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ENFORCEMENT OF THE UNIFORM CONSUMER CREDIT CODE: OBSERVATIONS FROM THE OKLAHOMA AND FEDERAL EXPERIENCE

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INTRODUCTION

The Uniform Consumer Credit Code,¹ on the whole, is a good substantive statute.² Among other things, it creates a much more rational system for the regulation of consumer credit transactions³ than

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* The aid of my research assistant, Sally Mock, is gratefully acknowledged in connection with the preparation of this article.

1. UNIFORM CONSUMER CREDIT CODE (1969 Official Text with Comments), *as amended*, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 173 (1970) [hereinafter cited as UCCC]. The full text of the UCCC with comments can be found in 1 CCH CONSUMER CREDIT GUIDE ¶ 5001-5703. As of this writing, seven states have enacted the UCCC. They are (1) Colorado, (2) Idaho, (3) Indiana, (4) Kansas, (5) Oklahoma, (6) Utah, and (7) Wyoming. 1 CCH CONSUMER CREDIT GUIDE ¶ 4770.

2. There are a plethora of articles concerning this. For a concise general treatment, *see, e.g.*, Malcolm, *The Uniform Consumer Credit Code*, 25 BUS. LAW. 937 (1970). For a more detailed discussion, *see, e.g.*, Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387 (1968). For a symposium, *see, e.g.*, *Symposium—Consumer Credit Reform*, 33 LAW & CONTEMP. PROB. 639 (1968). For a detailed analysis concerning the impact the enactment of the UCCC would have in a particular state, *see, e.g.*, Robertson, *Myth and Reality in Consumer Credit Rate Regulation*, 43 MISS. L.J. (1972). Not all writings have been complimentary, however. Perhaps the broadest criticism is found in 1 CONSUMER VIEWPOINTS (R. Elbrecht ed. 1971). For a reply to some of the criticism, *see, e.g.*, Moo, *Consumerism and the UCCC*, 25 BUS. LAW. 957 (1970). The criticism and the experience to date in the enacting states have prompted work on a revision of the UCCC, which is presently in the fourth working redraft. CCH CONSUMER CREDIT GUIDE, Issue No. 210, Dec. 18, 1972 [hereinafter cited as RUCCC].

3. A "consumer credit transaction" under the UCCC is a sale of goods, services, or an interest in land in which credit is granted by a person who regularly engages as a seller in credit transactions of the same kind; the buyer is a person other than an organization; the goods, services, or interest in land are purchased primarily for a personal, family, household, or agricultural purpose; either the debt is payable in installments or a credit service charge (hereinafter "finance charge") is made; and, with respect to a sale of goods or services, the amount financed does not exceed \$25,000. UCCC § 2.104(1); applicable definitions are found respectively in UCCC §§ 2.105, 1.301, 2.109, 2.111. But *see* exceptions in UCCC §§ 2.104(3), 1.106. A "consumer credit transaction" also includes a loan made by a person regularly engaged in the business of making loans in which the debtor is a person other than an organization; the debt is incurred primarily for a personal, family, household, or agricultural purpose; either the debt is payable in installments or a loan finance charge (hereinaf-

the hodgepodge of fragmented statutes and case law presently constituting the system in most states.⁴ For example, it avoids the ludicrous situation of billions of dollars in open-end credit⁵ in search of a legal shelter.⁶ It also allows the inclusion in the legal consumer credit market of most consumers and most creditors without undue barriers to entry and operation, which lays the groundwork for more of the free enterprise system to prevail.⁷ Finally, it modernizes the balance between creditors and debtors so that the reasonable needs of each are accommodated.⁸ But much of this would be only a facade unless the

ter "finance charge") is made; and either the principal does not exceed \$25,000 or the debt is secured by an interest in land. UCCC § 3.104(1) applicable definitions are found respectively in UCCC §§ 3.106, 1.301, 3.109, 3.107(3). *But see* exceptions in UCCC §§ 3.104(2), 1.106. However, a "consumer credit transaction" does not include certain excluded transactions (UCCC § 1.202), nor does it include (except with respect to disclosure, civil liability for violation of disclosure provisions, and the debtor's right to rescind certain transactions) a sale of an interest in land if the finance charge does not exceed 10% "simple" per year, or a loan primarily secured by an interest in land if at the time the loan is made the value of the collateral is substantial in relation to the amount of the loan and the finance charge does not exceed 10% "simple" per year. UCCC §§ 2.104(2)(b), 3.104(1), 3.105.

Moreover, the UCCC also governs consumer leases (UCCC § 2.106), consumer related transactions (basically sales or loans to individuals of \$25,000 or less made by non-merchant sellers or non-professional lenders or made for a business purpose, UCCC §§ 2.602-.604, 3.602-.604), and transactions which are neither consumer credit transactions nor consumer-related transactions (basically sales or loans in excess of \$25,000 or made to organizations, UCCC §§ 2.605, 3.605), although in each of these circumstances the regulation is less or freedom of contract fundamentally prevails. *See generally* Miller, *The Basic Exclusions from the UCCC: A Roadmap for Traversing a New World with Oblique Guides*, 43 U. COLO. L. REV. 269 (1972).

4. *See generally*, B. CURRAN, *TRENDS IN CONSUMER CREDIT LEGISLATION* (1965). Thus, the UCCC replaces the system with exceptions on the sales side under the time-price doctrine and perhaps a retail installment sales act, and on the loan side with a small loan law, an industrial loan law or case law validating the Morris plan, an installment loan law, a provision denying corporations the defense of usury, and so on. *See* UCCC § 9.103 and notes following.

5. *See* UCCC §§ 2.108, 3.108. "Open end credit," among other things, includes revolving charge accounts and lender credit cards like bank credit cards. At the end of June, 1972, alone, \$4.5 billion of consumer credit was outstanding under bank credit cards. 4 CCH CONSUMER CREDIT GUIDE Report 102, Sept. 12, 1972, at 5.

6. *Compare* State v. J.C. Penney Co., 48 Wis. 2d 125, 179 N.W.2d 641 (1970), with *Sliger v. R.H. Macy & Co.*, 59 N.J. 465, 283 A.2d 904 (1971) (revolving charge accounts). *Compare* *Kass v. Central Charge Serv., Inc.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,161 (D.C. Super. Ct. Civ. Div. July 15, 1972), with *Op. Att'y Gen. of Idaho*, Sept. 16, 1969, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,752 (lender credit cards). Considering this state of affairs, it is not surprising that more and more states are adding yet another layer of legislation to their systems described in note 4, *supra*, to settle the problem. *See* 1 CCH CONSUMER CREDIT GUIDE ¶ 630 (Charts). In a UCCC state, however, open end credit is already realistically accommodated within the same statute that controls other forms of credit. *See* UCCC §§ 1.301(9), (16), 2.104, 3.104, 3.106.

7. *See* Robertson, *supra* note 2.

8. *See, e.g.*, Miller, *Book Review*, 56 IOWA L. REV. 716 (1971).

statute also provided adequate means for its enforcement⁹ with reference to creditor conduct. This article will discuss this crucial aspect of the Code.

A number of articles have already been written concerning enforcement of the UCCC.¹⁰ But to date, no article has appeared that has used the actual experience in a UCCC state to any appreciable degree as a basis for ascertaining and evaluating the deficiencies, if any, in its enforcement provisions. On the assumption that the proof of the pudding is in the tasting, this article will draw heavily on the Oklahoma experience.¹¹

9. See, e.g., Felsenfeld, *Some Ruminations About Remedies in Consumer-Credit Transactions*, 8 B.C. IND. & COM. L. REV. 535, 535 (1967):

The draftsmen of the Uniform Consumer Credit Code . . . have thus far directed most of their time and effort to establishing a permissive pattern within which creditors give and debtors receive credit. . . . [T]hese permissive, or authorizing, guidelines of the Credit Code are clearly its most important aspects.

Underlying much of the thinking of the Credit Code draftsmen is an assumption that most debtors will honor their debts and most creditors will obey the law. Remedies follow violation, and, since violation is really the exception rather than the rule, the pattern of remedies in existing consumer-credit legislation is haphazard. It is, therefore, important, though only secondarily so, to consider what happens when either debtor or creditor violates a statutory provision or a term of his bargain.

While the above places the matter in proper perspective, still the need for any statute or regulation at all suggests that the question of enforcement is a not too distant second consideration. There is much truth that "[i]t is axiomatic that no regulatory legislation can be stronger than its enforcement provisions." Spanogle, *The U3C—It May Look Pretty, But Is It Enforceable?*, 29 OHIO ST. L.J. 624, 624 (1968); cf. Consumer Credit Protection Act, 15 U.S.C. §§ 1601-81t (1970) [hereinafter cited as CCPA]. Section 1633 only allows the Board of Governors of the Federal Reserve System to exempt by regulation from the requirements of that statute "any class of credit transactions within any State if it determines that under the law of the State that class of transactions is subject to requirements substantially similar to those imposed by the CCPA, and that there is adequate provision for enforcement" (emphasis added).

10. See, e.g., Braucher, *Administrative Enforcement Including Licensing*, 26 BUS. LAW. 907 (1971); Curran, *Administration and Enforcement Under the Uniform Consumer Credit Code*, 33 LAW & CONTEMP. PROB. 737 (1968); Dole, *Private Enforcement of Consumer Credit Legislation*, 26 BUS. LAW. 915 (1971); Felsenfeld, *supra* note 9; Fritz, *Would the Uniform Consumer Credit Code Help the Consumer?*, 25 BUS. LAW. 511, 513-19 (1970); Jordan & Warren, *supra* note 2, at 417-32; Spanogle, *supra* note 9; Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Efficacy Private Enforcement?*, 23 BUS. LAW. 1039 (1968); and Note, *Enforcement Under the UCCC*, 55 MINN. L. REV. 572 (1971).

11. That experience, as of this writing, encompasses three and one-half years, the effective date of the UCCC in Oklahoma (OKLA. STAT. ANN. tit. 14A, §§ 1-101 to 9-103 (1972) [hereinafter cited as OKLAHOMA UCCC]) being July 1, 1969. It may also be noted that the title of this article refers to the federal experience. The UCCC, of course, is not a federal statute. However, the CCPA contains many provisions which are substantially similar to provisions contained in the UCCC; therefore the federal experience under those provisions is included in the discussion to the extent it appears transferable. In short, this article will apply hindsight to assess the validity of the foresight indulged in by the authors, and others, listed in note 10, *supra*, particularly

Discussion of the enforcement provisions will be organized in the following manner: First, the enforcement provisions of the UCCC will be grouped into five basic categories. Some indication of the current published opinion regarding probable effectiveness will be given at or near the beginning of the discussion of each of these five methods. An enumeration of provisions or examples will also be provided. Then the operation of the statute in practice will be described. Finally, comment will be made on its puissance as demonstrated in practice—including, as applicable, suggestions for revision. Inevitably, considering the newness of the statute and the proclivities of the author, discourses on theory, usually untested, may have crept in, but hopefully this will enhance rather than detract from any value in the discussion. One should keep in mind that these five categories are only creatures of convenience for purposes of this article; in practical fact these methods cannot exist in isolation from each other, and normally, as will appear from the discussion, effective enforcement depends on the utilization of more than one of them to resolve a particular situation.

CRIMINAL PROVISIONS OF THE UCCC

The UCCC provides criminal sanctions¹² for persons who engage in the following conduct: (1) a supervised lender¹³ who willfully¹⁴

those whose vision was critical as opposed to general. *See, e.g.*, Fritz, *supra* note 10, at 513-19; Spangole, *supra* note 9. To the extent this effort may be subject to Felsenfeld's observation that what has passed for learning in this area has more often been generalization drawn from limited experience, Felsenfeld, *supra* note 9, at 566, at least it can be said that the experience used here has been under the actual statute involved. Finally, evaluating this experience will obviously necessitate some generalization and the formulation of opinions. While I am deeply grateful to the former Oklahoma Administrator, Bill Roberts, and the staff of the Oklahoma Department of Consumer Affairs (the "Administrator" in Oklahoma is the state official who heads the Department of Consumer Affairs, which is the state agency created to administer the OKLAHOMA UCCC, UCCC § 6.103, OKLAHOMA UCCC §§ 6-103, 6-501) for their help with respect to the information which went into this article, all opinions based on that information are my own, unless otherwise indicated.

12. The details of the sanctions are in part left up to individual state enactment by the UCCC. Thus, a violation of UCCC § 5.501 is characterized as a misdemeanor and imprisonment for a period not exceeding one year is provided in two situations, but the amounts of the fines in all situations are left up to local decision. Oklahoma provided for fines of up to \$500 in two situations, and for a fine of up to \$500 in the third, OKLAHOMA UCCC § 5-301. A violation of UCCC § 5.302 is left open as to characterization as a misdemeanor or a felony, but a fine of up to \$5000 or imprisonment not exceeding one year, or both, is provided. Oklahoma characterized the violation as a misdemeanor, OKLAHOMA UCCC § 5-302; *cf.* CCPA § 1611 (substantively the same as UCCC § 5.302, provides for a fine of up to \$5000 or imprisonment for not more than one year, or both).

13. UCCC § 3.501(4).

14. "Willfully" is not defined by the UCCC. In Oklahoma, the term is defined in

makes charges in excess of those permitted by the provisions of UCCC article 3, part 5;¹⁵ (2) a person, other than a supervised financial organization,¹⁶ who willfully engages in the business of making supervised loans¹⁷ without a license in violation of the provisions applying to authority¹⁸ to make supervised loans;¹⁹ (3) a person who willfully engages in the business of making consumer credit sales, consumer leases, or consumer loans,²⁰ or of taking assignments of rights against debtors arising therefrom and undertakes direct collection of payments or enforcement of these rights, without complying with the provisions concerning notification²¹ or payment of fees;²² (4) a person who willfully and knowingly²³ gives false or inaccurate information or fails to provide information that he is required to disclose under the provisions of the UCCC on disclosure and advertising²⁴ or of any related rule of the Administrator²⁵ adopted pursuant to the UCCC;²⁶ (5) a person who

Title 21, of the Oklahoma Statutes, dealing with Crimes and Punishments, as follows: "The term 'wilfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." OKLA. STAT. ANN. tit. 21, § 92 (1958). Without more, it might appear that this definition should hold for purposes of OKLAHOMA UCCC § 5-301. But it is submitted that there is more, and it is therefore highly dubious whether this definition of "willfully" should be used in OKLAHOMA UCCC § 5-301, or any similar definition with respect to UCCC § 5.301. A discussion of the reasons for this observation will appear later in this article.

15. UCCC § 5.301(1). Presumably the basic violation here is imposing a finance charge in excess of the rates permitted by UCCC § 3.508, but in light of UCCC § 3.513, which makes all provisions of the UCCC applying to consumer loans generally applicable to the loans covered by UCCC art. 3, pt. 5, except as otherwise provided, it is doubtful whether it is the only violation. *See, e.g.*, UCCC § 3.203.

16. UCCC § 1.301(17).

17. UCCC § 3.501(3).

18. UCCC § 3.502.

19. UCCC § 5.301(2).

20. *See note 3 supra.*

21. UCCC §§ 6.201, 6.202.

22. UCCC §§ 6.201, 6.203, 5.301(3).

23. "Willfully" is not defined by the UCCC, but *see note 14 supra.* "Knowingly" is also not defined. In Oklahoma, again the term is defined in title 21 of the Oklahoma Statutes, as follows: "The term 'knowingly,' when so applied, imports only a knowledge that the facts exist which bring the act or omission within the provisions of this Code. It does not require any knowledge of the unlawfulness of such act or omission." OKLA. STAT. ANN. tit. 21, § 96 (1958).

24. UCCC art. 2, pt. 3 and art. 3, pt. 3.

25. UCCC § 6.104(2). In Oklahoma, the Administrator, pursuant to OKLAHOMA UCCC § 6-104(2), has substantially adopted, as a state rule, the provisions of Federal Reserve Board Regulation Z, 12 C.F.R. Part 226 (1971) [hereinafter cited as Regulation Z], the implementing regulation for the CCPA (*see* CCPA § 1604). *See* Rules of the Administrator, Department of Consumer Affairs, Part II—Disclosure and Advertising—Regulation Z, 3 CCH CONSUMER CREDIT GUIDE (Okla.) ¶¶ 6521-661 (hereinafter cited as Oklahoma Regulation Z). For a discussion of the relation-

willfully and knowingly uses any rate table or chart, the use of which is authorized by rule of the Administrator²⁷ adopted pursuant to the provisions on calculation of rate to be disclosed,²⁸ in a manner that consistently understates the annual percentage rate determined according to those provisions;²⁹ and (6) a person who willfully and knowingly otherwise fails to comply with any requirement of the provisions on disclosure and advertising or of any related rule of the Administrator.³⁰

"Criminal sanctions . . . are . . . often dismissed on the ground that they are little used in practice."³¹ Even the draftsmen of the UCCC have commented: "[D]istrict attorneys usually have more rewarding matters to attend to than prosecuting tax-paying, politically aware businessmen."³² To date in Oklahoma, there have been no criminal prosecutions under the Oklahoma UCCC.³³ The federal experience has been much the same.³⁴ Nonetheless, "little use" should not necessarily be equated with "little utility."

One commentator argues that little use of criminal sanctions in consumer credit legislation may not portray the complete picture. Thus, an attorney's advice to a client regarding a proposed course of

ship between the UCCC and any related rule of the Administrator concerning disclosure, see Miller, *Living with Both the UCCC and Regulation Z*, 26 OKLA. L. REV. 1 (1973).

26. UCCC § 5.302(1), CCPA § 1611(1) is much the same.

27. UCCC §§ 6.104(1)(e), (2).

28. UCCC §§ 2.304, 3.304.

29. UCCC § 5.302(2). CCPA § 1611(2) is much the same.

30. UCCC § 5.302(3). CCPA § 1611(3) is much the same.

31. Spanogle, *supra* note 9, at 635 n.43.

32. Jordan & Warren, *supra* note 2, at 419.

33. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, Oklahoma City, Dec. 19, 1972.

34. J. Mitchell, U.S. Att'y Gen., REP. OF THE ATT'Y GEN. TO THE CONG. OF THE U.S. ON THE ENFORCEMENT OF TITLE I OF THE CONSUMER CREDIT PROTECTION ACT OF 1968 FOR THE CALENDAR YEAR 1970 (1971), cited in 4 CCH CONSUMER CREDIT GUIDE ¶¶ 99,593, 99,248. The report for 1970 indicates no criminal prosecutions initiated for violations of CCPA § 1611. Of the twelve cases referred to United States Attorneys during that year for consideration as to criminal prosecution, prosecution was declined in ten and two were under investigation. The report for 1971 shows that prosecution was declined in these two cases and in five others referred during 1971, that four more cases were under investigation, and that on Nov. 19, 1971, the grand jury for the Western District of Wisconsin did return indictments against eight individuals charging violations of 15 U.S.C. § 1611 (1970). J. Mitchell, U.S. Att'y Gen., REP. OF THE ATT'Y GEN. TO THE CONG. OF THE U.S. ON ENFORCEMENT OF TITLE I OF THE CONSUMER CREDIT PROTECTION ACT OF 1968 FOR THE CALENDAR YEAR 1971 (1972), cited in 4 CCH CONSUMER CREDIT GUIDE ¶ 99,248. Further developments, including two more indictments, are reported in R. Kleindienst, U.S. Att'y Gen., REP. OF THE ATT'Y GEN. TO THE CONG. OF THE U.S. ON THE ENFORCEMENT OF TITLE I OF THE CONSUMER CREDIT PROTECTION ACT OF 1968 FOR THE CALENDAR YEAR 1972, (1973), cited in 4 CCH CONSUMER CREDIT GUIDE ¶ 99,072.

questionable conduct may be far less cautious when money alone is being risked than if criminal sanctions, and the attendant publicity, could be involved, even though a criminal action has never been brought in the state.³⁵ Whatever truth there is in this observation, it is submitted that the criminal sanctions of the UCCC have a great deal more potential utility than that.

For example, the UCCC provides that persons engaged in making consumer credit sales, consumer leases, or consumer loans in the enacting state and persons having an office or place of business in the enacting state who take assignment of and undertake direct collection of payments from or enforcement of rights against debtors arising from these sales, leases, or loans must file notification with the Administrator within thirty days after commencing business in the state and thereafter on or before January 31 of each year. Such persons also must pay an annual fee to the Administrator on or before January 31 of each year.³⁶ It is estimated from studies conducted by the Department of Business Research, University of Oklahoma, and from available sales tax lists that there are approximately twelve thousand non-lender creditors (retailers, automobile dealers, and acceptance companies) operating in Oklahoma subject to jurisdiction under the above provisions.³⁷ A large number of these persons filed and paid on their own initiative, or upon prompting by the Administrator after their failure to comply was discovered by (1) a check for a notification filing in connection with a consumer complaint lodged against them;³⁸ (2) a check for notification filings by dealers with whom licensees undergoing examinations³⁹ had dealt; and (3) spot checks of merchants by the staff of the Department of Consumer Affairs in various locales on a random basis.⁴⁰ Indeed, the Oklahoma Administrator even designed a decal which could be posted on the door of a merchant who had filed notification and paid his fees to demonstrate that he had joined the "club."⁴¹ Notwithstand-

35. Spanogle, *supra* note 9, at 635 n.43.

36. UCCC art. 6, pt. 2. In Oklahoma, the coverage of these provisions was reduced by exempting supervised financial organizations and licensees from their requirements. OKLAHOMA UCCC § 6-201.

37. [1971] OKLA. ADM'R OF CONSUMER AFFAIRS ANNUAL REP. 1 (1971) [hereinafter cited as ANNUAL REPORT].

38. Under OKLAHOMA UCCC § 6-104(1)(a) the Administrator may receive and act on complaints. UCCC § 6.104(1)(a) is the same.

39. Under OKLAHOMA UCCC § 3-506(1), the Administrator shall examine at times he deems necessary the loans, business, and records of every licensee. UCCC § 3.506(1) is the same.

40. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972; 1971 ANNUAL REPORT 3.

41. Braucher, *supra* note 10, at 909-10.

ing all this effort, however, and even allowing for some considerable margin of error in the estimate of twelve thousand non-lender creditors, a significant number of Oklahoma non-lender creditors have not as yet complied with the law.⁴²

Under the UCCC there is no private remedy for a consumer against a creditor who does not file a notification and pay fees, and creditor failure to do so in no way impairs rights on the debt.⁴³ Thus one is basically remitted to administratively initiated action to enforce these provisions. The Administrator can, for example, bring a civil action to restrain a person from violating the UCCC and for other appropriate relief.⁴⁴ It is immediately obvious, however, that if such civil actions must be brought against more than a handful of recalcitrant creditors, little or no other administrative enforcement endeavors will be feasible for approximately the next decade. Something more is needed. Consequently, an additional remedy is currently being experimented with by the Oklahoma Administrator: a civil action to restrain and to recover a requested penalty of up to five thousand dollars from creditors who have had lengthy correspondence from the Oklahoma Department of Consumer Affairs repeatedly advising them of their duty to file a notification and pay fees.⁴⁵ If anything near the requested maximum civil penalty is awarded in one or two such suits, it can be expected that the result will have some salutary effect on overall creditor conduct with respect to notification and fees.

Nonetheless, while one can certainly believe that if any such case is well-prepared and forcefully argued that its outcome will be satisfactory, it would perhaps be naive automatically to assume that any such penalty (which might well be a great deal less than the requested five thousand dollars) will be sufficient alone to accomplish the desired general compliance. It is in this context, perhaps, that one of the

42. There are 4909 filed notifications. Later study does indicate that there is an error in the twelve thousand figure given in the text; the proper figure is probably closer to 8500. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, March 1, 1973.

43. UCCC § 5.202(5).

44. UCCC § 6.110.

45. The Administrator may bring a civil action against a creditor or a person acting in his behalf to recover a civil penalty for willfully violating the statute, and if the court finds that the defendant has engaged in a course of repeated and willful violations, it may assess a civil penalty of no more than \$5000. OKLAHOMA UCCC § 6-113 (2). UCCC § 6.113(2) is the same. The word "willful" is not defined, and what it should mean in any context is a problem alluded to before and which will be discussed later. See note 14, *supra*. Suffice to say in the context of the discussion here that the creditor conduct should be willful in almost any sense of the word.

criminal sanctions of the UCCC should come into play. The UCCC also provides for a criminal penalty for any person who willfully engages in the business of making consumer credit sales, consumer leases, or consumer loans, or of taking assignments of rights against debtors arising therefrom and undertakes direct collection of payments or enforcement of these rights, without complying with the notification and fee provisions.⁴⁶ If a successful criminal prosecution or two could be accomplished in fact situations like the ones for which the civil penalty might be requested (although not necessarily in the same cases), it is reasonable to surmise that any conviction sustained would have a beneficial effect at least equal to that of a successful recovery in the civil action.⁴⁷ Moreover, the two penalties in tandem should unequivocally write the lesson sufficiently to bring the remaining notification hold-outs into line. And while it may be true that the Administrator cannot get the local prosecuting attorney to prosecute every merchant in town for not joining the club,⁴⁸ obtaining prosecution of one or a handful of merchants under the circumstances present at this stage is a very different thing and should be feasible.⁴⁹

I have thus suggested that the criminal sanctions of the UCCC may have a real use as an adjunct or supplement to other remedies for certain violations of the statute. But it is also probable that in a few instances they may furnish a primary remedy for particular kinds of violations. To illustrate, consider a loan-shark operation with an unlicensed creditor making small loans at exorbitant rates to low-income and welfare consumers without disclosure of terms and with repayment being accomplished in a number of cases with implied or actual threats of violence.⁵⁰ In such circumstances, the Administrator should and no

46. UCCC § 5.301(3).

47. "Fines tend to be insignificant when compared to the potential dollar loss a large financier faces when credit transactions involving millions of dollars may be subject to civil penalties." Felsenfeld, *supra* note 9, at 544. True enough, but first we are talking here about generally small merchants, and second, the publicity is the true sanction, whatever the fine, since these merchants are reputable, albeit independent and stubborn, businessmen.

48. Braucher, *supra* note 10, at 909.

49. The General Counsel of the Oklahoma Department of Consumer Affairs informs me that, while to his knowledge, no criminal prosecutions have yet been requested in connection with a failure to file notification and pay fees, general exploratory conversations in this regard have not been entirely unproductive, and that in at least one instance he has received a strong indication of cooperation. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972.

50. The Oklahoma Department of Consumer Affairs has uncovered at least one situation which, on the information presently available, appears to accord in most

doubt would file a civil action seeking an injunction,⁵¹ a recovery of all amounts paid and the avoidance of all amounts owed,⁵² and a civil penalty in the maximum amount.⁵³ However, even if a judgment were rendered on all counts for the Administrator in such an action, thus theoretically putting an end to the operation as it was then constituted, a question as to the effectiveness of the remedy for the future might be raised. After all, a creditor already operating so far outside the law might not reform and cooperate under an injunction, even one tightly drawn to prevent technical evasions. The creditor's customers would

respects with the hypothetical operation described in the text. The Administrator has filed a civil action alleging violations of the Oklahoma UCCC's licensing, disclosure, maximum charge, extortionate extension of credit, and other provisions, and requesting an injunction, a recovery of amounts paid and the avoidance of amounts owed, and a civil penalty, as suggested would be done in the following text. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972.

51. UCCC § 6.110. The violations involved would be of the licensing provisions (UCCC §§ 3.501, 3.502), the maximum charge provisions (UCCC § 3.508), the disclosure provisions (UCCC § 3.306 and, pursuant to UCCC § 6.104(2), any rule of the Administrator such as Regulation Z as a state rule), and no doubt others including UCCC § 5.107.

52. Under UCCC § 5.202(2), a violation of UCCC § 3.502 renders the loan void and the debtor is not obligated to pay either the principal or finance charge, and if he has paid any part thereof, he has a right to recover the payment. In addition, under UCCC § 5.107 the repayment of an extortionate extension of credit is unenforceable through civil judicial processes against the debtor. In UCCC § 6.113(1), the Administrator is given the power, after demand, to bring a civil action against a creditor for making or collecting charges in excess of those permitted, which action may relate to transactions with more than one debtor, and if it is found that an excess charge has been made, the court shall order a refund to the debtor or debtors of the amount of the excess charge. It might be argued from UCCC § 6.113, Comment 1, that only the finance charge in excess of that allowed under UCCC § 3.508 comes under this subsection. However, UCCC § 5.202(2) makes the whole finance charge and the principal as a charge against the debtor, charges in excess of those allowed by the UCCC. Thus such an interpretation appears to be an unduly literal reading without a policy basis. For example, it would preclude use of UCCC § 6.113(1) to recover excess delinquency, additional, and other types of charges. In addition there is support for the broader reading in UCCC § 5.202(3) itself, which characterizes an amount in excess of the lawful obligation under the agreement as an excess charge. Finally, UCCC § 6.113(1) can be construed to allow stay of the Administrator's action if the debtor sues under either UCCC § 5.202(2) or §§ 5.202(3), (4), and since the statutes of limitations are the same and UCCC § 5.202(2) is not denominated as a penalty, no other possible inconsistency need result. As to the avoidance aspect of the relief, if it cannot be had as an adjunct to the remedy under UCCC § 6.113(1), it certainly should be possible under the wording of UCCC § 6.110, which allows an injunction and other appropriate relief.

53. UCCC §§ 6.113(1), (2). UCCC § 6.113, Comment 4, states that an action for a civil penalty under subsection (2) may be in lieu of or in addition to an action for a refund under subsection (1), and so an argument for two civil penalties exists in this situation. Again we meet, and defer, the problem surrounding the term willful, to which is now added the question of the meaning of the terms "deliberate" and "reckless disregard" encountered in UCCC § 6.113(1).

still need credit,⁵⁴ and since prior collection methods were not always limited to legal means, the avoidance of the contracts might turn out to be a remedy more illusory than real. Perhaps in situations such as this, the best means to assure continued compliance with the statute would be to incarcerate the persons involved. Since all of the described conduct would constitute a violation of the criminal provisions of the UCCC,⁵⁵ this sanction would be available, and one could expect that the prosecuting authority would not suffer any malaise in instituting the appropriate proceedings.⁵⁶

At this point it is really too early accurately to assess the effectiveness of the criminal provisions of the UCCC; the statute is a little over three years old in Oklahoma, and one does not criminally prosecute creditors for non-compliance without some breaking-in period. About all that can be postulated is that the criminal provisions of the UCCC should not be dismissed as being of little utility because they have been little used to date.

54. Consider the experience after the Supreme Court of Nebraska declared about 100 million dollars of obligations void a few years ago as described in Braucher, *supra* note 10 at 908. During the interim when there was no law, collections kept up just about the way they always had because people thought they might want credit again some day. A similar thing happened in Oklahoma when the Department of Consumer Affairs discovered a large number of loans made by a reputable company without the required license; an overwhelming majority of the borrowers elected to pay the obligation rather than regard their transaction as void.

55. A supervised lender who willfully makes charges in excess of those permitted under UCCC art. 3 violates UCCC § 5.301(1). A person, other than a supervised financial organization, who willfully engages in the business of making supervised loans without a license violates UCCC § 5.301(2). And a person who willfully and knowingly fails to provide information which he is required to disclose or otherwise fails to comply with any requirement of the provisions on disclosure and advertising violates UCCC §§ 5.302(1), (3).

56. The Oklahoma Department of Consumer Affairs has experienced satisfactory cooperation to the extent requested so far in connection with the situation discussed in note 50, *supra*. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972. Further support for the supposition advanced in the text can be found in the federal record. There has been a plethora of prosecutions under the CCPA's "loan sharking" provisions (18 U.S.C. §§ 891-94, 96 (1970)), which are similar to UCCC § 5.107 except that they provide for criminal sanctions. See *United States v. Keresty*, 465 F.2d 36 (3d Cir. 1972); *United States v. DeLutro*, 435 F.2d 255 (2d Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *United States v. Fiore*, 434 F.2d 966 (1st Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *United States v. DeStafano*, 429 F.2d 344 (2d Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); *United States v. Perez*, 426 F.2d 1073 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States v. Biancofiori*, 422 F.2d 584 (7th Cir. 1970), *cert. denied*, 398 U.S. 942 (1970); *United States v. Curcio*, 310 F. Supp. 351 (D. Conn. 1970); *United States v. Markowitz*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,731 (S.D.N.Y. May 11, 1970); *United States v. Schulman*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,754 (S.D.N.Y. April 17, 1970). Compare this with the record evidenced in note 34, *supra*.

SELF-EXECUTING PROVISIONS OF THE UCCC

There are a number of UCCC sections that expressly or impliedly declare that conduct or a contractual instrument in contravention of their provisions is ineffective; that is to say, since no ancillary affirmative action need be taken to reach this result, they are self-executing. Indicative of the type are the provisions that stipulate (1) that an agreement by a buyer, lessee, or debtor with respect to a consumer credit sale, a consumer lease, a consumer loan, or a modification thereof to which the UCCC applies, that the law of another state shall apply, or that the buyer, lessee, or debtor consents to the jurisdiction of another state, or that fixes venue, is invalid;⁵⁷ (2) that an agreement by the buyer or lessee with respect to a consumer credit sale or consumer lease not to assert against an assignee a claim or defense arising out of the sale or lease is unenforceable;⁵⁸ or (3) that a security interest taken by a seller in a consumer credit sale, other than in the property sold, other than in goods upon which services are performed or in which goods sold are installed or to which they are annexed when the debt secured is three hundred dollars or more, and other than in land to which the goods are affixed or which is maintained, repaired, or improved as a result of the sale of the goods or services when the debt secured is one thousand dollars or more, is void;⁵⁹ (4) that a security interest taken by a lessor with respect to a consumer lease or a security interest taken in an interest in land to secure a consumer loan bearing a rate of finance charge in excess of eighteen percent per year and in which the principal is one thousand dollars or less, is void;⁶⁰ (5) that an irrevocable assignment of the earnings of a buyer, lessee, or debtor for payment or as security for payment of a debt arising out of a consumer credit sale, a consumer lease, or a consumer loan is unenforceable;⁶¹ (6) that an agreement by the buyer, lessee, or debtor in a consumer credit sale, consumer lease, or consumer loan for the payment of attorney's fees is unenforceable;⁶²

57. UCCC § 1.201(9) (except as otherwise provided in UCCC § 1.201(8)).

58. UCCC § 2.404, Alternative A. The rule does not extend to a sale or lease primarily for an agricultural purpose. UCCC § 2.404, Alternative B, allows limited enforceability of such a provision only if certain preconditions are met.

59. UCCC §§ 2.407(1), (3). The rule does not apply to a security interest taken by the seller in any property of the buyer to secure the debt arising from a consumer credit sale primarily for an agricultural purpose, and is subject to the provisions on cross-collateralization in UCCC § 2.408.

60. UCCC §§ 2.407(2) (other than a lease primarily for an agricultural purpose), 3.510.

61. UCCC §§ 2.410, 3.403.

62. UCCC §§ 2.413, Alternative A and 3.404, Alternative A. Under UCCC §§

(7) that an agreement with respect to a consumer credit sale or a consumer loan that provides for any charges as a result of default by the buyer or debtor other than reasonable expenses incurred in realizing on a security interest, delinquency charges, and attorney's fees, as allowed, is unenforceable;⁶³ (8) that an authorization to any person to confess judgment on a claim arising out of a consumer credit sale, a consumer lease, or a consumer loan is void;⁶⁴ (9) that a creditor may not attach unpaid earnings of a debtor by garnishment or like proceedings prior to the entry of judgment in an action against the debtor for a debt arising from a consumer credit sale, a consumer lease, or a consumer loan;⁶⁵ and (10) that no court may make, execute, or enforce an order or process which subjects to garnishment to enforce payment of a judgment arising from a consumer credit sale, consumer lease, or consumer loan any more of the aggregate disposable earnings of an individual for any workweek than the lesser of twenty-five percent of the individual's disposable earnings for that week or the amount by which his disposable earnings for that week exceed forty times the federal minimum hourly wage.⁶⁶

The published comment on the effectiveness of these and other similar provisions from the standpoint of enforcement has been somewhat spotty and, for the most part, unfavorable.

There are many other ways of potential violations, such as use of . . . clauses assigning earnings, confessing judgment, waiving defenses and providing unreasonable attorney's fees and default charges Although these practices are prohibited and regulated and many such clauses are expressly voided, they are outside the "Debtor's Remedies" sections. Assuming that the statutory prohibitions do not merely create defenses, but also create a right of action for reformation of the contract or a declaratory judgment, the remedy is simply the striking of the prohibited clause. Thus there is no penalty through private enforcement actions attached to the continued use of such clauses for "*in terrorem*" value. The consumer will not be compensated for his investment of time and money, if he attacks such use on his own initiative, even if litigation is necessary.⁶⁷

2.413, Alternative B and 3.404, Alternative B, such an agreement is enforceable within specified limitations and note, in that event, UCCC § 3.514. It would not appear that any of these limitations apply in connection with attorney's fees recoverable by statute. In Oklahoma, for example, see OKLA. STAT. ANN., tit. 12, § 936 (Supp. 1972).

63. UCCC §§ 2.414, 3.405.

64. UCCC §§ 2.415, 3.407.

65. UCCC § 5.104.

66. UCCC § 5.105. That amount is presently sixty-four dollars.

67. Spanogle, *supra* note 10, at 1045.

That is to say, such UCCC provisions are entirely adequate so long as everyone abides by the statutory mandate, but there are reasons for using the prohibited clauses or for engaging in the prohibited conduct, and when that happens the prognostication is not a reassuring one.

The accuracy of this prediction seemingly bore fruit in *Oldham v. Oldham*,⁶⁸ which was a case brought by a wage earner against his creditor for damages consisting of the loss of his rightful earnings, damage to his reputation in the community, and exemplary damages stemming from a garnishment of his wages allegedly in violation of Consumer Credit Protection Act (CCPA) section 1673, which is a provision substantially similar to UCCC section 5.105. The court dismissed the action for failure to state a claim upon which relief could be granted on the basis that the CCPA makes no provision for a private civil action to enforce its garnishment restriction provisions. The same decision would undoubtedly be correct under the UCCC.⁶⁹ Thus at this point the UCCC appears to be little more than a precatory admonition, but such an initial appearance in this context, it is submitted, is deceiving.

The UCCC Administrator has considerable power both to halt and to penalize violations of the statute.⁷⁰ Thus, an aggrieved debtor need only request the invocation of that power. That task is not difficult. The Administrator may receive and act on complaints, take action designed to obtain voluntary compliance, or commence proceedings on his own initiative.⁷¹ Oklahoma consumers in significant numbers have filed complaints with the Oklahoma Administrator concerning alleged violations of the type of provisions under discussion.⁷² In the vast majority of these cases the complaints have been resolved by conferences with the creditors involved after the fact of the violation has been established.

68. 337 F. Supp. 1039 (N.D. Iowa 1972).

69. See UCCC §§ 5.105(3), 5.202.

70. In the context involved, see, e.g., UCCC § 6.110 (power to bring a civil action to restrain violations and for other appropriate relief) and UCCC § 6.113(2) (power to bring a civil action to recover a civil penalty for repeated and willful violations).

71. UCCC § 6.104(1)(a).

72. Complaints have been received involving garnishment, improper security interests, agreements that the law of another state shall apply, and improper default charges. In some instances, there have been no complaints because of the provisions of the OKLAHOMA UCCC; for example, Oklahoma did not prohibit waiver of defenses clauses or agreements for attorney's fees. OKLAHOMA UCCC §§ 2-404, 2-413, 3-404. In other instances, the conduct prohibited by the UCCC was already not engaged in under prior law, such as in the case of cognovit clauses. 1970 ANNUAL REPORT 15-16; 1971 ANNUAL REPORT 9.

This has customarily resulted in voluntary compliance, and future actions are remedied by form changes and the discontinuance of the conduct that caused the violation without the need for the Administrator actually to commence further proceedings.⁷³ In the event that more is needed, however, these situations are precisely the ones in which the Administrator should be inclined to act, because an effective private right of action under the statute is generally unavailable to the consumers concerned.⁷⁴

The absence of such a private right of action under the UCCC⁷⁵ should not, however, be equated with the absence of any such right of action in the consumer whatsoever. To illustrate, the situation that obtained in the *Oldham* case,⁷⁶ which could arise under UCCC section

73. 1971 ANNUAL REPORT 7; 1972 ANNUAL REPORT 9-10.

74. For example, in Oklahoma the Administrator has filed eight civil actions to date. One of those was in connection with a failure by a creditor to file notifications and pay fees which, as we have discussed, is basically an administrative matter. See text accompanying notes 43-44 *supra*. One involved a massive violation, in terms of dollar amounts, by an unlicensed lender. However, the action was limited to a claim under OKLAHOMA UCCC § 6-113(2), for the purpose of deterrence and to establish that a violation had occurred, since the consumers involved had an adequate private right of action. See OKLAHOMA UCCC § 5-202(2). Two involved such difficult questions of law, and concerned problems of such widespread applicability, that the Administrator decided to sue even though theoretically the consumers had an adequate civil remedy to recover the alleged excess charges involved. The four remaining actions were brought by the Administrator (three of them involved unconscionable contracts and one a loan shark type operation) as least in part because, even though the consumers had a civil remedy under the Oklahoma UCCC (see OKLAHOMA UCCC §§ 5-108, 5-107, 5-202(2)), it was believed under the circumstances involved that otherwise the objectionable conduct might not be pursued. In one of the unconscionable cases, however, a private action was brought. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972.

75. It should perhaps still be an open question whether consumers, in connection with the provisions under discussion, do not really have effective enough private relief pursuant to the UCCC. The only reported case under the UCCC to date is *Sanco Enterprises, Inc. v. Christian*, 495 P.2d 404 (Okla. 1972), which involved a provision of the type under discussion (UCCC § 5.103, which in substance prohibits a seller in a consumer credit sale where the cash price of the goods or services was \$1000 or less from both repossessing and also obtaining a deficiency) and in which \$480 was at stake. The consumer hired an attorney and fought it out to the Oklahoma Supreme Court. In addition, an Oklahoma attorney informs me he has handled several such cases unreported. See also *First Nat'l Bank v. Columbia Credit Corp.*, — Colo. —, 499 P.2d 1163 (1972), which involved the garnishment restrictions of CCPA § 1673, which are, for our purposes, substantially similar to those of UCCC § 5.105. Of course, several such cases are hardly conclusive, but it does demonstrate the danger of flat assertions of ineffectiveness. Then, too, there is at least some argument that the provision allowing a consumer to recover reasonable attorney's fees in any case in which it is found that a creditor has violated the UCCC (UCCC § 5.202(8)) is of general application, and is not limited to the situations enumerated in UCCC § 5.202 where the consumer is given an express right of action.

76. 337 F. Supp. 1039 (N.D. Iowa 1972).

5.105, is not dissimilar to that which could occur under any basic exemption statute.⁷⁷ It has long been settled that if exempt property is seized and applied to the payment of a judgment, the owner may have his action against the wrongdoer, unless such exemption is waived⁷⁸ by some act or omission of the debtor.⁷⁹ Thus it would appear that the remedy that the debtor might seek in an *Oldham*-type case in a UCCC state should certainly be obtainable, albeit outside the UCCC itself.⁸⁰ Furthermore, if a little research were done, a non-UCCC civil remedy might be found for the violation of most, if not all, of the self-executing provisions of the UCCC.

Thus, a creditor who attaches the unpaid earnings of a debtor by garnishment prior to the entry of judgment in violation of UCCC section 5.104 may arguably be liable in damages for a violation of the debtor's civil rights.⁸¹ And if a creditor who validly repossesses an automobile in which he has a security interest is nonetheless liable in conversion for taking personal property located in the automobile in which he has no security interest,⁸² the same principle would seem to require that a creditor who repossesses under a security interest that is void under UCCC section 2.407 should be liable for conversion as well.

Present experience suggests that, on the whole, the self-executing provisions of the UCCC are not paper tigers and that compliance with

77. UCCC § 5.105 is not a basic exemption statute since it complements rather than displaces local garnishment laws, but that in no way detracts from its essential character as a type of debtor exemption. See UCCC § 5.105 Comments 2, 3, 5.

78. See UCC § 1.107(1).

79. See, e.g., *Albrecht v. Treitschke*, 17 Neb. 205, 22 N.W. 418 (1885).

80. Moreover, punitive damages can be awarded. See, e.g., *Barlow v. Ritchie*, 105 Okla. 257, 232 P. 391 (1925). As a practical matter, the availability of such damages will provide an incentive for the action, if one is needed, and may cover the attorney's fees involved if the recovery sought is achieved. Cf. *Spanogle*, *supra* note 9, at 650, who suggests that a consumer may have no right of action outside of the UCCC, where that statute explicitly undertakes to regulate certain conduct but refuses the consumer an express remedy in connection therewith, under a preemption theory. I think not. See UCCC §§ 1.103, 5.202, Comment 4.

81. See, e.g., *McMeans v. Schwartz*, 330 F. Supp. 1397 (S.D. Ala. 1971), holding, in an action for declaratory relief and money damages under the Civil Rights Act of 1871, 42 U.S.C. 1983 (1971), with respect to prejudgment garnishment taken on plaintiff's wages, that prejudgment garnishment was state action, that the plaintiff in garnishment was acting under color of state law, and that the prejudgment garnishment law involved was violative of due process and to that extent invalid. A possible hurdle in the context under discussion of course would be that under the UCCC state law prohibits prejudgment garnishment.

82. See, e.g., *Klingbiel v. Commercial Credit Corp.*, 439 F.2d 1303, (10th Cir. 1971) and *Varela v. Wells Fargo Bank*, 5 Cal. App. 2d 741, 93 Cal. Rptr. 428 (1971). Punitive damages are recoverable. Compare *Klingbiel*, 439 F.2d at 308-10. Compare with *Thompson v. Ford Motor Credit Co.*, 324 F. Supp. 108 (D.S.C. 1971).

the various statutory mandates can generally be expected, even though that compliance may be partially induced by the presence of several big sticks in the background. However, the fact remains that administratively initiated enforcement of such provisions, apart from voluntary compliance, must be practically⁸³ or legally⁸⁴ selective and that private enforcement of these provisions will not actually be undertaken in a substantial number of cases because of insufficient incentive⁸⁵ or a questionable chance for recovery outside the statute.⁸⁶ Such factors suggest room for improvement. In that regard, it is clear that the provisions of the Revised Uniform Consumer Credit Code (RUCCC) offer a more satisfactory approach.⁸⁷ They provide for a private right of action with a recovery of actual damages and, in addition,⁸⁸ a penalty in an amount determined by the court of not less than one hundred dollars nor more than one thousand dollars for violation, for example, of the provisions applying to (1) restrictions on interests in land as security,⁸⁹ (2) attorney's fees,⁹⁰ (3) security in sales and leases,⁹¹ (4) assignments of earnings,⁹² (5) authorizations to confess judgment,⁹³ (6) assignees subject to defenses,⁹⁴ and (7) limitations on default charges.⁹⁵

SELF-HELP PROVISIONS OF THE UCCC

Closely related to the self-executing provisions of the UCCC, but primarily differentiated from them by the necessity for some affirmative action by the consumer, before the remedy provided by the statute comes into play, are a number of provisions that can be labeled as "self-help provisions." Included in this category are (1) the right of a consumer to refinance the amount of a balloon payment at the time it is

83. See text following note 44, *supra*.

84. Under UCCC § 6.113(2), a civil penalty may be imposed only if the court finds that the defendant has engaged in a course of repeated and willful violations.

85. See note 75, *supra*. An argument over whether effective enough private relief pursuant to the UCCC now prevails does not deny that there will be cases where private action will not be pursued.

86. See notes 81-82, *supra*.

87. See RUCCC § 5.201(1). In addition, if a violation is found, reasonable attorney's fees and the costs of the action shall be awarded. RUCCC § 5.201(9).

88. The additional penalty is available under the provisions of the RUCCC if the action is one other than a class action.

89. RUCCC § 2.307 (UCCC § 3.510).

90. RUCCC § 2.507 (UCCC §§ 2.413, 3.404, 3.514).

91. RUCCC § 3.301 (UCC § 2.407).

92. RUCCC § 3.305 (UCCC § 2.410, 3.403).

93. RUCCC § 3.306 (UCCC §§ 2.415, 3.407).

94. RUCCC § 3.404 (UCCC § 2.404).

95. RUCCC § 3.402 (UCCC § 2.414 and 3.405).

due without penalty and on terms no less favorable to the consumer than the terms of the original transaction;⁹⁶ (2) the right of a buyer or lessee in a consumer credit sale or consumer lease induced by a referral scheme to rescind the agreement or retain the goods delivered and the benefit of any services performed without any obligation to pay for them;⁹⁷ (3) the right of a buyer to cancel a home solicitation sale⁹⁸ until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase which complies with the statute;⁹⁹ (4) the right of a consumer to rescind a consumer credit sale or consumer loan with respect to which a security interest is retained or acquired in an interest in land that is used or expected to be used as his residence until midnight of the third business day following the consummation of the transaction or the delivery of notice of the right and all other applicable disclosures, whichever is later;¹⁰⁰ and (5) the right of a buyer or lessee with respect to a consumer credit sale or consumer lease¹⁰¹ to assert against an assignee, not related to the seller or lessor and who acquires the buyer's or lessee's contract in good faith and for value, a claim or defense arising out of the sale or lease, notwithstanding an agreement by the buyer or lessee not to do so, if the buyer or lessee gives written notice to the assignee of the facts giving rise to his claim or defense within three months after the assignee has mailed to the buyer or lessee a notice of the assignment that complies with the statute.¹⁰²

These provisions are obviously subject to much the same criticism that is leveled at the self-executing provisions previously discussed.¹⁰³

96. Thus, a balloon payment is unenforceable on its original terms against a debtor who elects to refinance it. UCCC §§ 2.405, 3.402. This right does not extend to a consumer credit sale or a consumer loan primarily for an agricultural purpose or pursuant to open end credit, nor does it apply to the extent that the payment schedule is adjusted to the seasonal or irregular income of the debtor.

97. An agreement induced by a referral is unenforceable and the consumer can either retain the goods sold or the benefit of services rendered without obligation, or rescind the agreement, return the goods, and recover any payment. UCCC § 2.411.

98. UCCC § 2.501.

99. UCCC § 2.502(1).

100. UCCC § 5.204.

101. This section does not apply to a sale or lease primarily for an agricultural purpose. UCCC § 2.404.

102. Thus, the waiver of defenses clause is not enforceable against a debtor who gives timely notice to the assignee of his obligation. It is also not enforceable with respect to claims or defenses arising after the end of the three-month period after notice was mailed. UCCC § 2.404, Alternative B.

103. See Spanogle, *Why Does The Proposed Uniform Consumer Credit Code Eschew Private Enforcement?*, *supra* note 10, at 1045. Spanogle specifically mentions balloon notes and home solicitation sales, and no doubt would have included referral

The answer to such criticism must be much the same: administratively initiated enforcement is available,¹⁰⁴ and the consumer may also obtain relief through a privately brought action.¹⁰⁵ But, in addition, another

sales except that such transactions were subject to a different treatment under the draft of the UCCC which he was discussing.

104. See notes 70-71 *supra*. The Oklahoma Administrator has received numerous complaints involving the self-help provisions. The largest number over the period has been in connection with the buyer's right to cancel a home solicitation sale; in that category, for example, there were 128 complaints in 1972. 1970 ANNUAL REPORT 15-16; 1971 ANNUAL REPORT 7; 1972 ANNUAL REPORT 9. As to the enforcement measures necessary to resolve these complaints, see note 73 *supra*.

105. There are no such reported cases in Oklahoma as yet concerning these sections. However, a consumer class action has been instituted with respect to a creditor allegedly making referral home solicitation sales. Also, UCCC § 5.204, concerning the right to rescind a transaction with respect to which a security interest is retained or acquired in the consumer's home, is a carbon copy of CCPA § 1635, and so the experience under the latter section should be largely transferable. That experience indicates that consumers are apparently willing to take up the cudgel concerning their rights in this area through the vehicle of a civil action. Thus, in *Young v. Tri-City Remodeling Enterprises, Inc.*, 71 Misc. 2d 108, 335 N.Y.S.2d 308 (Albany City Ct. 1972), the consumer sued to establish her right to rescind a contract to have certain roofing work done on her home and to recover her downpayment which the seller refused to return on the ground he was entitled to it under a liquidated damages clause in the contract. The consumer lost under CCPA § 1635 as the contract bore no finance charge and was payable \$692 down with the balance due on completion, thus removing the transaction from the category of a consumer credit transaction. Compare Regulation Z §§ 226.9(a) and 226.2(k) (CCPA § 1635 is supplemented by Regulation Z, § 226.9, reprinted at 1 CCH CONSUMER CREDIT GUIDE ¶ 3585-3591. See CCPA §§ 1635(a), (d), 1604; whether or not it is also expanded by Regulation Z was until recently a matter of litigation. Compare, e.g., *Gardner & North Roofing & Siding Corp. v. Board of Governors of the Fed. Reserve Sys.*, 464 F.2d 838 (D.C. Cir. 1972), with *N.C. Freed Co. v. Board of Governors of the Fed. Reserve Sys.*, — F. Supp. —, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,356 (W.D.N.Y. Sept. 29, 1971)) *rev'd* — F.2d — (2d Cir. 1973), 4 CCH CONSUMER CREDIT GUIDE ¶ 99,079 with UCCC § 5.204(1), 2.104(1)(d), 1.201(12). In *Douglas v. Beneficial Fin. Co.*, 334 F. Supp. 1166 (D. Ala. 1971), *rev'd*, 469 F.2d 453 (9th Cir. 1972), the consumer sued to establish her mortgage placed on their residence to secure an extension of credit made with respect to a past due obligation which they had incurred on rental property which they purchased and owned as an investment, as well as other relief. They lost because the transaction was entered into for a business purpose and thus was not a consumer credit transaction. Compare CCPA §§ 1635(a), 1603(1) with UCCC §§ 5.204(1), 3.104(1)(b). In *Garza v. Chicago Health Clubs, Inc.*, 329 F. Supp. 936 (N.D. Ill. 1971), the consumer sued to establish a right to rescind retail installment contracts which contained confession of judgment provisions, as well as for other relief. See the discussion concerning *Douglas, supra*. The consumer lost on this point because the contracts also contained an effective waiver of all rights to make a judgment a confessed lien on any real property owned by the buyer. See 12 C.F.R., 262,2620 (1972). But see UCCC §§ 5.204(1), 3.407. In *Bostwick v. Cohen*, 319 F. Supp. 875 (N.D. Ohio 1970), the consumer sued on a disclosure violation in connection with the purchase and installation of a swimming pool, an action which apparently would also establish her right to rescind the transaction as she had elected to do. In an election of remedies analysis, the court held that the consumer who rescinded the transaction was not among the class protected by the civil liability section of the CCPA. For a critical comment on the case, see Comment, *Private Remedies Under the Truth-in-Lending Act: The Relationship Between Rescission and Civil Liability*, 57 IOWA L. REV. 199 (1971). Finally, a

type of censure has been aimed at the self-help provisions of the UCCC on the ground that a consumer cannot be expected to help himself by invoking the statutorily provided relief unless he has both knowledge and an appreciation of his legal rights. Thus, for example, one commentator reports: "[Consumer interests] argue that the notice [of assignment in conjunction with a waiver of defenses clause] from the assignee in all probability will not be read, and that if it is read, in all probability it will not be understood."¹⁰⁶

By and large, the UCCC adequately assures that the consumer will obtain notice of his remedy in connection with the self-help provisions. First, each of the provisions giving the right to cancel a home solicitation sale, the right to rescind a transaction with respect to which a security interest is retained or acquired in the consumer's residence, and the right to assert claims and defenses arising out of the sale or lease transaction against an assignee specifically provides for notice at an appropriate time in the transaction,¹⁰⁷ and while the provisions on balloon payments do not specifically provide for such notice, disclosure of the right to refinance is required elsewhere.¹⁰⁸ The one exception is in referral transactions. Of course, it would be nonsense to require in that situation that the creditor must provide the debtor with a statement that the agreement is unenforceable and that he has a right to retain the goods delivered and the benefit of any services performed without any obligation to pay for them, but it is perhaps equal nonsense to create a sanction that is generally unknown.¹⁰⁹ A persuasive

private right of action may exist outside of the UCCC with respect to some or all of these sections. See, e.g., Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Eschew Private Enforcement?*, *supra* note 10, at 1049. The RUCCC, to date, has made no revisions in connection with the remedies in this area.

106. Robertson, *Consumer Protections Under the Uniform Consumer Credit Code*, 41 Miss. L.J. 36, 56 (1969).

107. UCCC §§ 2.503, 5.204(1), 2.404(1) Alternative B. The details of the notice required by UCCC § 5.204(1) are left to rules to be adopted by the Administrator pursuant to UCCC §§ 6.104(1)(e), (2). These rules, where promulgated in a UCCC state, have closely followed the provisions of Regulation Z, § 226.9; see, e.g., Oklahoma Regulation Z, § 226.9, 3 CCH CONSUMER CREDIT GUIDE (Oklahoma) ¶ 6621-28.

108. UCCC §§ 2.306(2)(I), 3.306(2)(i), 6.104(2), and Regulation Z, § 226.8 (b)(3). As to the supplement of the UCCC by Regulation Z as a state rule, see Miller, *supra* note 25.

109. An effective general program of consumer credit education can be expected to help here in time. The UCCC Administrator is given the power to establish programs for the education of consumers with respect to credit practices and problems under UCCC § 6.104(1)(c). However, this will have little impact in the short run, and even in the long run it is doubtful whether any general knowledge will be as good as a specific notice in connection with the actual transaction. To illustrate, Oklahoma has had an excellent program of consumer credit education almost from the beginning. Since July 1, 1970, efforts aimed at all educational levels including elementary,

argument can be made that the referral transactions provision of the UCCC would be more effective if only a right to cancel were provided, coupled with a notice requirement, such as in the home solicitation sales provisions.¹¹⁰

Secondly, the sanctions for the failure to give notice where notice is called for generally seem satisfactory enough to assure widespread creditor compliance. A failure to disclose in connection with a balloon payment may generate a liability equal to twice the amount of the finance charge but not less than one hundred dollars nor more than one thousand dollars.¹¹¹ The absence of or improper notice of assignment allows claims or defenses arising out of the sale or lease to be asserted.¹¹² And the absence of or improper notice of the right to cancel

secondary, college and adult, and consisting of, among other things, the development of resource and teaching units designed to implement the formal study of the UCCC, addresses to various consumer, business, professional and educational groups estimated to have reached 10,000 Oklahomans, and a mobile educational center with audio-visual presentations which attracted over 250,000 people, have been carried on. Nonetheless, during 1972, the Oklahoma Administrator received only 10 complaints concerning referral sales while receiving 128 concerning the buyer's right to cancel. 1972 ANNUAL REPORT 9-12; cf. 1970 ANNUAL REPORT 15-16, which showed no complaints on referral sales and seventy-five on home solicitation sales. Of course, it is unknown how many referral sales are actually being made in Oklahoma, but even conceding that the present referral sale provision is doing a reasonable job, which may be an unwarranted assumption based on my conversations with practicing attorneys, the figures still seem significant from the standpoint of the likelihood of consumer knowledge.

110. One probably insoluble problem with this approach, however, is that the cancellation period would have to be unduly long to assure that the referral scheme was or was not working as promised. Perhaps a better approach would be to increase the sanction for using these schemes even further by providing a private right of action for damages in addition to the unenforceability of the contract.

111. UCCC § 5.203(1)(a). Moreover, since under UCCC § 1.107(1), except as otherwise provided in the statute, a buyer, lessee, or debtor may not waive or agree to forego rights or benefits under the UCCC, and since the above sanction is only for the failure to disclose, it would appear the debtor in a balloon payment situation would retain the right to refinance without penalty on terms no less favorable than those of the original transaction, and thus should be able to recover any penalty paid or charges imposed in excess of those involved in the original transaction, or the value of any property lost due to a default on the balloon payment, as the case may be, from the creditor. See UCCC §§ 5.202(3), 1.103. This line of thought perhaps lends more credence to the referral provision of UCCC § 2.411, since a debtor could always presumably recover any payment, but in such situations the seller is not always around, it is at least open to question whether an excess charge is involved and thus whether any express provision for recovery from an assignee exists even without worrying about the effect of UCCC § 2.404 Alternative B; see UCCC § 5.202(3). What the consumer needs here is not a lawsuit at the end but effective relief at the beginning.

112. UCCC § 2.404 Alternative B. Is it perhaps also arguable that any failure to give notice removes the limitation in UCCC § 2.404(3) Alternative B that the claim or defense is only utilizable as a matter of defense or setoff? Cf. Warren, *Comments on Vasquez v. Superior Court*, 18 U.C.L.A. L. REV. 1065 (1971).

or to rescind extends the right to cancel or to rescind indefinitely.¹¹⁹ Finally, all notices required to be given must be conspicuous. Thus the statement of the buyer's rights in a home-solicitation sale must appear under the conspicuous caption, "BUYER'S RIGHT TO CAN-

113. UCCC §§ 2.503(3), 5.204(1); *cf.* the recommendation of the Board of Governors of the Federal Reserve System to Congress to amend the CCPA to provide a limitation on the time the right of rescission may run under CCPA § 1635, from which section UCCC § 5.204 was derived. FED. RESERVE Bd., ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1971, at 19 (1972). Characterizing, upon cancellation or rescission, anything retained by the creditor as an excess charge would result in the imposition of no limitation under UCCC §§ 5.202(3), 5.205. But because UCCC §§ 2.503(3), 5.204(1), 5.204(2) seem to contain their own remedies, it is perhaps questionable whether such retention should be so characterized. Moreover, under the UCCC it is clear that a failure to give the required notice of the right to cancel or to rescind results in no disclosure violation under UCCC § 5.203(1), but whether for the failure to give other required disclosures the consumer can both cancel or rescind and also recover for a disclosure violation is still an open question. *See* note 105 discussion the *Bostwick* case, *supra*. One more substantial problem remains concerning the sanction for absence of or an improper notice. To illustrate, consider the situation where a plumbing and heating contractor enters into a consumer credit sale of a heating or an air conditioning system to a debtor under circumstances where a security interest is retained or acquired in the residence of the debtor, no notice of the right to rescind is provided, and the work is completed. This was the situation in *In re Fabbis, Inc.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,114 (FTC Docket No. 8833, Nov. 14, 1972). If the goods cannot be removed without their destruction or damage and substantial loss to the realty, what should transpire? One possibility is to accord the right to rescind and, if the debtor decides to exercise it, allow tender in kind in place and the removal of the goods, and if removal is accomplished, require a payment equal to any value the debtor may have lost. UCCC § 5.204(2). Thus, perhaps a new furnace could be removed and the debtor awarded sufficient funds to buy and install a used one approximately equal to his original furnace, which funds he could use for that purpose or toward the purchase of a new one on better terms. But if the work completed involved a new roof, for example, problems arise, since presumably there is no such thing as a used roof and thus rescission could leave the debtor with no roof and too short for a new one on terms he can obtain, and consequently no true option would exist. Moreover, UCCC § 5.204(2) provides that if return of the property in kind would be impractical or inequitable, the debtor shall tender its reasonable value, which seems to argue against tender in kind in place. That last provision gets us to a second possibility. If UCCC § 5.204 is read literally, the answer to this sort of situation appears to be that upon rescission the debtor owes the creditor the reasonable value of the property, the security interest is void, and the debtor is not liable for any finance or other charge. But this interpretation has numerous problems. For one, it practically eviscerates the right to rescind the transaction since the debtor is not returned to his original position but still owes a substantial debt. Second, on what terms does he owe that debt, immediately or over some period of time, and if so, how long and at what finance charge? Third, this is an illusory remedy if he defaults in payment since the creditor can get a judgment and thus a judgment lien on the residence, unless the homestead laws would prevent this. In Oklahoma, for example, they might not since the urban homestead is limited in value and the exemption for the homestead does not apply where the debt is due for work and material used in constructing improvements thereon. OKLA. STAT. ANN. tit. 31 §§ 2, 5 (1955). In short, this possibility is entirely unacceptable since it allows the creditor to benefit in substantially the same way he would have, had he obeyed the statute. Perhaps the only truly effective resolution of the problem is to grant the right to rescind and, if the debtor elects to exercise it, allow him to retain the goods without obligation on his part to

CEL,¹¹⁴ and the notice of the right to rescind must be printed in capital and lowercase letters of not less than twelve-point bold-faced type on one side of a separate statement that identifies the transaction to which it relates.¹¹⁵ The notice of assignment must be in writing and contain a conspicuous notice to the buyer or lessee concerning his right to notify the assignee,¹¹⁶ and disclosure of a balloon payment must be made clearly and conspicuously.¹¹⁷ It is difficult to envisage what more could be done to bring notice of his legal rights to the consumer's attention.

pay for them. This, more than anything else, would assure notice of the right to rescind being given, is not duly harsh considering that in other circumstances the debtor can also become the owner of the property without obligation to pay for it (*see* UCCC § 5.204(2)), and can perhaps overcome the provision, that if return of the property in kind would be impractical or inequitable the debtor shall tender its reasonable value, by the argument that some sanction must be deemed to occur for a violation of Regulation Z § 22.69(c), which should exist as an Administrator's rule pursuant to UCCC §§ 5.204 and 6.104(1)(e), (2). Further support for this resolution of the matter can be garnered from a consideration of the case where the rescindable transaction also constitutes a home solicitation sale. In such an instance, the debtor has an election of the appropriate sections. UCCC § 2.502(6). UCCC § 2.505(1) provides that upon cancellation, the buyer, upon demand, must tender any goods delivered. In the context under discussion, and in the absence of the concept of a tender in kind in place, which one gathers was no more contemplated here than it was in UCCC § 5.204, he cannot do that. Thus, the statute has omitted this situation, and a remedy must be fashioned. It is at least reasonable that a solution similar to that stipulated in UCCC § 2.505(3), where if the seller has performed any services prior to cancellation the seller is entitled to no compensation for them, other than a possible cancellation fee, would be adopted. Parenthetically, the same ought to hold true for the infrequent, but possible, case of a home solicitation sale of, for example, food, where the food is consumed prior to cancellation. Finally, if the consumer had paid cash for the improvement work obtained by a consumer loan coupled with a lien on his home to finance the payment, to hold that upon rescission the consumer owes the principal to the lender produces defeating consequences similar to requiring a buyer in a credit sale situation to tender the reasonable value of the property. Accordingly, the result should be the same as in the credit sale case, an ability to rescind without obligation on the loan, and for a similar reason. *See* Regulation Z § 226.9(c). Moreover, this resolution should not be mitigated by applying the reasoning of those usurious mortgage loan cases which render the loan void but require the debtor to pay at least the principal thereof to obtain equitable relief removing the lien of record (*see* G. OSBORNE, MORTGAGES § 111 (1950)), since UCCC § 5.204(2) explicitly indicates that upon rescission the creditor shall take any action necessary or appropriate to reflect the termination of any security interest. It must be noted in summary, however, that the advocated solution in a theoretical sense, as opposed to what makes the best remedy under the sections as now written, is not really satisfactory, since it is far too harsh. Revision is in order, and one suggestion might be that the consumer owes the reasonable value of the goods or the principal and has a right to finance that debt with the creditor on terms no less favorable than in the original transaction, except that no lien can be obtained in the consumer's residence to secure or enforce the debt. *Cf.* Note, *Truth In Lending: Problems with the Right of Rescission*, 7 WILLAMETTE L.J. 119 (1971).

114. UCCC § 2.503(2)(a).

115. Regulation Z § 225.9(b).

116. UCCC § 2.404(1) Alternative B.

117. Regulation Z § 226.6(a). This should be a part of an Administrator's rule pursuant to the direction of UCCC § 6.104(2).

In this light, arguments against the provisions on the ground that the notices will not be read are subject to the all-too-accurate observation "[that] any law which requires intelligent, affirmative action on the part of the consumer is [too frequently viewed as] a creditor-oriented law."¹¹⁸

Assuring appreciation or understanding of the situation called to the consumer's attention in the notice is perhaps another matter. In this respect, the UCCC stipulates the exact wording that must appear in a valid notice of the rights to cancel and to rescind in order to prevent any obfuscation that might stem from variations in language or from over- or under-description of the rights involved.¹¹⁹ And while the precise wording for the notice of assignment or the disclosure of a balloon payment is generally not spelled out, the statute specifically requires enough detail so that appreciation of what is being communicated should not be an atypical result.¹²⁰ In the end, this problem of understanding is not unique to the context involved,¹²¹ and perhaps all that is possible is to set up a statutory scheme that is reasonably sure to provide comprehension to the large majority of consumers involved.¹²² The UCCC

118. Robertson, *supra* note 106, at 56.

119. UCCC §§ 2.503, 5.204(1) and Regulation Z § 226.9(b). A converse benefit of this approach to the creditor is that if he follows the statutory direction he is absolutely assured of a valid notice.

120. UCCC § 2.404(1), Alternative B, provides that the notice of assignment shall be in writing and addressed to the buyer or lessee at this address as stated in the contract, identify the contract, describe the goods or services, state the names of the seller or lessor and buyer or lessee and the number, amounts and due dates of the installments, and contain a conspicuous notice to the buyer or lessee that he has three months within which to notify the assignee in writing of any complaints, claims or defenses he may have against the seller or lessor and that if written notification of the complaints, claims or defenses is not received by the assignee within the 3-month period, the assignee will have the right to enforce the contract free of any claims or defenses the buyer or lessee may have against the seller or lessor which have arisen before the end of the three-month period after notice was mailed. UCCC § 6.104(2) and Regulation Z § 226.8(b)(3) provide that if any payment is more than twice the amount of an otherwise regularly scheduled equal payment, the creditor shall identify the amount of such payment by the term "balloon payment" and shall state the conditions, if any, under which that payment may be refinanced if not paid when due.

121. For example, the same problem manifests itself in connection with disclaimers of implied warranties under § 2.316 of the Uniform Commercial Code. See Miller, *The Crossroads: The Case for the Code in Products Liability*, 21 OKLA. L. REV. 411, 445-46 (1968).

122. It is generally recognized that the idea of disclosure in consumer credit is not uniformly valuable to all consumers. That does not mean it is not worthwhile. See H. KRIPKE, CONSUMER CREDIT 49-54 (1970); Abbott & Peters, *Fuentes v. Shevin: A Narrative of Federal Test Litigation in the Legal Services Program*, 57 IOWA L. REV. 955, 957-58 (1972); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 445-69 (1968). It may even be a great deal more worthwhile than many commentators presently think; the complete story on this one has not yet been written. See Miller, *An Alternative Response to the Supposed Direct Loan Loophole in the UCCC*, 24 OKLA. L. REV. 427, 453-54 (1971).

certainly does this, and in addition it should be noted that the UCCC Administrator is always available to assist in interpreting the meaning of any notice¹²³ and to prevent attempts to lessen appreciation of the message conveyed.¹²⁴

ADMINISTRATIVE PROVISIONS OF THE UCCC

Many commentators are of the opinion that the administrative provisions are the most important enforcement vehicle in the UCCC.¹²⁵ There are several reasons for this feeling. First, as has been noted, the fact or the possibility of administratively initiated action is a valuable, perhaps an essential, accessory to the UCCC's numerous criminal, self-executing, and self-help remedies¹²⁶ and even to the private rights of action given to the consumer by the statute.¹²⁷ Secondly, in a number of instances administrative action is substantially the whole story. This is true with respect to creditor failure to file notification and pay fees,¹²⁸ with respect to any enforcement of the notice provisions in connection with advances to perform covenants of the debtor,¹²⁹ perhaps with regard to the obligation of the creditor to provide the debtor with a copy of any evidence of indebtedness signed by him when the writing is signed,¹³⁰ with regard to fraudulent or unconscionable conduct in inducing debtors to enter into or in the collection of debts arising from consumer credit transactions,¹³¹ with respect to a licensee carrying

123. UCCC § 6.104(1)(b).

124. The Oklahoma Administrator has discovered several attempts, for example, to lessen the impact of the notice of assignment provided for in OKLAHOMA UCCC § 2-404 by incorporating it, maybe even conspicuously, in advertising and "welcome as a customer" type flyers. *Cf., e.g., Peoples Fin. & Thrift Co. v. Landes*, 28 Utah 2d 392, 503 P.2d 444 (1972). So far the problem has been rectified without having to conclude any litigation. Telephone conversation with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Jan. 12, 1973.

125. *See, e.g., Braucher, supra* note 10; Curran, *supra* note 10, Jordan & Warren, *supra* note 2, at 417-19. The administrative provisions of the UCCC are found basically in art. 6, pt. 1 and art. 3, pt. 5.

126. *See text following notes 47, 71-72, supra*, and notes 104, 123-24, *supra*.

127. *See note 74, supra*, and UCCC § 6.113, Comment 1.

128. *See notes 43, 44, 45, and 46, supra*.

129. UCCC §§ 2.208(1), 3.208(1). A failure to provide the specified information would not be a disclosure violation. UCCC §§ 5.203(1), 2.302(1)(h), 3.302(1)(h); *cf. letter from Griffith L. Garwood, Chief of Truth in Lending Section of the Federal Reserve Board, June 24, 1971, 4 CCH CONSUMER CREDIT GUIDE* ¶ 30,692 at 66,302 (the purchase of VSI insurance where the customer fails to provide insurance under his contract is a subsequent occurrence).

130. UCCC §§ 2.302(2)(b), 3.302(2)(b). For a discussion of the problem involved here, *see Miller, Living with Both the UCCC and Regulation Z, supra* note 25, at 16 n.64.

131. UCCC §§ 6.111(1)(b), (c). UCCC § 5.108 provides an individual con-

on another business at a location where he makes supervised loans for the purpose of evasion of the UCCC,¹³² and with respect to violations of the advertising provisions of the UCCC.¹³³ Thirdly, and perhaps of most consequence, the Administrator under the authority granted to him in the statute is in the best position to discover and cure violations of the Code on a wide scale.¹³⁴ This is so for two reasons. First, the Administrator has the power to receive complaints.¹³⁵ When an apparently valid complaint is received, if it evidences a violation that has likely occurred in more than one instance,¹³⁶ there may be probable cause for an investigation by the Administrator to ascertain whether the particular creditor has violated the statute on a broader scale.¹³⁷ If he has, appropriate action can be taken to remedy the situation.¹³⁸ Secondly, the

sumer with rights only with respect to an unconscionable agreement or clause. *But cf.* UCCC § 6.111(1)(a).

132. UCCC § 3.512. As to the type of problem encountered here, see Johnson, *The New Law of Finance Charges: Disclosure, Freedom of Entry, and Rate Ceilings*, 33 LAW & CONTEMP. PROB. 671, 678 (1968).

133. UCCC §§ 2.313, 3.312; see UCCC § 5.203(1). Compare letter from Milton W. Schober, Assistant Director of the Federal Reserve Board, April 22, 1970, 4 CCH CONSUMER CREDIT GUIDE ¶ 30,408 at 66,120 and *Jordan v. Montgomery Ward & Co.*, 442 F.2d 78 (8th Cir.), cert. denied, 404 U.S. 870 (1971) (there is no private right of action in connection with advertising violations). Of course, in addition to state administrative enforcement, there is also federal administrative enforcement since any exemption from the CCPA cannot extend to advertising; see UCCC § 2.313, Comment 1. *But see* Barrett, *Truth in Lending-Advertising*, 26 BUS. LAW. 829 (1971). Also, the criminal provisions of the UCCC may be applicable. UCCC § 5.302.

134. See, e.g., Braucher, *supra* note 10, at 910.

135. UCCC § 6.104(1)(a).

136. There are numerous examples possible here. To illustrate, the creditor may be in the business of making home solicitation sales and his form may contain no buyer's right to cancel (UCCC § 2.503); there may be absence of or an improper authorization of a separate charge for consumer credit insurance (UCCC §§ 2.202(1)(b), (2)(b), 3.202(1)(b), (2)(b)); there may be an invalid provision for the payment of attorney's fees (UCCC §§ 2.413, 3.404, 3.514), and so on. Such situations are to be contrasted with the case where the disclosure format is correct and one blank is merely not filled in, which is probably an isolated instance.

137. UCCC § 6.106. Most investigations of non-lender creditors in Oklahoma are a result of consumer complaints filed with the Administrator. 1972 ANNUAL REPORT 5. The procedure involves the Administrator's serving notice on the creditor, which notice advises the creditor of the authority to make the investigation, the sections of the UCCC suspected to be violated, and demands immediate access to all records to determine whether violations have occurred. To the extent necessary, the further powers granted the Administrator in UCCC §§ 6.106(1)-(3) may be used. To date, 139 administrative investigations have been instituted. 1972 ANNUAL REPORT, 6-7.

138. This could come in the form of a cease and desist order after notice and hearing (UCCC § 6.108); the acceptance of an assurance of discontinuance (UCCC § 6.109); the filing of a civil action to recover excess charges and/or a civil penalty § 6.109); the filing of a civil action to restrain violations (UCCC § 6.110); or the filing of a civil action to recover excess charges and/or a civil penalty (UCCC § 6.113). In addition, although not a violation, if the complaint suggests unconscionable conduct in more than the transaction involved in the complaint, as, for example, was the case

UCCC directs the Administrator to examine at intervals he deems appropriate the loans, business, and records of every licensee.¹³⁹ Not only will this process turn up any violations by the licensee, which can then be corrected,¹⁴⁰ but it is also very likely to turn up evidence of violations by those with whom the licensee deals, such as sellers of consumer paper, which the investigative process can then substantiate and which can likewise be rectified.¹⁴¹

Notwithstanding this, some writers have been less than optimistic over the prospects of the described system. Their comments have primarily been directed at the possibility of having an ineffective Administrator for reasons outside of the UCCC or an ineffective Administrator due to deficient powers awarded by the statute itself.

On the first point, for example, one observation concludes: "Thus the present draft will be effective only in those states having a well-

in one situation in Oklahoma where the complainant indicated to the Administrator that others were involved in contracts similar to the one complained of as unconscionable, after investigation, an injunction can be sought under UCCC § 6.110, 6.111 and 6.113 if necessary. Under this procedure, the vast majority of investigations which have produced sufficient evidence to warrant administrative action have resulted in voluntary compliance, and in the few where that has not been true, a civil action has been filed. Consequently, the provisions of UCCC § 6.108 have not to date proved valuable in Oklahoma, and no cease and desist orders have been issued by the Oklahoma Administrator. 1972 ANNUAL REPORT 6-7; Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City Dec. 19, 1972.

139. UCCC § 3.506(1). In addition, for the purpose of discovering violations or securing information lawfully required, the Administrator may at any time investigate the loans, business, and records of any regulated lender. In Oklahoma, since the dividing line between supervised and non-supervised loans was reduced from eighteen percent to ten percent, there are no regulated lenders as opposed to licensees. Compare UCCC § 3.501 and OKLAHOMA UCCC § 3-501. There are 559 licensees in Oklahoma, but it should be noted that, unlike in the UCCC (§ 3.503), under OKLAHOMA UCCC § 3-504(7), a separate license is required for each office operated. 1972 ANNUAL REPORT 3. Licensees receive regularly scheduled examinations at least once annually. Special visits are scheduled in addition if excessive errors are noted. *Id.* at 5.

140. In Oklahoma, "each examination is prepared in writing, which includes documentation and analysis of loans, according to term, amount and charges, and an analysis of the computations. The examinations also include an analysis of rebates, refunds and insurance charges and the correctness of these computations." 1970 ANNUAL REPORT 8. These written examinations are returned to the Department for review, where a formal examination report is prepared, citing specific violations and the provisions of the law involved. This report, together with a true copy of the actual examination, is then forwarded to the licensee, and constitutes not only an instruction document but also a demand for refunds or adjustments on the transactions which are necessary. *Id.* at 5. Compliance, where not voluntary (and to date voluntary compliance has occurred in all but one case), can be enforced by the authority specified in note 138, *supra*, and, in addition, by a proceeding to revoke or suspend a license. UCCC § 3.504; OKLAHOMA UCCC § 3-505.

141. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972; see notes 137-38 *supra*.

financed, aggressive, consumer-oriented Administrator. It seems unlikely that *all* Administrators in 50 states for the next 40 years will meet these criteria."¹⁴² Obviously it is impossible at this point in time to answer such an allegation from experience, but since the observation was prompted by experience prior to the UCCC,¹⁴³ perhaps it is fair to make a counter-observation from the experience under the UCCC thus far. In that regard, it can be generally stated without qualification that the Oklahoma experience concerning administrative enforcement has been satisfactory. "Well-financed," of course, is a relative term, and while it is no doubt true that the Oklahoma Department of Consumer Affairs could use more money, on the whole, it has not been financially starved.¹⁴⁴ "Aggressive" is an ambiguous standard, but it might be considered "aggressive" that the Oklahoma Administrator filed a civil action under Oklahoma UCCC section 6.113(1) for a refund of finance charges that allegedly existed, even though not identified, in consumer credit sale installment contracts discounted to a financing institution,¹⁴⁵ that the Oklahoma Administrator promulgated a rule getting at the so-called "shrinking billing"¹⁴⁶ period while others were still talking,¹⁴⁷

142. Spanogle, *supra* note 9, at 625.

143. *Id.* at 626-27.

144. The population of Oklahoma is 2,559,253. THE 1973 WORLD ALMANAC AND BOOK OF FACTS 200. The Oklahoma Department of Consumer Affairs has a staff of 15, extending from the Administrator through secretaries, and has a budget for the fiscal year 1972-1973 of \$283,313. In 1972 ANNUAL REPORT 12. That this is sufficient for adequate enforcement is attested by the Oklahoma exemption from the CCPA, which exemption may be granted and continued only if there is adequate provision for enforcement. See CCPA § 1633 and 1 CCH CONSUMER CREDIT GUIDE (Okla.) ¶¶ 3671-73, 3679, 3681. Oklahoma provides for a separate license for each office and fees in connection with the issuance and continuation of the license as well as for examinations, which probably generates more revenue than the revenue structure of the UCCC. Compare OKLAHOMA UCCC §§ 3-503(1), 3-504(7), 3-506(1) with UCCC §§ 3.503, 3.506. Compare the Oklahoma provisions above and OKLAHOMA UCCC §§ 6-201, 6-203 with UCCC §§ 6.201, 6.203. To conclude that the Oklahoma deviations from the UCCC influence the economic position of the Oklahoma administrative agency is undoubtedly correct, but to conclude that this will make Oklahoma unique as to adequate funding is a far too simplistic view with respect to the total picture of legislative appropriations.

145. For a discussion of the theory, see Miller, *supra* note 3, at 278-83. The action was dismissed when the assignee-purchaser of the installment contracts agreed to refund the amount of the discounts. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972. It might be protested this gave up a "test case," but when one considers the difficulty of overcoming the presumption of UCCC § 2.110 and the possibility that part or none of the discount was in law an excess charge (see UCCC § 2.201) as opposed to a disclosure violation (see UCCC § 5.203(2)), this disposition seemed the most beneficial and besides, as a practical matter, the point was established and became known.

146. See Rules of the Administrator, Oklahoma Department of Consumer Affairs, part IV—General, § 400.2, 3 CCH CONSUMER CREDIT GUIDE (Okla.) ¶¶ 6711-12.

147. See, e.g., SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS,

and that the Oklahoma Administrator has filed three, and successfully concluded two, actions concerning unconscionability under UCCC section 6.111.¹⁴⁸ Not all "aggressive" actions have been immediately successful, of course,¹⁴⁹ but the point seems sufficiently made. Finally, "consumer-oriented" is a clear enough criterion; it is simply an improper one, however, since both creditors and consumers are entitled to an advocate at times,¹⁵⁰ and in the long run an impartial stance is the only one that can result in practical effectiveness.¹⁵¹ In short, if one con-

TRUTH IN LENDING ACT AMENDMENTS OF 1972, S.652, dated April 17, 1972, CCH Consumer Credit Guide Special Report No. 92, Part 1, at 8, April 25, 1972.

148. The two concluded cases involved consumer credit sales of dancing lessons to limited income aged female consumers. In one case, the final contract consolidating prior contracts was in the amount of 31,000 dollars for 1,050 hours of instruction sold a widow of advanced age with an income from Social Security and limited other sources of less than 500 dollars per month. The unconcluded case involves a consumer credit sale of computer "dating" services.

149. For example, the Oklahoma Administrator promulgated a rule requiring disclosure in connection with consumer loans made to finance transactions that would have been consumer credit sales but for the loans in an effort to resolve the so-called direct loan problem under the UCCC. See Miller, *An Alternative Response to the Supposed Direct Loan Loophole in the UCCC*, 24 OKLA. L. REV. 427 (1971). The rule never became effective. The final chapter in this story, however, has not yet been written. Compare, e.g., RUCCC §§ 3.403, 3.405, 3.501, 5.103, and Proposed Trade Regulation Rules on Preservation of Consumers' Claims and Defenses, Fed. Trade Comm'n Revised Proposed Trade Regulation Rule, 4 CCH CONSUMER CREDIT GUIDE ¶ 10,181-86.

150. For example, one complaint filed with the Oklahoma Department of Consumer Affairs involved a consumer who obtained a loan to purchase a \$695 used car, and who, after charges of \$148.05 for credit life and disability insurance, \$116 for auto physical damage insurance, \$70.50 for other personal property insurance on his household goods in which a security interest was taken, a finance charge, and official fees, came out owing \$1410. Given that the annual percentage rate indicated this transaction bore the maximum finance charge permitted by law, it was thought the transaction fell within the provisions of OKLAHOMA UCCC § 4-106. Under such oppressive but untried circumstances, it is submitted the Administrator should take the consumer's side pursuant to the powers granted him in UCCC art. 6, pt. 1. On the other hand, another complaint brought to the Department showed a finance charge equaling an annual percentage rate of about 240%, which disclosure no doubt prompted the complaint. Such a charge, however, is legal in Oklahoma for small loans. See OKLAHOMA UCCC § 3-508 B. In this situation, the Administrator should do more than tell the consumer what was charged is legal; he should take the creditor's side, explain to the consumer the necessity for the amount of the charge on such a small amount of credit, but then perhaps, in addition, suggest that such a transaction represents an unwise use of credit unless it is absolutely necessary.

151. The fact that the overwhelming majority of the over 3000 consumer complaints filed with the Oklahoma Department of Consumer Affairs, the 139 administrative investigations so far instigated, and the examinations of licensees so far conducted have all concluded by voluntary compliance (see notes 73, 138, 140, *supra*) is not an accident. The reputation for tough impartiality which the Oklahoma Administrator has gained assures a thoughtful response when action is taken. It is questionable, if the Administrator instead were known as consumer oriented, whether such results could be produced at all, let alone without a considerably greater expenditure in resources because of the need for litigation, since the administrative judgment would be viscerally suspect.

siders the experience to date in all UCCC jurisdictions,¹⁵² it appears that there is no discernible trend toward ineffective administrative enforcement of the statute because of captive or creditor-oriented Administrators, grossly inadequate funding, or other reasons outside of the UCCC itself.

As to the second point—an ineffective Administrator due to deficient powers—some of the comments made are extremely theoretical. For example, the criticism has been put forth that it is foolish to restrict injunctions under UCCC section 6.111 only to those situations in which the Administrator finds that a creditor has been engaging in a course of illegal activity since a single violation should be met with an injunction.¹⁵³ Theoretically, this is true, but since the resources of staff and time are never infinite, the prerequisite hardly imposes a limitation that does not already practically exist, and the point is thus negligible. The same critics state the Administrator's counseling ability is too inadequate to protect creditors since there is no provision for declaratory orders and thus that the Administrator's informal counsel, if adverse, is nonappealable and, if favorable, cannot be relied upon to provide protection from subsequent action by the Administrator.¹⁵⁴ That is true enough so far as UCCC section 6.104 is concerned, although one can question whether a UCCC Administrator would penalize past conduct taken pursuant to informal advice as opposed to future conduct after notice of a change in opinion; but the objection is satisfied if one notes that either UCCC section 6.409 or the administrative procedure

152. As is obvious from what has been said, in my opinion the Oklahoma experience has been good. This judgment is based upon the work of two summers as a formal consultant to the Oklahoma Department of Consumer Affairs, and upon numerous contacts on an informal basis. See letter from J. L. Robertson of the Federal Reserve Board, Sept. 22, 1972, 4 CCH CONSUMER CREDIT GUIDE ¶ 30,885: "Oklahoma . . . , we believe, . . . [is] doing a particularly good job of enforcement." What there is available concerning the other UCCC states is also basically favorable. My personal impressions of the people involved in enforcement there are to the good; the same Federal Reserve Board letter cited above notes that Wyoming's staffing level appears to be adequate, and the [1972] UTAH ADM'R ANNUAL REP., and STUCKI, UTAH CONSUMER CREDIT CODE REPORT VOL. II (1972), disclose an administrative experience in Utah not greatly dissimilar to that of Oklahoma (for example, supervised lenders are examined at least once each year, notification fees of twenty-five dollars per year generate sufficient revenue to cover expenses, eight administrative hearings have been held with four resulting so far in consent orders, eight suits have been brought with most satisfactorily concluded so far; the largest difference is in the number of complaints—277—but initially a complete record was not kept and the population of Utah is less than half that of Oklahoma). But see Note, *Utah's UCCC: Boon or Boondoggle, or Just Plain Doggle*, 1972 UTAH L. REV. 133 (1972).

153. James and Fragomen, *The Uniform Consumer Credit Code: Inadequate Remedies Under Articles V and VI*, 57 GEO. L.J. 923, 951 (1969).

154. *Id.* at 949 n.91.

act of the state, as the case may be,¹⁵⁵ will provide for declaratory rulings.¹⁵⁶

Another observer charges that the assurance of discontinuance, under a literal reading of the statute, may not be used to handle claimed violations of the UCC but only claimed violations of an Administrator's order or a court order¹⁵⁷ and thus cannot be used to process initial violations of the statute when an informal procedure would be most useful to inform the creditor of the violation and impose a mild sanction.¹⁵⁸ If one considers UCCC section 6.109 in isolation, this is a possible result, but if one considers UCCC section 6.109 in conjunction with UCCC section 6.106, which contains similar language and which clearly indicates that any act or conduct aimed at need not have been the subject of a formal proceeding,¹⁵⁹ the objection can be labeled as an illusory problem.,

Some comments are good faith predictions that simply have not been borne out. Thus it was prognosticated that, while there was a theoretical possibility of putting a man out of business by taking away his license,¹⁶⁰ it would not be an important part of the enforcement arm as a practical matter.¹⁶¹ In Oklahoma just the converse has happened. The Oklahoma Administrator, pursuant to information received from periodic examinations or other sources, has commenced eight administrative revocation or suspension of license proceedings by serving notice upon the creditors involved that they were believed to have engaged in

155. See UCCC § 6.401 and Comment; UCCC § 6.107.

156. Thus, in Oklahoma, OKLA. STAT. ANN. tit. 75, §§ 306-07 (1965) provide for declaratory judgments and declaratory rulings, and to the extent required by those statutes the Oklahoma Administrator has adopted a rule of implementation.

157. Under UCCC § 6.109, if it is claimed that a person has engaged in conduct subject to an order by the Administrator (§6.108) or by a court (§§ 6.110-112) the Administrator may accept an assurance in writing that the person will not engage in the conduct in the future.

158. Spanogle, *supra* note 9, at 643.

159. UCCC § 6.106, Comment 3. Moreover, the Oklahoma use of the assurance of continuance has not followed the restrictive interpretation noted in the text; an assurance has been taken in connection with the dismissal of a proceeding for the revocation or suspension of a supervised lender's license. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972.

160. UCCC § 3.504(1) provides in pertinent part that the Administrator may issue to a person licensed to make supervised loans an order to show cause why his license should not be revoked or suspended for a period not in excess of 6 months. After a hearing the Administrator shall revoke or suspend the license if he finds that the licensee has repeatedly and willfully violated the UCCC or any rule or order lawfully made pursuant to it or facts or conditions exist which would clearly have justified the Administrator in refusing to grant a license in the first place.

161. Braucher, *supra* note 10, at 911.

activity that might result in the suspension or revocation of their licenses. The notices further stated the facts or conduct that warranted the action and gave the licensee an opportunity to show compliance with the UCCC and thereby avoid suspension or revocation.¹⁶² One license has been revoked, two proceedings were dismissed when the deficiencies were voluntarily corrected and an assurance of discontinuance was furnished,¹⁶³ and five proceedings are still open.¹⁶⁴ The exceedingly high rate of voluntary compliance with respect to consumer complaints and examination reports must be due in part to this activity.¹⁶⁵ Another observation that has gone awry with respect to the Oklahoma experience is the proposition that temporary injunctive relief is available to the Administrator only after notice and a hearing, no matter how clear the violation, how convincing the evidence, how heinous the violation, or how numerous the potential victims.¹⁶⁶ The Oklahoma Administrator

162. See Selected Rules and Regulations. Part III—Procedure, Procedure Governing the Denial, Revocation or Suspension of License, Sec. 300.2. 3 CCH CONSUMER CREDIT GUIDE (Okla.) ¶¶ 6692-6694.

163. This was upon a determination that the errors resulted from negligence alone.

164. 1972 ANNUAL REPORT 7-8; Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972.

165. See notes 73 and 140, *supra*. Compare, for example, the criticism that the Administrator literally cannot help the individual consumer who has been harassed by all-night telephone calls (Spanogle), *supra* note 9, at 647, with the following Oklahoma episode. A consumer complaint was filed with the Administrator against a supervised lender when a collection agent of the lender harassed the debtor by threatening to have her thrown in jail and her welfare checks stopped for delinquent payments. A telephone call to the lender from the Oklahoma Department of Consumer Affairs produced a written apology to the consumer from the lender with an assurance that such conduct was not approved and would not happen again, a censure of the employee involved, and an instructional memorandum to all employees concerning such conduct. There no doubt is some validity connected with any observation that the favorable Oklahoma experience is due not only to the license revocation and suspension record described, but also in at least a small part to the different Oklahoma standard in this respect. Under OKLAHOMA UCCC § 3-505, a license can be suspended or revoked without limitation as to time upon a finding that the licensee either knowingly or without the exercise of due care to prevent the same has violated any provision. That should be sufficient to lay fear in even the most callous lender, and no doubt does to some degree. However, this standard has remained solely "statutory overkill" in practice, and the actual application has been sensible; the one license revoked in Oklahoma could have been revoked under a standard like that of UCCC § 3-504(1)(a), and two proceedings were dismissed when only negligence was involved. Finally, the point might be raised—then why not license other creditors? The current thinking on that is well summed up in Braucher, *supra* note 10, at 911.

166. Spanogle, *supra* note 9, at 645. The comment was made with respect to UCCC § 6.112, which provides, with respect to an action brought to enjoin violations, or unconscionable agreements or fraudulent or unconscionable agreements or conduct, the Administrator may apply to the court for appropriate temporary relief pending final determination. If the court finds, after a hearing held upon notice, that there is reasonable cause to believe that the respondent is engaging in or is likely to engage in conduct sought to be restrained, it may grant any temporary relief or restraining order it deems appropriate.

was able to secure an *ex parte* temporary restraining order in the civil action discussed earlier, and in each of the unconscionability actions he has instituted.¹⁶⁷

Some of the comments concerning anticipated difficulties in the administrative enforcement of the UCCC, on the other hand, have been substantiated in practice, but the problems engendered have fortunately not been as debilitating as might have been expected, at least in Oklahoma. One danger widely recognized, although largely unsolvable,¹⁶⁸ was a loss of effectiveness due to any fragmentation of administration.¹⁶⁹ In Oklahoma, administration of the UCCC is substantially centered in an Administrator as head of a Department of Consumer Affairs,¹⁷⁰ but the Oklahoma Administrator has no powers of examination and investigation over state-chartered supervised financial organizations nor, of course, over federally chartered ones.¹⁷¹ Accordingly, one of the most important benefits of the UCCC's administrative provisions in Oklahoma could have been significantly reduced.¹⁷² Pursuant to the direction for cooperation contained in the statute,¹⁷³ however, state-chartered supervised financial institutions are examined by the Oklahoma Banking Department in accordance with an examination prepared by the Oklahoma Department of Consumer Affairs, with a copy of the examination findings as they pertain to provisions of the UCCC placed on file with the Department of Consumer Affairs. These examinations are reviewed; deficiencies, if any, with applicable law are noted; and written instruction by the Department of Consumer Affairs is given to the creditor for

167. See note 148, *supra*. The argument for this result is that UCCC § 6.112 governs only the Administrator's ability to obtain *ex parte* relief under the UCCC; it does not restrict his ability, if any there be, under other provisions of state law. Compare Spanogle, *supra* note 9, at 645 nn. 88 & 89. See OKLA. STAT. ANN. tit. 12 §§ 1382-85 (Supp. 1971).

168. See UCCC §§ 6.103 and Comment, 6.105; Jordan & Warren, *supra* note 2, at 419-26.

169. See note 168, *supra*; Braucher, *supra* note 10, at 911-12. Division along lines of established expertise, for example leaving rule-making and some enforcement powers with respect to premium rates and insurance forms with the Commissioner of Insurance, however, is not of the same nature. See Curran, *supra* note 10, at 738.

170. Oklahoma UCCC § 6-103, art. 6, pt. 5; Selected Rules and Regulations, Part 1—Organization, Purpose, Methods, Etc., 3 CCH CONSUMER CREDIT GUIDE (Okla.) ¶ 6501. See also note 11, *supra*.

171. OKLAHOMA UCCC § 6-105; OKLA. STAT. ANN. tit. 6 §§ 201, 208 (1966), as amended (Supp. 1972); OKLA. STAT. ANN. tit. 18 § 381.11 (Supp. 1971); Jordan & Warren, *supra* note 2, at 420-21.

172. See note 134, *supra*. The percentage of consumer installment credit outstanding held by such organizations in Oklahoma is over fifty percent, 1972 ANNUAL REPORT 4.

173. OKLAHOMA UCCC § 6-105(3).

remedial action.¹⁷⁴ Consequently, little or nothing is lost due to a division of authority in this respect. Unfortunately, the same cannot be said with regard to federally chartered institutions. Despite continued efforts on the part of the Oklahoma Administrator, procedures to have federal regulatory agencies examine financial institutions for compliance with state consumer protection laws have yet to be worked out.¹⁷⁵

Another problem that has come to the fore is some loss of effectiveness because of uncertainty as to the degree of creditor intent that must be established by the Administrator before a civil penalty can be invoked for various conduct.¹⁷⁶ For example, to recover a civil penalty in connection with excess charges the Administrator must establish that the creditor has made an excess charge in deliberate violation of or in reckless disregard for the UCCC,¹⁷⁷ and to recover a civil penalty for violations generally he must establish that the creditor has engaged in a course of repeated and willful violations of the statute.¹⁷⁸ Consider for a moment the following situation. An interstate lender, not a supervised financial organization, begins to make consumer auto loans in Oklahoma at annual percentage rates varying between eleven percent and fifteen percent per year. The lender does not procure a license from the Oklahoma Administrator¹⁷⁹ pursuant to the advice of non-Oklahoma counsel that no license is needed under the UCCC until the annual percentage rate on consumer loans exceeds eighteen percent.¹⁸⁰ All such loans at an annual percentage rate in excess of ten percent are void.¹⁸¹ Can the Oklahoma Administrator recover by civil action all amounts paid on such loans, avoid the unpaid obligations,¹⁸² and recover civil penalties for making excess charges in deliberate violation of or in reckless disregard for the statute and for repeated and willful viola-

174. 1972 ANNUAL REPORT 4-5.

175. *Id.* at 15-16. See also Report of the National Commission on Consumer Finance, Consumer Credit in the United States, CCH CONSUMER CREDIT GUIDE, Issue No. 215, at 53-60 (1973).

176. See Spanogle, *supra* note 9, at 648-49.

177. UCCC § 6.113(1). In addition, a civil penalty may be had if a creditor had refused to refund an excess charge within a reasonable time after demand by the debtor or the Administrator.

178. UCCC § 6.113(2).

179. OKLAHOMA UCCC §§ 3-501, 3-502 stipulates that, unless a person is a supervised financial organization, he shall not engage in the business of making consumer loans in which the rate of the finance charge exceeds the percent per year without having first obtained a license from the Administrator authorizing him to make such loans.

180. See UCCC §§ 3.501(3), 3.502. Compare the Oklahoma provisions described in note 179, *supra*.

181. OKLAHOMA UCCC § 5-202(2).

182. OKLAHOMA UCCC § 6-113(1). UCCC § 6.113(1) is the same.

tions?¹⁸³ A situation similar to this hypothetical did arise in Oklahoma,¹⁸⁴ and while no action was brought under UCCC section 6.113(1) for refunds or a civil penalty,¹⁸⁵ an action was brought by the Administrator under UCCC section 6.113(2) for a five thousand dollar civil penalty.¹⁸⁶ Ultimately, this action was dismissed when a satisfactory settlement in the circumstances was made, but a considerable factor influencing that resolution was uncertainty whether the described creditor conduct amounted to "willful violations."¹⁸⁷

"Willful," in the above context, is not defined by the UCCC. Moreover, as previously noted,¹⁸⁸ it is highly questionable whether it should be defined in this context without reference to its use, or the use of related standards, in other contexts. A logical place to begin constructing a definition is with the civil liability provision for disclosure violations,¹⁸⁹ since that section is the only one among the several possibilities that has any relevant judicial interpretation.¹⁹⁰ To establish liability under UCCC section 5.203, it probably must be shown that the creditor conduct constituting the disclosure violation was intentional; that is, was not unintentional and the result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.¹⁹¹ In other

183. OKLAHOMA UCCC §§ 6-113(1), (2). UCCC § 6.113(1) and (2) are the same.

184. See note 74, *supra*.

185. First, there is perhaps a substantial question whether this is an excess charge situation, and therefore forms the basis for a civil action under UCCC § 6.113(1). See note 52, *supra*. Second, and more to the point, in the context involved, an action under UCCC § 6.113(1) would preclude the debtor from having the option of carrying through the contract if he desired and might come close to bankrupting the creditor, practical considerations which merit some weight in view of the facts that the debtors involved had adequate private rights of action OKLAHOMA UCCC § 5-202(2)) and that a successful action under UCCC § 6.113(2) would serve both as an example for deterrence and also to establish that violations had occurred. See notes 53, 54, 74, *supra*. Finally, there is what might be called an ethical problem concerning a possible defense of the creditor. Compare UCCC §§ 5-202(2), (7), and 6.113(1); perhaps there is only an excess charge under UCCC § 6.113(1) after UCCC §§ 5.202(2), (7) are considered together, and then perhaps one exists pursuant to UCCC § 5.202(2) alone.

186. See note 74, *supra*.

187. See note 45, *supra*, and interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972.

188. See notes 14, 23, 45, 53, *supra*.

189. UCCC § 5.203.

190. Actually, UCCC § 5.203 has not been judicially construed but CCPA § 1640 has. However, since the former is almost a carbon copy of the latter the learning should largely be transferrable. See UCCC § 5.203, Comment.

191. UCCC §§ 5.203(1), (3). Technically, if the debtor shows a disclosure violation, liability may follow unless the creditor then shows by a preponderance of the evidence that the violation was unintentional and the result of a bona fide error under proper procedures. Cf., e.g., *Martin v. Glenn's Furniture Co.*, 126 Ga. App. 692, 191

words, if the creditor intended to do that which constitutes the violation, even if he did not intend to violate the law, liability is possible.¹⁹² This standard would appear to apply also to other civil liability provisions conferring private rights of action in the UCCC.¹⁹³ If one considers that the liability involved up to this point is more akin to compensatory damages than it is to a civil penalty or a criminal sanction,¹⁹⁴ it seems logical that a higher degree of creditor culpability should be required when an actual civil penalty is at issue.¹⁹⁵ This is apparently borne out when the provision providing for a civil penalty in an administratively initiated action for excess charges is examined,¹⁹⁶ but probably still allows the con-

S.E.2d 567 (1972), and *Jones v. Seldon's Furniture Warehouse, Inc.*, § — F. Supp. —, 4 CCH CREDIT GUIDE ¶ 98,996 (E.D. Va. 1973).

192. *E.g.*, *Ratner v. Chem. Bank New York Trust Co.*, 329 F. Supp. 270, 281 (S.D.N.Y. 1971).

193. UCCC § 5.202(7). A basic exception exists with respect to the refund of excess charges, however, under UCCC § 5.202(3), where the fact of an excess charge is sufficient without regard to the cause. Moreover, note that under UCCC § 5.203(3) the creditor may be held liable if it is established that the violation was intentional, but it is arguable that the creditor may not be held liable under UCCC § 5.202(7), even if that which constitutes the violation was intentional, unless it also was not the result of a bona fide error, because of the use of the word "or" in that latter section. No discussion will be engaged in here as to whether a different standard was in fact intended and thus whether "or" should be read as "and," or whether, if there is a different standard, which is preferable, or indeed whether there is any practical difference between the standards. Those who do wish to pursue this point may want to contemplate, for example, whether a violation is intentional when the creditor, notwithstanding proper procedures and due to a bona fide clerical error, arrives at an incorrect disclosure figure on his worksheet and then transfers this incorrect figure correctly to the disclosure statement. Suffice to say that generally the same definition of "intentional" should prevail.

194. *See, e.g.*, *Ratner v. Chem. Bank New York Trust Co.*, 329 F. Supp. 270, 282 (S.D.N.Y. 1971); *Bostwick v. Cohen*, 319 F. Supp. 875 (N.D. Ohio 1970). The court in *Bostwick* stated that CCPA § 1640 (*cf.* UCCC § 5.203) is remedial rather than punitive in nature even though the section provides that damages shall be two times the finance charge, the double damage provision being only an incentive for aggrieved debtors to initiate civil actions. 319 F. Supp. at 878. It would seem that generally the same observation should hold for UCCC § 5.202 notwithstanding the use of the word "penalty" therein. *See generally* Dole, *supra* note 10. *Contra* Eovaldi v. First Nat'l Bank, — F. Supp. —, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,054 (N.D. Ill. 1972).

195. *Compare, e.g.*, *Ratner v. Chem. Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971), with *Martin v. Glenn's Furniture Co.*, 126 Ga. App. 692, 191 S.E.2d 567 (1972).

196. "If a creditor has made an excess charge in deliberate violation of or in reckless disregard for this Act . . ." UCCC § 6.113(1). While the penalty accrues to the debtor under this section, the incentive motive is removed since the Administrator initiates the action, and thus the sanction appears to depart from any compensatory related purpose and closely approaches a fine or quasi-criminal sanction. Oddly enough, UCCC § 6.113(1) then goes on to provide that if the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error, no liability to pay a penalty shall be imposed. If the violation was deliberate, this clause can hardly apply since the violation would be intentional and not a result of error. Even if the violation was the result of reckless disregard, it would not seem to

clusion that "willfully," as used in UCCC section 6.113(2), can be equated with "intentionally," because of the added condition for liability in UCCC section 6.1113(2) that there must be a course of repeated and willful violations.¹⁹⁷ This conclusion in turn suggests, however, that "willfully" as used in the UCCC's criminal provisions¹⁹⁸ should require more than intentional conduct,¹⁹⁹ such as *mala fides* or an intention to violate the law, if not more, as the case may be.²⁰⁰ Nonetheless, the point remains that even if this definitional scheme tenuously hangs together, there are still enough questions in it to cause some potential loss of effectiveness in administrative enforcement,²⁰¹ and perhaps in other enforcement,²⁰² under the UCCC.

Finally, experience has unearthed several problems that do not appear to have attracted observation in the writings concerning the administrative provisions of the UCCC to date. For example, the Administrator is given the power, in connection with an investigation under UCCC

be the result of a bona fide error, and, as a practical matter, reckless disregard would be almost impossible to separate from subjective intentional violation. Perhaps this clause was intended only to relate to the other basis in UCCC § 6.113(1) for the imposition of a civil penalty—if the creditor has refused to refund an excess charge within a reasonable time after demand, and inappropriate draftsmanship makes it appear to apply in both situations. See Spanogle, *supra* note 9, at 640 n.99. Another discordant note in this analysis is that the same standard that is used in UCCC § 6.113(1) also appears in UCCC § 5.202(4), relating to the debtor's ability to recover a penalty for excess charges and where presumably the incentive and thus compensatory related purpose is involved. At this point one begins seriously to wonder whether a unitary, as opposed to an ad hoc, analysis is possible.

197. Cf. *Martin v. Glenn's Furniture Co.*, 126 Ga. App. 693, 191 S.E.2d 567 (1972); see notes 45 and 53, *supra*. Perhaps this is also the appropriate standard for license revocations or suspensions, since similar language is used and similar considerations appear to exist. See UCCC § 3.504(1)(a).

198. UCCC §§ 5.301-.302.

199. *Compare* *Ratner v. Chem. Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971); see note 14, *supra*.

200. See notes 14 and 23, *supra*. But, to the contrary, one might argue that the UCCC criminal provisions are similar to various food and drug laws, building regulations and child labor laws where liability accrues basically from the violation alone and thus "willful" should mean only intentional as opposed to inadvertent or accidental. Other than the text, the best argument against this is that the similar provisions of the CCPA have apparently not been so interpreted. See the full text of the materials cited in note 34 *supra*.

201. See text accompanying note 187, *supra*. One can always simply argue that by using the term "willful," the legislature must have meant something beyond "intentional." See *Martin v. Glenn's Furniture Co.*, 126 Ga. App. 692, 191 S.E.2d 567 (1972).

202. One wonders whether the affirmative response described in note 49, *supra*, concerning criminal prosecution was motivated with the standard cited in note 14, *supra*, in mind, which, according to the text discussion, may well be too low. But, of course, in the context of that discussion, it would appear that even the higher standard could be met. But then one wonders if the uncertainty as to the applicable standard, if appreciated, and when coupled with the natural reluctance to bring a criminal prosecution anyway, might not persuade most prosecutors that the matter is best avoided.

section 6.106, to apply to a court for an order compelling compliance upon a failure without lawful excuse to obey a subpoena or to give testimony. Reasonable notice must be given to all persons to be affected by the requested order.²⁰³ In Oklahoma a creditor once refused the Administrator access to his records in an administrative investigation begun when information, including several consumer complaints, evidenced a course of repeated violations. From information that had been given to the Administrator, this development had been foreseen. The Administrator had also anticipated that if the course of action stipulated in UCCC section 6.106(3) were then followed, there would be few, if any, original records available when an order for compliance was secured. Forewarned, the Administrator filed a civil action under Oklahoma UCCC sections 6.110, 6.111, and 6.113 on the basis of the information then at hand, but with allegations that set out what the investigation was expected to disclose and also the probability that the records might disappear. Pursuant to this action appropriate court orders were obtained so that such refusal could be met with such orders without injurious delay.²⁰⁴ It goes almost without saying that the Administrator should not have to adopt a procedure such as this to effectuate his powers under the UCCC.

For another example, the Oklahoma Administrator early recognized that if a consumer filed a complaint of a disclosure violation and the Administrator, pursuant to his authority to act on complaints,²⁰⁵ contacted the creditor in an effort to resolve the matter, the consumer's private right of action to recover for the violation²⁰⁶ might be eliminated under circumstances in which that right of action might be of substantial value.²⁰⁷ This could occur because the UCCC provides that a

203. UCCC § 6.106(3).

204. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972.

205. UCCC § 6.104(1)(a).

206. A creditor who, in violation of the provisions on disclosure other than advertising, fails to disclose information to a person entitled to it under the UCCC is liable to that person, except as otherwise provided in the section, in an amount equal to the sum of (a) twice the amount of the finance charge in connection with the transaction but not less than one hundred dollars or more than one thousand dollars, and (b) in the case of a successful action to enforce the above liability, the costs of the action plus reasonable attorney's fees as determined by the court. UCCC § 5.203(1).

207. For example, if the creditor, in his disclosure statement in connection with an extension of closed end loan credit on which the finance charge was \$500, on a broad basis failed to use anything approaching the terminology required by an Administrator's rule adopted pursuant to UCCC § 6.104(2) (in Oklahoma, see Selected Rules and Regulations, Part II—Disclosure and Advertising—Regulation Z, §§ 226.6(a), .8(b), (d), 3 CCH CONSUMER CREDIT GUIDE (Okla.) ¶¶ 6571, 6602, 04) he might have a

creditor has no civil liability for violation of disclosure provisions if, prior to the institution of an action under UCCC section 5.203 or the receipt of written notice of the error, the creditor discovers the error, notifies the person concerned within fifteen days of discovery, and makes whatever adjustments are necessary to assure that the person will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed.²⁰⁸ Since the statute does not stipulate that the creditor must discover the error without assistance and since it is doubtful that notice from the Administrator would suffice to cut off the curative right,²⁰⁹ a creditor could, upon receipt of the Administrator's notice, deliver to the complaining consumer a corrected disclosure statement and absolve himself basically from all liability.²¹⁰ This problem is solved easily enough in the case of the individual consumer by advising him of his rights and then proceeding, or having the consumer send a notice of the error²¹¹ prior to administrative action, or by closing the complaint on advice to the consumer that he employ a private attorney, depending on the circumstances and the consumer's wishes in the matter.²¹² But this solution is not feasible with respect to other consumers who might be affected by the same disclosure violation as the complaining consumer²¹³ or in the case of violations discovered by the

liability of one thousand dollars. The defense of an unintentional violation resulting from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error in UCCC § 5.203(3) would not appear to be applicable since a violation of this scope evidences a reckless disregard for the legal requirements. Cf. *Richardson v. Time Premium Co.*, 4 CCH CONSUMER CREDIT GUIDE ¶¶ 99,272-73 (S.D. Fla., Sept. 14, 1972).

208. UCCC § 5.203(2).

209. Compare UCCC § 6.113(1) where a demand by the debtor or the Administrator is specified, and *Dole*, *supra* note 10, at 922 n.43.

210. If the disclosure error was such that an adjustment was required in connection with the curative effort under UCCC § 5.203(2) to assure that the consumer would not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed, the creditor would not escape all consequences for his disclosure violation and it could be argued therefore that the indicated result is a satisfactory one. It could even be argued that in the hypothetical described in note 207, *supra*, the result is justifiable since the purpose of UCCC § 5.203 is to assure proper disclosure, and if that is accomplished, the justification for liability in that case no longer exists. But none of this gets precisely at the Administrator's problem, which may be only a public relations one but which is nonetheless real, of perhaps giving away a substantial cause of action vested in the consumer.

211. Or errors. To be on the safe side, the notice should reasonably detail the errors involved and not merely indicate there is a disclosure violation. The Administrator should have the authority to prepare this notice for the consumer under UCCC § 6.104(1)(a), (b).

212. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972.

213. A disclosure violation of the type described in note 207, *supra* will undoubtedly exist in the creditor's other contracts if the form is printed, and probably even if it

Administrator pursuant to an examination or an investigation.²¹⁴ Indeed, no total solution, if one is possible, has been devised for these situations; instead the Oklahoma Administrator has taken perhaps the only position practically available, which is that in the vast majority of cases the prompt resolution of violations through the administrative enforcement process is more satisfactory to most consumers than preserving a theoretically usable private right of action.²¹⁵

In summation, experience relevant to the UCCC has so far demonstrated that many of the problems perceived with respect to its administrative provisions were largely illusory or were bad predictions. Experience has also shown, however, that some of the problems envisioned have in fact materialized, and that others exist that were not foreseen. Nonetheless, the verdict on the whole must be that the administrative provisions are both potentially and actually adequate for the tasks assigned to them.²¹⁶

is not. However, the consumer participants in those other contracts are unknown for purposes of contacting them, even if this were a feasible possibility. If the creditor realizes this when the knowledge of the error arises out of the complaining consumer, he can correct and absolve liability, unless the complaining consumer's notice can prevent this, an unlikely conclusion. *See Dole, supra* note 10, at 922 n.43. Of course, of some comfort is the fact that this would also be the result if the complaining consumer acted on his own without the Administrator's assistance. Moreover, this situation is one for an administrative investigation to ascertain whether other contracts are also subject to the violation, which then gets us to the next aspect of the problem.

214. If widespread disclosure errors are discovered in connection with an administrative investigation under UCCC § 6.106 or an examination under UCCC § 3.506, theoretically the Administrator might contact the consumers affected prior to notice of the errors to the creditor. But in reality, this idea has its obvious problems, and has not been pursued by the Oklahoma Administrator under the rationale described in the following text.

215. Most Oklahoma consumers to date have opted for compliance on the part of the creditor obtained through the administrative process and have not chosen to pursue a private right of action. Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972. It might be noted here, however, that it is likely that the Oklahoma practice will have to be re-examined if the present provisions of the RUCCC are finalized and that statute is enacted in Oklahoma, since the RUCCC considerably broadens the instances where a private right of action is available to the consumer with a minimum recovery of \$100 and a maximum recovery of \$1000 and extends the curative defense or ability to liquidate liability beyond the disclosure violation situation. *Compare* RUCCC § 5.201 and UCCC § 5.202. Indeed, since the discussed problem is probably inherently not susceptible of full solution under this approach, the drafters of the RUCCC will hopefully consider this before finalizing RUCCC §§ 5.201 and 5.203.

216. As noted before in a different context (*see* the concluding remarks in the text concerning the UCC's self-executing provisions, *supra*), this hardly argues against improvement. The RUCCC, in its present status, contains many such improvements. Without being exhaustive, for example, the RUCCC clarifies the context in which an assurance of discontinuance can be used (*see* note 158, *supra*; RUCCC § 6.109), delineates what may be included within the phrase "other appropriate relief" used in UCCC § 6.110 and the Administrator's standing to sue in certain instances (*see* Span-

PRIVATE ENFORCEMENT PROVISIONS OF THE UCCC

Finally, it is necessary to consider the private enforcement sections of the UCCC, which are expressly only two in number.²¹⁷ They are (1) a private action to enforce civil liability for violation of the disclosure provisions²¹⁸ and (2) a private action to enforce civil liability for violation of (a) the provision applying to negotiate instruments,²¹⁹ (b) the provision applying to limitations on the schedule of payments or term for regulated loans,²²⁰ (c) the provision applying to authority to make supervised loans,²²¹ (d) the provisions regulating charges to the debtor,²²² and (e) the provision prohibiting discharge of the debtor in connection with the garnishment of unpaid earnings.²²³

Comments concerning the probable effectiveness of the civil liability section for violation of the UCCC's disclosure provision have been mild in nature, perhaps because this section in all important respects is the same as CPA section 1640, which confers a private right of action for disclosure violations under the Truth-in-Lending Act.²²⁴ This reticence has proved judicious, because there has been an avalanche of activity attesting to the workability of these sections. Not surprisingly, in light of its broader geographical scope, most of this experience has been accumulated under the federal statute,²²⁵ but the lessons are largely

ogle, *supra* note 9, at 646-47; RUCCC § 6.110), and expressly settles the scope of the Administrator's authority concerning "excess charges" under UCCC § 6.113(1) (*see* note 185, *supra*; RUCCC § 6.113). Of course, the RUCCC does not resolve all the present problems (for example, RUCCC § 6.112 is the same as UCCC § 6.112—*see* text after note 165, *supra*), and may even exacerbate some (*see* note 215, *supra*), but more is done than underdone.

217. Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Eschew Private Enforcement?*, *supra* note 10, at 1044. However, *see* Spanogle, *supra* note 9, the previous discussion in this article under the text headings concerning the self-executing and self-help provisions of the UCCC, and UCCC § 5.202, Comment 2.

218. UCCC § 5.203.

219. UCCC § 5.202(1).

220. *Id.*

221. UCCC § 5.202(2).

222. UCCC § 5.202(3), (4).

223. UCCC § 5.202(6).

224. *See, e.g.*, Spanogle, *supra* note 9, at 653; Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Eschew Private Enforcement?*, *supra* note 10, at 1046.

225. No particular purpose would be served and too much space would be involved to specify the details of each published private action under CCPA § 1640 for disclosure violations to date. *See, e.g.*, 4 CCH CONSUMER CREDIT GUIDE 71,201, 71,204-05, 71-323-24. The textual statements can be substantiated by noting that in its 1971 report to Congress, the Board of Governors of the Federal Reserve System stated that the Board was aware of 71 civil actions brought under CCPA § 1640 for damages for alleged violations and it was likely that additional suits had been instituted. FED. RESERVE Bd., ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1971, at 9 (1972). The Board's report for 1972 contains no such statistic. *See also*, Hale, *The Direction of Litigation in the Consumer Credit Field*, 28 BUS. LAW. 639 (1973).

applicable to UCCC section 5.203 because of the substantial similarity of the statutes.²²⁶ One can argue with a fair degree of credibility that much of this flood has been prompted by the class action,²²⁷ and now that the bloom is perhaps temporarily off the class-action rose,²²⁸ more must be learned before any final conclusions can be drawn. This is no doubt a safe observation, but the residual experience omitting the class actions,²²⁹ the theoretical possibilities still open,²³⁰ and the prob-

226. In an effort to obtain an idea as to how many private actions had been instituted in Oklahoma for violations of the UCCC (Oklahoma has received an exemption from the CCPA—Regulation Z § 226.12, Supp. III, Par. (c), 1 CCH CONSUMER CREDIT GUIDE (Okla.) ¶ 3681—so most actions, except as to a few classes of credit transactions not exempted, would concern the Oklahoma UCCC), I published a request for information in the Oklahoma Bar Association Journal, a weekly publication of the Oklahoma Bar which reaches all practicing attorneys in the state. Based on the reply, and on an interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972, at least six disclosure violation private actions have been brought to date in Oklahoma. Since the reply was somewhat limited I have no way of knowing what percentage this is of the actual total. One could surmise it might be a fairly high percentage, since compliance has generally been good in Oklahoma and a large number of disclosure violation situations have been handled through the Oklahoma Administrator: 60 in the period ending Dec. 31, 1970, 160 in the period ending Dec. 31, 1971, and 125 in the period ending Dec. 31, 1972. See 1970 ANNUAL REPORT 15-16; 1971 ANNUAL REPORT 7; 1972 ANNUAL REPORT 9. Even if one makes the assuredly erroneous assumption that six cases are the extent of it, this is still in the neighborhood of five percent of the probable present federal experience, and Oklahoma has only about one percent of the United States population.

227. In 49 of the 71 known cases in 1971 under CCPA § 1640, class action status was sought. FED. RESERVE Bd., ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1971, at 9 (1972). Of the six Oklahoma cases, only one involved class action, however.

228. "[T]he clear trend appears to be against the allowance of class actions in Truth in Lending suits." FED. RESERVE Bd., ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1972, at 7 (1973). I know of no ruling yet in Oklahoma.

229. In Oklahoma, as noted, five of the six private actions for disclosure violations were not class actions. Under CCPA § 1640, 4 CCH CONSUMER CREDIT GUIDE—Current Topical Index to New Developments: Truth-in-Lending, at 71,203 *et seq.* discloses that as of this writing six out of the sixteen cases reported there were not brought as class actions, or something over thirty-five percent.

230. In a civil action for a disclosure violation under UCCC § 5.203, if a violation is shown and neither of two defenses, one of which can be cut off by either notice or the action itself, is established, a recovery of twice the finance charge, with a minimum of one hundred dollars and a maximum of one thousand dollars, is possible, plus costs of the action and reasonable attorney's fees. Even without theory, this can produce some noteworthy results. See, e.g., *Grubb v. Oliver Enterprises, Inc.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,094 (N.D. Ga. Nov. 3, 1972), where the debtor recovered a total of two hundred dollars for disclosure violations on two loan contracts bearing total finance charges of 11.18 dollars and amounting to 111.88 dollars of total debt, and 1750 dollars for attorney's fees were awarded. But with theory, even this dramatic a story is too simplistic a picture. In *Wachtel v. West*, 344 F. Supp. 680 (E.D. Tenn. 1972) *aff'd*, — F.2d —, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,036 (6th Cir. 1973) the consumers, trying to get around the statute of limitations (CCPA § 1640 (e), UCCC § 5.203(5)), argued that the failure to disclose was a continuing violation.

able shape of future developments²³¹ indicate that suitable private enforcement of the UCCC's disclosure requirements is likely to continue.

If this argument were extended to liability, it might produce a recovery of at least one hundred dollars per day from the time of the credit extension until some later date, such as notice of the violation or suit. The argument in *Wachtel* was turned back, and so should it be if it were used in relation to liability, but the lesson for innovative advocacy is obvious. A more tenable proposition, which one can conclude so far has largely been postponed in assertion by the class action lure, is what might be called the cumulation of liability argument. To illustrate, UCCC § 5.203(1), in pertinent part, provides that a creditor who, in violation of the provisions on disclosure, fails to disclose information to a person entitled to the information, is liable. Suppose in a consumer loan carrying a 120 dollar finance charge the creditor fails to make any disclosure at all. Is his liability 240 dollars (twice the finance charge), or 2640 dollars (\$240 x 11, the number of items of information required to be disclosed in the transaction under UCCC § 3.306(2)—note the 1000 dollar limitation of UCCC § 5.203 would not be exceeded for any one violation in this view); in short, does the liability under UCC § 5.203 relate to items of information or to the "transaction"? For a more detailed discussion, see *Dole, supra* note 106 and for a ramification of it in open end credit, see *Thomas v. Myers-Dickson Furniture Co.*, — F. Supp. —, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,056 (N.D. Ga. 1972), *aff'd, as to this issue*, — F.2d —, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,004 (5th Cir. 1973). This cumulation argument has been presented in one of the Oklahoma disclosure violation actions, but no direct ruling apparently occurred, since the action involved an unlicensed lender and the relief was limited to avoidance of the transaction, perhaps on a *Bostwick* analysis. See note 105, *supra*.

231. First, the Board of Governors of the Federal Reserve System (the Board) has recommended that CCPA § 1640 be amended so as to recognize the class action as an enforcement tool but also to set limits so the use of that device will not result in a horrendous, possibly annihilating, punishment. FED. RESERVE BD., ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1972, at 13-14, 31 (1973). If this probable (a similar proposal passed the United States Senate) amendment occurs, it is likely that UCCC § 5.203 will be similarly amended, which will rejuvenate (see note 228, *supra*) the class action device in this context. If that transpires, there will be less need for theoretical arguments such as the cumulation of liability proposition (see note 230, *supra*), on which the board made a negative recommendation (see FED. RESERVE BD., ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1972, at 15, 32 (1973), and so what otherwise could be an adverse possible future development is mitigated. Second, it appears that the probable final interpretation of the defense to disclosure violation liability which concerns an unintentional violation resulting from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error will be to exclude errors of law. See *Owens v. Modern Loan Co.*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,099 (W.D. Ky. Nov. 6, 1972); *Douglas v. Beneficial Fin. Co.*, 334 F. Supp. 1166 (D.C. Alas. 1971), *rev'd*, 469 F.2d 453 (9th Cir. 1972); *Buford v. American Finance Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971); *Ratner v. Chem. Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971). For a discussion of the issue, see *Dole, supra* note 10. For the most part, this seems a desirable development, and one that is possible under UCCC § 5.203(3). For instance, in Oklahoma the issue has arisen whether a creditor can rely on an opinion of counsel, even though that opinion is completely erroneous. The Board also has made a recommendation toward allowing a "good faith reliance" defense in connection with CCPA § 1640 (see FED. RESERVE BD., ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1972, at 14-15, 32 (1973), but any adoption of that suggestion for the CCPA should not influence the interpretation of UCCC § 5.203(3) since that recommendation is limited to a rule, regulation or interpretation of the Board, and the UCCC already has a substantially similar rule. UCCC § 6.104(4). It might be noted that this latter point concerning errors of law as a defense perhaps becomes more complex when the

There has been no such bountiful experience relevant to the UCC's other right of private action since the CCPA does not go much beyond requiring disclosure. The published comments about this enforcement provision have been generally critical.²³² For example, one observer has stated that the consumer has a right of action only if the violation concerns "excess charges" or what once was called usury.²³³ Without undertaking an explanation of the law of usury,²³⁴ one can say that this description of the matter may give a misleading impression of the scope of UCCC subsections 5.202(3) and (4), which provide in substance that if a debtor has paid an amount in excess of the lawful obligation under the agreement, he may recover the excess amount and, in appropriate circumstances, a penalty in an amount determined by a court within stipulated limitations. If the debtor is charged more than the maximum rate of finance charge that the UCCC permits,²³⁵ a recovery is certainly authorized.²³⁶ But there is little doubt that the debtor is also empowered to recover, for example, unauthorized additional charges,²³⁷ delinquency charges excessive in amount or imposed less

mistake of law is not in relation to what the disclosure rules require (as was apparently involved in the cited four cases), but rather is in relation to a substantive rule of state law which then generates a disclosure violation. For a case which seems to involve this last situation but where the issue has not yet been reached, see *Kenney v. Landis Financial Group, Inc.*, 349 F. Supp. 939 (N.D. Iowa 1972), 4 CCH CONSUMER CREDIT GUIDE ¶ 99,100 (N.D. Iowa June 19, 1972) (motion to amend). If there is a disclosure violation in such cases the considerations behind the denial of a defense for errors of law would seem to apply equally whether the mistake is as to the requirements of the disclosure rules or as to the requirements of substantive state law upon which any disclosure obligation is based. But query, should a contractual provision for, e.g., a prepayment penalty and appropriate disclosure thereof under UCCC § 6.104(2) and, as an Administrator's rule, Regulation Z § 226.8(b)(6), when under state law, e.g., UCCC §§ 2.209, 3.209, such a penalty is prohibited, constitute a disclosure violation since in truth no disclosure is required, but perhaps it is misleading additional information—Regulation Z § 226.6(c).

232. E.g., "Effective private enforcement depends upon the solution of two problems: The consumer must be induced to seek legal counsel; and the attorney must be paid, whether he litigates or not. The UCCC attacks neither of these problems, however, which indicates to this author that the problems have not been sufficiently analyzed." Spanogle, *supra* note 9, at 666. *Contra*, Thrift Funds of Baton Rouge, Inc. v. Jones 4 CCH CONSUMER CREDIT GUIDE ¶ 99,076 (La. Sup. Ct. 1973).

233. Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Eschew Private Enforcement?*, *supra* note 10, at 1044.

234. See, e.g., Hershman, *Usury and the Tight Mortgage Market*, 22 BUS. LAW. 333 (1967).

235. For closed-end sales, see UCCC § 2.201. For open end sales, see UCCC § 2.207. For non-supervised loans, see UCCC § 3.201. For supervised loans, see UCCC § 3.508. See also UCCC §§ 2.205, 2.206, 3.205, 3.206.

236. See UCCC § 6.113, Comment 1.

237. See UCCC §§ 2.202, 3.202. In some instances, an unauthorized additional charge may be treated as part of the finance charge rather than immediately as an excess charge, however. For a full discussion, see Miller, *supra* note 3, at 283-88.

than ten days after a scheduled installment is due,²³⁸ penalty charges collected on prepayment in full,²³⁹ unearned charges in connection with finance-charge rebates,²⁴⁰ excessive finance charges as a result of the use of multiple agreements,²⁴¹ an excessive charge at the expiration of a consumer lease,²⁴² additional charges in connection with an unauthorized change of terms with respect to open-end credit,²⁴³ an excessive charge for insurance,²⁴⁴ penalties or excessive charges in connection with the refinancing of balloon payments,²⁴⁵ and payments made in connection with referral sales,²⁴⁶ a home solicitation sale that has been cancelled,²⁴⁷ or a transaction with respect to which a security interest was retained or acquired in the debtor's residence that has been rescinded.²⁴⁸ While there may be more doubt as to whether a void loan comes under the provisions of UCCC subsections 5.202(3) and (4),²⁴⁹ the point seems sufficiently made that these subsections are not unduly restrictive in nature.

The same observer has also commented in substance that the only

238. UCCC §§ 2.203, 3.203.

239. UCCC §§ 2.209, 3.209.

240. UCCC §§ 2.210, 3.210.

241. UCCC §§ 2.402, 3.409, 3.509.

242. UCCC § 2.406.

243. UCCC §§ 2.416, 3.408.

244. UCCC § 4.104.

245. UCCC §§ 2.405, 3.402, and note 111, *supra*.

246. UCCC § 2.411 and comment 3. *See also* note 111, *supra*.

247. UCCC § 2.504.

248. UCCC § 5.204. It might be argued that in connection with these last two provisions, the debtor's only remedies are those provided in the sections, such as retention of any property delivered by the creditor until he performs his obligations. *See* UCCC § 2.504 and Comments, § 5.204(2), and note 113, *supra*. However, considerations arguing against this conclusion are: (1) the possible inadequacy of these remedies (what if the creditor has delivered no property, for example?); (2) various comments to the UCCC (UCCC § 2.504, Comment 5, indicates retention of property is a means of assuring compliance by the seller; UCCC § 5.202, Comment 2, states that the statute provides for other remedies in addition to those set forth in UCCC § 5.202, citing both UCCC §§ 2.501 and 5.204); and (3) the general direction commanding liberal construction (UCCC § 1.102(1)). In addition, it might be noted that some of the sections cited (*e.g.*, UCCC § 4.104) specifically refer to UCCC § 5.202, and some (*e.g.*, UCCC §§ 2.202, 3.202) do not. This should not be deemed relevant in light of the general direction commanding liberal construction noted above, and, indeed, if it were, it could result in the inequitable general proposition, for example, that unauthorized additional charges not paid cannot be collected, but that those paid cannot be recovered. *Cf.* UCCC § 5.205.

249. *Cf.* note 52, *supra*. Indeed, since in this context UCCC § 5.202(2) specifically authorizes a right of action, and some differences can be generated by interplaying UCCC § 5.202(2), (3), (4), (7), it would appear the preferable construction is that UCCC § 5.202(2) alone controls. This sort of problem is avoided in the RUCCC. *See* RUCCC §§ 5.201(2), 6.113(1), (2). The RUCCC also adopts a better recovery scheme in relation to excess charges. *See* RUCCC § 5.201(3), (4).

violation for which both principal and interest may be cancelled is the making of supervised loans without a license,²⁵⁰ but that this penalty seems illusory since the distinction between supervised loans and others is the greater finance charge rate allowed the supervised lender, and therefore that the creditor who charges more than the rate allowed for non-supervised loans may claim that he is merely a usurer, not an unlicensed supervised lender, and that he is liable for no more than the lesser usury penalties under UCCC subsections 5.202(3) and (4).²⁵¹ Of course, anyone can claim anything, but since this argument would render UCCC subsection 5.202(2) without any function whatsoever, it is unlikely to prevail.²⁵² A more relevant question concerning UCCC subsection 5.202(2) liability exists with respect to the defense available to a creditor who can establish by a preponderance of evidence that a violation is unintentional or the result of a bona fide error.²⁵³ Consider, as occurred in Oklahoma,²⁵⁴ the case of an unlicensed lender who is not a supervised financial organization and who makes consumer car loans at an annual percentage rate of twelve percent. The lender bases his conduct on the advice of counsel that no license is necessary until the annual percentage rate exceeds eighteen percent under the UCCC, but the jurisdiction involved has changed the eighteen percent figure to ten percent. This would be an intentional violation within the rationale of the *Ratner* case,²⁵⁵ but it would be the result of a bona fide error? If errors of law are not errors within the purview of the defense, then the answer is "no." It is strongly submitted that this should be the result, for otherwise any opinion of counsel, no matter how inconsiderate, would bar consumer recovery for what, considering the sanction, was contemplated as the worst civil violation of the UCCC that could occur.²⁵⁶

250. UCCC § 5.202(2).

251. See Spanogle, *supra* note 9, at 653.

252. In Oklahoma, one is reminded of the argument under the old usury law that a creditor could relieve himself of the penalties imposed by that statute by writing into the contract an agreement to rebate or refund interest collected in excess of the legally authorized rate, which prevailed until the court realized it had been had. See *Oklahoma Pre-Fin. & Loan Corp. v. Morrow*, 497 P.2d 221 (Okla. 1972).

253. UCCC § 5.202(7).

254. See note 74 *supra*.

255. *Ratner v. Chem. Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971). Of course, *Ratner* involved a disclosure violation under CCPA § 1640, but the terms of the defense there are substantially equal to that of the defense here.

256. *Cf.* a similar issue discussed in note 231, *supra*. The RUCCC disagrees, providing in RUCCC § 5.201(8) that if a creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of law or fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such

As a final example, another critic has noted that UCCC subsection 5.202(1) provides a remedy of no more than three times the finance charge in the event a creditor takes a negotiable, as distinguished from the required non-negotiable,²⁵⁷ note,²⁵⁸ and that on a three hundred dollar installment credit sale in which the maximum finance charge would be sixty dollars for a one-year agreement, the most a debtor could recover for a violation would be 180 dollars.²⁵⁹ The implication is that a consumer would be reluctant to fight a lawsuit for that amount.²⁶⁰ That is only one side of the picture, however. The other side is perhaps represented by a current lawsuit in Oklahoma under Oklahoma UCCC subsection 5.202(1) against a home builder who allegedly made consumer credit sales and took negotiable promissory notes.²⁶¹ While that particular suit is a class action, the potential liability in any individual case²⁶² would be more than enough to warrant suit.²⁶³ But the main point in

violation or error (for procedures in relation to errors of law, *see* Dole, *supra* note 10) no liability is imposed under subsection (1) and (2) (the void loan subsection), and (4). Obviously, I dissent as to subsection (2), and also at least as to subsection (1), as the discussion, *infra*, will disclose.

257. UCCC § 2.403.

258. The same remedy applies if the creditor violates the limitations on the schedule of payments or loan term for regulated loans. UCCC §§ 5.202(1), 3.511.

259. Fritz, *supra* note 10, at 516.

260. Actually, the consumer could derive greater benefit than this as § 5.202(1) provides if a creditor has violated UCCC § 2.403, the debtor is not obligated to pay the finance charge *and* has a right to recover a penalty in an amount determined by the court not in excess of three times the amount of the finance charge. Attorney's fees also may be awarded. UCCC § 5.202(8). Is this enough? Consider the class action device, and *Sanco Enterprises, Inc. v. Christian*, discussed in note 75, *supra*.

261. Note that, except for disclosure and debtor's remedies in connection therewith, a consumer credit sale does not include the sale of an interest in land if the finance charge does not exceed ten percent "simple" per year. UCCC § 2.104(2)(b). Note also that the defense of an unintentional violation or a violation the result of a bona fide error applies with respect to liability under UCCC § 5.202(1). UCCC § 5.202(7). The previous observation with regard to the exclusion of errors of law (*see* note 256, *supra*) should apply here, since a basic purpose behind the elaborate rules as to the form of a negotiable instrument is to be able to clearly identify it as such. *See* J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 399 (1972). Thus, the defense should be reserved for those situations where, for example, the salesman by mistake picks out a negotiable note blank rather than a non-negotiable note blank, if such a situation can be called a "bona fide" error.

262. By way of illustration, the interest on a monthly payment thirty-year seven percent loan will be something like one and two-fifths times the principal amount. Benfield, *The Effect of Credit Regulation on Real Estate Transactions*, 25 *BUS. LAW.* 501, 503 (1970). While the contracts here may be shorter, the finance charge will be higher. *See* note 261, *supra*. Multiply that times three (note there is no maximum liability in UCCC § 5.202(1)).

263. The description of the Oklahoma experience in this part of the article are derived from replies to the request for information (*see* note 226, *supra*) and Interview with James A. McCaffrey, General Counsel, Oklahoma Department of Consumer Affairs, in Oklahoma City, Dec. 19, 1972. In addition to the above action, a second class

all of this is that the remedy provided in UCCC subsection 5.202(1) is simply inappropriate. In that respect, the RUCCC will be a substantial improvement.²⁶⁴

One could expect from the published enunciations concerning the private enforcement provisions of the UCCC other than for disclosure violations that the actual experience with them should be pretty dismal. Such has not been the case in Oklahoma. In addition to the two lawsuits previously noted²⁶⁵ for violations of the prohibition against negotiable instruments, two actions have been brought under Oklahoma UCCC subsection 5.202(2) in connection with supervised loans made without a license, and two others have been brought under Oklahoma UCCC subsections 5.202(3) and (4) for excessive charges.²⁶⁶ Overall, then, one can fairly conclude that the private enforcement provisions of the UCCC are working²⁶⁷ and, with the prospective advent of the RUCCC,²⁶⁸ are likely to work even better in the future.

action under OKLAHOMA UCCC § 5.202(1) has been brought against an automobile dealer for allegedly taking negotiable promissory notes in consumer credit sales. Of course, the potential liability here even on an individual basis is not small either. A demurrer to the petition was sustained on the ground the notes were not negotiable, and the case is on appeal.

264. In addition to broadening the types of violations for which a private action is expressly provided, RUCCC § 5.201(1) provides that the consumer has a cause of action to recover actual damages and in addition a right in an action other than a class action to recover a penalty in an amount determined by the court not less than \$100 nor more than \$1000. Costs and attorney's fees are also recoverable. RUCCC § 5.201(9). This, of course, adopts the scheme which has basically proven itself in connection with disclosure violations.

265. See note 263 and accompanying text, *supra*.

266. None of these is or was a class action. In addition, it is probable that there are others, since as previously noted, the response to my inquiry for information was somewhat limited. Finally, and perhaps only by way of information considering the context here, there is a class action pending concerning home solicitation referral sales, although if the analysis of the scope of the excess charge remedy (see notes 246, 247, and 248, *supra*) in this article is sound, perhaps that lawsuit is properly listed here too.

267. Of the two types of private actions not discussed with reference to experience, one is the right to recover lost wages as a result of a violation of UCCC § 5.106 prohibiting discharge of an employee in connection with the garnishment of his unpaid earnings for the purpose of paying a judgment arising from a consumer credit transaction. UCCC § 5.202(6). There has been no experience here in Oklahoma, probably because Oklahoma significantly reduced the scope of UCCC § 5.106. See OKLAHOMA UCCC § 5-106. However, at least the UCCC provides a private right of action here; there is none with respect to a similar provision in CCPA § 1674. *Simpson v. Sperry Rand Corp.*, 350 F. Supp. 1057 (W.D. La. 1972). The other action is for violation of UCCC § 3.511 regulating the schedule of payments in certain consumer loans. UCCC § 5.202(1). Lack of experience here is probably largely attributable to effective administrative examination, although the private remedy would clearly be less productive in these cases due to the amounts of the finance charge involved. Again see note 264, *supra*.

268. See notes 249 and 264, *supra*.

CONCLUSION

Forecasting is a risky process. The subject matter of this article perhaps illustrates that as well as anything, although the daily weather reports may illustrate it more frequently. Nonetheless, this observation has never stopped the prognostication business, and that holds true here. To the extent that the published forebodings discussed above, as well as others not discussed, have resulted in potential improvements in the enforcement provisions of the UCCC via the RUCCC, these negative forecasts have been all to the good. To the extent, however, that they may have influenced the postponement of the enactment of the UCCC in any jurisdiction, this is unfortunate. The main purpose of this article then has been to temper any such impact by presenting the overwhelmingly favorable experience relevant to the UCCC to date. Admittedly, the UCCC, as to enforcement, is not a perfect statute. In fact, it is doubtful whether the RUCCC, when it is finalized, will be perfect either, especially if one considers the complexities with which it deals and the compromises involved in its preparation, although perhaps the actual experience under the UCCC can assist in its movement toward that goal. In the final analysis, the crucial point should be that the UCCC has demonstrated that it works. Thus, with what is now available or soon will be available in the RUCCC, the time has come to get the UCCC out of the law reviews and onto the statute books.

