the same to Mother Sheehan, and after her telephone call to Mr. Sheehan, the latter spent a fruitless, and no doubt frantic, seven hours making long distance calls to hospitals and police departments in San Francisco. The Florida court had no trouble affirming an award to Mr. Sheehan of $4,000 compensatory and $11,000 punitive damages, based on a common law intentional infliction of emotional distress theory. The Sheehan result undoubtedly would be obtained in such a case in Louisiana, although section 3562 of the Credit Law appears to be of little aid.

Had Ford Motor Credit Company been a debt collector, several provisions of the Fair Debt Collection Practices Act would have been violated. One of the underlying justifications for the Louisiana and federal laws is the likelihood of coercion when a small debt is involved. Creditors and debt collectors have legal recourse; if they choose not to utilize it for reasons of economics, that is their choice. But an economically non-viable claim must be "written off"; it cannot be the justification for continuous coercion. In short, the laws now provide a choice for creditors and debt collectors: sue the small account debtor in default, or forget him. The potential for loss of employ-

154. 373 So. 2d 956 (Fla. App. 1979).
156. Most legitimate financial institutions fall without the section 1692a(6) definition of debt collector; as an assignee of the dealer, Ford Motor Credit Company is collecting a debt (originally) owed by another, but as an assignee thereof, falls within the exclusion language of 15 U.S.C. § 1692a(6)(G)(iii) or (iv).
157. Ford Motor Credit Company had the ability under the act to contact third parties in an effort to locate Mr. Sheehan, but it did not follow the commandments of sections 1692b(1) and 1692c(b); the company also violated the provisions of section 1692e(10)(11) and (14).
158. The presumption attendant to contracting is that the obligation will be judicially enforced. La. Civ. Code arts. 1799, 1803. It should be noted that creditors themselves understand that the major reasons for default are unemployment and illness,
ment also justifies protection of the debtor in default. As a part of the protection of consumer debtors, the Consumer Credit Protection Act prohibits the discharge of an employee whose earnings have been subjected to garnishment for but one indebtedness. The act provides for a fine for violators, but does not expressly provide for a private action by the wrongfully discharged consumer. In 1974 the Ninth Circuit Court of Appeals held that such an action was implicitly authorized by Congress; the fifth circuit has now taken the contrary view, in Smith v. Cotton Brothers Baking Company, Inc.

QUALITY EXPECTATIONS

The Consumer Product Warranties (Magnuson-Moss) Act

As a nationalized uniform law of consumer product warranties and of warranty disclaimer, the Magnuson-Moss Act represents an alternative or additive to the redhibitation action for the Louisiana consumer purchaser. But the federal act adds very little to the protection currently provided by the Civil Code; in fact, the federal law enhances the redhibitation action by neutering all attempts by affected suppliers to waive redhibitation. Aside from federal court jurisdiction, the Louisiana consumer might find the possibility of an attorney’s fee award (based on actual time expended) an inducement for a Magnuson-Moss action. But as seen in Watts v. Volkswagen Artiengesellschaft the possibility of class action status is not an inducement to the plaintiff unless there are one hundred named plaintiffs at the time federal jurisdiction is invoked.

while lack of intention to pay ("deadbeat") ranks relatively low on the list of reasons for default. REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE AND CONSUMER CREDIT IN THE UNITED STATES 43 (1972).

160. Stewart v. Travelers Corp., 503 F.2d 108 (9th Cir. 1974).
161. 609 F.2d 738 (5th Cir. 1980).
164. 15 U.S.C. § 2308 (1976). A supplier is a person engaged in the business of making a consumer product directly or indirectly available to consumers. 15 U.S.C. § 2310(d)(1) (1976). If the supplier makes a written warranty, or enters into a service contract with the consumer, he is affected by section 2308. In truth, even this provision adds little to the protection in Louisiana. See Thibodeaux v. Meaux’s Auto Sales, Inc., 984 So. 2d 1370 (La. App. 3d Cir. 1978).
Redhibition

By virtue of its tenure and relative immutability, the Civil Code typically affords the lawyer the great advantage of a wealth of jurisprudence to aid his analysis of the Code's meaning. Until very recently, however, this was not so in the case of the reimbursement of expenses in the rescission of a home sale transaction, perhaps because buyers of a defective home historically have opted more often for a reduction in price under articles 2541-44 than for redhibition under articles 2520 and 2531. The Supreme Court of Louisiana has now provided, in Abdelbaki v. University Presbyterian Church, clarification of the recoverable expenses in a home sale rescission case. The court held recoverable, as "expenses occasioned" by the sale, loan closing costs, loan appraisal costs, homestead charges such as interest, real estate taxes and insurance premiums, expenses incident to release of mortgage including penalties incurred, all costs of reconveyance of the property, and finance charges.171

CONTRACTS FOR THE PERFORMANCE OF CONSUMER SERVICES

Damages for Nonperformance

The home purchaser is not typically motivated primarily by the possibility of a profit upon ultimate resale. Hence, even in the relatively rare case of a bad faith seller, the home purchaser is not likely to have suffered the kind of loss or damage readily measur-
able in pecuniary terms as required under article 1934. The same may be said for the owner who has contracted with a nonperforming contractor for home construction or home repair. Article 1934, in the third enumerated paragraph, seems to have contemplated that not all who contract will be able to show pecuniary damages, yet in some instances ought to be awarded damages nonetheless. Prior to the November, 1979, Supreme Court of Louisiana decision in Ostrowe v. Darenbourg,172 Louisiana courts had seemed willing to bring within article 1934(3) consumer transactions that were important174 and, in some instances, obviously unforeseeable from the vantage point of the year 1825. The Ostrowe decision holds that damages for mental anguish are not recoverable for the breach of a contract to build a home, even a “distinctively designed” and “exclusive” one, since the principal object of such a contract is simply to provide shelter from the elements, rather than the gratification of some intellectual enjoyment. Thus, under the court’s narrow view of article 1934(3) the “gratification of some intellectual enjoyment” must be the principal object of the contract, rather than a principal object thereof, as was arguably suggested in the court’s prior decision in Meador v. Toyota of Jefferson, Inc.175 If the court is unwilling, or unable, to distinguish a simple one-room cinder-block abode from a distinctively planned and unique home in an exclusive residential area, it appears that article 1934(3) has virtually no meaning for the Louisiana consumer.176

Enforcement of Consumer Contracts

The common law and the civil law of Louisiana share at least one heritage—one set of rules for the formation of contracts, with the implicit premise that all obligations are contracted at arm’s length through a process of actual term-by-term bargaining by par-

173. 377 So. 2d 1201 (La. 1979).
175. 332 So. 2d 433 (La. 1976).
176. Presumably unaffected by the Ostrowe decision are: Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903), Graham v. Western Union Tel. Co., 109 La. 1069, 34 So. 91 (1903), O’Meallie v. Moreau, 116 La. 1020, 41 So. 243 (1906), Jiles v. Venus Community Center Benev. Mut. Aid Ass’n, 191 La. 803, 186 So. 342 (1939), and Grather v. Tipery Studios, Inc., 334 So. 2d 758 (La. App. 4th Cir. 1976). In the recent decision in Gele v. Markey, 387 So. 2d 1182 (La. 1980), there appears a hint that Meador and Ostrowe may not be the final chapter in the mental damages sage: “[T]he application of . . . Meador . . . to this case seems to work an injustice [and] the court of appeal did not appear to have consideration whether the record would support an award of emotional distress damages as the result of a delict or quasi-delict.” 387 So. 2d at 1163.
ties having relatively equal bargaining power. The need for mass contracting, brought about by mass production and mass marketing, surely undercut whatever validity that implicit premise historically may have enjoyed. The “similarity” between the two systems is superficial, for at the foundation of the common law is the notion of caveat emptor—an idea foreign to the Louisiana Civil Code.\textsuperscript{177} Because of the tradition of caveat emptor, the common law states did not always adjust easily to changes in the manner in which contracts were formed with standard form contracts. The Civil Code, on the other hand, has been applied in Louisiana under a dual standard, recognized as such by the Supreme Court of Louisiana,\textsuperscript{178} whereby the formation and enforceability of a contract may depend, to a large degree, on the level of sophistication of the buyer, landowner, lessee, or borrower. The court has recently reaffirmed that position in \textit{Louisiana Leasing Corp. v. ADF Service, Inc.}, stating that:

Safeguards protecting consumers must be more stringent than those protecting businessmen competing in the marketplace. It must be presumed that persons engaged in business . . . were aware of the contents of the lease agreement which they signed.\textsuperscript{179}

The commercially sophisticated lessee, therefore, could not claim that the contract clause waiving the lessor’s implied warranty of fitness of the leased thing had not been brought to its attention, \textit{i.e.}, consumer-protective decisions such as \textit{Prince v. Paretti Pontiac Company, Inc.},\textsuperscript{180} do not fully apply in non-consumer cases.\textsuperscript{181} The lessor in \textit{Southern States Equipment Company v. Jack Legett Company}\textsuperscript{182} similarly enforced a rather harsh clause imposing on the commercially sophisticated lessee unrestricted liability for loss or damage to the leased thing.

That successful reliance on self-serving contract terms is considerably less likely in cases involving a consumer is demonstrated

\textsuperscript{177} \textit{See} Rushton v. LaCaze, 106 So. 2d 729 (La. App. 2d Cir. 1958); \textit{Dependable Refrig., Inc. v. Giambelluca}, 94 So. 2d 148 (La. App. Ori. Cir. 1957).

\textsuperscript{178} \textit{In Media Prod. Consultants, Inc. v. Mercedes-Benz of N. Am., Inc.}, 262 So. 2d 377 (La. 1972), the court stated that “Louisiana has aligned itself with the consumer-protection rule, by allowing a consumer without privity to recover . . . .” \textit{Id.} at 381. The idea was applied in \textit{Anderson v. Bohn Ford, Inc.}, 291 So. 2d 786 (La. App. 4th Cir. 1973), in which the fourth circuit conceded that, because there is a greater presumption that a commercially sophisticated buyer is more aware of the contents of a written agreement than is the typical consumer, \textit{id.} at 791, the rules as to renunciation or waiver of redhibition do not apply equally to those two classes of buyer.

\textsuperscript{179} \textit{377 So. 2d 92}, 96 (La. 1979) (citation omitted).

\textsuperscript{180} \textit{281 So. 2d 112} (La. 1973).

\textsuperscript{181} \textit{See} 1978-1979 \textit{Term, supra} note 3, at 619-23.

\textsuperscript{182} \textit{379 So. 2d 881} (La. App. 4th Cir. 1980).
by Bowes v. Fox-Stanley Photo Products, Inc.,183 in which a photo processor’s attempted disclaimer of warranty in the form of a limit on liability for loss of the customer’s film or photographs, was held ineffective against a consumer. The Bowes decision applies the same legal principle as was applied in ADF and Legett, i.e., whether the clause was explained or brought to the attention of the affected party; but the result obtained is quite different. One would conclude, then, that a given waiver or exculpation clause held not binding against a commercially sophisticated lessee, or services contractant, will certainly be of no effect as against a consumer. One accordingly must doubt the efficacy of the ubiquitous “we are not responsible for loss or theft.”184

183. 379 So. 2d 844 (La. App. 4th Cir. 1980).