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IT IS TIME FOR A COMPREHENSIVE FEDERAL CONSUMER CREDIT CODE

THOMAS D. CRANDALL†

In 1968, Congress enacted the Consumer Credit Protection Act, with emphasis in its "Truth in Lending" provisions on disclosure of credit terms in consumer transactions. Although the disclosure provisions in the "Truth in Lending" portion of the Act are intended to preempt inconsistent state law, most consumer credit regulation is still left largely to the states. In most states, this regulation consists of a variety of statutes covering discrete areas such as usury, secured transactions and various creditor practices. Professor Crandall demonstrates that the complexity and nonuniformity inherent in this patchwork of state statutes makes compliance vexatious for creditors, while providing little protection for consumers. He then shows how this problem is exacerbated by the inadequacies and uncertainties of present federal regulation. To remedy this situation, Professor Crandall presents a detailed proposal for a comprehensive federal consumer credit code containing all legislation relating to the direct regulation of consumer credit.

I. INTRODUCTION.....	2
II. THE PROBLEMS WITH THE PRESENT SYSTEM OF CONSUMER CREDIT REGULATION	3
A. <i>State Regulation</i>	3
1. Complexity	4
a. <i>Credit Sale Financed by the Seller</i>	8
b. <i>Credit Sale Pursuant to a Retail Installment Con- tract Subsequently Assigned to a Finance Com- pany</i>	10
c. <i>Consumer Loan by a Small Loan Company</i> ...	13
d. <i>Consumer Loan by a State Chartered Bank</i> ...	14

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2.	Lack of Uniformity	20
3.	Inadequacy of State Consumer Protection Measures	25
	<i>a. Defining "Default"</i>	26
	<i>b. Restrictions on Security Interests</i>	28
	<i>c. Restrictions on Self-Help Repossession</i>	30
	<i>d. Restrictions on Deficiency Judgments</i>	31
B.	Federal Law	32
	1. National Banks	33
	2. Federal Preemption	35
	3. Regulation of Consumer Credit by Federal Trade Commission Rule	36
III.	THE PROPOSAL	40
IV.	EXPECTED CRITICISMS	48
	<i>A. Experimentation in Consumer Credit Legislation</i>	48
	<i>B. Legislating from Washington, D.C.</i>	50
V.	CONCLUSION	51
	APPENDIX	52

I. INTRODUCTION

Consumer credit is defined as the lending of money or sale of goods and services to a natural person for a personal, family or household purpose in which a finance charge is levied or the loan or sale is repayable in more than four installments by one who regularly makes such loans or sales.¹ It is a multibillion dollar business.² Consumers are financing purchases of everything from vacations to health spa

1. There is no one definition of consumer credit. The definition in the text, however, is utilized in both the federal Consumer Credit Protection Act (CCPA), 15 U.S.C. § 1602(e)-(f), (h) (1976), and the most recent version of the Uniform Consumer Credit Code (UCCC), UNIFORM CONSUMER CREDIT CODE §§ 1.301(3), (12), (15), (18), (30) (1974 version).

The definition in the text is not all inclusive. Both the CCPA and the 1974 UCCC have a number of types of transactions excluded from their definitions of consumer credit. For example, most transactions in which the amount financed exceeds \$25,000 are excluded. 15 U.S.C. § 1603(3) (1976) (real estate transactions included whatever the amount financed); UNIFORM CONSUMER CREDIT CODE §§ 1.301(12)(a)(v), (15)(a)(iv). Under the UCCC most real estate transactions are excluded whatever the amount financed. *Id.* §§ 1.301(12)(b)(ii), (15)(b)(ii).

Leasing arrangements, and not just credit sales of consumer goods and consumer loans, are also increasingly subject to consumer credit regulation. *See, e.g.*, 15 U.S.C. §§ 1667-1667(e) (1976). On a state by state basis, the transactions subject to special consumer credit regulation vary considerably. *See* 2-4 CONS. CRED. GUIDE (CCH).

2. Between 1950 and 1971, consumer credit outstanding increased from \$21.5 billion to \$137.2 billion. NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 5 (1972) [hereinafter cited as NCCF REPORT].

memberships, and are borrowing money not only via traditional loans from banks, finance companies, credit unions, and other lending institutions, but increasingly by check overdrafts and through the use of credit cards as well. There is no limit in sight; nor does there seem to be any serious movement to initiate one.

Consumer credit regulation is primarily a matter of state law. The maximum rates of finance and other permissible charges, available methods for calculating charges, methods for rebating unearned charges, controls on creditor practices in initiating a transaction, and the creditors' and consumers' remedies are examples of consumer credit regulation mostly left to the states.³ But the federal government has also been indirectly involved with its regulation for many years.⁴ More recent federal regulation is designed to directly regulate consumer credit transactions.⁵

There are major problems with the present state-federal system caused by the needless complexity and nonuniformity of state regulation, the refusal by most states to enact consumer protection provisions as an integral part of their consumer credit laws, federal preemption issues, and the increasing tendency of the federal government to control harsh credit practices by Federal Trade Commission rule rather than by statute. This article, after discussing the problems with the existing regulatory structure, proposes as an alternative to the present system a comprehensive federal consumer credit code. It concludes by considering the likely criticisms of such a proposal.

II. THE PROBLEMS WITH THE PRESENT SYSTEM OF CONSUMER CREDIT REGULATION

A. State Regulation

Primary regulation of consumer credit at the state level has not worked because (1) most states' consumer credit laws are overly complex and offer little guidance to the creditor seeking to comply or the consumer seeking protection; (2) the lack of uniform state laws unnecessarily increases compliance costs and creates difficult choice of law

3. For a collection of state consumer credit laws, see 2-4 CONS. CRED. GUIDE (CCH).

4. *See, e.g.*, National Banking Act, 12 U.S.C. §§ 21-215b (1976) (first passed in 1864); Bankruptcy Act, 11 U.S.C. §§ 1-1200 (1976) (first passed in 1800). The Bankruptcy Reform Act of 1978 was enacted Nov. 6, 1978. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (to be codified in 11 U.S.C. §§ 101-1330) (effective Oct. 1979).

5. The most notable recent federal statute is the Consumer Credit Protection Act, 15 U.S.C.A. §§ 1601-1693 (West 1974 & Supp. 1979); 18 U.S.C. §§ 891-896 (1976).

problems for the interstate creditor; and (3) the states have not generally kept pace with the need for additional consumer protections.

1. Complexity

Most states have a "scattered" approach to consumer credit: the applicable set of statutes for any particular consumer credit transaction depends primarily on what type of credit grantor is extending the credit. This unsatisfactory approach to consumer credit regulation stems from the checkered development of consumer credit granting.

Before the turn of the century there was a significant amount of lending for consumer credit purposes, but little from authorized credit institutions. Traditional credit institutions had other, more lucrative sources for investment, and legal usury rates were considered too low to make consumer credit lending attractive. As a consequence, consumers were often forced to borrow from "loan sharks" who grossly violated the states' usury statutes. After studying this problem, the Russell Sage Foundation proposed a Uniform Small Loan Law for adoption by the states. The proposal authorized a new class of lenders, "small loan" companies, who were limited to lending amounts of \$300 or less at a higher rate of interest than that prescribed by the general usury rates. It was assumed these small loan companies would provide a small loan market that would serve as an alternative to borrowing from the loan sharks.⁶

Most states adopted small loan statutes because of the Foundation's proposal, and such statutes are generally considered the first attempt at consumer credit regulation by the states.⁷ Small loan statutes primarily provided a licensing structure for small loan companies, limitations of the amount such companies could lend, and maximum rates of finance charges higher than those allowed in the general usury statutes.⁸ Of lesser effect were some minimal consumer protections that were generally included.⁹ Over the years, although there have been a few added consumer protections, further benefits have also been bestowed on small loan companies. For example, restrictions on the amount that small loan companies can loan at the authorized high rates

6. B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 2 (1965).

7. *See id.*

8. *Id.* at 16.

9. *See, e.g.*, WASH. REV. CODE ANN. § 31.08.150 (Supp. 1978) (prohibits certain deceptive advertising practices).

have been significantly liberalized.¹⁰ Finance companies, as the small loan companies are now more commonly known, still primarily engage in consumer credit transactions under these small loan laws in states with a scattered approach to consumer credit regulation.

Despite the presence of finance companies, most of the dollar volume of consumer credit lending today is by depositary institutions—those institutions allowed to accept deposits by their customers.¹¹ These depositary institutions—banks, credit unions, and savings and loan associations—are regulated solely by the states if they are state chartered. Federally chartered banks, credit unions, and savings and loan associations are also regulated by federal statutes and regulations. Problems created because of the interrelationship of the federal and state regulatory schemes will be discussed later.¹²

The major purpose of state regulation of consumer lending by depositary institutions, like federal regulation of those institutions, is the protection of depositors.¹³ Every state has general banking, credit union, and savings and loan laws with which lenders of each type must comply, whether engaging in consumer or nonconsumer lending.¹⁴ In addition, primarily to provide an exemption from the general usury rates that would otherwise be applicable, most states with a scattered approach also have other statutes specifically designed to regulate consumer lending by depositary institutions.

Morris Plan banks were the first type of bank engaged in consumer lending. They were first organized in 1910 and later became known as “industrial banks.” The major purpose of industrial banks was to enter the consumer lending market, which at the time was not financially interesting to commercial banks because of low usury rate limitations. General usury rate limitations were circumvented by industrial banks via a method of calculating a finance charge called “discounting” and by requiring each borrower to become a “depositor.” Loans with these features were called “industrial loans.” Over a period of years such loans were authorized in nearly half the states. In some states, lenders other than industrial banks, including traditional commercial banks, are allowed to grant industrial loans. The primary substantive provisions of industrial loan laws, in addition to authorizing industrial

10. See, e.g., *id.* § 31.08.160(1). The maximum amount that may now be loaned in Washington by a small loan company is \$2,500. *Id.*

11. NCCF REPORT, *supra* note 2, at 10.

12. Part II.B. *infra*.

13. NCCF REPORT, *supra* note 2, at 46.

14. B. CURRAN, *supra* note 6, at 45-47.

banks, are those that carve out a statutorily authorized exception to the general usury rates.¹⁵ Consumer protection is minimal in industrial loan laws; even the mild consumer protections found in the small loan acts are not generally evident.¹⁶

Commercial banks became heavily involved in consumer lending after the Depression. To avoid the general usury statutes, most states passed "installment loan laws," which authorized commercial banks to charge a higher rate of interest than permitted by the general usury statutes. Several states expanded their installment loan laws to authorize installment loans by industrial as well as commercial banks.¹⁷ Again, consumer protection is minimal. In states without special installment loan laws, banks make consumer loans solely under the general banking and usury laws or industrial loan laws.¹⁸

In addition to industrial loan, installment loan, general banking, banking, and usury laws, some states have specific statutes regulating, for example, loans pursuant to bank-issued credit cards¹⁹ or check-credit plans.²⁰ Once again, the primary function of such statutes is to allow a higher rate of finance charge than would otherwise be allowed by the general usury statute.²¹

Credit unions engage heavily in consumer lending.²² The primary focus of state laws regulating consumer loans by credit unions is also to establish a maximum rate of finance charge higher than the general usury rate.²³ In some states, however, there are no special consumer credit laws applicable to credit unions and the credit union is, therefore, subject only to the general usury statute,²⁴ or, in some states, to an installment loan law.²⁵

Savings and loan associations are generally permitted to engage in consumer loans secured by members' shares in, or savings accounts with, the associations. Most are also authorized to make unsecured loans for the purpose of repair and improvement to residential real

15. *Id.* at 52-53.

16. *See id.* at 59.

17. *Id.* at 66.

18. *See, e.g.*, WASH. REV. CODE ANN. § 19.52.020 (1978).

19. *E.g.*, OHIO REV. CODE ANN. § 1107.27 (1968).

20. *E.g.*, N.J. STAT. ANN. §§ 17:9A-59.6 to .8 (West Supp. 1978).

21. *See, e.g., id.* §§ 17:9A-59.7, .8.

22. In 1970, credit unions had \$12.5 billion of consumer credit outstanding which was 12.4% of all such credit outstanding. NCCF REPORT, *supra* note 2, at 11.

23. *See* B. CURRAN, *supra* note 6, at 47.

24. *See, e.g.*, WASH. REV. CODE ANN. § 19.52.020 (1978).

25. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5069-4.01(1) (Vernon 1971).

property. Unlike laws regulating loans by other depository institutions, consumer lending laws for savings and loans are primarily limited to merely an authorization of the loan.²⁶ The maximum rate of finance charge for a savings and loan association in a scattered approach state is usually that under the general usury statute.²⁷ In a few states, however, savings and loans are authorized to lend under installment loan laws.²⁸

Regulation of retail sellers who sell goods pursuant to a consumer credit transaction has a more recent history than the regulation of lenders. Until relatively recently, all aspects of retail consumer credit sales were unregulated. Because of the long accepted "time-price" doctrine, even the charge for credit was generally assumed to be excluded from the coverage of the states' general usury statutes.²⁹ In 1935, Indiana passed the first "retail installment sales act,"³⁰ and now most states have their own version. Initially, consumer protection consisted almost exclusively of disclosure requirements on the theory that informed consumers could not be hurt.³¹ Although disclosure remains the primary emphasis, most modern retail installment sales acts also prohibit certain abusive practices³² and limit the maximum rates of finance charge.³³

Some states have "all goods" retail installment acts that cover all credit sales of consumer goods.³⁴ Other states have one act for all consumer credit sales of goods other than motor vehicles and another for the credit sale of motor vehicles, and their provisions may vary substantially.³⁵

In a scattered approach state, then, one might find consumer credit

26. B. CURRAN, *supra* note 6, at 60-61.

27. *See, e.g.*, WASH. REV. CODE ANN. § 19.52.020 (1978).

28. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5069-4.01(1) (Vernon 1971).

29. Historically, retailers who sold goods on credit were considered not subject to usury limitations if the sale was structured as a "time-price sale." That is, the retailer could charge a higher "time-price" if the customer paid over a period of time than that normally charged if the customer paid a "cash price" at the time of sale. The difference between the normal cash price and the time-price, the "time-price differential," was generally not considered an interest or finance charge and, therefore, not controlled by usury statutes. For an analysis of the time-price doctrine, see *State v. J.C. Penney Co.*, 48 Wis. 2d 125, 179 N.W.2d 641 (1970).

30. B. CURRAN, *supra* note 6, at 2 & n.7.

31. *See* D. ROTHCHILD & D. CARROLL, *CONSUMER PROTECTION: TEXT AND MATERIALS* § 19.03 at 692 (2d ed. 1977).

32. *See, e.g.*, CAL. CIV. CODE § 1807.3 (West 1973) (limits the use of "balloon payments," payments that are substantially larger than other periodic payments).

33. *See, e.g., id.* § 1805.1.

34. *See, e.g.*, HAW. REV. STAT. § 476-1 to -38 (1976).

35. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 44-281 to -295, -6001 to -6006 (Supp. 1978).

regulation in the form of small loan laws, general usury laws, industrial loan laws, installment loan laws, credit card laws, laws affecting only check-credit plans, special provisions for credit unions, and/or one or more retail installment sales acts (depending upon the state and the type of goods—motor vehicle or not). Other consumer credit statutes such as those affecting consumer credit insurance,³⁶ insurance premium financing,³⁷ or even those solely affecting home improvements³⁸ might also be found. The complexity resulting from the scattered approach can best be illustrated by example. Below are four hypothetical consumer credit transactions applying relevant Washington law, an example of state regulation by the scattered approach.

a. Credit Sale Financed by the Seller

Assume Mike Little decides to purchase for his personal use a \$300 television set from Sally's Appliances. Further assume that Mike wants to have the transaction financed. Sally's, a new organization, decides that if they are going to compete they should offer credit and agrees to finance the transaction. The newly hired credit manager is given the task of setting up the transaction, and he contacts the attorney for Sally's for advice. The attorney remembers from law school³⁹ that Washington has a version of a retail installment sales act known as the Credit Disclosure Act. He finds it at Chapter 63.14 in the Washington Revised Code Annotated under the heading "Retail Installment Sales of Goods and Services."⁴⁰ It is applicable to Sally's transaction with Mike. Sally's attorney first searches for the maximum rate of finance charge available to Sally's for the transaction and finds, at section 63.14.130, a section entitled "Retail installment contracts and retail charge agreements—Service charge, composition, other fees and charges prohibited—Maximums."⁴¹ From the definition of "service charge,"⁴² Sally's attorney determines that the term is synonymous with

36. See, e.g., IOWA CODE ANN. §§ 509.1(3) (West Supp. 1978).

37. See, e.g., MICH. STAT. ANN. §§ 24.11501-.11514 (Callaghan 1974 & Supp. 1978).

38. See, e.g., N.C. GEN. STAT. § 54-21.4 (1975).

39. Students get little exposure in most law schools to the study of consumer credit law despite its complexity. To the extent it is a part of the curriculum, consumer credit law is generally part of a "consumer protection" course in which the instructor must also cover a variety of non-credit law such as warranty and state and federal unfair and deceptive trade practice laws.

40. WASH. REV. CODE ANN. ch. 63.14 (1966 & Supp. 1978).

41. *Id.* § 63.14.130 (Supp. 1978).

42. "the amount which is paid or payable for the privilege of purchasing goods or services to be paid for by the buyer in installments over a period of time." *Id.* § 63.14.010.

the "finance charge"⁴³ required to be disclosed under the federal Consumer Credit Protection Act.⁴⁴

As the title of section 63.14.130 suggests, in order to determine the applicable maximum rate the attorney must first determine whether the seller wants to utilize a "retail installment contract" or a "retail charge agreement." He finds from a comparison of the definitions of those terms that a "retail installment contract" contemplates a one-shot transaction,⁴⁵ whereas a "retail charge agreement" contemplates a revolving plan—more than one purchase by Mike.⁴⁶ After confirming it with Sally's, the attorney decides to utilize a "retail installment contract" that provides for thirty-six equal installments with a finance charge figured at the maximum applicable rate of one percent per month on the unpaid balance or twelve percent per annum.⁴⁷ As permitted by the Credit Disclosure Act, the contract also provides for a minimum finance charge of twenty-five dollars.⁴⁸ If Mike decides to pay off the obligation earlier than planned, this ensures that Sally's will receive at least a twenty-five dollar finance charge, whatever the maximum rate yields. If Sally's had opted for a "retail charge agreement," the maximum rate of finance charge would also be one percent per month.⁴⁹ The minimum finance charge for such agreements, however, is on a per month basis equaling one dollar per month, whatever the maximum rate yields.⁵⁰

The attorney wants to provide in the contract for a penalty charge if Mike is late in his payment and finds a provision for delinquency charges. He finds, however, that for both "retail installment contracts" and "retail charge agreements," there is no specified maximum delinquency charge, but only a provision for a "reasonable" delinquency charge.⁵¹ Nor can the attorney find a provision stating when a payment may be considered delinquent. Finding no relevant case law, the attorney provides in the contract for a delinquency charge of ten dollars or ten percent of the installment past due, whichever is less, whenever Mike is three days late.⁵² The attorney also provides for a security

43. 15 U.S.C. § 1605(a) (1976).

44. 15 U.S.C.A. §§ 1601-1693r (West 1974 & Supp. 1979); 18 U.S.C. §§ 891-896 (1976).

45. WASH. REV. CODE ANN. § 63.14.010(6) (Supp. 1978).

46. *Id.* § 63.14.010(7).

47. *Id.* § 63.14.130(1)(a).

48. *Id.* § 63.14.080.

49. *Id.* § 63.14.130(2).

50. *Id.*

51. *Id.* § 63.14.090 (1966).

52. This is a higher rate and a shorter time period for determining when the rate may be

interest in the television.

Mike defaults on his obligation and Sally's credit manager wants to repossess the television. Finding no prohibition of repossession under the Credit Disclosure Act, Sally's attorney merely advises Sally's credit manager not to trespass in repossessing the television because of the relevant provision against a "breach of the peace" under Washington's Uniform Commercial Code.⁵³

The credit manager gets Mike's permission to repossess the television, repossesses the television, and resells it for an amount less than the amount still owed. The credit manager then asks the attorney to sue for a deficiency judgment.⁵⁴ The attorney finds no prohibition against a deficiency judgment in the Credit Disclosure Act but does find this provision in Washington's version of section 9-501(1) of the Uniform Commercial Code:

Notwithstanding any other provision of this Code, in the case of a purchase money security interest in consumer goods taken or retained by the seller of such collateral to secure all or part of its price, the debtor shall not be liable for any deficiency after the secured party has disposed of such collateral . . . in satisfaction of the debt.⁵⁵

The attorney therefore advises Sally's credit manager that Sally's is not entitled to a deficiency. Sally's attorney makes a mental note that the next time he will advise Sally's to bring a simple action for breach of contract. Upon entry of a judgment, Sally's may have execution levied on the collateral and still have a remaining judgment for any deficiency left after the sheriff's sale of the collateral—the equivalent of repossessing collateral and suing for a deficiency.⁵⁶

b. Credit Sale Pursuant to a Retail Installment Contract Subsequently Assigned to a Finance Company

Assume that shortly after Mike's transaction, Sally's reconsiders

charged than allowed in some states for retail installment sales. *E.g.*, CAL. CIV. CODE § 1803.6 (West 1973). But with no statutory limitation in Washington other than "reasonable," the delinquency charges levied by merchants in Washington are not likely to be challenged. There are no reported cases in which such a challenge has been raised.

53. WASH. REV. CODE ANN. § 62A.9-503 (1966). The prohibition against a "breach of the peace" is the only UCC limitation concerning the process of self-help repossession.

54. *Id.* Section 62A.9-504 provides that a secured creditor is entitled, in a separate action, to any deficiency that remains after deducting from the proceeds of the resale, the costs of repossession, holding the collateral, preparing it for resale, permissible attorneys' fees and legal expenses, plus the remaining indebtedness.

55. *Id.* § 62A.9-501(1).

56. *See* *Lew v. Goodfellow Chrysler-Plymouth*, 6 Wash. App. 226, 231-32, 492 P.2d 258, 262 (1971) (dictum).

and decides they want out of the financing business.⁵⁷ Sally's assigns Mike's contract to Happy Finance Company.

It is generally assumed in Washington that assignees of a retail installment contract, whether finance companies or other legal entities organized as lenders, are subject to the terms of the Credit Disclosure Act and to the terms of the retail installment contract prepared by the seller and assigned. Also, although the above-quoted section 62A.9-501(1)⁵⁸ prohibits only the "seller" from obtaining a deficiency judgment, the limitation is assumed to be applicable to a lender who takes by assignment.⁵⁹

But consider the Washington Supreme Court case of *National Bank of Commerce v. Thomsen*.⁶⁰ The National Bank of Commerce was the assignee of a retail installment sales contract prepared by the seller of goods. Under Washington law, banks engaged in direct lending, whether or not for a consumer purpose, are subject to the general usury rate.⁶¹ At the time the transaction at issue was consummated, sellers in Washington were not subject to any maximum rate of finance charge. The "time-price" exception was accepted in Washington, and sellers were presumed to be able to charge whatever the traffic would bear as a "time-price differential."⁶² This, the bank argued, was the rate law applicable to it as a mere assignee of the seller, rather than the general usury rate law.⁶³ Not true, the court decided. When a lender

57. In increasing numbers, small retailers are getting out of the direct credit business. Most retailers in discussing this trend with the author have stated that they no longer wanted to extend credit directly because they no longer knew how to comply with both state and federal laws and because the costs of achieving and retaining compliance—primarily ever-increasing attorneys' fees—were prohibitive. Instead, these retailers now utilize bank charge card plans, assign all contracts or refer all customers to a finance company or bank that has agreed to finance the retailers' customers.

58. See text accompanying note 55 *supra*.

59. The author is aware of no cases in which the assignee-lender claimed the inapplicability of either the Credit Disclosure Act or § 62A.9-501. In a personal conversation in December 1977 with an attorney representing a large bank that finances consumer credit sales by taking assignment of credit sale contracts, the author was told that the assumption of the applicability of § 62A.9-501(1) has never been questioned by lender-assignees because of the (unrecorded) legislative history of the provision. During debate on the UCC, he stated, a number of legislators were concerned that the adoption of article 9 as originally drafted would, for the first time in Washington, allow deficiency judgments in a transaction pursuant to a conditional sales contract. Section 9-501 of the original UCC was, therefore, amended to prohibit deficiency judgments in all transactions that prior to the UCC's adoption would be considered conditional sales. The use of the word "seller" in amended § 9-501, he continued, has, therefore, always been thought to include the assignee of a conditional sales contract (retail installment contracts).

60. 80 Wash. 2d 406, 495 P.2d 332 (1972).

61. See WASH. REV. CODE ANN. § 19.52.020 (1978).

62. 80 Wash. 2d at 410-11, 495 P.2d at 335-36.

63. *Id.* at 408, 495 P.2d at 335.

such as the National Bank of Commerce regularly accepted the assignment of retail installment contracts from the seller, a *loan* was involved and not a sale. Therefore, the court held that National Bank, whether or not an assignee, was limited to the general usury rate applicable to banks.⁶⁴

The general usury rate for consumer loans by banks in Washington is by statute now equivalent to the maximum rate of service charge for sellers entering into consumer credit sales.⁶⁵ But that is not true for direct loans by small loan companies like Happy Finance.⁶⁶ Based on *National Bank*, could Happy Finance successfully argue that it should be subject to the small loan rate of up to thirty percent per year,⁶⁷ rather than Sally's twelve percent rate, and that it should not be subject to the limitation on deficiency judgments because it is truly a "lender" and not a "seller" as specified in the previously quoted Washington version of section 9-501(1) of the Uniform Commercial Code?⁶⁸ Who knows? There is a strong public policy argument to the contrary—the argument of Happy Finance, if accepted, would allow circumvention of Washington's limitation on the maximum rate for credit sales. There is, however, no statutory guidance on the issue. There are two provisions in the Credit Disclosure Act that prohibit the loss of "claims and defenses" available to the buyer because of the use of a waiver of defenses with respect to an assignee clause,⁶⁹ and there is a Federal Trade Commission rule to the same effect.⁷⁰ Such regulation, however, is designed to preserve the consumer's self-enforcement right of stopping payment in installment transactions.⁷¹ It is not designed to establish the substantive law on rates of finance charge or the availability of deficiency judgments to the credit grantor.⁷²

64. *Id.* at 415, 495 P.2d at 339.

65. For banks, the maximum rate is 12%, WASH. REV. CODE ANN. § 19.52.020 (1978), and for retailers, 12%, *id.* § 63.14.130 (Supp. 1978).

66. *Id.* § 31.08.160(1) (Supp. 1978) provides that small loan companies can charge a rate of finance charge of 30% per year on amounts loaned of up to \$500, 18% on the next \$500, and 12% on any amounts over \$1,000.

67. *Id.* § 31.08.160 (Supp. 1978).

68. See text accompanying note 55 *supra*.

69. WASH. REV. CODE ANN. §§ 63.14.020, .150 (1976).

70. Rule for the Preservation of Consumers' Claims and Defenses, 16 C.F.R. §§ 433.1-2 (1978).

71. See Crandall, *The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After*, 1973 WIS. L. REV. 334, 362-65 (1973).

72. See Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20,022 (1976).

c. Consumer Loan by a Small Loan Company

Assume again that Mike Little wants to purchase a television on credit from Sally's Appliances. This time, however, Sally's has already made a decision not to engage directly in the financing of sales. Instead, it has a working relationship with Happy Finance whereby it will refer all its customers directly to Happy Finance. Happy Finance will then decide whether to approve the requested credit. If credit is approved, Happy Finance grants a direct loan to Sally's customers, the proceeds of which will be directly payable to Sally's. Mike is referred to Happy Finance, who approves Mike's credit. Mike signs a consumer loan form and security agreement. Sally's receives the proceeds and goes broke.

Mike is charged the maximum rate of finance charge in Washington for "small loans" of \$500 or less—thirty percent per year.⁷³ No provision is made for a minimum finance charge because such charges are not permitted.⁷⁴ There is, however, a provision for the maximum permissible delinquency charge, and the signed "agreement" provides for the maximum. The small loan law specifies a maximum delinquency charge equivalent to "the portion of the precomputed charge applicable to the final installment period" if a scheduled installment is "in default more than seven days."⁷⁵

Mike is considered in default after he misses two payments, for which the finance company levies a delinquency charge. Mike authorizes Happy Finance to repossess the television.⁷⁶ Happy Finance repossesses the television, sells it and sues Mike for a deficiency judgment.⁷⁷

Mike finds his way to a legal services attorney. Mike is almost broke but wishes to avoid losing what little he has and asks the attorney to fight the deficiency action. The attorney tries to determine the applicability of section 62A.9-501(1).⁷⁸ He learns that lenders in the position of Happy Finance do not feel the section serves to limit their deficiency actions because when there is a direct loan no "seller" is involved.⁷⁹

73. WASH. REV. CODE ANN. § 31.08.160(1) (Supp. 1978).

74. *Id.* §§ 31.08.160(1), .200.

75. *Id.* § 31.08.160(3)(d).

76. *See* note 53 and accompanying text *supra*.

77. *See* note 54 *supra*.

78. *See* text accompanying note 55 *supra*.

79. The type of security interest taken by the lender would have been considered a chattel mortgage prior to the passage of the UCC. Given the assumed legislative history of § 62A.9-501(1), it is presumed that there is no limitation on deficiency judgments when a security interest

Mike's attorney might argue that the close relationship of the seller and the lender should make the lender subject to the no-deficiency-judgment limitation of section 62A.9-501. There is, however, no Washington statute or case authority on point. Washington's entirely separate treatment of sales and direct loans is typical of states with the scattered approach although such treatment perpetuates anomalous results and does little to promote understanding of the law.

d. Consumer Loan by a State Chartered Bank

Assume that instead of first going to Sally's, Mike finds his way to the New State Bank and informs the loan officer that he wants to borrow three hundred dollars for a new television. New State Bank tells Mike that they will be glad to loan him the money as soon as he tells them where he is going to buy the television. Mike leaves, finds the television he wants at Sally's and tells Sally's manager that he will return.

Mike returns to New State Bank and receives a loan of three hundred dollars, with the proceeds in the form of a check payable to Mike and Sally's.⁸⁰ Mike signs a "loan agreement," which includes a security agreement. The "agreement" provides for a maximum rate of finance charge of twelve percent per annum or, in the alternative, for a minimum charge, designed as a "setup charge," of twelve dollars. In addition, the bank provides for a delinquency charge of five percent or ten dollars, whichever is less.

Mike misses two payments, for which delinquency charges are levied. The bank repossesses the television with Mike's permission, sells the television and sues for a deficiency. This time, Mike's attorney correctly concludes there is indeed no limitation on deficiency judgments because there is not even a close relationship here between the lender and seller.⁸¹ The maximum rate and "setup charge" are found to be proper.⁸² The attorney, however, finds no authorization for delinquency charges in the usury statute or elsewhere and asks the court to offset from the bank's deficiency request penalties, for this violation of

in the form of a pre-UCC chattel mortgage is taken. Although a "purchase money loan" is granted, WASH. REV. CODE ANN. § 62A.9-107(b) (1966), lenders, despite the close relationship with sellers like that present in the instant case, do not feel they are "sellers" as required for the application of § 62A.9-501(1). See note 59 *supra*.

80. This ensures New State Bank's status as a purchase money creditor. See WASH. REV. CODE ANN. § 62A.9-107(b) (1966).

81. See notes 55, 59 & 79 and accompanying text *supra*.

82. WASH. REV. CODE ANN. § 19.52.020 (1978).

the usury statute, equivalent to all interest earned plus twice the amount of all interest paid.⁸³

There is indeed no statutory authorization under the general usury rate or elsewhere for delinquency charges on loans by banks, but they are regularly charged in Washington. Arguably, delinquency charges should not be considered as part of the finance charge used in calculating the rate because the Truth in Lending Act, for purposes of disclosure,⁸⁴ and the Washington Credit Disclosure Act, for purposes of determining whether the "service charge" is within the specified maximum rate,⁸⁵ specifically exclude such charges from the finance charge. By analogy, therefore, reasonable delinquency charges should be excluded from the finance charge under Washington's general usury rate. This issue, like so many others, is left unanswered by Washington statutes and case law.

If Mike had purchased the television from Sally's pursuant to a credit card issued by New State Bank, the maximum rate available to the bank would once again be limited to twelve percent per annum.⁸⁶ Most banks in Washington also levy a minimum finance charge each month on credit card transactions from one dollar per month, when the credit card is used to purchase goods, to as much as four dollars *per transaction*, when the credit card is used for a withdrawal of cash.⁸⁷ It is presumed banks find the authorization for these charges from the general usury rate's "setup charge." The general usury statute, in relevant part, states:

Provided, That in any loan of money in which the funds advanced do not exceed the sum of five hundred dollars, a setup charge may be charged and collected by the lender, and such setup charge shall not be considered interest hereunder:

Provided further, That such setup charge does not exceed four percent of the amount of funds advanced, or fifteen dollars, whichever is the lesser, except that on loans of under one hundred dollars a minimum not exceeding four dollars may be so charged.⁸⁸

The purpose of the setup charge is to provide a minimum charge that will reimburse the creditor for initial write-up costs that are fixed

83. *Id.* § 19.52.030.

84. 15 U.S.C. § 1605(d)(4) (1976), *interpreted in* Federal Reserve Board Regulation Z, 12 C.F.R. 226.4(c) (1978).

85. WASH. REV. CODE ANN. §§ 63.14.010(8) (Supp. 1978).

86. *See id.* § 19.52.020 (1978).

87. The \$4.00 charge, for example, is levied when a customer uses a credit card in an automatic teller machine and receives a dispersal of cash from the machine.

88. WASH. REV. CODE ANN. § 19.52.020 (1978).

whatever the amount of the loan. This charge, however, was apparently only intended to apply to traditional closed-end, nonrevolving loans in which it is a one-shot charge.⁸⁹ It is, therefore, questionable whether the present banking practice of levying a monthly setup charge for a revolving loan was ever specifically contemplated by the legislature or covered by the statute's purpose. At any rate, the Washington Legislature has also left the legal resolution of this issue to guesswork.

The above examples demonstrate that designing a road map to the state's consumer credit laws is not a simple task when a state has a scattered approach to consumer credit regulation. Also, only the Washington law on the issues of the maximum rate of finance charge, the minimum finance charge, delinquency charges, and the availability of a deficiency judgment were considered. Yet, to find the applicable law, a person was required to wade through Washington's version of a retail installment sales act, small loan law, general usury law, and a provision of the UCC made directly applicable in Washington to certain consumer credit transactions. Even with a thorough search of the statutes, the incompleteness of the Washington statutes and the separate treatment of the different transactions required a good deal of guesswork in determining the applicable law.

If one searched out the applicable law in another scattered approach state, he might find even more confusion. For example, note in the first hypothetical that the maximum rate of finance charge is the same in Washington for a credit sale whether or not it is open-end ("retail charge agreement") or other than open-end ("retail installment contract").⁹⁰ In North Carolina the maximum rate of finance charge for an open-end credit sale is eighteen percent per year,⁹¹ but for an other than open-end credit sale it is twenty-two percent per year.⁹² This too is qualified. If the credit sale of an automobile that is repayable in six or more installments is involved, the maximum rate is twenty-nine percent per annum.⁹³

Likewise, as discussed in the last hypothetical, although the maximum rate of finance charge of twelve percent per annum for an other

89. See 15 U.S.C. § 1602(i) (1976), for a definition of "open-end credit plan." Whereas an "open-end" plan contemplates ongoing transactions "from time to time," closed-end credit does not, as, for example, in the typical installment loan in which the amount borrowed plus precomputed finance charges is to be repaid at a specified date in the future.

90. See text accompanying notes 47 & 49 *supra*.

91. N.C. GEN. STAT. § 24-11 (1974 & Cum. Supp. 1977).

92. *Id.* § 25A-15 (Cum. Supp. 1977).

93. *Id.*

than open-end bank loan is the same in Washington as that for an open-end bank loan pursuant to a credit card,⁹⁴ most states have rates that differ for such loans. In North Carolina, again, the maximum rate for the other than open-end bank loans is fifteen percent per year,⁹⁵ but for bank loans pursuant to a credit card it is eighteen percent per year.⁹⁶

It is not enough to answer in response to the needless complexity found with the scattered approach that individual creditors will know the laws applicable to them. In fact, that is often not the case, and such a lack of knowledge can have disastrous consequences.⁹⁷ Of course, a particular state could revise its statutes piecemeal as irreconcilable problems with interpretation are found. But the political reality is that state legislatures are slow to adopt such legislation even when there is no opposition. Even if credit grantors were able to cope and state legislatures quick to respond, the scattered approach would still needlessly confuse consumers.

Why have the states not adopted a comprehensive code that in one

94. See text accompanying note 86 *supra*.

95. N.C. GEN. STAT. § 24-1.2 (Cum. Supp. 1977).

96. *Id.* § 24-11(a).

97. In *State v. J.C. Penney Co.*, 48 Wis. 2d 125, 179 N.W.2d 641 (1970), the court found that J.C. Penney was violating Wisconsin's usury statute by charging an 18% rate of finance charge on transactions in which the customer utilized a Penney's issued charge card. Penney's lawyers had mistakenly interpreted the usury law by treating its finance charge for card transactions as a "time-price differential" not subject to the usury statute. See note 29 and accompanying text *supra*. This mistake was understandable; Wisconsin had the scattered approach at the time of the decision and it was unclear what statute, or indeed whether any statute, was applicable to charge cards.

The statutory penalty in Wisconsin for a violation of the state usury statute at the time of the case included a forfeiture of *all principal* under \$2,000. WIS. STAT. ANN. § 138.06(1) (West 1974). No malice on the part of the creditor needed to be shown before recovery, see 48 Wis. 2d at 150-51, 179 N.W.2d at 655, although an unintentional violation of the usury statute, corrected upon demand, did not affect enforceability of the contract as corrected, WIS. STAT. ANN. § 138.06(5) (West 1974). All Wisconsin retailers with charge cards were charging the 18% rate at the time of the Penney's decision and the author quite vividly recalls the understandable panic that *J.C. Penney* caused. The author was told on a number of occasions by representatives of retailers that the total monetary penalties that could be levied against all retailers in violation of the usury statute could exceed \$1 billion.

The retailers formed a strong lobby to ensure the passage of what became known both to proponents and opponents as the "forgiveness bill." It passed in the dying days of the 1972 special legislative session, Law of May 11, 1972, ch. 308, 1971 Wis. Laws 1238 (codified at WIS. STAT. ANN. § 138.06(6), (7) (West 1974)), but only after a great deal of expense and worry. In fact, the *J.C. Penney* decision was also responsible, to some extent, for the passage of the Wisconsin Consumer Act. WIS. STAT. ANN. §§ 421.101 - 427.105 (West 1974 & Supp. 1978). The retailer lobby, as well as all creditor lobbies, was told by then Governor Patrick Lucey that if it did not negotiate in good faith on a comprehensive consumer credit package the Governor would not sign any individual items of legislation solely in their interest. The retail lobby assumed this statement included the "forgiveness bill," and presumably, at least partly for this reason, the retail lobby negotiated in good faith on the initial version of the Wisconsin Consumer Act.

place contains all applicable consumer credit laws whatever the type of credit grantor? That occurred to the National Commissioners of Uniform State Laws, who, in 1968, proposed the Uniform Consumer Credit Code (UCCC) for adoption in every state.⁹⁸ The 1968 UCCC was revised a number of times until, in 1974, the final draft was adopted by the National Commissioners.⁹⁹

One of the basic assumptions of the drafters of the UCCC was that "consumer credit legislation should be contained in one law so that any attorney can quickly and effectively advise his consumer client."¹⁰⁰ The UCCC drafters felt "only an expert [could] find or understand" consumer credit law under the scattered approach.¹⁰¹ One of the underlying purposes of the UCCC was "to simplify, [and] clarify" consumer credit laws.¹⁰²

The UCCC was so drafted that it does contain all legislation directly relevant to consumer credit transactions as defined therein. Thus, the relevant consumer credit law in each of the Washington hypotheticals discussed above would be decided in a UCCC state under only the UCCC without resort to a different applicable set of statutes that are dependent on the type of creditor and/or consumer credit transaction. By consolidating all consumer credit law into one statute, the UCCC does indeed simplify and clarify consumer credit law.

The UCCC, if adopted, would also serve to simplify and clarify by answering most of the unanswered questions raised by the statutes of a state, such as Washington, with the scattered approach. For example, as illustrated in the second hypothetical above, it is unclear in Washington what the maximum rate of finance charge is in a credit sale in which the retail installment contract is assigned by the seller to a finance company.¹⁰³ That rate issue is clearly resolved by the UCCC's definition of "seller" to include an assignee of the seller's right to payment.¹⁰⁴ In the last hypothetical, which involved a closed-end consumer loan by a state chartered bank, it was noted that Washington's consumer credit laws made no provision for a delinquency charge in such a transaction.¹⁰⁵ The UCCC specifically provides for a delin-

98. UNIFORM CONSUMER CREDIT CODE (1968 version).

99. UNIFORM CONSUMER CREDIT CODE.

100. *Id.* Prefatory Note (1968 version).

101. *Id.*

102. *Id.*

103. See notes 57-72 and accompanying text *supra*.

104. UNIFORM CONSUMER CREDIT CODE § 1.301(38).

105. See notes 83-85 and accompanying text *supra*.

quency charge for all closed-end consumer loans, limited to five dollars or five percent of the unpaid installment, whichever is less.¹⁰⁶

Although the UCCC's comprehensive approach would do much to simplify and clarify consumer credit regulation, it is not above criticism. The UCCC does contain some difference in treatment between sales and loans.¹⁰⁷ To some extent this is justified and cannot be avoided,¹⁰⁸ but the distinction is also retained in sections in which it is not justified.¹⁰⁹ Also, some of the UCCC's substantive provisions leave much to be desired from a consumer advocate's viewpoint.¹¹⁰ Moreover, unless it is adopted on a broad scale and in substantially the same form, the UCCC would not cure the problem of lack of uniformity among the states.¹¹¹

Very few states, however, have seen fit to adopt the UCCC or any other comprehensive approach. The 1968 UCCC has gained full acceptance in only six states.¹¹² Kansas adopted a later version.¹¹³ The 1974 UCCC has not yet been adopted anywhere. Some states have adopted comprehensive codes other than the UCCC,¹¹⁴ but the vast

106. UNIFORM CONSUMER CREDIT CODE § 2.502.

107. The 1968 version of the UCCC treated sales and loans entirely separately in articles 2 and 3. The 1974 UCCC, for the most part, has the same substantive provisions for all "consumer credit transactions." *See, e.g.*, UNIFORM CONSUMER CREDIT CODE § 2.505 (finance charge on consolidation).

108. Some provisions are not applicable to both loans and sales; for example, the provision on referral sales. *Id.* § 3.309.

109. *See, e.g., id.* § 5.103(1) (limits deficiency judgments in all consumer credit sales in which the goods purchased have a purchase price of \$1,750 or less, but limits deficiency judgments in loans to purchase such goods only when the lender is closely related to the seller).

110. The most extensive compilation of consumer concerns with the 1974 UCCC can be found in National Consumer Law Center, Suggested Amendments to the 1974 Uniform Consumer Credit Code (1974) (unpublished document prepared by the National Consumer Law Center, Boston, Mass.) (copy on file at University of North Carolina School of Law Library). For a discussion of the various consumer criticisms directed toward the 1968 UCCC, see D. ROTHCHILD & D. CARROLL, *supra* note 31, § 19.06 at 807. Probably the most highly criticized provisions are the UCCC rate provisions, which, if adopted, would result in significantly higher maximum rates in most states. For example, § 2.202(3) of the 1974 UCCC would permit a maximum rate of finance charge on open-end sales of up to 24% per year although most states now limit the maximum rate on such transactions to 18% per year. *See generally* 1 CONS. CRED. GUIDE (CCH) ¶ 630 (1977).

111. *See* Part II.A.2. *infra*.

112. *See* COLO. REV. STAT. §§ 5-1-101 to -9-103 (1973 & Supp. 1976); IDAHO CODE §§ 28-31-101 to -39-103 (Supp. 1978); IND. CODE ANN. 24-4.5- 1-101 to 6-202 (Burns 1972 & Supp. 1974); OKLA. STAT. ANN. tit. 14A, §§ 1-101 to 9-103 (West 1972 & Supp. 1978); UTAH CODE ANN. §§ 70B-1-101 to -9-103 (Supp. 1977); WYO. STAT. §§ 40-14-101 to -14-702 (1977).

113. KAN. STAT. ANN. §§ 16a-1-101 to -9-102 (1974 & Supp. 1978).

114. Iowa Consumer Credit Code, IOWA CODE ANN. §§ 537.1101-.7103 (Supp. 1978); Louisiana Consumer Credit Law, LA. REV. STAT. ANN. §§ 9:3510-.3571 (West Supp. 1978); Maine Consumer Credit Code, ME. REV. STAT. ANN. tit. 9A, §§ 1.101 to 6-415 (Supp. 1978); South Carolina Consumer Protection Code, S.C. CODE §§ 37-1-101 to -9-102 (1976 & Supp. 1978); West Virginia

majority still cling to the cumbersome scattered approach.¹¹⁵ There are a number of reasons for this reticence to restructure state consumer credit regulation into a comprehensive approach. State legislators do not like to tackle as complex a field as consumer credit, particularly when it involves undoing years of legislation. With the dearth of experienced staff and the lack of other legislative resources at the state level, who can blame them? Also, during the massive revision of consumer credit laws required for the enactment of a comprehensive code, consumer advocates will seek more protection and argue for lower rates than creditor advocates. This is a mild summation of what will be a tough, highly publicized, political fight, which most state legislators would like to avoid. It is much easier to obtain passage of a limited amendment of one section of one act, affecting one industry, and thereby perpetuate the scattered approach.¹¹⁶

2. Lack of Uniformity

The present approach to consumer credit regulation by the states creates problems beyond the mere complexity of any one state's consumer credit statutes. As is evident from the above discussion, states have substantially different provisions governing the maximum rate of finance charge, methods of calculating delinquency charges, and consumer protections such as disclosure, prohibited practices or creditors' remedies. For the interstate creditor, nonuniformity can be costly. It is not always clear which state's laws are applicable in a credit transaction involving a consumer in one state and a creditor in a different state. Moreover, even when a creditor engaged in interstate business *knows* which state's laws are applicable, it is costly to tailor separate lending operations for each state.

A creditor with an office in State X who extends credit in State X to a borrower who resides in State X is clearly subject to State X's consumer credit laws. As the above discussion on the complexity of state laws indicates, however, determining each state's consumer credit laws may be a very difficult and, therefore, costly task. State-by-state compliance typically involves hiring local counsel, maintaining, and keep-

Consumer Credit Protection Act, W. VA. CODE ANN. §§ 46A-1-101 to -8-102 (1976 & Supp. 1978); Wisconsin, WIS. STAT. ANN. §§ 421.101 to .105 (West Supp. 1978).

115. Because there are only 7 UCCC states, plus 6 other states having a comprehensive approach, 37 states still have the scattered approach.

116. These conclusions are based on the author's lobbying efforts in Wisconsin for consumer interests on the Wisconsin Consumer Act and other low income issues in 1970-1973, and in Pennsylvania on consumer credit and other issues in 1973-1974.

ing current, separate forms for initiation of a transaction,¹¹⁷ and may involve formulating different collection procedures and employee training programs.¹¹⁸ Aldens, Inc., a large mail-order retailer with its chief place of business in Illinois, has estimated that its cost of compliance with the differing consumer credit laws in all fifty states would be in excess of \$320,000.¹¹⁹ That estimate does not include revenue loss represented by varying rates of maximum finance charge.¹²⁰ Obviously, compliance costs are passed to the consumer in the form of higher retail prices or finance charges.

When the interstate creditor is also faced with a choice of law problem, the specter of penalties for failure to comply arises.¹²¹ Yet, there is very little guidance from the courts on choice of law issues.

Assume, for example, that a consumer from State X, because of the creditor's advertisements in State X, enters into a consumer credit transaction at the creditor's office in State Y. Consumer, pursuant to his understanding with the creditor, then returns to State X to spend the money borrowed or utilize the goods purchased. Creditor charges the maximum rate of finance charge applicable in State Y—eighteen percent. The consumer defaults, and the creditor brings an action for breach of contract. The consumer counterclaims for damages based on State X's usury law, which limits a creditor to a maximum of twelve percent. Is the creditor subject to State X's sanctions for violation of State X's usury law or is the creditor correct in its contention that State Y's law applies?

The general conflict of laws rule in usury cases has been that a court should apply the law of the state in which the contract is valid rather than applying the sanctions of the state that would make the contract usurious, provided that the state whose usury law is used bears a normal relationship to the transaction.¹²² Under this general rule, which supports the validity of a contract, the State Y rate will stand

117. For example, to comply with the disclosure requirements of the Consumer Credit Protection Act, a creditor must alter his disclosures so as to disclose the rate of finance charge levied in each state. 15 U.S.C. § 1639(a)(4) (1976). Disclosure forms may also differ from state to state because some states require disclosures in addition to those required by the CCPA. See Part II.B.2. *infra*.

118. Several states have quite detailed acts regulating debt collection practices by creditors enforcing their own obligations. *E.g.*, WIS. STAT. ANN. ch. 427 (West 1974 & Supp. 1978).

119. *Aldens, Inc. v. Packel*, 379 F. Supp. 521, 525 (M.D. Pa. 1974), *modified*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

120. *Id.*

121. These can be substantial. See, *e.g.*, WIS. STAT. ANN. § 425.305 (West 1974) (transaction void).

122. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 331 (1972).

even though it is higher than the State X rate.¹²³ The obvious effect of this rule is to encourage a creditor to contract for the higher rate. That is problematical from a public policy view. At least, if all courts utilized the rule, it would provide some certainty. But certainty is not to be found in choice of law issues; the theories used in many jurisdictions in place of the general validation rule are complex and do little to build confidence in predicting which state's laws will govern.

Some courts reject the general rule because it is felt that it does not allow a state to protect its consumers from overreaching.¹²⁴ Other courts place the greatest significance on the place of the making of the contract unless the parties agree that another state's laws shall govern, and there is a reasonable basis for the parties so agreeing.¹²⁵ The proviso forces inquiry into the relative bargaining power of the contracting parties. In a consumer credit context, therefore, the proviso inherently creates reliance problems for the creditor uncertain about a later court's decision on the bargaining power issue.

Other courts have adopted a significant contacts or center of gravity test. What contacts are the most important thus becomes an issue.¹²⁶ Still other courts use different theories at the same time in a particular case. For example, in *Cooper v. Cherokee Village Development Co.*,¹²⁷ in which the issue was whether a New York or Arkansas usury rate was applicable, the court considered five different conflict theories to come to its decision.¹²⁸

Section 203 of the *Restatement (Second) of Conflict of Laws* is an attempt to present a universally acceptable rule. The rule states:

The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly

123. See *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927) (when the court must choose between the law of the place where the contract is made and the law of the place where the contract is performed, court should choose the law most favorable to the lender and validate the contract).

124. See Prebble, *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws*, 58 CORNELL L. REV. 635, 681-85 (1973).

125. E.g., *Lyles v. Union Planters Nat'l Bank*, 239 Ark. 738, 393 S.W.2d 867 (1965).

126. *Pioneer Credit Corp. v. Catalano*, 51 Misc. 2d 407, 273 N.Y.S.2d 310 (Columbia County Ct. 1966).

127. 236 Ark. 37, 364 S.W.2d 158 (1963).

128. The court considered the following theories: where the contract is "made" or the *lex loci contractus* theory, *id.* at 41-42, 364 S.W.2d at 161-62; the "law of the state in which the contract is to be performed in its most essential features," *id.* at 42, 364 S.W.2d at 161; the law of the state to which the parties agreed as long as that state has a substantial connection, *id.*; the general rule of validation, *id.* at 45, 364 S.W.2d at 162; and the grouping of contracts theory, *id.*

in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.¹²⁹

This rule still leaves complex issues for the courts because of the use of the terms "not greatly in excess" and "substantial relationship," and courts have been slow to adopt the section. In the hypothetical discussed above, for example, the forum court would have to decide whether the eighteen percent rate of State Y is "not greatly in excess" of the twelve percent rate of State X. A comment to section 203 states that if the variance is only a "few" percentage points higher, the higher rates should still be followed.¹³⁰ How many are a "few" percentage points? The "greatly in excess" language also raises the issue whether the court is to compare the maximum rate of finance charge permitted under each state's statutes or the rate actually charged under the contract at issue with the maximum rate permitted in the other state at issue. In *O'Brien v. Shearson Hayden Stone, Inc.*,¹³¹ a majority of the Washington Supreme Court stated in dictum that, since the maximum rate of finance charge in New York for the transaction at issue was 25%, the rate "was 'greatly in excess of the [12%] rate *permitted* by the general usury law of the state of the otherwise applicable law under the rule of § 188'—the State of Washington."¹³² The lone dissenting justice argued that the words "permissible in the state to which the contract has a substantial relationship" contained in section 203 logically refer only to the actual rate charged and not to the maximum rate allowed by statute.¹³³ The *Restatement* rule, then, does little to avoid the confusion in the law.

In response to the confusion with respect to conflicts principles and to better protect consumers, some states have passed statutes specifically making their state's law the applicable law if that state is the domicile of the debtor.¹³⁴ Three recent United States Court of Appeals decisions have upheld the constitutionality of this kind of statute.

In *Aldens, Inc. v. Packel*,¹³⁵ Aldens sought injunctive and declaratory relief against the enforcement of such a Pennsylvania law. Aldens is an Illinois corporation not registered in Pennsylvania and with no assets or employees there. Aldens advertises by mail-order catalog and

129. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1971).

130. *Id.* § 203, comment *b* (1971).

131. 90 Wash. 2d 680, 586 P.2d 830 (1978).

132. *Id.* at 687, 586 P.2d at 834.

133. *Id.* at 693, 586 P.2d at 838 (dissenting opinion).

134. *E.g.*, 69 PA. STAT. ANN. § 1103 (Purdon Supp. 1978).

135. 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

flyers, ships all orders F.O.B. to another state and handles all its billing and credit in Illinois. Aldens' credit agreements are used nationwide and provide for twenty-one percent interest on a balance of \$350 or less, and twelve percent on one greater than \$350.¹³⁶ The agreement used by Aldens was valid under Illinois law but not Pennsylvania law, which limited the maximum rate on consumer credit sales to fifteen percent.

The court of appeals affirmed Pennsylvania's right to regulate the rate of interest charged by Aldens to consumers in that state. It was held that the territorial application statute did not violate any provisions of the United States Constitution. The court found that Pennsylvania's interest in protecting its citizens outweighed Illinois' interests, even though nearly all the relevant contacts were in Illinois. In considering the burden on interstate commerce, the court noted that there is a tremendous lack of uniformity among the states¹³⁷ but that only Congress could remedy the confusion.¹³⁸

In the second case, *Aldens, Inc. v. LaFollette*,¹³⁹ Aldens challenged the Wisconsin Consumer Act's provision on territorial applicability. The facts were essentially the same as in *Packel*, and the *LaFollette* court adopted the *Packel* decision. The court in the third case, *Aldens, Inc. v. Ryan*,¹⁴⁰ again on similar facts, affirmed Oklahoma's right to regulate the interest rate Aldens charged to Oklahoma's consumers.

The state territorial applicability statutes at issue in the *Aldens* cases do provide a greater degree of certainty for the interstate creditor in the interstate transaction. But such statutes do not answer all choice of law issues,¹⁴¹ nor are they uniform.¹⁴²

The problems with state by state compliance and choice of law

136. *Aldens, Inc. v. Packel*, 379 F. Supp. 521, 525 (M.D. Pa. 1974).

137. 524 F.2d at 48, n.15.

138. *Id.* at 48-49.

139. 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977).

140. 571 F.2d 1159 (10th Cir.), *cert. denied*, 99 S. Ct. 180 (1978).

141. *See O'Brien v. Shearson Hayden Stone, Inc.*, 90 Wash. 2d 680, 586 P.2d 830 (1978). This case was a complicated one involving the issue whether the usury law of Washington, or that of two other states, California and New York, was applicable. The plaintiff was a Washington resident and Washington's usury law provides, in part, as follows:

Whenever a loan or forbearance is made outside Washington state to a person then residing in this state the usury laws found in chapter 19.52 RCW, as now or hereafter amended, shall be applicable in all courts of this state to the same extent such usury laws would be applicable if the loan or forbearance was made in this state.

WASH. REV. CODE ANN. § 19.52.034 (1976). Yet, the Washington Supreme Court evidently totally ignored the statute because no mention is made of it in the opinion.

142. *Compare* 69 PA. STAT. ANN. tit. 69, § 1103 (Purdon Supp. 1978) *with* WIS. STAT. ANN. § 421.201 (West 1974 & Supp. 1978).

issues could be significantly diminished by the adoption of a truly uniform consumer credit code.¹⁴³ The Uniform Consumer Credit Code was designed to solve the uniformity problem in all fifty states.¹⁴⁴ As previously noted, however, the UCCC has been adopted in full in only seven states, with six adopting the 1968 version and Kansas enacting a later version.¹⁴⁵

Even those six states who adopted the 1968 version often adopted significantly different provisions.¹⁴⁶ For example, in the 1968 UCCC the maximum annual rate of finance charge for other than open-end consumer credit sales was thirty-six percent on the first \$300, twenty-one percent on the next \$700, and fifteen percent on any amount over \$1,000 or a flat rate of eighteen percent.¹⁴⁷ The dollar amounts were to be subject to change pursuant to the provisions on adjustment of dollar amounts.¹⁴⁸ Colorado substituted twenty-five percent for thirty-six percent and twenty percent for twenty-one percent.¹⁴⁹ Oklahoma substituted thirty percent for thirty-six percent.¹⁵⁰ Colorado, Oklahoma and Wyoming deleted the subsection providing for a change in the dollar amounts, while Idaho, Utah and Indiana adopted differing provisions for the adjustment of dollar amounts so that in Idaho and Utah, \$300 is now \$540, and \$1,000 is now \$1,800, while in Indiana, \$300 is now \$450, and \$1,000 is now \$1,500.¹⁵¹ So much for the uniformity that the UCCC drafters thought would facilitate and reduce the costs of interstate operations and maximize the understanding of today's mobile consumers.¹⁵²

3. Inadequacy of State Consumer Protection Measures

Most states have failed to exercise adequately their current authority over consumer credit transactions by refusing to enact sufficient consumer protection measures. This is particularly true in consumer credit transactions secured by personal property of the consumer.

143. Only "significantly diminished," rather than entirely removed, because of the likelihood of differing opinions by states on identical provisions.

144. UNIFORM CONSUMER CREDIT CODE, Prefatory Note (1968 version).

145. See notes 112 & 113 and accompanying text *supra*.

146. Oklahoma made over 200 modifications. See D. ROTHCHILD & D. CARROLL, *supra* note 31, § 19.06 at 811.

147. UNIFORM CONSUMER CREDIT CODE § 2.201(2) (1968 version).

148. *Id.* § 2.201(7). The provision for the adjustment of dollar amounts is at *id.* § 1.106.

149. See 1 CONS. CRED. GUIDE (CCH) ¶ 5635.

150. See *id.*

151. See *id.*

152. See UNIFORM CONSUMER CREDIT CODE, Prefatory Note (1968 version).

Forty-nine states have adopted the Uniform Commercial Code.¹⁵³ Article 9 of the UCC defines the rights and remedies of a secured creditor and debtor.¹⁵⁴ Although the first drafts of Article 9 contained a number of consumer protection provisions,¹⁵⁵ they became the subject of a great deal of criticism.¹⁵⁶ The draftsmen, therefore, decided to leave consumer protection to state consumer credit legislation such as retail installment sales acts.¹⁵⁷ The UCC was rewritten to provide that state consumer credit regulation would not be repealed by the UCC's passage.¹⁵⁸ As illustrated by the following examples, however, most states have failed to amend their consumer credit laws to fill the consumer protection gaps left in Article 9.

a. Defining "Default"

Under Article 9 of the UCC, when the debtor defaults, the secured creditor has the right to reduce his claim to judgment, foreclose or otherwise enforce the security interest.¹⁵⁹ The creditor may repossess, with or without judicial process, any collateral of the debtor¹⁶⁰ and then sell the repossessed collateral.¹⁶¹ Despite these obviously significant consequences of default, the UCC does not define the term. The reason for this omission is the UCC's strong bias for the "freedom of contract" principle.¹⁶² A default occurs when the parties' "agreement" states that it occurs. In the typical consumer credit transaction, however, an "agreement" is not reached through "freedom" of contract. As stated by the National Commission on Consumer Finance:

[T]he time has come to recognize that in consumer credit transactions the creditor's ability to use a full range of collection devices is not a matter for creditor-debtor negotiation but a set of contractual conditions imposed by the creditor on 'a take-it-or-leave-it basis.' The disparity in bargaining power between creditor and debtor in consumer

153. Louisiana has yet to adopt the Uniform Commercial Code as such. However, articles 1, 3, 4, 5, 7 and 8 of the UCC have been adopted in substance. LA. REV. STAT. ANN. §§ 10:1-101 to :8-501 (West Supp. 1978).

154. See U.C.C. § 9-102.

155. See Gilmore, *The Secured Transactions Article of the Commercial Code*, 16 LAW & CONTEMP. PROB. 27, 45 (1951).

156. I G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 293 (1965).

157. Gilmore, *supra* note 155, at 45.

158. U.C.C. § 9-203(2), Official Note. See V. COUNTRYMAN & A. KAUFMAN, COMMERCIAL LAW: SELECTED STATUTES 483 (1976).

159. U.C.C. § 9-501(1).

160. *Id.* § 9-503.

161. *Id.* § 9-504(1).

162. See *id.* § 1-102(3) and Official Comment 2; V. COUNTRYMAN & A. KAUFMAN, *supra* note 158, at 20, 22.

transactions is a fact of the marketplace¹⁶³

What constitutes a "default" in a typical secured consumer credit transaction, then, is what the creditor says constitutes a default.¹⁶⁴ The term is generally defined broadly to include the consumer's failure to obey any covenant such as the obligation to pay when due, to keep insurance on the collateral and to avoid any activity that makes the creditor feel "insecure."¹⁶⁵ The definition of default imposed by the creditor is most often coupled with a provision enabling a creditor to accelerate the entire obligation immediately upon the occurrence of any default.¹⁶⁶ In the case of missed installments, an acceleration clause serves the valid purpose of allowing the creditor upon default to sue on the entire obligation rather than suing for each installment as it comes due. When the customer has no right to cure the default, however, a creditor can conceivably refuse to accept a payment that is only one day late and insist on payment of the full amount of the debt. Or the creditor may, when there is no right to cure, refuse to allow the debtor to remedy some other default under the contract, such as failure to insure the collateral.¹⁶⁷

163. NCCF REPORT, *supra* note 2, at 23 (footnotes omitted).

164. Shuchman, *Consumer Credit by Adhesion Contracts*, 35 TEMP. L.Q. 125, 132 (1962).

165. The following terms from a form contract are representative:

DEFAULT. Time is of the essence and in any of the following events, hereinafter called "Events of Default," to wit:

(a) Any failure by Buyer to pay when due the full amount of any payment, taxes, insurance premium, or other indebtedness or charges which are or may be secured hereby; or

(b) Any failure by Buyer to perform as required by any covenant or agreement herein; or

(c) The falsity of any representation by Buyer herein or in any credit application or financial statement given by Buyer to Seller as the basis for any extension of credit secured hereby; or

(d) If the property should be seized or levied upon under any legal or governmental process against Buyer or against the property; or

(e) If Buyer becomes insolvent or is the subject of a petition in bankruptcy either voluntary or involuntary or in any other proceeding under the Federal Bankruptcy Laws; or makes an assignment for the benefit of creditors; or if Buyer is named in or the property is subjected to a suit for the appointment of a receiver; or

(f) Loss, substantial damage to, or destruction of any portion of the property; or

(g) If Seller deems the property in danger of misuse or confiscation, or in case

(h) The Seller deems itself insecure;

Then and in any of such events of default, the entire amount of the unpaid purchase price and other charges and indebtedness secured hereby shall then or at any time thereafter, at the option of the Seller, become immediately due and payable without notice or demand, and Seller shall have an immediate right to pursue the remedies herein provided.

Conditional Sales Contract and Security Agreement (Motor Vehicle), Washington Bankers Association, Form U.C.C. 8Z (rev. ed. Dec. 1972).

166. *See id.*

167. *See id.*

Because of the potential for creditor abuse in defining default too restrictively and in unreasonably denying the debtor's offer to cure a default, the National Commission on Consumer Finance recommended curative state legislation providing that, whatever the terms of an "agreement," default would not occur because of technical violations, creditors would not be allowed to accelerate a debt solely because of their alleged "insecurity," and debtors would be given notice of an alleged default followed by fourteen days in which to cure the default before the creditor would be allowed to accelerate.¹⁶⁸ Similar provisions were proposed by the National Commissioners on Uniform State Laws in the 1974 Uniform Consumer Credit Code,¹⁶⁹ and by the National Consumer Law Center in the 1973 Model Consumer Credit Act.¹⁷⁰ Wisconsin has had legislation like that suggested by the NCCF since 1973.¹⁷¹ Yet forty states have taken no action in limiting the events constituting default or in granting a reasonable period in which to cure a default.¹⁷²

b. Restrictions on Security Interests

All states exempt certain kinds of property from levy of execution on judgment and also from the debtor's estate available for distribution to unsecured creditors in insolvency proceedings.¹⁷³ The purpose of these statutes is to ensure that the debtor can retain certain necessities despite his misfortune in losing a judicial action or being declared insolvent.¹⁷⁴ State exemption statutes, however, do not exempt such ne-

168. NCCF REPORT, *supra* note 2, at 25.

169. UNIFORM CONSUMER CREDIT CODE §§ 5.109-.111.

170. MODEL CONSUMER CREDIT ACT §§ 7.102, .103, .108 (1973).

171. WIS. STAT. ANN. §§ 425.103-.105 (West 1974 & Supp. 1978). A comparison of the provisions in the Wisconsin Consumer Act, NCCF recommendations, and the 1974 UCCC is found in Crandall, *Proposal for Consumer Credit Reform: A Definition of Default, a Right to Cure, and a Right to Notice and an Opportunity for a Hearing Before Repossession*, 13 GONZ. L. REV. 1, 9-16 (1977).

172. See Appendix *infra*.

173. D. EPSTEIN, TEACHING MATERIALS ON DEBTOR-CREDITOR RELATIONS 230 (1973); see Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 § 522, 92 Stat. 2549 (to be codified in 11 U.S.C. § 522). The new federal Bankruptcy Act, effective Oct. 1, 1979, establishes federal exemptions, 11 U.S.C.A. § 522(d) (West 1979), that preempt state exemptions unless a state enacts legislation specifically providing that federal exemptions are not controlling, *id.* § 522(b)(1).

174. A stronger statement of their purpose is found in *Slyfield v. Willard*, 43 Wash. 179, 182, 86 P. 392, 394 (1906):

The purposes of a constitutional provision or statute allowing exemptions are to prevent the weak from being overreached by the strong, to prevent pauperism, to guard the impecunious from their want of caution, to protect the families and other dependents of persons to whom exemptions are allowed, to guard the improvident and unfortunate against penury and want, and to save the state and the community from the burden and

cessities from the rights of the Article 9 secured creditor.¹⁷⁵ Whatever the protected status of the property under exemption statutes, personal property subject to an Article 9 security interest is subject to the creditor's right of repossession upon default. Creditors regularly take blanket security interests in household goods that have no real market value.¹⁷⁶ A blanket lien "gives the creditor *in terrorem* leverage over what may be a legitimately dissatisfied or recalcitrant debtor since the creditor may threaten extreme deprivation to induce the consumer to acquiesce in his demands, whether reasonable or not."¹⁷⁷ The FTC noted the following reference to the use of blanket security interests in one of the training manuals of a major small loan company:

Chase and recheck is a psychological device in which the Dial Office representative visits the uncooperative customer's home specifically for the purpose of rechecking the security. A complete list of the furniture or details of the furniture is made (note—this was also done at the time the loan was made). . . . Normally, this will arouse concern on the part of the customer as to the reason for the rechecking. You are not to threaten that your branch is ready to repossess the security; merely, [sic] advise the customer that you do not know the reason for the recheck, that you are just carrying out an assignment, and that if you were in similar circumstances, you would contact the office immediately.¹⁷⁸

The National Commission on Consumer Finance recommended in 1972 that creditors not be allowed to take any security interests in consumer credit sales other than a purchase money security interest in the goods purchased.¹⁷⁹ The 1974 UCCC contains a similar limitation.¹⁸⁰ The 1973 Model Consumer Credit Act¹⁸¹ and the 1973 Wisconsin Consumer Act,¹⁸² in addition to the NCCF recommended limitation in consumer credit sales, contain limits on security interests

disagreeable consequences that experience has shown to be a natural result of laws subjecting all of the property of debtors to the demands of their creditors.

175. This is by statute in most states, *see, e.g.*, ARIZ. REV. STAT. ANN. § 33-1122 (Supp. 1978), and by case law in others, *see, e.g.*, United States v. Elliot, 209 F. Supp. 374 (D. Colo. 1962). *See* Bankruptcy Reform Act of 1978, 11 U.S.C.A. §§ 101-1330 (West 1979). Although the Bankruptcy Reform Act does provide some protection, *see* note 173 *supra*, the federal exemptions do not exempt any of the debtor's property that is subject to a purchase money security interest or any automobile of the debtor, whatever the nature of the security interest. *Id.* at § 522(f)(2).

176. *See* Federal Trade Commission Staff Study Relating to Proposed Trade Regulation Rule Defining Certain Creditor Remedies as Unfair Trade Practices 232 (Apr. 19, 1974) (unpublished memorandum on file at Federal Trade Commission Office, Washington, D.C.).

177. *Id.* at 233-34.

178. *Id.* at 254 n.44 (cited by the FTC as "Dial Financial Corp., Collection Dues 27.>").

179. NCCF REPORT, *supra* note 2, at 27.

180. UNIFORM CONSUMER CREDIT CODE § 3.301.

181. MODEL CONSUMER CREDIT ACT § 2.411.

182. WIS. STAT. ANN. § 422.417 (West 1974 & Supp. 1978).

in consumer loans. Thirty states, however, still have no legislation restricting what property of the debtor may be made the subject of a security interest in consumer credit sales.¹⁸³

c. Restrictions on Self-Help Repossession

Article 9 of the UCC allows a creditor to repossess collateral subject to a security interest without judicial action—that is, to repossess by self-help.¹⁸⁴ The only limitation on this right in Article 9 is that a creditor may not “breach the peace.”¹⁸⁵ At no time before losing collateral is the debtor entitled to assert before an independent tribunal that he is not in default. For example, whether the debtor’s defense is based on the creditor’s failure to properly credit a payment, or the creditor’s failure to credit a setoff available to the debtor because of a breach of warranty claim,¹⁸⁶ the debtor faces the loss of his property interest in secured collateral without having the opportunity to raise the defense before anyone other than the creditor.

In addition, self-help repossession as authorized by the UCC serves to lessen public respect for our system of law and to create a real possibility for violence. Grant Gilmore, the principal draftsman of article 9 of the UCC, had this to say about prejudgment repossession:

In the financing of business debtors repossession causes little trouble or dispute. In the underworld of consumer finance, however, repossession is a knockdown, drag-out battle waged on both sides with cunning guile and a complete disregard for the rules of fair play. A certain amount of trickery seems to be accepted: it is all right for the finance company to invite the defaulting buyer to drive over to its office for a friendly conference on refinancing the loan and to repossess the car as soon as he arrives.¹⁸⁷

The following is by an independent contractor who repossesses for creditors for a flat fee of \$35-\$45 per repossession:

I was under the hood of this Continental one evening last summer connecting the wires when this man ran out of the house waving a .38. This guy did not know what was going on—he didn’t speak a word of English and I mean he was rippin’.

He came back later with his ol’ lady—who understood Eng-

183. See Appendix *infra*.

184. U.C.C. § 9-503.

185. *Id.*

186. *Id.* § 2-717, for example, gives the buyer, upon notification to the seller, the right to deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due.

187. 2 G. GILMORE, *supra* note 156, § 44.1, at 1,212.

lish—and paid the bill. This particular car was \$45. I almost took a thirty-eight slug for \$45.¹⁸⁸

In 1972, the National Commission on Consumer Finance recommended that states adopt legislation ensuring that prior to repossession, whether with or without judicial process, the debtor be given notice of the claim against him and the opportunity to be heard on the merits of the underlying claim.¹⁸⁹ The 1973 Model Consumer Credit Act contains an abbreviated judicial process, ensuring notice and a right to a hearing on the issue of default before repossession.¹⁹⁰ Since 1973, Wisconsin has provided for such an abbreviated pre-seizure process.¹⁹¹ Forty-three states, however, have yet to place any restrictions beyond the UCC “no breach of the peace” limitation on the creditor’s right to take possession of collateral without judicial action.¹⁹²

d. Restrictions on Deficiency Judgments

Section 9-504 of the Uniform Commercial Code allows a secured party after repossession to sell the collateral and apply the proceeds to (1) the reasonable expenses of retaking, holding and selling; (2) the satisfaction of the indebtedness secured; and (3) the satisfaction of any subordinate security interests. Should the proceeds of the sale be insufficient to meet the above obligations, the debtor is personally liable for the deficiency.¹⁹³ The sale of repossessed collateral may be at a public or private sale.¹⁹⁴ The UCC provides that proof that a better price could be obtained by a sale at a different time or by a different method from that selected by the secured party is insufficient to show that the sale is improper.¹⁹⁵

Professor Philip Shuchman traced eighty-three automobile repossessions in Connecticut¹⁹⁶ and found that the price obtained at repos-

188. SPOKANE COMMUNITY PRESS, September 21, 1977, at 3.

189. NCCF REPORT, *supra* note 2, at 29.

190. MODEL CONSUMER CREDIT ACT §§ 7.205-206.

191. WIS. STAT. ANN. §§ 425.203, .205 (West 1974 & Supp. 1978). Empirical studies on the effects of requiring pre-seizure notice and hearing before repossession can be found in Crandall, *supra* note 171, at 57-64, 69-71; Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CALIF. L. REV. 82 (1973). See also Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 WIS. L. REV. 607.

192. See Appendix *infra*.

193. U.C.C. § 9-504(2).

194. *Id.* § 9-504(3).

195. *Id.* § 9-507(2).

196. Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20, 57-61 (1969).

session sales averaged only fifty-one percent of retail and seventy-one percent of the established wholesale price.¹⁹⁷ This compared to ninety percent of the wholesale price for used cars sold by automobile dealers at weekly auctions.¹⁹⁸ John Firmin and Robert Simpon, in testing Professor Shuchman's thesis, studied 106 traceable repossessions and 284 court-recorded deficiency suits.¹⁹⁹ They found that resold automobiles in Washington, D.C. brought sixty-two percent of the retail price and eighty-one percent of the wholesale price.²⁰⁰ In seventy-one percent of the cases, the dealer who had originally sold the auto to the debtor repurchased it at the sale.²⁰¹

Because the UCC provisions and creditor practices promote deficiencies rather than keeping them at a minimum, the National Commission on Consumer Finance in 1972 recommended that when the cash price of goods purchased is over a specified dollar amount no deficiency judgment be allowed.²⁰² The 1974 UCCC contains essentially the same limitation.²⁰³ The 1973 Model Consumer Credit Act²⁰⁴ and the 1973 Wisconsin Consumer Act²⁰⁵ contain even more restrictive limitations. Although the states have shown more activity in this area than those previously discussed, twenty-six states have yet to adopt any special restrictions on deficiency judgments.²⁰⁶

B. Federal Law

Although consumer credit regulation remains primarily a matter of state law, federal law is playing an ever-increasing role. In 1968, Congress passed the Consumer Credit Protection Act (CCPA).²⁰⁷ While initially the CCPA primarily required credit cost disclosure,²⁰⁸ the CCPA now contains titles providing equal credit opportunities,²⁰⁹

197. *Id.* at 31.

198. *Id.* at 44-45.

199. Note, *Business as Usual: An Empirical Study of Automobile Deficiency Judgement Suits in the District of Columbia*, 3 CONN. L. REV. 511 (1971).

200. *Id.* at 518 (Table 1).

201. *Id.* at 517.

202. NCCF REPORT, *supra* note 2, at 29-30.

203. UNIFORM CONSUMER CREDIT CODE § 5.103.

204. MODEL CONSUMER CREDIT ACT § 7.208.

205. WIS. STAT. ANN. § 425.209 (West 1974).

206. See Appendix *infra*.

207. Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C.A. §§ 1601-1693) (West 1974 & Supp. 1979); 18 U.S.C. §§ 891-896 (1976)).

208. *Id.* tit. I (codified at 15 U.S.C. §§ 1601-1614 (1976)).

209. 15 U.S.C. §§ 1691-1691f (1976).

regulation of debt collection practices²¹⁰ and consumer protection from potential problems arising in the electronic transfer of funds.²¹¹ The Federal Trade Commission has promulgated a rule designed to preserve consumer claims and defenses with respect to third-party financiers of consumer credit transactions²¹² and has proposed a more comprehensive rule prohibiting certain creditor practices.²¹³ Other federal laws of long standing, such as the Bankruptcy Act²¹⁴ and the National Banking Act,²¹⁵ are also relevant in consumer credit regulation.

There are three major problems with the present system of federal regulation. First, the National Banking Act allows federally chartered banks to ignore state usury rate limitations on banks. Second, it is often unclear to what extent federal consumer credit regulation preempts state law. Third, the Federal Trade Commission has shown an increased willingness to regulate by rule in matters traditionally left to the states, and regulation by FTC rule is not the most effective means of regulation.

1. National Banks

In part, section 85 of the National Banking Act provides:

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, . . . except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter.²¹⁶

Assume that Bank A is a state chartered bank, Bank B is a federally chartered bank, and both banks are located in State X. State X's consumer credit law provides for a general contractual usury rate of ten percent but a rate for bank loans of twelve percent. Section 85 clearly permits Bank B, the federally chartered bank, to charge the twelve per-

210. 15 U.S.C.A. §§ 1692-1692o (West Supp. 1979).

211. *Id.* §§ 1693-1693r (West Supp. 1979).

212. 16 C.F.R. pt. 433 (1978).

213. 40 Fed. Reg. 16,347 (1975).

214. 11 U.S.C.A. §§ 101-1101 (West Supp. 1979). The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, (effective Oct. 1979) was enacted on Nov. 6, 1978 to replace the 1898 Bankruptcy Act. For a discussion of the consumer protection aspects of the 1898 Bankruptcy Act, see D. ROTHSCHILD & D. CARROLL, *supra* note 31, §§ 11.01-.03 (1977).

215. 12 U.S.C. §§ 21-215b (1976).

216. *Id.* § 85 (1976).

cent rate allowed state banks.²¹⁷ Federally chartered banks, however, are not limited under section 85 to the usury rate applicable to state chartered banks if any other type of creditor may charge a higher rate. For example, if small loan companies in State X are entitled to charge a maximum rate of thirty percent, so is the federally chartered bank, but Bank A would be limited by state law to the twelve percent rate.²¹⁸ This does little to foster understanding of consumer credit laws and arguably creates an unfair competitive advantage for federally chartered banks.²¹⁹

Section 85 also serves to create problems in interstate transactions by federally chartered banks. In *Marquette National Bank v. First of Omaha Service Corp.*,²²⁰ plaintiff asked the Court to declare unlawful the federally chartered Omaha bank's practice of charging its Minnesota charge card customers the Nebraska rate of finance charge of eighteen percent. Minnesota statutes provide that "national banking association[s] doing business in this state" are limited to twelve percent.²²¹ The Omaha bank was clearly doing business in Minnesota, utilizing agents in Minnesota to offer Minnesota residents charge cards issued by the Omaha bank.²²² The United States Supreme Court, however, refused to declare the practice unlawful, stating that the usury rate for banks in a state where a national bank is doing business is irrelevant. The Court held that the only law that is relevant is the law of the state in which the bank "is located."²²³ Since the Omaha bank was located in Nebraska, the Court allowed it to charge the rate permitted in that state.

Contrast this decision with the three *Aldens* decisions discussed previously.²²⁴ Three different federal Circuit Courts of Appeals held that *Aldens* was subject to the maximum usury rate in the three states where it was doing business because of the territorial applicability provisions of those states, regardless of the law in the state where *Aldens* was located. Of course, the *Aldens* cases can be distinguished from *Marquette* because of the applicability of section 85 of the National

217. See *United Mo. Bank, N.A. v. Danforth*, 394 F. Supp. 774 (W.D. Mo. 1975).

218. See *First Nat'l Bank v. Nowlin*, 509 F.2d 872, 879-80 (8th Cir. 1975).

219. See Redford, *Dual Banking: A Case Study in Federalism*, 31 LAW & CONTEMP. PROB. 749, 755-60 (1966).

220. 99 S. Ct. 540 (1978).

221. MINN. STAT. ANN. § 48.185 (West Supp. 1979).

222. 99 S. Ct. at 547-48.

223. *Id.* at 545-46.

224. See notes 135-140 and accompanying text *supra*.

Banking Act in *Marquette*. But the conflicting results further interfere with the development of an understanding of consumer credit law. Also, as admitted by the Supreme Court in *Marquette*, the exportation of interest rates by national banks via credit card offerings will significantly impair the ability of states to enact effective usury laws.²²⁵

2. Federal Preemption

The major attempt at direct federal regulation of consumer credit transactions is the Consumer Credit Protection Act.²²⁶ The best known provisions of that act require the disclosure of the credit terms of consumer credit transactions.²²⁷ These "Truth in Lending Act" provisions are intended to preempt state law to the extent state law is "inconsistent" with federal law.²²⁸ Problems with interpretation arise in attempting to determine when a state law is inconsistent. The determination is an important one. Consistent state disclosures may be disclosed along with Truth in Lending disclosures as "additional information" so long as they do not "mislead or confuse the customer . . . or contradict, obscure, or detract attention from the information required by . . . [Regulation Z] to be disclosed."²²⁹ Inconsistent state disclosures may also be made, but they are subject to additional disclosure requirements. Regulation Z provides in part:

Any creditor . . . who elects to make disclosures specified in any provision of State law, which . . . is inconsistent with the requirements of the Act and [Regulation Z] may

(1) Make such inconsistent disclosures on a separate paper apart from the disclosures made pursuant to [Regulation Z], or

(2) Make such inconsistent disclosures on the same statement on which disclosures required by [Regulation Z] are made; provided:

(i) All disclosures required by [Regulation Z] appear separately and above any other disclosures,

(ii) Disclosures required by [Regulation Z] are identified by a clear and conspicuous heading indicating that they are made in compliance with Federal law, and

(iii) All inconsistent disclosures appear separately and below a conspicuous demarcation line, and are identified by a clear and con-

225. 99 S. Ct. at 550-51.

226. 15 U.S.C.A. §§ 1601-1693r (West 1974 & Supp. 1979); 18 U.S.C. §§ 891-896 (1976).

227. *Id.* §§ 1601-1667e (1976).

228. *Id.* § 1610(a).

229. 12 C.F.R. § 226.6(c) (1978). The Board of Governors of the Federal Reserve System has the duty to prescribe regulations to carry out the purpose of title I of the Consumer Credit Protection Act, 15 U.S.C. § 1604 (1976). Regulation Z contains these regulations. 12 C.F.R. § 226.1(a) (1978).

spicuous heading indicating that the statements made thereafter are inconsistent with the disclosure requirements of the Federal Truth in Lending Act.²³⁰

The creditor who includes state disclosures with Truth in Lending disclosures does so at some risk. If a court should determine that the state mandated disclosure is inconsistent with or "detracts attention from" federal disclosures, the creditor may be in violation of the Truth in Lending Act for failing to make the disclosures on a separate paper or below a conspicuous demarcation line.²³¹ On the other hand, if the creditor should entirely omit a state disclosure, believing it to be inconsistent, he runs the danger of being held in violation of state law for failing to comply with a law that was not affected or annulled by the Truth in Lending Act. The prudent course for the creditor would seem to be to list all doubtful state disclosures, separately labeling them as inconsistent with federal law where necessary. But this approach is likely to be confusing to the consumer who is now left to decide which of the inconsistent disclosures he should consider in comparing the cost of credit. Partial federal preemption tends to frustrate the Truth in Lending Act's purpose of providing "meaningful disclosures."²³²

There are advantages to the interstate creditor of a truly national Truth In Lending law. Compliance costs are lower and interpretation problems are not compounded by a multiplicity of state laws.²³³ These advantages are significantly lessened, however, by the Truth In Lending Act provision that exempts a state from the Act for a "class of credit transactions" if the Federal Reserve Board determines that the state's laws for the class of transactions are "substantially similar" to those of the Act, and there is "adequate" provision for enforcement.²³⁴

3. Regulation of Consumer Credit by Federal Trade Commission Rule

In 1975, the Federal Trade Commission took its first major plunge into the substantive law of consumer credit by promulgating the rule for preservation of consumers' claims and defenses.²³⁵ The rule at-

230. *Id.* § 226.6(c) (1978).

231. 15 U.S.C. § 1640 (1976).

232. *Id.* § 1601.

233. See Part III.A.2. *supra*.

234. 15 U.S.C. § 1633 (1976); see, e.g., 35 Fed. Reg. 7550 (1970) (granting an exemption to Oklahoma); *id.* at 10,358 (Massachusetts); *id.* at 11,992 (Connecticut); 37 Fed. Reg. 24,105 (1972) (Wyoming).

235. 16 C.F.R. pt. 433 (1978).

tempted to establish by federal law a consumer right not provided by some states²³⁶—the right of consumer purchasers of goods on credit to raise defenses against the third-party financiers of the transactions despite the insulation of such doctrines as the holder in due course.²³⁷ The FTC should be commended for its action in attempting to provide needed consumer protection ignored by some states, but regulation by FTC rule is not the most effective method of federal regulation.

It is unclear, for example, whether there is a private right of action for the violation of FTC rules.²³⁸ Although the FTC may bring an action for private redress,²³⁹ limitations of staff and funds would indicate that the FTC will probably bring these actions only when the wronged consumer can show he is part of a large class injured by the alleged violator.²⁴⁰ Without a right of private action, the consumer has no right to pick his own counsel, must face administrative red tape and delay, and has no ultimate say in what settlement is acceptable.²⁴¹ Without private actions, there is some question about how adequate compliance will be inasmuch as administrative enforcement by the FTC has been highly criticized in the past.²⁴²

Another problem with regulation by FTC rule is that the Federal Trade Commission has no power to issue rules that regulate banks.²⁴³ The Federal Trade Commission Act provides that within sixty days af-

236. See Crandall, *The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After*, 1973 WIS. L. REV. 334, 386-394 (Appendix 4) (list of states that had made some modification to the holder in due course doctrine as of 1973).

237. See 16 C.F.R. § 433.2 (1978).

238. The majority of cases say there is no private right of action. See, e.g., *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232 (2d Cir. 1974); *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973); *Holloway v. Bristol Meyers Corp.*, 485 F.2d 986 (9th Cir. 1973). See also Comment, 69 Nw. U.L. REV. 462 (1974). *Contra*, *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582, 586-89 (N.D. Ind. 1976) (holding that 15 U.S.C. § 45 (1976) gives the FTC primary but not exclusive jurisdiction). See also White, *F.T.C.: Wrong Agency for the Job of Adjudication*, 61 A.B.A.J. 1242 (1975).

The law in some states providing a private right of action for a violation of a state's prohibition against unfair or deceptive trade practices includes unfair or deceptive trade practices under federal law. See, e.g., WASH. REV. CODE § 19.86.090 (1976); *State v. Reader's Digest Ass'n*, 81 Wash. 2d 259, 501 P.2d 290 (1972).

239. 15 U.S.C. § 57b (1976).

240. See D. ROTHSCHILD & D. CARROLL, *supra* note 31, § 3.09 at 86-87. The FTC operating manual states that "[n]umbers and types of consumers likely to be adversely affected by the subject practice/transaction" are to be considered before an FTC investigation commences. *Id.* (citing FTC Operating Manual, ch. 3 (1972)).

241. See Spanogle, *Why Does the Proposed Uniform Consumer Credit Code Eschew Private Enforcement?*, 23 BUS. LAW. 1039, 1040-41 (1968).

242. See Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 826 (1971); NCCF REPORT, *supra* note 2, at 62.

243. See 15 U.S.C. 57a(f)(1) (1976).

ter any rule is promulgated by the FTC, the Federal Reserve Board must issue "substantially similar" regulations prohibiting acts or practices of banks that are "substantially similar" to those prohibited by the FTC rules.²⁴⁴ The Act also provides, however, that the Board is not required to issue such rules if it finds that the acts or practices of banks are not unfair or deceptive or that the implementation of similar regulations with respect to banks would seriously conflict with essential monetary and payment systems policies of the Board.²⁴⁵ To the extent the Board refuses to promulgate rules for banks that are similar to FTC rules, consumers who happen to borrow from banks rather than other credit institutions will have less protection merely because of their choice of creditor.²⁴⁶ Also, the "substantially similar" requirement raises the possibility of nonuniform rules for banks and other creditors.

In addition to the problems with enforcement and FTC jurisdiction, there is a significant problem with the language of the one major consumer credit rule promulgated. The rule for preservation of consumers' claims and defenses makes it an unfair and deceptive trade practice in certain consumer credit transactions for the *seller* to accept direct loan proceeds between a lender and a consumer unless the agreement for the loan contains a notice to the customer providing that the lender will be liable for any defenses the consumer might have against the seller.²⁴⁷ The notice is required only in "purchase money loans"²⁴⁸—loans in which the seller "(1) refers consumers to the creditor or (2) is affiliated with the creditor by common control, contract, or business arrangement."²⁴⁹ For example, if the seller of a color television "refers" a customer to a local finance company and the finance company inserts the requisite notice in its loan agreement, as a matter of basic contract law, the finance company will be subject to the consumer's defenses because of the terms of the notice. If, however, the finance company refuses or forgets to insert the notice, there is nothing in the rule that would serve to make the lender liable for the defenses

244. *Id.*

245. *Id.*

246. The Federal Reserve Board did not issue a rule for banks similar to the rule for preservation of consumer claims or defenses, 16 C.F.R. pt. 433 (1978), because the rule does not apply to lenders, but only to "sellers." The Board has proposed a rule against unfair lending practices by banks similar to that of the FTC against unfair creditor practices, 40 Fed. Reg. 19,494 (1975). It is impossible, however, to determine to what extent a final FRB rule concerning bank practices would be similar to a final FTC rule concerning lending practices by institutions other than banks or whether the FRB will issue any final rule at all.

247. 16 C.F.R. § 433.2(b) (1978).

248. *Id.*

249. *Id.* § 433.1(d).

of the consumer.²⁵⁰ It would be an unfair and deceptive trade practice for the seller to accept proceeds from such a loan,²⁵¹ but it is not an unfair and deceptive trade practice for the lender to make such a loan.

The FTC, four days after it promulgated the existing rule in 1975, proposed an amendment that would also make lenders liable for an unfair and deceptive trade practice for not following the dictates of the rule,²⁵² but that amendment has yet to be promulgated. Although it may not be convincing to claim that regulation by FTC rule is ineffective merely because of the significant gap in protection in the current rule, the FTC's failure to amend the rule before promulgation and its continued failure to promulgate the amendment for four years after its discovery indicate that the FTC may not be equipped to adequately solve recognized problems within its rules.

The efficiency of regulation by FTC rule may also be diminished by a sentiment shared by many of those regulated—to the extent more regulation is needed, it should be imposed by elected representatives rather than administrative agencies. Whether or not one agrees with this philosophy, it must be argued that, to the extent regulation by rule is not an accepted method of regulation, respect for and, therefore, compliance with regulation by rule will suffer.

Another concern about regulation of consumer credit by FTC rule relates not to its efficacy but to a practical political result of such regulation. Because of the dictates of time, legislative bodies are more likely to legislate in areas devoid of regulation rather than in areas where a regulatory “solution” has already been fashioned, even though the existing solution may well be less effective than that which the legislative body could construct.

The FTC has proposed a rule that would prohibit certain creditor practices.²⁵³ If promulgated, the rule would represent a more significant exercise of FTC authority in regulating areas of consumer credit traditionally left to the states. Among other things, the proposed rule would limit property subject to security interests²⁵⁴ and provide some protection from deficiency judgment actions by creditors.²⁵⁵ These are

250. There are only a few states with consumer credit regulations which make a direct lender in such a transaction subject to the consumers' defenses. *See, e.g.*, WIS. STAT. ANN. § 422.408 (West 1974).

251. 16 C.F.R. § 433.2(b) (1978).

252. 40 Fed. Reg. 53,530 (1975).

253. *See id.* at 16,347.

254. *Id.* (Proposed § 444.2(a)(4)).

255. *Id.* (Proposed § 444.2(a)(7)).

areas identified earlier as having been inadequately addressed by state legislation.²⁵⁶ If the FTC promulgates its rule, however, the ultimate result may well be that comprehensive and effective federal legislation in these areas may be foreclosed.

III. THE PROPOSAL

To alleviate the problems with the present state-federal system of consumer credit regulation, Congress should enact a federal consumer credit code. It is beyond the scope of this article to propose the specific language for such a code. Nevertheless, some general observations about what a federal code should contain and a suggested structure for that code follow.

A federal consumer credit code should be comprehensive, containing all legislation, to the extent possible, relating to the direct regulation of consumer credit. A comprehensive approach would alleviate the problems with interpretation inherent in the scattered approach prevailing in most states.²⁵⁷ The federal code should, for example, include substantive provisions that preserve consumers' claims and defenses against third-party lenders and that prohibit certain creditor practices, rather than leaving these matters for the existing Federal Trade Commission regulation by rule.²⁵⁸ The inclusion of matters subject to FTC rule in a comprehensive code should also result in more effective regulation,²⁵⁹ particularly if it is assumed that Congress would provide strong private enforcement provisions similar to those in the current Consumer Credit Protection Act.²⁶⁰

To the extent possible, a comprehensive federal consumer credit code should provide the same consumer credit regulation for all creditors similarly organized. For example, nationally chartered banks should be subject to the same rate limitations as state chartered banks. This would solve the problems arising from section 85 of the National Banking Act and its interpretations.²⁶¹

A federal code should clearly state Congress' intent to totally pre-

256. See Parts II.A.3.b., *d. supra*.

257. For a discussion of the problems with noncomprehensive regulation, see Part II.A.1. *supra*.

258. See 16 C.F.R. pt. 433 (1978).

259. For a discussion of the problems involved in regulating consumer credit by FTC rule, see Part II.B.3. *supra*.

260. See text accompanying notes 302 & 303 *infra*.

261. For a discussion of section 85 of the National Banking Act, its interpretations, and resulting problems, see Part II.B.1. *supra*.

empt direct consumer credit regulation. This would alleviate the problems caused by fifty nonuniform state laws²⁶² and issues of federal preemption that arise with the existing provisions of the Consumer Credit Protection Act.²⁶³ A federal code should also contain those consumer protections whose need has been established to cure the lack of adequate consumer protection activity by most state legislatures.²⁶⁴

To incorporate a comprehensive consumer credit code, the existing Consumer Credit Protection Act should be repealed and a new Consumer Protection Act adopted. The structure of the new act could accommodate the provisions of the proposed code as follows:

Title I. Consumer Credit Transactions

Chapter 1	.....	General Provisions and Definitions
Chapter 2	.....	Credit Advertising
Chapter 3	.....	Maximum Charges
Chapter 4	.....	Disclosure
Chapter 5	.....	Limitations on Agreements and Practices
Chapter 6	.....	Preservation of Defenses
Chapter 7	.....	Consumer Leases
Chapter 8	.....	Credit Insurance
Chapter 9	.....	Credit Billing
Chapter 10	.....	Debt Collection
Chapter 11	.....	Enforcement of Credit Obligations
Chapter 12	.....	Consumer Remedies
Chapter 13	.....	Administration

Title II. Extortionate Extensions of Credit

Title III. Restrictions on Garnishment

Title IV. Consumer Credit Reporting

Title V. Equal Credit Opportunity

Title VI. Electronic Funds Transfers

Under the suggested structure, title I of the proposed Consumer Protection Act would contain relevant provisions of title I (Truth In Lending) of the current Consumer Credit Protection Act,²⁶⁵ the provisions of existing title VIII²⁶⁶ (Debt Collection Practices), as well as the

262. See Part II.A.2. *supra*.

263. See Part II.B.2. *supra*.

264. See Part II.A.3. *supra*.

265. 15 U.S.C. §§ 1601-1667e (1976 & Supp. I 1977).

266. *Id.* §§ 1692-1692o.

provisions added by the proposed federal consumer credit code. Titles III-VI of the proposed Consumer Protection Act would contain the other titles of the current Consumer Credit Protection Act with some renumbering of titles.

As with the existing title I of the CCPA, the scope of proposed title I should be delineated in chapter 1. Congress should consider, however, providing a broader scope for a consumer credit code than that now found in title I of the CCPA. For example, most credit transactions in which the total amount financed exceeds \$25,000 are excluded from the coverage of existing title I.²⁶⁷ Although there may be some justification for excluding transactions in which the amount financed is very high on the theory that individuals engaged in such transactions can protect themselves, the figure of \$25,000 was adopted in 1968 with the original passage of the CCPA.²⁶⁸ The rate of inflation suggests a higher figure would now be more reasonable. Proposed chapter I should also contain Congress' intent to totally preempt consumer credit regulation, any necessary definitions and any necessary exemptions from coverage.

Proposed chapter 2 on credit advertising should contain the substance of the provisions in chapter 3 of title I of the existing CCPA.²⁶⁹

The most hotly contested part of the proposal would be the provisions of chapter 3, which set the maximum rates of finance charge. The author does not purport to have the answer to the riddle of what *the* maximum rate of finance charge should be for any particular transaction. It is suggested, however, that maximum rates should not be set at a fixed rate. Instead, maximum rates should fluctuate with the money market. For example, rather than setting a flat maximum rate of eighteen percent for credit sales, Congress could specify that the maximum rate of finance charge for credit sales is "X" percent over the monthly index of long-term United States Government bond yields as regularly identified and publicized by the administrator of the proposed act.²⁷⁰

Neither creditor advocates, consumer advocates, nor members of Congress should be faced with an ongoing lobbying effort to keep interest rates in proportion to the economic realities from time to time. A flexible rate would prevent this waste of resources and would en-

267. *Id.* § 1603(3) (1976).

268. Pub. L. No. 90-321, § 104, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. § 1603 (1976)).

269. 15 U.S.C. §§ 1661-1666j (1976).

270. *See, e.g.*, PA. STAT. ANN. tit. 41, §§ 101(f), 301 (Purdon Supp. 1978).

courage Congress to initially set a rate that compares with current rates rather than setting too high a maximum in contemplation of future inflation.

Proposed chapter 3 would also contain limitations on, for example, minimum charges,²⁷¹ delinquency charges,²⁷² and permissible additional charges.²⁷³ Although the advisability of and limitation on such charges have not received as much publicity as the issue of maximum rates of finance charge, charges other than finance charges are economically significant to both the creditor and consumer and should be regulated just as closely.

Chapter 4 should contain the substance of all disclosure provisions of existing chapter 2 of title I of the CCPA²⁷⁴ with the exception of section 130, which specifies civil liability.²⁷⁵ For clarity, all penalty provisions should be contained in the same chapter of the proposal—chapter 12.²⁷⁶ In addition, any other provisions requiring disclosure, such as a provision requiring that the creditor disclose to cosigners the nature of their liability,²⁷⁷ should be contained within the proposed chapter 4.

Chapter 5, as proposed, would contain provisions that both prohibit the creditor from including certain terms with a harsh result in credit “agreements” and engaging in certain unfair practices. For example, such provisions as a limitation on unequal (“balloon”) payments,²⁷⁸ a prohibition against irrevocable wage assignments²⁷⁹ and limitations on what collateral may be taken under a security agreement²⁸⁰ should be in chapter 5. Section 167, Use of Cash Discounts,²⁸¹

271. *See, e.g.*, MODEL CONSUMER CREDIT ACT § 2.202(4); WIS. STAT. ANN. § 422.201(8) (West 1974).

272. *See, e.g.*, MODEL CONSUMER CREDIT ACT § 2.206; WIS. STAT. ANN. § 422.203 (West 1974).

273. *See, e.g.*, MODEL CONSUMER CREDIT ACT § 2.204; WIS. STAT. ANN. § 422.202 (West 1974 & Supp. 1978).

274. 15 U.S.C. §§ 1631-1645 (1976).

275. *Id.* § 1640.

276. *See* text accompanying notes 302-306 *infra*.

277. *See, e.g.*, WIS. STAT. ANN. § 422.305 (West 1974); Proposed Trade Regulation Rule on Credit Practices, 40 Fed. Reg. 16,347 (1975) (Proposed § 444.2(b)(1)).

278. *See, e.g.*, MODEL CONSUMER CREDIT ACT § 2.402; WIS. STAT. ANN. § 422.402 (West 1974).

279. *See, e.g.*, WIS. STAT. ANN. § 422.404 (West 1974).

280. *See, e.g.*, MODEL CONSUMER CREDIT ACT § 2.411; WIS. STAT. ANN. § 422.417 (West 1974 & Supp. 1978); Proposed Trade Regulation Rule on Credit Practices, 40 Fed. Reg. 16,347 (1975) (Proposed § 444.2(a)(4)).

281. 15 U.S.C. § 1666f (1976).

and section 168, Prohibition of Tie-in-Services,²⁸² of chapter 4 of title I of the existing CCPA should also be placed in proposed chapter 5.

Chapter 6 would contain all provisions designed to remove the insulation from consumers' defenses of third parties who finance consumer credit transactions. Because of the previously discussed problems with the FTC rule on preservation of consumers' claims and defenses, Congress should not enact the provisions of the rule, but instead should adopt a direct limitation on the insulation from liability of third-party financiers of consumer credit transactions.²⁸³ Chapter 6 should also contain the substance of existing section 170 of title I of the existing CCPA,²⁸⁴ which makes the issuer of lender credit cards subject to the cardholders' claims and defenses.

For an increasing number of consumers, leasing is the preferred method of acquiring automobiles and deferring payment for them.²⁸⁵ Problems encountered by the consumer lessee are often like those of the consumer in the typical consumer credit sale or purchase money loan.²⁸⁶ Chapter 5 of existing title I of the CCPA provides protection for the consumer lessee.²⁸⁷ Under the suggested structure of the proposed CCPA, the substance of these leasing protections could be included in chapter 7. Alternatively, the substance of the leasing provisions of existing chapter 5 could be inserted in other chapters of the proposal: definitions in chapter 1 of the proposal, disclosures in chapter 4, lessee's liability in chapter 5, advertising in chapter 2, and civil liability in chapter 13. Whichever alternative is adopted, existing section 186, Relation to State Laws,²⁸⁸ would not be necessary because of the proposed provision on complete federal preemption recommended for inclusion in proposed chapter 1.

282. *Id.* § 1666g.

283. *See, e.g.*, MODEL CONSUMER CREDIT ACT §§ 2.601-.604.

284. 15 U.S.C. § 1666i (1976).

285. In 1973, automobile manufacturers estimated that by 1980 some 40% of their production would be leased rather than sold. In the last ten years, lease and fleet registrations on new cars have increased 127%, while new car sales have increased only 42%. Truth-in-Lending Annual Report to Congress for the Year 1973 by the Board of Governors of the Federal Reserve System, reprinted in INSTALLMENT CREDIT GUIDE (CCH) Issue No. 271, Part II, 14-15 (Jan. 16, 1974). The vice-president in charge of consumer loans in one major bank in the State of Washington stated that his bank soon expected to be financing most consumer acquisition of automobiles by leases. Telephone conversation with author (October 1977).

286. *See generally* Ayer, *Clearing the Smog Surrounding Consumer Auto Leasing*, 6 PAC. L.J. 447 (1975). *See also* Truth-in-Lending Annual Report to Congress for the Year 1973 by the Board of Governors of the Federal Reserve System, reprinted in INSTALLMENT CREDIT GUIDE (CCH) Issue No. 271, Part II, 15-16 (Jan. 16, 1974).

287. 15 U.S.C. §§ 1667-1667e (1976).

288. *Id.* § 1667e.

The McCarran-Ferguson Act²⁸⁹ provides that no act of Congress shall preempt any state's regulation of insurance unless the act states that it is "specifically related to the business of insurance."²⁹⁰ Proposed chapter 8 would regulate consumer credit insurance, that is, credit life and credit accident and health, as well as personal property and liability insurance offered or required in connection with a consumer credit transaction. Provisions should be included, for example, that specify the terms²⁹¹ and amounts²⁹² of credit insurance. Therefore, to avoid the McCarran-Ferguson Act, proposed chapter 8 must specifically state that it is related to insurance.

Suggested chapter 9 should contain sections 161 to 166 of chapter 4 of title I of the existing CCPA.²⁹³ These sections regulate billing procedures and the resolution of billing errors. Section 171 of chapter 4 of title I of the existing CCPA, Relation to State Laws,²⁹⁴ again should be repealed because the proposed code would totally preempt state consumer credit laws in chapter 1.

Proposed chapter 10 would replace existing title VIII, Debt Collection Practices.²⁹⁵ Like title VIII, chapter 10 should prohibit harsh collection practices by debt collection agencies. In addition, proposed chapter 10 should also prohibit harsh collection practices by creditors collecting their own debts.²⁹⁶ The FTC has indicated in its proposed rule prohibiting unfair credit practices a desire to limit harsh collection practices by creditors collecting their own obligations.²⁹⁷ Chapter 10, if enacted as suggested, would avoid the need for the proposed rule.

Chapter 11 would contain all limitations on the creditor's attempts to enforce a credit obligation with the exception of the limitations on harsh debt collection practices found in chapter 10. For example, chapter 11 should specify under what circumstances the creditor may

289. *Id.* §§ 1011-1015.

290. *Id.* § 1012. *See also* *Cochran v. Paco, Inc.*, 409 F. Supp. 219 (D.C. Ga. 1976) (Merely because the Truth-in-Lending Act does not specifically exempt insurance does not mean that Act is "specifically related to the business of insurance.").

291. *See, e.g.*, MODEL CONSUMER CREDIT ACT § 4.202; WIS. STAT. ANN. § 424.207 (West 1974).

292. *See, e.g.*, MODEL CONSUMER CREDIT ACT § 4.203; WIS. STAT. ANN. § 424.208 (West 1974).

293. 15 U.S.C. §§ 1666-1666e (1976).

294. *Id.* § 1666j.

295. *Id.* §§ 1692-1692o (Supp. I. 1977).

296. *See, e.g.*, MODEL CONSUMER CREDIT ACT §§ 6.101-303; WIS. STAT. ANN. §§ 427.101-105 (West 1974 & Supp. 1978).

297. 40 Fed. Reg. 16,347 (1975) (Proposed § 444.2(a)(10)).

repossess secured collateral and what procedure must be followed.²⁹⁸ Chapter 11 should also contain any limitations on deficiency judgments²⁹⁹ and cosigner liability,³⁰⁰ as well as the substance of section 169, Prohibition of Offsets, currently in chapter 4 of title I of the existing CCPA.³⁰¹

Under the proposed structure, chapter 12 should be drafted to ensure effective private enforcement. It should provide a sliding scale of remedies depending on the nature of the violation.³⁰² Minimum penalties should also be provided, as they are in section 130 of title I of the existing CCPA.³⁰³ Jurisdiction should lie in both state and federal courts and consumers' attorneys fees should be provided in all successful actions in order to ensure access to the courts similar to section 130 of the existing CCPA.³⁰⁴ Class action relief should be available with some limitation on relief similar to that in section 130 of title I of the existing CCPA.³⁰⁵ Chapter 12 should also contain a statute of limitations that is not applicable to consumer actions raised by way of counterclaim.³⁰⁶

Chapter 13 would contain provisions relating to administration, including administrative enforcement. Ideally, chapter 13 would establish a separate agency for administration. Under the system of administrative enforcement of title I of the existing CCPA, enforcement responsibility is divided among a number of agencies³⁰⁷ whose primary

298. See, e.g., MODEL CONSUMER CREDIT ACT §§ 7.201-206; WIS. STAT. ANN. §§ 425.201-207 (West 1974 & Supp. 1978).

299. See, e.g., MODEL CONSUMER CREDIT ACT § 7.208; WIS. STAT. ANN. § 425.209 (West 1974).

300. See, e.g., MODEL CONSUMER CREDIT ACT § 7.111; Proposed Trade Regulation Rule on Credit Practices, 40 Fed. Reg. 16,347 (1975) (Proposed § 444.2(b)(4)).

301. 15 U.S.C. § 1666h (1976).

302. See, e.g., MODEL CONSUMER CREDIT ACT §§ 8.105-110; WIS. STAT. ANN. §§ 425.302-305 (West 1974).

303. 15 U.S.C. § 1640 (1976).

304. *Id.* § 1640(e).

305. *Id.* § 1640(a)(2)(B).

306. See, e.g., MODEL CONSUMER CREDIT ACT § 8.103; WIS. STAT. ANN. § 425.307 (West 1974).

307. The CCPA is enforced by the Comptroller of the Currency with respect to national banks, 15 U.S.C. § 1607 (1976), the Federal Reserve Board with respect to member banks of the Federal Reserve System, *id.*, the Board of Directors of the Federal Deposit Insurance Corporation with respect to banks insured by the F.D.I.C., *id.*, the Civil Aeronautics Board with respect to carriers subject to the Federal Aviation Act, *id.*, the Secretary of Agriculture with respect to any activities covered by the Packers and Stockyards Act of 1921, *id.*, the Farm Credit Administration with respect to any bank or association under its administrative control, *id.*, the Federal Home Loan Bank Board with respect to any bank or association under its control, *id.*, the Administrator of the National Credit Union Administration with respect to any federal credit union, *id.*, and the Federal Trade Commission generally, *id.*

duties are not related to consumer protection.³⁰⁸ As a result, enforcement of consumer protection provisions is often of secondary concern.³⁰⁹ Even if the proposed code, like existing title I, divided administrative enforcement among existing agencies, such enforcement could be improved by better staffing of those agencies. This is not an outlandish proposal, even given a "Proposition 13" mentality, because most of the funding for administration of a federal code could come from those creditors regulated by the code.³¹⁰

Moreover, there would be better administrative enforcement if a federal code were designed to incorporate the enforcement potential of state agencies now charged with enforcing state consumer credit laws. This approach would lessen the fears of state employees whose jobs would be threatened by a federal code that totally preempts state consumer credit regulation. The incentive to the states to adequately enforce a federal law could be monetary grants based on the quality of enforcement. Similar systems of state enforcement of federal law currently exist under the Clean Air Act³¹¹ and the Federal Water Control Act.³¹²

Proposed title II, Extortionate Extensions of Credit; title III, Restrictions on Garnishment; title IV, Consumer Credit Reporting; title V, Equal Credit Opportunity; and title VI, Electronic Funds Transfers are found in the existing CCPA as titles II,³¹³ III,³¹⁴ VI,³¹⁵ VII³¹⁶ and IX³¹⁷ respectively. Proposed title II is not included within title I of the proposal because title II is primarily a criminal statute.³¹⁸ Titles III, IV, and VI of the proposal are excluded from title I because they cover

308. The one possible exception is the FTC. In addition to traditional consumer protection activities, however, the Commission must devote substantial time and effort to prohibiting "unfair methods of competition." 15 U.S.C. § 45b (1976).

309. "In addition, this committee and other congressional and government sources have found the level of administrative enforcement by the Federal bank agencies seriously inadequate." S. REP. NO. 95-720, 95th Cong., 2d Sess. 2 (1978).

310. See, e.g., MODEL CONSUMER CREDIT ACT § 9.203; WIS. STAT. ANN. § 426.202 (West 1974 & Supp. 1978).

311. 42 U.S.C.A. §§ 7401-7626 (Supp. 1978). See W. RODGERS, ENVIRONMENTAL LAW § 3.19 (1977).

312. 33 U.S.C. §§ 1251-1376 (1976). See W. RODGERS, *supra* note 311, §§ 3.19, 4.21 (1977).

313. 18 U.S.C. §§ 891-96 (1976).

314. 15 U.S.C. §§ 1671-1677.

315. 15 U.S.C.A. §§ 1681-1681t (West 1974 & Supp. 1979).

316. 15 U.S.C. §§ 1691-1691f (1976).

317. 15 U.S.C.A. §§ 1693-1693r (West Supp. 1979).

318. Title II of the CCPA, Extortionate Credit Transactions, is a criminal statute codified at 18 U.S.C. §§ 891-896 (1976). The purpose of the statute is to combat organized crime.

noncredit as well as credit transactions.³¹⁹ Title VII is excluded because it covers nonconsumer credit transactions.³²⁰ Because this article has not discussed criminal sanctions or transactions other than those involving the extension of credit to consumers, no suggestions are offered for the structure or substance of titles II-VI of the proposal.³²¹

IV. EXPECTED CRITICISMS

A proposed comprehensive federal consumer credit code would be hotly contested. In this part, the major³²² objections to regulating consumer credit entirely by federal law will be discussed with some rebuttal.

A. *Experimentation in Consumer Credit Legislation*

One of the major objections to comprehensive federal consumer credit legislation has traditionally been that such legislation will stifle innovation by precluding the states from adopting experimental solutions to consumer credit problems as they arise.³²³ It is true that some

319. The definition of consumer credit is the lending of money or the sale of goods and services to a natural person for a personal, family or household purpose by a creditor who regularly makes such loans or sales when a finance charge is levied or the creditor agrees to allow repayment in more than four installments. See note 1 and accompanying text *supra*.

Title III of the CCPA, Restriction on Garnishment, is a limitation on all types of garnishment, and not just garnishment resulting from credit transactions, 15 U.S.C. § 1671 (1976). Title VI of the CCPA, the Fair Credit Reporting Act, deals not only with credit worthiness but suitability for employment and insurability. *Id.* § 1681 (1976). The newly added title IX, Electronic Funds Transfers, does not deal at all with consumer credit. Section 903(2) of title IX, 15 U.S.C.A. § 1693a(2) (West Supp. 1979), defines that title's scope as including "other than . . . an open end credit plan." The title is meant to cover electronic funds transfers only from savings and checking accounts, and not extensions of credit.

320. The Equal Credit Opportunity Act, title VII of the CCPA, is codified at 15 U.S.C. §§ 1691-1691f (1976). Title VII applies to *all* extensions of credit, and not just to consumer credit. *Id.* § 1691.

321. The problems discussed above about nonuniformity of state laws, however, would appear to apply equally here to all but title II, Extortionate Extensions of Credit. The benefits of a comprehensive federal law are as applicable to these titles as to the extension of credit to consumers. To the extent that these other current titles of the CCPA allow for inconsistent state laws, see, e.g., 15 U.S.C. § 1681t (1976), the current titles should be redrafted to allow total federal preemption.

322. It is assumed that there would be no *major* objection to the constitutionality of a federal consumer credit law. It is clear that Congress has the power to regulate consumer credit to the exclusion of the states and does so in the Consumer Credit Protection Act based on the commerce clause, U.S. CONST. art. 1, § 8, and the bankruptcy clause, U.S. CONST. art. 1, § 8. See, e.g., *Mourning v. Family Publication Serv., Inc.*, 411 U.S. 356 (1973); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976); *United States v. Perez*, 426 F.2d 1073 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *Hodgson v. Cleveland Municipal Ct.*, 326 F. Supp. 419 (N.D. Ohio 1971).

See generally, *Wickard v. Filburn*, 317 U.S. 111 (1942); P. BENSON, *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970*, at 96-102, 177-81, 345-57 (1970).

323. See Felsenfeld, *Competing State and Federal Roles in Consumer Credit Law*, 45 N.Y.U.L. REV. 487, 509-10 (1970).

experimental state consumer credit legislation has been of benefit. Most state legislatures, however, have been unwilling to adopt novel legislative solutions and, in fact, refuse even to adopt the experimental solutions tried elsewhere and found to be successful. For example, those states that have adopted legislation regulating deficiency judgment actions have all adopted essentially the same legislation.³²⁴ The Wisconsin Consumer Act³²⁵ was a grand experiment, the first comprehensive consumer credit code to be negotiated by creditor and consumer groups. Although it became effective in 1973,³²⁶ its most innovative and beneficial feature—an efficient, inexpensive judicial proceeding required before the repossession of collateral in consumer credit transactions³²⁷—has yet to be adopted by any other state.³²⁸

In addition, solutions to developing consumer credit problems can come from sources other than state statutes. On January 3rd of each year, the United States Attorney General and the Federal Reserve Board must report to Congress concerning their respective administration of existing title I of the CCPA and make such recommendations as they deem necessary or appropriate.³²⁹ The recommendations offered for amendments to cure the deficiencies of existing title I have been well received by Congress.³³⁰ Likewise, a comprehensive federal code could provide for recommendations by the agency charged with administration. Also, some flexibility in dealing with newly devised, harsh creditor practices could be provided the administrator of the proposed code by enabling the administrator to prohibit unconscionable practices on a case-by-case basis.³³¹

324. See Appendix *infra*. Whether or not a deficiency is allowed generally depends on the cash price of the goods or amount owing at the time of default. Little has been done to regulate the sale procedure in order to ensure that the sale price will equal or approximate the fair market value of the goods sold.

325. WIS. STAT. ANN. §§ 421.101-428.106 (West 1974 & Supp. 1978).

326. Ch. 239, § 39(1), 1971 Wis. Laws 688.

327. WIS. STAT. ANN. § 425.111 (West 1974 & Supp. 1978).

328. See Appendix *infra*.

329. 15 U.S.C. § 1613 (1976).

330. For example, the Federal Reserve Board recommended on January 16, 1973, that Congress amend § 125 of the Truth in Lending Act, 15 U.S.C. § 1635 (1976), in order to limit the time in which the consumer's right to rescind would run when the creditor failed to notify the consumer of the right of rescission. See Truth-in-Lending Annual Report to Congress for the Year 1972 by the Board of Governors of the Federal Reserve System, *reprinted in* INSTALLMENT CREDIT GUIDE (CCH) Issue No. 216, Part II, at 15-16 (1973). On October 28, 1974, subsection f was added to § 125, which limits the right of rescission to three years after the date of consummation of the transaction or the sale of property, whichever is earlier, whether or not the creditor notified the consumer of the right of rescission. See Act of Oct. 28, 1974, Pub. L. No. 93-495, §§ 404, 405, 412, 88 Stat. 1517 (codified at 15 U.S.C. § 1635(f) (1976)).

331. See, e.g., WIS. STAT. ANN. § 426.108 (West 1974 & Supp. 1977).

B. Legislating from Washington, D.C.

Another objection that has been voiced in the past to federal consumer credit legislation can be translated freely into "What do they know in Washington about our problems?" At times those raising the objection note the geographical and cultural differences between states and argue that no one law can effectively deal with such differences.³³² The author has heard creditor representatives voice the objection, however, more as a fear that the federal government will not adequately consider the credit industry's concerns in drafting legislation that directly affects their day-to-day operations. The author has had the same kind of fear expressed to him by consumer advocates, but then, of course, the concern is that Congress will not adequately deal with consumer problems.

Although federal consumer credit legislation would be the same despite cultural and geographical difference—the same for New York as Wyoming, the same for Washington as Ohio—state consumer credit legislation also ignores cultural and geographical differences—the same for Indianapolis as for Bean Blossom, Indiana, the same for Pueblo as for Aspen, Colorado. Consumer credit granting is a national phenomenon and not a local one: most consumer credit granting is by large creditors with interstate organizations, not by local hardware stores.³³³

The creditor and consumer objections about the lack of legislative input at the federal level are also rebuttable. Creditors do have an adequate say in federal consumer credit legislation. The Truth in Lending Act was considered for seven years before passage,³³⁴ during which numerous hearings were conducted at which creditor representatives were most often the witnesses.³³⁵ Many of the major Washington, D.C. lobbies represent credit grantors,³³⁶ and those lobbies take a very direct and active interest in federal consumer credit legislation.

If the creditor concern, though, is really that creditors have a better chance to get what they want at the state level than at the federal level,

332. See D. ROTHSCHILD & D. CARROLL, *supra* note 31, § 19.06 at 809. See generally Felsenfeld, *supra* note 323.

333. See NCCF REPORT, *supra* note 2, at ch. 2. See also, H.R. REP. NO. 1040, 90th Cong., 2d Sess. (Tables 1 & 2) reprinted in [1968] U.S. CODE CONG. & AD. NEWS 1962.

334. *Id.* at 1999 (remarks of Leonore K. Sullivan). The first bill was introduced in 1960 by Senator Paul Douglas (D. Ill.), but it was not acted upon until 1967.

335. See *Truth in Lending Bill: Hearings on S. 1740 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 87th Cong., 1st Sess. (1961); *Truth in Lending: Hearings on S. 1750 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 88th Cong., 1st Sess. (1963).

336. See CONGRESSIONAL QUARTERLY, THE WASHINGTON LOBBY 43-45 (2d ed. 1974).

that is probably true.³³⁷ There is a better balancing of concerns at the federal level, but that emphasizes the need for federal legislation. The better balancing of interests at the federal level should also calm those consumer advocates concerned with more extensive federal regulation. In most states there is no organized consumer lobby. To the extent there is, it may consist of unpaid volunteers or perhaps a legal services' lawyer with many other concerns. And in most states there is very little legislative staff with consumer credit expertise. It is hard for a state legislator to oppose legislation proposed by a creditor advocate or adopt legislation opposed by a creditor advocate if the only view on the merits of the legislation by one with consumer credit expertise is that of the creditor advocate. At least at the federal level there are some organized consumer lobbies³³⁸ and legislative staff with consumer credit expertise. This is not to say all federal legislation is perfectly balanced between creditor and consumer concerns, but there is at least the chance for a balance that is nonexistent in most states.

V. CONCLUSION

The author recognizes that enactment of a comprehensive federal consumer credit code would not be an easy political feat. Concerns about state interests, the inherent fears of vested interests about new legislation and its potential effects, the difficulties of balancing consumer and creditor interests in order to gain acceptance, and Congress' concern about the time needed for such legislation, plus its members' fears of political reprisals if things go wrong, would combine to create a lengthy and bruising legislative battle. Technically, the actual drafting would be difficult. The legislation must deal effectively with problems recognized at the time of drafting yet ensure flexibility for future problems. It is hoped, however, that this article establishes that it is time to begin the drafting and the legislative battle.

337. "[B]usiness groups, rather than consumer groups, are the most powerful lobbies in virtually every state capital." D. ROTHSCHILD & D. CARROLL, *supra* note 31, § 16.04 at 468-69.

338. See CONGRESSIONAL QUARTERLY, *supra* note 336, at 38-45.

APPENDIX

SUMMARY OF STATE RETAIL INSTALLMENT SALES LEGISLATION, OR
 COMPREHENSIVE CONSUMER CREDIT LEGISLATION DEALING
 WITH INSTALLMENT SALES, IN FOUR SELECTED
 CONSUMER PROTECTION AREAS

A. Definition of Default and Right to Cure

State	Definition of Default	Right to Cure
Colorado		Before creditor may accelerate or proceed against the collateral after a default consisting of a missed payment, he must send notice to the debtor advising him he has twenty days in which to cure the default by tendering all unpaid sums due at the time of tender, without acceleration, plus any delinquency or deferral charges. Notice may not be sent until required payment is ten days past due. Only one cure period per obligation. COLO. REV. STAT. §§ 5-5-111 to -112 (Supp. 1978).
District of Columbia		On credit sales other than direct motor vehicle installment loan or loan directly secured on real estate, after a default consisting of failure to pay money, the creditor may not accelerate, sue or proceed against collateral for thirty days. Debtor may cure default by tendering unpaid sums due at time of tender, without acceleration, plus delinquency or deferral charges, unless creditor has first given notice of election to accelerate, has brought action against debtor or has proceeded against the collateral. D.C. CODE ANN. § 28-3812 (1973).
Iowa	Default means the failure to make a required payment within ten days or failure to observe any covenant the breach of which materially impairs the collateral or prospect of payment without justification under the law. IOWA CODE ANN. § 537.5109 (West Supp. 1978).	Consumer has right to cure unless notice of right to cure was given for a prior default within last 365 days. Where right exists, creditor may not accelerate, sue or proceed against collateral until twenty days after giving notice that consumer may cure by tendering unpaid amounts due at time of tender without acceleration, plus any deferral or delinquency charges. IOWA CODE ANN. § 537.5110 (West Supp. 1978)

State	Definition of Default	Right to Cure
Kansas	An agreement with respect to default is enforceable only to extent that (1) consumer fails to make a required payment or (2) the prospect of payment, performance or realization on the collateral is significantly impaired. KAN. STAT. § 16a-5-109 (1974).	Creditor may not accelerate or take possession of collateral after a default consisting of failure to make a required payment until twenty days after sending consumer notice of right to cure by tendering unpaid sums due at the time of tender, without acceleration, plus any delinquency or deferral charges. Notice may not be sent until required payment is ten days past due. Only one cure period is allowed per obligation. KAN. STAT. §§ 16a-5-110 to -111 (1974).
Maine	An agreement on default is enforceable only to extent (1) the consumer fails to make a required payment or (2) the prospect of payment, performance or realization of collateral is significantly impaired. Significant impairment is, without limitation: death, insolvency or commencement of insolvency proceeding; loss, theft or damage to collateral not covered by insurance; sale or prior encumbrance of collateral; or termination of insurance on collateral. ME. REV. STAT. ANN. tit. 9-A, § 5.109 (West Supp. 1978).	Creditor may not accelerate, take possession of collateral or otherwise enforce a security interest after a default consisting of failure to make a required payment until twenty days after sending consumer notice of right to cure by tendering unpaid sums due at time of tender, without acceleration, plus delinquency or deferral charges. Notice may not be sent until required payment is ten days past due. Only one cure period is allowed per obligation. ME. REV. STAT. ANN. tit. 9-A, § 5.110-.111 (West Supp. 1978).
Massachusetts	An agreement on default is enforceable only to extent that the default is material, and consists of failure to make one or more installments or the occurrence of an event that substantially impairs the collateral. MASS. ANN. LAWS ch. 255D, § 21 (Law. Co-op Supp. 1978).	Ten days after a default, the creditor may send a notice to consumer informing him he may cure within twenty-one days after notice by tendering all unpaid sums due at time of tender, without acceleration, plus deferral or delinquency charges. Debtor may cure default by tendering unpaid sums due at time of tender unless creditor has first given notice of election to accelerate, has brought an action against the debtor or has proceeded against the collateral. Debtor has up to three cure periods per consumer credit transaction. MASS. ANN. LAWS ch. 255D, § 21 (Law. Co-op Supp. 1978).
Ohio		Seller may not accelerate for failure to make an installment payment that has not continued for at least thirty days. OHIO REV. CODE ANN. § 1317.06(C) (Page Supp. 1978). <i>See also</i> part C of this Appendix (right to cure following repossession).

State	Definition of Default	Right to Cure
South Carolina	An agreement on default is enforceable only to extent that consumer fails to make a required payment or the prospect of payment, performance or realization of collateral is significantly impaired. S.C. CODE § 37-5-109 (Supp. 1978).	Creditor may not accelerate, take possession of collateral or otherwise enforce a security interest after a default consisting of a failure to make a required payment until twenty days after sending consumer notice of right to cure by tendering unpaid sums due at time of tender, without acceleration, plus any deferral or delinquency charges. Notice may not be sent until required payment is ten days past due. Only one cure period is allowed per obligation. S.C. CODE §§ 37-5-110 to 111 (Supp. 1978).
Virginia		Creditor may not accelerate or repossess because of failure to make payment arising from sale or financing of consumer goods if payment plus allowable penalty is paid within ten days of due date. VA. CODE § 11-4.3 (1978) (provision included in title 11 covering contracts in general).
West Virginia		After a default consisting of failure to make a scheduled payment for five days or failure to otherwise perform pursuant to a credit sale, except with respect to covenants to provide insurance or otherwise protect collateral, the creditor may give consumer notice of default and his right to cure within ten days by tendering unpaid sums, without acceleration, plus any delinquency or deferral charges. The creditor may not accelerate, sue or take possession of collateral until ten days after notice. A consumer may cure up to three times per obligation. W. VA. CODE § 46A-2-106 (1976).
Wisconsin	Notwithstanding any agreement to the contrary, default means, without justification under any law, to have, in case of monthly payments, two or more scheduled payments remaining unpaid for more than ten days; to fail to pay when due on two occasions within any twelve-month period with respect to an open-end plan; or to fail to observe any other covenant, the breach of which materially impairs the collateral or the debtor's ability to pay. WIS. STAT. ANN. § 425.103 (West 1974 & Supp. 1978).	A creditor may not accelerate, sue or proceed against the collateral, unless he believes the consumer is in default and more than fifteen days have passed since he sent consumer notice of default and his right to cure by tendering unpaid installments due at time of tender, without acceleration, plus any deferral or delinquency charges within fifteen days. A consumer may not cure more than twice within a twelve-month period. WIS. STAT. ANN. § 425.105 (West 1974 & Supp. 1978).

B. Restrictions on Security Interests (Excluding Cross-Collateral Provisions Involving Multiple Sales)

1. The following states have adopted provisions substantially similar to the 1974 Uniform Consumer Credit Code. Essentially, security interests in credit sales (other than for agricultural purposes) are limited to three categories: (1) the goods sold; (2) goods upon which services are performed or in which the goods sold are installed or annexed when the debt secured exceeds certain amounts; and (3) land to which goods sold are affixed or land which is maintained, repaired or improved as a result of the sale of goods or services, and in which the debt secured exceeds certain amounts. The table below lists the minimum amount of debt that must be secured in order to take a security interest in "annexed goods," as described in (2), or in land to which goods are affixed, as described in (3). All states allow security interest in goods sold.

State	Minimum Debt Secured to Obtain Security Interest in Annexed Goods	Minimum Debt Secured to Obtain Security Interest in Real Property to Which Goods Affixed
a. Colorado COLO. REV. STAT. § 5-2-407(1) (1973).	\$ 300	\$ 1,000
b. Idaho IDAHO CODE § 28-32-407 (Supp. 1978). (Amounts adjusted periodically in accordance with Consumer Price Index. <i>Id.</i> § 28-31-106.)	\$ 540	\$ 1,800
c. Indiana IND. CODE ANN. § 24-4.5-2-407 (Burns 1974). (Amounts adjusted periodically in accordance with Consumer Price Index. <i>Id.</i> § 24-4.5-1-106.)	\$ 450	\$ 1,500
d. Iowa IOWA CODE ANN. § 537.3301 (West Supp. 1978).	\$ 300 (household goods or motor vehicle, \$ 100)	\$1,000
e. Kansas KAN. STAT. § 16a-3-301 (1974).	\$ 300	\$ 1,000
f. Maine ME. REV. STAT. ANN. tit. 9-A, § 3.301 (West Supp. 1978). (Amounts adjusted periodically in accordance with Consumer Price Index. <i>Id.</i> 9-A, § 1.106.)	\$ 420	\$ 1,400
g. North Carolina N.C. GEN. STAT. § 25A-23 (Cum. Supp. 1977).	\$ 300 (self-propelled motor vehicle to which repairs made, \$ 100)	\$ 1,000

State	Minimum Debt Secured to Obtain Security Interest in Annexed Goods	Minimum Debt Secured to Obtain Security Interest in Real Property to Which Goods Affixed
h. Oklahoma OKLA. STAT. ANN. tit. 14A, § 2-407 (West 1972).	\$ 200	\$ 1,000
i. South Carolina S.C. CODE § 37-2-407 (Supp. 1978).	\$ 300	\$ 1,000
j. Utah UTAH CODE ANN. § 70B-2-407 (Supp. 1977). (Amounts adjusted periodically in accordance with Consumer Price Index. <i>Id.</i> § 70B-1-106.)	\$ 540	\$ 1,800
k. West Virginia W. VA. CODE § 46A-2-107 (1976).	\$ 300	\$ 1,500
l. Wisconsin WIS. STAT. ANN. § 422.417 (West 1974).	\$ 500	\$ 1,000
m. Wyoming WYO. STAT. § 40-14-241 (1977).	\$ 300	\$ 1,000

2. Arizona—In credit sale, a security interest may only be taken in goods sold, goods with respect to which services have been rendered and realty to which goods are affixed, without regard to amount of debt secured. ARIZ. REV. STAT. ANN. § 44-5501(c) (Supp. 1978).

3. Georgia—No security interest pursuant to a retail installment contract or revolving account may be taken with respect to clothing, softwares and other nondurable items. GA. CODE ANN. § 96-914 (Supp. 1978).

4. Hawaii—No provision in a retail installment contract may provide for subsequent inclusion of title to or a lien upon goods other than goods sold, accessories therefore or auxiliary equipment used in connection therewith. HAW. REV. STAT. § 476-16 (1976).

5. Massachusetts—No retail installment sale agreement may provide for a security interest in personal property other than (1) goods sold unless such goods become affixed to such personal property; (2) after acquired collateral other than accessions to goods sold or worked on; or (3) goods subject to prior sale unless two or more agreements are consolidated. MASS. ANN. LAWS ch. 255D, § 15 (Law. Co-op Supp. 1977).

6. New York—No retail installment contract may provide for a security interest in any real or personal property other than goods sold, except a mortgage on real property may be taken to secure payment for goods and services for repairs or improvements in connection with buildings on the real property. N.Y. PERS. PROP. LAW § 421 (Consol. 1976).

7. Ohio—Seller may only take security interest in goods sold, goods upon which services are performed or goods to which goods sold are annexed. OHIO REV. CODE ANN. § 1317.071 (Page Supp. 1978).

8. Texas—No retail installment contract or retail charge agreement shall grant a first lien upon real estate except (a) such lien as is created by law upon the recording of an abstract of judgment or (b) contracts for sale or construction of a residence so long as the time price differential does not exceed 10%. TEX. REV. CIV. STAT. ANN. art. 5069-6.05 (Vernon Supp. 1978).

C. Restrictions on Repossession

1. Colorado—A seller who repossesses because he deems himself insecure or because he feels his collateral is impaired, but is later unable to show, in good faith, that he had reasonable cause to believe such was the case, shall be liable to buyer for court costs and attorneys' fees and will not be able to exact finance charges for period in which debtor is without use of collateral. COLO. REV. STAT. § 5-5-103.5 (Supp. 1978). Prior to judgment seller may not replevy goods of the debtor, except motor vehicles, with the use of force from a dwelling upon an ex parte order of the court. *Id.* § 5-5-104 (1973).

2. Connecticut—Under the Retail Instalment Sales Financing Act, CONN. GEN. STAT. ANN. §§ 42-83 to -100a (West 1958 & Supp. 1978), a seller has two options. He may send notice at least ten days prior to a retaking, stating the nature of the default, the buyer's rights and the date of the intended retaking. If the buyer does not cure the default within the specified period, the seller may retake, and the buyer loses the right to redeem. Alternatively, if the seller does not give this notice, after retaking he must hold the goods fifteen days, during which time the buyer may redeem by paying the unaccelerated amount due at time of retaking, or tendering other performance, plus paying the actual and reasonable costs of retaking and storing. *Id.* § 42-98 (West Supp. 1978).

3. District of Columbia—The Consumer Protections Act, D.C. CODE ANN. §§ 28-3801 to -3817 (1973 & Supp. V. 1978), provides that the parties may agree that the creditor may repossess without judicial process, but only if it can be done without breach of the peace and with consent of the debtor. *Id.* § 28-3812 (1973). Additional provisions are contained in the Consumer Retail Credit Regulations. See 2 CONS. CRED. GUIDE (CCH) ¶¶ 6655-6657.

4. Hawaii—Under Hawaii's Retail Installment Sales Act, HAW. REV. STAT. §§ 476-1 to -38 (1976), a seller has the option of sending the buyer notice 20-40 days prior to repossession stating the nature of default, the intention to retake and the buyer's rights upon retaking. If the buyer does not cure the default before the day set for retaking, the seller may retake and the buyer forfeits his right to redeem. If this notice is not sent, the seller must hold the goods for ten days, during which time the buyer may redeem upon payment of amount owing on the contract, plus costs of retaking when allowed. *Id.* § 476-24, -25.

5. Maryland—Under the Retail Installment Sales Act, MD. COM. LAW CODE ANN. §§ 12-601 to -636 (1975 & Supp. 1978), the seller may send buyer

a discretionary notice at least ten days before repossession stating the default, date of repossession and the buyer's rights upon retaking. *Id.* § 12-624(c) (Supp. 1978). If the seller repossesses, he must hold goods for fifteen days after sending a required notice informing buyer of right to redeem by tendering the amount due at the time of redemption, without acceleration, or by tendering other required performance. The seller may also collect actual and reasonable expenses of retaking and storing if the above discretionary notice was sent. *Id.* § 12-625 (1975).

6. Massachusetts—Under Retail Installment Sales and Services Act, MASS. ANN. LAWS ch. 255D, §§ 1-32 (Law. Co-op 1968 & Supp. 1978), a secured creditor may use self-help repossession only if it can be done without use of force, without breach of peace and with the consent of the debtor to enter his property given at time of such entry. *Id.* ch. 255D, § 22(a) (Supp. 1978).

7. Ohio—Under the Retail Installment Sales Act, OHIO REV. CODE ANN. §§ 1317.01-.99 (Page Supp. 1978), a secured party may not repossess collateral, except for motor vehicles and motor homes, if time balance at time of default is less than 25% of the original time balance plus amount of down payment. *Id.* § 1317.13 (Supp. 1978). The buyer has a right to cure his default within twenty days after repossession or fifteen days after notice of right to cure is sent, whichever is later, by tendering installments due or past due at the time of tender, any unpaid delinquency or deferral charges, actual and reasonable costs of retaking, and bond or cash in the amount of two installments to secure timely payment of future installments. *Id.* § 1317.12.

8. Wisconsin—In order to enforce his security interest, a creditor must file a replevin action in small claims court, regardless of the value of the collateral. The abbreviated proceeding considers the sole issue of right to possession of the collateral. Filing costs are minimal and action may be commenced without the services of an attorney. The summons must give clear notice of right to a hearing on the merits. Following a default judgment or successful hearing on the merits, the creditor may repossess. If self-help repossession is utilized, the merchant may not breach the peace or enter the debtor's dwelling except with the latter's voluntary request. For fifteen days after issuance of summons, the customer may redeem the goods by tendering unpaid amounts, without acceleration, plus delinquency or deferral charges and any court costs or fees. The debtor must also make a performance deposit of three scheduled installments. WIS. STAT. ANN. §§ 425.203-.208 (West 1974 & Supp. 1978).

D. Restrictions on Deficiency Judgments

1. The following states have enacted provisions dealing with deficiency judgments that substantially conform to the recommendation of the National Commission on Consumer Finance and the 1974 Uniform Consumer Credit Code. That is, the seller must sometimes elect his remedies. If he accepts voluntary surrender or repossesses goods in such cases, the consumer will not be personally liable for a deficiency. If the seller chooses to sue on the debt in a situation where the buyer would not be liable for a deficiency judgment had the goods been repossessed, then he may not levy on the collateral in satisfac-

tion of any judgment obtained. The following table indicates the states and the amount below which the election of remedies is required.

State	Seller Must Elect Remedies If:
a. Colorado COLO. REV. STAT. § 5-5-103 (Supp. 1978).	Cash sales price is \$1,000 or less.
b. District of Columbia D.C. CODE ENCYCL. § 28-3812 (1973).	Cash sales price is \$2,000 or less.
c. Idaho IDAHO CODE § 28-35-103 (Supp. 1978). (Amount adjusted periodically in accordance with Consumer Price Index. <i>Id.</i> § 28-31-106.)	Cash sales price is \$1,800 or less.
d. Indiana IND. CODE ANN. § 24-4.5-5-103 (Burns 1974). (Amount adjusted periodically in accordance with Consumer Price Index. <i>Id.</i> § 24-4.5-1-106.)	Cash sales price is \$1,500 or less.
e. Kansas KAN. STAT. ANN. § 16a-5-103 (1974).	Cash sales price is \$1,000 or less.
f. Maine ME. REV. STAT. ANN. tit. 9A, § 5.103 (Law. Co-op Supp. 1978). (Amount adjusted periodically in accordance with the Consumer Price Index. <i>Id.</i> tit. 9A, § 1.106.)	Amount financed is \$1,400 or less.
g. Minnesota MINN. STAT. ANN. § 325.947 (West Supp. 1978).	Aggregate amount of credit extended is \$3,000 or less.
h. Oklahoma OKLA. STAT. ANN. tit. 14A, § 5-103 (West 1972).	Cash price is \$1,000 or less.
i. Oregon OR. REV. STAT. § 83.830 (1977).	Unpaid time balance or time sales price is less than \$1,250.
j. South Carolina S.C. CODE § 37-5-103 (Supp. 1977).	Cash sales price is \$1,500 or less.
k. Utah UTAH CODE ANN. § 70B-5-103 (Supp. 1977). (Amount adjusted periodically in accordance with the Consumer Price Index. <i>Id.</i> § 70B-1-106.)	Cash sales price is \$1,600 or less.
l. West Virginia W. VA. CODE § 46A-2-119 (1976).	Balance owed at time of repossession is \$1,000 or less.
m. Wisconsin WIS. STAT. ANN. § 425.209 (West 1974).	Amount owing on default is \$1,000 or less.
n. Wyoming WYO. STAT. § 40-14-503 (1977).	Cash price is \$1,000 or less.

2. Alabama—If seller or assignee of seller repossesses or voluntarily accepts surrender of goods with an original cash price of \$1,000 or less, the buyer is not personally liable for the deficiency. ALA. CODE § 5-19-13 (1975).

3. Arizona—If seller elects to bring action for the unpaid balance he may not thereafter retake or levy on the goods. If seller, however, elects to repossess, buyer is not liable for a deficiency if the sales price is less than \$1,000. ARIZ. REV. STAT. ANN. § 44-5501(B), (C) (Supp. 1978).

4. California—The Retail Installment Sales Act, CAL. CIV. CODE §§ 1801-1801.10 (West 1973 & Supp. 1979), which does not cover sales of registered motor vehicles, provides that if proceeds of sale of repossessed goods are not sufficient, the holder may not recover the deficiency from the buyer or anyone who has succeeded to the buyer's obligations. *Id.* § 1812.5 (1973).

5. Connecticut—The holder may not recover a deficiency from a retail buyer, except in the case of a motor vehicle with an aggregate cash price of more than \$2,000. In such case the amount of deficiency is determined by a statutory formula. CONN. GEN. STAT. ANN. § 42-98(f), -98(g) (West Supp. 1979).

6. Florida—If a creditor repossesses, the consumer shall not be personally liable to the creditor for a deficiency unless the unpaid balance at the time of default was \$2,000 or more. When unpaid balance is \$2,000 or more, the amount of deficiency will be determined by using fair market value. FLA. STAT. ANN. § 516.31(3) (West Supp. 1979).

7. Georgia—Seller is not entitled to recover a deficiency against the buyer unless within ten days after repossession he gives buyer notice of intent to pursue a deficiency claim. GA. CODE ANN. § 96-909 (1976).

8. Hawaii—If buyer has paid 80% or more of the total time-sale price at the time of default and surrenders the goods without legal proceedings, the holder must within five days after repossession elect to (1) retain the goods and release the buyer from further obligation or (2) return the goods and sue to recover balance due. HAW. REV. STAT. § 476-28 (1976).

9. Illinois—If buyer has paid 60% or more of the deferral payment price at the time of his default and surrenders the goods without legal proceedings, the holder must within five days after repossession elect to (1) retain the goods and release the buyer from further obligation or (2) return the goods and sue to recover balance due. ILL. ANN. STAT. ch. 121 1/2, § 526 (Smith-Hurd Supp. 1979).

10. Massachusetts—If the unpaid balance of a consumer credit transaction at the time of default was less than \$1,000, the buyer is not liable for any deficiency. If the unpaid balance is \$1,000 or more, any deficiency is computed by deducting fair market value from the unpaid balance. MASS. ANN. LAWS ch. 255D(d), 255D(e), § 22 (Law. Co-op Supp. 1978).

11. Ohio—After repossession, a secured party must dispose of collateral by public sale. Ten days prior to sale he must send notice to debtor stating, *inter alia*, that debtor may be liable for any deficiency. OHIO REV. CODE ANN. § 1317.16 (Page Supp. 1978).

12. Washington—The Washington version of UCC § 9-501 provides

that when a seller takes or retains consumer goods subject to a purchase money security interest to secure all or part of its price, the debtor shall not be liable for any deficiency. WASH. REV. CODE ANN. § 62A.9-501 (1966).

