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Legislative Overview of the Uniform Consumer Credit Code A 1971 Perspective*

By L. Richard Freese, Jr.**

Introduction

A plethora of commentary has been offered on the Uniform Consumer Credit Code (UCCC) since its promulgation by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in August 1968.[1] I hesitate to add to that commentary: the risk is that it will only be a reformulation of thoughts succinctly stated before. Nevertheless, the invitation of the *Denver Law Journal* to comment on the UCCC is irresistible. I have succumbed to the assignment in the hope that my own experience with the UCCC will reflect a current overview for a new audience and that this article will allow publication of a view different from that of Professor Littlefield's. I have intended to phrase my observations for all who are concerned with this legislation and not just for the legal profession.

I. Uniformity

The raising of the issue of whether or not it was appropriate for the National Conference to promulgate the Uniform Consumer Credit Code as a "uniform" act provokes several preliminary thoughts. The National Conference draftsmen are highly practical men, many of whom are legislators and all of whom are keenly interested in political and legislative processes. They knew that uncompromising uniformity is not possible in the passage of state legislation. To dwell on the

* See editors note p. 1 *supra* for introduction to this article and a parallel discussion by Neil O. Littlefield.

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1 Recent articles include the transcribed remarks of 21 distinguished speakers at an American Bar Association National Institute on "Consumer Credit in the Seventies," sponsored by the ABA Section of Corporation, Bank and Business Law, 26 Bus. Lawyer 753 (1971); Braucher, *Consumer Credit Reform: Rates, Profits and Competition,* 43 Temp. L. Q. 313 (1970), where in note 1 is listed a number of prominent articles published in 1968 and 1969 on the UCCC; and Eovaldi, *Private Consumer Substantive and Procedural Remedies Under State Law,* 15 Antitrust Bull. 255 (1970). *See also Symposium, Consumer Credit,* 8 B. C. Ind. & Com. L. Rev. 387 (1968); *Symposium, Consumer Credit Reform,* 33 Law & Contemp. Prob. 639 (1968); *Symposium Consumer Credit Reform,* 44 N.Y.U.L. Rev. 1 (1969).

reasons why the National Conference chose to promulgate the UCCC as a "uniform" act is probably wasteful at this juncture.[2] Our focus now should be to determine whether uniform state regulation of consumer credit practices is viable. Thus, my thoughts will be directed to considerations which have come to the fore in the nearly 3 years of legislative experience with the UCCC.

I believe that the National Conference made an attractive decision — from a political, economic, and sociological point of view — when it promulgated the Uniform Consumer Credit Code as a uniform act.

A first factor in this judgment is that the regulation of consumer credit seems highly appropriate for "umbrella" treatment or, rather, treatment in one piece of state legislation, and not by the approach of the past of regulating consumer credit in a piecemeal fashion through several separate state statutes directed to each "type" of credit-extending institution and by piecemeal "consumer protection" statutes, such as garnishment limitation statutes and statutes limiting the holder in due course privilege.[3] We must recognize the existence of the anticompetitive overtones of the existing segmented regulation of the credit industry;[4] of the "captive administrator" problem;[5] of the uncoordinated, sometimes inconsistent statutes in the credit area;[6] and of the ability of selected credit institutions to kill piecemeal legislation of the "consumer protection" variety. Given the presence of these four concerns, the National Conference's decision to promulgate umbrella regulation was eminently correct if one is concerned with viable consumer protection in the consumer credit field. Moreover, as a lawyer, I am exhausted from trying to decipher existing state laws in this area. It is nearly impossible to advise credit institutions on how they are to behave under this patchwork of laws.[7] For example, this unpredictability becomes a serious handicap to credit institutions in their dealings among themselves. They are unable to negotiate realistically in the

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2 The draftsmen of the UCCC set forth their thinking in their Prefatory Note, *"Uniform Legislation Desirable"* (1969 Official Text).

3 *See* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION (1965); Benfield, *Money, Mortgages and Migraine—the Usury Headache,* 19 CASE W. RES. L. REV. 819 (1968), and *infra* note 17.

4 Eovaldi, *supra* note 1, at 261-68.

5 See p. 42 *infra.*

6 *See* Benfield, *supra* note 3.

7 Credit institutions are often left to guess what the courts may do in interpreting the legal effects of consumer credit dealings.

purchase and assignment of debt paper. I see no justification for this continued impairment of the free flow of commerce.

A second factor is that several compelling reasons for establishing uniformity throughout the United States in the regulation of consumer credit extension have emerged during legislative review of the UCCC.[8] First, the populace of the United States is transient. Transient consumers need to know the ground rules for credit extension. Shopping for credit becomes illusory for those consumers who change jurisdictions frequently unless they are provided with a familiar legal framework within which they can seek credit. A consumer's bargaining ability is not enhanced when only the creditor knows the legal variables within which a debt may be created and collected.[9] A second, related reason is that consumers should know what are the ground rules when they shop for credit in states other than their own.[10] Third, there are many benefits to both consumers and creditors in uniform regulation of the creditors' practices and procedures. Cost efficiencies are achieved by uniform training of credit personnel, by uniform forms used in credit transactions, and by uniform standards of conduct in dealing with consumers.[11] These concerns touch all creditors, regardless of size. Credit extension is not an insular affair. Every creditor is dependent upon the network of interrelationships with his bank, his national trade association, his supplier, the manufacturer of his products, or even a national financial institution which finances his unpaid accounts and receivables or his lendable funds. Those areas where national uniformity may tend to increase creditors' efficiencies necessarily should redound to the benefit of the public in permitting credit extension at lower finance charge level.

These three reasons are the basis for the Congress' conclusion that uniform disclosure of credit terms is imperative. The report of the Federal Reserve Board to Congress in January 1971 on the progress of the Federal Truth in Lending Act concludes that uniform disclosures made by creditors pursuant to that Act are indeed beginning to work.[12] Consumers

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[8] Before legislative experience with the UCCC had occurred, Carl Felsenfeld examined arguments for and against promulgation of the UCCC as a uniform act in *Uniform, Uniformed and Unitary Laws Regulating Consumer Credit*, 37 FORDHAM L. REV. 209, 221-36 (1968).

[9] *Id.* at 223-26.

[10] *Id.* at 226.

[11] *Id.*

[12] BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM, 92d Cong., 1st Sess., ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1970, at 7-13 (1971); *See also* Feldman, *FTC Enforcement of the Truth in Lending Act — One Year Later*, 26 BUS. LAWYER 835 (1971).

are becoming more alert to the terms and conditions of credit extension and are using such knowledge to shop for the best credit terms.

I know that the reader is tempted to ask: What does this have to do with the Uniform Consumer Credit Code? I submit that it has a great deal to do with the Code. The Code's disclosure provisions were made substantially identical to the disclosure provisions of the Federal Truth in Lending Act, not only because inconsistent state disclosure provisions are rendered invalid by the Act, but also because the Code is designed to return enforcement of consumer credit disclosure laws to a state administrator rather than to leave it at the federal level under the nine federal agencies designated for such enforcement under the Act.[13] There is much more to the story than that, however. The Federal Truth in Lending Act does *not* invalidate *consistent* and *additional* disclosure requirements.[14] Thus a state legislature may impose further disclosures upon the creditor which would require him to make the delicate judgment of whether or not those additional disclosures are inconsistent with the Federal Truth in Lending and Regulation Z disclosure requirements and, if not, how they can be fitted into the federal disclosure scheme in a meaningful way.[15] Any counsel for credit institutions knows that making these judgments is a nearly impossible task in many instances. If legislators can only avoid the temptation to amend or add to the Code's disclosure provisions, disaster will be avoided. The Code, as drafted, accepts the burden of state enforcement without sacrificing the obvious benefits of uniform disclosure.

Uniformity is also significant in the area of the holder in due course privilege. Those who buy debt paper need to know what exposure they may have for claims or defenses which the buyer may have against the seller. The case law today is changing in this area.[16] Many financial institutions find that they have negotiated a purchase price for such

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13 Federal Consumer Credit Protection Act (CCPA) § 123, 15 U.S.C. § 1622 (1970), permits exemption for state-regulated transactions where such regulation is substantially similar and there is adequate provision for enforcement. *See, Prefatory Note to UCCC* (1969 official text) and UCCC § 1.102, Comment. Inconsistent state disclosure requirements are invalid under the CCPA § 111(e), 15 U.S.C. § 1610(a); and administrative enforcement is provided in the CCPA § 108, 15 U.S.C. § 1607.

14 CCPA § 111(a) 15 U.S.C. § 1610(a), and § 226.6(b) and (c) of Regulation Z thereunder.

15 § 226.6(a), (b) and (c) of Regulation Z.

16 James, *Holders in Due Course and Other Prohibitions,* 26 BUS. LAWYER 881 (1971).

paper based upon reliance on the holder in due course privilege, only to have a court subsequently hold that, because of the close relationship of the seller and the holder, the holder is not a holder in due course because he did not purchase the paper in "good faith."[17] Also, consumer debt paper is often

[17] *Id.* In commercial transactions, case-by-case determination of the legal effects of the transactions is disastrous. Thus predictability, through fixed rules, becomes almost as important as what the rules actually are. This is not to imply that § 2.403 and either Alternatives A or B of § 2.204 of the *UCCC* necessarily are socially beneficial rules. Many financiers have argued that they will no longer be able to buy consumer debt paper at an attractive enough price to the dealer — because they must protect themselves from exposure by requiring higher compensatory accounts, escrows and the like — to permit sellers to make direct credit extensions and negotiate the resulting debt paper. The holder in due course privilege has, however, been severely restricted or eliminated in Massachusetts, Texas, Oklahoma, Utah, California, and elsewhere and, although no special studies have been made, the evidence is strong that there have been no appreciable negative effects on the ongoing pace of creation and negotiation of consumer installment debt paper. Sections 2.403 and 2.404 may, of course, tend to shift some credit extension to direct lending from installment credit selling, and thus the lender, by virtue of stricter standards of credit-worthiness, may well narrow credit availability to the "marginal" debtor. Financiers may also after a period of experience with the new rules, find that they may be able to make prices and conditions of their purchases of debt paper more attractive, especially with respect to those sellers whose products are shown over a period of time to be reliable or who demonstrate that they are adequate to hold the financier harmless when strike or nuisance suits are commenced. Regardless of the evidence that no appreciable negative effects ensue on the free flow of credit extension, it is a close question whether the financier should be set up as a policeman of his dealers' trade practices. Two arguments are normally advanced: (1) the financier is in a better position to know of and control those practices, and (2) where the dealer has disappeared, the financier can spread the loss over a wider group and the burden does not fall exclusively on the injured buyer.

As to (1), in some instances, the *buyer* may be in a much better position to appraise the value and reliability of the product he has bought than the financier, who may not know or be able to know such matters where a large variety of products are sold by the dealer. A special problem arises in the credit card area where an issuer, especially a bank, is one of a large number of banks issuing the same card, whose card customers may use the card for purchases from a retailer who was signed up by a competing bank and with whom the issuer has no direct relationship; it is naive to assume that this issuer can effectively police that merchant. Attempts to set up a joint policing mechanism among the issuer banks suggest anti-trust problems. Perhaps bank card arrangements can be established so as to place the responsibility on the bank who signed up the merchant whose practices are the source of the liability (barring recoupment from the merchant). Clearly, however, the institution of §§ 2.403 and 2.404 restrictions create widespread, perhaps nearly insoluable, problems.

As to (2), although persuasive that it seems very inequitable that an injured buyer alone should bear the loss caused by the unlawful trade practices of a seller simply because he presumably was the happenstance victim, why should that loss be absorbed by a financier who must reflect it as a penalty upon his owners, employees, and other customers. If a seller is harming the public, then the resultant loss should truly be spread over the public fisc, perhaps by some type of government consumer insurance arrangement which would permit the government to recompense the buyer for his loss and then police the seller so as both to make the government whole and to terminate the harmful practice. Finally, if the financier is to be an effective policeman, he must know exactly the extent of his maximum liability. To leave him exposed to unlimited consequential damages is an unneeded "in terrorem" weapon which will simply eliminate all transference of installment paper rather than introduce the intended policing mechanism.

bought by financial institutions from sellers in other states. Uniformity will facilitate such transactions.

The Code's limitations on the use of collateral,[18] its restrictions on balloon payments,[19] its ban of confessions of judgment,[20] and its restrictions on the deficiency judgments[21] are indicated for uniform treatment by virtue of all three reasons under the second factor *i.e.*, the transient consumer, the interstate credit shopper, and creditors' efficiencies. Such areas as rebates on prepayment[22] and change of terms in revolving credit accounts[23] probably are less important to the first and second reasons but are of substantial significance with respect to the third.

Because an umbrella bill was indicated and because a significant portion of the topics to be covered by the bill were properly the subject of uniform, national treatment, the National Conference *had* to promulgate a uniform act. Admittedly, there are areas covered by the Code where uniformity may have only tangential value. It would have been inappropriate, however, for the conference to have designated those few areas where uniformity might not have been appropriate as optional areas for enactment. To do so would have undermined the urgency of passage of comprehensive, internally consistent, consumer credit regulation. Of course, to the extent that we can identify those areas where uniformity is not necessarily appropriate, state legislatures may, arguably, amend. That task is a delicate one, however, and may be an elusive one to a busy legislature.

The regulation of garnishment practices may be an area where uniformity would have de minimis value. It is imperative, of course, that creditors be able to collect their debts where debtors refuse to comply with payment obligations. Nevertheless, the garnishment vehicle is only one of several historical devices for debt collection, and the extent of its uniform use throughout the United States is relatively unimportant as long as the basic ability to collect is preserved by other available devices.[24]

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18 UCCC §§ 2.407-.409.
19 UCCC §§ 2.405, 3.402.
20 UCCC §§ 2.415, 3.407.
21 UCCC § 5.103.
22 UCCC §§ 2.210, 3.210.
23 UCCC §§ 2.416, 3.408.
24 See discussion p. 43 *infra*.

One related issue inevitably is raised: Why not impose uniform regulation through Congressional mandate? Present events suggest that the state regulation is still preferable.[25] Congress has shown no inclination to act in a coordinated fashion to enact umbrella regulation; rather, it is piecemealing and fragmenting the area, both substantively and as to enforcement. First was the Consumer Credit Protection Act in 1968, which included the Federal Truth in Lending Act, directed principally to disclosure of credit terms, including credit advertising, with nine federal agencies enforcing its terms,[26] and also included new rules as to garnishments.[27] In 1970 Congress enacted a ban on unsolicited credit cards,[28] a limitation on the consumer's liability for a lost or stolen credit card,[29] and the Fair Credit Reporting Act.[30] Perhaps the National Commission on Consumer Finance[31] can unify this area, but the direction of the Commission is as yet unclear. At this point it appears that prospects for umbrella regulation by Congress are bleak.[32]

Perhaps even more important, federal enforcement seems inappropriate and impractical. Complaints in the area of consumer credit, for the most part, are small, local, and individualized. The consumer is wandering in an enforcement maze when he must turn to the federal bureaucracy whose agents

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[25] Malcom, *Consumer Credit-Probings Into the Future,* 26 BUS. LAWYER 899 (1971).

[26] Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1665.

[27] *Id.* § § 1671-1677.

[28] *Id.* § 1642.

[29] *Id.* § § 1643-1644.

[30] *Id.* § 1681.

[31] The National Commission on Consumer Finance was created by Title IV of the Consumer Credit Protection Act P.L. 90-321 § § 401-07, *as amended* P.L. 91-344 on July 20, 1970).

[32] The President's Consumer Message of February 24, 1971, contains no recommendations relating to credit practices. On February 7, 1971, Senator Proxmire released his "Fair Credit Billing Act" (S. 652) which continues the piecemealing trend by proposing, as an amendment to the Federal Truth in Lending Act, a series of new restrictions on credit practices, including a requirement that creditors investigate and answer inquiries about billing errors within 30 days or forfeit the amount in dispute; forbidding a creditor to threaten a consumer with an adverse credit rating while a billing dispute is being investigated; a requirement that creditors who operate revolving credit plans must mail out monthly statements at least 21 days prior to the time when the consumer must make a payment to avoid a finance charge; prohibition of use of the previous balance method of computing finance charges in revolving charge accounts; prohibition of a minimum finance charge; and permission of retailers to offer a cash discount. Rep. Murphy's H.R. 243 would require statements in revolving credit plans to be mailed in time to permit payment prior to imposition of a finance charge. And Rep. Jacob's H.R. 821 would impose a national interest charge ceiling of 6 percent per year on any loan or credit transaction.

seldom are known or available. Informal disposition of small consumer credit complaints may be an unreachable goal for a federal enforcement agency, whose rules necessarily are attuned to concerns of national, or at least regional, concerns rather than local and minor concerns.[33] The consumer, however, must know to whom to turn and how to get a response, with the ability to complain to his legislative representative should agency performance be lax. The more localized the enforcement, the more likely the efficacious result.

Finally, should the rate ceilings in consumer credit regulation be uniform?[34] The Code draftsmen offer the "competition" theory. This theory, briefly stated, is that, through the Code's provisions (disclosure, free entry, fair credit practices) shopping for credit will be maximized; competition for credit terms will be sharpened; creditor efficiencies will be stimulated; and thus, the lowest finance charges will be offered, in most cases below the rate ceilings suggested by the National Conference, but with sufficient flexibility to permit the creditor to raise those charges in the case of high-risk debtors making credit available to those who are credit-worthy, regardless of their income level.[35] Skeptics say that, in light of the existence of oligopolistic and segmented credit markets, it is naive to assume that there will ever be viable finance charge competition.[36] These skeptics often suggest that rate regulation should be based on a "public utility" theory, namely, that legislatures should examine periodically the costs which each type of credit incurs and then set a rate which permits a reasonable return to that institution over and above those costs.[37] If the public utility theory is adopted, uniform rates for all creditors will not occur. Under the competition theory

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33 In his consumer legislation recommendations of February 24, 1971, the President strongly indicated that federal courts and agencies must expend their energies in areas of broad national concern and that effective state and local relief vehicles must assume the major responsibility in resolving consumer disputes. The revitalized FTC is showing how a federal agency can create new standards of credit practices on a national basis by promulgation of Trade Regulation Rules: See the FTC's proposed rule, released on January 21, 1971, relating to preservation of a buyer's claims and defenses in consumer installment sales; and its proposed rule, subject to hearings this March giving buyers three days to cancel door-to-door sales of goods or services costing more than $10.

34 See part V *infra*.

35 UCCC § 2.201, Comment.

36 Fritz, 26 BUS. LAWYER 864-66, 873-74 (1971); *see* Fritz, *Would the Uniform Consumer Credit Code Help the Consumer?*, 25 BUS. LAWYER 511 (1970).

37 This argument has been repeatedly suggested in almost every legislative committee study of the UCCC. *See* Warren, *Rate Limitations and Free Entry*, 26 BUS. LAWYER 855 (1971).

rate ceilings should be uniformly high so as not restrict availability of credit through price-fixing, but exact uniformity of these ceilings may not be necessary.

II. The "Polarization of Attitudes" Problem

The National Conference surely intended its promulgation of the UCCC in August 1968 to be a unifying force in credit regulation, pulling together all segments of the credit industry and inducing significant public support. The initial effect in 1968-69 was just the opposite.[38] In retrospect, the picture in broad terms was as follows:

One reaction was the various consumer groups' attack on the Code in 1968 and 1969. The Consumer Federation of America and the National Consumer Law Center had both just gotten off the drawing boards about that time, and various new state consumer groups and Legal Services groups were just becoming aware, through extensive exposure in the ghetto and elsewhere, of the areas of possible abuse in credit extension practices which needed legislative attention. Naturally, most of the consumer organizations which are visible today did not have a hand in the formulation of the August 1968 and earlier drafts because they were not then in existence. This does not, of course, mean that their current observations were not advanced during the drafting process. Most of them were carefully reviewed by the draftsmen. The reaction of these new groups in 1968 and 1969 suggests, perhaps, a disappointment that they had not been directly involved in the drafting of the Code and a determination to add some of their own language before widespread adoption of the Code occurred. Fortunately, sophistication has evolved within the loose amalgam of "consumer groups" in the last two years, and responsible voices are being heard which are leading to an understanding of the creditors' concerns and to sensible proposals for amendment to the Code.[39] The current

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38 Braucher, *supra* note 1, at 322. For a composite of early reactions by consumer representatives, *see* "Consumer Viewpoints: Critique of the Uniform Consumer Credit Code," Consumer Research Foundation (Berkeley, 1969).

39 The most significant development in these regards is the issuance by the National Consumer Law Center and the Department of Consumer Affairs of the City of New York on December 17, 1970, of a series of amendments to the UCCC (Publication # A192-150). This issuance coincides with the Center's rethinking, if not withdrawal, of its April 1970 draft of a "National Consumer Act" which was ill-received by the credit industry: *See* Moo, *New Consumer Credit Legislation: Which Approach — the UCCC or the NCA?*, 2 URBAN LAWYER 439-59 (1970). An early example of constructive thinking is James and Fragomen, *The Uniform Consumer Credit Code: Inadequate Remedies Under Articles V and VI*, 57 GEO. L. J. 923 (1969); Kass, *Consumer's View*, 26 BUS. LAWYER 847 (1971).

legislative sessions have seen selected amendments to the Code offered by the National Consumer Law Center and others which indicate a considerable lessening of the polarization dividing "consumer groups" and "creditors' groups" which occurred in 1968-69.[40]

Professor Littlefield has observed elsewhere that the National Conference "battled industry" to produce its August 1968 draft.[41] I agree. In light of this "battle" the conference should not have been stunned by the opposition of many creditor groups. Thus, in 1969 the virulent opposition of the American Banking Association[42] was echoed by other credit groups, except retailing.[43] Within the credit industry since 1969, however, responsible spokesmen have emerged and a significant cross-section of credit institutions now supports the UCCC.[44] Fear of change is being overcome and the educational efforts of the conference are making tangible breakthroughs with industry.

In short, I see signs that the 1968-69 polarization is on the wane. We would all like to see the decade of the 70's be a decade of the *consumer*, rather than "consumerism." "Consumerism" has been a divisive and polarizing force at the expense of the consumer. Responsible industry is learning, however, that there are thoughtful proponents of reform in the consumer credit area and that the intention of these proponents

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[40] Note 37 *supra*. See also the Code bill in Connecticut as it was presented to the Connecticut Legislature by an interim study committee; Colorado H.B. 1076 (UCCC bill) as amended in the House on March 11, 1971.

[41] Littlefield, *Consumerism: A Review and Preview*, DENVER L. J., Special Magazine Issue 12 (1971).

[42] On July 3, 1968, a staff member of the American Bankers Association prepared a strong statement opposing the UCCC which was circulated in late 1968 or early 1969 to state banking associations and, almost without exception, led those associations into opposition to the UCCC in the 1969 legislative sessions. In a statement prepared for presentation at hearings on the UCCC before the Massachusetts Legislature on January 29, 1969, Senator Paul Douglas sharply reacted to this opposition. A notable exception was banking support in Oklahoma and Utah in 1969 (the only two states where the UCCC passed in 1969).

[43] State consumer finance associations, the American Industrial Bankers Association (AIBA) and state motor vehicles dealers' associations all opposed the UCCC in 1969. *See, Hearings Before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency*, 91st Cong., 1st Sess., Part I, at 112 (1969); Denonn, *The Consumer Credit Code — Bombshell*, 22 PERSONAL FINANCE L.Q. 125 (1968); Harper, *The Uniform Consumer Credit Code: A Critical Analysis*, 44 N.Y.U.L. REV. 53 (1969).

[44] Many banks and banking associations now support the UCCC, including state associations in Connecticut, Indiana (where the UCCC was passed and signed by the Governor on March 5, 1971), and Wyoming (where the UCCC was passed and signed by the Governor on February 28, 1971). The AIBA and most consumer finance companies have reversed their earlier opposition.

is to work toward a more sensitive legal mechanism for the benefit of the public.

III. Effective Relief

We should start with a very brief review of the National Conference's decisions on private relief for violations of the many provisions of the Code. The basic private relief section is 5.202, a comprehensive section which sets up various private recovery rights with respect to violations of most of the provisions of the Code. There are some additional private relief provisions within the substantive Code sections, such as the rescission right in the referral sales ban.[45] A highly significant decision, for our purposes here, is that the Code draftsmen did *not* include a specific provision enabling private class actions for any violation of the Code's provisions but rather left the issue of whether or not such class actions should be maintained to existing state law outside the confines of the Code.[46] Of course, the Code establishes sophisticated *administrative* relief for violations, including cease and desist orders, temporary restraining orders, preliminary and permanent injunctions, and recoupment of excess charges for all debtors who have paid such excessive charges.[47] This scheme of private relief has been attacked by some as not sufficiently effective.[48] We will examine the validity of that criticism.

In April 1969 the United States Supreme Court held that small class claims could not be aggregated under Federal Rule of Civil Procedure 23 to reach the requisite $10,000 amount in controversy for federal court jurisdiction.[49] This opinion, for all practical purposes, excluded consumer class actions from the federal court system.[50] Subsequent attempts in Congress to reestablish federal court jurisdiction over small consumer claims through federal class actions has created a nationwide

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[45] UCCC § 2.411. Another example is in the home solicitation sales provisions, UCCC §§ 2.501-2.505. *See also* UCCC §§ 5.107, 5.108, 5.203, 5.204.

[46] *See* UCCC § 6.115, Comment 1.

[47] UCCC §§ 6.108-.113.

[48] Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Eschew Private Enforcement*, 23 Bus. Lawyer 1039 (1968); Spanogle, *The UCCC May Look Pretty, But Is It Enforceable?*, 29 Ohio St. L.J. 624 (1968).

[49] *Snyder v. Harris*, 394 U.S. 332 (1969).

[50] Seldom, if ever, will any *one* consumer claim reach $10,000 in amount.

dialogue on the appropriateness of the class action as a vehicle for effective consumer relief.[51]

The proponents of extensive use of the class action vehicle in the consumer area argue that without this vehicle the typical consumer complaint, small in size, cannot be effectively pursued through the courts because the costs of such pursuit would exceed the size of the claim.[52] In other words, no consumer can afford to pay a lawyer to champion his small complaint, and thus he must be permitted to pursue his claim, and the claims of all others similarly situated, by aggregation of those claims in a "class" action so that the total judgment will be sufficiently large to pay the class lawyer an adequate fee out of that judgment, thus spreading the fee over the total class claims, while each class claimant will still receive recompense commensurate with the harm. Some critics of the Code are now saying that the omission of the class action device within its confines overlooks the vital interrelationship between the Code's substantive provisions and such effective relief.[53]

This emphasis on the class action vehicle is misplaced. The inclusion of the class action vehicle within the confines of the Code would not provide more effective relief, if such is

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[51] Although none were passed, Congress had before it in 1970 a number of bills which would have reversed in whole or in part *Snyder v. Harris*. The administration proposed limited access to the federal courts in selected enumerated instances and after successful prosecution of the FTC or Department of Justice (original S. 3201, before amendment in Senate Committee). Other bills would have permitted federal consumer class actions, regardless of the size of any one claim. *See* S. 2246, S. 3092, S. 1222 (administration bill), H.R. 262, H.R. 5630 and H.R. 14589 91st Cong. 2d Sess. *See* Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME LAWYER 663 (1970). A recent general article is Travers and Landers, *The Consumer Class Action*, 18 KANSAS L. REV. 811 (1970). Already the same bills are appearing before Congress in 1971; the President's Consumer Message again makes the same recommendation for a limited reversal of *Snyder v. Harris*; Sen. Magnuson has offered the bill which came out of the Senate Commerce Committee last year (S. 984); Rep. Ogden, in H.R. 1078 91st Cong. 2d Sess. would permit federal class action damage relief for violation of § 5 of the FTC Act; and the irrepressible Rep. Eckhardt has just offered a new wonderland bill which includes every conceivable class action vehicle.

[52] *See generally A Symposium, Federal Rules 23 — The Class Action*, 10 B. C. IND. & COM. L. REV. 493 (1969); and particularly, the article therein by Ford, *Federal Rule 23: A Device for Aiding the Small Claimant, Id.* at 501-54. It is not, however, at all clear that consumer class actions are not maintainable under the class action rules of the states. *See*, Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80 (1969). *Compare* Darra v. Yellow Cab, 67 Cal. 2d 695, 433 P. 2d 732 (1967), *with* Hall v. Coburn, 26 N.Y. 2d 396, 259 N.E. 2d 720 (1970), (although New York and California have essentially the same class action rule, *Darra* permitted a consumer-type class action to be maintained, whereas *Hall* did not). *See also* Holstein v. Montgomery Ward, CCH Poverty Law Rep. ¶ 9652 (Cook County Cir. Ct., Illinois, No. 68, ch. 275 (1969).

[53] *See* Spanogle, *supra* note 48, at 1045.

needed.[54] Even from a 1971 perspective, I believe that the National Conference's decision to omit specific class action enablement was correct.

Accepting for purposes of discussion that a problem does exist in consumer claims where the cost of litigation to enforce those claims may exceed the recovery sought, the solution calls for the creation of (1) a low cost procedure for enforcing the claim, (2) a quick resolution of the claim, and (3) an effective recovery, should the claim be deemed to be valid. The class action vehicle fails to meet all three criteria. A class action is an enormous monolith, complex in every respect.[55] Proponents of the class action device insist that it can be effectively wielded by the courts to reach ready dispositions of small claims and that the failure of the class action vehicle to produce such results is caused by the defendant's determination to test every edge of the privilege to maintain an action as a class action.[56] In my experience, this is unfair. Because the mere filing of a class action normally exposes the defendant to massive liabilities, a class action defendant should be permitted to raise every conceivable consideration relative to the propriety of the maintenance of the action as a class action. The safeguards established in Federal Rule 23 must be carefully observed if basic fairness and due process are to be achieved. The court should, *inter alia*, be sure that a substantial commonality of law or fact exists, that the class action is the most effective remedy, and that it is truly manageable.[57]

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[54] *See* note 47 *supra.*

[55] *See* note 52 *supra,* and especially the article in the Boston College Symposium, Weithers, *Amended Rule* 23: *A Defendant's Point of View* B. C. IND. & COM. L. REV. 493, 515-26; *see also* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1, 5-12 (1971).

[56] *See* note 52 *supra.*

[57] *See* FED. R. CIV. P. 23(b) (3); 39 F.R.D. 98, 102-04 (1966). In a survey in five large cities for a 6-month period ending on October 31, 1970, the FTC found (see its release dated November 25, 1970) the following 6 major categories (comprising 48 percent of the total) of consumer complaints, in order of number: (1) failure to deliver merchandise that has been paid for; (2) Truth in Lending violations; (3) defective work or services; (4) inferior merchandise; (5) false advertising; and (6) refusal to grant refunds without prior notice that such claims would not be honored. Except for possibly (2) these are fragmented, individualized complaints dealing with broken merchandise, bad service, or complaint adjustment problems. (The FTC survey's findings were also those of a recent Better Business Bureau study). These individual disputes between one consumer and one seller lack the commonality requirement and, in any event, would be hopelessly unmanageable in that the court necessarily would have to try each complaint as a separate cause. *See,* Hackett v. General Host (E.D. Pa., July 30, 1970) denying maintenance of a class action for unmanageability where damages for an alleged class of 1½ million purchasers of bread in the Philadelphia area were sought based on an alleged price-fixing conspiracy among the defendants.

Assurances must be given that the representatives of the class are adequate and that the judgment, when entered, comports with the best interests of the class.[58] In order to assure fairness to the defendants, the courts and the parties have necessarily had to expend considerable time and energy, thus failing to satisfy the need for swift and inexpensive dispositions of the alleged claims.

Defendants have insisted, with considerable justification, that the class action vehicle is being misused by plaintiffs' representatives, who have no thought of the legitimate complaints of the class but rather are interested in either monetary reward and/or harassment of large business units whose customer group is sufficiently large so that the judgment rendered will make that recompense dramatically satisfying. Thus, characteristically, consumer class actions have been directed against relatively large defendants, in which violations of technical and highly complex provisions of regulatory statutes are often alleged, such as provisions of the Federal Truth in Lending Act.[59] They have *not* been, and perhaps cannot be directed against major identifiable areas of consumer complaints, such as those involving fly-by-nights or highly individualized sales practices.[60]

Without commenting further on these arguments, it is quite clear that it all boils down to a failure of the class action vehicle to meet the problem. Specifically, the class action has not provided a low-cost procedure for either party in reaching a resolution of disputes. Recoveries have been reached, if at all, at a snail's pace. Quick resolution is unknown. Even if the substantive claim is finally determined in favor of the proponents, recovery is cumbersome. Class membership is

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[58] *See* FED. R. CIV. P. 23(c) (2); 39 F.R.D. 98, 104-05 (1966). There may be many consumers who do *not* wish to pursue technical claims against business units with whom they are pleased to continue to deal.

[59] *Hearings before the Consumer Subcommittee of the Senate Commerce Committee on S.* 2246, *S.* 3092 *and S.* 3201, 92ND CONG., 2D SESS., at 522-23 (1970) revealed that, except for one case, all class actions brought for violation of the Federal Truth in Lending Act by that date had been filed against major corporations such as Westinghouse, Sun Oil, Sinclair Oil, Diner's Club, American Express, Mobil Oil, and Gimbel Bros., based upon allegedly highly technical infractions. This should be compared with the generally accepted conclusion that there has been little compliance with the act in the ghetto. A particularly unwise use of the class action vehicle is in the recovery of statutory penalties: *See,* Dole, *Private Enforcement of Consumer Credit Legislation,* 26 BUS. LAWYER, 915 (1971).

[60] *See* note 57 *supra*. Typical frauds are the highly localized, hard-core frauds such as bait and switch and phony referral plans. *See* Braucher, *Administrative Enforcement Including Licensing,* 26 BUS. LAWYER 907 (1971).

often difficult to define. The costs of calculating the small amount to which each member of the class is entitled can be more costly than the amount of the total judgment.[61] Often, ferreting out actual claims in such small amounts is impossible because of the scant retention of records by either party. Finally, there are brooding questions, after the class is completed, of whether res judicata has been achieved and whether constitutional due process has been satisfied through adequacy of notice.[62]

If the class action mechanism is not suitable for resolving consumer complaints is the search for effective private relief vehicles futile? I think not. There are viable alternatives which have not yet been tested adequately and which merit serious consideration. Among the alternatives are (1) compulsory arbitration, (2) creation of consumer courts or small claims courts directed to consumer problems, and (3) additional administrative enforcement.

The third alternative is the best. The Code draftsmen apparently knew this and created, within the confines of the Code, flexible administrative enforcement devices which went beyond those now existing in most of the credit regulation laws of the states. Generally unknown in the small loan laws and retail installment sales acts are the administrative powers of cease and desist, temporary and permanent injunctions, and assurances of discontinuance.[63] The cost of administrative enforcement is relatively minor when spread over the public and that cost should be considered a price which we all must pay for consumer protection in the credit field. Significantly, the fee structure of the Code actually shifts most, if not all, of this administrative cost to the credit industry.[64] In the past, regulatory acts have relied principally on administrative license revocation, a cumbersome bludgeon which was seldom used because it sweeps too broadly by eliminating the ongoing value of the licensee.[65] The more flexible administrative relief permitted in Article 6 of the Code permits the administrator to

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[61] *See* Eisen v. Carlisle, 391 F.2d 555, 571 (2d Cir. 1968) (Lumbard, C. J., dissenting opinion).

[62] *See* 39 F.R.D. 98, 106-07 (1966), *see also* Comment, *Constitutional and Statutory Requirements of Notice under Rule* 23(c) (2), 10 B.C. IND. & COM. L. REV. 571 (1969).

[63] Compare the provisions of the UCCC §§ 6.104-6.113 with the enforcement provisions of the present small loan laws, the motor vehicle installment sales laws, and personal property installment sales laws. *E.g.*, COLO. REV. STAT. ANN. §§ 73-3-1 *et seq.*; §§ 13-16-1 *et seq.*; §§ 121-2-1 *et seq.* (1963).

[64] *See* UCCC § 6.203.

[65] *See* Braucher, *supra* note 60, at 911.

tailor the nature of the relief to the heinousness of the offense. With expertise which the private counsel will not have, the administrator should be able to pursue a quicker resolution, either through the cease and desist procedures, or assurances for discontinuance, or injunctions and restitution.[66] The administrator can pursue the fly-by-nights or the insubstantial creditor without concern for monetary reward.

We should not be unaware of the concern expressed by many that regulatory agencies often become "captives" of the industry which they regulate. This is a valid concern. The captive administrator *must* be made a thing of the past. In eliminating the "captive" administrator, however, there is a danger that the administrator will be captured by a new pressure group, such as consumers' league. The proper goal is for an administrator who attends equally to the legitimate concerns of the consuming public and of the industry which he regulates. In the credit area, the Code takes a substantial step forward in achieving this goal. The Code essentially eliminates the present segmented regulation of the several types of credit industries and places them under one administrator. Competition for the administrator's attention will tend toward equitable treatment of all. Moreover, the Code provides for a watchdog Council of Consumer Advisors.[67] Equally significant is the fact that consumer groups and public awareness of the need for effective administrative enforcement are overcoming the lethargy which has permitted the administrator to be a captive of the industry regulated.[68] These new tensions necessarily tend to render the captive administrator an historical and fading vestige.

Of greater concern today than the captive administrator problem is the fact that an administrator necessarily has a limited budget and must also act with a wider public interest that necessarily may leave out, now and then, the concerns of an individual who has a substantive claim for relief. Also, the administrator may often not be able to act as swiftly as we would like in the resolution of small consumer complaints.

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[66] *See* UCCC §§ 6.108-.113.

[67] UCCC, Part 3, Article 6.

[68] In addition to national groups such as the Consumer Federation of America and the National Consumer Law Center, local Legal Services units, state and local consumers leagues, and FTC-sponsored consumer protection committees now exist in some cities (those in Boston, Chicago, Detroit, Philadelphia, Los Angeles, and San Francisco were formed in 1970).

Thus we should pursue, probably on a test basis now, additional *private* relief mechanisms, such as arbitration or consumer courts.[69]

Voluntary arbitration, of course, is already available and hopefully will grow as business responsibility is heightened.[70] The problem, arguably, will never be fully solved, however, until consumer complaints *must* be arbitrated. Arbitration has many elements of attractiveness. It is quick because it can be held informally, because it can be easily heard, because it does not require professional legal involvement, thus eliminating a significant cost factor, and because it normally is not subject to appeal. Consumer courts could be created with the same features. Both the consumer and the creditor would seem to benefit from such a mechanism, which would promptly resolve the individual complaint at a low cost. The public could absorb the costs of the arbitrator or the consumer court and they could be made available locally. What must be avoided in these vehicles, at all costs, is the creation of new procedural monsters, similar to what has evolved in the workmen's compensation area, which would establish the problem all over again by forcing up costs so that they exceed the recovery.

IV. Limitations on Creditors' Rights and Remedies

The Uniform Consumer Credit Code speaks to many issues in the area of creditors' rights and remedies. The discussion here will be directed to the manner in which the Code's new limitations on existing creditors' rights and remedies relate to an overall regulatory scheme.

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[69] On February 26, 1971, a private, non-profit group called the National Institute for Consumer Justice was formed, with the President's blessing, to study the adequacy of procedures for resolution of private disputes arising out of commercial transactions, to be headed by former Harvard Law Professor Robert Braucher, who has just left Harvard and the chairmanship of the National Commission on Consumer Finance to become an Associate Justice of the Massachusetts Supreme Court. A radical new approach now being discussed which will be tackled no doubt by the Institute is that the government would pay all loss from consumer complaints upon mere filing of a claim, with stiff penalties for filing of false claims; all prosecution of industry for harming the consumer would be done by the government, and private enforcement would be unnecessary.

Another way to provide for ability in the consumer to pursue his individual claim is for the court to assess, as *additional* damages, the consumer's attorney's fees (should the consumer win). This can, of course, also be legislatively provided.

[70] The American Arbitration Association is giving high priority to the increased use of voluntary arbitration in the area of resolution of consumer disputes.

The common law and statutory maze which exists today as to creditors' rights and remedies has been described by some to be inviolate and indispensable in protecting creditors against defaulting or malicious debtors.[71] The Code proposes to limit or even eliminate some of these "traditional" rights and remedies.[72] Thus, the Code necessarily raises the question of how far legislatures should go in limiting these "traditional" rights and remedies.

To those who feel that the status quo is inviolate, it must be acknowledged that the shape of creditors' rights and remedies has been continually under revision. The small loan laws of 50 years ago placed new statutory limitations on lenders[73] and, more recently, the motor vehicle retail installment sales laws and the personal property installment sales laws have imposed new limitations on retail credit sales.[74] In the last few years, several states have enacted in piecemeal fashion many of the limitations found in the Uniform Consumer Credit Code.[75]

In many and probably most states, however, the UCCC would impose an extensive new set of limitations on creditors' rights and remedies. These new limitations would have a very significant effect. At the time when the creditor makes his decision to extend credit, he will be forced to rely heavily, if not totally, on his initial judgment as to the credit-worthiness of the debtor and to decrease his accustomed reliance on his collection rights and remedies. This shift in reliance, at first blush, seems reasonable. Rephrased, it means that these new limitations will require the creditor to sharpen his judgment of the debtor's credit-worthiness at the outset rather than allow him to be a "lazy" creditor and to extend credit to the "marginal" debtor, who truly should not have received credit at all, on the basis of his ability to obtain payment through legal process. One obvious problem with this effect is that of protecting the creditor from an unforeseen change of the debtor's credit-worthy condition.

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[71] *See* note 43 *supra*.

[72] *See, e.g.,* UCCC Part 4, Article 2; Part 4, Article 3; and Part 1, Article 5.

[73] The *Uniform Small Loan Laws* created by the Russell Sage Foundation.

[74] *See, e.g.,* COLO. REV. STAT. ANN. §§ 13-16-1 *et seq.* and §§ 121-2-1 *et seq.* (1963).

[75] Nineteen states have enacted cooling-off periods in home solicitation sales *see*, Hogan, *Cooling-Off Legislation*, 26 BUS. LAWYER, 875 (1971). Maryland (MD. STAT. ANN. Art. 83 § 147), Vermont (VT. STAT. ANN. Tit. 9, § 2455) and Massachusetts (MASS. GEN. LAWS ANN. ch. 244 § 12C), and most recently, New York, have abolished the holder in due course doctrine in consumer credit transactions.

There must, of course, be placed in the law adequate vehicles for providing an ability in the creditor to collect an unpaid debt. The Uniform Consumer Credit Code appears to be a healthy legislative contribution toward retaining that ability while tightening up on creditors' rights and remedies in a sufficient way both to eliminate known abuses and to require better initial judgments as to credit-worthiness.

There has not yet been enough experience with these delicate balances in the UCCC to know whether more extensive limitations would cripple the creditor's ability to extend credit.[76] Some critics of the UCCC seem sure that most creditors' remedies could safely be eliminated, and these critics have suggested, as a rationale, that all such remedies can be misused. Their view seems to be that a creditor should simply suffer a total loss if he has made the wrong judgment of credit-worthiness at the time of the extension of credit, except where there is a subsequent event (such as loss of employment) which could not be foreseen. I do not share this view. I know of no behavioral imperative that credit-worthy debtors will necessarily repay their debts without effective legal coercion as the alternative to non-payment.

I agree, of course, that some traditional rights and remedies have been abused. The Code attacks those abuses. It does not, however, attack hypothetical abuses. If newly apparent or overlooked abuses do exist, Code amendments are in order. A prerequisite to sound legislative rule-making, however, should be proof that such abuses exist.

V. Regulation of Rates

With respect to regulation of rates in the consumer credit area, the National Conference, taking a daring and perhaps revolutionary step, proposed institution of a "competition" theory of rate control and rejected the "public utility" approach of the past.[77] It would seem quite enticing to me, to accept this competition theory rather than face the constant machinations of credit oligopolies knocking on my door for rate increases every time the inflationary spiral increased the costs of credit extension, particularly in the explosive area of how much the average man pays for the irresistible urge he has

[76] UCCC Prefatory Note, "*Basic Assumptions*" (1969 official text).

[77] *Id; see also*, UCCC § 2.201, Comment; Warren, *Rate Limitations and Free Entry* (and remarks of a panel), 26 Bus. Lawyer 855 (1971); Malcolm, *Consumer Credit — Probings Into the Future*, 26 Bus. Lawyer 899; The Conference on Personal Finance Law, The Realities of Maximum Ceilings on Interest and Finance Charges (1970).

to buy things on credit. As a matter of practice, however, we have seen that it is very hard for the legislators to overcome the traditional reliance on the public utility theory.

The National Conference's decision to embrace the competition theory flowed from the congressional commitment to maximization of credit shopping through uniform disclosure of credit terms in the enactment of the Federal Truth in Lending Act.[78] The Code, however, carried the Federal Truth in Lending Act theory forward by opening the doors to new competition for credit terms through elimination of the legal bases for existing oligopolies in certain credit markets.[79] Thus, the UCCC incorporated certain devices to insure that its competition theory would work. The Code puts all creditors under its rate ceilings and permits any creditor, if he chooses, to operate, in any one or more types of credit extension, such as the high-risk loan, the credit card sale, the motor vehicle installment sale, or the sale of small items of merchandise on credit.[80] Competitive climate is heightened by new fair credit practice rules.[81] Competition effectuates maximization of efficiencies in the creditor's operations and requires him to respond to his competitors' lower finance charges.

As noted above, skeptics have asserted that there is a natural segmentation of credit markets according to types of credit extension and thus that rate competition among those types cannot be achieved.[82] They proclaim that rate competition has never worked in the past.[83] I believe that this is untrue. There is evidence that, in the marketing of retail products on credit, rate competition has long been keen, particularly in big ticket items, such as in motor vehicle sales.[84] It is true that in the small loan area (approximately 8 percent of the credit market) credit prices have often risen to the ceilings, but this is probably because those ceilings are often unrealistically low in light of inflationary costs and because the small loan market is basically one which deals with high risk debtors who, in order to retain credit at all, either must pay the highest lawful rate or go to those who operate out-

[78] *See* Committee reports to the Federal Truth in Lending Act.
[79] *See* UCCC § 2.201 Comment 1(3); Warren, *supra* note 77.
[80] *Id. See* UCCC § 3.512.
[81] UCCC Prefatory Note, *"Basic Assumptions"* (1969 official text).
[82] *See* notes 36 and 37 *supra*.
[83] *Id.*
[84] Johnson, *Rate Competition*, 26 BUS. LAWYER 777, 782-84 (1971).

side the law.[85] The experiences in Utah, during the 2 years in which the Uniform Consumer Credit Code has been the law there, suggest that the competition theory has a chance.[86]

The old public utility theory, at least in the area of retail sales credit, is a doubtful approach at best. The 50 state legislatures could, of course, periodically try to make an agonized determination of what the costs of credit extension for each credit group were and then specify an additional reasonable return on investment by setting a finance charge rate which would cover both those costs and the return.[87] Latest studies in the revolving sales credit area indicate that at least 2 per cent a month on the outstanding balance would be needed.[88] Legislatures, however, have not found it easy to act as a public utility commission in the credit area, for there is a widespread misunderstanding that the costs of credit extension are much less than what they really are and thus legislators receive pressure, based on this misinformation, to impose credit rate ceilings well below what even the public utility theory would determine. In the State of Washington, a public referendum in November 1968 imposed a 1 per cent per month rate ceiling on revolving charge accounts, and disastrous effects have resulted to the economy of that state.[89] In the retail sales

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[85] *Id.* Where there is competition and reasonable rate ceilings, the actual rates in the small lending market will fall below the ceilings. *Inter alia* such is the case today in Colorado, Wyoming, and Utah.

[86] *See* STUCKI, UTAH CONSUMER CREDIT REPORT (1970). No study has been made of the Okahoma experiences—Oklahoma also adopted the UCCC in 1969—but informal discussions with Oklahomans indicate that competition is producing the expected effects.

[87] Benfield, *Usury Laws and Consumer Credit,* 26 BUS. LAWYER 787, 788-89 (1971). Professor Benfield observes that there are practical problems which make it impossible to set rates on a public utility basis: (1) a creditor need not serve all comers and thus can always exclude from the market any person who does not qualify at whatever statutory rate is established; and (2) the *expense* structure of the credit industry is quite different from that of a public utility, including a wide variation of administrative costs and bad debt losses according to the character of the customers, the size of the credit extended, and the interplay of the money market between the controlled market (fixed by usury ceilings), and the uncontrolled market (over 60 percent of the total market). Professor Benfield was focusing on the cash lending market, but he could have added that, in credit selling, there is no feasible way to fix credit charges by setting rate ceilings, for the seller can always hide additional charges in inflated cash prices as long as the legislatures do not fix cash prices also (which they show no signs of doing).

[88] NATIONAL RETAIL MERCHANTS ASSOCIATION, ECONOMIC CHARACTERISTICS OF DEPARTMENT STORE CREDIT, 24-26 (1969).

[89] In a study made by the Graduate School of Business Administration of the University of Washington at Seattle, published in late 1970, entitled "The Impact of a Consumer Credit Interest Limitation Law, Washington State: Initiative 245," the effects of the one percent per month rate were found to include a marked decrease in availability of consumer credit, increased cash prices to cover deficits incurred in extending credit, higher

area, to the extent by which the allowable finance charge does not match the costs of credit extension, those costs must become part of the cost of the goods sold to all buyers, both credit buyers and *cash* buyers, and thus, in a broad sense, the cash buyer will subsidize the credit buyer by paying, in part, the cost of the credit buyer's credit.[90] It has always seemed a mystery to me how a legislature could openly impose this kind of inequity when the majority of consumers are cash buyers.[91]

Lamentably, the public's misunderstanding of the costs of credit is so deeply set that creditors are beginning to learn that their own presentation of the facts relative to those costs are rejected out of hand as mere protestations of the self-interested. Thus, it is incumbent upon responsible consumer representatives to take a leadership role and to inform the public that unrealistically low rates in consumer credit are detrimental to the public.[92] Unless consumer representatives sponsor this understanding immediately, rather than succumb to the passion of the times, we are faced not only with a legislative stalemate in the consumer credit area but also a breakdown of the consumer credit industry.

In summary, why do we not gamble on the National Conference's rate competition theory. We have everything to lose from the public utility theory and everything to gain for the consumer by the competition theory.

Turning to subsidiary issues, some observers have contended that there can be no maximization of credit shopping as long as the creditor presents one basic credit form to his customers on a "take it or leave it" basis. In response, it should be noted that the cost savings of uniformity in the processing of complex accounts, particularly revolving charge accounts where a number of small items are purchased under one con-

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down payments, shortened maturities, increased requirement of credit insurance, and increased product-related fees (formerly given free). A similar problem in Arkansas is studied in Lynch, *Consumer Credit at Ten Percent Simple: The Arkansas Case*, 1968 U. ILL. LAW F. 592 (Winter 1968).

90 *Id. See also* note 88 *supra*.

91 Cash buyers are most often those whose income is small, *i.e.*, the *poor*.

92 There is no doubt that responsible consumer representatives understand the dire effects of low rates. The National Consumer Law Center has carefully omitted offering any amendments to UCCC relative to rates. Many consumer spokesmen are forthrightly attempting to correct this misunderstanding, but as yet they have not achieved an acceptance of their view by organized consumer groups, a necessary prerequisite to political acceptance of realistic rates. *See*, Caplovitz, *Breakdowns in the Consumer Credit Marketplace*, 26 BUS. LAWYER 795 (1971).

tract, are substantial. These savings should tend toward the lowest possible finance charge rate because of heightened efficiency. Elimination of these efficiencies will either make credit extension in small purchases impossible or undesirable because of substantially higher costs of credit extension. What is really needed is strong competition *among* creditors so that, if a creditor's forms do not present the best competitive rate, he will simply lose customers, as he should, until he revises his standard form to meet his competition.[93]

Finally, to those who have argued that restrictively low rate ceilings should be set in order to cause creditors to deny credit to the "marginal" debtor, my thought is that this argument for "low" rates is misguided. Even though the effect of "low" rates may indeed be to restrict the availability of credit to those less able to pay, the *additional* side effects are drastically *undesirable.* Many poor people are sufficiently creditworthy to receive credit in small amounts and yet, where rates are so low as to eliminate high-risk debtors, they will be denied any legitimate outlet for their modest needs.[94] How else can a welfare mother buy a $50 coat except in installments? The alternative to legitimate credit is credit *outside the law* — where $5 is extended for one week at a repayment of $6 and nonpayment is treated by violence.[95] The Washington state situation has called our attention to other disastrous consequences.[96] In short, the marginal credit problem must be tackled with more subtle weaponry. The UCCC has chosen to do so by stricter limitations on creditors' rights and remedies.[97] This appears to be the sound approach.

VI. CONCLUSION

From a 1971 perspective, the efforts of the National Conference in promulgating the UCCC are remarkable. Unfor-

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[93] *Cf.* Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power,* 84 HARV. L. REV. 529 (1971).

[94] Part IV *supra* discusses how the creditor will be required by the UCCC's "consumer protection" provisions to focus his credit extension decision on the credit-worthiness of the credit applicant, thereby tending to eliminate the "marginal debtor." A "marginal debtor" is one who overbuys on credit. A poor person need not necessarily be a marginal debtor, as long as he buys on credit commensurate with his ability to pay. The UCCC "consumer protection" provisions hopefully will require the creditor to make a thorough investigation and an accurate prognostication of that ability but it should not be the place of statutory rate ceilings to eliminate availability of credit to the extent of that ability.

[95] UCCC Prefatory Note, *"Basic Assumptions"* (1969 official text). *See also* Shay, *A Portrait of the Consumer Credit Market,* 26 BUS. LAWYER 761 (1971).

[96] *See* note 89 *supra.*

[97] These limitations are principally found in UCCC Parts 4 of Articles 2 and 3 and Part 1 of Article 5.

tunately, the UCCC's legislative potential is often not apparent, for its themes are complex and subtle, and it deals with one of the most politically delicate issues of the day. To be involved in the resolution of these issues is an exhilarating, albeit exasperating, affair.